

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: French

No.: ICC-02/11-01/11
Date: 26 January 2015

TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Cuno Tarfusser
Judge Olga Herrera-Carbuccia

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public Document

Application for leave to appeal the Single Judge's "Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record" (ICC-02/11-01/11-749) issued on 19 January 2015

Source: Defence Team for Laurent Gbagbo

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

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I. Preliminary remarks: for reasons pertaining to the proper administration of justice, this application is filed before Trial Chamber I sitting as a full bench

1. The designation of a Single Judge is a means of streamlining use of the Chamber's resources: the Single Judge sees to routine procedural matters and makes decisions where questions of principle are not raised. The Single Judge acts where there is no need to involve three Judges to ensure that a case moves forward. In other words, the Single Judge directs the preparation of a case for trial, whereas the full bench of the Trial Chamber is responsible for deciding on important issues. This is reflected in both the letter and the spirit of the Statute.

2. In the present case, however, the matter under consideration is an application for leave to appeal a decision concerning the transmission of documents – including documents in the case record that have not been used by the parties and therefore have not been transmitted to the Judges, as well as medical documents and confidential documents reserved for the parties, etc. – to third-party participants (in this case, the victims). Put otherwise, it involves examining the status of certain documents in order to determine which ones may be transmitted to third-party participants. The reason for classifying documents into different categories is because they cannot all be treated in the same way. In particular, they cannot all be disclosed to everyone involved in a case. The systematic disclosure of documents could actually pose a risk to individuals who provide statements or could violate principles such as medical confidentiality or respect for privacy. Ultimately, the issue at hand is the effective protection of fundamental principles and, in consequence, the fairness of the proceedings.

3. Moreover, if the Single Judge were asked to rule on the same issue twice, that would place him or her in a difficult situation: in a way, he or she would be both judge and party.

4. Considering the importance of the issue under consideration and the consequences of a decision granting the Legal Representative of Victims (LRV) access to all of the documents exchanged by the parties – including documents that the parties do not intend to use and documents that are subject to professional privilege, medical confidentiality, privacy protection, etc. – it would appear necessary for the full bench of the Chamber to rule on the application for leave to appeal filed by the Defence in accordance with rule 132 *bis*(3).

II. The law applicable to the application for leave to appeal

5. The following should be noted with respect to the previous decisions of the Pre-Trial Chamber in this case:

- An application for leave to appeal should not detail all of the arguments that the applicant intends to raise before the Appeals Chamber;¹
- Where questions of fairness are concerned, the Pre-Trial Chamber needs only to verify the logic of the argument set out in the application for leave to appeal without necessarily discussing it;²
- In her dissenting opinion of 31 July 2013, the Presiding Judge moreover considered that where “[the] fairness of proceedings is at the core of the issue proposed for appeal by the Defence, it is in my view self-evident that the issue affects the fair conduct of the proceedings”;³

¹ ICC-02/11-01/11-307, para. 70.

² ICC-01/04-01/07-3327, para. 12.

³ ICC-02/11-01/11-464-Anx, para. 71

- In the instant case, the Pre-Trial Chamber considered on 31 July 2013 that an “issue” that is mis-framed by the party seeking a measure could be re-framed by the Judges on their own motion, especially when it would be useful for the Appeals Chamber to rule on the point in question;⁴
- Additionally, “the Defence Application should not be rejected for lack of proper identification of an appealable issue, but should be considered further in light of the substance of the arguments that are advanced therein”;⁵
- The Chamber does not have unfettered discretion to decide whether or not to grant leave to appeal. In her dissenting opinion, the Presiding Judge noted on 31 July 2013 that:

[i]n particular, the determination of an “issue” within the meaning of article 82(1)(d) of the Statute appears to require a rather simple and straightforward assessment by the Chamber of whether the question identified by the party arises from what is actually said in the impugned decision.⁶

III. Discussion

6. In the impugned decision, the Single Judge established a general rule of principle: that the LRV has a right to have access to the entire case record.⁷

7. In addition to the documents that are disclosed to the LRV because the parties indicate their wish to do so during the disclosure process, the decision of the Single Judge effectively gives the LRV automatic access to the following categories of documents:

- Documents “material to the preparation of **the defence**” disclosed by the Prosecution to the Defence pursuant to rule 77 of the Rules of Procedure and Evidence (RPE). The Defence is of the view that the LRV should be privy

⁴ *Ibid.*, para. 36.

⁵ *Ibid.*, para. 63.

⁶ *Ibid.*, paras. 5 and 6.

⁷ ICC-02/11-01/11-749, para. 15.

to these documents only if the Defence intends to use some of them in connection with the trial and discloses them to the LRV;

- Potentially **exculpatory** documents disclosed by the Prosecution to the Defence under article 67(2). The Defence is of the view that the LRV should be privy to these documents only if the Defence intends to use some of them in connection with the trial and discloses them to the LRV;
- Confidential decisions issued by the Chambers following confidential proceedings from which the LRV was excluded for reasons either of security or of respect for Mr Gbagbo's privacy or compliance with medical confidentiality;
- Requests or motions filed confidentially by the Defence or the Prosecution for reasons of witness security, respect for Mr Gbagbo's privacy or compliance with medical confidentiality, or for any other reason;
- Any document filed confidentially by the Defence or the Prosecution for sufficiently justified reasons;
- Evidence, statements or documents mentioning witness names filed confidentially by the Defence or the Prosecution for security reasons; and
- Documents filed confidentially by the Registry, in particular reports containing information protected by medical confidentiality or relating to detention.

8. The Defence is of the view that the LRV should have access only to the documents that the parties have decided to transmit to her. Victims are not parties to the proceedings and are not entitled to the same treatment as parties. Therefore, in the view of the Defence, access to confidential documents must be reserved for the parties. The parties effectively determine the scope and nature of a trial through the documents they decide to disclose and the witnesses they decide to call. The substance and dynamics of the trial consequently depend on the dialectic engaged in by the parties. This presupposes, of course, an absolute balance between

the Prosecution and the Defence. Any involvement of a third party would destroy that balance and compromise the fairness of the proceedings. It is for this reason that the Statute specifies that victims are not parties to the trial and that they may take part in it only under certain conditions: “[w]here [their] personal interests are affected” (article 68(3)). The parties make enquiries and they alone are able to ascertain whether the disclosure of a document or statement might have security implications for the people mentioned in them. Moreover, a number of witnesses and institutions cooperate with the parties only on the express condition that their testimony or the fruit of their cooperation is not made known to the public, and the victims in particular. In this regard, it is interesting to note that, in such a sensitive case, some United Nations or state institutions might be able to cooperate only on the express condition that the documents that they supply to the parties are kept confidential.

9. The purpose of the “confidential” status assigned by parties to certain documents is to distinguish between documents exchanged by the parties and documents disclosed to third parties. The only explanation for the different document categories established by the Statute is that there is a fundamental difference between the protagonists involved in the trial: the parties, on the one hand, and third-party participants, on the other. The case law in this regard is clear and consistent:

Participation [...] aims to afford victims an opportunity to voice their views and concerns on matters affecting their personal interests. **This does not equate them**, as the case law of the Appeals Chamber conclusively establishes, **to parties to the proceedings before a Chamber, restricting their participation to issues arising therein touching upon their personal interests**, and then at stages and in a manner not inconsistent with the rights of the accused and a fair and impartial trial.⁸

⁸ ICC-01/04-556, para. 55; cf. ICC-01/04-01-06-824 OA7; ICC-01/04-503; ICC-02/05-138; ICC-01/04-01/06-1432.

As a result, victims may participate only within a framework strictly defined by the Statute and case law.⁹ The case law makes no distinction whatsoever between victims and their representatives, since, logically, the only latitude that representatives of victims have is that given to them by the people they represent.

10. Consequently, the Defence is of the opinion that the reasoning adopted by the Single Judge appears to be based on a number of misinterpretations, which materially affect the impugned decision.

11. It would, therefore, be appropriate for the Appeals Chamber to decide whether any errors (of fact or law) have been made, by responding to the issues set out below, which meet the criteria for lodging an appeal, as established by case law. These issues (1) effectively arise out of the impugned decision, (2) could affect the fairness of the proceedings or the outcome of the trial, and (3) require immediate resolution by the Appeals Chamber.

1. Appealable issues

Introduction

12. The Single Judge previously held that:

pursuant to Rules 131(2) and 92(5) of the Rules, the LRV has a general right to access the case record and that this right shall apply to confidential filings, as well as any material uploaded in Ringtail, including documents disclosed pursuant to Rule 77 of the Rules and Article 67(2) of the Statute. As such, the 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 proceedings. 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*. The Single Judge emphasises that the victims’ access to the case

⁹ Article 63(8); rule 89(1); ICC-02/11-01/11-155; ICC-01/04-01/06-925, para. 26.

record described above is limited to the LRV only. Requests for access for individual victims must be approved by the Single Judge on a case-by-case basis.¹⁰

13. However, the Single Judge's reasoning brings to light a number of issues which can be framed as questions that may be examined on appeal.

1.1 Does the question of what material the Legal Representative may access fall within the purview of the Single Judge or the full bench of the Trial Chamber?

14. The functions of the Single Judge are detailed in the RPE. They concern specific procedural issues, fixing the schedule, coordinating exchanges between parties and overseeing detention conditions. In other words, the Single Judge handles only routine administrative matters.

15. However, rule 132 *bis*(6) provides that

[t]he judge shall not render decisions which significantly affect the rights of the accused or which touch upon the central legal and factual issues in the case, nor shall he or she, subject to sub-rule 5, make decisions that affect the substantive rights of victims.

16. The impugned decision touches upon the rights of both the accused and the victims, in particular because, in establishing a new party in the proceedings, alongside the Prosecution and the Defence, it could undermine the fairness of the proceedings. The decision also concerns the scope and limits of the victims' access to important information relating to the proceedings, and consequently redefines their rights.

17. The Defence consequently considers that, in accordance with rule 132 *bis*(6), a decision which carries such significant consequences should have been made by the full bench of the Trial Chamber. Therefore, the decision should be reversed on account of a defect of form.

¹⁰ ICC-02/11-01/11-749, para. 15.

1.2 Was the Single Judge at liberty to grant the LRV access to confidential documents even though the RPE expressly provides that victims' right to access exchanged documents is limited by the notion of confidentiality?

18. The question of what material the LRV may have access to has elicited varied responses from the Chambers. Some have granted the LRV access to confidential information exchanged by the parties,¹¹ while others have required the LRV to justify his or her request for access to a particular confidential document on a case-by-case basis.¹² Still other Chambers have considered that the LRV was not entitled to have access to confidential documents exchanged by the parties, for reasons of principle.¹³ The reason for these different approaches is that, until now, each of the Chambers has ruled on a case-by-case basis "in accordance with the circumstances of each case".¹⁴

19. With the impugned decision, a Judge has for the first time considered that (1) as a matter of principle, the LRV should have the right of access to all case documents; (2) with regard to the transmission of case documents, the question of the victims' "personal interests" does not apply; and (3) the LRV should have access to the documents disclosed under rule 77. The Judge therefore sets himself apart in this case in terms of the new approach he has taken to this issue and the solution he has provided, which extends the LRV's right of access to all documents, in line with the right afforded to parties.

¹¹ ICC-01/09-01/11-460, para. 67.

¹² ICC-01/05-01/08-807-Corr, para. 47; ICC-01/04-01/06-1119, para. 106.

¹³ ICC-01/05-01/08-320, para. 103.

¹⁴ ICC-01/09-01/11-460, para. 66.

20. However, such an approach and decision of principle are not consistent with either the letter of the Court's statutory documents or the meaning and status of "victim" under the Rome Statute.

21. For instance, to support his reasoning, the Single Judge relies on rules 92(5) and 131(2) of the RPE. Yet these provisions do not provide grounds for granting victims general access to parties' documents.

22. Rule 92(5) provides only for victims to be notified of developments in the proceedings (in particular, the parties' requests, submissions and motions) and the dates of hearings. It in no way defines the scope of victims' access to the parties' documents.

23. Rule 131(2) provides that victims may consult the "record of the proceedings", "subject to any restrictions concerning confidentiality". This rule cannot, therefore, be used as a basis for the Single Judge's decision.

24. On the contrary, the rule appears to exclude victims' access to confidential documents, which moreover led the Chamber to conclude in *Lubanga* that:

Due to the fact that confidential filings within the record often contain sensitive information related to national security, protection of witnesses and victims, and the prosecution's investigations, the presumption will be that the legal representatives of victims shall have access only to public filings.¹⁵

25. Consequently, there is no legal basis for the decision of principle made by the Single Judge.

¹⁵ ICC-01/04-01/06-1119, para. 106.

1.3 In granting the LRV general and permanent access to documents that were disclosed by the Prosecution to the Defence on an *inter partes* basis in accordance with rule 77 and are not accessible via e-Court, did the Single Judge make a decision that has no basis in law?

26. Neither rule 92(5) nor rule 131(2) make any reference to documents disclosed under rule 77. What is more, such documents in no way form part of the “record of the proceedings”, as they are simply transmitted by the Prosecution to the Defence on an *inter partes* basis and are not uploaded to e-Court. As a result, the Judges do not have access to them unless one of the parties – the Prosecution or the Defence – uses and formally discloses them. Such documents cannot, therefore, be covered by the two rules cited by the Single Judge. It should be noted that none of the provisions of the Statute or the Rules provide for the LRV to have access to documents exchanged on an *inter partes* basis. This is especially important considering that the question here is not the nature of the documents – confidential or public – but what the parties do with them. For a document to be classified as confidential, it must first have been filed in the case file and then disclosed, which is not the case of documents covered by rule 77.

27. When the Single Judge asserts that the “LRV must be notified in a timely manner of all documents **filed in the record** and that it shall therefore have access to the filings and material uploaded in Ringtail, both public and confidential”,¹⁶ he does not explain the legal basis for extending this notification to all documents, including those disclosed under rule 77.

28. It is possible that the conclusion reached by the Single Judge is based on confusion between Ringtail and e-Court. For the parties to exchange documents in a practical manner, the documents must be registered in Ringtail. It is another matter

¹⁶ ICC-02/11-01/11-749, para. 20.

for parties to register documents in e-Court, which is for the sole purpose of officially disclosing documents that will be used during the proceedings. Granting the LRV access to all of the documents registered in Ringtail, as the Single Judge has done, would make the LRV privy to absolutely all of the information available to the parties, even extremely confidential information that the parties do not intend to use.

29. With regard to documents covered by rule 77, if the documents are disclosed by the Prosecution to the Defence because they are the results of its investigations, the Defence alone – provided that the Prosecution subsequently uses certain documents as incriminating material – is responsible for deciding what to do with them and whether or not to use them. Rule 77 itself specifically refers to documents which are “material to the preparation of the defence”.

1.4 Was the Single Judge at liberty to allow the Legal Representative to be privy to documents without first verifying that they directly concerned the “personal interests” of the victims?

30. The Single Judge’s decision is not consistent with the meaning ascribed to victim participation under the Statute. The participation of victims in proceedings is not actually enshrined as a principle in the Statute: it depends, at each stage of the proceedings, on whether the victims, through their representatives, can demonstrate that they have “personal interests” that might be affected by a particular discussion or decision.¹⁷ Where the Chambers have effectively granted the LRV a certain level of access to confidential case documents, they have done so solely in consideration of the personal interests of the victims. In *Ruto*, for instance, the Chamber granted the LRV access to confidential documents “to the extent that their content is relevant to the personal interests of the victims”.¹⁸

¹⁷ Article 68(3).

¹⁸ ICC-01/09-01/11-460, para. 67.

31. In disregarding the requirement of having a “personal interest”, even though this is explicitly provided for in the Statute, the Single Judge has reversed the inherent logic of the Statute: despite the fact that the onus is on the victims to prove that they require access to certain confidential documents in order to address a specific issue that might affect their personal interests, the Judge has now granted them automatic access and has reversed the burden of proof, placing it on the Defence, who must now prove that the victims’ personal interests are not affected.

32. What is more, the Judge has dispensed with the very logic underlying the distinction between confidential documents and public documents, as he now requires the parties to prove why a particular confidential document cannot be automatically transmitted to the LRV.

33. According to the Single Judge:

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 proceedings. 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*.¹⁹

¹⁹ ICC-02/11-01/11-749, para. 15.

1.5 Was the Single Judge at liberty to make a distinction between the LRV and the victims themselves? More generally, has he misinterpreted the function and role ascribed to the LRV by the Statute?

34. The Single Judge “emphasises that the victims’ access to the case record described above is limited to the LRV only. Requests for access for individual victims must be approved by the Single Judge on a case-by-case basis”.²⁰

35. In so doing, he distinguishes between the LRV and the victims, who are the LRV’s principals. The Judge consequently makes an artificial distinction despite the fact that the LRV, as her title indicates, participates in the proceedings only as the victims’ representative. It is the LRV’s duty to discuss the information available to her with her principals so that she may best serve their interests. What would be the logic in granting the LRV access to documents that she would be prohibited from discussing with the victims, who are her principals? In such circumstances, how could she ascertain the extent to which their personal interests might be affected? How could the victims explain to their representative how their personal interests might be affected if they know nothing about the information discussed?

36. In effect, the decision creates a false dichotomy between the victims and their representative, who, logically, does not have any rights other than those of the victims she represents. The LRV participates in the proceedings because the victims have rights, not because she has any particular rights herself. The LRV speaks and acts on behalf of the victims, and it is on their behalf that she requests access to the documents exchanged between the parties. Such a distinction makes no more sense than distinguishing between the defence and the accused.

²⁰ *Idem.*

1.6 In so ruling, has the Single Judge made an artificial distinction between the Common Legal Representative and the other Representatives of Victims?

37. It seems that, in his decision, the Single Judge intended to give the Common Legal Representative, i.e. the Representative acting within the framework of the Institution, a different status than that granted to the other Representatives of Victims, which is impossible from the standpoint of both logic and the Statute.

1.7 In making his decision, which effectively eliminates the boundaries between parties and representatives, has the Single Judge distorted the spirit and letter of the Statute?

38. In granting the LRV access, as a matter of course, to all of the documents available to the parties – even the documents the parties wish to keep in their possession and not disclose – without even examining whether the “personal interest” of the victims so requires, the Single Judge places the LRV on equal footing with the parties in terms of their knowledge of the case record and access to information. In so doing, the Single Judge has taken a step towards recognising victims as parties to the proceedings. Yet victims are not parties to the proceedings. This equating of the victims to parties is illustrated by the fact that the Single Judge has invited the Defence to file documents as confidential and *ex parte* if it does not want the victims to have access to them.²¹

39. However, by definition, *ex parte* classification concerns only the parties. When the parties wish to exclude a non-party participant – such as victims – they must use the “confidential” classification.

²¹ ICC-02/11-01/11-749, para. 15.

40. Ultimately, the decision of the Single Judge makes the LRV a quasi-party and grants her specific rights that are different from those of the victims she represents. In so doing, the Single Judge complies with neither the spirit nor the letter of the Statute, he alters the nature of what constitutes a “victim” before the ICC, and he compromises the balance of the proceedings.

1.8 Was the Single Judge at liberty to allow the LRV to be privy to documents subject to medical confidentiality or privacy protection without the express consent of the person concerned?

41. In the impugned decision, the Single Judge considers that the documents to which the LRV now has general and automatic access include documents that may contain medical information that is subject to medical confidentiality and/or privacy protection.²²

42. The Defence recalls that medical confidentiality, professional privilege and the rules governing the protection of privacy apply at all times and cannot be disregarded without having immediate repercussions on the fairness of the proceedings. The denial of the rights of the accused – as recognised under the Statute and international human rights instruments – calls into question the fairness of the trial.

43. What is more, such information clearly does not concern the “personal interests” of the victims. The Single Judge therefore erred in law in considering that the victims were entitled to have access to all of the information available to the parties, including information subject to medical confidentiality, privacy protection, professional privilege, etc.

²² ICC-02/11-01/11-749, para. 20.

44. The Defence further points out that, in the instant case, “with regard to filing ICC-02/11-01/11-697-Conf, the Single Judge notes that much of the redacted medical information contained therein has been previously mentioned in public decisions issued by Pre-Trial Chamber I as well as in public Defence’s filings”.²³ The Defence has three observations in this regard:

45. Firstly, the Single Judge should not have merely “noted” that “**much** of the redacted medical information” has previously been disclosed to the public. He should have verified this and he should have further verified which non-public medical information the LRV was not entitled to have access to. This was especially important considering that, in fact, most of the medical information included in the case record was not disclosed to the public and that the disclosure of this information – to the LRV or other third parties – could have serious implications for the rights of the accused. In addition, such a disclosure would clearly constitute a serious and irreparable violation of his privacy.

46. Secondly, the fact that, in their decision on Mr Gbagbo’s fitness to stand trial,²⁴ the Judges of the Pre-Trial Chamber disclosed information subject to medical confidentiality without the express consent of the person concerned, cannot under any circumstances be relied on by the Single Judge as a precedent for allowing the LRV to have access to other information subject to medical confidentiality, against the will of the person concerned. Moreover, in the view of the experts appointed by the Court in July 2012, the content of the medical examinations cannot under any circumstances be disclosed to third parties without the express consent of the person concerned, as only the conclusions of the reports may be used in judicial proceedings. Again, the Judges of the Pre-Trial Chamber should not have disregarded the practices of the experts.

²³ ICC-02/11-01/11-749, para. 21.

²⁴ ICC-02/11-01/11-286-Red.

47. Thirdly, even if the Judge had performed a detailed analysis of what was disclosed to the public, the question of principle remains: information pertaining to medical confidentiality, the privacy of the accused and professional privilege must be automatically excluded from the material accessible to the victims, regardless of the scope of their access to information.

2. Failure to resolve the issues raised could materially affect the fair and expeditious conduct of the proceedings

2.1 Failure to resolve these issues could affect the fairness and integrity of the proceedings

48. As mentioned above, the decision of the Single Judge essentially makes victims parties to the proceedings, which affects the balance and, consequently, the fairness of the proceedings.

49. More specifically, in postulating that the LRV should have access to all of the documents available to the parties, the Single Judge not only released the victims from their statutory obligation to prove the existence of “personal interests” in order to participate and gain access to documents, he also placed the burden of proof on the Defence, obliging it to prove, on a case-by-case basis, that the victims should not have access to a particular confidential document. As a result, the Defence will have to devote part of its time and limited resources to preparing submissions on these issues.

50. Finally, if the LRV were entrusted with all of the information that is available to the parties (but not to the Judges), this would enable her to develop her own strategies, based on documents that are not used by the parties and which are not

dependent on the dialectic organised by the parties, which would slow down the proceedings and compromise their fairness.

2.2 Failure to resolve these issues could affect the expeditiousness of the proceedings

51. Aside from the *sub judice* issue, the Single Judge's reasoning could have a broader impact on the expeditiousness of the proceedings.

52. The fact that the Single Judge considers that the victims' "personal interests" are affected regardless of the stage of the proceedings and the discussion in question essentially makes the notion of "personal interests" entirely irrelevant. Although the drafters of the Statute intended that victims would participate only at certain points and under certain conditions, the Single Judge seems to take their continued participation as a given, going so far as to place them on equal footing with the parties. However if the notion of "personal interest" disappears, this will pave the way for growing numbers of requests for participation. As the notion of "personal interest" – the key to victim participation – takes on an ever broader meaning, it becomes so watered down that no substance is left. As a consequence of the Single Judge's decision, the LRV could bring in increasing numbers of applications for intervention and participation because all she would have to demonstrate is a mere theoretical and even abstract "personal interest".

53. This could result in the LRV filing many requests and the Defence and the Prosecution filing many responses, not to mention potential applications for leave to appeal, all requiring a determination by the Chamber.

3. An immediate resolution of the issue is necessary to materially advance the proceedings

54. According to the case law, the notion of “advancement” refers to making it possible to “remov[e] doubts about the correctness of a decision or ma[p] a course of action along the right lines”, while the term “immediate” has been defined as making it possible to “avoi[d] errors [...] by the prompt reference of the issue to the court of appeal”.²⁵

55. The Defence submits that the immediate resolution of the issue raised is of paramount importance because it would give the parties a theoretical and practical framework and consequently ensure their legal certainty, in accordance with the case law in *Katanga and Ngudjolo Chui*.²⁶

56. In this regard, the Defence notes that, before the ICTR, the resolution of a matter of principle is considered a material advancement of the proceedings.²⁷ However, as mentioned above, the different chambers have yet to adopt a uniform approach towards this important issue. It therefore appears necessary for the Appeals Chamber to make a decision of principle in the instant case.

57. Finally, by providing a definitive response to the issues that have been raised, an immediate resolution by the Appeals Chamber would rid the judicial process of possible mistakes that might taint the fairness of the proceedings or mar the outcome of the trial.²⁸ Indeed, if these issues had to wait for an appeal of a judgment before they could be resolved, and they were determined in line with the interpretation of

²⁵ *Ibid.*, para. 20.

²⁶ ICC-01/04-01/07-384.

²⁷ ICTR, *The Prosecutor v. Nzirodera*, “Decision on Joseph Nzirodera’s Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK”, 9 October 2007.

²⁸ ICC-02/04-177.

the Defence, there would be no appropriate remedy at such a late stage of the proceedings. The victims would have had access to all of the confidential information available to the parties throughout the entire trial, and the strategy of the Defence would have been affected as a result. At that point, it would be too late to resolve the problem.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I TO:

Noting article 82(1)(d) of the Statute, rules 155(1) and 132 bis(3) of the Rules of Procedure and Evidence and regulation 65 of the Regulations of the Court;

- **Grant** the Defence leave to appeal the Single Judge's "Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record" (ICC-02/11-01/11-749) issued on 19 January 2015.

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 26 January 2015

At The Hague, the Netherlands