

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/11-01/11

Date: 11 March 2015

**TRIAL CHAMBER I**

**Before: Judge Geoffrey Henderson, Single Judge**

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

**Public**

**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.**

Decision 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

**Legal Representatives of Victims**

Ms Paolina Massidda

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**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**

**Victims Participation and Reparations  
Section**

**Others**

**Judge Geoffrey Henderson**, acting as Single Judge on behalf of Trial Chamber I (respectively, 'Single Judge' and 'Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Laurent Gbagbo*, having regard to Articles 64(3)(a) and 82(1)(d) of the Rome Statute ('Statute') and Regulation 23 *bis* of the Regulations of the Court ('Regulations') issues the following "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".

### **I. Procedural history**

1. On 19 January 2015, the Single Judge issued a decision ('Impugned Decision' or 'Decision') in which it, *inter alia*, granted access to the confidential record of the case, as well to documents disclosed pursuant to Article 67(2) of the Statute and Rule 77 of the Rules to the Legal Representative of Victims ('LRV').<sup>1</sup>
2. On 26 January 2015, the defence team for Mr Gbagbo ('Defence') filed a request seeking leave to appeal the Impugned Decision ('Request Seeking Leave to Appeal' or 'Application').<sup>2</sup>
3. On 27 January 2015, the Defence filed a request seeking suspensive effect of the Impugned Decision pending the ruling on the Request Seeking Leave to Appeal and, if granted, during the proceedings to be held before the Appeals Chamber ('Request for Suspensive Effect').<sup>3</sup>

---

<sup>1</sup> 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.

<sup>2</sup> *Demande d'autorisation d'interjeter appel de la décision du Juge Unique* « on the Legal Representative of Victims' access to certain confidential filings and to the case record » (ICC-02/11-01/11-749) rendue le 19 Janvier 2015, 26 January 2015, ICC-02/11-01/11-752.

<sup>3</sup> *Requête en suspension, à titre conservatoire, des effets de la décision du Juge unique du 19 janvier 2015* (ICC-02/11-01/11-749) autorisant le Greffe à transmettre au Représentant légal des victimes l'ensemble des documents portés au dossier de l'affaire ainsi que les documents Règle 77 non portés au dossier de l'affaire, le temps que la Chambre se prononce sur la demande d'autorisation d'interjeter appel de cette décision formulée

4. On 28 January 2015, the LRV responded to the Request for Suspensive Effect, arguing that it should be rejected ('LRV Response to the Request for Suspensive Effect').<sup>4</sup>
5. On 30 January 2015, the Office of the Prosecutor ('Prosecution') responded to the Request Seeking Leave to Appeal and to the Request for Suspensive Effect, arguing that both should be dismissed ('Prosecution Response').<sup>5</sup>
6. On 30 January 2015, the LRV also responded to the Request Seeking Leave to Appeal averring that it should be rejected ('LRV Response').<sup>6</sup>
7. On 2 February 2015, the Single Judge indicated to the parties and participants that the Request for Suspensive Effect had been rejected, and that a formal decision would follow in due course.<sup>7</sup>

## II. Applicable Law

8. Article 82(1)(d) of the Statute sets the requirements applicable to grant a request for leave to appeal, as follows:

A. whether the decision involves an issue that would significantly affect:

- i. the fair and expeditious conduct of proceedings; or
- ii. the outcome of the trial; and

---

*par la Défense et, en cas d'autorisation, le temps de le procédure d'appel, 27 January 2015, ICC-02/11-01/11-753.*

<sup>4</sup> Réponse de la Représentante légale commun à la « *Requête en suspension, à titre conservatoire, des effets de la décision du Juge unique du 19 janvier 2015 (ICC-02/11-01/11-749) autorisant le Greffe à transmettre au Représentant légal des victimes l'ensemble des documents portés au dossier de l'affaire ainsi que les documents Règle 77 non portés au dossier de l'affaire, le temps que la Chambre se prononce sur la demande d'autorisation d'interjeter appel de cette décision formulée par la Défense et, en cas d'autorisation, le temps de le procédure d'appel* », dated 27 January and notified on 28 January 2015, ICC-02/11-01/11-754.

<sup>5</sup> Prosecution's consolidated response to the Defence Request for Leave to Appeal the "Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record" and to the Defence Request "*en suspension, à titre conservatoire, des effets de la décision du Juge unique du 19 Janvier 2015 (ICC-02/11-01/11-749)*", 30 January 2015, ICC-02/11-01/11-755.

<sup>6</sup> Response to the "*Demande d'autorisation d'interjeter appel de la décision du Juge unique « on the Legal Representative of Victims' access to certain confidential filings and to the case record »(ICC-02/11-01/11-749) rendue le 19 Janvier 2015*", 30 January 2015, ICC-02/11-01/11-756.

<sup>7</sup> Email communication from Legal Officer of the Trial Chamber on 2 February 2015 at 12:12.

B. whether in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

9. The Single Judge recalls that, for the purpose of the first prong of the test the Appeals Chamber has defined an 'issue' as 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.<sup>8</sup>

10. The Single Judge further notes that no automatic right of appeal is conferred by Article 82(1)(d) of the Statute. A right of appeal will arise only if, in the Chamber's opinion, the impugned decision 'must receive the immediate attention of the Appeals Chamber'.<sup>9</sup>

### III. Submissions and Analysis

11. As a preliminary matter, the Defence submits that the Request Seeking Leave to Appeal should be ruled upon by the full Chamber instead of the Single Judge. It argues that the issue at stake, namely whether participants may access all documents exchanged by the parties, will have very important consequences on the fairness of the proceedings and that, therefore, the decision should be issued by the Chamber in its full composition.<sup>10</sup>

12. In this regard, the Single Judge has considered Rule 132 *bis*(3) of the Rules, which provides the Single Judge with discretion over whether certain decisions shall be issued by the full Chamber instead of the Single Judge. Specifically, the Rule states that '[T]he Judge *may* [...] if appropriate, at the request of a party, refer specific issues to the Trial Chamber for its decision'.

---

<sup>8</sup> *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 ('Appeals Chamber Judgment'), para. 9.

<sup>9</sup> Appeals Chamber Judgment, ICC-01/04-168, para. 20.

<sup>10</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, paras 1-2 and 4.

The Single Judge wishes to emphasise that, as opposed to what appears to be suggested by the Defence in the Application,<sup>11</sup> requests seeking leave to appeal of decisions issued by the Single Judge do not automatically necessitate a ruling by the full Chamber. In the present circumstances, and considering that Single Judge decisions must be rendered in any event 'in consultation with the Trial Chamber' under Rule 132 *bis*(2) of the Rules, the Single Judge does not consider there to be compelling reasons to rule upon the present Application by the full Chamber.

13. As to the Impugned Decision itself, the Defence seeks leave to appeal the following eight issues which, it states, arise from the Decision. It considers that the Decision:

- (i) Should have been issued by the Chamber in its full composition ('First Issue');
- (ii) Should not have granted the LRV access to all confidential documents where the Rules explicitly foresee that such access is limited by the Rules ('Second Issue');
- (iii) Should not have granted the LRV access to documents disclosed pursuant to Rule 77 of the Rules without any legal basis ('Third Issue');
- (iv) Should not have granted the LRV access to documents without having assessed that victims' personal interests are affected ('Fourth Issue');
- (v) Should not have artificially distinguished the LRV from participating victims themselves ('Fifth Issue');

---

<sup>11</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, para. 3.

- (vi) Should not have created an artificial distinction between the LRV and other victims' representatives ('Sixth Issue');
- (vii) Violates the letter and the spirit of the Statute in so far as it abolishes the differences between the parties and treats the LRV as a 'quasi-party' ('Seventh Issue'); and
- (viii) Without sufficient consideration and the express consent of Laurent Gbagbo ('the Accused') unduly grants access to documents covered by medical secrecy and privacy ('First Limb of the Eighth Issue') and should not have ordered the notification to the LRV of document ICC-02/11-01/11-697-Conf ('Second Limb of the Eighth Issue') ('collectively 'Eight Issue').

14. The Single Judge observes that the Defence raises a large number of issues, variously substantiated and sometimes overlapping with each other. Consequently, the Single Judge has grouped the Issues into three categories, namely: i) whether the Single Judge erred in granting access to the LRV to the confidential record of the case (Second Issue and Eighth Issue); ii) whether the Single Judge erred in granting the LRV access to documents disclosed pursuant to Rule 77 of the Rules (Third Issue); and iii) whether the Single Judge misconceived the status of the LRV (Fourth Issue, Fifth Issue, Sixth Issue and Seventh Issue). The First Issue, namely whether the Decision should have been issued by the Chamber in its full composition instead of the Single Judge, will be dealt with separately.

15. The Single Judge observes that the Defence has not made specific submissions as to why the eight abovementioned Issues affect the fairness and expeditiousness or the outcome of the proceedings and why their immediate resolution may materially advance the proceedings, as required by Article 82(1)(d) of the Statute. It states in general that if not resolved the

Issues identified will affect the fairness and the expeditiousness of the proceedings as they will: i) force the Defence to dedicate resources to prove that the victims' personal interests are not affected and that the LRV should therefore not access certain documents;<sup>12</sup> ii) enable the LRV to develop its own strategies based on the documents it will have access to;<sup>13</sup> and iii) lead to an increased number of requests from the LRV – and in turn from the Prosecution and the Defence – due to the fact that the LRV no longer needs to establish that victims' personal interests are affected.<sup>14</sup> Further, the Defence submits that the immediate resolution of the Issues is necessary to materially advance the proceedings, as there is no coherent approach among the Chambers in relation to access to confidential documents for legal representatives of victims. It finally contends that the Request Seeking Leave to Appeal should be granted as, assuming the Decision was overturned, the Appeals Chamber would be in a position to provide the appropriate remedy at an early stage; if, however, the Appeals Chamber's first review of these issues comes on a potential appeal of the final judgment, an appropriate remedy would be impossible as irreparable harm will have been suffered.<sup>15</sup>

16. The Prosecution argues that the Application fails to meet the Article 82(1)(d) criteria, averring that none of the eight Issues would have an impact on the fairness of the proceedings. The Prosecution submits that the Defence has misread the Decision, leading it to incorrectly claim that fairness would be affected. The Prosecution further submits that the Decision actually provides safeguards to the LRV's access by providing the parties with the opportunity to not disclose certain information to the LRV if appropriate, by classifying filings confidential and *ex parte*.<sup>16</sup> Further, the Prosecution contests the

---

<sup>12</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, paras 48-49.

<sup>13</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, para. 50.

<sup>14</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, paras 51-53.

<sup>15</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, paras 54-57.

<sup>16</sup> Prosecution Response, ICC-02/11-01/11-755, paras 38-42.



Defence's assertion that, if not resolved, the issues would impact on the expeditiousness of the proceedings because of an increased volume of requests from the LRV, arguing it to be speculative.<sup>17</sup> Finally, the Prosecution submits that the Defence's argument that the Appeals Chamber should rule upon the Issues in order to harmonise the Chambers' approaches is based on a misreading of the Impugned Decision and on a misunderstanding of the Appeals Chamber's role.<sup>18</sup>

17. The LRV argues that none of the eight Issues meet the criteria set out in Article 82(1)(d) of the Statute and that some of them arise from past decisions. Even assuming that some of the Issues identified by the Defence would indeed qualify as 'issues' in the sense of Article 82(1)(d), the LRV opines that none of them significantly affects the fairness and expeditiousness of the proceedings or the outcome of the trial and, therefore, their immediate resolution would not materially advance the proceedings.<sup>19</sup>

18. Before turning to the analysis of the issues raised, the Single Judge recalls that on 4 November 2014, during the first status conference, the Chamber directed the parties and the LRV to, from that date, always notify the parties and participants of their confidential filings. The Single Judge added that where the party or participant filing the document had a reason not to do so, it should indicate, pursuant to Regulation 23 *bis* of the Regulations, the status of the filings as 'confidential and *ex parte*' and the reason for said classification in the filing itself to enable the Chamber to make its ultimate decision ('Instruction').<sup>20</sup> 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

<sup>17</sup> Prosecution Response, ICC-02/11-01/11-755, para. 40.

<sup>18</sup> Prosecution Response, ICC-02/11-01/11-755, para. 41.

<sup>19</sup> LRV Response, ICC-02/11-01/11-756, paras 20-22.

<sup>20</sup> Transcript of hearing dated 4 November 2014, ICC-02/11-01/11-T-25-CONF-ENG CT, page 4 line 22 to page 5 line 7.

have access to all confidential documents filed in the record of the case before this Chamber,<sup>21</sup> 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.

19. Hence, with regard to the LRV access to the confidential record of the case, the Impugned Decision merely restated the Instruction and provided reasons for it. Additionally, the Decision stated that the LRV shall also have access to disclosed documents falling under the ambit of Rule 77 of the Rules and Article 67(2) of the Statute, both public and confidential.<sup>22</sup>

**1) Whether the Impugned Decision should have been issued by the full Chamber (First Issue)**

20. The Single Judge is not persuaded that the matter raised in the First Issue constitutes an appealable issue. An appeal lies where the issue to be determined is a subject the resolution of which would be essential for the determination of the matter at stake in the Impugned Decision.<sup>23</sup> In this regard, Rule 132 bis(1) of the Rules authorises the designation of one or more members of a trial chamber to conduct proceedings for the purposes of ensuring the preparation of the trial. Rule 132 bis(2) of the Rules provides that the Single Judge shall act 'in consultation with the Trial Chamber' and Rule 132 bis(3) of the Rules sets out that '[a] Majority of the Trial Chamber may also decide *proprio motu* [...] to deal with issues that could otherwise be dealt with by the judge'. It follows that the decision of a Single Judge is in fact a decision issued in consultation with the Chamber. Consequently, the Single Judge finds that the First Issue cannot be considered for appeal.

<sup>21</sup> Order on the notification of confidential filings to the Legal Representative of victims, ICC-02/11-01/11-724, para. 4.

<sup>22</sup> Impugned Decision, ICC-02/11-01/11-749, para. 15.

<sup>23</sup> Appeals Chamber Judgment, ICC-01/04-168, para. 9.

**2) Whether the Single Judge erred in granting the LRV access to the confidential record of the case (Second Issue and Eighth Issue)**

21. The Defence claims that the Decision: i) lacks any legal basis to grant access to the LRV to the confidential record of the case (Second Issue)<sup>24</sup> ; and ii) erroneously grants the LRV automatic and general access to documents covered by medical secrecy and privacy without the Accused's express consent and should not have ordered the notification of document ICC-02/11-01/11-697-Conf (Eighth Issue).<sup>25</sup>
22. As to the Second Issue, it does not arise from the Decision as the decision granting the LRV access to the confidential record of the case derives from the oral ruling made during the first status conference, an order repeated in the Order of 20 November 2014. In any event, the Impugned Decision does provide a legal basis, namely Rules 92(5) and 131(2) of the Rules.
23. With regard to the Eighth Issue, namely the contention that the decision grants access to material covered by medical secrecy and privacy without the consent of the Accused, it is misconceived and does not arise from the Decision. The Decision does not provide the LRV with an automatic access to all documents covered by medical secrecy and privacy. Should a document contain information covered by medical secrecy that would justify not giving access to the LRV, the parties retain the option to classify the document confidential and *ex parte*.<sup>26</sup> In those circumstances, the First Limb of the Eighth Issue does not arise from the Decision. Further, in relation to the Second Limb of the Eighth Issue, namely notification of filing ICC-02/11-01/11-697-Conf, the Single Judge notes, as specifically stated in the Decision, that a major factor in the decision to give access to this document to the LRV

---

<sup>24</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, paras 18-25.

<sup>25</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, paras 41-47.

<sup>26</sup> Impugned Decision, ICC-02/11-01/11-749, paras 15 and 20.

was that the Defence itself had already made public the diagnosis in, at least, two public filings.<sup>27</sup> The Single Judge also stresses that the additional information on the Accused's health contained in document ICC-02/11-01/11-697-Conf<sup>28</sup> is of a general nature and does not mention any detail. Hence, the Single Judge considers that the Defence merely disagrees with the Single Judge's assessment of the nature of the confidential information contained in this document and its decision to notify it to the LRV. The Second Limb of the Eighth Issue shall therefore not be certified for appeal.

**3) Whether the Single Judge erred in giving the LRV access to documents disclosed pursuant to Rule 77 of the Rules (Third Issue)**

24. The Defence contends that without any legal basis, the LRV has been provided access to documents disclosed pursuant to Rule 77 of the Rules. This submission appears to ignore the Impugned Decision itself which expressly provides that Rules 92(5) and 131(2) of the Rules form the legal basis for authorising such disclosure.<sup>29</sup> Additionally, pursuant to Pre-Trial Chamber I's Decision on disclosure matters, which remains in force until further notice, documents disclosed pursuant to Rule 77 of the Rules and Article 67(2) of the Statute are not currently part of the case record,<sup>30</sup> a matter which the Defence seems to acknowledge in its request.<sup>31</sup>

25. Further, it is not to be found in the Decision that the LRV is granted access to the parties' Ringtail, which is and remains to be used by the parties and only the parties. Hence, in accordance with the Decision, the LRV shall have access to documents disclosed pursuant to Rule 77 of the Rules and Article

<sup>27</sup> Impugned Decision, ICC-02/11-01/11-749, para. 21, in particular footnote 22.

<sup>28</sup> *Requête urgente, fondée sur des circonstances humanitaires exceptionnelles, déposée afin que le Président Gbagbo soit autorisé à se recueillir devant la dépouille de sa mère et à assister à son enterrement*, 22 October 2014, ICC-02/11-01/11-697-Conf, para. 40.

<sup>29</sup> Impugned Decision, ICC-02/11-01/11-749, para. 15.

<sup>30</sup> Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, ICC-02/11-01/11-30, paras 15 and 19.

<sup>31</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, paras 26-27.

67(2) of the Statute by any other technical means but not by gaining access to the parties' Ringtail. The Single Judge recalls that the disclosing party retains the option to not disclose specific documents to the LRV, should there be a justification for it.

26. Consequently, the Third Issue cannot be certified for appeal within the meaning of Article 82(1)(d) of the Statute.

**4) Whether the Single Judge misconceived the status of the LRV (Fourth Issue, Fifth Issue, Sixth Issue and Seventh Issue)**

27. The Defence argues that in granting the LRV access to the confidential record of the case it ignores the principle of victims' personal interests (Fourth Issue). The Defence further contends that the Single Judge creates an artificial differentiation between the victims themselves and their legal representative, who acts on their behalf and who therefore cannot have different procedural rights (Fifth Issue).<sup>32</sup> Moreover, the Defence avers that the Impugned Decision seems to grant the LRV a different status than the one other victims' representatives enjoy (Sixth Issue).<sup>33</sup> Finally, the Defence argues that giving the LRV access to confidential documents and documents disclosed *inter partes* without the requirement that she establish that victims' personal interests are affected abolishes the distinction between the parties and the LRV (Seventh Issue).<sup>34</sup>

28. With regard to the Fourth Issue, the Defence misconceives the Decision to the extent that the issue does not arise from it. In granting the LRV access to the confidential record of the case the Single Judge did consider the victims' personal interests within the meaning of Article 68(3) as shown by the

---

<sup>32</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, paras 34-36.

<sup>33</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, para. 37.

<sup>34</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, paras 38-40.

references made to relevant case-law.<sup>35</sup> Consequently the Single Judge finds that the Fourth Issue cannot be certified for appeal within the meaning of Article 82(1)(d).

29. With regard to the Fifth Issue, namely the contention that the Impugned Decision has artificially distinguished the LRV from the participating victims, it is not essential for the determination of the Impugned Decision and, accordingly shall not be certified for appeal. If the distinction made between the LRV and the victims was erroneous, then the consequence of reversing this finding would be that the LRV and victims would need to be given equal access. Such a conclusion would not impact the LRV's access to the case record, which is plainly the overarching matter for which the Defence seeks appellate intervention. Further, the Single Judge stresses that leave to appeal should not be granted on the sole basis that the issue raised is of general interest.<sup>36</sup>

30. As to the Sixth Issue, it is questionable to what extent it could be considered an issue within the meaning of Article 82(1)(d) of the Statute. The Decision solely gives access to the confidential record of the case and to documents disclosed to the LRV in this particular case, who happens to be a representative from the Office of Public Counsel for Victims ('OPCV'). Whether other Chambers in other cases, in which different groups of victims are represented by different LRVs, would establish a distinction between a legal representative of victims from the OPCV and other victims' representatives appears to be irrelevant and cannot be considered an issue within the meaning of Article 82(1)(d) of the Statute.

<sup>35</sup> Impugned Decision, ICC-02/11-01/11-749, para. 15, in particular footnote 14.

<sup>36</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(A), Decision on Ruto Defence's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses', 24 September 2013, ICC-01/09-01/11-983, para. 20. See also, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision on the prosecution and defence applications for leave to appeal the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 26 January 2011, ICC-01/05-01/08-1169, para. 25.

31. Finally, as to the Seventh Issue, the Single Judge considers that it is a mere reformulation of the Second Issue, the Third Issue and the Fourth Issue already decided upon. The Single Judge reiterates that victims' personal interests have been duly taken into consideration in reaching the decision that the LRV shall have access to the confidential record of the case, as well as to documents disclosed pursuant to Rule 77 of the Rules and Article 67(2) of the Statute. Hence, the Seventh Issue does not arise from the Decision and cannot be certified for appeal.

32. Having found that all Issues raised by the Defence fail to qualify as issues within the meaning of Article 82(1)(d) of the Statute, it is unnecessary to proceed to consider the further requirements of Article 82(1)(d) of the Statute. However, the Single Judge has noted the Defence arguments that granting the LRV access to the confidential record of the case and to documents disclosed pursuant to Rule 77 of the Rules would affect the fairness and the expeditiousness of the proceedings, as it would enable the LRV to develop her own strategies, would lead to an increased number of requests from her part and, in turn, from the parties and would oblige the Defence to dedicate resources to demonstrate that the victims' personal interests are not affected. According to the Defence, this combination of factors would undermine the balance of the proceedings and slow them down.<sup>37</sup>

33. The Single Judge considers that these arguments are unfounded and that the Defence does not establish that the fairness or the expeditiousness of the proceedings will be affected by the Issues raised. The submission that the LRV will slow the proceedings and affect their fairness because she was given access to confidential documents and documents disclosed pursuant to Rule 77 of the Rules is purely speculative. The Single Judge recalls that the

---

<sup>37</sup> Request Seeking Leave to Appeal, ICC-02/11-01/11-752, paras 49-53.

LRV can only intervene in the proceedings where it is established that victims' personal interest are affected. Even interpreted broadly, such a principle does not mean that victims are vested with a general right to intervene on every single matter before this Chamber. The Single Judge has left open the possibility for a party to classify a document confidential and *ex parte* in accordance with Regulation 23 *bis*, should the matter require being withheld from the LRV.<sup>38</sup> Further, the Single Judge wishes to clarify that the modalities of victims' participation at trial will be discussed at a later stage and that the Defence will be given the opportunity to make observations on it.

34. The Single Judge has also noted the Defence's argument that the intervention of the Appeals Chamber is necessary in order to harmonise the approaches among Trial Chambers with regard to access being granted to the confidential record of the case.<sup>39</sup> In this regard, the Single Judge recalls that leave to appeal should not be granted on the sole basis that the issue raised is of general interest.<sup>40</sup>

#### **IV. Reasons for the Decision on the Request for Suspensive Effect**

35. In the Request for Suspensive Effect, the Defence requested the Chamber to suspend the effect of the Impugned Decision with regard to confidential documents and material disclosed pursuant to Rule 77 of the Rules.<sup>41</sup> It argued that should these documents be disclosed to the LRV, the right of the Accused to privacy would be violated, witnesses would be endangered and,

<sup>38</sup> Impugned Decision, ICC-02/11-01/11-749, para. 15.

<sup>39</sup> Impugned Decision, ICC-02/11-01/11-749, para. 15.

<sup>40</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(A), Decision on Ruto Defence's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses', 24 September 2013, ICC-01/09-01/11-983, para. 20. *See also*, *The Prosecutor v. Jean Pierre Bemba Gombo*, Trial Chamber III, Decision on the prosecution and defence applications for leave to appeal the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 26 January 2011, ICC-01/05-01/08-1169, para. 25.

<sup>41</sup> Request for Suspensive Effect, ICC-02/11-01/11-753.



more generally, the consequences of the Decision would be irreparable.<sup>42</sup> The Defence referred to the jurisprudence of the European Court of Human Rights ('ECHR') to argue that the Chamber has the power to decide on such suspensive effect.<sup>43</sup>

36. In its response, the Prosecution argued that the Court's statutory framework does not authorise requests for suspensive effects before Trial Chambers. Further, even assuming that the Request amounted to a Request to stay the Decision, the Prosecution argued it is unfounded as the Request for Leave to Appeal is without merit. Finally, it submitted that the implementation of the Impugned Decision cannot lead to any prejudice as access is restricted to the LRV only.<sup>44</sup>

37. The LRV contended that the Defence misrepresents the ECHR's case-law, which does not apply in the case at hand.<sup>45</sup> It further argued that, as apparent from the Statute and as already stated by Trial Chamber V, a Trial Chamber has no power to order suspensive effect of its own decisions.<sup>46</sup>

38. The Single Judge notes that the Statute does not explicitly confer Trial Chambers the power to impose suspensive effect on one of its decisions. However, the Single Judge considers that Article 64(3)(a) of the Statute gives a Trial Chamber the power to suspend the execution of certain orders if this is 'necessary to facilitate the fair and expeditious conduct of the proceedings'. Apart from this very particular circumstance, a Trial Chamber has no power to impose suspensive effect of its own decisions.

39. In the case at hand, the Single Judge considered that the fact that the LRV, who is bound by duties of confidentiality and secrecy, has been given access

---

<sup>42</sup> Request for Suspensive Effect, ICC-02/11-01/11-753, para. 17.

<sup>43</sup> Request for Suspensive Effect, ICC-02/11-01/11-753, paras 18-20.

<sup>44</sup> Prosecution Response, ICC-02/11-01/11-755, paras 43-44.

<sup>45</sup> LRV Response to the Request for Suspensive Effect, ICC-02/11-01/11-754, paras 11-13.

<sup>46</sup> LRV Response to the Request for Suspensive Effect, ICC-02/11-01/11-754, paras 9-10.

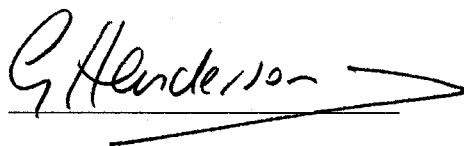
to confidential documents and documents disclosed pursuant to Rule 77 of the Rules and Article 67(2) of the Statute, as of the notification of the Decision, was not a fact of such magnitude that it would affect the fairness of the proceedings in a way that would warrant granting the Request for Suspensive Effect pending the decision on the Application or ultimate resolution of any appeal. Accordingly, the Request for Suspensive Effect was rejected.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**GIVES REASONS** for its rejection of the Request for Suspensive Effect; and

**REJECTS** the Request Seeking Leave to Appeal.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read "G. Henderson", with a long horizontal line extending to the right from the end of the signature.

**Judge Geoffrey Henderson, Presiding Judge**

Dated 11 March 2015

At The Hague, The Netherlands