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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Cuno Tarfusser
Judge Olga Herrera Carbuccion

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

Public

With Confidential Annex A – only available to the Prosecution and Defence

Prosecution's Submissions on a Redaction Protocol

Source: Office of the Prosecutor

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

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Introduction

1. On 13 November 2014, the Single Judge directed the parties to make submissions on a proposed redaction protocol by 19 November 2014 and 21 November 2014, respectively.¹ On 17 November 2014, the Single Judge granted an extension of time as requested by the parties, and ordered the Prosecution to file its submissions by 26 November 2014 and the Defence by 28 November 2014.²
2. The parties met and also exchanged draft versions of a potential redaction protocol but unfortunately were not able to reach an agreement.
3. The Office of the Prosecutor (“Prosecution” or “OTP”) submits that the redactions protocols as applied in the Kenya cases, with two amendments, should be adopted in this case. The Prosecution contends that the Kenya protocols “codify” the redactions decisions and practice as adopted by Pre-Trial Chamber I (“PTC I”). An amended version of the Kenya protocols would also have the advantage of expediting the disclosure of evidence while respecting the rights of the Defence, the interests of justice and would favour the administration of justice and judicial economy.

Confidentiality

4. The Prosecution files this submission as public and Annex A as confidential since it reflects *inter partes* discussions of the parties to which the public should not have access or for which the views of the Legal Representatives are not sought by the Chamber. Such confidentiality is necessary in order to encourage frank discussions between the parties on legal and factual issues without the fear of such discussions being reproduced in public filings, including without the other parties agreement.

¹ Order for Submissions on a Redaction Protocol, 13 November 2014, ICC-02/11-01/11-719.

² Decision on request for extension of time to make submissions on a redaction Protocol, 17 November 2014, ICC-02/11-01/11-722.

Submissions

Position of the Prosecution

5. The parties met to discuss a redaction protocol, had follow up telephone communications and further exchanges by e-mail. Despite these exchanges, the parties were not able to reach an agreement. The Prosecution submits, in confidential Annex A, the last edited version of the Prosecution's proposal. This proposed version of the protocol was sent to the Defence on 21 November 2014, late afternoon. Without any forewarning, on 26 November 2014, the Defence sent the Prosecution a new proposal of 18 pages, just a few hours before the deadline to submit the present observations.³ Consequently, the Prosecution is not in a position to comment on that latest proposal and its current submissions are limited to the version as submitted in Confidential Annex A.
6. The Prosecution submits that Trial Chamber I ("Chamber") should adopt the same redaction protocol as adopted in the Kenya cases,⁴ with the following two amendments:
 - 1) Paragraph 36 of the Kenya Protocols should be amended to authorise the *proprio motu* redactions to the names, identifying and contact information of the investigators. Consequently, such redactions should be included as *Standard Justification* redactions. The Prosecution also submits, for the reasons further developed below, that such redactions should be implemented on an ongoing basis. The disclosing party would provide the receiving party, as is the current practice, with a document identifying by a code (pseudonym) each investigator in the corresponding disclosed statements or transcripts of interviews.⁵

³ Email received at 12.27pm. and the version received was without any track changes to identify the differences with Annex A.

⁴ ICC-01/09-01/11-458-AnxA-Corr, Corrigendum of Annex A: Decision on the protocol establishing a redaction regime and ICC-01/09-02/11-495-AnxA-Corr, Corrigendum: Annex A to Decision on the protocol establishing a redaction regime.

⁵ The practice of providing codes was limited to statements and transcripts of interviews by PTC1 since the purpose was to answer the Defence's concern of a « pattern » by investigators when conducting interviews. The

- 2) Paragraph 19 of the Kenya protocols sets out a process in case of a dispute of a redaction that falls in the *Standard Justification* category. The Prosecution submits that the receiving party, for the reasons further developed below, should seize the Chamber of the dispute. Once the Chamber is seized, the disclosing party would have the onus to provide the justification for the challenged redaction.
7. The Prosecution submits that both proposed amendments reflect the redactions decisions and ensuing practice developed by PTC I. Such amendments are therefore not new to the Defence. For the amendment pertaining to the redaction of identifying information of investigators as covered by the *Standard Justification* category:
- a- The Prosecution has a limited pool of investigators. In the course of their employment they work on multiple cases involving multiple situations and countries and multiple accused persons. Currently in Ivory Coast, the cases of Mr Gbagbo and Blé Goudé are still being investigated, a further case is waiting the outcome of an admissibility challenge and the situation itself is still open for investigation. If the identity of investigators were to be disclosed and known to a greater number of individuals, entities or the public, the ongoing and further investigations could be put at risk. The Prosecution notes that PTC I was mindful of these ongoing investigations when it granted the authorization to redact identifying information of investigators.⁶ The Prosecution is also mindful that PTC I authorised such redactions for that stage of the proceedings but for the reasons outlined just above, it is submitted that such redactions should be ongoing. The

Prosecution recalls that Article 55(2) interviews are recorded and verbatim transcript of such interviews is disclosed to the Defence. Therefore such « pattern » should be easily discernable.

⁶ First decision on the Prosecutor's requests for redactions and other protective measures, ICC-02/11-01/11-74-Conf-Exp, para. 87; For Prosecution arguments before PTC I see ICC-02/11-01/11-38-Conf-Exp, para.6, ICC-02/11-01/11-53, para.5, ICC-02/11-01/11-64, para.10, ICC-02/11-01/11-77-Conf-Exp, para.12, ICC-02/11-01/11-96, para.5, ICC-02/11-01/11-339-Conf-Exp, paras 8-10, ICC-02/11-01/11-450, paras 4-7, ICC-02/11-01/11-463, paras 4-7, ICC-02/11-01/11-494, paras 4-7, ICC-02/11-01/11-523, paras 3-7, ICC-02/11-01/11-535-Conf-Exp, paras 14-17, ICC-02/11-01/11-537-Conf, paras 4-7, ICC-02/11-01/11-559, paras 16-20, ICC-02/11-01/11-562, paras 25-29, ICC-02/11-01/11-583-Conf-Exp, paras 8-12, ICC-02/11-01/11-626-Conf, paras 22-28.

Prosecution also advanced this position in the *Ntaganda* case and a decision is still pending.⁷ Further, the Prosecution notes that it lifts the names of investigators when they leave the OTP and that the Defence will always be in a position to seek lifting in specific circumstances that may warrant lifting. In other words, the Chamber will always be in a position to balance the rights of the Defence against the interest of justice.

- b- Information tending to identify investigators is a common feature of many documents and metadata to be disclosed. Of the approximate 600 documents to be disclosed as incriminating evidence with redactions approximately 570 contain identifying information of an investigator on the document or in the metadata.⁸ This includes over 340 documents where the investigator's name appears only in the metadata of the chain of custody. If such redactions were not covered by the *Standard Justification* category, the Prosecution will have to seize the Chamber for its authorisation for all these documents and their metadata;
 - c- Permitting the parties to redact identifying information of an investigator under the *Standard Justification* category would substantially reduce the number of redaction requests that the Chamber would be seized with and would simplify and expedite the actual disclosure of these items.
8. For the proposed amendment in which the receiving party would seize the Chamber in case of a dispute over a redaction, the Prosecution submits that:
- a- The receiving party should have the procedural burden of presentation of a dispute. This would prevent the receiving party from flooding the disclosing party with disputes. The disclosing party would still have the substantive burden of persuasion when disputes are presented to the

⁷ ICC-01/04-02/06-393-Red2, Public Redacted Version of "Prosecution's Proposed Protocol on Redactions" dated 31 October 2014, paras 34, 39, 57-64.

⁸ The numbers of these documents are approximate because the Prosecution is presently reviewing its evidence collection and additional documents are being identified (or re-classified) as incriminating and thus the actual number of documents being prepared for disclosure changes as more documents are reviewed.

Chamber, including the obligation to demonstrate why the redaction is necessary.

- b- This would be consistent with the procedure established at the pre-trial stage for a dispute on redactions to material disclosed pursuant to Article 67(2) of the Rome Statute or Rule 77 of the Rules of Procedure and Evidence that, “if the disagreement persists, the Defence may seek a ruling from the Single Judge.”⁹

Position of the Defence

9. The Prosecution submits that the proposal of the Defence as reflected in Annex A, while hesitatingly recognising categories of redactions, requests so much alternative information that it is actually more onerous than the current practice of seeking authorisation to redact. It also confuses the purpose of a protocol on redactions with requests for the disclosure of information.
10. The main purpose of redactions is to protect investigations and/or persons at risk because of the activities of the Court. The alternative information sought by the Defence in its proposal is information that could actually lead to the identification of persons or locations,¹⁰ the Prosecution is actually trying to protect. In other words, if the Prosecution would have the obligation to disclose such identifying information it could actually defeat the purpose of the redactions sought. The alternative information sought in most cases by the Defence is not even information contained in the redactions themselves. The Defence is seeking in most cases the disclosure of additional information that may go to the integrity of staff or contracted persons employed by the OTP.
11. The Prosecution notes that it employs a limited number of contractual staff to act, for instance, as Dioula interpreters. The alternative information sought by the

⁹ Decision establishing a disclosure system and a calendar for disclosure, ICC-02/11-01/11-30, para. 51.

¹⁰ For location the Defence is seeking information that goes to identify how and where the Prosecution conducts its investigations.

Defence for such category of persons is biographic and therefore very identifying. One could also argue that the information sought is discriminatory in nature. It is not because a person is a Dioula interpreter that he/she is adverse or biased against the Accused. But in order to avoid any such misperceptions, the Prosecution is willing, as with investigators, to provide to the Defence a separate list that would contain the codes (pseudonyms) of the interpreters that sit on interviews. The Defence would consequently be in a position to assess whether there is indeed a “pattern” in the interviews conducted with Dioula interpreters.

12. In relation to the lifting of redactions, the Prosecution submits that while it may be true that the Defence will be receiving by 6 February 2015 all material the Prosecution intends to rely on at trial (five months before the start of the trial), redactions should nevertheless be lifted for certain categories of redactions identified in Annex A, only 60 days before the start of the trial. The Defence will still be in a position to ask, on an *inter partes* basis before the 60 days, the lifting of redactions in specific circumstances. The Prosecution submits that in the present case the Defence knows the identity of every witness the Prosecution potentially intends to rely on at trial. The redactions being limited, the Defence is already in a position to investigate the background and account of the witnesses without any undue challenges. The Prosecution submits that 60 days in the present circumstances is not unreasonable. Also, the Prosecution recalls that the Chamber noted that the current schedule does not include the possible joinder of the Blé Goudé case with the Gbagbo case.¹¹

¹¹ ICC-02/11-01/11-723

Conclusion

13. The Prosecution respectfully requests the Chamber to adopt the redaction protocol as applied in the Kenya cases with the amendments proposed in paragraph 6 above.



Fatou Bensouda, Prosecutor

Dated this 26th day of November 2014

At The Hague, The Netherlands