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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 further submissions by the Defence of Mr. Gbagbo
on the level of access and the classification of documents and materials
on the case record (ICC-02/11-01/15-124-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 13 April 2015, upon requests by the Defence of Mr. Gbagbo and the Defence of Mr. Blé Goudé, the Chamber extended the deadline established in the Joinder Decision, ordering the parties, the legal representative of the victims and the Registry to file by 28 April 2015 any objection to any party or participant (including the LRV) being granted access to any “confidential”, “confidential, *ex parte*” or “under seal” material on the *Gbagbo* and *Blé Goudé* pre-trial and trial case records.⁷

5. On 28 April 2015, the Defence of Mr. Gbagbo made submissions concerning access to confidential material, which were notified with redactions to the legal representative on 5 May 2015 (the “Objections”).⁸

6. On 15 May 2015, the legal representative filed her response to the Objections (the “Objections Response”).⁹

7. On 24 June 2015, the Single Judge ruled on the Objections (the “Objections Decision”),¹⁰ *inter alia* directing “[t]he filing party or participant of the documents identified in Annex C [to said decision] to ,[...], make further submissions in accordance with the instructions given in paragraph 18 above”,¹¹ and to “[u]pload all materials in the eCourt databases of the *Gbagbo* and *Blé Goudé* cases to the *Gbagbo* and *Blé Goudé* case eCourt database (Ringtail) in accordance with the instructions given in paragraphs 16 and 19 above”.¹²

⁷ 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”), p. 8.

⁸ 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”).

⁹ See the “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)”, No. ICC-02/11-01/15-65-Conf, 15 May 2015 (the “Objections Response”). On 6 July 2015, by e-mail sent to the Trial Chamber, the Common Legal Representative has requested the reclassification of the document as public.

¹⁰ 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 (the “Objections Decision”).

¹¹ *Idem*, p. 12.

¹² *Ibid.*

8. On 6 July 2015, the Defence of Mr. Gbagbo filed the “*Soumissions portant sur le niveau de confidentialité et sur la classification à attribuer aux documents émanant de la Défense de Laurent Gbagbo listés à l’Annexe C de la décision du Juge unique du 24 juin 2015 (ICC-02/11-01/15-101) et soumissions sur le niveau de confidentialité et sur la classification à attribuer aux documents non mentionnées par le Juge unique dans sa décision du 24 juin 2015*” (the “Further Objections”),¹³ requesting *inter alia* that a number of filings listed in Annex C to the Objections Decision be classified “confidential *ex parte*” vis-à-vis the LRV,¹⁴ and that all the evidence used by the Defence during the confirmation hearing not listed in Annexes A and C to the Objections Decision, except for four pieces thereof, be also classified “confidential *ex parte*” vis-à-vis the LRV.¹⁵

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”),¹⁶ respectfully submits her response to the Further Objections.

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

10. The Common Legal Representative submits that the Further Objections mostly reiterate the arguments already submitted by the Defence of Mr. Gbagbo on 28 April 2015 and are unfounded. The Defence does not provide specific and detailed reasons as to how disclosing the information at hand to the Common Legal Representative

¹³ See the “Version publique expurgée - Soumissions portant sur le niveau de confidentialité et sur la classification à attribuer aux documents émanant de la Défense de Laurent Gbagbo listés à l’Annexe C de la décision du Juge unique du 24 juin 2015 (ICC-02/11-01/15-101) et soumissions sur le niveau de confidentialité et sur la classification à attribuer aux documents non mentionnées par le Juge unique dans sa décision du 24 juin 2015”, No. ICC-02/11-01/15-124-Red, 6 July 2015 (the “Further Objections”).

¹⁴ *Idem*, paras. 19 and 34.

¹⁵ *Ibid.*, para. 61.

¹⁶ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, para. 61.

will have any negative impact on the Defence's investigations or on the Defence witnesses' safety.

11. In this regard, the Further Objections are inconsistent with the duty of the Defence to inform its witnesses of the possible disclosure of their testimony to the parties and participants, and overlook the possibility for the Defence to request redactions to particular information prior to said disclosure. Moreover, the Further Objections reveal the apparent wish of the Defence of Mr. Gbagbo not to abide by the classification system established in the Confidential Filings Decision, and ignore once again the confidentiality obligations of the Common Legal Representative. As a consequence, the Common Legal Representative requests that the Further Objections be rejected.

a. On the requested classification as “confidential *ex parte*” vis-à-vis the Common Legal Representative of filings listed in Annex C to the Objections Decision¹⁷

12. The Defence requests that a number of filings included in Annex C to the Objections Decision – 14 filings at least –¹⁸ be classified as “confidential *ex parte*” vis-à-vis the Common Legal Representative. In this regard, the Common Legal Representative submits that the Defence has not complied with the Single Judge's direction to provide specific and detailed reasons for the requested classification of the documents listed in Annex C, and to simultaneously file “public redacted” and/or “confidential redacted” versions of the relevant documents.¹⁹ Instead, the Defence merely refuses to disclose the relevant filings to the Common Legal Representative in a redacted or unredacted form on the basis of the alleged risk that the disclosure of said information to the Common Legal Representative may entail to the Defence's strategy, the Defence witnesses' safety, and the Defence's

¹⁷ See the Further Objections, *supra* note 13, section 1.

¹⁸ The redactions prevent the Common Legal Representative from ascertaining the exact number of filings. See the Further Objections, *supra* note 13, paras. 19 and 34-42.

¹⁹ See the Objections Decision, *supra* note 10, para. 18 and p. 12.

investigations. The Common Legal Representative submits that all these allegations are unfounded, and that the Defence wrongly relies on the approach adopted by the Pre-Trial Chamber to the classification of documents.

i) *On the alleged risk to the Defence's strategy*

13. Firstly, the Defence argues that the classification of some filings included in Annex C as “confidential *ex parte*” is necessary because granting the Common Legal Representative with access to said documents would lead to “[lui] *donner, sans raison, des indications sur l'identité de témoins potentiels de la Défense*”.²⁰ However, the alleged reason for not sharing these documents with the Common Legal Representative, although possibly contained in the next paragraph of the Further Objections, is not available to her because of the redactions applied by the Defence.²¹

14. In these circumstances, the Common Legal Representative refers to the repeated statements of the Chamber and the Single Judge that “[a]ll parties and participants have a right to access the entire case record (including evidentiary material), unless ‘confidential, ex parte’ classification is justified”,²² and reiterates her inability to respond to any objections on her access to confidential documents when the reasons for said objections are entirely redacted or simply not provided.²³ Consequently, the Common Legal Representative can only rely on the Chamber, to whom the unredacted version of the Further Objections is available, to determine whether maintaining the confidential *ex parte* character of these materials is necessary and proportionate.²⁴

²⁰ See the Further Objections, *supra* note 13, p. 6.

²¹ *Idem*, para. 21.

²² See the “Decision on request for leave to appeal the ‘Decision on objections concerning access to confidential material on the case record’” (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-132, 10 July 2015, para. 4.

²³ See the Objections Response, *supra* note 9, paras. 19-20 and 34.

²⁴ *Idem*, paras. 21 and 39.

15. In this regard, the Common Legal Representative submits that the classification of these documents as confidential *ex parte* is not necessary in light of the Common Legal Representative's duty of professional secrecy and confidentiality.²⁵ Moreover, not sharing these documents with her appears to be disproportionate, since there might be less extreme ways to alleviate the Defence's concerns,²⁶ proposing for instance reasonable redactions.

16. In fact, the Defence does not discard now providing the Common Legal Representative with the redacted version of seven filings for which the Defence opposed disclosure two months ago.²⁷ In this regard, the Common Legal Representative argues that, in the same way as the Defence has now changed its approach to sharing these documents with her, the Defence is not prevented from changing its strategy in the future, even if further documents are disclosed to the Common Legal Representative in the meantime. Accordingly, the Defence's argument opposing disclosure of evidence to the Common Legal Representative on the basis that the Defence's strategy may change in the future must be rejected.²⁸

ii) *On the alleged risk to the witnesses' safety*

17. Secondly, the Defence argues that the classification of some filings included in Annex C as "confidential *ex parte*" is necessary in order to ensure the witnesses' safety. In this regard, the Defence reiterates, word by word, the general and unfounded statement, already submitted in the Objections, that the Common Legal Representative cannot offer the same guarantees for confidentiality as the Prosecution and the Defence because she does not have the same degree of experience and is working with "political activists",²⁹ and that the parties are the only

²⁵ See the Confidential Filings Decision, *supra* note 1, para. 22; and the Leave to Appeal Decision, *supra* note 3, para. 39.

²⁶ See the Objections Response, *supra* note 9, para. 44.

²⁷ Cf. the Further Objections, *supra* note 13, para. 31, and the Objections Response, *supra* note 9, para. 44.

²⁸ See the Further Objections, *supra* note 13, para. 30.

²⁹ Cf. the Further Objections, *supra* note 13, para. 23, and the Objections, *supra* note 8, paras. 41-42.

ones who can determine the potential impact of the disclosure of a document on the witnesses' safety.³⁰

18. The Common Legal Representative refers the Chamber to her response filed two months ago on the two matters identified above,³¹ and emphasizes the Single Judge's recent finding that the parties have an obligation to avoid "general" and "dated" reasons for the restricted classification of documents and materials.³²

19. Moreover, the Common Legal Representative raises her most serious concerns about the Defence's submission that "[d]ivulguer l'identité de certains des témoins de la Défense au RLV et partant, à un nombre important de personnes supplémentaires, est susceptible d'accroître les risques qu'ils courent".³³ The Defence is thereby referring to a possible violation by the Common Legal Representative of her professional obligations to respect the confidentiality of the information received from the Defence, ensuring that the members of her team comply with the same duty,³⁴ and of her obligation to comply with an express order of the Chamber not to disclose confidential information to her clients.³⁵ As such, this is a very serious allegation, already submitted by the Defence in the past and without any piece of supporting information.³⁶ In these circumstances, the Common Legal Representative requests the Chamber to disregard this unfounded allegation and to instruct the Defence not to submit any unsubstantiated comment of this nature in the future.

20. In a similarly unsupported manner, the Defence refers to the possible lack of continued cooperation by its witnesses as a further reason for not disclosing their identities to the Common Legal Representative. In this regard, the Defence argues

³⁰ Cf. the the Further Objections, *supra* note 13, para. 45, and the Objections, *supra* note 8, para. 34.

³¹ See the Objections Response, *supra* note 9, paras. 40-43 and 34-36, respectively.

³² See the Objections Decision, *supra* note 10, para. 20.

³³ See the Further Objections, *supra* note 13, paras. 23 and 44.

³⁴ See the Code of Professional Conduct for counsel, articles 7(4) and 8(3).

³⁵ See the Confidential Filings Decision, *supra* note 1, para. 15.

³⁶ Cf. the the Further Objections, *supra* note 13, paras. 23 and 44, and the Objections, *supra* note 8, paras. 44 and 58. See also the Objections Response, *supra* note 9, paras. 52-54.

that its witnesses have accepted to testify on condition of their statements being transmitted only to the Prosecution.³⁷

21. However, the Defence fails to mention that the Court has found it to be “part of good practices” for the parties and participants to obtain from the individuals they interview their informed consent to their involvement with the Court (not only with a given organ thereof, such as the Office of the Prosecutor), after providing them with explanations about *inter alia* the persons to whom the information they provide may be revealed.³⁸ Against this background, contact between a party or a participant and the witnesses to be called by the other party or a participant in advance of their evidence has been consistently permitted in the jurisprudence of the Court.³⁹ Consequently, the fact that witnesses of the Defence may not want to be contacted by the Common Legal Representative cannot *per se* be a valid ground for not disclosing their identity to the latter, but only a relevant consideration for any potential meeting of the Common Legal Representative with said witnesses.

iii) *On the alleged risk to the Defence’s investigations*

22. Thirdly, the Defence reiterates some of the abovementioned arguments in support of its third contention, namely that the classification of some filings included in Annex C as “confidential *ex parte*” is necessary in order to ensure the Defence’s investigations. In this regard, the Defence contends that the disclosure of the identity and contact information of its witnesses represents a risk to its investigations, not only because the witnesses may decide not to collaborate further with the Defence if

³⁷ See the Further Objections, *supra* note 13, paras. 24 and 47.

³⁸ See the “Decision on the Protocol on the handling of confidential information and contact of between a party and witnesses of the opposing party” (Trial Chamber IV), No. ICC-02/05-03/09-451, 19 February 2013, paras. 36-37.

³⁹ See *inter alia* the “Decision on the ‘Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure’” (Trial Chamber III), No. ICC-01/05-01/08-2293, 4 September 2012, paras. 7-8; the “Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses” (Trial Chamber I), No. ICC-01/04-01/06-2192-Red, 20 January 2010, para. 49; and the “Decision on the prosecution’s application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses” (Trial Chamber I), No. ICC-01/04-01/06-1372, 3 June 2008, para. 11.

their identities are disclosed to the Common Legal Representative,⁴⁰ but also because disclosing said information allegedly increases the risk to the witnesses' safety and is allegedly inconsistent with the confidentiality obligations of the Defence.⁴¹

23. In this regard, the Defence simply enumerates contentions already submitted in preceding sections of the Further Submissions, without any sort of details or further elaboration. Accordingly, the Common Legal Representative refers the Chamber to the arguments raised above.⁴²

24. Moreover, the Defence's contention that the non-disclosure of the identity and contact information of its witnesses to the Common Legal Representative is similar to redacting the names of Prosecution's investigators in order not to prejudice the latter's investigations must be dismissed. The Common Legal Representative contends that witnesses cannot be compared to investigators, as reflected by the fact that rule 81(2) of the Rules of Procedure and Evidence only provides a basis for the non-disclosure of the identity of the latter and only in some circumstances.⁴³

25. The concerns of the Defence appear to be premised on the consideration that the Common Legal Representative is "*un tiers non partie à la procédure*".⁴⁴ The Single Judge already dismissed similar contentions half a year ago, ruling that "[t]he Defence contention that the materials available to the LRV be limited on grounds that they are 'third parties' is misconceived. Though the victims are not parties to the proceedings, they are participants 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

⁴⁰ See the Further Objections, *supra* note 13, paras. 26 and 46.

⁴¹ *Idem*, para. 26.

⁴² See *supra* paras. 18-21.

⁴³ See the "First decision on the Prosecutor's requests for redactions and other protective measures" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-74-Red, 27 March 2012, paras. 84-91; and the "Public Redacted Version of the 'First Decision on the Prosecution's Requests for Redactions' issued on 14 August 2009" (Pre-Trial Chamber I, Single Judge), No. ICC-02/05-02/09-58, 27 November 2012, paras. 12-15.

⁴⁴ See the Further Objections, *supra* note 13, para. 46.

proceedings”.⁴⁵ Consequently, the Single Judge has repeatedly stated that the Common Legal Representative must respect the confidentiality level of any document transmitted to her.⁴⁶

iv) On the approach adopted by the Pre-Trial Chamber to the classification of documents

26. Lastly, the Defence argues that some documents must be classified “confidential *ex parte*” simply because the Pre-Trial Chamber considered that the public redacted version thereof sufficed to maintain the Common Legal Representative informed.⁴⁷

27. In this regard, the Common Legal Representative reiterates her submissions that the Defence must use the classification level ordered by the Chamber, instead of relying upon the practice of the Pre-Trial Chamber.⁴⁸ Accordingly, the contentions of the Defence that are exclusively based on the classification of filings by the Pre-Trial Chamber must be dismissed.

28. Moreover, the Defence’s explanation of its intention to be “exhaustive” rather than “contradictory” by listing the same 11 filings both as documents to which the Common Legal Representative should not have access pursuant to the Pre-Trial Chamber’s decisions and as documents that could be disclosed to the Common Legal Representative as per the Confidential Filings Decision is not persuasive.⁴⁹ Rather, this part of the Objections is further evidence of the Defence’s unwillingness to apply the classification system as ordered by the Chamber.

⁴⁵ See the Confidential Filings Decision, *supra* note 1, para. 15.

⁴⁶ See the Confidential Filings Decision, *supra* note 1, para. 22; and the Leave to Appeal Decision, *supra* note 3, para. 39.

⁴⁷ See the Further Objections, *supra* note 13, paras. 39 and 42.

⁴⁸ See the Objections Response, *supra* note 9, paras. 17-18.

⁴⁹ See the Further Objections, *supra* note 13, para. 33.

b. On the requested classification as “confidential *ex parte*” vis-à-vis the Common Legal Representative of evidence not listed in Annexes A and C to the Objections Decision⁵⁰

29. The Defence requests that five translations allegedly not listed in Annex A to the Objections Decision be classified as “confidential *ex parte*” vis-à-vis the Common Legal Representative,⁵¹ and that all evidence used by the Defence during the confirmation hearing not listed in Annexes A and C to the Objections Decision, except for four pieces thereof, be also classified “confidential *ex parte*” vis-à-vis the Common Legal Representative.⁵²

30. Regarding the classification as “confidential *ex parte*” of the evidence used by the Defence during the confirmation hearing and not included in Annexes A and C to the Objections Decision, the Common Legal Representative submits that the Defence has not complied with the Single Judge’s direction to release said materials to her unless the “confidential *ex parte*” classification is demonstrably justified.⁵³

31. Instead, the Defence literally reiterates arguments already submitted to the Chamber on the risk allegedly posed to its investigations by the transmission of confidential documents to the Common Legal Representative.⁵⁴ In this regard, the Common Legal Representative submits that the provision of arguments already considered and dismissed by the Chamber cannot demonstrate why evidence not included in Annexes A and C to the Objections Decision must now be classified as “confidential *ex parte*”. More importantly, the Defence once again ignores the duty of the Common Legal Representative to maintain at all times the confidentiality of the evidence eventually transmitted to her.⁵⁵

⁵⁰ See the Further Objections, *supra* note 13, section 2.

⁵¹ *Idem*, paras. 50-51.

⁵² *Ibid.*, paras. 52 and 61.

⁵³ See the Objections Decision, *supra* note 10, para. 19 and p. 12.

⁵⁴ *Cf.* the Further Objections, *supra* note 13, para. 55, and the Objections, *supra* note 8, para. 58.

⁵⁵ See *supra* para. 19.

32. Moreover, the Defence once again premises its Further Objections to the transmission of evidence to the Common Legal Representative on the lack of an obligation to disclose the witnesses' statements to her and on the consideration of the latter as a third party ("*des tiers*" and "*de tierces personnes*").⁵⁶ As already argued above,⁵⁷ the Defence's reliance on both arguments is misconceived.

33. The Defence also argues that transmitting to the Common Legal Representative the evidence not included in Annexes A and C to the Objections Decision may pose a risk to the Defence witnesses' safety.⁵⁸ However, the Common Legal Representative notes that the Defence does not elaborate on the source and scope of the alleged risk, and, unlike the approach adopted for the provision of seven filings to the Common Legal Representative,⁵⁹ the Defence does not even consider whether redactions may suffice to counteract the alleged risks and how much time the Defence may need to redact the relevant documents.

34. In any event, the Common Legal Representative reiterates that she is bound by a duty of confidentiality and secrecy that prevents her from disclosing the confidential information to her clients without the authorisation of the Chamber.⁶⁰ Therefore, there is no need to analyse the risks to the witnesses' safety allegedly arising from disclosing their confidential statements to the Common Legal Representative.

⁵⁶ See the Further Objections, *supra* note 13, paras. 56-59.

⁵⁷ See *supra* paras. 21 and 25.

⁵⁸ See the Further Objections, *supra* note 13, para. 60.

⁵⁹ See *supra* para. 16.

⁶⁰ See *supra* notes 34-36.

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

- **instruct** the Defence to cease making unsupported arguments on the alleged risks of sharing confidential documents with the Common Legal Representative;
- **reject** the Further Objections as unfounded; and consequently
- **grant** the Common Legal Representative access to the relevant material.

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 16th day of July of 2015

At The Hague, The Netherlands