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**International
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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***

Confidential

Response to Mr Gbagbo's request for leave to appeal the "Decision granting the request of the Gbagbo Defence and re-scheduling opening statements" and the "Order on the classification of the Expert Reports and other related documents" (ICC-02/11-01/15-330-Conf)

Source: Office of Public Counsel for Victims

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

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I. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the "Legal Representative")¹ submits that Mr Gbagbo's request (the "Request") for leave to appeal the "Decision granting the request of the Gbagbo Defence and re-scheduling opening statements" (the "Experts' Appearance Decision") and the "Order on the classification of the Expert Reports and other related documents" (the "Expert Reports Order") does not satisfy the requirements of article 82(1)(d) of the Rome Statute and must be rejected.

2. The Request does not demonstrate that the issues identified by the Gbagbo Defence arise from the Decisions and can be the subject of an interlocutory appeal, nor does it show how said issues would significantly affect the fair and expeditious conduct of the proceedings. The Request merely represents the Defence's misreading of and its disagreement with the rulings of Trial Chamber I (the "Chamber").

II. Confidentiality

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this submission is filed confidential following the Defence classification and because it refers to filings and orders currently classified as confidential.

¹ See the "Directions on the conduct of the proceedings" (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015, p. 24.

III. Background

4. On 7 September 2015, the Chamber ordered a medical examination of Mr Gbagbo with a view to assessing his current medical condition (the "Medical Examination Decision").²

5. On 30 September 2015, the Chamber, *inter alia*, appointed three medical experts (the "Experts") to provide their respective reports on Mr Gbagbo's current medical condition (the "Expert Reports") by 29 October 2015 (the "Experts Order"),³ ordered the Defence to propose redactions to the Expert Reports for the purpose of notification to the parties and participants by 30 October 2015,⁴ and scheduled a hearing to be held in private session on 5 November 2015 to discuss any matter arising from said reports (the "Hearing").⁵

6. On 20 October 2015, the Chamber ordered, *inter alia*, the Registry to provide Mr Gbagbo's medical record to one of the Experts for the purposes of Mr Gbagbo's medical examination, without the latter's consent (the "Medical Record Decision").⁶

7. On 28 October 2015, upon request of the Gbagbo Defence,⁷ the Chamber rescheduled the Hearing to 10-12 November 2015, and ordered the Experts to appear

² See the "Decision granting in part the Prosecution request for an examination of Mr Gbagbo pursuant to rule 135 of the Rules and instructing the parties to file supplemental submissions concerning the selection of expert(s)" (Trial Chamber I), No. ICC-02/11-01/15-206-Conf-Exp, 7 September 2015, reclassified as confidential pursuant to Trial Chamber I's order dated 20 October 2015 (the "Medical Examination Decision"), para. 11.

³ See the "Order to conduct an examination of Mr Gbagbo under Rule 135 of the Rules" (Trial Chamber I), No. ICC-02/11-01/15-253-Conf, 30 September 2015 (the "Experts Order"), paras. 11-12 and 16.

⁴ *Idem*, para. 19.

⁵ *Ibid.*, para. 20.

⁶ See the "Order to provide Appointed Expert with access to Mr Gbagbo's medical record" (Trial Chamber I), No. ICC-02/11-01/15-302-Conf, 20 October 2015 (the "Medical Record Decision").

⁷ See the "Requête aux fins d'ordonner la présence des trois experts nommés par la Chambre lors de l'audience du 5 novembre 2015", No. ICC-02/11-01/15-318-Conf, 27 October 2015.

at said hearing together with the Prosecution, the Defence, the Registry and the Legal Representative (the "Experts' Appearance Decision").⁸

8. On 30 October 2015, the Gbagbo Defence proposed redacted versions of the Expert Reports for transmission to the Prosecution, and objected to their notification to the Blé Goudé Defence and the Legal Representative.⁹

9. On 2 November 2015, the Single Judge of the Chamber, *inter alia*, instructed the notification of the Expert Reports in redacted version to all parties and participants in order to be in a position to make oral submissions during the Hearing, and issued directions concerning the conduct of the Hearing (the "Expert Reports Order").¹⁰

10. On 3 November 2015, the Gbagbo Defence filed the Request,¹¹ seeking leave to appeal the Experts' Appearance Decision and the Expert Reports Order (the "Decisions") on the following two issues:

- i) The Chamber made an error of law by authorising the Legal Representative and the Blé Goudé Defence to participate in the Hearing and to question the experts (the "First Issue");¹² and

⁸ See the "Decision granting the request of the Gbagbo Defence and re-scheduling opening statements" (Trial Chamber I), No. ICC-02/11-01/15-322, 28 October 2015 (the "Experts' Appearance Decision").

⁹ See the "Version confidentielle expurgée des «Observations portant sur les expurgations à effectuer dans les rapports des trois experts et soumissions quant aux parties et participants à qui ces rapports doivent être communiqués» déposées le 30 octobre 2015 (ICC-02/11-01/15-327-Conf-Exp)", No. ICC-02/11-01/15-327-Conf-Red, 3 November 2015.

¹⁰ See the "Order on the classification of the Expert Reports and other related documents" (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-329-Conf, 2 November 2015 (the "Expert Reports Order").

¹¹ See the "Demande d'autorisation d'interjeter appel de la «Decision granting the request of the Gbagbo Defence and re-scheduling opening statements» (ICC-02/11-01/15-322) et du «Order on the classification of the Expert Reports and other related documents» (ICC-02/11-01/15-329-Conf).", No. ICC-02/11-01/15-330-Conf, 3 November 2015 (the "Request").

¹² *Idem*, paras. 16-24.

- ii) The Chamber erred in issuing a decision without reasoning (the "Second Issue").¹³

11. Pursuant to regulation 65(3) of the Regulations of the Court, the Legal Representative respectfully submits her response to the Request.

IV. Submissions

1. The issues identified by the Defence do not arise from the Decisions

12. The First Issue does not arise from the Decisions, but from the Defence's misreading thereof. Contrary to the Defence's contention,¹⁴ the Chamber did not fail to provide a justification in the Decisions for the limitation of Mr Gbagbo's right to confidentiality of his medical information. In fact, the Chamber explained that said right is not absolute, and referred to the arguments and authorities supporting the same conclusion in the Medical Record Decision.¹⁵ The Legal Representative notes that the Defence did not seek leave to appeal the latter decision within the prescribed deadline. Therefore, the Defence cannot be allowed to challenge it now indirectly with the Request.

13. Similarly, the Chamber did not impose on the Defence "[l]a charge de justifier que les droits de Laurent Gbagbo devraient être respectés".¹⁶ In fact, the Chamber took notice of Mr Gbagbo's right to the confidentiality of medical information, but concluded that the Defence had failed to identify which specific information needed to be withheld from the Legal Representative and the Blé Goudé Defence in order for said right not to be infringed.¹⁷

¹³ *Ibid.*, paras. 25-30.

¹⁴ *Ibid.*, para. 17.

¹⁵ See the Expert Reports Order, *supra* note 10, para. 7, footnote 14, referring to the Medical Record Decision, *supra* note 6, para. 17.

¹⁶ See the Request, *supra* note 11, para. 18. See also *idem*, para. 19.

¹⁷ See the Expert Reports Order, *supra* note 10, para. 7.

14. The Defence also misreads the Decisions when stating that the Chamber's alleged error in authorising the Legal Representative and the Blé Goudé Defence to participate in the Hearing and to question the experts stems from the fact that "[l]a Chambre a donc confondu deux moments [différents] de la procédure," namely "[l]es questions qui seront posées aux experts portant sur leurs constats d'une part, et la discussion juridique sur les conséquences de la décision de la Chambre sur l'aptitude à être jugé de Laurent Gbagbo d'autre part".¹⁸

15. In this regard, the Chamber distinguished in prior rulings between the "[medical] examination [...] with a view to assessing Mr Gbagbo's current medical condition" to be conducted by the Experts,¹⁹ and the "legal determination to be made by the Chamber" on Mr Gbagbo's fitness to stand trial.²⁰ This difference in nature between the medical determinations (factual) and the consequences of said determinations on the proceedings (legal) is recognised by other international criminal tribunals dealing with the fitness of accused persons.²¹

16. However, the Chamber has never referred to the temporal distinction alleged by the Defence. On the contrary, since its first decision on the matter, the Chamber clarified that the discussion of any issues as to Mr Gbagbo's fitness to attend trial is not distinct from the one on the practical modalities eventually needed to accommodate the Accused's attendance at trial.²²

¹⁸ See the Request, *supra* note 11, para. 21. See also *idem*, para. 23.

¹⁹ See the Medical Examination Decision, *supra* note 2, para. 11; and the Experts Order, *supra* note 3, para. 12.

²⁰ See the Experts Order, *supra* note 3, para. 14.

²¹ See ICTY, *Prosecutor v. Stanišić and Simatović*, "Decision on Urgent Defence Request for Further Submissions of Psychiatric Medical Expert and Decision on Defence Motion to Redact Medical Reports", No. IT-03-69-PT, 6 August 2009, para. 15; and ECCC, *Prosecutor v. Nuon Chea et al.*, "Decision on Nuon Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise", No. E115/3, 16 November 2011, para. 19.

²² See the Medical Examination Decision, *supra* note 2, para. 10 ("[a]n updated medical evaluation will also be of assistance to the Chamber and the Registry in setting any practical modalities needed").

17. Against this background, the two “*moments de la procédure*” mentioned in the Request are not envisaged in the Decisions. The Experts’ Appearance Decision allows the questioning of the Experts concerning their reports in order to “[f]acilitate the Chamber adjudicating any issues which may arise therefrom”.²³ Similarly, the Expert Reports Order expressly relates the questioning of the Experts to issues affecting Mr Blé Goudé’s right to be tried without undue delay and to the Chamber’s duty to consider the interests of the victims.²⁴

18. Accordingly, the Legal Representative submits that the First Issue only arises from the Defence’s misreading of the Decisions. As such, it is not an appealable “issue” pursuant to article 82(1)(d) of the Rome Statute.²⁵ This conclusion cannot be affected by the findings made by Pre-Trial Chamber I three years ago,²⁶ already considered by the Chamber in a decision no longer amenable to appeal.²⁷

19. Similarly, the Second Issue does not arise from the Decisions, but from the Defence’s disagreement therewith. Contrary to the Defence’s contention, the Decisions are not comprised “[d]’affirmations d’ordre général et non motivées”,²⁸ since they expressly make reference to the legal provisions of the Court and provide reasons supporting its conclusions.²⁹

²³ See the Experts’ Appearance Decision, *supra* note 8, para. 9.

²⁴ See the Expert Reports Order, *supra* note 10, para. 7 (“[t]he Blé Goudé Defence and the LRV shall be permitted to receive the confidential redacted versions of the Expert Reports, in order to be in a position to make oral submissions thereon [...] on issues specifically pertaining to their respective interests under Article 67(1)(c) and 68(3) of the Statute”).

²⁵ See, *inter alia*, 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.

²⁶ Cf. the Request, *supra* note 11, para. 24.

²⁷ See the Medical Examination Decision, *supra* note 2, para. 9.

²⁸ See the Request, *supra* note 11, para. 25.

²⁹ See the Experts’ Appearance Decision, *supra* note 8, para. 9; and the Expert Reports Order, *supra* note 10, para. 7.

20. Moreover, the Chamber has not changed its position “[e]n fonction d’éléments non juridiques” regarding the possibility for the Blé Goudé Defence and the Legal Representative to attend the Hearing and to question the Experts.³⁰

21. As admitted by the Defence,³¹ the Experts Order already provided for the notification of the redacted Expert Reports to the “parties and participants”, not only to the Prosecution.³² In these circumstances, the participation of the Blé Goudé Defence and the Legal Representative in the Hearing can only be seen as a clarification required by the progress of the proceedings.

22. In addition, the Experts’ Appearance Decision far from lacking any reasoning is expressly premised upon the Chamber’s intent to “[f]acilitate the Chamber adjudicating any issues which may arise therefrom”,³³ and the Expert Reports Order is otherwise consistent with the very purpose of the Hearing and with ensuring Mr Gbagbo’s rights during said hearing.³⁴

23. Against this background, the Second Issue merely reflects the Defence’s disagreement with the Decisions. As reiterated by the Chamber, a question over which there is disagreement or conflicting opinion cannot amount to an appealable “issue” under article 82(1)(d) of the Rome Statute.³⁵

³⁰ Cf. the Request, *supra* note 11, paras. 26 and 30.

³¹ *Idem*, para. 27.

³² See the Experts Order, *supra* note 3, para. 19.

³³ See the Experts’ Appearance Decision, *supra* note 8, para. 9.

³⁴ See the Expert Reports Order, *supra* note 10, para. 10.

³⁵ 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.” (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-809, 11 March 2015, para. 9; and the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 25, para. 19.

2. The issues identified by the Defence do not affect the fair and expeditious conduct of the proceedings

24. Since it is clear that none of the issues identified by the Defence arise from the Decisions, the Request must be dismissed on this basis alone. Assuming *arguendo* that any of said issues arises from the Decision, the Legal Representative opposes the Defence's contention that they significantly affect the fairness and expeditiousness of the proceedings.

25. In fact, the Defence does not provide in the Request detailed arguments on the impact of the Decisions on the fairness of the proceedings, limiting itself to the contention that "[p]uisque la question de l'aptitude est centrale, la question de la manière dont doit être déterminée cette aptitude est centrale".³⁶

26. The Legal Representative does not deny the importance of the issue of the fitness of the Accused for the fairness of the proceedings,³⁷ but submits that the manner of determining said fitness does not unavoidably and *per se* affects the fairness of the proceedings.

27. In this regard, the Request fails to argue that the attendance of other participants will prejudice the purpose behind the Hearing. In fact, regardless of the participation of the Blé Goudé Defence and the Legal Representative,³⁸ the Hearing will take place as scheduled, satisfying the Gbagbo Defence's desire for a hearing to ensure "[t]ransparency and in order to allow the parties the opportunity to question the

³⁶ See the Request, *supra* note 11, para. 37.

³⁷ See the "Decision on the 'Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012'" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-152-Red, 12 June 2012, para. 24.

³⁸ See the email received from Trial Chamber I on 5 November 2015 at 16h40, acknowledging the waiver by Mr Blé Goudé's Lead Counsel of his right to attend the sessions scheduled for 10 November 2015 in the afternoon, 11 and 12 November 2015.

*Appointed Experts on the methodology for their examinations and the contents of their reports".*³⁹

28. The Request does not argue either how the Blé Goudé Defence's and the Legal Representative's participation in the Hearing may infringe upon Mr Gbagbo's right to privacy and the confidentiality of medical information.⁴⁰ The lack of a detailed contention in this regard is consistent with the fact that the Gbagbo Defence did not challenge the transmission of the redacted Expert Reports to all participants in the proceedings.⁴¹

29. Moreover, the Request only refers to the alleged impact of the issues identified by the Defence on the fairness of the proceedings, failing to address the impact on their expeditiousness. In this regard, the Legal Representative contends that the "[t]ight[ly] management by the Chamber"⁴² of the time used by the participants during the Hearing could not support any contention that the participation of the Blé Goudé Defence and the Legal Representative will affect the "*speedy conduct of the proceedings*".⁴³

30. Finally, since the issues identified by the Defence do 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.⁴⁴

³⁹ See the Experts' Appearance Decision, *supra* note 8, para. 9.

⁴⁰ See the Request, *supra* note 11, para. 15.

⁴¹ See the Experts Order, *supra* note 3, para. 19.

⁴² See the Expert Reports Order, *supra* note 10, para. 9.

⁴³ See 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. 18.

⁴⁴ See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", *supra* note 25, para. 26.

V. Conclusion

31. For the foregoing reasons, the Legal Representative respectfully requests the 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 6th day of November of 2015

At The Hague, The Netherlands