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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

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 response to the Gbagbo Defence's
«Éléments d'information concernant la non présence de Laurent Gbagbo lors de
l'audience des 10, 11 et 12 novembre 2015» (ICC-02/11-01/15-338-Conf)",
9 November 2015, ICC-02/11-01/15-342-Conf**

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

Ms Fatou Bensouda
Mr James Stewart
Mr Eric Macdonald

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Legal Representatives of the Victims

Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Patrick Craig

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution responds to submissions made by the Defence team for the Accused Gbagbo (“Gbagbo Defence”) on 6 November 2015 entitled *«Éléments d’information concernant la non présence de Laurent Gbagbo lors de l’audience des 10, 11 et 12 novembre 2015»* (“Gbagbo Submission”).¹ While there may be instances when an accused can waive his right to be present, it is submitted that the Accused ought to be present during crucial hearings, particularly ones dealing with his fitness and modalities of his presence at trial.

Confidentiality

2. The Prosecution files this submission as confidential pursuant to regulation 23bis(2) of the Regulations of the Court, because it responds to a submission of the same classification.

Submissions

3. On 6 November 2015, the Gbagbo Defence informed the Trial Chamber, the Parties and the participants that their client, Mr Laurent Gbagbo, signed a waiver to his right to be present during the hearings of 10, 11 and 12 November 2015 dealing with his fitness to stand trial.
4. While an accused may have the right to waive his presence in court, the Prosecution submits that a Chamber must be satisfied that waiver by an accused must be free, unequivocal and done with full knowledge.²
5. Mr Gbagbo has been repeatedly absent from the beginning of these proceedings, despite the fact that he is detained in The Hague and can physically attend the hearings. His absence from the proceedings has become the rule, rather than the exception.
6. [REDACTED].³ In the current Gbagbo Submission, no explanation is provided.

¹ ICC-02/11-01/15-338-Conf.

² *Prosecutor v. Nahimana et al.* Judgement, Case No. ICTR-99-52-A, 28 November 2007, para. 109.

³ See for example ICC-02/11-01/15-39-Conf-Red, ICC-02/11-01/15-238-Conf-Red2 and ICC-02/11-01/11-733-Conf-Red.

7. Article 63(1) of the Statute and jurisprudence in the *Ruto* case⁴ maintain the principle of the presence of the Accused, at trial.⁵ While the current proceedings are yet to enter the trial phase, it is submitted that, by analogy, if the presence of the Accused at trial is significant, it is equally significant for the Accused to be present during hearings addressing his fitness to stand trial and modalities for the hearings at trial. The Chamber may have questions to put to the Accused to ensure he agrees to and is satisfied with the proposed modalities. Indeed, the discussions during the upcoming hearings may have an impact on the conduct of trial for the coming years.
8. The Prosecution notes that the Gbagbo Defence has indicated over the past five months that the Accused may be unfit. It therefore comes as a surprise that, following the filing of the reports of three experts concluding that Mr Gbagbo is fit, a waiver is filed announcing Mr Gbagbo's absence in relation to the very topic of his fitness.
9. Pursuant to article 64(6)(f) of the Statute and as an inherent power to conduct the proceedings, the Trial Chamber can order the Accused to appear in Court. It is submitted that given the importance of the issues at hand, the Chamber should use its discretion to order the Accused Gbagbo's presence.

⁴ ICC-01/09-01/11-1066, para. 61: "In this respect, the Appeals Chamber recalls that the presence of the accused must remain the general rule and that article 63 (1) of the Statute clearly limits the Trial Chamber's discretion to excuse an accused person from presence during the trial."

⁵ Unless the Accused fits one of the exception at rule 134 *ter* and 134 *quater*.

Conclusion

10. For the foregoing reasons, the Prosecution submits that the Trial Chamber order the presence of Mr Gbagbo during the hearings of the experts on 12 and 18 November 2015 as well as any hearing addressing the issue of the modalities.



Fatou Bensouda, Prosecutor

Dated this 1st day of February 2016

At The Hague, The Netherlands