Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-02/11-01/11**
Date: **27 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

Request for the interim suspension of the effects of the Single Judge's decision of 19 January 2015 (ICC-02/11-01/11-749) – authorising the Registry to transmit to the Legal Representative of victims all documents included in the case record as well as rule 77 material not included in the case record – until the Chamber rules on the Defence's application for leave to appeal the decision and, if leave is granted, while appellate proceedings are pending

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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Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

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States' Representatives

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REGISTRY

Registrar
Mr Herman Von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Procedural history

1. On 5 November 2014, the Registry informed the Single Judge by e-mail that several documents filed confidentially had not been notified to the Legal Representative of victims.[1]

2. On 20 November 2014, the Single Judge instructed the Registry "to notify the documents listed below to the LRV [9 documents], unless the Prosecution and the Defence provide reasons for the chosen classification pursuant to Regulation 23 *bis* of the Regulations".[2]

3. On 20 November 2014, the Prosecutor informed the Chamber by e-mail that it had "no objection to the OPCV having access" to the first four documents.

4. On 21 November 2014, the Defence filed observations "[TRANSLATION] on the need to maintain the classification level of some of the documents the Single Judge indicated should be transmitted to the Legal Representative of victims".[3]

5. On 24 November 2014, the Legal Representative of victims filed a response to the Defence observations.[4]

6. On 19 January 2015, the Single Judge issued the "Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record".[5] He instructed the Registry to give the Legal Representative of victims access to the nine documents indicated. In addition he decided that the Legal

[1] ICC-02/11-01/11-683-Conf-AnxA; ICC-02/11-01/11-683-Conf-AnxB; ICC-02/11-01/11-683-Conf-AnxC; ICC-02/11-01/11-694-Conf-AnxA; ICC-02/11-01/11-697-Conf; ICC-02/11-01/11-697-Conf-Anx; ICC-02/11-01/11-707-Conf; ICC-02/11-01/11-709-Conf-Red; ICC-02/11-01/11-710-Conf. See ICC-02/11-01/11-749, para. 2.
[2] ICC-02/11-01/11-724.
[3] ICC-02/11-01/11-725-Conf.
[4] ICC-02/11-01/11-728-Conf.
[5] ICC-02/11-01/11-749.

Representative of victims "shall have access to the confidential record of the case"[6] and should have access to rule 77 material.

7. On 26 January 2015, the Defence filed an application for leave to appeal the Single Judge's decision of 19 January 2015.[7]

II. Discussion

1. The protection of non-public material before the Bench's definitive ruling

1.1 *Applicable law*

8. Article 64(6) of the Statute states that "the **Trial** Chamber may, as necessary: […] (c) Provide for the protection of confidential information; […] (e) Provide for the protection of the accused, witnesses and victims".

9. In accordance with article 64(2) of the Statute, the Court "shall ensure that a **trial** is **fair** and expeditious and is conducted with full respect for the rights of the accused and due regard for the **protection** of victims and **witnesses**".

10. Article 21(3) stipulates that "[t]he application and interpretation of law pursuant to this article must be **consistent with internationally recognized human rights** […]".

1.2 Violation of the notion of effective recourse

11. In its application filed on 26 January 2015 for leave to appeal the Single Judge's decision of 19 January 2015, the Defence opposed the transmission of documents

[6] *Idem*.
[7] ICC-02/11-01/11-752-tENG.

not used by the parties or confidential in nature to third parties, in particular to the Legal Representative of victims.

12. As a result, the transmission of all of these documents to the Legal Representative before the Chamber has ruled on the Defence's application for leave to appeal would be tantamount to invalidating any effect such recourse might have.

13. The right to effective recourse is an internationally recognised human right. It is provided for under article 2(3)(a) of the International Covenant on Civil and Political Rights, article 13 of the European Convention on Human Rights and article 25 of the American Convention on Human Rights.

14. In its judgment in *Mamatkulov v. Turkey*, the European Court of Human Rights recalls that

> The notion of an effective remedy under Article 13 of the Convention requires a remedy capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention.[8]

15. In the same judgment, the ECHR recalls that

> interim measures, as they have consistently been applied in practice […], play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted.[9]

16. Therefore, the right to interim measures – in this case suspension of the effects of the decision to transmit documents to the Legal Representative – guarantees the practical benefit of the rights asserted and, in particular, allows for the accused to truly exercise his or her right to effective recourse.

[8] ECHR, *Mamatkulov v. Turkey*, 4 February 2005, para. 124; ECHR, *Čonka v. Belgium*, 5 February 2002, para. 79.
[9] ECHR, *Mamatkulov v. Turkey*, 4 February 2005, para. 125.

2. The practical consequences of transmitting the documents before a decision is made

17. In the event of disclosure to the Legal Representative of documents that are of a confidential nature (subject to medical confidentiality, respect for privacy, professional privilege, etc.), i.e. documents classified as confidential by the parties and documents not included in the case record and not in eCourt (rule 77 material), before the Chamber has ruled on the Defence's application for leave to appeal or after it has granted the Defence leave to appeal, this would result in a violation of respect for the Accused's privacy with irreversible consequences and, moreover, could threaten witnesses' security if information such as the name or details that could enable Defence witnesses to be located were to be transmitted to the Representative.

3. The need to order interim suspension measures

18. Rule 39 of the ECHR's Rules of Court states

> 1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. 2. […] 3. The Chamber may request information from the parties on any matter connected with the implementation of any **interim measure** it has indicated.

19. The ECHR further recalls in its judgment in *Mamatkulov v. Turkey*: "whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending".[10]

20. The Chamber must take interim measures so that no material is communicated to the Legal Representative other than material communicated to the Legal Representative by the parties at the time of disclosure. Otherwise, the Defence's

[10] ECHR, *Mamatkulov v. Turkey*, 4 February 2005, para. 124.

application of 26 January for leave to appeal would become moot in that the practical consequences of the Single Judge's decision would at that point be irreversible.

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

Noting articles 21 and 64 of the Statute,

- **Order** the interim suspension of the effects of the Single Judge's decision of 19 January 2015 (ICC-02/11-01/11-749) – authorising the Registry to transmit to the Legal Representative all documents included in the case record, including documents which the parties do not intend to use, documents subject to medical confidentiality, documents concerning the privacy of the Accused, documents transmitted to the parties under the express condition that they remain confidential and documents not included in the case record under rule 77 – until the Chamber rules on the Defence's application of 26 January 2015 for leave to appeal the decision and, if leave is granted, while appellate proceedings are pending.

[signed]

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Emmanuel Altit

Lead Council for Laurent Gbagbo

Dated this 27 January 2015

At The Hague, the Netherlands