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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

Public

With Annexes 1, 2 and 6 – Confidential, *ex parte*, only available to the Office of the Prosecutor and Annexes 3, 4 and 5 - Confidential

Prosecution's request pursuant to Regulation 35 for the extension of time to apply for redactions and request for redactions pursuant to Rule 81(2) and Rule 81(4)

Source: Office of the Prosecutor

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

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Introduction

1. On 3 June 2013, Pre-Trial Chamber I adjourned the hearing on the confirmation of charges and requested the Prosecution to provide further evidence or conduct further investigations and adopted for that purpose a new disclosure calendar ("the Decision").¹ The Chamber also requested the Prosecution to submit "as soon as practicable and no later than Tuesday, 15 October 2013 any requests for redactions with regard to the evidence she has collected in the course of her further investigation and on which she intends to rely for the purposes of the confirmation of charges".²
2. Pursuant to Regulation 35(2) of the Regulations of the Court, the Prosecution seeks an extension of the time limit to request redactions to 2 documents and their metadata and to request redactions to the metadata only of a third document. Without presuming the decision of the Chamber on this request, the Prosecution also simultaneously presents its request for these redactions pursuant to Rule 81(2) and Rule 81(4).

Confidentiality

3. Pursuant to Regulation 23*bis* of the Regulations of the Court and the instruction of the Single Judge in her Decision establishing a disclosure system, the Prosecution files annexes 1 and 2 as confidential, *ex parte*, only available to the Prosecution, as knowledge by the Defence of the requested redactions would defeat the purpose of this submission. Annexes 3 to 5 are filed as confidential as they pertain to evidentiary matters.

¹ ICC-02/11-01/11-432.

² ICC-02/11-01/11-432, page 23, c)(v).

Application to extend the time limit to request redactions

4. Documents CIV-OTP-0046-0153 and CIV-OTP-0046-0156 are two *procès-verbaux d'audition* of witness CIV-OTP-P-0330 that were collected by an investigator with the Office of the Prosecutor ("OTP") on 8 July 2013. They are attached respectively as Annexes 1 and 2.

5. These two documents were reviewed and considered to be relevant incriminatory evidence. The review also identified redactions to be requested from the Chamber. The documents and their metadata were prepared to be included with the Prosecution's 15 October 2013 request for redactions ("Request of 15 October").³ However, due to an oversight, they were not included with that request.

6. Document CIV-OTP-0043-0206 was collected by an OTP investigator on 25 May 2013. It is attached as Annex 3. The Prosecution is seeking one redaction to its metadata.

7. A copy of CIV-OTP-0043-0206 (Annex 3) was shown to witness CIV-OTP-P-0010 during his recent interview conducted in the second part of 2013; thus by reference it can be considered to be part of the said interview and ought to be disclosed with the transcripts of the interview. Redactions to these transcripts⁴ (and their metadata) were included with the Prosecution's Request of 15 October 2013 and it was the Prosecution's intention to include the request for the redaction to the metadata of this document at the same time. However, due to an oversight, it was not included with that request.

³ ICC-02/11-01/11-537-Conf.

⁴ CIV-OTP-0051-0255, CIV-OTP-0051-0266, CIV-OTP-0051-0300, CIV-OTP-0051-0335, CIV-OTP-0051-0390, CIV-OTP-0051-392, CIV-OTP-0051-0434, CIV-OTP-0051-0459, CIV-OTP-0051-0462, CIV-OTP-0051-0480, CIV-OTP-0051-0505, CIV-OTP-0051-0537, CIV-OTP-0051-1573 & CIV-OTP-0051-1574.

8. There was no earlier request for a redaction to the metadata of Appendix 3, because prior to a copy being shown to witness CIV-OTP-P-0010 the Prosecution did not intend to rely on this document for the purposes of the confirmation of charges.
9. On 7 November 2013, the Chamber issued its decision regarding the Prosecution's 15 October 2013 request for redactions, including to the transcripts of interviews of witnesses CIV-OTP-P-0330 and CIV-OTP-P-0010.⁵ This decision included the direction to disclose all the referenced material (with the authorised redactions) within 5 days. It was during the process of preparing this material for disclosure that the Prosecution became aware of the oversights referred to above.
10. The Prosecution submits that its request meets the requirements of Regulation 35(2) since an oversight is by definition an unexplained and uncontrolled error. The Prosecution does indeed take all its disclosure obligations seriously and makes every effort to strictly comply with the time limits set by the Chamber.⁶ However, notwithstanding the Prosecution's best efforts, inadvertent errors do occasionally occur. In this regard, it is notable that these oversights occurred in the context of the Prosecution's 15 October 2013 request for redactions, which was a submission that pertained to a large number of documents and pages.
11. The Prosecution submits that the Defence will not suffer any prejudice if the Chamber grants the requested extension of time and the requested redactions.
12. If these requested redactions had been included in the Prosecution's 15 October 2013 request for redactions, they would most certainly have been examined by the Chamber and dealt with in the decision of 7 November 2013. The documents

⁵ ICC-02/11-01/11-556.

⁶ As noted by the Chamber in decision ICC-02/11-01/11-520, para. 14.

and metadata would then have been subject to the same disclosure deadline of November 13, 2013.

13. Annexes 4 and 5 are copies of documents CIV-OTP-0046-0153 and CIV-OTP-0046-0156 with the requested redactions already applied. Without presuming the decision of the Chamber, these documents and Annex 3 are provided immediately to the Defence for the benefit of their preparation; and within the same deadline that would likely have applied if the Chamber had been able to review these redactions in its 7 November 2013 decision.⁷

14. The 3 documents in question are together a total of 7 pages of text. The redactions sought are limited and do not impact on the ability to understand the documents. The Defence will have sufficient time to analyse these documents and respond to them in the context of the confirmation of the charges; the calendar having been recently suspended by the Chamber.⁸

Requests for redactions

15. Without presuming the Chamber's decision on the Regulation 35 request submitted above, if granted, the Prosecution hereby requests approval for the redactions set out below.

Redactions pursuant to Rule 81(2)

16. The redactions sought are: with respect to the metadata of Annex 1 and 2, the name of the investigator who obtained the document and the name of a source;

⁷ICC-02/11-01/11-556.

⁸ICC-02/11-01/11-557.

and with respect to the metadata of Annex 3, the name of the investigator who collected the document.

17. These redactions are sought pursuant to Rule 81(2) to protect further and ongoing investigations. Revealing to the Defence any of the above information could impact on the Prosecution's ability to conduct its investigations, as it may unduly attract attention to the movement of Prosecution staff and by extension to (potential) witnesses and also impact on their security.⁹ The above redactions also ensure that the Prosecution can conduct its investigations using a limited number of OTP staff. This precludes the necessity to replace staff, which would have a negative impact, both on the expeditious conduct of its investigations and the resources required to conduct such investigations.

18. The Prosecution recalls that investigators within the Prosecution can work on different investigations at once, and when they finish working on one investigation they are assigned to another. In this respect, they will be always moving from one investigation to another and will therefore be repeatedly facing potential security issues requiring that their identities be kept confidential. When the identities of investigators are revealed in one case, it makes it significantly more difficult to maintain confidentiality in subsequent cases. Thus absent some showing of a specific need or justification for the disclosure of the identities of the investigators, the Prosecution will seek as a matter of practice to maintain the confidentiality of investigator identities. For these reasons, pertaining both to the present case and to the overall practice of the Prosecution, the identities of the investigators should be redacted.

19. The investigations of the Prosecution are also conducted confidentially. The Prosecution noted above that the Chamber in its Decision requested the

⁹ Although these redactions are sought pursuant to Rule 81(2), they also have security implications for victims and witnesses and they can therefore equally be justified under Rule 81(4).

Prosecution to consider the submission of additional evidence or the conduct of further investigations.¹⁰ The Prosecution has done so, and continues to investigate the situation in Côte d'Ivoire. In order to maintain the confidentiality of its investigation and protect the reliability of its ongoing evidence collection, the Prosecution seeks to redact investigative leads, including the names of sources. Such redactions do not affect the ability to understand the annexed documents.

20. The Prosecution submits that the redactions sought pursuant to Rule 81(2), which in this submission apply only to the metadata of the 3 documents, would not result in unfairness to the suspect at the confirmation of charges, since they do not relate to information that is relevant for the preparation of the case of the Defence. The Prosecution will also periodically review the need to maintain redactions and, if they are no longer required, request their lifting. Furthermore, the redactions sought under Rule 81(2) are consistent with prior Decisions of the Chamber that authorised similar redactions.¹¹

Redactions pursuant to Rule 81(4)

21. Additionally, with respect to Annexes 1 and 2, the Prosecution seeks pursuant to Rule 81(4) authorisation to redact (a) identifying information of third parties at risk on account of the activities of the Court (also referred to as “innocent third parties”) and (b) identifying information of family members of witnesses.
22. Specifically, in both of Annexes 1 and 2 the Prosecution seeks to redact the name of the witness’s father and the witness’s phone number.

¹⁰ The Chamber has made public the topics on which it wishes the Prosecution to submit or collect further evidence. In this context, keeping confidential the identity of possible lead information becomes all the more essential.

¹¹ ICC-02/11-01/11-74-Red, ICC-02/11-01/11-106, ICC-02/11-01/11-294, ICC-02/11-01/11-520 and ICC-02/11-01/11-556.

23. These redactions do not have any impact on the fairness of the proceedings and the rights of the Defence, as they do not cover any information that is relevant for the preparation of the case of the Defence. Besides, the proposed redactions are very limited and in no way affect the content or substantive information presented in the documents.
24. Regarding the proposed redactions falling into the category of “identifying information of family members of any witnesses”, the Prosecution emphasizes that it is essential for the purposes of its investigations to be able to seek this type of protection. Witnesses often fear for the security of their family, and in many cases, their cooperation with the Prosecution depends on it. Consequently, it is in the interest of justice, including the search for the truth, to protect family members of cooperating witnesses.
25. Annex 6 to this filing contains a table that identifies the exact redactions requested to the documents and their metadata and identifies the factual and legal basis for the requested redactions.

Conclusion

26. For the reasons set out above, the Prosecution requests the Chamber to:

- a. grant, pursuant to Regulation 35, the extension of time for the Prosecution to request redactions to the subject documents and their metadata; and,
- b. grant, pursuant to Rule 81(2) and Rule 81(4), the Prosecution's requests for redactions to the metadata of Annex 3 and to the documents in Annexes 1 and 2 and their metadata.



Fatou Bensouda, Prosecutor

Dated this 12th day of November 2013

At The Hague, The Netherlands