

**Cour
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**International
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Court**



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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

**Decision on Prosecutor's requests for lifting of certain redactions in victim
application forms (ICC-02/11-01/15-465 and ICC-02/11-01/15-493)**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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States' Representatives

Amicus Curiae

REGISTRY

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**Victims Participation and Reparations
Section**

Ms Isabelle Guibal

Others

Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Articles 67(2) and 68(1) of the Rome Statute and Rules 77, 81 and 87 of the Rules of Procedure and Evidence (“Rules”), issues the following “Decision on Prosecutor’s requests for lifting of certain redactions in victim application forms (ICC-02/11-01/15-465 and ICC-02/11-01/15-493)”.

I. BACKGROUND AND SUBMISSIONS

1. In June and July 2015, in accordance with the “Decision on victim participation”,¹ the Office of the Prosecutor (“Prosecutor”) disclosed victims’ application forms of dual status individuals with redactions to identifying information of intermediaries who assisted them with filling in the application forms. These redactions were applied at the request of the Legal Representative of Victims (“LRV”).² They were subsequently approved by the Chamber in its “Decision on the Legal Representative of Victims’ requests to maintain redactions to information relating to certain intermediaries” (“2 September 2015 Decision”).³ In March 2016, the Prosecutor disclosed further victims’ application forms of dual status individuals with similar redactions applied at the request of the LRV.⁴
2. On 18 March 2016, the Prosecutor filed a request seeking leave to lift certain redactions to identifying information of intermediaries, who are also Prosecutor’s witnesses, as applied to victims’ application forms disclosed in June and July 2015 and in March 2016 (“Prosecutor’s First Request”).⁵ In her view, this information is disclosable under Rule 77 of the Rules. Further, the Prosecutor indicated that she was in the process of completing her review of the applications of further dual

¹ 6 March 2015, ICC-02/11-01/11-800.

² Prosecution’s Communication of Evidence Disclosed to the Defence on 8 June 2015, 9 June 2015, ICC-02/11-01/15-86.

³ 2 September 2015, ICC-02/11-01/15-202.

⁴ Prosecution’s Communication of Evidence Disclosed to the Defence on 18 March 2016 and 24 March 2016, 31 March 2016, ICC-02/11-01/15-478.

⁵ Prosecution request for the lifting of certain redactions in the victim applications of nine dual status witnesses, ICC-02/11-01/15-465.

status individuals (“Further Applications”) and of liaising with the LRV and the Victims Participation and Reparation Section (“VPRS”) for the purpose of determining what redactions should be applied to those applications.

3. On 29 March 2016, the defence team for Mr Gbagbo (“Gbagbo Defence”) responded, supporting the Prosecutor’s First Request (“Gbagbo Defence Response”).⁶ With regard to the Further Applications, the Gbagbo Defence requested that all redactions to identifying information of intermediaries who are also Prosecutor’s witnesses be lifted (“Gbagbo Defence Request for Lifting of Redactions”).⁷
4. Also on 29 March 2016, the LRV filed her response, opposing the Prosecutor’s First Request (“LRV Response”)⁸, submitting (i) that identifying information of victims’ intermediaries who are also Prosecutor’s witnesses does not fall within the Prosecutor’s disclosure obligation; (ii) that, even assuming that such information falls under Rule 77 of the Rules, the consent of the victims’ intermediaries would be required before redactions to their names could be lifted; (iii) that disclosing the identifying information of said intermediaries would pose a risk to their safety, well-being and ongoing activities, particularly in light of the persistent volatility of the security situation in Côte d’Ivoire and (iv) that disclosure of those names would also enable the Defence to discover the identity of certain victims who were assisted by the same intermediaries but who are not dual status witnesses, thereby also posing a risk to their safety and well-being.⁹ As an alternative, proportionate measure, in the event that the Chamber were to grant the Prosecutor’s First

⁶ *Réponse de la Défense à la « Prosecution request for the lifting of certain redactions in the victim applications of nine dual status witnesses »* (ICC-02/11-01/15-465) et *requête de la Défense aux fins de la levée de ces mêmes expurgations dans toutes les demandes de participation des victimes lorsqu’elles portent sur l’identité d’intermédiaires qui sont en même temps témoins de l’Accusation*, ICC-02/11-01/15-474-Conf. A public redacted version was filed on the same day (ICC-02/11-01/15-474-Red).

⁷ Gbagbo Defence Response, ICC-02/11-01/15-474-Red.

⁸ Response to ICC-02/11-01/15-465 and request to maintain certain redactions in the victim applications of dual status individuals, 29 March 2016, ICC-02/11-01/15-473.

⁹ LRV Response, ICC-02/11-01/15-473.

Request, the LRV requested that pseudonyms be assigned to each victims' intermediary without the actual identifying information being disclosed ("LRV Alternative Request").¹⁰

5. With regard to the Further Applications, the LRV requested that the redactions applied to identifying information of victims' intermediaries in the application forms disclosed in March 2016 be maintained ("LRV Request for Redactions").¹¹
6. On 4 April 2016, the Prosecutor responded to the Gbagbo Defence Request for Lifting of Redactions, opposing it.¹²
7. On 6 April 2016, the Prosecutor responded to the LRV Request for Redactions, partly opposing it.¹³
8. On 7 April 2016, the Gbagbo Defence responded to the LRV Alternative Request and to the LRV Request for Redactions,¹⁴ opposing them ("Gbagbo Defence Response to LRV Requests").
9. On 8 April 2015, the LRV filed a motion requesting that the Gbagbo Defence Response to LRV Requests be struck from the record, as it would constitute a reply filed without leave of the Chamber, in breach of Regulation 24(5) of the Regulations of the Court ("Motion to Strike Gbagbo Defence Response to LRV

¹⁰ LRV Response, ICC-02/11-01/15-473.

¹¹ LRV Response, ICC-02/11-01/15-473.

¹² Prosecution Response to the Gbagbo Defence *Réponse de la Défense à la « Prosecution request for the lifting of certain redactions in the victim applications of nine dual status witnesses »* (ICC-02/11-01/15-465) et *requête de la Défense aux fins de la levée de ces mêmes expurgations dans toutes les demandes de participation des victimes lorsqu'elles portent sur l'identité d'intermédiaires qui sont en même temps témoins de l'Accusation*, ICC-02/11-01/15-480.

¹³ Prosecution response to the Office of Public Counsel for Victims' "Response to ICC-02/11-01/15-465 and request to maintain certain redactions in the victim applications of dual status individuals" (ICC-02/11-01/15-473), ICC-02/11-01/15-481.

¹⁴ *Réponse de la Défense à la « Response to ICC-02/11-01/15-465 and request to maintain certain redactions in the victim applications of dual status individuals »* (ICC-02/11-01/15-473), ICC-02/11-01/15-482.

Requests from the Record”).¹⁵ On the same day, the Gbagbo Defence responded thereto, requesting that it be rejected.¹⁶

10. On 29 April 2016, the Prosecutor filed a request for the lifting of certain redactions in four Further Applications (“Prosecutor’s Second Request”).¹⁷
11. On 4 May 2016, the Defence for Charles Blé Goudé stated¹⁸ they would not oppose the Prosecutor’s Second Request and would support “the lifting of any redaction to victim intermediaries who are also Prosecution witnesses and to information relevant to a material fact in the case”.
12. On 6 May 2016, in accordance with the Chamber’s order shortening the deadline for response,¹⁹ the LRV²⁰ and the Gbagbo Defence²¹ responded to the Prosecutor’s Second Request, respectively opposing and supporting it. In addition, the Gbagbo Defence requests the Chamber to “*rappeler au Procureur que c’est sur lui que repose l’obligation de lever dans les documents en sa possession les expurgations portant sur des informations essentielles à la préparation de la Défense, et qu’il ne saurait «sous-traiter» cette obligation à la RLV*” (“Gbagbo Defence Supplementary Request”).

II. ANALYSIS

Motion to Strike Gbagbo Defence Response to LRV Requests from the Record

¹⁵ Motion to strike document ICC-02/11-01/15-482 from the case record, ICC-02/11-01/15-483.

¹⁶ *Réponse de la Défense à la « Motion to strike document ICC-02/11-01/15-482 from the case record »* (ICC-02/11-01/15-483) déposée par la RLV le 8 avril 2016, notified on 11 April 2016, ICC-02/11-01/15-484.

¹⁷ Prosecution request for the lifting of certain redactions in four victim applications, ICC-02/11-01/15-493.

¹⁸ Email to the Chamber, the parties and participants sent at 18:15 hours.

¹⁹ Email from Legal Officer of the Chamber on 2 May 2016 at 14:47.

²⁰ Response to the Prosecution request for the lifting of certain redactions in four victim applications (ICC-02/11-01/15-493) ICC-02/11-01/15-500-Conf-Exp and ICC-02/11-01/15-500-Red.

²¹ *Réponse de la Défense à la « Prosecution request for the lifting of certain redactions in four victim applications »* (ICC-02/11-01/15-493), ICC-02/11-01/15-501.

13. As a preliminary matter, the Chamber notes that the Gbagbo Defence Response to LRV Requests addresses the two autonomous requests made by the LRV in its response to the Prosecutor's First Request, namely the LRV Alternative Request and the LRV Request for Redactions. Thus, the Chamber finds that the Gbagbo Defence was entitled to respond without seeking prior leave of the Chamber. Accordingly, the Motion to Strike Gbagbo Defence Response to LRV Requests from the Record is dismissed.

Prosecutor's First Request

14. Turning to the merits of the Prosecutor's First Request, the Chamber recalls its 2 September 2015 Decision, stating that it was for the Prosecutor "to disclose lesser redacted versions of applications for participation of dual status witnesses in accordance with its disclosure obligations and in a manner consistent with the Redaction Decision". At that time, the Chamber granted the redactions sought to the identifying information of intermediaries on the basis (i) that there was a risk that the victims' intermediaries might be erroneously perceived as potential witnesses or collaborators with the Court, thus putting them and the applicants at risk and that (ii) their identity was not relevant to any known issues in the case.
15. The Chamber notes that, since the 2 September 2015 Decision, the situation has changed. The Prosecutor states that she will be calling some of those intermediaries as witnesses and submits that the fact that an individual to be called as a witness by the Prosecutor has also acted as an intermediary to the benefit of one or more victims in the case qualifies as information which may be material to the preparation of the Defence within the meaning and for the purposes of Rule 77 of the Rules.
16. As stated by the Chamber in the 2 September 2015 Decision, "through assisting individuals to complete application forms, the relevant intermediaries

have engaged in the Court process”, and they no longer qualify as “innocent third parties”; this finding *a fortiori* applies to individuals who, besides having acted as intermediaries, are to be called before the Court as witnesses. Furthermore, since their identity as witnesses to be called by the Prosecutor has already been disclosed to the Defence, the argument supporting the redaction of their identity based on the need to avoid that they be wrongly perceived as potential witnesses is no longer applicable. The 2 September 2015 Decision had already anticipated that the need to revisit the decision granting the redaction might materialise, by stating that the ruling made at that stage was “without prejudice to the lifting of these redactions at any further stage of the proceedings, either *proprio motu* or upon request of a party or participant, if the redacted information becomes relevant to a live issue in the case”.

17. The Chamber is not persuaded by the LRV’s argument that the consent of the intermediaries is required before lifting redactions to their identity. Indeed, these individuals have already agreed to disclose their identity as witnesses to be called by the Prosecutor and as victims participating in the present case. It does not therefore appear necessary to seek their consent to disclose the mere fact that they facilitated the application of other victims.
18. Moreover, the Chamber notes that the deadline for applying as a participating victim in the present case has now expired. The LRV’s argument that revealing the identity of the intermediaries will affect the intermediaries’ ongoing activities in this case therefore lacks persuasiveness. With regard to the potential impact that this decision may have on victims’ application process in any related cases, the Chamber notes that the subject of the Prosecutor’s First Request is to disclose the identity of the intermediaries only to the Defence teams in the present case.

19. As regards the LRV's additional argument that disclosing an intermediary's identity "could reasonably" enable the Defence to identify certain victims who are not to be called as witnesses by the Prosecutor and who did not consent to the disclosure of their identity, the Chamber first notes that the LRV fails to adequately substantiate this argument. Second, and more fundamentally, the Chamber has taken note of the Prosecutor's submission that the information at stake in the Prosecutor's First Request is material to the preparation of the case by the defence, including for the purposes of its ability to adequately investigate; accordingly, granting the lifting of redactions initially authorised, on the basis of the additional role that the intermediaries are to play in the proceedings, is the appropriate outcome of the weighing exercise the Chamber is called to make each time it debates the appropriateness of a protective measure *vis-à-vis* the rights of the defence.

20. As regards the LRV Alternative Request, the Chamber is not satisfied that the Defence's interests would be equally or adequately protected by applying pseudonyms to the intermediaries' identifying information. What the Prosecutor submits that it is material information, as such subject to disclosure, is the role that the relevant witnesses have played in the context of the applications of other victims, rather than merely their identity; this information would not be available to the Defence if pseudonyms were to be applied *in lieu* of redactions.

21. Consequently, the Chamber decides that the identity of intermediaries who assisted victims in their application process and who are also to be called as witnesses by the Prosecutor shall be disclosed to the Defence.

Gbagbo Defence Request for Lifting of Redactions

22. With regard to the Gbagbo Defence Request for Lifting of Redactions, the Chamber recalls that, in accordance with the "Decision on victim participation", it

is for the Prosecutor to disclose lesser redacted versions of applications for participation of dual status witnesses.²² Accordingly, the request is rejected.

23. The Chamber further notes the Prosecutor's submission that the review of all applications has been completed as of 1 April 2016.²³ Accordingly, the Prosecutor, the LRV and the VPRS shall ensure that the Further Applications are disclosed by 27 May 2016, with redactions applied in accordance with the "Protocol establishing a redaction regime [...]"²⁴ and with the present decision.

LRV Request for Redactions

24. In respect of four application forms disclosed in March 2016, the LRV requests that redactions be applied to the identifying information of victims' intermediaries and to the name and location of the organisations they belong to. The Prosecutor partly opposes it.
25. With regard to the LRV's request for redactions to the application form of P-0442 (a/25130/15), the Chamber notes that the relevant intermediary is also a witness to be called by the Prosecutor. Accordingly, in line with the principles established in the 2 September 2015 Decision as well as in this decision, the Chamber rejects the LRV request.
26. With regard to the LRV's request for redactions to the application form of P-0188 (a/10228/14), the Chamber notes that, since the name of the intermediary has already been disclosed to the Defence by way of disclosure of P-0188's witness statement, the Defence is already in a position to identify the name of the

²² 6 March 2015, ICC-02/11-01/11-800.

²³ Prosecution Response to the Gbagbo Defence *Réponse de la Défense à la « Prosecution request for the lifting of certain redactions in the victim applications of nine dual status witnesses »* (ICC-02/11-01/15-465) et *requête de la Défense aux fins de la levée de ces mêmes expurgations dans toutes les demandes de participation des victimes lorsqu'elles portent sur l'identité d'intermédiaires qui sont en même temps témoins de l'Accusation*, ICC-02/11-01/15-480.

²⁴ Protocol establishing a redaction regime in the case of *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-737-AnxA.

organisation to which the relevant intermediary belongs. Accordingly, the Chamber rejects the LRV's request.

27. Finally, with regard to the LRV's request for redactions to the application forms of P-0350 (a/10179/14) and P-0489 (20094/13), the Chamber notes the Prosecutor's submission that the relevant intermediaries are not Prosecutor's witnesses and that the Defence does not seek lifting of redactions of identifying information of intermediaries who are *not* Prosecutor's witnesses. Accordingly, the Chamber grants the LRV's request.

Prosecutor's Second Request

28. The Prosecutor seeks authorisation to lift the redactions to (i) the names and organisational affiliations of victims' intermediaries who are also witnesses for the Prosecutor; and (ii) the fact that certain victims' application forms corroborate Prosecutor's allegations that certain persons were killed during the 25 February 2011 and the 3 March 2011 incidents.
29. The LRV opposes the request, arguing *inter alia* – as regards the disclosure of information other than the one relating to the identity and the affiliations of intermediaries who are also witnesses to be called by the Prosecutor – (i) that victims' application do not qualify as evidence for the purposes of Rule 77 of the Rules; (ii) that the family relationship between a participating victim and a deceased victim of one of the incidents charged is not information material to the Defence; and (iii) that the approach underlying the Prosecutor's Second Request is contrary to both the Court's jurisprudence and the Court's duty to protect victims.
30. In line with the principles established in the 2 September 2015 Decision as well as in this decision, the Chamber decides that the redactions to the names and

organisational affiliations of victims' intermediaries who are also witnesses for the Prosecutor shall be lifted.

31. With regard to the other relevant information contained in victims' application forms, the Chamber has taken note of the Prosecutor's submission to the effect that the family relationship between these applicants and alleged victims of the crimes charged is material for the preparation of the Defence. The LRV, in her response, notes her disagreement with the Prosecutor's position on the basis of the difference between applications and evidence and of the lack of consent to the disclosure of their identity, without however elaborating as to the substantial reasons which might negate the materiality of the information. The Chamber is mindful of both the Prosecutor's submission to the effect that granting the lifting of these redactions might lead, directly or indirectly, to the identification of some of the applicants, who did not consent to disclosure of their identity as participating victims, and of the notes of caution struck by the LRV in presenting her opposition thereto. Nevertheless, the Chamber reiterates that redaction of information which is found to be material to the preparation of the defence can only be justified under exceptional circumstances and that, in this case, the lifting of redactions bearing on such information is warranted in order to preserve the rights of the defence.

32. Finally, as regards the Gbagbo Defence Supplementary Request, the Chamber notes that, in seizing the Chamber by way of her First and Second Requests, the Prosecutor shows that she is perfectly mindful both of her own disclosure obligations and of the need that the Chamber be the ultimate arbiter of the determination of the amount of information which can or cannot be withheld from the Defence. Accordingly, no reminder is needed or appropriate at this stage.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Prosecutor's First Request;

GRANTS the Prosecutor's Second Request;

REJECTS the LRV Alternative Request;

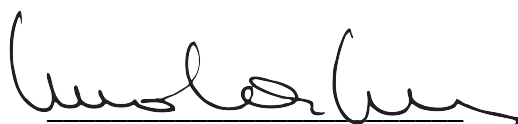
GRANTS, in part, the LRV Request for Redactions, in accordance with paragraphs 24-27 above;

REJECTS the Gbagbo Defence Request for Lifting of Redactions;

ORDERS the Prosecutor to re-disclose forthwith – and in any event, no later than 27 May 2016 – lesser redacted version of victims' application forms of dual status individuals that contain redactions to identifying information to victims' intermediaries who are also to be called as witnesses by the Prosecutor; and

REJECTS the Gbagbo Defence Supplementary Request.

Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Geoffrey Henderson

Dated 9 May 2016

At The Hague, The Netherlands