



Original: English

No.: ICC-02/11-01/15
Date: 1 September 2015

APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Kuniko Ozaki
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chang-ho Chung

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public

Public redacted version of Prosecution's request for an unredacted or less redacted version of the "Document à l'appui de l'appel de la 'Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute' (ICC-02/11-01/15-127-Conf) du 8 juillet 2015" (ICC-02/11-01/15-147-Conf-Exp-Red OA), 21 July 2015, ICC-02/11-01/15-149-Conf-Exp

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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REGISTRY

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Submissions

1. The deadline for the Defence for Mr Laurent Gbagbo to file its Document in Support of Appeal against the Ninth Decision on Mr Gbagbo's Detention Review was 16 July 2015. On this date, the Prosecution was notified only of the filing of one annex to the Document in Support of Appeal, but not the document itself.¹ Subsequently on 20 July 2015, the Prosecution was notified of a Confidential *Ex parte* and redacted version of the Document in Support of Appeal.² However, paragraphs regarding the second ground of appeal, in particular, "consequences of the legal error of the Chamber [concerning conditional release]" are almost entirely redacted.³

2. Despite the late notification and the extensive redactions of the Defence's Document in Support of Appeal, the Prosecution is prepared to file its response within the time limit (27 July 2015). However, the Prosecution notifies the Appeals Chamber that it will be unable to respond to the Defence's submissions regarding the impact of the second ground of appeal due to the level of redactions.⁴ Additionally, the Prosecution submits that these redactions are unnecessary and unjustified. Therefore, the Prosecution requests the filing of an unredacted version of the Document in Support of Appeal or, in the alternative, the filing of a less redacted version that would permit it to respond to the Defence's submissions on the currently redacted extracts.

3. The Defence argues that the redactions are necessary because it refers to documents with this level of confidentiality at pre-trial, and because the documents deal with the Accused's health situation which is protected by medical privilege.⁵ This argument does not justify the applied redactions. Since the Defence seeks to rely on the redacted information to support its request in these appeal proceedings, this

¹ ICC-02/11-01/15-147-Anx. The Ninth Decision on Mr Gbagbo's Detention Review was rendered on 8 July 2015: ICC-02/11-01/15-127-Conf. A public redacted version has been filed: ICC-02/11-01/15-127-Red.

² ICC-02/11-01/15-147-Conf-Exp-Red ("Document in Support of Appeal").

³ See Document in Support of Appeal, paras.50-69. Paras.61-62 and 65-68 are fully redacted. Paras.5, 51-53, 57, 60 and 69 are partially redacted.

⁴ Document in Support of Appeal, paras.59-69.

⁵ Document in Support of Appeal, para.1 and ICC-02/11-01/15-141-Conf-Exp, para.25. The Prosecution notes that the Defence does not rely on regulation 156 of the Regulations of the Registry.

information should be made available to the Prosecution so that it can make meaningful submissions. This position is supported by the following reasons:

- [REDACTED]. [REDACTED].⁶ [REDACTED].⁷
- Trial Chamber I's decision is consistent with the jurisprudence of the *ad hoc* tribunals, which indicates that the accuseds' right to privacy over their medical information is not absolute. At the ICTR in the *Karemera et al.* case, the Trial Chamber, following a request by Joseph Nzirorera to disclose the full medical reports of his co-accused Mathieu Ndirumapatse to make "meaningful submissions" on the continuation of the proceedings, granted such full disclosure to the other parties in the case (including the Prosecution) on a confidential basis. Key to the Chamber's determination was that the "*fully-informed submissions from all parties are necessary*" to assess the impact of the state of Ndirumapatse's health and ability to attend the proceedings and "*to make the necessary legal determination regarding whether and how to resume the proceedings.*"⁸ Critically, the Trial Chamber found that this was "*a sufficiently important objective to override Ndirumapatse's right to the privacy of his medical information.*"⁹ Indeed, the Chamber held that submissions from all parties was "*a pertinent consideration*" because the other accused as well as the Prosecution obviously have a direct interest in whether, when and how the proceedings continue.¹⁰

⁶ [REDACTED].

⁷ [REDACTED].

⁸ ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Disclosure of Medical Information and for Extension of Time, 28 August 2009 ("*Karemera Decision of 28 August 2009*"), paras.6-17 (emphasis added) :

<http://41.220.139.198/Portals/0/Case%5CEnglish%5CKaremera%5Cdecisions%5C090828.pdf> .

⁹ *Karemera Decision of 28 August 2009*, para.14 (emphasis added).

¹⁰ *Karemera Decision of 28 August 2009*, para.14. The Prosecution further notes that, unlike in *Karemera*, in most cases the accuseds have consented to the disclosure of this information, so the issue has not arisen. Nevertheless, the general principle - that confidential and full access to the accused's medical information is critical to the Prosecution's meaningful submissions (along with those of other parties) on relevant matters to the proceedings - still holds. See, for example, in the *Stanisic and Simatovic* case at the ICTY, the Trial Chamber held that "transparent medical reporting should not unnecessarily encroach on the privacy rights of the Accused or third persons. Nevertheless, any redactions of medical reports will only be considered in relation to 'redacting to the public', and not as 'redacting from the Chamber or the parties.'" (See ICTY, *Prosecutor v. Stanisic and*

- The Accused's rights to a fair trial are not affected by such disclosure: the Accused will not be placed on a disadvantaged position with respect to the Prosecution if this information is disclosed to the Prosecution on confidential basis. Mr Gbagbo has already voluntarily disclosed this private medical information to the Chamber and has not advanced any cogent reasons why the further disclosure to the Prosecution would cause him any prejudice.

4. Further, the Defence provides no support for its submission that the documents should follow the same level of classification as in the pre-trial proceedings.¹¹ There is no reference to a Pre-Trial Chamber's order justifying this level of classification. To the contrary, even the Single Judge of Pre-Trial Chamber I recognised that the Accused's right to privacy over medical information may be reasonably limited, when she authorised disclosure of expert medical reports to the Prosecution so that it could provide submissions to the proceedings to determine the Accused's fitness to stand the confirmation of charges hearing.¹²

5. Nevertheless, the matter is now before the Appeals Chamber, which may make its own determination regarding the appropriate level of confidentiality. Should the Appeals Chamber consider that the actual level of classification and redaction accords with the Pre-Trial Chamber's orders, the Prosecution respectfully requests the Appeals Chamber re-classification of the documents – and unredaction of the related paragraphs of the Document in Support of Appeal - pursuant to regulations 23bis(3)¹³ and 42(3) of the Regulations of the Court ("RoC") to make them available to the Prosecution for the reasons advanced above.¹⁴

Simatović, Case No.IT-03-69-T, Decision on Urgent Defence Request for Further Submissions of Psychiatric Medical Expert and Decision on Defence Motion to Redact Medical Reports, 6 August 2009, para.18: http://www.icty.org/x/cases/stanislav_simatovic/tdec/en/090806.pdf)

¹¹ *Contra*, ICC-02/11-01/15-141-Conf-Exp, para.25.

¹² ICC-02/11-01/11-196-Conf-tENG, where the Single Judge ordered the Defence to secure the written consent of Mr Gbagbo to the disclosure of the Expert Reports to the Prosecutor or, failing that, to propose reasoned redactions. See also ICC-02/11-01/11-201, paras.15-20, where the Single Judge considered the proposed redactions excessive and ordered the disclosure of two reports with limited redactions and a third report in its entirety.

¹³ "[...] A Chamber may also re-classify a document upon request by any other participant or on its own motion. In the case of an application to vary a protective measure, regulation 42 shall apply".

¹⁴ See above para.3.

Confidentiality

6. Pursuant to regulation 23*bis*(2) of the RoC, this response is classified as “Confidential, *ex parte* – only available to the Registry, Prosecution, and Defence of Mr Laurent Gbagbo” consistent with the classification of the Defence filing that it responds to, and trial records with the same level of confidentiality.

Conclusion

7. For the above reasons, the Prosecution requests the Appeals Chamber to instruct the Defence:

- to file an unredacted version of its Document in Support of Appeal, or
- to file a less redacted version that permits the Prosecution to meaningfully respond to the Defence’s submissions; and
- to grant a confined extension of time pursuant to regulation 35(2) of the RoC, should the Prosecution consider that the unredacted extracts require further submissions.

8. Unless otherwise instructed, the Prosecution will proceed to file its response to the Document in Support of Appeal – with the exception of the redacted extracts - by 27 July 2015.



Fatou Bensouda, Prosecutor

Dated this 1st day of September 2015

Word Count:1,659¹⁵

At The Hague, The Netherlands

¹⁵ It is certified that this document contains the number of words specified and complies in all respects with the requirements of regulation 36 of the RoC. This statement (51 words), not itself included in the word count, follows the Appeals Chamber's direction to "all parties" appearing before it: ICC-01/11-01/11-565 OA6, para.32.