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**International
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TRIAL CHAMBER I

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

SITUATION INCÔTE D'IVOIRE

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

Public Document

Redacted version of "Response to the Prosecution request for the lifting of certain redactions in four victim applications (ICC-02/11-01/15-493) "

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. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that the request by the Prosecution to lift certain redactions in four victim applications (the “Request”)² must be rejected. The Prosecution fails to advance any reason why the disclosure to the Defence of the redacted information identified in the four applications falls within the scope of rule 77 of the Rules of Procedure and Evidence.

2. Regarding the redactions to the identifying information of intermediaries who are also Prosecution witnesses, the Legal Representative reiterates her previous submissions in the matter and in particular that rule 77 of the Rules of Procedure and Evidence does not require the disclosure of this information.

3. Regarding the redactions to information which in the Prosecution’s view is “*relevant to a material fact in the case*”, the Legal Representative submits that the Request *de facto* broadens the meaning of rule 77 of the Rules of Procedure and Evidence by making an extensive interpretation thereof which is inconsistent with the relevant jurisprudence of the Court and which nullifies the difference between the nature and purpose of victims’ applications *vis-à-vis* witness statements.

4. Addressing the specific information for which the Prosecution seeks the lifting of redactions, the Legal Representative submits that it is unnecessary to lift the redactions currently applied [REDACTED].

5. Similarly, the Legal Representative opposes the lifting of the other redactions currently applied [REDACTED]. [REDACTED] to do otherwise would lead to lifting

¹ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015; and the “Decision on victims’ participation status” (Trial Chamber I), No. ICC-02/11-01/15-379, 7 January 2016, p. 23.

² See the “Prosecution request for the lifting of certain redactions in four victim applications”, No. ICC-02/11-01/15-493, 29 April 2016 (the “Request”).

the redactions applied to the identity of almost all victims participating in these proceedings, who are not witnesses and have repeatedly stated their wish to remain anonymous.

6. Lastly, the Legal Representative reiterates her previous arguments on the mandatory need for the concerned victims to provide their consent *before* the Prosecution discloses their identities to the Defence, and informs the Chamber that said potential disclosure is a matter of the outmost concern to all the victims recently met.

7. In this regard, the Legal Representative regrets that the Prosecution only made a nominal effort to balance its disclosure obligations under article 67(2) of the Rome Statute and rules 76 and 77 of the Rules of Procedure and Evidence with its equally binding obligations to adopt measures to protect the safety, well-being, dignity and privacy of victims pursuant to article 68(1) of the Rome Statute. The lack of protection of the interests of the victims in the Request is all the more evident when compared with the careful approach adopted by the Prosecution for the protection of the witnesses it intends to call to testify.

II. Confidentiality

8. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this submission is filed confidential *ex parte*, only available to the Legal Representative, the Prosecution and the VPRS, because it contains information not disclosed to the Defence. The Legal Representative files simultaneously a public redacted version of the submission.

III. Background

9. On 15 December 2014, the Single Judge of Trial Chamber I (the “Single Judge”) adopted the redaction regime to be followed in the case of *The Prosecutor v. Laurent Gbagbo* (the “Redaction Protocol”).³

10. On 8 June 2015 and on 7 July 2015, the Legal Representative filed two requests (the “First Request” and the “Second Request” respectively) to maintain redactions to the identifying and contact information of the intermediaries mentioned in several applications of dual status individuals (the “LRV Requests”).⁴

11. On 26 June 2015, the Legal Representative filed her reply to the responses of the Defence teams of Mr Gbagbo and Mr Blé Goudé opposing the First Request (the “Reply”).⁵

12. On 2 September 2015, the Single Judge granted the Legal Representative Requests upon finding that “[a]pplying the redactions sought is the most appropriate measure to protect the safety of the intermediaries, and also of other individuals who have applied or may apply for participation through these intermediaries or are otherwise in contact with these intermediaries in the field”.⁶

³ See the “Protocol establishing a redaction regime in the case of *The Prosecutor v. Laurent Gbagbo*” (Pre-Trial Chamber I), No. ICC-02/11-01/11-737-AnxA, 15 December 2014 (the “Redaction Protocol”).

⁴ See the “Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the applications of dual status individuals”, No. ICC-02/11-01/15-85, 8 June 2015 (the “First Request”); and the “Second request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the applications of dual status individuals”, No. ICC-02/11-01/15-126, 7 July 2015 (the “Second Request”; together with the First Request, the “LRV Requests”).

⁵ See the Public redacted Version - Reply to Defence responses ICC-02/11-01/15-98 and ICC-02/11-01/15-100”, No. ICC-02/11-01/15-106-Red, 26 June 2015 (the “Reply”).

⁶ See the “Decision on the Legal Representative of Victims’ requests to maintain redactions to information relating to certain intermediaries” (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-202, 2 September 2015, para. 20.

13. On 7 March 2016, the Legal Representative informed the Chamber that she had consulted the 468 victims authorised to participate at trial and that all of them, except for the ones enjoying dual status of victims and witnesses, had expressed their wish to not disclose their identity to the Defence (the “Communication”).⁷

14. On 29 March 2016, the Legal Representative filed her response to the Prosecution’s request seeking authorisation to lift redactions to the identifying information of intermediaries and/or third parties who assisted victims during the application process contained in the applications of nine dual status individuals previously disclosed to the Defence (the “Response”),⁸ together with a request to maintain certain redactions in the applications of four additional dual status individuals (the “Third Request”).⁹

15. On 29 April 2016, the Prosecution filed the Request,¹⁰ seeking authorisation to lift certain redactions in the applications of four dual status individuals previously disclosed to the Defence, which the Prosecution identifies as material to the Defence’s preparation of the two witnesses to be called next in the case (P-0441 and P-0579).

16. On 2 May 2016, the Chamber shortened to Friday 6 May 2016 at 11:00 am the time limit for filing any response to the Request.¹¹

17. Pursuant to regulation 24(2) of the Regulations of the Court, the Legal Representative submits the following response to the Request.

⁷ See the “Communication of the Common Legal Representative concerning the non-disclosure to the Defence of the identity of participating victims”, No. ICC-02/11-01/15-460, 7 March 2016 (the “Communication”).

⁸ See the “Response to ICC-02/11-01/15-465 and request to maintain certain redactions in the victim applications of dual status individuals”, No. ICC-02/11-01/15-473, 29 March 2016, paras.14-45 (the “Response”).

⁹ See the “Response to ICC-02/11-01/15-465 and request to maintain certain redactions in the victim applications of dual status individuals”, No. ICC-02/11-01/15-473, 29 March 2016, paras.46-48 (the “Third Request”).

¹⁰ See *supra* note 2.

¹¹ See the e-mail received from Trial Chamber I on 2 May 2016 at 14h47.

IV. Submissions

1. Redactions to the identifying information of intermediaries who are also Prosecution witnesses

18. The Legal Representative recalls *in toto* her previous submissions filed in relation to the previous requests by the Prosecution for the lifting of redactions in victims' applications.¹²

19. Indeed, said submissions are also applicable to the arguments advanced by the Prosecution for requesting disclosure of the intermediaries' identifying information in the four applications concerned by the Request.¹³

2. Redactions to "information relevant to a material fact in the case"

20. The Prosecution also argues in the Request that "[i]nformation relevant to the identities of certain deceased victims of the 3 March 2011 incident" and "[i]nformation relevant to the death of one victim of the 25 February 2011 incident", currently redacted in the four victims' applications, is, *per se*, "information relevant to a material fact in the case" which must be disclosed pursuant to rule 77 of the Rules of Procedure and Evidence.¹⁴

21. This conclusion stems from the general approach adopted by the Prosecution whereby certain redacted information in the victims' applications is "material to Defence preparation" under rule 77 of the Rules of Procedure and Evidence.¹⁵ The

¹² See the First Request, *supra* note 4; the Reply, *supra* note 5; the Second Request, *supra* note 4; the Communication, *supra* note 7; the Response, *supra* note 8; and the Third Request, *supra* note 9.

¹³ See the Request, *supra* note 2, paras. 14-17; and [REDACTED].

¹⁴ See the Request, *supra* note 2, para. 18.

¹⁵ *Idem*, para. 9.

Request, however, does not refer to any jurisprudence identifying victims' applications as potentially falling within the scope of said provision.¹⁶

22. In this regard, the Legal Representative wishes to underline that the Appeals Chamber has clarified that the Prosecution disclosure obligations under rule 77 refer to “[e]vidence which is material for the preparation of the defence, and evidence which will be used at trial”.¹⁷ In this sense, victims' applications cannot be considered as evidence collected by the Prosecution during its investigations and thus as falling within the scope of rule 77 of the Rules of Procedure and Evidence.¹⁸

23. Victims' applications “[u]nlike evidence collected to support or challenge the substantive criminal charges in the case, [...] are administrative in nature and [...] are

¹⁶ *Ibid.*, paras. 11-12.

¹⁷ See the “Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial” (Appeals Chamber), No. ICC-01/04-01/07-2288 OA11, 16 July 2010, para. 72 (emphasis added). By the same token, see also the “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties” (Pre-Trial Chamber III), No. ICC-01/05-01/08-55, 31 July 2008, paras. 48 and 51.c) (emphasis added) (“[r]ule 77 of the Rules puts an obligation on the Prosecutor to disclose to the defence three types of evidence: any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, (i) which are material to the preparation of the defence or (ii) are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or (iii) were obtained from or belonged to the person charged [...] evidence in the possession or control of the Prosecutor, which is material to the preparation of the defence or is intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or was obtained from or belonged to the person charged and which are subject to inspection pursuant to rule 77 of the Rules”); and the “Decision on the ‘Defence Request for Disclosure of Article 67(2) and Rule 77 Materials’” (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-01/11-196, 14 July 2011, para. 8 (emphasis added) (“[t]he Single Judge recalls that the scope of disclosure of evidence between the parties is regulated by various provisions of the applicable law [...] For the purposes of the present decision, article 67(2) of the Statute and rule 77 of the Rules are of particular relevance [...] if a piece of evidence is to be disclosed to the Defence by virtue of any such provision it is not necessary that an order to this effect be issued by the Chamber”).

¹⁸ See the “Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011” (Trial Chamber III), No. ICC-01/05-01/08-2012-Red, 9 February 2012, paras. 100-101 (emphasis added) (“[t]he probative value of the application forms is limited. Unlike evidence collected to support or challenge the substantive criminal charges in the case, the application forms are administrative in nature and are created through a relationship of confidence between a potential victim and the Registry of the Court”). See also transcripts of the Confirmation of Charges Hearing held on 7 July 2008, No. ICC-01/04-01/07-T-44-ENG, p. 14, line 25 to p. 15, line 3.

intended to serve a limited purpose: to provide the Chamber with a basis for determining whether individual victims should be permitted to participate in the proceedings”.¹⁹

24. Accordingly, the Request *de facto* broadens the meaning of rule 77 by making an extensive interpretation thereof which is inconsistent with the relevant jurisprudence of the Court on this issue.

25. The Request solely relies on particular findings reached in the *Lubanga* and *Bemba* cases.²⁰ However, the Prosecution fails to bring to the attention of the Chamber more recent rulings clarifying the scope of rule 77 of the Rules of Procedure and Evidence.²¹

26. In particular, Trial Chamber VI in the *Ntaganda* case recently rejected several Defence requests to lift redactions in the statements and victims’ applications of dual status individuals because the redacted identities of the persons concerned did not form part of the expected testimony of the dual status individual and/or were not relevant to any known issue in the case.²²

27. Applying the *Ntaganda* approach in order to determine whether the redacted information in the victims’ applications is “*relevant to a material fact in the case*”, the Legal Representative submits that the Request fails to substantiate how said information may be relevant for the Defence, especially considering that it has already been disclosed to the Defence.

¹⁹ See the “Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011” (Trial Chamber III), No. ICC-01/05-01/08-2012-Red, 9 February 2012, para. 100.

²⁰ See the Request, *supra* note 2, paras. 11-12.

²¹ See the “Decision on the ‘Prosecution’s Submissions on the Trial Chamber’s 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart’” (Trial Chamber III), No. ICC-01/05-01/08-682, 29 January 2010, para. 25 (“*Counsel has an obligation to bring any apparently relevant jurisprudence to the attention of the Bench, particularly in a situation such as the present when the prosecution was one of the parties involved in a nearly identical issue before another Chamber of this Court*”).

²² See the [REDACTED].

28. Indeed, the Prosecution requests the disclosure of [REDACTED].²³

29. In this regard, the Request indicates that [REDACTED].²⁴

30. In these circumstances, the Legal Representative submits that it is unnecessary to lift the redactions currently applied [REDACTED].²⁵ The Prosecution itself indicates in the Request that “[w]here [...] *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*”.²⁶ [REDACTED].

31. [REDACTED].

32. Therefore, the lifting of the redactions applied to [REDACTED] is not legally required and must be rejected.

33. The Prosecution also seeks the disclosure of other information contained in the applications of victims a/20013/12, a/20014/12 and a/25122/15.

34. Lifting the redactions currently applied in the relevant applications, [REDACTED].

35. The only reason advanced by the Prosecution to lift the abovementioned redactions is [REDACTED].²⁷

36. In this regard, the Legal Representative submits that the Prosecution obviates the different nature and purpose of a victim application *vis-à-vis* a witness statement,

²³ See [REDACTED].

²⁴ *Idem*.

²⁵ *Ibid*.

²⁶ See the Request, *supra* note 2, para. 9.

²⁷ *Idem*, pp. 2-3.

and relies on an approach to rule 77 of the Rules of Procedure and Evidence that nullifies the difference between these two types of documents.

37. As noted by different Chambers, victims' applications are not evidence on which the Chamber may rely in order to reach a decision pursuant to article 74 of the Rome Statute but administrative documents to decide on the participation (and eventual reparation) of victims.²⁸ Accordingly, if the Prosecution deems that the information contained in a victim application may be relevant to determine the criminal responsibility of a person, it must investigate said information and collect the relevant *evidence* for eventual disclosure to the Defence.²⁹

38. The Request is inconsistent with the approach identified *supra*. The Prosecution requests authorisation to lift the redactions in the applications of a/20013/12 a/20014/12 and a/25122/15 solely on the basis that [REDACTED]. [REDACTED].³⁰ More importantly, the Prosecution does not intend to call victims a/20013/12, a/20014/12 and a/25122/15 to testify at trial.

39. In these circumstances, the request to lift the redactions is only based on the fact that [REDACTED].

40. The Legal Representative reiterates that, as recently found by Trial Chamber VI in the *Ntaganda* case,³¹ the reference to [REDACTED] cannot be accepted as the sole basis to lift redactions to their identifying information pursuant to rule 77 of the Rules of Procedure and Evidence. To do otherwise would lead to the erroneous assimilation of victims' applications with witness statements.

²⁸ See, *inter alia*, the "Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case" (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-01/11-169, 8 July 2011, paras. 9-10; and the "Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011", *supra* note 19, paras. 100-102.

²⁹ See the "Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case", *supra* note 28, paras. 11-13.

³⁰ *Idem*.

³¹ See the [REDACTED].

41. Moreover, considering the [REDACTED] of many of the victims in this case, this approach would lead to applications for lifting redactions to the identity of almost all victims participating in the proceedings. The duty of the Court to protect the safety, well-being and privacy of the victims would then be compromised.

42. Therefore, the lifting of the redactions applied to [REDACTED] of victims a/20013/12, a/20014/12, and a/25122/15 in Annexes C, D and E of the Request is not legally required and must be rejected.

43. In addition to not being required by rule 77 of the Rules of Procedure and Evidence, lifting the redactions currently applied to the alleged “*information relevant to a material fact in the case*” identified in the Request should not be ordered because [REDACTED].³²

44. In this regard, the Legal Representative reiterates her previous arguments on the mandatory need for the concerned victims to provide their consent *before* the Prosecution discloses their identities to the Defence either directly or by way of inference.³³

45. The Legal Representative recently gathered the views and concerns of her clients on different issues arising from the proceedings. The potential disclosure of their identities to the Accused remains a matter of the outmost concern to all of them.³⁴ The fact that the Prosecution moved for the disclosure of this information to the Defence against the victims’ stated wish to remain anonymous has further increased the anxiety of many of the victims participating in the proceedings.

³² See the Communication, *supra* note 7, paras. 9-11.

³³ See the First Request, *supra* note 4, paras. 28 and 55-56; and the Response, *supra* note 8, paras. 27-32.

³⁴ See the Communication, *supra* note 7, para. 12.

46. In this scenario, the Legal Representative is surprised, to put it mildly, when the Prosecution states that it “[a]cknowledges 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 [...] 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”.³⁵

47. The Legal Representative truly regrets that the Prosecution is not balancing its disclosure obligations *vis-à-vis* the Defence under article 67(2) of the Rome Statute and rules 76 and 77 of the Rules of Procedure and Evidence with its equally binding obligations *vis-à-vis* the victims to adopt measures to protect their safety, well-being, dignity and privacy pursuant to article 68(1) of the Rome Statute. In fact, it appears that for the Prosecution the former obligations *unavoidably* trump the latter, over and without the consent of the victims concerned.

48. The whole Request is permeated by this uneven approach, whereby the Prosecution formally notes “[t]he restrictions provided for in the Statute and rules 81 and 82 of the Rules, including the protection of victims” and acknowledges its “obligations towards victims”,³⁶ but concludes without further elaboration that the best approach to solve any possible tension between the latter obligations and its disclosure obligations under rule 77 is simply to “[l]imit [...] itself to seeking the lifting of the fewest redactions possible to enable the material information to be conveyed to the Defence”.³⁷

49. This uneven approach by the Prosecution, inconsistent with the statutory right of the victims to the protection of their safety, well-being and privacy, is all the more obvious when attention is paid to the exceedingly protective position adopted by the Prosecution towards its own intermediaries, its own staff and the witnesses it intends

³⁵ See the Request, *supra* note 2, para. 19.

³⁶ *Idem*, para. 13.

³⁷ *Ibid.*

to call to testify. For said witnesses, the Prosecution supports the redaction of all potentially identifying information, including more recently the very pseudonyms assigned to each witness as a protective measure.³⁸ By contrast, the Prosecution adopts a much weaker stance to maintain redactions that are necessary to ensure the protection of victims who do not benefit from dual status and whose applications for participation cannot be considered as evidence, such as the ones addressed in the Request. In the latter instance, the balance appears to unavoidably favour the disclosure of the redacted information to the Defence.

50. In conclusion, the Legal Representative submits that the approach adopted by the Prosecution in the Request when assessing the need to maintain redactions is unnecessary and contrary both to the jurisprudence of the Court and to the duty to protect victims and witnesses which lies at the core of the Rome Statute, as repeatedly stated by the Chambers.³⁹

³⁸ See, *inter alia*, the “Public redacted version of “Prosecution’s application for Witness [REDACTED] to give testimony by means of video technology”, 15 April 2016, ICC-02/11-01/15-486-Conf”, No. ICC-02/11-01/15-486-Red, 15 April 2016; the “Public redacted version of ‘Prosecution application to conditionally admit the prior recorded statements and related documents of [REDACTED] under rule 68(2)(b) and the prior recorded statements and related documents of [REDACTED] under rule 68(3)’, 19 April 2016, ICC-023-/11-01/15-487-Conf”, No. ICC-02/11-01/15-487-Red, 28 April 2016; and [REDACTED].

³⁹ See the Reply, *supra* note 5, para. 26.

V. Conclusion

51. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to dismiss the Request.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 6th day of May of 2016

At Genoa, Italy