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TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

PUBLIC

**With Confidential *EX PARTE* Annexes A to E only available to the Chamber, the
Prosecution, the Legal Representatives of the Victims and the Victims
Participation and Reparations Section**

Prosecution request for the lifting of certain redactions in four victim applications

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. The Prosecution seeks the Trial Chamber's authorisation to lift certain redactions made to four applications for participation as victims in the proceedings ("victim applications"),¹ with a view to disclosing lesser redacted versions to the Defence teams for Mr Gbagbo ("Gbagbo Defence team") and Mr Blé Goudé ("Blé Goudé Defence team") respectively. Specifically, the Prosecution requests the lifting of redactions i) to the names and organisational affiliations of victims intermediaries where the intermediary is also a Prosecution witness, and ii) to information relevant to a material fact in the case.

Request for Confidentiality

2. The Prosecution requests that Annex A is received as "Confidential *ex parte*", not available to the Defence, as it refers to the information currently redacted in the version of the four victim applications available to the Defence. The Prosecution equally requests that Annexes B, C, D and E are received as "Confidential *ex parte*", as they contain the four victim applications in unredacted form.

Procedural Background

3. On 16 May 2012, the Registry transmitted unredacted versions of victim applications a/20005/12, a/20013/12 and 20014/12 to the Prosecution,² and redacted versions of the same to the Gbagbo Defence.³ On 19 June 2014, the Registry transmitted redacted versions of the three applications to the Blé Goudé Defence.⁴
4. On 15 December 2014, the Chamber issued its "Decision on the Protocol establishing a redaction regime".⁵ Annexed to this decision was the Chamber's "Protocol establishing a redaction regime".⁶

¹ The four applications are a/2005/12, a/20013/12, a/20014/12 and a/25122/15.

² ICC-02/11-01/11-121.

³ ICC-02/11-01/11-122.

⁴ ICC-02/11-02/11-88.

⁵ ICC-02/11-01/11-737.

⁶ ICC-02/11-01/11-737-AnxA.

5. On 7 October 2015, the Registry transmitted an unredacted version of victim application a/25122/15, in full, to the Prosecution.⁷ On the same day, it transmitted a redacted version of the same victim application, minus the second page of the application, to the two Defence teams.⁸
6. On 17 March 2016, the Prosecution requested authorisation to lift redactions in the applications of nine dual status witnesses to the names and affiliations of victim intermediaries and other persons assisting victims in the application process, where the intermediary or other person is also a Prosecution witness.⁹
7. On 24 March 2016, the Prosecution filed its “certification of review of its case file”.¹⁰ In this certification, it informed the Chamber that it was finalising a full review of all victim application in its possession, in order to identify any information disclosable under rule 77 of the Rules of Procedure and Evidence (“Rules”) that was redacted by the Victims Participation Section (“VPRS”) in the versions disclosed to the Defence teams.”¹¹

Submissions

8. As stated in previous filings,¹² the Prosecution has recently conducted a broad review of all victim applications in its possession. This review is now complete, and the Prosecution has identified to the Legal Representative of Victims (“LRV”) and the VPRS a number of victim applications where it seeks agreement on the lifting of certain redactions. Of this number, there are four victim applications which the Prosecution has identified as material to the Defence’s preparation of the two Prosecution witnesses to be called next in the sequence: Witnesses P-0441 and P-0579. The Prosecution and the LRV have expedited discussions on these four applications in order to ensure that any necessary disclosure of victim

⁷ See ICC-02/11-01/15-278, giving the OTP access to the annexures of ICC-02/11-01/15-225.

⁸ ICC-02/11-01/15-278.

⁹ ICC-02/11-01/15-465.

¹⁰ ICC-02/11-01/15-470.

¹¹ ICC-02/11-01/15-470, para. 5.

¹² See ICC-02/11-01/15-465, para. 11, ICC-02/11-01/15-470, para. 5.

applications - with redactions duly lifted - is carried out well in advance of these Witnesses testifying.

9. As the Prosecution and the LRV have not been able to reach agreement on the redactions to be lifted in respect of these four applications, the Prosecution now applies to the Chamber to authorise the lifting of certain redactions. The Prosecution has taken the decision not to seize the Chamber in every instance where the LRV has not agreed with its proposal to lift redactions, but only those where the Prosecution deems the item of redacted information to be material to Defence preparation. Where, for instance, the same information is available to the Defence in another disclosed form, then the Prosecution has not considered that information to be “material” to Defence preparation.
10. The Prosecution sets out its two broad bases for the lifting of redactions in the paragraphs below. In Confidential *Ex Parte* Annex A, the Prosecution also identifies the redactions that it seeks authorisation to lift, with additional details to substantiate the broad bases. In Confidential *Ex Parte* Annexes B, C, D and E, the Prosecution provides unredacted versions of the four victim applications, with the redactions it seeks to lift highlighted in grey.¹³

The Prosecution’s obligations under rule 77 of the Rules

11. Rule 77 of the Rules is framed broadly to require disclosure by the Prosecution of “any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence...”. In *Lubanga*, the Appeals Chamber stated that the term “material to the preparation of the defence” “should be understood as referring to all objects that are relevant for the preparation of the defence.”¹⁴ It found that the Trial

¹³ The other colour categories indicate redactions to be maintained under the following categories of the Redaction Protocol: blue indicates Category A redactions; red indicates Category B redactions. In relation to victim application a/20015/12, the LRV and the Prosecution have reached agreement on the lifting of certain redactions. These agreed redactions are also highlighted in grey, but the Chamber need not make a determination in relation to them. The Chamber only need make a determination on the redactions identified in the chart in Confidential *Ex Parte* Annex A.

¹⁴ ICC-01/04-01/06-1433, para. 77.

Chamber in that case had interpreted rule 77 too narrowly, by excluding “objects which, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence.”¹⁵

12. Victim applications serve the “limited purpose” of allowing the Chamber to determine whether individual victims should be permitted to participate in the proceedings.¹⁶ Should it be argued that this limited purpose removes victim applications from the scope of the Prosecution’s disclosure obligations, the Prosecution clarifies that this cannot be the case; there is nothing to suggest that the Prosecution’s broad obligations under rule 77 are limited by reference to the purpose of the document under review. The victim applications are in the Prosecution’s possession in unredacted form. The Prosecution considers, therefore, that it is required to assess whether any information redacted in the versions transmitted by the VPRS to the Defence teams are material to the Defence preparation.

13. The Prosecution notes that its disclosure obligations under rule 77 are subject to the restrictions provided for in the Statute and rules 81 and 82 of the Rules, including the protection of victims.¹⁷ Mindful of its obligations towards victims, the Prosecution has limited itself to seeking the lifting of the fewest redactions possible to enable the material information to be conveyed to the Defence.

Redactions to victim intermediaries who are also Prosecution witnesses

14. As the chart in Confidential *Ex Parte* Annex A indicates, each of the four victim applications currently contains redactions to the names and affiliations of victim intermediaries who are also Prosecution witnesses.

15. As submitted in previous filings,¹⁸ where Prosecution witnesses have acted as victim intermediaries, the identities and organisational affiliations of such

¹⁵ ICC-01/04-01/06-1433, para. 77.

¹⁶ ICC-01/05-01/08-2012, para . 100.

¹⁷ See rule 81(4).

¹⁸ ICC-02/11-01/15-465; ICC-02/11-01/15-481.

Prosecution witnesses is information which the Prosecution is required to disclose under rule 77 of the Rules.

16. As the Chamber has already determined, none of the standard redaction categories under the Redaction Protocol – including the “B.3” category for innocent third parties – applies to victims intermediaries.¹⁹ Whilst the Chamber, in its 2 September 2015 Decision, previously authorised redactions to the identities of intermediaries, it appeared to do so in order to counter the risk that “the intermediaries ‘may be perceived as potential witnesses or collaborators with the Court’”.²⁰ In the case of victims intermediaries who are in fact Prosecution witnesses, this basis for non-disclosure is not applicable and the fact of their assistance is material to the preparation of the Defence.

17. There would appear to be no countervailing basis for non-disclosure of this information. While Chambers of this Court have previously considered whether redactions to intermediaries in victim applications should be lifted,²¹ as far as the Prosecution is aware, no Chamber has been faced with the situation where the victim intermediaries were also Prosecution witnesses.

Redactions to information relevant to a material fact in the case

18. As the chart in Confidential *Ex Parte* Annex A indicates, each of the four victim applications currently contains redactions to information relevant to a material fact in this case. The chart identifies what the relevant information is, for each redaction sought to be lifted. In broad terms, the relevant information falls under the following categories:

- a. Information relevant to the identities of certain deceased victims of the 3 March 2011 incident;

¹⁹ ICC-02/11-01/15-202, paras. 16- 18.

²⁰ ICC-02/11-01/15-202, para. 19.

²¹ See, for example, ICC-01/04-01/06-2659.

- b. Information relevant to the death of one victim of the 25 February 2011 incident.

19. The Prosecution acknowledges, with regret, that the lifting of these redactions would have the additional effect of directly or potentially revealing the identity of the person applying to participate as a victim, whether by revealing the name of that person, or by way of inference. However, the Prosecution notes that in the case of some persons,²² their names have already been disclosed to the Defence.²³ Furthermore, where this is not the case,²⁴ the way redactions are currently applied is such that lifting redactions to the material information would, when paired together with other potentially identifying information that is unredacted, have the unfortunate effect of potentially revealing the identity of the person applying to participate as a victim. Regrettable as this is, the lifting of redactions is nonetheless necessary to disclose to the Defence teams information relevant to a material fact in the case.

Request

20. For the reasons set out, the Prosecution seeks the Chamber's authorisation to lift the identified redactions to the four victim applications, so that it may disclose them to the Defence teams of Mr Gbagbo and Mr Blé Goudé with fewer redactions.

²² See a/20005/12 at Confidential *Ex Parte* Annex B, p. 4; a/20013/12 at Confidential *Ex Parte* Annex C, p. 1; and a/20014/12 at Confidential *Ex Parte* Annex D, p. 1.

²³ For further details, refer to Confidential *Ex Parte* Annex A.

²⁴ See a/25122/15 at Confidential *Ex Parte* Annex E, p. 1.



Fatou Bensouda, Prosecutor

Dated this 29th day of April 2016

At The Hague, The Netherlands