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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN CÔTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ***

Public Document

**Request to attend the *ex parte* hearing scheduled on 16 June 2015
and to access the Registry Report**

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. Procedural background

1. On 11 March 2015, Trial Chamber I (the “Chamber”) issued 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”,¹ joining the cases and deciding, *inter alia*, to hold a status conference on 21 April 2015, establishing a provisional agenda thereof, and requesting the parties and the participants to submit their observations on said agenda no later than 14 April 2015.

2. On 15 April 2015, the Defence for Mr. Gbagbo filed a waiver in relation to his right to be present during said status conference.²

3. During the status conference held on 21 April 2015, the Chamber invited oral submissions on the possible practical modalities to facilitate Mr. Gbagbo’s attendance at trial. On this occasion, the Defence suggested that an *ex parte* session be held to further discuss this matter.³

4. On 6 May 2015, the Chamber issued the “Order convening an *ex parte* status conference on 16 June 2015” (the “Order”),⁴ by which it (i) scheduled an *ex parte* hearing, Defence, Registry and Prosecution only, in relation to Mr. Gbagbo’s current health condition and on possible practical modalities to be put in place to facilitate his attendance at trial (the “Hearing”);⁵ and (ii) ordered the Registry to provide by 28 May 2015 an updated report classified *ex parte*, Registry and Defence only on Mr. Gbagbo’s health-related needs and on the advancement of arrangements made to

¹ See 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” (Trial Chamber I), No. ICC-02/11-01/15-1, 11 March 2015.

² See the “Éléments d’information concernant la non présence de Laurent Gbagbo lors de l’audience du 21 avril 2015”, No. ICC-02/11-01/15-39-Conf-Red, 15 April 2015.

³ See the transcript of the status conference held on 21 April 2015, No. ICC-02/11-01/15-T-1-CONF-ENG ET, p. 7, lines 7-11 and p. 95, line 24 to p. 98, line 18.

⁴ See the “Order convening an *ex parte* status conference on 16 June 2015” (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-57, 6 May 2015 (the “Order”).

⁵ *Idem*, para. 4.

meet them, and instructed that a redacted version of said report be provided to the Prosecution (the “Report”).⁶

5. In accordance with article 68(3) of the Rome Statute, the Common Legal Representative respectfully submits the present Request in order to be able to properly fulfil her mandate and present the views and concerns of the victims in the proceedings.⁷

II. Request to attend the Hearing

6. The Common Legal Representative reiterates that issues related to Mr. Gbagbo’s fitness to attend trial are of crucial importance for the victims she represents, in so far as said issues may determine the outcome of the proceedings.⁸

7. Therefore, the Common Legal Representative submits (i) that the personal interests of the victims are affected by the discussions about the health conditions of Mr. Gbagbo and his fitness to attend trial, and (ii) that their eventual partaking in said discussions and on the practical modalities to facilitate his attendance at trial is not prejudicial or inconsistent with the rights of the Accused and the fairness of the proceedings and it is appropriate at this stage of the proceedings.

⁶ *Ibid.*, para. 5.

⁷ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 06 March 2015, paras. 60-61.

⁸ See the “Request for leave to submit observations and Request to access the Expert Reports”, No. ICC-02/11-01/11-203, 7 August 2012, paras. 9-13. See also ICTY, *The Prosecutor v. Strugar*, Case No. IT-01-42-A, “Appeal Judgment” (Appeals Chamber), 17 July 2008, para. 34; ECHR, *S.C. v. the United Kingdom*, No. 60958/00, para. 29; ECHR, *T. v. the United Kingdom [GC]*, No. 24724/94, 16 December 1999, para. 83; ECHR, *V. v. the United Kingdom [GC]*, no. 24888/94, para. 90; ECHR, *Stanford v. the United Kingdom*, Series A No. 282-A, Judgment, 23 February 1994, para. 26.

1) The personal interests of the victims are affected by the issues which will be discussed at the Hearing

8. Considering the determinative character of the issue of Mr. Gbagbo's health as regards the outcome and the expeditious conduct of the proceedings,⁹ the Common Legal Representative argues that said issue clearly affects the personal interests of the victims admitted to participate in the present case. Indeed, if the Chamber was to be satisfied that Mr. Gbagbo's health conditions are not compatible with his attendance at trial, it may result in an adjournment and/or a stay of the proceedings.¹⁰ The possible occurrence of this scenario was indeed one of the delegations' major concerns during the drafting of rule 135 of the Rules of Procedure and Evidence.¹¹ Both results are likely to jeopardise the victims' right to truth, justice, and eventually reparations.

9. In this regard, the Common Legal Representative submits that, pursuant to the established jurisprudence of the Court, "[t]he participation of victims in the proceedings is not limited to an interest to receiving reparations and their personal interests are self-evidently not limited to reparations issues",¹² and that "the victims are seeking not only to obtain reparations, but they also mention other grounds, such as seeking determination of the truth concerning the events they experienced, or wishing to see the perpetrators of the crimes they suffered being brought to justice".¹³

10. In the *Katanga and Ngudjolo Chui* case, Pre-Trial Chamber I referred to "the latest empirical studies conducted amongst victims of serious violations of human rights, which show that the main reason why victims decide to resort to those judicial mechanisms

⁹ See *supra* para.6.

¹⁰ In this sense, see the International Covenant on Civil and Political Rights, UNTS Vol. 999, 1-14668, 23 March 1976, requiring in article 14 that defendants be able to participate in their own trial.

¹¹ See LEWIS (P.), "Trial Procedure", in LEE (R.S.) (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers Inc., 2001, p. 545.

¹² See the "Decision on victims participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 98.

¹³ See the "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010, para. 59.

which are available to them against those who victimised them is to have a declaration of the truth by the competent body".¹⁴ On this basis, it concluded that the "victims' core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right to the truth for the victims of serious violations of human rights",¹⁵ finding that is fully supported by international human rights jurisprudence and scholar studies.¹⁶ In particular, "[w]hen the right to truth is to be satisfied through criminal proceedings, victims have a central interest in the outcome of such proceedings: (i) bring clarity about what indeed happened; and (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth".¹⁷

11. Consistent with this approach, at the pre-trial stage of the present proceedings, the Single Judge already recognised that "[t]he personal interests of

¹⁴ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, para. 31. See also in this regard AMBOS (K.), *El Marco Jurídico de la Justicia de Transición*, Tenus, Bogota, 2008, notes 107-112; KIZA (E.), RATHGEBER (C.), ROHNE (H.), *Victims of War An Empirical Study on War Victimization and Victims Attitudes towards Addressing Atrocities*, Hamburg 2006, pp. 123 and 126. See also the Note prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven, in accordance with paragraph 2 of Sub-Commission resolution 1996/28, UN Doc. E/CN.4/1997/104, 13 January 1997, pp. 2 to 5. See also the Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997, pp. 3-31.

¹⁵ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 14, para. 32.

¹⁶ See in this regard IACHR, *La Cantuta v. Peru*, Judgment of 29 November 2006, Series C, No. 162, para. 222; IACHR, *Vargas-Areco v. Paraguay*, Judgment of 26 September 2006, Series C, No. 155, paras. 153 *et seq.*; IACHR, *Almohacid-Arellano et al. v. Chile*, Judgment of 26 September 2006, Series C, No. 154, para. 148; IACHR, *Comunidad Monviana v. Suriname*, Judgment of 15 June 2005, Series C, No. 124, para. 204; and IACHR, *Velásquez- Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 7, paras. 162 to 166 and 174. See also ECHR, *Hugh Jordan v. UK*, Application No. 24746/94, 4 May 2001, paras. 16, 23, 157 and 160; ECHR, *Selmouni v. France*, Application No. 25803/94, 28 July 1999, para. 79; ECHR, *Kurt v. Turkey*, Application No. 24276/94, 25 May 1998, para. 140; ECHR, *Selcuk and Asker v. Turkey*, Application No. 23184/94, 24 April 1998, para. 96; ECHR, *Aydin v. Turkey*, Application No. 23178/94, 25 September 1997, para. 103; and ECHR, *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, para. 98. In this sense, see also NAQVI (Y.), "The Right to the Truth in International Law Fact or Fiction 9", in (2006) *ICRC International Review*, No. 88, pp. 267-268; MENDEZ (J.), "The Right to Truth", in JOYNER (Ch.) (Ed.), *"Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights' Proceedings of the Siracuse Conference"*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257 *et seq.* and AMBOS (K.), *El Marco Jurídico de la Justicia de Transición*, Tenus, Bogota, 2008, pp. 42-44.

¹⁷ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 14, para. 34.

victims may, in principle, be affected by a determination as to the fitness of Mr Gbagbo to participate in the hearing on the confirmation of charges against him, in particular by any delay in the proceedings which may result therefrom and that it may be appropriate to receive their observations in this regard".¹⁸

12. The Common Legal Representative submits that the findings of the Single Judge of the Pre-Trial Chamber quoted above are even more relevant at this stage of the proceedings. Indeed, the victims' personal interests will be affected by any decision issued by the Chamber on Mr. Gbagbo's attendance to the trial hearings because any delay for health reasons at this stage of the proceedings will have a more detrimental effect on the rights of victims than the one which could have been produced at the confirmation of the charges stage,¹⁹ and therefore it will have an impact on the longer duration of the trial.

13. In other words, the Common Legal Representative submits that any potential delay in the trial is likely to have more important consequences on the victims' personal interests at this stage of the proceedings. Indeed, unlike the confirmation hearing meant to determine whether Mr. Gbagbo was to face the evidence against him before the Trial Chamber, the trial will result in a finding on Mr. Gbagbo's eventual responsibility for the charges brought against him.

14. Consequently, the Common Legal Representative submits that granting her authorisation to participate in the discussions that will take place during the Hearing will ensure that the participation of victims is meaningful,²⁰ and that their views and

¹⁸ See the "Decision on the OPCV's 'Request for leave to submit observations and Request to access the Expert Reports'" (Pre-Trial I, Single Judge), No. ICC-02/11-01/11-211, 15 August 2012, para. 13.

¹⁹ See the transcripts of the confirmation hearing No. ICC-02/11-01/11-T-14-ENG, 19 February 2013; No. ICC-02/11-01/11-T-15-CONF-ENG, 20 February 2013; No. ICC-02/11-01/11-T-16-CONF-ENG, 20 February 2013; No. ICC-02/11-01/11-T-17-CONF-ENG, 22 February 2013; No. ICC-02/11-01/11-T-18-CONF-ENG, 25 February 2013; No. ICC-02/11-01/11-T-19-CONF-ENG, 26 February 2013; No. ICC-02/11-01/11-T-20-CONF-ENG, 27 February 2013; No. ICC-02/11-01/11-T-21-ENG, 28 February 2013.

²⁰ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 14, para. 51(iv).

concerns are taken into account by the Chamber when deciding on this crucial issue for their personal interests.

2) The participation of the Common Legal Representative at the Hearing is not prejudicial or inconsistent with the rights of the Accused and the fairness of the proceedings, and is appropriate at this stage of the proceedings

15. The Common Legal Representative submits that providing the victims authorised to participate with the possibility to present their views and concerns on the issue of Mr. Gbagbo's health and related arrangements for the conduct of the trial, is not in itself prejudicial or inconsistent with his rights and the fairness of the proceedings. On the contrary, it is likely to assist the Chamber in making its legal determination on a critical issue affecting both the outcome and the expeditious conduct of the proceedings.

16. Furthermore, the participation of the victims in any discussion about the Accused's fitness is appropriate at this stage given the critical character of the matter and its material impact on the personal interests of the victims, as indicated above.²¹

17. In this regard, the Common Legal Representative notes that in the Order, the Single Judge considered that "[i]n light of the confidential nature of the information to be provided and discussed, the hearing should be held *ex parte* and in private session".²² The Common Legal Representative submits that the sensitive character of the matters to be addressed at the hearing should not entail an automatic side-lining of the interests of the victims in the discussions.

18. Indeed, following the reasoning of the Chamber's previous decisions,²³ it is submitted that the Common Legal Representative's knowledge of confidential

²¹ See *supra* paras. 8-14.

²² See the "Order convening an *ex parte* status conference on 16 June 2015", *supra* note 6, para. 4.

²³ See the "Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record" (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-749, paras. 15 and 20; and the

information does not impact *per se* the rights of the Accused nor is prejudicial to him. The Common Legal Representative, as recalled in several occasions by the Single Judge,²⁴ is in fact bound by the same duties of confidentiality and secrecy as any other Counsel before the Court and offers the same guarantees in this regard as the ones afforded by Counsel for the Defence and for the Prosecution. Furthermore, the fact that access to confidential information is limited to the Legal Representative only and disclosure to individual victims must be approved on a case-by-case basis by the Single Judge²⁵ is a further guarantee in this regard.

19. In any case, the Common Legal Representative recalls that she has already been granted access to formerly redacted medical information related to Mr. Gbagbo's health.²⁶

20. For all these reasons, the Common Legal Representative, while acknowledging that the Chamber's use of its powers must not derogate from the Accused's right to a fair and impartial hearing in which his or her rights are fully safeguarded,²⁷ contends that authorising her participation in the Hearing is not prejudicial to the rights of the Accused, but instead ensures a fair and expeditious conduct of the proceedings.

"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" (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-809, 11 March 2015, para. 18.

²⁴ See the "Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record", *supra* note 23, para. 22; and 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", *supra* note 23, para. 39.

²⁵ See the "Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record", *supra* note 23, para. 15.

²⁶ *Idem*, para. 21, granting the Common Legal Representative access to Defence filing No. ICC-02/11-01/11-697-Conf.

²⁷ See in this sense the "Decision on the starting date of the defence presentation of evidence and related issues" (Trial Chamber III), No. ICC-01/05-01/08-2221, 24 May 2012, para. 11.

III. Request to be notified of the redacted Registry Report

21. The Common Legal Representative notes that in the Order, the Single Judge requests the Registry to prepare an updated confidential report on Mr. Gbagbo's health-related needs and on the advancement of arrangements made to meet them, and to transmit a redacted version to the Prosecution.²⁸

22. The Common Legal Representative submits that there is no apparent reason why she should not be notified of the redacted version of the Registry Report to be transmitted to the Prosecution.

23. In this regard, the Common Legal Representative wishes to recall that the Single Judge already found that “[t]he LRV has a general right to access the case record and that this right shall apply to confidential filings”.²⁹ Indeed, the Chamber adopted a different approach from the one taken by Pre-Trial Chamber I as regard the legal representatives' right to access the case record, finding in particular that “[v]ictims [...] 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”.³⁰

24. Moreover, the Common Legal Representative reiterates her submissions made in the preceding paragraphs,³¹ as well as in her previous submissions,³² regarding her obligations and ensuing guarantees of professional secrecy and confidentiality.

²⁸ See the Order, *supra* note 6, para. 5.

²⁹ See the “Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record”, *supra* note 23, para. 15.

³⁰ *Idem*. As already indicated, by the same Decision the Single Judge granted access to the Common Legal Representative to the Defence filing No. ICC-02/11-01/11-697-Conf, related to medical information on the health condition of Mr. Gbagbo.

³¹ See *supra* paras. 15-20.

³² See the “Response to the ‘Soumissions portant sur le niveau de confidentialité à attribuer aux documents que comprend le dossier de l’affaire (ICC-02/11-01/15-47-Conf-Red)’”, No. ICC-02/11-01/15-65-Conf, 15 May 2015, especially paras. 40-44.

25. Finally, the Common Legal Representative recalls her considerations above on the crucial importance of the issues addressed in the Report and the substantial impact that the health condition of Mr. Gbagbo and his consequent presence at trial have on the victims' interests.³³

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Chamber

- To be authorised to attend the hearing to be held on 16 June 2015; and
- To be granted access to the updated report of the Registry on Mr Gbagbo's health-related needs and on the advancement of arrangements made to meet them, in the same redacted version to be transmitted to the Prosecution.

Respectfully submitted.



Paolina Massidda
Principal Counsel

Dated this 22nd day of May 2015

At The Hague, the Netherlands

³³ *Supra* paras. 8-14. See also the "Request for leave to submit observations and Request to access the Expert Reports", *supra* note 8, paras. 9-10; and the "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'", No. ICC-02/11-01/11-728-Conf, 24 November 2014, para. 13.