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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Geoffrey Henderson
Judge Olga Herrera-Carbuccia

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND
CHARLES BLÉ GOUDÉ***

Public Document

**Defence response to the "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)**

Source: Defence Team for Laurent Gbagbo

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

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart

Counsel for the Defence of Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for the Defence of Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'Dry

Legal Representatives of Victims

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman Von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Background

1. On 15 December 2014, the Single Judge of Trial Chamber I, in *Gbagbo*, rendered a decision on the protocol “establishing a redaction regime”.¹
2. On 6 March 2015, the Chamber rendered the “Decision on victim participation,”² in which it ruled that

under Rule 76 or 77 of the Rules, it is for the Prosecution 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.³
3. On 8 June 2015, in accordance with rule 77, the Prosecution disclosed to the Defence 19 “applications for participation of dual status witnesses, disclosed in accordance with Trial Chamber I’s Decision on Victim Participation”.⁴ It specified that “those redactions marked ‘B.3. LRV’ are applied upon the request of the Legal Representative of Victims (‘LRV’).”⁵
4. On the same day, the LRV submitted a “Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the application of dual status individuals”,⁶ concerning 12 applications for participation.
5. On 23 June 2015, the Defence for Laurent Gbagbo responded to the LRV that:

(1) the LRV’s request was not admissible as, in accordance with the protocol on

¹ ICC-02/11-01/11-737-AnxA.

² ICC-02/11-01/11-800.

³ ICC-02/11-01/11-800, para. 56.

⁴ ICC-02/11-01/15-86, para. 3.

⁵ ICC-02/11-01/15-86, para. 3.

⁶ ICC-02/11-01/15-85.

⁷ ICC-02/11-01/15-98.

⁴ ICC-02/11-01/15-86, para. 3.

⁵ ICC-02/11-01/15-86, para. 3.

⁶ ICC-02/11-01/15-85.

redaction, it is the duty of the disclosing party – namely the Prosecution – to provide justification for redactions to be maintained and (2) the category applicable to intermediaries was “intermediary” (A.5.) – hence they had to be identified by pseudonyms.⁷

6. On 7 July 2015, the LRV filed a “Second Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the application of dual status individuals”⁸ concerning a new application for participation of a dual status witness.
7. On 8 July 2015, the Prosecution disclosed to the Defence for Laurent Gbagbo the same new application for participation of a dual status witness (for which the LRV had made a request the previous day) containing redactions “marked ‘B.3. LRV’ [...] applied upon the request of the Legal Representative of Victims”.⁹
8. On 28 July 2015, on the same grounds for objecting to the previous LRV request on 23 June 2015, the Defence for Laurent Gbagbo objected to the LRV’s¹⁰ request of 7 July 2015.
9. On 21 September 2015, the Single Judge rendered the “Decision on the Legal Representative of Victims’ requests to maintain redactions to information relating to certain intermediaries”.¹¹ In the Decision, the Single Judge considered that:

through assisting individuals to complete application forms, the relevant intermediaries have engaged in the Court process, and does not consider that they are

⁷ ICC-02/11-01/15-98.

⁸ ICC-02/11-01/15-126.

⁹ ICC-02/11-01/15-128, para. 1 (e).

¹⁰ ICC-02/11-01/15-166.

¹¹ ICC-02/11-01/15-202.

therefore appropriately categorised as falling under category B.3 of the Protocol on redaction relating to “innocent third parties”;¹²

he further considered that the intermediaries also did not fall under category A.5 (“identifying and contact information of intermediaries”).¹³ The Single Judge did, however, authorise redactions to be maintained on the 13 applications for participation of dual status witnesses,¹⁴ adding that “in order to facilitate investigations and the Defence’s ability to prepare for trial, the redacted identities of the intermediaries concerned should be substituted by pseudonyms for each individual intermediary”.¹⁵ The Single Judge nonetheless added that: [t]his ruling is 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.¹⁶

10. On 18 March 2016, the Prosecution disclosed to the Defence two new applications for participation from dual status victims. The Prosecution justified the late disclosure by stating that it noticed their dual status as both witnesses and victims only in March 2016. The Prosecution specified in a letter attached to the disclosure that one application “contains some ‘LRV’ category redactions, and understands that the LRV will soon be filing a formal request in relation to these redactions”, including with regard to the identities of the intermediaries.

11. On the same day, the Prosecution filed a “Prosecution request for the lifting of certain redactions in the applications for participation of nine dual status witnesses”.¹⁷ The Prosecution sought to have the redactions concerning the name

¹² ICC-02/11-01/15-202, para. 16.

¹³ ICC-02/11-01/15-202, para. 17.

¹⁴ ICC-02/11-01/15-202, paras. 20 and 21.

¹⁵ ICC-02/11-01/15-202, para. 21.

¹⁶ ICC-02/11-01/15-202, para. 20.

¹⁷ ICC-02/11-01/15-465.

and the contact information of the intermediaries lifted from the nine applications for participation. In fact, the Prosecution claimed to have become aware only a short time before filing the request that some Prosecution witnesses were intermediaries who had had a role to play in the participation of certain dual status victims. Consequently, to provide the Defence with all relevant information concerning the said witness-intermediaries, it requested the lifting of redactions concerning those intermediaries.

12. On 29 March 2016, the Defence responded to the Prosecution request.¹⁸ It invited the Chamber to grant the Prosecution request and asked it to order the lifting of redactions concerning identifying information of intermediaries who are also Prosecution witnesses, in the applications for participation of dual status witnesses. The Defence further asked for redactions on the identifying information also to be lifted in all victim applications for participation, not only those of dual status victims.
13. On the same day, the LRV filed a “Response to ICC-02/11-01/15-465 and request to maintain certain redactions in the victim applications of dual status individuals”.¹⁹

II. Discussion

14. In submission No. 473, dated 29 March 2016, the LRV (1) objects to the Prosecution request for the lifting of redactions of names of intermediaries of victims who are also Prosecution witnesses found in certain applications for participation from dual status victims and (2), on the same grounds, presents a new request to maintain redactions concerning the name and identifying information of intermediaries who are also Prosecution witnesses in new

¹⁸ ICC-02/11-01/15-474-Conf.

¹⁹ ICC-02/11-01/15-473.

applications for participation from dual status victims. This submission is in response to the latter request.

15. As a preliminary remark, the Defence notes that such a complex procedure could have been avoided:
16. Firstly, if there had been discussions between the Parties and the participants. A solution could have been found without resorting to such a complex written procedure.
17. Secondly, if the Prosecution had become aware in good time – and not so belatedly – that some of its witnesses were also intermediaries to certain dual status victims, whereas the Prosecution’s witness list had been finalised in June 2015.
18. Thirdly, if the LRV had confined herself to the role assigned to her in the Statute, the Rules and decisions of the Chamber. The LRV does not represent intermediaries and plays no part in decisions regarding redactions to documents disclosed by the Prosecution as a statutory duty, even regarding victim applications for participation. Yet, with the assistance of the Prosecution, the LRV exceeds her mandate here, which largely accounts for the complexity of the procedure.
19. In this respect, last June the Defence already pointed out²⁰ that, with respect to redactions between parties, the appropriate procedure is clearly stated in the protocol on redaction: “the disclosing party is required [...] to individually assess whether the standard justifications are met for each document disclosed”.²¹ In

²⁰ ICC-02/11-01/15-98.

²¹ ICC-02/11-01/11-737, para. 19 (emphasis added).

other words, the obligation to determine the need to redact and to justify redactions is the sole duty of the party disclosing the material.

20. Further, in the event of inability to agree, the protocol on redaction is unambiguous:

Should the receiving party consider that in relation to specific information a redaction should be lifted, it shall raise the request as quickly as possible on an *inter partes* basis with the disclosing party. The parties shall then consult in good faith with a view to resolving the matter and shall inform the Chamber of the outcome of the discussions. In the event of inability to agree, the receiving party may seek the Chamber's intervention through a written application, thereby creating a duty for the disclosing party to justify the redaction in question.²²

21. The disclosing party therefore has the duty, after *inter partes* discussions, and in the event that the receiving party contests, to justify to the Trial Chamber the maintenance of the redactions.

22. This procedure is applicable to all material disclosed by the Prosecution including applications for participation by people with the dual status of victim and witness. This was specified by this Chamber in the decision on the participation of victims:

the Chamber recalls that, under Rule 76 or 77 of the Rules, it is for the Prosecution 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.²³

23. This procedure is consistent with the Court's case law. In *Bemba*, Trial Chamber III stated that "it is for the prosecution to determine for dual status victims whether the application forms and accompanying documents should be disclosed"²⁴ and, consequently, that it is for the Prosecution to determine the necessary redactions.²⁵

²² ICC-02/11-01/11-737-AnxA, para. 5.

²³ ICC-02/11-01/11-800, para. 56.

²⁴ ICC-01/05-01/08-807, para. 59.

²⁵ See also ICC-01/04-01/06-1637, paras. 13 and 14.

24. In other words, as the Prosecution has a legal obligation to disclose, it is for the Prosecution to make and justify any redactions that it intends to apply to all the material disclosed, including applications for participation by dual status individuals.
25. Yet, the Defence notes that, whereas it is the Prosecution's duty to make and justify redactions, it has continued to "outsource" this role to the LRV and to apply redactions requested by the LRV even when it does not agree with her, flouting the framework set by the Chamber and the terms of the protocol on redaction.
26. Under these circumstances, the Chamber should clarify the role of all involved in procedures concerning redactions. In particular, the Chamber should remind the Prosecution that it is its duty, not the LRV's, to determine which redactions should be made to or lifted from the documents it discloses to the Defence pursuant to its statutory obligations.

**1. Access to all relevant information on the relationship between
Prosecution witnesses is indispensable for the preparation of the
Defence**

27. In its response to the Prosecution's request for the lifting of redactions concerning names of intermediaries in the victim applications for participation by dual status victims,²⁶ the Defence noted that the legal process requires each party to be informed. Accordingly, without exception a redaction must be made only where it does not obstruct full understanding not only of the meaning of the document but also of its overall contribution to the Prosecution's whole body of

²⁶ ICC-02/11-01/15-474-Conf.

evidence and any information it contains. There is an obvious explanation for the principle of *in extenso* transmission, in particular of evidence, namely that redactions by definition deny the other party, in this case the Defence, access to the information appearing in the document, making the Defence's analysis more difficult and obstructing its investigation.

28. Access to suitable information is all the more important if the Defence has to apprise itself of the meaning and details of Prosecution evidence or of the nature of exculpatory material in the possession of the Prosecutor (rule 77). The Defence's ability to conduct counter investigations and hence to carry out a genuine *inter partes* discussion with the Prosecution is at stake. In other words, the Defence's ability to exercise its rights depends on the quantity and the quality of the material accessible to it. Ultimately it is about allowing the Defence access to enough information for it to efficiently defend its case. In fact, according to case law, the most complete access possible to information in the possession of the Prosecutor constitutes a facility which must be afforded to the Defence for it to exercise its rights in full. The protection and exercise of the right to prepare the trial implies complete access²⁷ "to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory."²⁸

29. As it now transpires that some intermediaries to some of the victims are also Prosecution witnesses, the Defence must have access to all materials that will allow it to determine the nature of the intermediaries' relationship with the other Prosecution witnesses. This crucial information is the only information that can reveal the frequency and nature of relations between Prosecution witnesses and, hence, allow the Defence to test the reliability of the testimony and to assess it.

²⁷ INTERIGHTS Manual for Lawyers – Right to a Fair Trial under the ECHR (Article 6), p. 66.

²⁸ Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, p. 10.

30. The intermediaries agreed to be involved in the Court's work to the extent of becoming Prosecution witnesses. It is critical to have complete transparency regarding their role in the participation of certain victims in the trial especially where the victims are also Prosecution witnesses.

31. In challenging this argument, the LRV contended that:

The Legal Representative submits that the identifying information of an intermediary should be disclosed to the Defence only in two instances: when said individual is also called as a witness – his or her application form is then disclosed under article 67(2) of the Rome Statute; – or when doubts could be casted upon the actions of said intermediary vis-à-vis other victims – the information is then disclosable under rule 77 of the Rules of Procedure and Evidence– The identifying information of the intermediary or a third party who assisted dual status individuals in completing their application forms are not disclosable *per se*, even in the circumstances in which the individual is a Prosecution's witness.²⁹

32. As a preliminary remark, let us point out the contradiction in the arguments of LRV, who begins the paragraph by stating that "the identifying information of an intermediary should be disclosed to the Defence [...] **when said individual is also called as a witness**",³⁰ then proceeds to state the exact opposite three lines below: "The identifying information of the intermediary or a third party who assisted dual status individuals in completing their application forms are not disclosable *per se*, **even in the circumstances in which the individual is a Prosecution's witness.**"³¹

33. More importantly, there are no legal grounds in support of the LRV's arguments. To substantiate her arguments, the LRV cites Appeals Chamber case law as follows:

²⁹ ICC-02/11-01/15-473, para. 20.

³⁰ ICC-02/11-01/15-473, para. 20.

³¹ ICC-02/11-01/15-473, para. 20.

21. The Appeals Chamber expressly endorsed this approach, upon finding that “[t]he term [“material to the preparation of the defence” in rule 77] should be understood as referring to all objects that are relevant for the preparation of the defence”, and that “[i]t is reasonable that, in particular where the submissions in the victims’ applications for participation indicate that victims may possess potentially exculpatory information, the Prosecutor’s investigation should extend to discovering any such information in the victims’ possession. Such information would then be disclosed to the accused pursuant to article 67(2) of the Statute and rule 77 of the Rules of Procedure and Evidence”.³²

34. Yet, upon closer examination of the legal context of the LRV’s quotations, it emerges that in fact none of the LRV’s quotations relates to the matter at hand, namely the disclosure to the Defence of identifying information of intermediaries who are also Prosecution witnesses.
35. Worse still, the LRV combines two quotations from rulings in two different cases – the first from *Lubanga* and the second from *Katanga* – which addressed two distinct issues, to give the impression that the Appeals Chamber had “expressly endorsed” the LRV’s position.
36. The first quotation, which comes from a Judgment in *Lubanga*, is an extract from a broader discussion in which the Appeals Chamber found that the Trial Chamber had adopted too narrow a definition of rule 77:

The Appeals Chamber finds that the Trial Chamber interpreted rule 77 of the Rules of Procedure and Evidence too narrowly because it excluded objects which, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence.³³

The LRV therefore distorts the statement of the Appeals Chamber, which took the position for a broad interpretation of the documents covered by rule 77, to use it in support of a narrow interpretation.

³² ICC-02/11-01/15-473, para. 20.

³³ ICC-01/04-01/06-1433, para. 77.

37. Regarding the second quotation, it relates to the potential scope of the Prosecution's duty to investigate exonerating circumstances: the issue to which the Appeals Chamber was responding was whether the Prosecution should investigate exculpatory material in the victim-participants' possession. The quotation from the Appeals Chamber should be read in its entirety:

81. In this context, the Appeals Chamber recalls that under article 54(1)(a) of the Statute, the Prosecutor has a duty to investigate exonerating and incriminating circumstances equally. Under article 54(3)(b) of the Statute, the Prosecutor may, with respect to his investigations "[r]equest the presence of and question persons being investigated, victims and witnesses". The Appeals Chambers therefore considers that it is reasonable that, in particular where the submissions in the victims' applications for participation indicate that victims may possess potentially exculpatory information, the Prosecutor's investigation should extend to discovering any such information in the victims' possession. Such information would then be disclosed to the accused pursuant to article 67(2) of the Statute and rule 77 of the Rules of Procedure and Evidence.³⁴

It is clear that (1) the decision concerns the Prosecution's duty to investigate exonerating circumstances; (2) it is not a decision about whether or not to maintain redactions; and hence (3) the Appeals Chamber does not make any statement whatsoever on the issue of whether the names of intermediaries have to be disclosed to the Defence when they are also Prosecution witnesses.

38. Under the circumstances it is hard to understand how the LRV can claim that the Appeals Chamber "expressly endorsed" her position. On the contrary, the Appeals Chamber clearly indicated that the documents falling under rule 77 "necessary for preparing the defence of the accused" have to be given a broad interpretation, far beyond the strictly exculpatory documents. Hence, although this is clearly stated in the case law which she cites, the LRV misinterprets the meaning of rule 77 by stating that "the Prosecution does not indicate in the Request how the redacted information may be potentially exculpatory".³⁵

³⁴ ICC-01/04-01/07-2288, para. 81.

³⁵ ICC-02/11-01/15-473, para. 22.

2. The consent of intermediaries who are also Prosecution witnesses is not needed for their activity as intermediaries to be revealed to the Defence

39. The LRV considers that: “the disclosure of said information requires the prior consent of the intermediaries and/or the third parties concerned”.³⁶ To support her argument, the LRV makes a distinction between the person’s status as a witness and his or her activity as an intermediary:

the intermediaries and third parties who are also Prosecution’s witnesses agreed to testify in the case and thereby to the disclosure to the Defence of their identities as witnesses. However, in agreeing to testify, they did not consent to disclosing their identities as intermediaries or third parties.³⁷

40. Such a distinction is not admissible. In fact, the Prosecution witnesses’ statements mention the activity of the witnesses. This information allows the Defence to test the reliability of the witness’s testimony bearing in mind his or her socio-cultural profile and professional experience, and hence to prepare cross-examination efficiently. More importantly, a witness who agrees to testify in court cannot, *proprio motu*, choose the information to be transmitted to the Defence and the information to be concealed from it. Redactions fall under the Prosecution’s responsibility in strict appliance of the Protocol on redaction and they must be exceptional. The only principle they must abide by is respect for the rights of the defence.

41. Once again, it is worth highlighting the crucial nature of the information which the LRV does not wish to disclose to the Defence. It consists of indicating to the Defence that a Prosecution witness was in close contact with other Prosecution witnesses, the LRV and possibly a number of victim participants, which provides a perspective of the role of this victim which is quite different from the

³⁶ ICC-02/11-01/15-473, para. 27.

³⁷ ICC-02/11-01/15-473, para. 28.

perspective where the information remains concealed. It is inexplicable that the LRV considers that the existence and the content of such a network of exchanges between victims, witnesses, the Prosecution and the LRV does not amount to relevant information to be disclosed to the Defence.

3. Revealing Prosecution witnesses' activities as intermediaries to the Defence does not objectively constitute any risk for the said intermediaries

42. As a preliminary remark, it should be noted that in her request, without being solicited or authorised, the LRV conducts herself as the spokesperson of intermediaries who assisted certain victims in the participation procedure.³⁸ Yet the LRV has no duty or authority to speak on behalf of these intermediaries. The LRV is the representative of victim participants in the proceedings, not the representative of the intermediaries who assist certain victims. She therefore has no authority to speak on behalf of intermediaries or to represent their "views" on any topic whatsoever, as intermediaries are not victims.
43. The LRV alleges that revealing to the Defence the activities as intermediaries of certain Prosecution witnesses could constitute a risk both for them and for the victims they assisted. In support of the allegation, the LRV lists a series of claims which are either unsubstantiated or unrelated to the matter at hand.
44. The LRV simply makes vague reference to possible violence on witnesses or intermediaries as a result of the commencement of trial,³⁹ without a modicum of evidence or any demonstration.

³⁸ ICC-02/11-01/15-473, para. 35.

³⁹ ICC-02/11-01/15-473, para. 35.

45. As a factor in support of the non-disclosure of the names of the intermediaries, the LRV also mentions the fact that there is media coverage of the trial and that the names of certain witnesses may lead to speculation. Yet, certain witnesses and intermediaries have received protective measures and, with respect to those for whom anonymity was requested, their identities are not released to the public. In fact, the Representative behaves as if revealing crucial information to the Defence amounts *ipso facto* to revealing it to the public. This is untrue.
46. The LRV also mentions rape victims who may not have informed their families about their appearance at trial and that “[l]ifting the redactions identified in the Request would jeopardize the privacy and well-being of the said victims in an unnecessary and disproportionate manner”⁴⁰. The LRV fails to explain how revealing to the Defence the name of an intermediary could lead to revealing to the family the fact that a person is a witness in the case. It should be noted that, in the instant case, there is a protocol providing a strict framework for the type of information that a party can discuss with the family of a victim of sexual violence,⁴¹ which has nothing to do with the issue of intermediaries. Ultimately, it appears that the LRV is using the rape victims as an excuse to maintain redactions whereas this is unconnected to the matter at hand.
47. In fact, all the arguments raised by the LRV are based on the same hypothesis: revealing information about intermediaries to the Defence amounts to revealing the same information to the public. Such an approach and spirit cannot be accepted, all the more so as the LRV’s position amounts to obstructing efficient preparation by the Defence, by preventing it from gaining access to essential information. It is worth noting that, in order for the LRV to work her way up to the level of the parties and gain access to exchanges of confidential disclosures

⁴⁰ ICC-02/11-01/15-473, para. 40.

⁴¹ ICC-02/11-01/15-200-Anx.

between those parties, she consistently reminds the Chamber that she is bound by the same professional and ethical constraints as the parties. She therefore cannot claim that she is unaware of those professional and ethical constraints.

4. The use of pseudonyms is not a measure taken in compensation of the harm suffered by the Defence

48. Lastly, the LRV considers that the use of pseudonyms to identify the said intermediaries would be sufficient to safeguard the rights of the Defence:

In the alternative, should the Chamber be eventually minded to lift the redactions identified in the Request and order the disclosure of any of the information at hand to the Defence, the Legal Representative submits that the use of pseudonyms to identify the names of the intermediaries and third parties who assisted the dual status individuals in filling in their application forms would serve the interests of the Defence while protecting at the same time the safety, dignity, privacy and well-being of the victims, intermediaries and/or third parties concerned.⁴²

49. This assertion reveals the LRV's manifest misunderstanding of what is at stake here. In fact, if the Defence is to prepare its cross-examination of a certain number of witnesses it requires knowledge of the interactions between them and their exact role in the trial and also, from an even more general perspective, their precise social role so that they can understand the meaning of their testimony and ask the right questions to test their reliability and assess the testimony. The use of pseudonyms amounts to denying the Defence access to the only piece of information of any use: the relationship between the Prosecution witnesses.

5. Conclusion

⁴² ICC-02/11-01/15-473, para. 43.

50. In the light of the foregoing, the LRV's request to maintain redactions of identifying information of intermediaries who are also Prosecution witnesses in the applications for participation from dual status victims should be dismissed.
51. The request in the alternative to maintain pseudonyms to identify the said intermediaries who are also Prosecution witnesses should also be dismissed.
52. Lastly, with respect to maintaining the redaction of the names of intermediaries who are not Prosecution witnesses in the latest applications for participation from dual status witnesses to be disclosed by the Prosecution, the Defence reiterates its earlier position: namely, it does not object, for now, to such redactions, subject to the identification of each intermediary by a pseudonym, which is what the Chamber decided.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I,

Mindful of the protocol on redaction, mindful of article 68 of the Statute, to

- **Deny** the LRV's request for redactions to be maintained on the identifying information of intermediaries **who are also Prosecution witnesses**.
- **Order** the identification by pseudonyms of intermediaries **who are not Prosecution witnesses**, such that the pseudonyms appear in victim applications for participation.

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 7 April 2016

At The Hague, the Netherlands