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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN CÔTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ***

Confidential

**Response to the "Soumissions portant sur le niveau de confidentialité à attribuer
aux documents que comprend le dossier de l'affaire"
(ICC-02/11-01/15-47-Conf-Red)**

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 19 January 2015, the Single Judge of Trial Chamber I (the “Single Judge”) issued the “Decision on the Legal Representative of Victims’ access to certain confidential filings and to the case record” (the “Confidential Filings Decision”),¹ whereby he found *inter alia* that “[t]he LRV has a general right to access the case record and that this right shall apply to confidential filings [...] If the party submitting filings/material is of the view that the LRV ought not to access them, then it must indicate the factual and legal basis for the chosen classification pursuant to Regulation 23 bis of the Regulations and the relevant filing should be filed confidential and ex parte”.²

2. On 11 March 2015, the Single Judge rejected the request by the Defence of Mr. Gbagbo for leave to appeal the Confidential Filings Decision (the “Leave to Appeal Decision”),³ whereby the origin and scope of said decision were clarified further.⁴

3. On the same date, Trial Chamber I (the “Chamber”) issued the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” (the “Joinder Decision”),⁵ joining the cases and ordering the parties, the legal representative of the victims and the Registry to indicate by 7 April 2015 “[a]ny objection, and the reasons therefore, to any party or participant being granted access to any confidential document or material on either the Blé Goudé or Gbagbo case records”.⁶

¹ See the “Decision on the Legal Representative of Victims’ access to certain confidential filings and to the case record” (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-749, 19 January 2015 (the “Confidential Filings Decision”).

² *Idem*, para. 15. See also *ibid.*, para. 20.

³ See the “Decision on Defence’s requests seeking leave to appeal the ‘Decision on the Legal Representative of Victims’ access to certain confidential filings and to the case record’ and seeking suspensive effect of it.” (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-809, 11 March 2015 (the “Leave to Appeal Decision”).

⁴ *Idem*, paras. 18-19.

⁵ See the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” (Trial Chamber I), No. ICC-02/11-01/15-1, 11 March 2015 (the “Joinder Decision”).

⁶ *Idem*, para. 73.

4. On 27 March 2015, the Defence of Mr. Gbagbo requested a clarification of the Joinder Decision and an extension of time to file the abovementioned objections.⁷

5. On 2 April 2015, the Defence of Mr. Blé Goudé provided its response to Mr. Gbagbo's requests, making *inter alia* a similar request for clarification of the Joinder Decision and an extension of time to submit its eventual objections to any party or participant being granted access to any confidential document or material on the *Blé Goudé* and *Gbagbo* case records.⁸

6. On the same date, the Chamber communicated via email its "Decision on Defence requests for clarification of that portion of the Joinder Decision relating to review of the Gbagbo and Blé Goudé case records, and extension of time to conduct its review (ICC-02/11-01/15-14)", informing the parties and participants of its decision to extend the deadline for filing any objection to granting any party or participant access to any "confidential", "confidential, *ex parte*", and "under seal" material on the *Gbagbo* and *Blé Goudé* pre-trial and trial case records to 28 April 2015, and to reject all other requests.⁹

7. On 13 April 2015, the Chamber issued the reasons for the abovementioned decision (the "Clarification Decision"),¹⁰ ordering the parties, the legal representative of the victims and the Registry to make any objections in accordance with paragraph 73 of the Joinder Decision by 28 April 2015.¹¹

⁷ See the "Demande aux fins de clarification de la « Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters » rendue par la Chambre de première instance I le 11 mars 2015 (ICC-02/11-01/11-810)", No. ICC-02/11-01/15-14, 27 March 2015.

⁸ See the "Defence response to the "Demande aux fins de clarification de la "Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters" rendue par la Chambre de première instance I le 11 mars 2015 (ICC-02/11-01/11-810)" and Request for clarification of the same decision", No. ICC-02/11-01/15-20, 2 April 2015.

⁹ See the e-mail received from the Chamber on 2 April 2015 at 16:11h.

¹⁰ See the "Decision on requests for clarification concerning review of the case record and extension of time" (Trial Chamber I), No. ICC-02/11-01/15-30, 13 April 2015 (the "Clarification Decision").

¹¹ *Idem*, p. 8.

8. On 28 April 2015, the Defence of Mr. Charles Blé Goudé filed the "Defence Objections on Access to Confidential Material" (the "Blé Goudé Objections").¹² On the same day, the Defence of Mr. Laurent Gbagbo filed the "Soumissions portant sur le niveau de confidentialité à attribuer aux documents que comprend le dossier de l'affaire" (the "Objections"),¹³ which were notified in full with redactions to the legal representative on 5 May 2015.

9. On 1 May 2015, the legal representative filed her response to the Blé Goudé Objections (the "Blé Goudé Objections Response").¹⁴

10. Pursuant to regulation 24(2) of the Regulations of the Court, the Principal Counsel of the Office of Public Counsel for Victims, acting as Common Legal Representative of the victims admitted to participate in the proceedings (the "Common Legal Representative"),¹⁵ respectfully submits her response to the Objections.

11. Pursuant to regulation 23 *bis*(2) of the Regulations of the Court, the Common Legal Representative files this response as confidential, following the classification of the Objections.

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

12. The Common Legal Representative submits that the Objections are premised on an apparent challenge or misunderstanding of the relevant decisions of the Chamber, contravene the principle of publicity guaranteed by articles 64(7) and 67(1)

¹² See the "Defence Objections on Access to Confidential Material", No. ICC-02/11-01/15-45-Conf, 28 April 2015 (the "Blé Goudé Objections").

¹³ See the "Version Confidentielle expurgée - Soumissions portant sur le niveau de confidentialité à attribuer aux documents que comprend le dossier de l'affaire", No. ICC-02/11-01/15-47-Conf-Red, 01 May 2015 (dated 28 April 2015) (the "Objections").

¹⁴ See the "Response to the 'Defence Objections on Access to Confidential Material' (ICC-02/11-01/15-45-Conf)", No. ICC-02/11-01/15-52-Conf, 1 May 2015 (the "Blé Goudé Objections Response").

¹⁵ See the "Decision on victim participation" (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, para. 61.

of the Rome Statute, and are not sufficiently justified. Consequently, the Common Legal Representative requests that the Objections be rejected to the extent that they unduly prevent the Common Legal Representative from having access to relevant documents.

13. Firstly, the Common Legal Representative notes that, after summarising the relevant decisions issued by the Chamber on the matter,¹⁶ the Defence provides and relies on its own interpretation of regulation 23 *bis* of the Regulations of the Court to conclude as a “*principe*” that “[d]ans tous les cas, le détenteur de l’information est maître de la classification et du choix des destinataires”.¹⁷

14. The Common Legal Representative submits that this “principle” is clearly incomplete because it ignores the numerous rulings of the Chamber correcting the classifications given by the participants to their filings and documents.

15. The Chamber found that if a participant objects to the classification given to a document by another participant, the Chamber ultimately decides who may have access to the document at hand.¹⁸ Pursuant to this approach, the Chamber dismissed objections made by the Defence in the past regarding the Common Legal Representative’s access to specific documents in the case record, ruling that pursuant to “[t]he general principle established [...], to ensure that victims’ participation is effective, the LRV must be notified in a timely manner of all documents filed in the record”.¹⁹

16. Moreover, before and after the Confidential Filings Decision, the Chamber has repeatedly stated its intention to rule on “objections” to granting any participant access to any “confidential”, “confidential, *ex parte*”, and “under seal” material on the *Gbagbo* and *Blé Goudé* pre-trial and trial case records.²⁰ This approach is predicated on

¹⁶ See the Objections, *supra* note 13, paras. 4-11.

¹⁷ *Idem*, paras. 13-14.

¹⁸ See the Confidential Filings Decision, *supra* note 1, para. 12.

¹⁹ *Ibid.*, para. 20. See also *idem*, para. 15.

²⁰ See the “Order on the notification of confidential filings to the Legal Representative of victims” (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-724, 20 November 2014, para. 4; the Confidential

the principle of publicity guaranteed by articles 64(7) and 67(1) of the Rome Statute, and on the fact that, pursuant to regulation 23 *bis* (3) of the Regulations of the Court, material on the case record should retain its classification only so long as it is justified.²¹ Accordingly, as noted by the Defence,²² “[a]ccess to ‘confidential’, ‘confidential, ex parte’ and ‘under seal’ material is limited to a necessary and proportional extent”.²³

17. Secondly, the Common Legal Representative notes that the Defence still appears reluctant to use the classification level ordered by the Chamber when determining whether the material at hand may be made available to the Common Legal Representative. Although the Chamber has clarified in multiple occasions that the Defence must classify the documents that the Defence does not wish to notify to the Common Legal Representative as “confidential and *ex parte*”,²⁴ the Defence refers to material not deemed fit for transmission to the Common Legal Representative as documents which “[c]onvient de conserver le caractère confidentiel en ne les transmettant pas au Représentant”.²⁵ More importantly, the Defence subsequently argues against the use of the classification level ordered by the Chamber, referring to the practice of the Pre-Trial Chamber on the classification of documents as “confidential” in this case and to a similar practice of other Chambers in other cases.²⁶

18. The Common Legal Representative submits that the Defence’s attitude in this regard is no longer admissible. The Defence may disagree with the decision affording the Common Legal Representative access to confidential documents but cannot be allowed to ignore it. The Chamber already considered the jurisprudence of other

Filings Decision, *supra* note 1, paras. 15 and 19; the Leave to Appeal Decision, *supra* note 3, paras. 18-19 and 33; the Joinder Decision, *supra* note 5, para. 73; and the Clarification Decision, *supra* note 10, paras. 10-11.

²¹ See the Clarification Decision, *supra* note 10, para. 10.

²² See the Objections, *supra* note 13, para. 11.

²³ See the Clarification Decision, *supra* note 10, para. 10.

²⁴ *Idem*, para. 8, footnote 22.

²⁵ See the Objections, *supra* note 13, section 1.3.

²⁶ *Idem*, paras. 32-33.

Chambers and expressly decided not to follow it.²⁷ Said decision is already final,²⁸ and as stated by the Chamber, the proceedings must move forward expeditiously.²⁹ Accordingly, the Common Legal Representative requests the Chamber not to entertain further these submissions by the Defence.

19. Lastly, the Common Legal Representative notes that the Objections are heavily redacted, making it very difficult for the Common Legal Representative to know whether the redacted filings, documents and evidence affect the victims' personal interests and, in some cases, what are the reasons put forward by the Defence to not share said materials with the Common Legal Representative.³⁰ In these circumstances, it is not always possible for the Common Legal Representative to make observations on the necessity and proportionality of maintaining the confidentiality requested by the Defence.

20. In this regard, the Common Legal Representative recalls the decision of the Chamber pursuant to which redactions must be made in a manner that, without defeating their very purpose, does not turn them into an obstacle to contextualise the information they refer to.³¹ In the case at hand, the Common Legal Representative submits that the redactions made by the Defence prevent her from conducting a proper assessment of whether some materials referred to in the Objections must exceptionally not be made available to the Common Legal Representative.

21. The Common Legal Representative relies on the Chamber, to whom the unredacted version thereof is available, to assess the validity of the redactions applied by the Defence and to determine whether the victims' personal interests may be affected by the materials at hand.

²⁷ See the Confidential Filings Decision, *supra* note 1, paras. 14-15.

²⁸ See the Leave to Appeal Decision, *supra* note 3, paras. 32-33.

²⁹ See the transcript of the status conference held on 4 November 2014 (open session), No. ICC-02/11-01/11-T-25-Red-ENG, p. 5, line 23 to p. 6, line 3.

³⁰ See e.g. the Objections, *supra* note 13, paras. 15-28 and 50-53.

³¹ See *mutatis mutandis* the "Decision on the Protocol establishing a redaction regime" (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-737, 15 December 2014, para. 26. See also the "Redacted Decision on Intermediaries" (Trial Chamber I), No. ICC-01/04-01/06-2434-Red2, 31 May 2010, para. 6.

22. Nonetheless, on the basis of the unredacted reasons provided by the Defence, the Common Legal Representative contends that the Defence's objections to grant her access to an important number of confidential filings, transcripts and evidence are inconsistent with the general principle established in the Confidential Filings Decision and recalled in the Clarification Decision.³² More detailed submissions are provided below regarding each type of material.

a. On the Defence's request to maintain and/or reclassify some filings as confidential *ex parte* vis-à-vis the Common Legal Representative³³

23. As argued above,³⁴ the heavy redactions on this part of the Objections prevent the Common Legal Representative from providing meaningful observations on the reasons argued by the Defence not to make available to her confidential documents that have so far been disclosed only to the Chamber or only to the Chamber and the Prosecution.

24. The Common Legal Representative submits that the reasons argued by the Defence for not disclosing confidential filings to her should have been provided in a less redacted format, without revealing the entire content of the filings at hand. For instance, the Defence refers to "*principes absolus et intangibles*" as a basis for maintaining the current classification level of some filings,³⁵ but the ensuing redactions prevent the Common Legal Representative from identifying said principles and whether they are indeed jeopardised by granting her access to the filings at hand. The Common Legal Representative reiterates her arguments against the extensive use of redactions by the Defence.³⁶

³² See the Confidential Filings Decision, *supra* note 1, paras. 15 and 20; and the Clarification Decision, *supra* note 10, para. 10.

³³ See the Objections, *supra* note 13, sub-sections 1.1, 1.2 and 1.3.

³⁴ See *supra* paras. 19-20.

³⁵ See the Objections, *supra* note 13, para. 15.1).

³⁶ See *supra* para. 21.

25. The Common Legal Representative also contends that said redactions prevent her from being able to assess whether the personal interests of the victims participating in the proceedings are affected by the filings that the Defence wishes to withhold from the Common Legal Representative. As noted by the Defence,³⁷ the victims authorised to participate in the proceedings must show that their personal interests are touched by issues arising therein. However, as already argued in the Blé Goudé Objections Response,³⁸ it is highly doubtful that the Defence may know better than the Common Legal Representative the interests of the victims participating in this case and the actual impact that the Defence filings may have on said interests.

26. From this perspective, the Common Legal Representative contends that any determination on the eventual impact on the victims' personal interests of a filing not transmitted to the Common Legal Representative requires that the content of said filing be provided to the Common Legal Representative, in a summary or redacted format, for her to provide her views on the extent of said impact.

27. Otherwise, the general principle established by the Chamber regarding the notification of all confidential documents to the Common Legal Representative will not be effective and the participation of the victims in these proceedings will be merely illusory.

28. In fact, when discussing the participation of the victims in the current proceedings, the Defence refers again to the potential imbalance brought about by "*toute intervention d'un tiers*".³⁹ However, the Chamber already clarified that victims

³⁷ See the Objections, *supra* note 13, para. 30.

³⁸ See the Blé Goudé Objections Response, *supra* note 14, para. 18.

³⁹ See the Objections, *supra* note 13, para. 31. See also the "Réponse de la défense à la demande présentée par le Procureur d'autorisation d'interjeter appel de la décision portant ajournement de l'audience de confirmation des charges conformément à l'article 61-7-c-i du Statut (ICC-02/11-01/11-435) et observations de la défense à la « réponse » du Représentant légal des victimes à la demande d'interjeter appel du Procureur (ICC-02/11-01/11-437)", No. ICC-02/11-01/11-438, 24 June 2013, para. 23; the "Réponse de la défense à la demande de participation à la procédure d'appel relative à la « décision d'ajournement de l'audience de confirmation des charges conformément à l'article 67-7-c-i du Statut » (ICC-02/11-01/11-432-tFRA) déposée par la Représentante légale des Victimes le 13 août

authorised to participate in these proceedings are not “third parties”, but “[p]articipants who are expressly entitled to be notified by the Registrar in a timely manner of, among other things, requests, submissions, motions and documents that form part of the proceedings”.⁴⁰

29. Similarly, the jurisprudence of the Appeals Chamber relied upon by the Defence found indeed that victims are not equated to the “parties” to the proceedings and referred to possible restrictions in their participation in the proceedings,⁴¹ but did not refer to restrictions in their right to access the records of said proceedings.

30. As noted in the Blé Goudé Objections Response,⁴² it is evidently clear that having access to the records of the proceedings is different from being allowed to

2013 (ICC-02/11-01/11-475)”, No. ICC-02/11-01/11-487, 21 August 2013, paras. 46 and 64; the “Réponse de la défense à la demande de participation à la procédure d’appel relative à la « Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60 (3) of the Rome Statute » (ICC-02/11-01/11-454) déposée par la Représentante Légale des Victimes le 22 juillet 2013 (ICC-02/11-01/11-460)”, No. ICC-02/11-01/11-488, 21 August 2013, paras. 47 and 67; and the “Demande d’autorisation d’interjeter appel de la décision du Juge Unique « on the Legal Representative of Victims’ access to certain confidential filings and to the case record » (ICC-02/11-01/11-749) rendue le 19 Janvier 2015”, No. ICC-02/11-01/11-752, 26 January 2015, paras. 8-9 and 39.

⁴⁰ See the Confidential Filings Decision, *supra* note 1, para. 15. The Chamber has also distinguished between “applicants” (victims not yet authorised to participate in the proceedings) and “third parties”. See the Decision on victim participation, *supra* note 15, para. 55.

⁴¹ See the Objections, *supra* note 13, para. 30, footnote 24. See also the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” (Appeals Chamber), No. ICC-01/04-01-06-824 OA7, 13 February 2007, paras. 39, 40, 44 and 55; the “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007” (Appeals Chamber), No. ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, paras. 36 and 88-89; the “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 6 December 2007” (Appeals Chamber), No. ICC-02/05-138 OA OA2 OA3, 18 June 2008, paras. 49 and 62; the “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008” (Appeals Chamber), No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, paras. 58, 61 and 64; and the “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007” (Appeals Chamber), No. ICC-01/04-556 OA4 OA5 OA6, 19 December 2008, para. 55.

⁴² See the Blé Goudé Objections Response, *supra* note 14, para. 14.

make submissions on the issues addressed in said records. Chambers have consistently made clear this distinction by granting victims access to the records, on the one hand, and finding, on the other hand, that subsequent submissions by the victims on documents filed in said records could be subject to further authorisation. The Chamber has already noted this difference.⁴³

31. As a consequence, the Common Legal Representative submits that there is no legal basis supporting the Defence's contention that granting her access to the confidential filings identified by the Defence would turn her into a "*quasi-partie*".⁴⁴ In fact, this contention is not even supported by the very practice of the Defence, who expressly refused to characterise *participants* as "third parties" in its recent submissions on the Protocol concerning the handling of confidential information in the course of investigations.⁴⁵

32. This notwithstanding, contrary to the Defence's contention,⁴⁶ victims authorised to participate in these proceedings cannot be equated to the public either regarding their access to information on the proceedings. Unlike the public, victims may present their views and concerns where their personal interests are affected by the ongoing proceedings.⁴⁷

33. This is all the more so because, as noted by the Defence,⁴⁸ "[t]he Single Judge has left open the possibility for a party to classify a document confidential and *ex parte* in accordance with Regulation 23 bis, should the matter require being withheld from the LRV".

⁴³ See the Leave to Appeal Decision, *supra* note 3, para. 33.

⁴⁴ See the Objections, *supra* note 13, para. 36.

⁴⁵ See the transcript of the status conference held on 4 December 2014 (open session), No. ICC-02/11-01/11-T-27-Red-ENG, p. 25, lines 14-20.

⁴⁶ See the Objections, *supra* note 13, para. 35.

⁴⁷ 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, para. 67.

⁴⁸ See the Objections, *supra* note 13, para. 39.

Otherwise, confidential information will remain available to the Common Legal Representative.

34. In this regard, it must be noted that the Defence cannot decide to not share information with the Common Legal Representative by classifying the information as confidential and *ex parte* without providing reasons for said classification. As stated by the Chamber, the principle is for the Defence to make available to the Common Legal Representative the content of all its confidential submissions.⁴⁹ Consequently, the Defence must submit reasons for any exception(s) to the application of this principle, in order for the Chamber to eventually rule whether said exceptions are justified.

35. Against this background, the Common Legal Representative submits that the Defence's contention that "[l]e Représentant ne doit avoir accès qu'aux éléments que les parties ont décidé de lui transmettre"⁵⁰ is not entirely accurate. The parties are only sovereign in the initial classification of their submissions, the final decision thereon lying with the Chamber.

36. In fact, as already shown by previous decisions of the Chamber, the reasons alleged by the Defence to classify their filings as confidential and *ex parte* vis-à-vis the Common Legal Representative may eventually be found to be not valid, and the confidential filings concerned may be ordered to be transmitted to the Common Legal Representative.

37. *A maiore ad minus*, the reasons for any request by the Defence to reclassify confidential filings as *ex parte*, thereby not transmitting them to the Common Legal Representative, must be unredacted vis-à-vis the latter to the extent possible. Otherwise, the Common Legal Representative will be unable to provide a response to this type of requests by the Defence, thereby preventing the Chamber from

⁴⁹ See the Confidential Filings Decision, *supra* note 1, paras. 15 and 19.

⁵⁰ See the Objections, *supra* note 13, sub-section 1.3.1).

considering the views of those potentially affected by a decision to classify the filings as confidential *ex parte*.

38. In fact, the Chamber expressly requested the Defence to indicate its objections “*and the reasons therefore*” to any participant (including the Common Legal Representative) being granted access to any confidential document or material on the *Gbagbo* and *Blé Goudé* case records.⁵¹

39. Contrary to this request, the Common Legal Representative notes that the objections put forward by the Defence to the reclassification as confidential of filings previously classified as confidential *ex parte* Defence and Prosecution only are entirely redacted.⁵² In these circumstances, the Common Legal Representative cannot provide a response to the reasons of proportionality and necessity argued by the Defence for not reclassifying said filings as confidential (if any). She therefore relies on the Chamber to assess the validity of these redactions and the requested *ex parte* classification of the relevant filings.⁵³

40. By contrast, the Common Legal Representative submits that the unredacted reasons provided in the Objections not to grant her access to confidential filings are unfounded.⁵⁴ Said arguments, referring to “[l]es risques de diffusion de l’information”,⁵⁵ are misplaced and inaccurate.

41. The Common Legal Representative submits that the Defence’s argument that “[l]es Représentants des victimes n’ont pas tous la même expérience et ne présentent pas tous les mêmes garanties du point de vue de la confidentialité que l’Accusation et les équipes de

⁵¹ See the Joinder Decision, *supra* note 5, para. 73; and the Clarification Decision, *supra* note 10, para. 11.

⁵² See the Objections, *supra* note 13, paras. 38 and 40.

⁵³ See *supra* para. 21.

⁵⁴ See the Objections, *supra* note 13, paras. 41-45.

⁵⁵ *Idem*, sub-section 1.3.2).

Défense”⁵⁶ is illogical and factually erroneous. The same contention may be made regarding the Prosecution and Defence teams, since not all of their members have the same experience and therefore may not be able to provide the same “guarantees” concerning the confidentiality of the information referred to by the Defence. In any event, this objection, which is unsupported by any concrete information, cannot refer specifically to the Common Legal Representative, who was called to the Bar over twenty years ago and has been practicing before the Court for the last ten years.⁵⁷

42. Regarding the Defence’s argument concerning “[l]e danger de diffusion de l’information à des activistes [par le Représentant] et le risque que pourrait faire peser une telle diffusion de l’information sur les témoins de la Défense”,⁵⁸ the Common Legal Representative strongly opposes the characterisation of her former legal assistant in the field as a “*militant politique*” and submits that, as it is already known to the parties, said legal assistant resigned from her team for professional reasons in January 2015.⁵⁹

43. Moreover, regardless of any political views alleged by the Defence, the Common Legal Representative submits that her former assistant in the field remains legally bound by the same confidentiality obligations as the Common Legal Representative.⁶⁰ In turn, the Chamber already found that the Common Legal Representative is bound by the same duty of professional secrecy and confidentiality as the Defence pursuant to the Code of Professional Conduct for counsel.⁶¹

44. Accordingly, if the Defence is concerned that the communication of some parts of the abovementioned filings to the Common Legal Representative may impair

⁵⁶ *Ibid.*, para. 41.

⁵⁷ The Common Legal Representative was appointed as Principal Counsel of the Office of Public Counsel for Victims in September 2005.

⁵⁸ See the Objections, *supra* note 13, para. 44.

⁵⁹ See the “Public Redacted Version of Information on Common Legal Representation of Victims in the proceedings”, No. ICC-02/11-01/15-53-Red, 15 May 2015, para. 11.

⁶⁰ See the Code of Professional Conduct for counsel, articles 1, 8 and 18(2).

⁶¹ See the Confidential Filings Decision, *supra* note 1, para. 22; and the Leave to Appeal Decision, *supra* note 3, para. 39.

the rights of the Defence and/or the fairness of the proceedings, the Common Legal Representative submits that the Defence cannot unilaterally refuse to disclose them to her on the basis of general assertions such as those addressed in the preceding paragraphs. The Defence must instead submit reasoned requests for authorisation to redact the relevant parts of said documents prior to disclosing them to the Common Legal Representative.

b. On the Defence's request to maintain some transcripts as confidential *ex parte vis-à-vis* the Common Legal Representative⁶²

45. By contrast with the Defence's objections for the Common Legal Representative to have access to some of its confidential filings in the *Gbagbo* case record,⁶³ the Defence completely redacts the reasons and/or fails to elaborate on the reasons for its objection to the eventual reclassification as confidential of the transcripts of hearings held *ex parte* in the *Gbagbo* case. The Defence only states that "[l]eur confidentialité [des transcrits] doit être préservée lors de l'audience elle-même mais aussi par la suite",⁶⁴ and that "[l]es transcrits [n']ont jamais été transmis [au Représentant] et ne peuvent pas lui être transmis car cela conduirait [EXPURGÉ]".⁶⁵

46. Firstly, the Common Legal Representative submits that these contentions by the Defence clearly contradict the purpose of the Joinder Decision. If documents and materials must remain classified as confidential and *ex parte vis-à-vis* the Common Legal Representative simply because they were classified as such in the past, the need identified by the Chamber in the Joinder Decision and restated in the Clarification Decision to analyse *now* whether the confidentiality of said documents and materials vis-à-vis the Common Legal Representative must be maintained would have no purpose. The Common Legal Representative understands that this re-

⁶² See the Objections, *supra* note 13, section 2.

⁶³ *Idem*, paras. 13-15, 29-45.

⁶⁴ *Ibid.*, para. 47.

⁶⁵ *Ibid.*, para. 51.

examination must take place in light of the general principle established by the Chamber in the Confidential Filings Decision.⁶⁶

47. Secondly, the Common Legal Representative insists that she is unable to provide observations on the justified or unjustified character of the exceptions raised by the Defence to the general principle of her being granted access to all confidential material if the reasons behind said exceptions are not provided to her.

48. In these circumstances and pursuant to the Clarification Decision,⁶⁷ the Common Legal Representative contends that unless the Chamber finds otherwise after analysing the reasons provided by the Defence (if any), there is no apparent need to preserve the *status quo ante*, i.e. the confidential and *ex parte* character vis-à-vis the Common Legal Representative of the transcripts of the seven closed sessions referred to by the Defence.⁶⁸

49. Regarding the transcripts of the private sessions mentioned by the Defence,⁶⁹ the Common Legal Representative agrees with the Defence's submission that they should remain available to the Common Legal Representative because she attended said hearings. However, the Common Legal Representative alerts the Chamber that the confidentiality of the matters addressed in these private sessions may not *per se* justify maintaining the confidentiality and *ex parte* classification vis-à-vis the Common Legal Representative of documents and materials related to said matters. Since the Common Legal Representative has already become aware of these matters during the private sessions, any confidential filing or evidence submitted before or after the sessions but related to these matters must be made available to the Common Legal Representative.

⁶⁶ See the Leave to Appeal Decision, *supra* note 3, para. 18.

⁶⁷ See the Clarification Decision, *supra* note 10, para. 9.

⁶⁸ See the Objections, *supra* note 13, footnote 34.

⁶⁹ *Idem*, footnote 32.

c. On the Defence's request to maintain some evidence as confidential *ex parte vis-à-vis* the Common Legal Representative⁷⁰

50. The Common Legal Representative contends that the Defence's objections to granting her access to all confidential documents disclosed by the Defence for the purposes of the confirmation of charges hearing are untenable and must be rejected.

51. The Defence contends that the transmission of said evidence to the Common Legal Representative "[a]ugmente les risques d'atteinte à la confidentialité et revient de facto à amoindrir la marge de manœuvre de la Défense dans ses enquêtes".⁷¹ The Common Legal Representative disagrees with both contentions.

52. The Common Legal Representative insists that the Chamber has reiterated that she is bound by the duty of professional secrecy and confidentiality pursuant to the Code of Professional Conduct for counsel.⁷² Said duty refers *inter alia* to any order of the Court in relation to evidence falling under the ambit of rule 77 of the Rules of Procedure and Evidence and article 67(2) of the Statute.⁷³ Since the materials referred to by the Defence arguably fall under these provisions and have been classified as confidential by the Court, the Common Legal Representative is bound by a duty to respect their confidentiality.

53. In this regard, the Defence's objection is based on an alleged risk that the Common Legal Representative may breach the confidentiality of the evidence. This allegation not only presumes a future violation by the Common Legal Representative of her professional duties but also her violation of an order of the Court, since the Chamber expressly ruled that "[t]he victims' access to the case record described above is

⁷⁰ *Ibid.*, section 3.2.

⁷¹ *Ibid.*, para. 58.

⁷² See the Confidential Filings Decision, *supra* note 1, para. 22; and the Leave to Appeal Decision, *supra* note 3, para. 39.

⁷³ See the Code of Professional Conduct for counsel, article 8(2).

*limited to the LRV only. Requests for access for individual victims must be approved by the Single Judge on a case-by-case basis".*⁷⁴

54. The Common Legal Representative submits that neither of these presumptions can underpin a valid objection to the transmission of confidential evidence to the Common Legal Representative, especially because the Defence does not provide any evidence of the abovementioned risk to the confidentiality of the evidence.

55. Similarly, the Defence's contention that transmitting the confidential evidence to the Common Legal Representative will make it more difficult to find witnesses willing to collaborate with it because it will not be able to "[g]arantir à des témoins potentiels quels seront les destinataires des attestations ou documents confidentiels"⁷⁵ must be dismissed as an unfounded objection. As stated above, the scope of those who may be granted access to the confidential documents referred to by the Defence is clearly determined by the Code of Professional Conduct of counsel and the decisions of the Chamber.

56. Moreover, the Chamber has repeatedly stated that a party must identify the specific documents that said party wishes not to be transmitted to the other party or participant, providing the reasons to enable the Chamber to make the ultimate decision on the confidential and *ex parte* classification of each of such documents.⁷⁶ Accordingly, the Common Legal Representative submits that the Defence's request to classify "[l]'ensemble des éléments de preuve classés confidentiels"⁷⁷ as confidential *ex parte* must be rejected for being inconsistent with the relevant decisions of the Chamber. The Defence should have provided instead arguments regarding the

⁷⁴ See the Confidential Filings Decision, *supra* note 1, para. 15.

⁷⁵ See the Objections, *supra* note 13, para. 58.

⁷⁶ See the Clarification Decision, *supra* note 10, para. 8, footnote 22, referring *inter alia* to the status conference held on 4 November 2014 (open session), No. ICC-02/11-01/11-T-25-Red-ENG, p. 5, lines 3-7; and the Leave to Appeal Decision, *supra* note 3, para. 33.

⁷⁷ See the Objections, *supra* note 13, para. 57.

necessity and proportionality of its objection to granting the Common Legal Representative access to each piece of confidential evidence.

57. In conclusion, under the current circumstances, where it cannot be concluded from the Objections that the filings, transcripts and/or evidence referred to by the Defence do not affect the victims' personal interests and that maintaining their confidentiality vis-à-vis the Common Legal Representative is a necessary and proportionate measure, the Common Legal Representative submits that there is no reason for said materials not to be made available to her pursuant to the general principle established by the Chamber. The Common Legal Representative will abide by her obligation to respect the confidentiality of any material made available to her and will not share them with her clients without the prior authorisation of the Chamber.⁷⁸

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

- **remind** the Defence of its obligation to provide the Common Legal Representative with the reasons supporting all its objections to her being granted access to any "confidential", "confidential, *ex parte*" or "under seal" material;
- **reject** the Objections as unfounded; and
- **grant** the Common Legal Representative access to the relevant material.



Paolina Massidda
Principal Counsel

Dated this 15th day of May of 2015

At The Hague, The Netherlands

⁷⁸ See the Confidential Filings Decision, *supra* note 1, para. 15.