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**International
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Date: 7 March 2017

THE 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

Confidential

**Response to Mr Gbagbo's Request for Leave to Reply to the Legal Representative
"Response to Mr Gbagbo's document in support of the appeal against the oral
decision of 29 November 2016 (ICC-02/11-01/15-827-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 for Leave to Reply (the “Request”)² to the “Response to Mr Gbagbo’s document in support of the appeal against the oral decision of 29 November 2016” (the “Response”)³ should be rejected because the Defence does not show that said Response raises new arguments which could justify the granting of the leave to reply.⁴

II. Procedural Background

2. On 29 November 2016, the Trial Chamber orally rejected Mr Gbagbo’s Defence request to lift the redactions to the identity and organisation of the intermediary who assisted Witness P-0350 to complete her application form (the “29 November Decision”).⁵

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.

² See the “Demande d’autorisation de répliquer à la ‘Response to Mr Gbagbo’s document in support of the appeal against the oral decision of 29 November 2016’ déposée par la Représentante légale des victimes le 24 février 2017”, No. ICC-02/11-01/15-830-Conf, 2 March 2017 (the “Request”).

³ See the “Response to Mr Gbagbo’s document in support of the appeal against the oral decision of 29 November 2016”, No. ICC-02/11-01/15-827-Conf, 24 February 2017 (the “Response”).

⁴ See the interpretation by the Appeals Chamber in relation to the applicability of regulation 24(5) of the Regulations of the Court in the context of an interlocutory appeal. See the “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” (Appeals Chamber), No. ICC-02/11-01/15-208 OA6, 8 September 2015, para. 26. See also the “Decision on Mr Laurent Gbagbo’s request for leave to reply” (Trial Chamber I), No. ICC-02/11-01/15-284 OA7, 9 October 2015, p. 3 and the most recent “Decision on Mr Ntaganda’s request for leave to reply” (Appeals Chamber), No. ICC-01/04-02/06-1813 OA5, 3 March 2017, para. 6.

⁵ See the transcript of the hearing held on 29 November 2016, No. ICC-02/11-01/15-T-107-CONF-ENG ET (closed session), p. 1, line 14 to p. 2, line 16

3. On 5 December 2016, Mr Gbagbo's Defence sought leave to appeal the 29 November Decision.⁶ The Legal Representative opposed the request.⁷

4. On 2 February 2017, the Trial Chamber granted leave to appeal the 29 November Decision (the "Decision granting Leave to Appeal").⁸

5. On 13 February 2017, Mr Gbagbo's Defence filed the "*Document à l'appui de l'appel interjeté à l'encontre de la décision de la Chambre, rendue oralement le 29 Novembre 2016, refusant à la Défense la levée d'une expurgation apposée par l'Accusation au point 24 de la demande de participation de P-0350*" (the "Appeal").⁹

6. On 24 February 2017, the Legal Representative filed her Response.¹⁰

7. On 2 March 2017, Mr Gbagbo's Defence filed the Request.¹¹

8. Pursuant to regulation 24(2) of the Regulations of the Court, the Legal Representative files her response to the Request.

⁶ See the "Demande d'autorisation d'interjeter appel de la décision de la Chambre rendue oralement le 29 Novembre 2016 refusant à la Défense la levée d'une expurgation apposée par l'Accusation au point 24 de la demande de participation de P-0350", No. ICC-02/11-01/15-768-Conf, 5 December 2016.

⁷ See the "Response to the 'Demande d'autorisation d'interjeter appel de la décision de la Chambre rendue oralement le 29 Novembre 2016 refusant à la Défense la levée d'une expurgation apposée par l'Accusation au point 24 de la demande de participation de P-0350 (ICC-02/11-01/15-768-Conf)'", No. ICC-02/11-01/15-774-Conf, 9 December 2016.

⁸ See the "Decision on the request for leave to appeal the oral decision of 29 November 2016" (Trial Chamber I), No. ICC-02/11-01/15-790-Conf, 2 February 2017 (the "Decision granting Leave to Appeal").

⁹ See the "*Document à l'appui de l'appel interjeté à l'encontre de la décision de la Chambre, rendue oralement le 29 Novembre 2016, refusant à la Défense la levée d'une expurgation apposée par l'Accusation au point 24 de la demande de participation de P-0350*", No. ICC-02/11-01/15-809-Conf, 13 February 2017 (the "Appeal").

¹⁰ See the Response, *supra* note 3.

¹¹ See the Request, *supra* note 2.

III. Confidentiality

9. Pursuant to regulation 23bis(2) of the Regulations of the Court, this response is filed confidentially because it makes reference to submissions filed under the same classification. A public redacted version will be filed in due course.

IV. Submissions

10. The Defence for Mr Gbagbo seeks leave to reply in relation to the Legal Representative submissions to dismiss *in limine* the First, Second and Third grounds of appeal on the basis that said submissions raise new arguments justifying a reply from the Defence.¹²

11. In accordance with the amended regulation 24(5) of the Regulations of the Court: “[u]nless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated”. The practice of the Chambers has clarified that leave to reply can only be granted if the requesting party or participant shows good cause.¹³ Furthermore, in relation to new issues¹⁴ that “could not have been foreseen”¹⁵ by the requesting party or participant, the practice has allowed the filing of a reply only if it could be beneficial for the adjudication of the appeal.¹⁶

¹² See the Request, *supra* note 2, paras. 16 and 25.

¹³ See the “Decision on the Defence’s Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008” (Pre-Trial Chamber III), No. ICC-01/05-01/08-294, 27 November 2008, para. 3. See also the “Decision on the “Prosecution application under regulation 24(5) for leave to reply” (Pre-Trial Chamber II), No. ICC-02/04-01/15-252, 17 June 2015, p. 3.

¹⁴ See the “Public redacted version of “Decision on ‘Defence Request for Leave to Reply to the Prosecution’s Response to ‘Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure’” (Trial Chamber III), No. ICC-01/05-01/08-3165-Red, 11 December 2014, para. 5. See also the “Decision on ‘Request concerning the review of seized material’ and related matters” (Trial Chamber VII), No. ICC-01/05-01/13-893-Red, 9 April 2015, para. 10.

¹⁵ See the “Decision on Mr Laurent Gbagbo’s request for leave to reply” (Appeals Chamber), No. ICC-02/11-01/15-284 OA7, 9 October 2015, para. 11.

¹⁶ See the “Decision on the “Prosecution application under regulation 24(5) for leave to reply”, *supra* note 13, p. 3.

12. Therefore, the Legal Representative submits that the Request should be denied on the ground that it does not demonstrate why the issues identified by the Defence are new and could not have been reasonably anticipated. Indeed, the arguments supporting the request to dismiss *in limine* the First and Second grounds of appeal were already known by and foreseeable to the Defence since they were contained in relevant previous submissions filed by the Legal Representative on the matter. Furthermore, in requesting the dismissal *in limine* of the Third ground of appeal, the Legal Representative did not actually raise any new issue.

13. In particular, in relation to the request to dismiss *in limine* the First and Second grounds of appeal,¹⁷ the Defence argues that it contains new arguments linked to the appealability of an issue under article 82(1)(d) of the Rome Statute and that as such it cannot properly be considered as “*une réponse aux arguments d’appel de la Défense.*”¹⁸

14. In this regard, the Legal Representative underlines that the entirety of the submissions contained in the Response on this specific topic are grounded and make clear reference to the arguments previously developed in her response to Mr Gbagbo’s Defence request for leave to appeal the 29 November Decision.¹⁹ Since the Appeal – with the exception of pages 8 to 13 – is an exact copy of the Defence’s request for leave to appeal said decision,²⁰ the Legal Representative contends that it was reasonable for the Defence to anticipate and foreseen that arguments already contained in her previous submissions were likely to be reiterated.

¹⁷ See the Response, *supra* note 3, paras. 17-19.

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

¹⁹ See the “Response to the ‘Demande d’autorisation d’interjeter appel de la décision de la Chambre rendue oralement le 29 Novembre 2016 refusant à la Défense la levée d’une expurgation apposée par l’Accusation au point 24 de la demande de participation de P-0350 (ICC-02/11-01/15-768-Conf)’”, *supra* note 7, paras. 14-15.

²⁰ In particular, compare the “Demande d’autorisation d’interjeter appel de la décision de la Chambre rendue oralement le 29 Novembre 2016 refusant à la Défense la levée d’une expurgation apposée par l’Accusation au point 24 de la demande de participation de P-0350”, *supra* note 6, paras. 6-17 with the Appeal, *supra* note 6, paras. 9-22.

15. In fact, the arguments on the appealability of an issue, developed in the Legal Representative's response to the Defence's request for leave to appeal the 29 November Decision remain substantially the same in the Response to the Appeal,²¹ save for the requested remedy. In particular, by relying on the same arguments, the Legal Representative does not request the Appeals Chamber to conduct its own assessment of the criteria of article 82(1)(d) of the Rome Statute, but instead to exercise its discretion when ruling on the interlocutory appeal.²²

16. As expressly clarified by the Appeals Chamber, in the context of an interlocutory appeal, the Chamber does not have an obligation to accept the determination of what is an appealable issue,²³ as it may: (i) decide to clarify or amend the "issue";²⁴ (ii) decide to address various issues together;²⁵ or (iii) decide that a certified issue has been rendered moot by a subsequent decision.²⁶

²¹ See the "Response to the 'Demande d'autorisation d'interjeter appel de la décision de la Chambre rendue oralement le 29 Novembre 2016 refusant à la Défense la levée d'une expurgation apposée par l'Accusation au point 24 de la demande de participation de P-0350 (ICC-02/11-01/15-768-Conf)'" , *supra* note 7, paras. 14-15; and the Response, *supra* note 3, paras. 17-19.

²² See the Response, *supra* note 3, para. 20.

²³ See the "Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06,a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber III" (Appeals Chamber), No. ICC-02/04-179 OA, 23 February 2009 and the dissenting opinion of Judge Pikis, paras. 8-9. See also the "Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008" (Appeals Chamber), No. ICC-01/04-01/06-1433, 11 July 2008, para. 11 and the dissenting opinion of Judge Song.

²⁴ See, *inter alia*, the "Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" (Appeals Chamber), No. ICC-01/04-01/07-476, 13 May 2008, para. 46. See also the "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial" (Appeals Chamber), No. ICC-01/04-01/07-2288, 16 July 2010, paras 56-57, 88-90. See also the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)" (Appeals Chamber), No. ICC-02/11-01/15-744 OA8, 1 November 2016, para. 13.

²⁵ E.g. See the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence" (Appeals Chamber), No. ICC-01/09-02/11-365, 10 November 2011, para. 44.

²⁶ See the "Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I" (Appeals Chamber), No. ICC-01/04-01/07-776, 26 November 2008, para. 11.

17. Contrary to the Defence arguments,²⁷ the Appeals Chamber's limited discretion does not run against the principle that it is for the Pre-Trial or Trial Chamber to certify the extent of the appealability of a decision.²⁸ While the Appeals Chamber enjoys a limited discretion in the context of appeals under article 82(1)(d) of the Rome Statute, the same does not apply to the parties – which are instead strictly bound to develop their grounds of appeal within the scope of the issues as certified by the Pre-Trial or Trial Chamber.²⁹

18. The Defence arguments supporting its Request in relation to the Third ground of appeal are also inapposite. Contrary to the Defence contentions,³⁰ the Legal Representative's request to dismiss *in limine* aspects of the appeal that fall outside of the scope of the certified issues does not include the development of new arguments. In fact, in the Response, the Legal Representative merely referred to the relevant jurisprudence,³¹ also recalled by the Defence in the Request,³² according to which "*it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent*".³³

²⁷ See the Request, *supra* note 2, para. 17.

²⁸ See, *inter alia*, the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'" (Appeals Chamber), No. ICC-02/11-01/11-572 OA5, 16 December 2013, paras. 63-64.

²⁹ See, *inter alia*, the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or alternatively to Stay Proceedings Pending Further Consultation with the WVU'" (Appeals Chamber), No. ICC-01/04-01/06-2582 OA 18, 8 October 2010, para. 45. See also the "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber 11" (Appeals Chamber), No. ICC-02/04-179 OA, 23 February 2009 and No. ICC-02/04-01/05 OA2, para. 32.

³⁰ See the Request, *supra* note 2, para. 25.

³¹ See the Response, *supra* note 3, para. 21.

³² *Idem*, para. 17.

³³ See the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'", *supra* note 28, paras. 63-64. See also the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of

19. Consequently, the Legal Representative noted that in its decision granting leave to appeal, the Trial Chamber considered the third issue as subsumed in the first one in so far as it related to the alleged error of law of requesting the Defence to justify the lifting of the redaction.³⁴ In particular, the Trial Chamber explained that it *“deemed that it is for the party asking the lifting of the redaction to demonstrate there were grounds to suspect possible malfeasance on the part of the intermediary”*.³⁵

20. Accordingly, the Trial Chamber decided to consider the third issue as overlapping with the first one related to the burden of proof on the parties and participants in requesting or opposing the lifting of redactions. By so doing, the Trial Chamber left outside of the scope of the appeal any aspects related to an alleged error of fact in the assessment of whether the identity of the intermediary had become a “live issue”.

21. In conclusion, the Legal Representative submits that the Response does not raise new arguments and that the Defence has failed to establish good cause for the filing of a reply. Moreover, in this particular case, the issues arising in the Appeal have been previously litigated at length before the Trial Chamber. Accordingly, the Legal Representative further contends that the submissions by the Defence in reply would be unnecessary for the adjudication of the Appeal.

9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, *supra* note 24, para. 13.

³⁴ See the Decision granting Leave to Appeal, *supra* note 8, para. 7.

³⁵ *Idem*.

V. Conclusion

22. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to reject the Request.

It is hereby certified that this document contains a total of 2,986 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.³⁶



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Principal Counsel

Dated this 7th day of March 2017

At The Hague, The Netherlands

³⁶ This statement (30 words), not itself included in the word count, follows the Appeals Chamber's direction. See No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 32. The Legal Representative notes that the Defence did not include a similar statement its Request.