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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 Document

Response to the "Demande d'autorisation d'interjeter appel de la décision du Juge unique du 24 juin 2015 « on objections concerning access to confidential material on the case record » (ICC-02/11-01/15-101)" filed by the Defence of Mr. Gbagbo

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Mr. Eric MacDonald

Counsel for Mr Blé Goudé

Mr. Geert-Jan Alexander Knoops

Mr. Claver N'dry

Counsel for Mr Laurent Gbagbo

Mr. Emmanuel Altit

Ms. Agathe Bahi Baroan

Legal Representatives of the Victims

Ms. Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

Mr. Enrique Carnero Rojo

Ms. Ludovica Vetrucchio

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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 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 e-mail 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. Blé Goudé filed the “Defence Objections on Access to Confidential Material”.¹² On the same day, the Defence of Mr. Gbagbo filed the “Soumissions portant sur le niveau de confidentialité à attribuer aux documents que comprend le dossier de l’affaire”,¹³ which were notified with redactions to the Common Legal Representative on 5 May 2015.

9. On 24 May 2015, the Single Judge issued the “Decision on objections concerning access to confidential material on the case record” (the “Decision”)¹⁴ indicating, *inter alia*, that there is no reason to withhold access from any party or participant to any confidential documents or material not listed in paragraph 16 and Annexes A, B and C of the Decision.¹⁵

10. On 30 June 2015, the Defence of Mr. Gbagbo filed the public redacted version of its “Demande d’autorisation d’interjeter appel de la décision du Juge unique du 24 juin 2015 « on objections concerning access to confidential material on the case record»” (the “Application”).¹⁶

11. On 3 July 2015, the Prosecution filed its Response to the Application (the “Prosecution’s Response”).¹⁷

12. Pursuant to regulation 65(3) of the Regulations of the Court, the Principal Counsel of the Office of Public Counsel for Victims, acting as common legal

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

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).

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

¹⁵ *Idem*, para. 19.

¹⁶ See the “Demande d’autorisation d’interjeter appel de la décision du Juge unique du 24 juin 2015 « on objections concerning access to confidential material on the case record» (ICC-02/11-01/15-101)”, No. ICC-02/11-01/15-113-Red, 30 June 2015 (the “Application”).

¹⁷ See the “Prosecution’s response to Laurent Gbagbo’s application for leave to appeal the Decision on objections concerning access to confidential material on the case record”, No. ICC-02/11-01/15-119, 3 July 2015 (the “Prosecution’s Response”).

representative of the victims admitted to participate in both cases (the “Common Legal Representative”),¹⁸ submits the following response to the Application.

13. As a preliminary remark, the Common Legal Representative notes that she has only been notified of the redacted version of the Application and therefore she is unable to fully appraise the reasons supporting the Defence’s request. Moreover, since all references to the relevant documents are redacted, she is unable to assess whether the Defence correctly refers to documents on which the Single Judge has ruled upon their level of confidentiality.

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

1. The criteria contained in article 82(1)(d) of the Rome Statute

14. Article 82(1)(d) of the Rome Statute limits the possibility to file an application for leave to appeal against “*a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings*”.

15. The jurisprudence of the Court established the complementary character of the two components mentioned in article 82(1)(d) of the Rome Statute, as well as the necessity to show their cumulative existence in order to be granted leave to appeal.¹⁹

16. In this regard, the Appeals Chamber determined that “[e]vidently, article 82 (1) (d) of the Statute has two components. The first concerns the prerequisites for the definition of

¹⁸ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, para. 61.

¹⁹ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 21. See also the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, paras. 8 and 14.

an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber".²⁰ The Appeals Chamber also stated that "[o]nly an 'issue' may form the subject-matter of an appealable decision",²¹ and defined the term "issue" as "*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion*".²² Accordingly, the mere dispute over the correctness of a Chamber's reasoning does not constitute sufficient reason to be granted leave to appeal an interlocutory decision.²³ The Chamber has recently clarified that "[i]n determining whether an issue identified by the parties meets the criteria of Article 82(l)(d), the Chamber will first consider whether the issue or issues identified by the party arise from the operative part of the impugned decision. For example, if an issue put forward by a party misstates or misapprehends the disposition of the Chamber, it cannot be said to have arisen from the decision as such and must be dismissed. Similarly, to the extent that an issue put forward by a party constitutes 'mere disagreement' or simply a conflicting opinion, this also cannot form an appealable issue within the meaning of Article 82(l)(d) of the Statute".²⁴

17. The Appeals Chamber also considered that "[n]ot every issue may constitute the subject of an appeal. It must be one apt to 'significantly affect', i.e. in a material way, either a) 'the fair and expeditious conduct of the proceedings' or b) 'the outcome of the trial'".²⁵

18. Moreover, pursuant to the constant jurisprudence of the Court, "*the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is*

²⁰ See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 19, para. 8.

²¹ *Idem*, para. 9.

²² *Ibid.*

²³ See the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 6; and the "Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'" (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, para. 12.

²⁴ See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'" (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 19.

²⁵ See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 19, para. 10.

not sufficient to warrant the granting of leave to appeal”,²⁶ and “[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”.²⁷

19. In this regard, since the Appeals Chamber will interfere with a discretionary decision only under limited conditions, a difference of opinion as to a Chamber’s exercise of its discretion is an appealable issue only if the Chamber improperly exercised its discretion.²⁸ The Chamber has further clarified that “[i]n deciding on a request for leave to appeal, a Trial Chamber is not concerned with the correctness of the impugned decision, per se; determination of whether the Chamber erred is a matter for the Appeals Chamber should leave be granted. Rather, the role of the Trial Chamber is simply to determine whether any of the issues presented by the parties seeking leave meet the requirements as set out in Article 82(1)(d) of the Statute”.²⁹

20. According to established jurisprudence, in analysing whether an appealable issue would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, the notion of “fairness” must be understood as making reference to situations “when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations

²⁶ See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’” (Trial Chamber II), No. ICC-01/04-01/07-2375-tENG, 8 September 2010, para. 4. See also the “Decision on Ruto Defence’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Add New Witnesses to its List of Witnesses’” (Trial Chamber V(a)), No. ICC-01/09-01/11-983, 24 September 2013, para. 20.

²⁷ See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’”, *supra* note 26, para. 4. See also the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 7.

²⁸ See the “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009” (Appeals Chamber), No. ICC-02/04-01/05-408 OA3, 16 September 2009, para. 80. See also the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’” (Trial Chamber III), No. ICC-01/05-01/08-2925-Red, 20 December 2013, para. 30.

²⁹ See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 24, para. 20.

*and evidence submitted to the Court that might influence its decision”.*³⁰ In turn, “expeditiousness” must be read as “closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”.³¹

21. The Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Rome Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.³²

2. Application of the criteria contained in article 82(1)(d) of the Rome Statute to the Application

22. The Defence of Mr Gbagbo seeks leave to appeal the Decision on the following issue:

“Whether the Single Judge erred in not indicating the reasons according to which the Defence should communicate to the Legal Representative of Victims all non-public documents related to its evidence”.

23. The Common Legal Representative submits that the Application does not satisfy the requirements of article 82(1)(d) of the Rome Statute. Indeed, the Application does not demonstrate the existence of an “issue” which could arise from the Decision and could be the subject of an interlocutory appeal, nor it shows how the alleged “issue” would significantly affect the fair and expeditious conduct of the

³⁰ See e.g. the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, para. 14.

³¹ *Idem*, para. 18.

³² See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 19, para. 13.

proceedings or the outcome of the trial. The Application merely expresses the disagreement of the Defence with the Decision.

24. The Common Legal Representative shares the arguments put forward by the Prosecution in its Response and in particular the assertion according to which the Decision does not rule on evidence eventually used by the Defence in the case,³³ but only on the level of confidentiality of documents filed in the *Gbagbo* and in the *Blé Goudé* cases before the issuance of the Joinder Decision.³⁴

25. Therefore, the Common Legal Representative contends that the “issue” identified in the Application does not arise from the Decision and it simply reflects a further attempt by the Defence of Mr. Gbagbo to limit the access of the legal representative to the case record despite the numerous and constant rulings by the Chamber and/or the Single Judge acknowledging her right to access confidential material as indicated *supra*.³⁵

26. In fact, the Defence of Mr. Gbagbo argues for an even more restrictive level of confidentiality of certain documents³⁶ for which the Single Judge has already considered that “[t]here is no readily apparent indication that the base for the ‘confidential’ classification of such documents and materials no longer exists”.³⁷

27. In this regard, the Defence misinterprets the Decision not only because the Single Judge has clearly indicated the *rationale* behind his ruling;³⁸ but also because it seems to forget that the Chamber and/or the Single Judge has the power to review

³³ See the Application, *supra* note 16, para. 26.

³⁴ See the Prosecution’s Response, *supra* note 17, para. 2.

³⁵ See *supra* paras. 1 and 2. See also the Prosecution’s Response, *supra* note 17, para. 7.

³⁶ See the Application, *supra* note 16, para. 19.

³⁷ See the Decision, *supra* note 14, para. 19.

³⁸ *Ibid.*, para. 13.

the level of confidentiality of documents and/or materials in the case record and depart from previous rulings.³⁹

28. Moreover, the Defence confounds the access by the Common Legal Representative and by victims to the confidential documents. In this regard, the Defence seems deliberately to forget that, as already found by the Chamber,⁴⁰ the Common Legal Representative is bound by the same confidentiality obligations as the Defence pursuant to the Code of Professional Conduct for counsel,⁴¹ and that in accordance with a previous ruling she cannot share confidential documents with her clients without the prior authorisation of the Chamber.⁴²

29. Such misreading of the Decision or mere disagreement with the conclusions of the Single Judge does not suffice for leave to appeal to be granted under article 82(1)(d) of the Rome Statute.⁴³

30. Since the alleged issue identified in the Application clearly does not arise from the Decision, said Application should be dismissed on that basis alone. Assuming *arguendo* that the alleged “issue” identified by the Defence arises from the Decision, the Common Legal Representative contends that it does not significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial.

31. Indeed, the Decision does not impact on the rights of the Defence. Contrary to the arguments put forward by the Defence,⁴⁴ the Decision does not rule out the right of the parties and participants to request a stricter level of confidentiality for certain documents. On the contrary, and in line with previous ruling of the Chamber, it

³⁹ See the Application, *supra* note 16, para. 27.

⁴⁰ See the Leave to Appeal Decision, *supra* note 3, para. 39.

⁴¹ See the Code of Professional Conduct for counsel, article 8.

⁴² See the Confidential Filings Decision, *supra* note 1, para. 15.

⁴³ In this sense, see *supra* notes 22-23.

⁴⁴ See the Application, *supra* note 16, para. 47.

reaffirms this right by instructing the parties and participants to indicate when such a classification is in fact required.⁴⁵

32. It is furthermore submitted that, although the Defence refers in some parts of its Application to the contention that the resolution of the alleged issue will have an impact on the expeditiousness of the proceedings,⁴⁶ it does not provide any support to this contention.

33. Finally, since the issue mentioned in the Application does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁴⁷

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Trial Chamber to reject the Defence's Application.



Paolina Massidda
Principal Counsel

Dated this 6th day of July 2015

At The Hague, The Netherlands

⁴⁵ See the Decision, *supra* note 14, para. 13.

⁴⁶ See the Application, *supra* note 16, paras. 45-48.

⁴⁷ See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", *supra* note 24, para. 26.