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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Ekaterina Trendafilova
Judge Christine Van den Wyngaert

SITUATION IN CÔTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. CHARLES BLÉ GOUDÉ***

Public Document

**Submissions of the Common Legal Representative of Victims on
the Notice of Alibi (ICC-02/11-02/11-146) and the Defence Communication of
Evidence (ICC-02/11-02/11-152 and ICC-02/11-02/11-153)**

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. PROCEDURAL BACKGROUND

1. On 30 September 2013, the warrant of arrest issued against Mr. Blé Goudé by Pre-Trial Chamber III on 21 December 2011 was made public.¹

2. On 4 November 2013, the decision on the Prosecutor's application for a warrant of arrest against Mr. Blé Goudé, issued by Pre-Trial Chamber III on 6 January 2012, was made public.²

3. On 22 March 2014, Mr. Blé Goudé was surrendered to the Court.

4. During Mr. Blé Goudé's initial appearance on 27 March 2014, Pre-Trial Chamber I (the "Chamber") set 18 August 2014 as the starting date for the confirmation of charges hearing.³

5. On 11 June 2014, the Chamber decided to admit 199 applicants as victims at the confirmation of charges hearing and in the related proceedings, appointed the Office of Public Counsel for Victims (the "OPCV" or the "Office") as the Common Legal Representative of said victims, and specified the manner of their participation in the proceedings.⁴

6. On 11 July 2014, the Chamber decided to postpone the confirmation of charges hearing to 22 September 2014, and ordered the Prosecutor to file the Document

¹ See the "Warrant Of Arrest For Charles Blé Goudé" (Pre-Trial Chamber III), No. ICC-02/11-02/11-1, 21 December 2011.

² See the "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Charles Blé Goudé" (Pre-Trial Chamber III), No. ICC-02/11-02/11-3, 9 January 2012 (dated 6 January 2012).

³ See the transcript of the hearing held on 27 March 2014, No. ICC-02/11-02/11-T-3-Red-ENG, p. 12, lines 14-16.

⁴ See the "Decision on victims' participation in the pre-trial proceedings and related issues" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-83, 11 June 2014, pp. 19-21.

Containing the Charges and its List of Evidence by 22 August 2014.⁵

7. On 1 August 2014, the Chamber decided to admit 271 applicants as victims at the confirmation of charges hearing and in the related proceedings, appointed the OPCV as the Common Legal Representative of said victims, and specified the manner of their participation in the proceedings.⁶

8. On 22 and 27 August 2014, the Prosecutor filed the Document Containing the Charges with its List of Evidence,⁷ and the Element Based Chart,⁸ respectively.

9. On 1 September 2014, the Chamber decided to postpone the confirmation of charges hearing to 29 September 2014, and set the deadline of 12 September 2014 for the Defence to complete the disclosure of any evidence on which it intends to rely at the confirmation of charges hearing, and to file its eventual List of Evidence.⁹

10. On 9 September 2014, the Defence filed an *ex parte* notice of alibi (the “Notice of Alibi”),¹⁰ to which the Prosecution responded on 10 September 2014.¹¹ The Chamber reclassified the document as public on 12 September 2014 and on that day it was notified to the Common Legal Representative.

11. On 11 and 12 September 2014, the Defence communicated to the Chamber the

⁵ See the “Public Redacted Decision on the ‘Prosecution’s Request for Variation of Time Limits Pursuant to Regulation 35 concerning the Confirmation of Charges’” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-108-Red, 11 July 2014, p. 7.

⁶ See the “Second Decision on victims’ participation in the pre-trial proceedings and related issues” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-111, 1 August 2014, pp. 13-15.

⁷ See the “Prosecution’s Submission of *Document de notification des charges* and *l’Inventaire des éléments de preuve à charge*”, No. ICC-02/11-02/11-124, 22 August 2014.

⁸ See the “Submission of the Element Based Chart”, No. ICC-02/11-02/11-130, 27 August 2014.

⁹ See the “Decision on the ‘Defence request for a variation of a time limit’” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-139, 1 September 2014, p. 5.

¹⁰ See the “Notice of Alibi”, No. ICC-02/11-02/11-146, 12 September 2014 (dated 9 September 2014).

¹¹ See the “Prosecution’s Response to Defence Notice of Alibi”, No. ICC-02/11-02/11-148, 12 September 2014 (dated 10 September 2014). The Chamber reclassified this document as public on 12 September 2014.

evidence disclosed to the Prosecutor (the “Defence Communication of Evidence”),¹² including the evidence on which the Defence plans to rely at the confirmation hearing (the “Annex A”),¹³ and a list thereof (the “Annex B”).¹⁴

12. Pursuant to regulations 24(2) and 34 of the Regulations of the Court, the Principal Counsel of the OPCV, acting as Common Legal Representative of the victims (the “Common Legal Representative”) admitted to participate in this case,¹⁵ files the following submissions in relation to the Notice of Alibi and the Defence Communication of Evidence.

13. Considering that the confirmation of charges hearing is scheduled to start in over a week, the Common Legal Representative respectfully requests the Chamber to treat these submissions on an expedited basis.

II. COMMON LEGAL REPRESENTATIVE’S RESPONSE

1. Regarding the Notice of Alibi

14. The Common Legal Representative submits that the Defence should have communicated the Notice of Alibi not only to the Chamber and the Prosecutor, but also to her, and requests the Chamber to direct the Defence to notify her of future submissions, if any, concerning grounds excluding criminal responsibility.

¹² See the “Defence Communication of Rule 78 Evidence Disclosed to the Parties on 11 September 2014”, No. ICC-02/11-02/11-152, 12 September 2014 (dated 11 September 2014); and the “Defence Communication of Rule 78 Evidence Disclosed to the Parties on 12 September 2014 and its List of Evidence”, No. ICC-02/11-02/11-153, 12 September 2014 (the “Defence Communication of Evidence”).

¹³ See the “Defence Communication of Rule 78 Evidence Disclosed to the Parties on 11 September 2014”, *supra* note 12, confidential Annex A; and the “Defence Communication of Rule 78 Evidence Disclosed to the Parties on 12 September 2014 and its List of Evidence”, *supra* note 12, confidential Annex A (the “Annex A”).

¹⁴ See the “Defence Communication of Rule 78 Evidence Disclosed to the Parties on 12 September 2014 and its List of Evidence”, *supra* note 12, confidential Annex B (the “Annex B”).

¹⁵ See *supra* notes 4 and 6.

15. Contrary to the Defence's submission,¹⁶ the Common Legal Representative contends that the fact that the Notice of Alibi makes reference to a document that has not been disclosed to the Common Legal Representative does not entail an automatic classification *ex parte* Prosecution and Defence only of said submission.

16. In this particular instance, the Notice of Alibi refers to a document that was disclosed to the Defence as confidential under article 67(2) of the Rome Statute, but according to the Prosecutor it does not contain any information that would put the source of the alleged alibi at risk.¹⁷

17. Eventually the Chamber reclassified public the Notice of Alibi *proprio motu*.¹⁸ However, the Common Legal Representative argues that the raising by the Defence of an alibi or any ground excluding criminal responsibility must be notified to the Common Legal Representative because it affects the personal interests of the victims participating in the case.

18. The Common Legal Representative is aware that rule 79 of the Rules of Procedure and Evidence imposes the Defence an obligation to disclose only to the Prosecution its intention to raise an alibi or any ground excluding criminal responsibility. However, she contends that, in order for the victims she represents to be able to participate meaningfully at the confirmation of charges hearing, the intent of the Defence as foreseen in rule 79 of the Rules of Procedure and Evidence must also be notified to them.

19. The Common Legal Representative submits that the defences mentioned in rule 79 of the Rules of Procedure and Evidence would have a clear impact during the confirmation of charges hearing. Indeed, they would be dealt with by the Chamber in

¹⁶ See the Notice of Alibi, *supra* note 10, par. 5.

¹⁷ See the "Prosecution's Response to Defence Notice of Alibi", *supra* note 11, par. 3.

¹⁸ See *supra* note 10.

determining whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged in accordance with article 61(7) of the Rome Statute. An alibi or any ground excluding criminal responsibility may result in the Chamber not confirming the charges – or part thereof – against Mr. Blé Goudé and, thereby, in jeopardising the holding of a trial and any entitlement of the victims to reparations.

20. In this regard, the Common Legal Representative submits that in accordance with the jurisprudence of the Court as developed by Pre-Trial Chambers I and II, *“the interests of victims are affected at [the stage of the confirmation of charges] since this is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the crimes included in the Prosecution Charging Document”*¹⁹ and that *“the issue of the guilt or innocence of the persons charged before this Court is not only relevant, but it also affects the core interests of those granted the procedural status of victim in any case before the Court, because this issue is closely linked to the satisfaction of their right to justice”*.²⁰ Furthermore, *“the personal interests of victims may be affected by the outcome of the Confirmation Hearing to the extent that it aims at either (i) confirming the charges against those responsible for perpetrating the crimes which caused them to suffer harm; or (ii) declining to confirm the charges for those not responsible for such crimes, so that the search for those who are criminally liable can continue”*.²¹

21. Pursuant to article 64(3)(c) of the Rome Statute, echoed by rule 79(4) of the

¹⁹ See the “Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, par. 45. See also the “Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation” (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-121, 6 February 2008, pp. 6, 8 and 9.

²⁰ See the “Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case”, *supra* note 19, paras. 31-44. See also the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” (Pre-Trial Chamber II), No. 02/04-01/05-252, 10 August 2007, paras. 9 to 11.

²¹ See the “Decision on 138 applications for victims’ participation in the proceedings” (Pre-Trial Chamber I), No. ICC-01/04-01/10-351, 11 August 2011, par. 23.

Rules of Procedure and Evidence, the Chamber may order the disclosure of documents and/or information not previously disclosed. Therefore, the Chamber may direct the Defence to inform the Common Legal Representative of any evidence which tends to exonerate the suspect of his criminal responsibility. For instance, Trial Chamber II found in the *Katanga and Ngudjolo* case that the Defence's intent to raise the existence of an alibi or to raise a ground for excluding criminal responsibility must also be disclosed to victims participating in the proceedings, together with the names of witnesses and any other evidence supporting it.²²

22. Moreover, the founding texts of the Court make it clear that "*the [suspect]'s right to a fair trial is not necessarily compromised by the imposition on him or her of an obligation to reveal in advance and in appropriate circumstances, details of the defences and the evidence to be presented, and the issues that are to arise.*"²³ Although the use of this discretionary power by a relevant Chamber shall never derogate from the suspect's right to a fair and impartial hearing in which his rights are fully safeguarded,²⁴ the Common Legal Representative contends that ordering such a disclosure to her does not jeopardise the rights of the suspect but instead ensures a fair and expeditious conduct of the proceedings.

23. Consequently, the Common Legal Representative argues that the personal interests of the victims she represents are affected by the existence of an alibi or any other ground excluding criminal responsibility that the Defence may raise, and that any filing on the existence thereof and/or any communication of documents or material in this regard must be notified to her as soon as possible, in advance of the

²² See the "Decision on the 'Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)'" (Trial Chamber II), No. ICC-01/04-01/07-2388, 14 September 2010, paras. 38 and 41.

²³ See the "Decision on disclosure by the defence" (Trial Chamber I), No. ICC-01/04-01/06-1235-Corr-Anx1, 20 March 2008, par. 31.

²⁴ *Idem*, paras. 33-35. See also in this sense the "Decision on the starting date of the defence presentation of evidence and related issues" (Trial Chamber III), No. ICC-01/05-01/08-2221, 24 May 2012, par. 11.

confirmation of charges hearing. Otherwise, the position of the victims participating in these proceedings would not be any different from that of the public following the proceedings.

2. Regarding the Defence Communication of Evidence

24. The Common Legal Representative contends that the Defence provides no valid reason for not notifying to her Annex A and Annex B of its submission filed on 12 September 2014.²⁵ Accordingly, she requests the Chamber to order the notification to her of both Annexes, as well as to be granted access to the documents and/or material listed in said Annexes, as specified *infra*.

25. As a preliminary remark, the Common Legal Representative notes that the only reason adduced by the Defence for the classification as confidential of said Annexes is that they “*should not be released to the public*”.²⁶ In this regard, the Common Legal Representative emphasises that, as clarified by the Appeals Chamber, participating victims are not “*the public*”, but participants who may present their views and concerns in the proceedings pending before the Court.²⁷ Therefore, the Defence’s argument is not applicable to the victims participating in this case.

26. Moreover, in accordance with the Defence’s wording, Annexes A and B also

²⁵ On 15 September 2014 the Common Legal Representative received an e-mail from the Defence informing her that it had no objection to granting her access to (i) evidence listed as public in Annex A, and (ii) a category of Annex B, namely a list of items collected by the Defence related to Mr. Blé Goudé, including open source material.

²⁶ See the “Defence Communication of Rule 78 Evidence Disclosed to the Parties on 11 September 2014”, *supra* note 12, par. 3; and the “Defence Communication of Rule 78 Evidence Disclosed to the Parties on 12 September 2014 and its List of Evidence”, *supra* note 12, par. 3.

²⁷ See the “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings” (Appeals Chamber), No. ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012, par. 67.

contain “open source material”,²⁸ for which there is no reason for not being disclosed to the Common Legal Representative, and, incidentally, made accessible to the public.

27. As a matter of principle, the Common Legal Representative observes that, in accordance with “internationally recognised human rights”,²⁹ the requirements of a “fair trial” mean, *inter alia*, that “each party must be afforded a reasonable opportunity to present his case [...] under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”³⁰ and that, moreover, the right to a “fair trial” involves “the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court’s decision”.³¹

28. In this regard, the Common Legal Representative recalls principle 21 of the Basic Principles on the Role of Lawyers, pursuant to which:

*“[i]t is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time”.*³²

29. In light of the aforementioned principles and “internationally recognised

²⁸ See the “Defence Communication of Rule 78 Evidence Disclosed to the Parties on 11 September 2014”, *supra* note 12, par. 4; and the “Defence Communication of Rule 78 Evidence Disclosed to the Parties on 12 September 2014 and its List of Evidence”, *supra* note 12, par. 4.

²⁹ In this regard, see “Judgment on the Prosecutor’s Application for extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision denying Leave to Appeal”, No. ICC-01/04-168, 13 July 2006, par. 11.

³⁰ See ECHR, *Dombo Beheer B.V. v. The Netherlands*, Application No. 14448/88, Judgment of 27 October 1993, par. 33.

³¹ See ECHR, *Mantovanelli v. France*, Application No. 21497/93, Judgment of 18 March 1997, par. 33; *Nideröst-Huber v. Switzerland*, Application No. 18990/91, Judgment of 18 February 1997, par. 24; *Lobo Machado v. Portugal*, Application No. 15764/89, Judgment of 20 February 1996, par. 31; *Vermeulen v. Belgium*, Application No. 19075/91, Judgment of 20 February 1996, par. 33; *Ruiz-Mateos v. Spain*, Application No. 12952/87, Judgment of 12 September 1993, par. 63.

³² See the “Basic Principles on the Role of Lawyers”, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. This document is available on the website of the Office of the High Commissioner for Human Rights: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

human rights”, the Common Legal Representative submits that she should be granted access to Annex A and Annex B. Otherwise, she would be deprived of the possibility of representing the interests of her clients effectively and appropriately at the confirmation of charges hearing.

30. As emphasised by the Single Judge of Pre-Trial Chamber II in the *Ruto et al.* case, “[i]f the list of evidence was always filed confidential, the victims’ Legal Representative would never be in a position - using the Prosecutor’s words - to ‘demonstrate that the material relates to issues specific to their interests’, even when the Legal Representative of victims has correctly identified an issue capable of affecting the victims’ rights”.³³ Moreover, Trial Chamber III in the *Bemba* case ruled that “in order to facilitate full participation by victims, it is in the interests of justice that those who have been granted leave to participate are afforded access to the confidential material in the case, relevant to their views and concerns. [...] In order to make this approach effective, the parties and participating victims are to inform the Chamber whenever confidential filings may engage the interests of particular participating victims”.³⁴

31. In an effort to avoid litigation, after having received notification of the Defence Communication of Evidence, the Common Legal Representative addressed an e-mail to the Defence on 15 September 2014 requesting whether it had any objection to her accessing Annexes A and B. The same day the Defence replied by e-mail elaborating on the different categories of documents included in the Annexes.

32. In said e-mail, the Defence indicated that it does not object to the Common Legal Representative having access to Annex A in its entirety, as well as to Annex B

³³ See the “Second Decision on the ‘Request by the Victims’ Representative for access to confidential materials’” (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-01/11-340, 23 September 2011, par. 14.

³⁴ See the “Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings” (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010, par. 47.

category identified as (i).³⁵

33. Concerning documents in Annex B identified as falling under category (ii),³⁶ as the Defence must be aware of, pursuant to an agreement with the Prosecution, the Common Legal Representative has access to the evidence disclosed to the Defence in the present case.³⁷ Therefore, there is no reason for her not accessing said category of documents.

34. Concerning documents in Annex B falling under category (iii),³⁸ similarly, the Common Legal Representative has gained access to some materials submitted by the Defence in the *Gbagbo* case, since she is currently also representing victims admitted to participate in said case.³⁹

35. Consequently, it might be that the Common Legal Representative already has access to some of the documents falling in said category. However, lacking knowledge of the list of said documents she is, at present, unable to identify whether she has access to some of the documents, and in the affirmative to which.

36. In this regard, the Common Legal Representative recalls the Single Judge's decision in the *Gbagbo* case when ruling on a request by the Common Legal Representative of victims for access to the list of evidence filed by the Defence

³⁵ See the "Defence Communication of Rule 78 Evidence Disclosed to the Parties on 12 September 2014 and its List of Evidence", *supra* note 12, par. 4.

³⁶ *Idem*.

³⁷ See the "Prosecution's Submission of *Document de notification des charges* and *l'Inventaire des éléments de preuve à charge*", *supra* note 7, with "Annexes 2 and 3 – Confidential, available to the Defence and OPCV". The Common Legal Representative is currently notified by the Prosecution of the disclosure of its evidence packages in eCourt.

³⁸ See the "Defence Communication of Rule 78 Evidence Disclosed to the Parties on 12 September 2014 and its List of Evidence", *supra* note 12, par. 4.

³⁹ See the "Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012, pp. 25-26; and the "Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-384-Corr, 6 February 2013, pp. 22-23.

pursuant to rule 121(6) of the Rules of Procedure and Evidence.⁴⁰ On that occasion the Single Judge clarified that *“granting [the Common Legal Representative] access to the Defence list of evidence does not amount to providing the Common Legal Representative with automatic access to all confidential material listed therein. Should the Common Legal Representative wish to access confidential documents in the Defence list of evidence, she will have to submit a specific and motivated request to this effect”*.⁴¹

37. The Single Judge in the present case already established the modalities of participation of the victims during the confirmation of charges hearing,⁴² enumerating their procedural rights. But she also specified that *“[these procedural rights are], however, without prejudice to any other right that the Chamber may grant to them in the course of the proceedings either proprio motu or upon specific and motivated request submitted by the legal representative”*.⁴³

38. Finally, the Common Legal Representative informs the Chamber that in the exchange of e-mails with the Defence, the latter suggested that the Defence of Mr. Gbagbo should be consulted on the possibility for the Common Legal Representative to access documents falling in Annex B, category (iii). The Common Legal Representative disagrees with this suggestion and fails to see the need for the Chamber to consult the Prosecution or the Defence in the *Gbagbo* case. The Chamber has, indeed, access to the evidence presented in both cases and it can decide on this request without further delay.

⁴⁰ See the “Decision on the OPCV’s ‘Requests to receive information and access documents for the effective participation of victims at the confirmation of charges hearing’” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-400, 13 February 2013, par. 19.

⁴¹ *Idem*.

⁴² See *supra* notes 4 and 6.

⁴³ See the “Decision on victims’ participation in the pre-trial proceedings and related issues”, *supra* note 4, par. 27; and the “Second Decision on victims’ participation in the pre-trial proceedings and related issues”, *supra* note 6, par. 17.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Pre-Trial Chamber

- to order the Defence to notify the Common Legal Representative of future submissions regarding the existence of an alibi or other grounds for excluding criminal responsibility and to provide her with any document and/or material related to this issue;
- to order the notification to the Common Legal Representative of Annexes A and B of the Defence Communication of Evidence in their entirety; and
- to order the notification to the Common Legal Representative of the document and/or material listed in Annexes A and B identified as “open source”, as well as of the evidence listed in Annex B category (ii), and of the evidence listed in Annex B category (iii) to which she has already been granted access in the *Gbagbo* case.



Paolina Massidda
Principal Counsel

Dated this 18th day of September 2014
At The Hague, The Netherlands