

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/11-01/11
Date: **19 January 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 the Legal Representative of Victims' access to certain confidential
filings and to the case record**

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 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 ('Single Judge') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Laurent Gbagbo*, having regard to Rules 92(5) and 131(2) of the Rules of Procedure and Evidence ('Rules') and Regulation 23 *bis* of the Regulations of the Court ('Regulations') issues the following 'Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record'.

I. Procedural history

1. On 4 November 2014, the Single Judge held the first status conference, during which he directed the Office of the Prosecutor ('Prosecution'), the defence for Mr Gbagbo ('Defence') and the Legal Representative of Victims ('LRV') to, from that date, always notify the parties and the 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 the said classification in the filing itself to enable the Chamber to make its ultimate decision.¹
2. On 5 November 2014, the Registry informed the Single Judge that a number of confidential documents filed before the abovementioned instructions were given, were not notified to the LRV. It referred to the following documents: 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.²
3. On 20 November 2014, the Single Judge instructed the Registry to notify these documents to the LRV, unless the parties provided reasons for the chosen

¹ Transcript of hearing dated 4 November 2014, ICC-02/11-01/11-T-25-CONF-ENG CT, p. 4-5.

² Emails from Registry to Chamber, 5 November 2014, 15.56 and 17.22.

classification pursuant to Regulation 23 *bis* of the Regulations by 21 November 2014.³

4. On 20 November 2014, the Prosecution informed the Chamber that it had no objection to the LRV having access to its own documents, namely documents 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.⁴
5. On 21 November 2014, the Defence filed its observations ('Defence's Observations') in which it objected to the notification to the LRV of :
i) Prosecution's documents ICC-02/11-01/11-683-Conf-AnxB, ICC-02/11-01/11-683-Conf-AnxC and ICC-02/11-01/11-694-Conf-AnxA and ii) three Defence filings or annexes, namely, ICC-02/11-01/11-697-Conf; ICC-02/11-01/11-697-Conf-Anx and ICC-02/11-01/11-709-Conf-Red.⁵
6. On 24 November 2014, the LRV filed a response ('LRV's Response') in which it argues that the Single Judge should reject the Defence's objection and maintain its order to notify the said documents to the LRV.⁶

II. Analysis

7. The Single Judge notes that the Defence opposes the notification of documents emanating both from the Prosecution and from the Defence itself. He will therefore address the submissions in two parts : i) notification of documents emanating from the Prosecution (ICC-02/11-01/11-683-Conf-AnxB; ICC-02/11-01/11-683-Conf-AnxC and ICC-02/11-01/11-694-Conf-AnxA); and

³ Order on the notification of confidential filings to the Legal Representative of victims, 20 November 2014, ICC-02/11-01/11-724, disposition.

⁴ Email from Prosecution to Chamber, 20 November 2014, 10.28.

⁵ *Observations de la Défense quant à la nécessité de préserver le niveau de classification de certains des documents mentionnés par le Juge unique comme devant être transmis au Représentant légal des victimes*, 21 November 2014, ICC-02/11-01/11-725-Conf (public redacted version available at ICC-02/11-01/11-725-Red).

⁶ Response of the Common Legal Representative of victims to the "*Observations de la Défense quant à la nécessité de préserver le niveau de classification de certains des documents mentionnés par le Juge unique comme devant être transmis au Représentant légal des victimes*", 24 November 2014, ICC-02/11-01/11-728-Conf (public redacted version at ICC-02/11-01/11-728-Red).

ii) notification of documents emanating from the Defence (ICC-02/11-01/11-697-Conf; ICC-02/11-01/11-697-Conf-Anx and ICC-02/11-01/11-709-Conf-Red).

1) Notification of documents emanating from the Prosecution

8. Documents ICC-02/11-01/11-683-Conf-AnxB; ICC-02/11-01/11-683-Conf-AnxC; ICC-02/11-01/11-694-Conf-AnxA are annexes to Prosecution's communications of evidence disclosed pursuant to Article 67(2) of the Statute or Rule 77 of the Rules. They consist of lists of the documents disclosed.
9. As mentioned above, the Prosecution does not object to the LRV having access to the said documents.
10. Recalling that during the Pre-Trial proceedings, Pre-Trial Chamber I had instructed the parties to file in the record of the case only the documents they intended to rely upon at the hearing on the confirmation of the charges, the Defence considers that this rule shall also apply to the lists of such documents. It argues that the Prosecution filed the lists only to enable the Chamber to make sure that the Prosecution discharged its duty to investigate both incriminating and exonerating circumstances and to have access to the material in the event that a dispute arises.⁷ It further submits that there are no reasons for the material disclosed *inter partes* to be communicated to 'third parties'.⁸ It argues that the lists of documents disclosed pursuant to Rule 77 of the Rules or Article 67(2) of the Statute may contain information that could lead to the identification of witnesses, which could endanger them or affect the Defence's investigations.⁹ Finally, the Defence submits that, as long as neither of the parties decides to rely upon these documents, the personal

⁷ Defence's Observations, ICC-02/11-01/11-725-Red, paras 5-8.

⁸ Defence's Observations, ICC-02/11-01/11-725-Red, paras 9-11.

⁹ Defence's Observations, ICC-02/11-01/11-725-Red, paras 17-18.

interests of the victims are not affected and therefore they should not have access to these documents.¹⁰

11. The LRV argues that the Defence cannot object to the notification of the three Prosecution's documents as it is for the filing party to decide who should have access to the said document, and in this specific instance the Prosecution clearly indicated that it does not oppose to such notification to the LRV.¹¹ The LRV further makes reference to relevant case-law, in the current proceedings and in other cases, supporting the argument that it should have access also to material disclosed pursuant to Rule 77 of the Rules and Article 67(2) of the Statute.¹²
12. The Single Judge notes that pursuant to Regulation 23 *bis*(1) of the Regulations of the Court, it is for the filing party to choose the level of confidentiality of a document filed in the record of the case and to decide who should have access to the said document. In this case, the filing party, namely the Prosecution, does not object to the LRV having access to the said documents. However, since the Defence objects to such notification, the Single Judge will address the relevant arguments raised.
13. The Single Judge considers that the objection of the Defence does not only concern the three mentioned Prosecution's lists of documents disclosed to the Defence but it expands to the more general issue of the LRV's access to material disclosed between the parties, which the Single Judge will also address.
14. The Single Judge is cognisant of the approach taken by Pre-Trial Chamber I, namely that the LRV had access to the *public* record of the case and was therefore notified of the *public* documents and that if a party wished to notify

¹⁰ Defence's Observations, ICC-02/11-01/11-725-Red, paras 14-16 and 19.

¹¹ LRV's Response, ICC-02/11-01/11-728-Red, paras 5-6.

¹² LRV's Response, ICC-02/11-01/11-728-Red, paras 7-9.

the LRV of a confidential document it was free to do so. The Pre-Trial Chamber also retained the option to grant the LRV access to confidential filings either *proprio motu* or upon receipt of a specific and motivated request.¹³

15. However, the Single Judge considers 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.¹⁴ 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 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.¹⁵

¹³ Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012, ICC-02/11-01/11-138, paras 55-57.

¹⁴ See *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Decision on victims' representation and participation, 3 October 2012, ICC-01/09-01/11-460, paras 64-69; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Trial Chamber V, Decision on victims' representation and participation, 3 October 2012, ICC-01/09-02/11-498, paras 63-68; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, paras 121-122.

¹⁵ See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, para. 123; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, *Corrigendum* to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr, para. 47; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Decision on victims' representation and participation, 3 October 2012, ICC-01/09-01/11-460, paras 68-69; *The*

16. Consequently, the Single Judge considers that the LRV shall be notified of documents ICC-02/11-01/11-683-Conf-AnxB; ICC-02/11-01/11-683-Conf-AnxC; ICC-02/11-01/11-694-Conf-AnxA, and shall have access to the relevant disclosed material.

2) Notification of documents emanating from the Defence

17. As mentioned above, the Defence also objects to the notification of three confidential documents that it filed in the record of the case. The first two documents are a Request from the Defence seeking authorisation for Mr Gbagbo to attend his mother's funeral ('Document ICC-02/11-01/11-697-Conf'), and its annex containing Mr Gbagbo's identity card ('ICC-02/11-01/11-697-Conf-Anx'). The third document, ICC-02/11-01/11-709-Conf-Red, is the confidential redacted version of the Defence's observations in preparation for the first status conference held on 4 November 2014 ('Document ICC-02/11-01/11-709-Conf-Red').

18. The Defence opposes the notification of Document ICC-02/11-01/11-697-Conf as it contains information pertaining to Mr Gbagbo's health condition partly covered by medical secrecy.¹⁶ It further objects to the notification of the annex, as it argues that Mr Gbagbo's identity card and the elements contained therein are of no interest to the victims.¹⁷ Finally, it considers that Document ICC-02/11-01/11-709-Conf-Red must not be notified to the LRV as it entails information about a Prosecution's witness, including information obtained by the Defence. The Defence considers that the statements of this witness, and in particular the information obtained in the course of the Defence's investigations, are an important element of the Defence strategy and that

Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Trial Chamber V, Decision on victims' representation and participation, 3 October 2012, ICC-01/09-02/11-498, paras 67-68.

¹⁶ Defence's Observations, ICC-02/11-01/11-725-Red, para. 22.

¹⁷ Defence's Observations, ICC-02/11-01/11-725-Red, para. 23.

disclosing this information to 'third parties' may compromise the Defence's ongoing investigations.¹⁸

19. The LRV considers that it shall be notified of Document ICC-02/11-01/11-697-Conf and its annex as the Defence provides no reason for the level of classification. The LRV argues that Mr Gbagbo's health is of interest to victims and that stating that the identity card of Mr Gbagbo is of no interest lacks any factual or legal basis pursuant Regulation 23 *bis* of the Regulations.¹⁹ Finally, in relation to Document ICC-02/11-01/11-709-Conf-Red, the LRV sees no reason why it should not be notified of it as the Prosecution already shared with it its confidential material relating to the witness in question. The LRV further recalls that it is bound by the duty of professional secrecy and confidentiality in accordance with Code of Professional Conduct for counsel.²⁰
20. The Single Judge has noted the Defence arguments. However, he recalls the general principle established above that, to ensure that victims' participation is effective, 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.²¹
21. Additionally, 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 filings²².

¹⁸ Defence's Observations, ICC-02/11-01/11-725-Red, paras 26-27.

¹⁹ LRV's Response, ICC-02/11-01/11-728-Red, paras 12-14.

²⁰ LRV's Response, ICC-02/11-01/11-728-Red, para. 11.

²¹ See above, para. 15.

²² See for example, Pre-Trial Chamber I, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red, paras 28, 36, 66, 37, 72-73, 75-77 and 88; Pre-Trial Chamber I, Decision on the review of Laurent Gbagbo's detention pursuant to article 63(3) of the Rome Statute, 12 November 2012, ICC-02/11-01/11-291, paras 26, 49 and 52; *Requête aux fins de prorogation des délais de dépôt des demandes d'expurgations, de soumission d'informations relatives à la présentation de témoignages viva voce et de dépôt de la liste amendée de preuves*, 17 January 2013, ICC-02/11-01/11-355, para. 2; *Demande aux fins de prorogation du délai fixé pour le dépôt par la défense d'observations*

22. Consequently, the Single Judge considers that the reasons given by the Defence to oppose the notification to the LRV of the said documents are not sufficiently compelling, and therefore decides that they should be notified to the LRV. The Single Judge recalls that access to the said confidential material is only granted to the LRV, who is bound by duty of professional secrecy and confidentiality.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE

INSTRUCTS the Registry to give access to the LRV of documents 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 and ICC-02/11-01/11-709-Conf-Red; and

DECIDES that the LRV shall have access to the confidential record of the case, in accordance with paragraph 15 above.

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 stroke extending to the right.

Judge Geoffrey Henderson

Single Judge

Dated 19 January 2015

At The Hague, The Netherlands

concernant les demandes de participation des victimes transmises par le Greffe le 18 janvier 2013, 21 January 2013, ICC-02/11-01/11-368, para. 7.