

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: *English*

No: *ICC-02/11-01/15*

Date: **08 April 2015**

TRIAL CHAMBER I

Before:

**Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Bertram Schmitt**

SITUATION IN COTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE

Public

Defence request for leave to appeal the “Decision on Defence requests for clarification of that portion of the Joinder Decision relating to review of the Gbagbo and Blé Goudé case records, and extension of time to conduct its review (ICC-02/11-01/15-14)”

Source: Defence of Mr Charles Blé Goudé

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

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Other

I. Procedural history

1. On 11 June 2014, Pre-Trial Chamber I issued a “Decision on victims’ participation in the pre-trial proceedings and related issues” (“the Decision on victims’ participation”).¹
2. On 11 December 2014, Pre-Trial Chamber I confirmed the charges against Mr. Blé Goudé² while on 20 December 2014, the Presidency referred the case to the Chamber.³
3. On 22 December 2014, the Prosecutor requested the Chamber to join the *Gbagbo* and the *Blé Goudé* cases.⁴
4. In the *Gbagbo* case, the Single Judge issued, on 19 January 2015, the “Decision on the Legal Representative of Victims’ access to certain confidential filings and to the case record”.⁵
5. On 26 January 2015, the Defence team of Mr. Gbagbo filed a request seeking leave to appeal the above mentioned decision issued on 19 January 2015.
6. On 11 March 2015, Trial Chamber I (“the Chamber”) issued two decisions: (i) 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” (“the Decision on the

¹ Pre-Trial Chamber I, Decision on victims’ participation in the pre-trial proceedings and related issues, 11 June 2014, ICC-02/11-02/11-83.

² Pre-Trial Chamber I, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, ICC-02/11-02/11-186. See also Partly Dissenting Opinion of Judge Christine Van den Wyngaert, ICC-02/11-02/11-186-Anx.

³ Corrigendum to the “Decision referring the case of *The Prosecutor v. Charles Blé Goudé* to Trial Chamber I”, ICC-02/11-02/11-193, 20 December 2014 (registered on 22 December 2014), 20 December 2014, ICC-02/1102/11-193-Corr.

⁴ ICC-02/11-02/11-194.

⁵ Trial Chamber I, Single Judge, Decision on the Legal Representative of Victims’ access to certain confidential filings and to the case record, 19 January 2015, ICC-02/11-01/11-749.

Gbagbo case record”),⁶ and (ii) the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” (“the Joinder Decision”).⁷

7. On 16 March 2015, the Defence team of Charles Blé Goudé (“the Defence”) filed a request for leave to appeal the Joinder Decision⁸ which is still pending before the Chamber.
8. On 27 March 2015, the Defence of Mr. Gbagbo filed a Request for clarification related to the Joinder Decision and, depending upon the clarification given, sought an extension of the 7 April above mentioned deadline by three weeks (“the Request for clarification”).⁹
9. On 2 April 2015, the Defence joined the Request for clarification submitted by the Defence of Mr. Gbagbo.¹⁰
10. On the same day, by email sent to the parties and participants, the Chamber issued the “Decision on Defence requests for clarification of that portion of the Joinder Decision relating to review of the *Gbagbo* and *Blé Goudé* case records, and extension of time to conduct its review (ICC-02/11-01/15-14)” (“the

⁶ Trial Chamber I, 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 to it, 11 March 2015, ICC-02/11-01/11-809.

⁷ Trial Chamber I, Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters, 11 March 2015, ICC-02/11-02/11-222, ICC-02/11-01/11-810 and ICC-02/11-01/15-1.

⁸ Defence Request for Leave to Appeal the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters”, 16 March 2015, ICC-02/11-01/15-5.

⁹ Demande aux fins de clarification de la “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” rendue par la Chambre de premiere instance I le 11 mars 2015 (ICC-02/11-01/11-810), 27 March 2015, ICC-02/11-01/15-14, para. 25-26.

¹⁰ Defence response to the “Demande aux fins de clarification de la “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” rendue par la Chambre de premiere instance I le 11 mars 2015 (ICC-02/11-01/11-810)” and Request for clarification of the same decision, 2 April 2015, ICC-02/11-01/15-20.

Decision on clarification”),¹¹ by which it granted the requested three-week extension of time but denied all other requests stating that “[the] Chamber will provide reasons for this decision in due course.”

II. Preliminary Observation

11. The Decision on clarification has been notified by email, on 2 April 2015, without the reasoning supporting it but with that “[t]he Chamber will provide reasons for this decision in due course”.¹²

12. Taking into account the fact that a request for leave to appeal should be based on the decision for which appeal is sought, it is unclear for the Defence to evaluate whether the deadline for leave to appeal should run from the day the decision per email has been issued or from the day the reasoned decision has been – or will be – issued. The Appeals Chamber has already hold and emphasized the importance given to the reasons supporting a decision from which leave to appeal is sought. In the *Lubanga* case,¹³ referring to the case law of the International Criminal for the former-Yugoslavia (“the ICTY”) and of the European Court of Human Rights (“the ECoHR”),¹⁴ it ruled that:

“In paragraph 11 of its “Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic’s Provisional Release” of 1 November 2005 in the case of Prosecutor v. Milutinovic et al. (Case No. IT-05-87-AR65.1), the Appeals Chamber of the ICTY held that “as a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to

¹¹ Trial Chamber I, Decision on Defence requests for clarification of that portion of the Joinder Decision relating to review of the *Gbagbo* and *Blé Goudé* case records, and extension of time to conduct its review (ICC-02/11-01/15-14), email sent by Trial Chamber I to the parties and participants on 2 April 2015, 4:10 pm.

¹² *Ibid.*

¹³ Appeals Chamber, Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, ICC-01/04-01/06 (OA5).

¹⁴ ECoHR, *Hadjianastassiou v. Greece*, 16 December 1992, 12945/87, para. 32.

its decision". Although in the present case the right of the appellant to appeal the Impugned Decision was conditional on the granting of leave by the Pre-Trial Chamber pursuant to article 82(1) of the Statute and rule 155(1) of the Rules of Procedure and Evidence, the analysis by the European Court of Human Rights and by the Appeals Chamber of the ICTY in the cases referred to above applies with similar force to the case at hand."¹⁵

13. Given this uncertainty on the deadline as well as on the reasoning supporting the Decision on clarification, the Defence respectfully requests the Chamber to clarify the deadline and to be granted the authorization to file an addendum to the present request for leave to appeal if it appears that the deadline to seek leave to appeal ought to run from the day of the reasoned decision. In the event the deadline would run from the date of the decision notification by email, the Defence respectfully requests the Chamber to consider the present request for leave to appeal.

14. In regards to this very issue, the ICTY ruled that "the deadline for filing a motion for certification to appeal the decision would run from the date the reasons for the decision were filed."¹⁶

III. Submissions

15. On 11 March 2015, the Chamber issued the Decision on the Gbagbo case record¹⁷ in which it stated and reiterated that:

"Further, on 20 November 2014, in its 'Order on the notification of confidential filings to the Legal Representative of victims' ('Order of 20 November 2014)', the Single Judge reiterated that the LRV shall have access to all confidential documents filed in

¹⁵ *Ibid.*, para. 20.

¹⁶ ICTY, Trial Chamber I, Decision on Defence motion for variation of time limit for motion for certification to appeal decision denying protective measures, 11 December 2014, IT-09-92-T, D85322-D85317, para. 1, referring to T. 24876-24877.

¹⁷ ICC-02/11-01/11-809.

the record of the case before this Chamber, namely filings, transcripts and material, both public and confidential. Beyond the specific documents addressed in the Impugned Decision, **the Single Judge clarifies that the Decision does not give the LRV access to any other previously filed documents.**"¹⁸

16. However, it results from the Joinder Decision¹⁹ and the Decision on clarification²⁰ that:

"the Chamber considers that there is good cause to extend by three weeks, to 28 April 2015, the deadline for the parties, LRV and Registry to indicate any objection, and the reasons therefore, to any party or participant (including the Legal Representative of Victims) being granted access to any 'confidential', 'confidential, ex parte', and 'under seal' material on the Gbagbo and Blé Goudé pre-trial and trial case records, as ordered in paragraph 73 of Decision ICC-02/11-01/15-1."²¹

17. Thus, the Defence is facing a situation in which the Chamber seems to have adopted two different, inconsistent and irreconcilable decisions on the same day. Both decisions have binding legal effect but their solutions regarding the Legal Representative of Victims ("the LRV")'s access to confidential materials are contradictory and may not be reconciled. In other words, they exclude one another.

18. The Defence of Mr. Blé Goudé hereby respectfully requests from the Chamber to be granted leave to appeal the Decision on clarification, pursuant to article 82(1)(d) of the Rome Statute ("the Statute") and rule 155 of the Rules of Procedure and Evidence ("the R.P.E.").

19. The Decision on clarification raises pertinent questions, which go beyond simple disagreement or differences of opinion, but constitute issues that meet the criteria set forth in article 82(1)(d) of the Statute and, as such, deserve to be

¹⁸ Ibid., para. 18. Emphasis added.

¹⁹ ICC-02/11-02/11-222, ICC-02/11-01/11-810 and ICC-02/11-01/15-1.

²⁰ Email sent by Trial Chamber I to the parties and participants on 2 April 2015, 4:10 pm.

²¹ Emphasis added.

ruled on by the Appeals Chamber, in order to allow each trial to be conducted within the scope of fairness and without causing serious and irreparable prejudice to both Accused. The Decision on clarification has provided an interpretation of the Joinder Decision which has made the latter inconsistent with the Decision on the *Gbagbo* case record. However, given that both decisions have been issued on the same day, it is impossible to consider that one reverses or supersedes the other.

20. Although the Decision on the *Gbagbo* case record concerns the Defence team of Mr. Gbagbo, it entails considerable consequences for the Defence, in the context of the joinder. The inconsistency between both decisions – when read correctly by the Defence – directly impacts the Defence of Mr. Blé Goudé as it introduced a potential difference of access to confidential materials for the participants in both cases.

21. Besides, the mere existence of two contradictory decisions in both cases is sufficient to raise an issue within the parameters of the Appeals Chamber jurisprudence and thus to request the Appeals Chamber to rule the matters at stake.

IV. Applicable law

22. Article 82(1) of the Statute provides that:

“Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial Chamber or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

23. Pursuant to rule 155(1) of the R.P.E.:

“When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall [...] make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.”

24. Regulation 65 of the Regulations of the Court further provides that:

“1. An application for leave to appeal under rule 155 shall [...] specify the legal and/or factual reasons in support thereof. [...]

2. An application for leave to appeal under article 82, paragraph 1 (d), shall specify the reasons warranting immediate resolution by the Appeals chamber of the matter of the issue.”

V. Analysis

25. Article 82(1)(a), (b) and (c) of the Statute provides a list of decisions that may be appealed whereas paragraph (d), as a residual provision, sets forth the legal criteria a decision must meet in order for the parties to seek leave to appeal.

26. The Defence hereby submits that the Decision on clarification issued by the Chamber on 2 April 2015 meets all the following legal criteria which appear in the structure and content of article 82(1)(d): either party may appeal a decision that involves an issue (V.1.), which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial (V.2.), and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings (V.3.). Therefore, the Defence submits the following issue may be appealed.

V.1. The Decision on clarification raises an essential *appealable* issue related to the existence of two conflicting decisions issued on the same day.

27. In a founding decision of 13 July 2006,²² the Appeals Chamber delivered a definition of the “issue” according to article 82(1)(d):

“An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination, i.e. not merely a question over which there is a disagreement or conflicting opinion.”²³

28. In the present case, the Decision on clarification raises the following appealable issue: whether the Chamber erred in its ruling regarding the scope of the participants’ access to the *Gbagbo* and *Blé Goudé* case records when it found that the participants shall be granted access to every confidential document filed in the *Gbagbo* and the *Blé Goudé* pre-trial and trial case records whereas, on the same day, it also seems to have found that the participants shall not have access to any confidential document filed in the *Gbagbo* pre-trial case record.

29. It appears that on 11 March 2015, despite the Joinder Decision, the Chamber issued the Decision on the *Gbagbo* case record which specifically applies to the *Gbagbo* case. According to this decision, the LRV shall not have access to the *Gbagbo* pre-trial case record.²⁴ The Decision on the *Gbagbo* case record seems conflicting with the Joinder Decision, which leads to legal uncertainty.

30. Indeed, these apparent conflicting decisions seem to create two alternative legal schemes. In the first scheme, as determined by the Joinder Decision²⁵ and

²² Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, ICC-01/04-168, para. 9-13.

²³ *Ibid.*, para 9.

²⁴ ICC-02/11-01/11-809, para. 18.

²⁵ ICC-02/11-02/11-222, ICC-02/11-01/11-810 and ICC-02/11-01/15-1.

the Decision on clarification,²⁶ the LRV has an unlimited and unconditional access to the *Gbagbo* and *Blé Goudé* case records. On the other hand, according to the second scheme, the LRV has an unlimited and unconditional access to the *Blé Goudé* case record whereas, in the *Gbagbo* case, it only has access to every document filed before the Chamber, i.e. the Trial Chamber.

31. Moreover, the Defence would like to respectfully recall that, in its response to the Request for clarification, filed on 2 April 2015,²⁷ a sound reference was made to the Status Conference of 13 February 2015 during which the Chamber stated that:

“The Chamber is also aware of the approach of the Pre-Trial Chamber I as set out in its decision 83. However, in case of filing of confidential documents, the Chamber instructs the parties and participants that from today they should always notify the parties and participants, including the legal representative of victims of their filings.”²⁸

32. The statement was clear concerning the date from which the parties and participants, included the LRV, had to be notified of confidential filings. This oral decision seemed to be aligned with the Decision on the *Gbagbo* case record issued on 11 March 2015. Both decisions shared the same restriction according to which the victims could not have access to the confidential materials filed before the Pre-Trial Chamber, also known as the confidential materials of the pre-trial case records.

V.2. The resolution of the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

²⁶ Email sent by Trial Chamber I to the parties and participants on 2 April 2015, 4:10 pm.

²⁷ ICC-02/11-01/15-20.

²⁸ ICC-02/11-02/11-T-9-CONF-ENG ET 13-02-2015 6/75 NB T, p.6, line 3-8. Emphasis added.

33. To summarize the present situation, on 11 March 2015, the Chamber seems to have issued two inconsistent decisions: one restricting the LRV's access to the confidential materials filed before the Chamber, with the explicit and unambiguous precision that "the Decision does not give the LRV access to any other previously filed documents",²⁹ and the other which seems to grant the LRV's full access to the pre-trial and trial case records. By doing so, the Chamber created two alternative and inconsistent legal schemes – or timelines.

34. This situation where two different and exclusive legal schemes coexist entails tremendous consequences for the Defence. First, as both decisions were issued on the same day, it is not possible to consider that one would supersede the other. They provide conflicting and irreconcilable solutions but there is no guidance as to articulating them. Second, if both decisions were to be upheld, it would mean that, in spite of the joinder of cases ordered by the Chamber, the *Gbagbo* case would be governed by different rules with regard to the LRV's access to confidential materials. Such a situation would constitute a breach of the right to a fair trial as guaranteed by article 67(1) of the Statute.

35. In any event, the fact that, on the same day, the Chamber issued two decisions stating two inconsistent and contradictory schemes regarding the LRV's access to confidential documents, has created a situation of legal uncertainty which appears, as regards Mr. Blé Goudé, to be in violation of the fairness of the proceedings as guaranteed by article 67(1) of the Statute and article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

²⁹ ICC-02/11-01/11-809, para. 18.

V.3. The issue requires an immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

36. The Defence submits that an immediate resolution of the issues raised in this request will materially advance the proceedings.

37. The Defence draws the Chamber's attention to the definition given by the Appeals Chamber of the terms "immediate" which means avoiding errors by referring the issue to the Appeals Chamber; "advance" which means to move forward by ensuring that the proceedings follow the right course; and "proceedings" which means the proceedings in their entirety.³⁰ In this regard, the Appeals Chamber stated that:

"A wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances the proceedings will not be advanced but on the contrary they will be set back."³¹

38. The conflict arising from the Chamber's decisions, if not resolved immediately by the Appeals Chamber, in light of the issue explained above, will result in serious and irreversible prejudice and the breach of the right to fair trial against Mr. Charles Blé Goudé. Indeed, the coexistence of the conflicting decisions will lead to an unjustified difference of legal treatment between both Accused, which constitutes a material breach of their right to a fair trial. Given the fact that the Decision of the *Gbagbo* case record has been issued in the *Gbagbo* case only, this breach of the right to a fair trial would unduly affect Mr. Blé Goudé in light of the Joinder Decision.

39. On 2 April 2015, in the Decision on clarification, the Chamber extended by three weeks, to 28 April 2015, the deadline for the parties and participants to

³⁰ ICC-01/04-168, para. 14-19.

³¹ *Ibid.*, para. 16.

indicate any objection to any party or participant being granted access to confidential materials.³² Given the time granted to the Defence to raise such objections, an immediate resolution of the issue at stake by the Appeals Chamber is necessary to materially advance the proceedings. Indeed, the Defence finds itself in a need to receive the same legal treatment as the Defence of Mr. Gbagbo regarding the LRV's participation to the proceedings. As the request for leave to appeal, the Joinder Decision is still pending before the Chamber, and also if such request were to be rejected, such a significant difference of treatment between both Accused, which results in a situation of legal uncertainty is not justified.

40. For the foregoing reasons, the Defence submits that the immediate resolution of this issue by the Appeals Chamber is necessary to materially advance the proceedings.

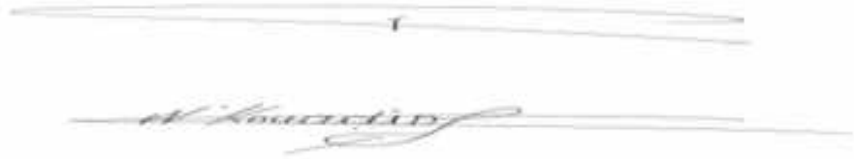
RELIEF SOUGHT

- For the foregoing reasons, the Defence respectfully requests the honourable Trial Chamber to **clarify** whether the deadline for seeking leave to appeal run from the day the Decision on clarification has been notified to the parties and participants – i.e. 2 April 2015 – by email or from the day the reasoning supporting this decision has been served to the parties and participants;
- In the event the honourable Trial Chamber finds that the deadline for seeking leave to appeal runs from the day the reasoning supporting the Decision on clarification has been served to the parties and participants, the Defence respectfully requests **to be granted authorization to file an**

³² Email sent by Trial Chamber I to the parties and participants on 2 April 2015, 4:10 pm.

addendum to the present request for leave to appeal, addressing the contents of the reasoned decision;

- In the alternative, if the honourable Trial Chamber was to find that the deadline for seeking leave to appeal runs from the day the Decision on clarification has been served to the parties and participants by email, the Defence respectfully requests the honourable Trial Chamber **to grant leave to appeal** the Chamber's "Decision on Defence requests for clarification of that portion of the Joinder Decision relating to review of the *Gbagbo* and *Blé Goudé* case records, and extension of time to conduct its review (ICC-02/11-01/15-14)", based upon the current filing.

A handwritten signature in dark ink, appearing to read 'Mr. Knoop', is centered within a rectangular box. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Mr. Knoop, Lead Counsel and Mr. N'Dry, Co-Counsel

Dated this 8 April 2015.

At The Hague, the Netherlands