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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

Common Legal Representative's Response to Mr. Gbagbo's request for leave to appeal the "Second decision on objections concerning access to confidential material on the case record" (ICC-02/11-01/15-150)

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, clarifying further the origin and scope of said decision.³

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”), 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”.⁴

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, paras. 18-19.

⁴ 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”).

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 (the “Clarification Decision”).⁵

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”).⁶

6. On 24 June 2015, the Single Judge ruled on the Objections (the “Objections Decision”),⁷ *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”, 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”.⁸

7. On 30 June 2015, the Defence of Mr. Gbagbo requested leave to appeal the Objections Decision.⁹

⁵ 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.

⁶ 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, 1 May 2015 (dated 28 April 2015)

⁷ 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”).

⁸ *Idem*, p. 12.

⁹ See the “Version publique expurgée - 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.

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”),¹⁰ *inter alia* requesting that a number of filings listed in Annex C to the Objections Decision be classified “confidential *ex parte*” *vis-à-vis* the LRV,¹¹ 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.¹²

9. On 10 July 2015, the Single Judge rejected Mr. Gbagbo’s request for leave to appeal the Objections Decision,¹³ *inter alia* clarifying that the Objections Decision “expressly provided that materials could be uploaded as ‘confidential, *ex parte*’, if ‘demonstrably justified’”.¹⁴

10. On 21 July 2015, the Single Judge ruled on the Further Objections (the “Decision”),¹⁵ *inter alia* directing “the Registry to transfer all Annex C Documents to the Gbagbo and Blé Goudé case record as ‘confidential’” and rejecting all other requests by the Defence.¹⁶

¹⁰ 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”).

¹¹ *Idem*, paras. 19 and 34.

¹² *Ibid.*, para. 61.

¹³ 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.

¹⁴ *Idem*, para. 4.

¹⁵ See the “Second decision on objections concerning access to confidential material on the case record” (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-150, 21 July 2015 (the “Decision”).

¹⁶ *Idem*, p. 9.

11. On 27 July 2015, the Defence of Mr. Gbagbo made an application requesting leave to appeal the Decision (the “Request”).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 representative of the victims admitted to participate in the case (the “Common Legal Representative”),¹⁸ respectfully submits her response to the Request.

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

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

13. 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*”.

14. 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

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

¹⁷ See the “Demande d’autorisation d’interjeter appel de la décision du Juge unique du 21 juillet 2015 intitulée ‘Second decision on objections concerning access to confidential material on the case record’ (ICC-02/11-01/15-150)”, No. ICC-02/11-01/15-163, 27 July 2015 (the “Request”).

¹⁸ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, para. 61. See also the Joinder Decision, *supra* note 4, para. 74 and p. 33 (“*all decisions and orders made in the Gbagbo and Blé Goudé cases shall continue to apply [...] in the joint case*”).

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.

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 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 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'".²³

16. Accordingly, discrete issues for resolution by the Appeals Chamber must be articulated when requesting leave to appeal and it is generally insufficient to argue that the entirety of a Chamber's reasoning is erroneous.²⁴ For the same reasons, Article 82(1)(d) of the Rome Statute cannot be used to litigate "abstract or hypothetical issues".²⁵

17. In determining whether an issue meets the criteria of Article 82(1)(d), "[t]he 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".²⁶

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 *Ibid.*, para. 10.

²⁴ See the "Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800" (Trial Chamber VII), No. ICC-01/05-01/13-877, 27 March 2015, para. 7. See also the "Decision on Defence Request for Leave to Appeal the 'Decision Providing Materials in Two Independent Counsel Reports and Related Matters'" (Trial Chamber VII), No. ICC-01/05-01/13-1096, 21 July 2015, para. 7, and references contained therein.

²⁵ See the "Decision on 'Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'" (Trial Chamber III), No. ICC-01/05-01/08-3273, 24 July 2015, para. 6, and references contained therein.

²⁶ 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. See also the "Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record'", *supra* note 13, para. 3, and references contained therein.

18. Similarly, 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.²⁷ In this regard, the Chamber has found 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".²⁸

19. 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 not sufficient to warrant the granting of leave to appeal*",²⁹ and "[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances".³⁰

20. 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.³¹

²⁷ 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.

²⁸ See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", *supra* note 26, para. 20.

²⁹ 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 'Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'", *supra* note 25, para. 9; and 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.

³⁰ 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 29, 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.

³¹ 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

21. Further, it is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.³²

22. Once an appealable issue is properly identified, the analysis of whether it would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute may take place. However, the Chamber presented with an application for leave to appeal must not enter into examining or considering “arguments on the merits or the substance of the appeal” because said arguments are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal is granted.³³ As a consequence, applications for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, but only the appealable issue(s) “by way of indicating a specific factual and/or legal error”.³⁴

23. Pursuant to the jurisprudence of the Court, in conducting the analysis of appealable issues 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 and evidence submitted to the Court that might influence its decision”.³⁵ In turn, “expeditiousness” must be read as “closely linked to the

³² 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.

³³ See the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on Defence Request for Relief for Abuse of Process’”, *supra* note 25, para. 9, and references contained therein.

³⁴ 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”, *supra* note 19, para. 22.

³⁵ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 30 November 2012 (dated 29 November 2012), para. 70.

³⁶ 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.

concept of proceedings 'within a reasonable time', namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned".³⁶

24. Finally, 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".³⁷

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

25. The Defence of Mr. Gbagbo seeks leave to appeal the Decision on the following issue (the "Issue"):

"l'absence de motivation de la décision crée une insécurité puisqu'en l'absence de tout critère à respecter qui aurait été donné par le Juge, les parties ne savent pas quels sont les documents pouvant être couverts par la confidentialité (c'est-à-dire pouvant être soustrait au RLV ou aux autres parties)".³⁸

26. The Common Legal Representative submits that the Request does not satisfy the requirements of article 82(1)(d) of the Rome Statute. Indeed, the Request does not demonstrate that the Issue arises from the Decision and can be the subject of an interlocutory appeal, nor does it show how the Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Request merely expresses the disagreement of the Defence with the Decision.

³⁶ *Idem*, para. 18.

³⁷ 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.

³⁸ See the Request, *supra* note 17, p. 10.

27. Moreover, the Common Legal Representative wishes to underline that, as indicated by the Single Judge in the Decision,³⁹ the applicable law concerning classification of, and access to, the case record has been set out in previous decisions.⁴⁰ Consequently, any challenge to the current regime of classification and notification to other parties and participants could have been done only in the framework of an interlocutory appeal against the relevant previous decisions.

28. In this regard, the Common Legal Representative wishes to stress that, as recalled by the Single Judge,⁴¹ the Defence has already made use of the opportunity to challenge said decisions and that its arguments have been repeatedly dismissed.⁴² Thus, insofar as the Request challenges the regime of classification and the rights of access, the Issue does not arise from the Decision.

a. The Issue does not arise from the Decision

29. The Defence reiterates or makes arguments similar to those previously advanced before the Chamber in the Further Objections, without presenting additional submissions. Said arguments were considered and dismissed by the Single Judge in the Decision. Consequently, the contentions raised by the Defence in the Request simply reflect a mere disagreement with the conclusions of the Single

³⁹ See the Decision, *supra* note 15, para. 12.

⁴⁰ See the transcript of the hearing held on 4 November 2014 (Trial Chamber I), No. ICC-02/11-01/11-T-25-Red-ENG CT, p. 4, line 22 to page 5, line 7; the Confidential Filings Decision, *supra* note 1, paras. 15 and 20; the transcript of hearing held on 13 February 2015 (Trial Chamber I), No. ICC-02/11-02/11-T-9-Red-ENG, p. 6, lines 5-13; 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”, *supra* note 3, paras. 18, 23 and 33; the Clarification Decision, *supra* note 5, para. 8; the Objections Decision, *supra* note 7, para. 13; and the “Decision on request for leave to appeal the ‘Decision on objections concerning access to confidential material on the case record’”, *supra* note 13, para. 4.

⁴¹ See the Decision, *supra* note 15, para. 11.

⁴² See *inter alia* 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”, *supra* note 3. See also the Objections Decision, *supra* note 7, paras. 13 and 19.

Judge, which as such does not meet the requisite threshold for leave to appeal to be granted.⁴³

30. Firstly, the Defence argues that the Single Judge failed to consider some of the arguments submitted in the Further Objections.⁴⁴

31. However, the Single Judge decided not to take into account some of the Defence's submissions, namely those "*concerning the general practice of other Chambers relating to notification, on whether the status of the LRV precludes her from a right of access to 'confidential' material, and on whether notification to the LRV, in and of itself, risks a breach in confidentiality*",⁴⁵ upon finding that the Defence "*attempt[ed] to re-litigate matters that have already been decided and repeatedly affirmed*".⁴⁶

32. Therefore, the lack of reasoning alleged by the Defence does not arise from the Decision. In fact, the very Request quotes the abovementioned reasons, challenges their validity and expresses its opposition thereto.⁴⁷ Accordingly, the Defence's contention must be read as a disagreement with the reasons provided in the Decision which, as ruled by the Appeals Chamber, cannot be subject to an interlocutory appeal under article 82(1)(d) of the Rome Statute.⁴⁸

33. Secondly, the Defence alleges that the Single Judge failed to provide "*de réelle explication*" for the dismissal of some of the Further Objections.⁴⁹ In particular, the Defence refers to the Single Judge's rejection of its arguments related to the existence of risks to individual persons and/or to the conduct of its investigations stemming from the reclassification as "confidential" of the documents contained in the Annex

⁴³ See *supra* note 22.

⁴⁴ See the Request, *supra* note 17, para. 31.

⁴⁵ See the Decision, *supra* note 15, para. 11.

⁴⁶ *Idem*.

⁴⁷ See the Request, *supra* note 17, para. 32.

⁴⁸ See *supra* note 22.

⁴⁹ See the Request, *supra* note 17, para. 33.

C, and from their consequent availability to the Common Legal Representative and to the Defence of Mr. Blé Goudé.⁵⁰

34. However, the Single Judge did provide reasons for these findings. The Decision expressly indicates that the Defence “*invokes exceptions to the general rule of access which could, in principle, justify ‘confidential, ex parte’ classification. However, these submissions are not substantiated. The Gbagbo Defence fails to demonstrate the existence of any objectively justifiable risk to any individual person or the conduct of its investigations*”.⁵¹ Moreover, the Single Judge addressed explicitly the Defence’s concerns in relation to documents contained in Annex C linked to requests for protective measures and limitations on access mandated by certain sources. The Decision clarifies that the former do not contain any identifying information of the relevant persons as “*this information is either redacted or included only in accompanying annexes, which have already been transferred to the Gbagbo and Blé Goudé case record as ‘confidential, ex parte’*”,⁵² and that the latter “*do not specify any details which would allow the Single Judge to assess them*”.⁵³

35. In these circumstances, the Common Legal Representative submits that the Defence once again fails to point out any “issue” that may merit leave to be brought before the Appeals Chamber. The Defence merely challenges the correctness of the reasons used by the Single Judge to dismiss its arguments and compares the standard used in the Decision with past decisions concerning other participants.⁵⁴ As already found in the past, submissions of this nature cannot provide sufficient basis to be granted leave to appeal an interlocutory decision because the Trial Chamber is not concerned under article 82(1)(d) of the Rome Statute with the correctness of the impugned decision.⁵⁵

⁵⁰ *Idem*, para. 34.

⁵¹ See the Decision, *supra* note 15, para. 14.

⁵² *Idem*.

⁵³ *Ibid*.

⁵⁴ See the Request, *supra* note 17, para. 35.

⁵⁵ See *supra* notes 27-28.

36. As a further argument on the alleged lack of reasoning, the Defence complains that the standard used by the Single Judge in the Decision (“*objective justifiable risk*”) is not precisely defined.⁵⁶

37. In this regard, the Common Legal Representative contends that this argument amounts to challenging the entirety of the Single Judge’s reasoning as *generally* erroneous. This type of challenges have been consistently rejected under article 82(1)(d) of the Rome Statute because otherwise it would allow the parties to litigate *ex novo* before the Appeals Chamber the entirety of the decision concerned.⁵⁷ Contrary to the requirements of said provision, the Defence fails to point out *particular* issues arising from the application of said standard that may merit resolution by the Appeals Chamber.

38. The Defence also complains that the Single Judge’s finding that the Defence “*fails to justify such classification [as confidential ex parte] for each item [of evidence]*”⁵⁸ does not provide a reasoned ruling on the Defence’s contention that it was unfeasible for it to review each piece of evidence to determine whether its reclassification would bring persons in danger and that, in any event, it should have been granted the time necessary to do so.⁵⁹

39. However, the Defence once again fails to identify an appealable issue under article 82(1)(d) of the Rome Statute and refers instead to a disagreement with the Decision. The Common Legal Representative notes that the expression of a different opinion as to the Single Judge’s use of his discretion does not suffice to be granted leave to appeal. The improper character of the exercise of said discretion must be argued for this purpose.⁶⁰ The Request does not argue that the Decision falls short in this regard by demanding from the Defence a justification to maintain the

⁵⁶ See the Request, *supra* note 17, para. 36. See also *idem*, para. 40.

⁵⁷ See *supra* note 24.

⁵⁸ See the Decision, *supra* note 15, para. 18.

⁵⁹ See the Request, *supra* note 17, para. 38.

⁶⁰ See *supra* note 31.

confidential *ex parte* classification for each piece of evidence or by not granting it an extension of time for this purpose. The Request merely reiterates the Further Objections. Consequently, it cannot be said to point to an appealable issue in the Decision.

40. Lastly, the Defence alleges that in the Decision the Single Judge failed to explain to the parties how to proceed in order to request that documents are not provided to the Common Legal Representative.⁶¹

41. This contention cannot be the basis of an interlocutory appeal against the Decision under article 82(1)(d) of the Rome Statute. The Defence makes reference to a past decision, namely the Confidential Filings Decision,⁶² for which leave to appeal was not granted.⁶³ As noted above,⁶⁴ said decision cannot be revisited now through an appeal against the Decision. Moreover, the Defence fails once again to identify any issue arising from the Decision. Instead, it only elaborates on the merits or substance of an eventual appeal. In this regard, the Common Legal Representative notes that a Chamber presented with an application for leave to appeal must not enter into examining or considering this type of arguments because this task is reserved to the Appeals Chamber.⁶⁵

42. In conclusion, the Common Legal Representative submits that the Issue is not an appealable one pursuant to article 82(1)(d) of the Rome Statute because it does not arise from the Decision.

43. The Common Legal Representative notes that the Issue is closely related to the Objections Decision, rendered on 24 June 2015 and in relation to which a request for

⁶¹ See the Request, *supra* note 17, para. 39.

⁶² *Idem*.

⁶³ 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", *supra* note 3.

⁶⁴ See *supra* paras. 27-28.

⁶⁵ See *supra* note 33.

leave to appeal by Defence was also rejected.⁶⁶ Indeed, the Decision recalls the instructions contained in the Objections Decision to the parties and participants concerning the transfer of materials in the e-Court databases for the *Gbagbo* and *Blé Goudé* cases to the e-Court database for the *Gbagbo and Blé Goudé* case, and “*instructs the Gbagbo Defence to, in the exercise of all reasonable diligence, comply with Decision 101*”.⁶⁷

44. In this regard, the Common Legal Representative submits with concern that by alleging an “issue” of lack of motivation, the Defence is again trying to re-litigate matters that have been already decided and for which all available remedies have been exhausted.

b. The Issue does not affect the fair and expeditious conduct of the proceedings

45. Since it is clear that the Issue does not arise from the Decision, the Request must be dismissed on this basis alone. Assuming *arguendo* that the Issue arises from the Decision, the Common Legal Representative contends that, contrary to the Defence’s contentions, it does not significantly affect the fairness and expeditiousness of the proceedings.

46. The alleged lack of reasoning does not *per se* affect the fairness of the proceedings, since there is no obligation for the Chambers of the Court to provide a full explanation for each and every aspect of their decisions, particularly where the issues addressed are procedural in nature. This is consistent with the jurisprudence of the European Court for Human Rights, which has constantly stated that “*Article 6 § 1 [ensuring fair trial guarantees] obliges courts to give reasons for their decisions, but*

⁶⁶ See the Objections Decision, *supra* note 8, paras. 13, 16 and 19; and the “Decision on request for leave to appeal the ‘Decision on objections concerning access to confidential material on the case record’”, *supra* note 13.

⁶⁷ See the Decision, *supra* note 15, para. 18.

cannot be understood as requiring a detailed answer to every argument”⁶⁸ and that “the extent to which [the] duty to give reasons applies may vary according to the nature of the decision and can only be determined in the light of the circumstances of the case”.⁶⁹ The Appeals Chamber has adopted a similar approach.⁷⁰

47. Moreover, the Common Legal Representative submits that revising generally the content of previously submitted arguments without demonstrating the conditions relevant for leave to appeal the Decision cannot suffice to satisfy the requirements set forth in Article 82(1)(d) of the Rome Statute.⁷¹

48. In this regard, the Defence contends that its arguments are no longer “purely speculative”,⁷² but still fails to concretise how the Decision reduces its capacity to gain the trust of potential witnesses.⁷³ The Defence fails to acknowledge that access to documents listed in Annex C is confidential and limited to the parties and participants,⁷⁴ and seems to forget that, as already found by the Single Judge,⁷⁵ the Common Legal Representative is bound by the same confidentiality obligations as the Defence pursuant to the Code of Professional Conduct for counsel,⁷⁶ and that in accordance with a previous ruling she cannot share confidential documents with her

⁶⁸ See ECHR, *Perez v. France*, Application No. 47287/99, 12 February 2004, para. 81; *García Ruiz v. Spain*, Application No. 30544/96, 21 January 1999, para. 26; *Van de Hurk v. The Netherlands*, Application No. 16034/90, 19 April 1994, para. 61.

⁶⁹ See ECHR, *Ruiz Torija v. Spain*, Application No. 18390/91, 9 December 1994, para. 29; *Hiro Balani v. Spain*, Application No. 18064/91, 9 December 1994, para. 27.

⁷⁰ See the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’” (Appeals Chamber), No. ICC-01/04-01/06-773 OA5, 14 December 2006, para. 20; and the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’” (Appeals Chamber), No. ICC-01/04-01/06-774 OA6, 14 December 2006, para. 30.

⁷¹ See e.g. the Request, *supra* note 17, paras. 44-47 and 51-52.

⁷² *Idem*, paras. 44-45.

⁷³ *Ibid.*, para. 43.

⁷⁴ See the Decision, *supra* note 15, para. 16.

⁷⁵ 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”, *supra* note 3, para. 39.

⁷⁶ See the Code of Professional Conduct for counsel, article 8.

clients without the prior authorisation of the Chamber.⁷⁷ Consequently, the Decision cannot be said to negatively affect the investigating capacities of the Defence.

49. Similarly, the Defence claims that the Decision has an impact on its investigations because of the means and time required for justifying that the former confidentiality levels remain valid.⁷⁸ However, this alleged impact of the Issue on the fairness and expeditiousness of the proceedings is inconsistent with the possibility enjoyed by the Defence under Regulation 35 of the Regulations of the Court to request an extension of time in order to review the evidentiary material to be disclosed to the parties and participants, and to prepare redacted versions thereof or submit requests for a stricter classification where necessary. As such, the Decision cannot be said to create conditions placing the Defence in a substantial disadvantage vis-à-vis the other parties and participants or to force the Defence to make an unreasonable use of the time.⁷⁹

50. The Defence's argument that the legal framework envisaged in the Decision must be validated by the Appeals Chamber because the Chamber is the first one in the history of the Court to read the provisions in this manner must be equally dismissed.⁸⁰ Regardless of whether this assertion is true or not,⁸¹ the Court has already determined that the mere fact that an issue is of general interest does not suffice to grant leave to appeal.⁸² Moreover, the Defence fails to take into account that the Chamber has a duty to ensure that the trial is fair and expeditious also without the guidance of the Appeals Chamber.⁸³

⁷⁷ See the Confidential Filings Decision, *supra* note 1, para. 15.

⁷⁸ See the Request, *supra* note 17, para. 46.

⁷⁹ See *supra* notes 35-36.

⁸⁰ See the Request, *supra* note 17, para. 47.

⁸¹ See *supra* paras. 27-28 and 43-44.

⁸² See *supra* note 29.

⁸³ See the "Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date" (Trial Chamber V(B)), No. ICC-01/09-02/11-908, 31 March 2014, para. 80. See also the "Decision on 'Defence Submissions on the Testimony of CAR-D04-PPPP-0007'" (Trial Chamber III), No. ICC-01/05-01/08-2839, 21 October 2013, para. 17; and the "Decision on issues related to the testimony of Witness D04-19 via video-link" (Trial Chamber III), No. ICC-01/05-01/08-2509, 15 February 2013, paras. 11 and 16.

51. The Defence equally fails to show how the Issue has a “significant” impact on the fairness and expeditiousness of the proceedings at hand,⁸⁴ but only claims generally that the Decision has “*réduit la marge de manœuvre des parties*” regarding “*des témoins potentiels*”.⁸⁵ No concrete indication is provided neither on the number of potential witnesses affected by the Decision nor on the scope of potential difficulties that the Defence may have to face when persuading them to testify. Accordingly, the Issue cannot be said to have the required material impact to constitute an “appealable issue”.

52. The Common Legal Representative also contests the Defence’s contention that the immediate resolution of the Issue by the Appeals Chamber may materially advance the proceedings. The Defence merely refers to abstract and hypothetical considerations in this regard,⁸⁶ which as such cannot be the subject of an interlocutory appeal under article 82(1)(d) of the Rome Statute.⁸⁷

53. In any event, since the Issue does not affect the fair and expeditious conduct of the proceedings, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁸⁸

⁸⁴ See *supra* note 23.

⁸⁵ See the Request, *supra* note 17, para. 43.

⁸⁶ *Idem*, para. 51 (“[l]a Défense pourrait se trouver dans l’impossibilité de conduire des enquêtes de façon effective”).

⁸⁷ See *supra* note 25.

⁸⁸ See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 26, para. 26.

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

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 31st day of July of 2015

At The Hague, The Netherlands