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**International
Criminal
Court**



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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

**Public redacted version
of filing ICC-02/11-01/15-52-Conf
Response to the "Defence Objections on Access to Confidential Material"
(ICC-02/11-01/15-45-Conf)**

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 “Objections”).¹² Analogous objections by the Defence of Mr. Laurent Gbagbo have not been notified to the legal representative of the victims by the time of filing the current submission.

9. 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”),¹³ respectfully submits her response to the Objections.

10. 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. However, the Common Legal Representative considers that no confidential information is contained in the present submission and she has no objection to it being reclassified as “public” by order of the Chamber.

11. In accordance with the Decision of the Single Judge dated 24 June 2015,¹⁴ the Common Legal Representative files a public redacted version of this response following the redactions applied by the Defence for Mr. Blé Goudé.¹⁵

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

12. The Common Legal Representative submits that the Objections are based on a misunderstanding of the relevant jurisprudence of the Court, are not sufficiently justified and ultimately defeat the principle of publicity guaranteed by articles 64(7)

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

¹³ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, para. 61.

¹⁴ See the “Decision on objections concerning access to confidential material on the case record” (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-101, 24 June 2015, p. 13.

¹⁵ See the “Public Redacted Version of ‘Defence Objections on Access to Confidential Material’, 28 April 2015, ICC-02/11-01/15-45-Conf”, No. ICC-02/11-01/15-45-Red, 30 June 2015.

and 67(1) of the Rome Statute. Consequently, the Common Legal Representative submits that the Objections should be rejected and access to the relevant document(s) granted to the Common Legal Representative.

13. Firstly, the Common Legal Representative contends that although the Defence of Mr. Blé Goudé rightly submits that “[t]he principle is of a full and complete access to every material for parties and participants”,¹⁶ it subsequently undermines the effective application of this principle by misinterpreting the finding by the Appeals Chamber that victims participating in the proceedings are not parties to the proceedings before a Chamber.¹⁷

14. The Common Legal Representative submits that the Appeals Chamber found indeed that victims are not equated to the parties to the proceedings by referring to possible restrictions in their participation in the proceedings, but said finding was not specifically directed to the victims’ right to access the records of the proceedings.

15. It is evidently clear that having access to the records of the proceedings is different than being allowed to 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.¹⁸

16. Consequently, the Common Legal Representative submits that the general assertion by the Defence that “[d]isclosing [...] confidential filings to the participants

¹⁶ See the Objections, *supra* note 12, para. 10.

¹⁷ See 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 OA04 OA05 OA06, 19 December 2008, para. 55.

¹⁸ See the Leave to Appeal Decision, *supra* note 3, para. 33.

(including the LRV) could be prejudicial to the rights of the Accused and to a fair and impartial trial”¹⁹ is purely speculative at this stage.

17. Secondly, the Common Legal Representative contends that the objections by the Defence of Mr. Blé Goudé to grant the Common Legal Representative access to filing ICC-02/11-02/11-[REDACTED] are inconsistent with the general principle established in the Confidential Filings Decision and recalled in the Clarification Decision,²⁰ and prevent a proper assessment of whether said filing must exceptionally not be made available to the Common Legal Representative.

18. The Defence of Mr. Blé Goudé argues that filing ICC-02/11-02/11-[REDACTED] should not be accessible to the Common Legal Representative because it (i) does “[n]ot affect the victims’ personal interests”, (ii) does “[n]ot contain information that could benefit, affect or be detrimental to the victims”, and (iii) contains “[i]nformation of the highest level of sensitivity” the disclosure of which “[w]ould seriously impair the rights of the Accused and the fairness of the trial”.²¹

19. In this regard, the Common Legal Representative contends that it is highly doubtful that the Defence may know better than the Common Legal Representative the precise interests of the victims participating in the case and whether the document at hand may affect said interests. Moreover, addressing the Defence’s confidentiality concerns,²² the Common Legal Representative notes that, as already found by the Chamber,²³ she is bound by the same confidentiality obligations as the Defence pursuant to the Code of Professional Conduct for counsel.²⁴

¹⁹ See the Objections, *supra* note 12, para. 15.

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

²¹ See the Objections, *supra* note 12, para. 16.

²² *Idem*, para. 17.

²³ See the Leave to Appeal Decision, *supra* note 3, para. 39.

²⁴ See the Code of Professional Conduct for counsel, article 8.

20. In the current circumstances, where it cannot be concluded that filing ICC-02/11-02/11-[REDACTED] does not affect the victims' personal interests, the Common Legal Representative submits that there is no reason for said document 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 this filing and will not share it with her clients without the prior authorisation of the Chamber.²⁵

21. If the Defence is concerned that the communication of some parts of said filing to the Common Legal Representative may impair the rights of the Defence and/or the fairness of the proceedings, the Common Legal Representative submits that the Defence may request authorisation to redact the relevant parts of the document prior to disclosing it to her. In any event, there is no apparent reason for not transmitting filing ICC-02/11-02/11-[REDACTED] to the Common Legal Representative in its redacted or unredacted version.

22. Finally, the Defence raises objections to other parties and the participants being granted access to "[t]he future filings to be submitted in the Gbagbo and Blé Goudé case [...] concerning the Accused's health, private life and detention conditions as well as any other private related matters".²⁶

23. In this regard, as noted by the Defence in its submission,²⁷ the Chamber did not grant the parties and participants the opportunity to raise objections to the access by other parties and participants to *future filings* but only to submissions *already filed* in the *Gbagbo* and *Blé Goudé* pre-trial and trial case records.²⁸ Consequently, the Common Legal Representative submits that the Defence's request to restrict access to

²⁵ See the Confidential Filings Decision, *supra* note 1, para. 15.

²⁶ See the Objections, *supra* note 12, para. 18.

²⁷ *Idem*, para. 1.

²⁸ See the Joinder Decision, *supra* note 5, para. 73; and the Clarification Decision, *supra* note 10, paras. 9 and 11.

its future filings falls outside the scope of the objections allowed by the Chamber at this stage and must therefore be dismissed.

24. In any event, as conceded by the Defence,²⁹ the Chamber has repeatedly stated that a party or participant must classify *specific* documents that said party or participant wishes not to be transmitted to the other party or participant as confidential *ex parte*,³⁰ and that reasons justifying said classification must be provided *at the time of filing* the submission at hand as confidential *ex parte*.³¹ Accordingly, the Common Legal Representative further submits that the current Defence's request to restrict access to "*every future filing*"³² must be dismissed for being inconsistent with the relevant decisions of the Chamber regulating the filing of confidential *ex parte* submissions.

25. Moreover, the Common Legal Representative observes that granting now the Defence's request for the classification of some of its future filings as confidential *ex parte* would be contrary to the finality of the Confidential Filings Decision, for which leave to appeal was denied,³³ and which was subsequently clarified by the Chamber upon request of both Accused.³⁴

²⁹ See the Objections, *supra* note 12, para. 10.

³⁰ See the Clarification Decision, *supra* note 10, para. 8, footnote 22.

³¹ See the Joinder Decision, *supra* note 5, para. 15.

³² See the Objections, *supra* note 12, p. 10.

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

³⁴ See the Clarification Decision, *supra* note 10, paras. 8-9.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Trial Chamber to dismiss the Objections and to grant her access to the relevant document(s).

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 6th day of July 2015

At The Hague, The Netherlands