

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

No.: ICC-02/11-01/15

Date: 6 May 2016

TRIAL CHAMBER I

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

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

Public

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

Source: Defence team for Laurent Gbagbo

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

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I. Procedural history

1. On 15 December 2014, the Single Judge of Trial Chamber I decided to introduce a Protocol “establishing a redaction regime” in the *Gbagbo* case.¹

2. On 6 March 2015, the Chamber rendered a “Decision on victim participation”,² which specified 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, the Prosecution disclosed to the Defence, pursuant to rule 77, 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. That same day, the LRV filed a “Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the application of dual status individuals”⁶ referring to 12 applications for participation.

5. On 23 June 2015, the Defence for Laurent Gbagbo responded to the LRV, stating that (1) her request was inadmissible as, under the Redaction Protocol, it is for the disclosing party – in this case the Prosecution – to justify the maintenance of redactions; and (2) the category to be applied to intermediaries was “intermediary” (A.5.), and they should accordingly be assigned a pseudonym.⁷

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.

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 which referred to a new application for participation from a dual-status witness.

7. On 8 July 2015, the Prosecution disclosed to the Defence for Laurent Gbagbo the same new application for participation from a dual-status witness (the subject of the LRV’s request filed the previous day) that included redactions “marked ‘B.3. LRV’ [...] applied upon the request of the Legal Representative of Victims”.⁹

8. On 28 July 2015, the Defence for Laurent Gbagbo objected to the LRV’s request of 7 July 2015¹⁰ on the same grounds as those on which it had opposed her previous request on 23 June 2015.

9. On 2 September 2015, the Single Judge delivered a “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 [he] does not consider that that they are therefore appropriately categorised as falling under category B.3 of the Redaction Protocol relating to ‘innocent third parties’,¹²

adding that that intermediaries did not fall within the category A.5 either (“identifying and contact information of intermediaries”).¹³ Nevertheless, the Single Judge authorised the maintenance of redactions in the 13 applications for participation from dual-status witnesses,¹⁴ specifying 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

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.

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, para. 2.

individual intermediary”.¹⁵ However, the Single Judge further specified 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 witnesses; the Prosecution explained that the late disclosure was due to the fact that it had not noticed their dual status as witnesses and victims until March 2016. It stated in a letter attached to the communication that one application “contains some ‘LRV’ category redactions, and [it] understands that the LRV will soon be filing a formal request in relation to these redactions”. The redactions in question included those applied to the identity of intermediaries.

11. That same day, the Prosecution filed a “Prosecution request for the lifting of certain redactions in the victim applications of nine dual status witnesses”¹⁷ seeking the removal of redactions of intermediaries’ names and contact details from those nine applications for participation. It stated that it had not realised until shortly before filing the request that some of its witnesses had been intermediaries who had played a role in the participation of several dual-status victims. It therefore requested the lifting of the redactions concerning those intermediaries so as to provide the Defence with information it needed in their regard.

12. On 29 March 2016, the Defence responded to the Prosecution’s request.¹⁸ It invited the Chamber to grant the Prosecution’s request, and asked the Chamber to order the lifting of the redactions applied to the identifying information of intermediaries who were also Prosecution witnesses in the applications for participation of dual-status witnesses. The Defence further sought the removal of redactions from such identifying information in all applications for participation

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.

¹⁸ ICC-02/11-01/15-474-Conf.

submitted by victims, and not only those filed by dual-status victims.

13. That 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 In that request, the LRV (1) responded and objected to the Prosecution’s request for the lifting of redactions in respect of the names of victims’ intermediaries who were also Prosecution witnesses in some applications for participation from dual-status victims and, (2) repeating the same arguments, presented a new request for the preservation of redactions of the names and identifying details of intermediaries who were also Prosecution witnesses in new applications for participation from dual-status victims.

14. On 7 April 2016, the Defence responded to the LRV’s request.²⁰

15. On 29 April 2016, the Prosecution filed a fresh “Prosecution request for the lifting of certain redactions in four victim applications”.²¹ In that request, the Prosecution asked, as it had done on 18 March 2016, for the lifting of redactions of information identifying intermediaries who were also its witnesses in victims’ applications for participation that contained their names. It further requested that redactions be lifted from information identifying several victims of the crimes alleged by the Prosecution in the applications for participation submitted by the victims mentioned in its request.

II. Discussion

16. With regard to the Prosecution’s request for the lifting of redactions applied to information identifying intermediaries who are also Prosecution witnesses, the Defence refers to its previous filings in which it explained why such information was vital to the work of the Defence.

17. In those filings, the Defence outlined in detail in what respects this

¹⁹ ICC-02/11-01/15-473.

²⁰ ICC-02/11-01/15-482.

²¹ ICC-02/11-01/15-493.

information was crucial and why acceding to the wishes of the LRV, who was unwilling to communicate this information to the Defence, effectively curtailed the Defence's scope for action and thus undermined the fairness of proceedings. To put it more precisely, the knowledge that a Prosecution witnesses was in close contact with other Prosecution witnesses, with the LRV and possibly with a number of victim participants casts a very different light on this witness's role from how it would appear should this essential information remain concealed from the Defence. It defies comprehension that the LRV should not consider the existence and membership of such a communication network linking victims, witnesses, the Prosecution and the LRV to be important information that warrants disclosure to the Defence.

18. In respect of the redactions of other information that the Prosecution sought to have lifted in its latest request, the Defence is not in a position to comment since it does not have access to the *ex parte* annexes appended to the Prosecution's request. However, to judge from what the Prosecution states in its request, the Defence notes that the information which the Prosecution wishes to communicate to the Defence apparently concerns the identity of certain victims of the women's demonstration of 3 March 2011 and the victims of the events in Yopougon in February 2011.²² This information is crucial to enabling the Defence to verify whether the alleged acts were indeed perpetrated and so test the plausibility of the Prosecution charges. It must, therefore, be communicated to the Defence.

19. With regard to this information, the Prosecution observes:

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.²³

The Defence cannot comprehend the reason for including this statement and notes with concern the Prosecution's apparent reluctance to furnish useful information to the Defence.

²² ICC-02/11-01/15-493, para. 18.

²³ ICC-02/11-01/15-493, para. 19.

20. This remark would appear to place the Prosecution in the same camp as the LRV, who in her previous request employed a false premise as a basis for her objection to the disclosure of information essential to the Defence's proper performance of its duties. The LRV seemed to believe that disclosing information about intermediaries or victims to the Defence is the same as making this information publicly available. Such an understanding of the role of the various protagonists in criminal proceedings is unacceptable – all the more so since the consequence of the position held by the LRV is to prevent the Defence from preparing effectively by withholding access to crucial information. It is curious that, when seeking to elevate herself to the same rank as the parties and thus obtain access to the confidential information exchanged by them, the LRV takes every opportunity to remind the Bench that she is bound by the same professional and ethical obligations as the parties. She cannot therefore behave as though she were unaware of those professional and ethical obligations.

21. Lastly, the Defence once again underscores that the convoluted nature of the present procedure is above all a consequence of the disproportionate role accorded by the Prosecution to the LRV in decisions about whether to lift redactions. However, it should be recalled that the LRV does not represent the intermediaries and it is not for her to decide what redactions are to be applied in documents disclosed by the Prosecution under its statutory obligations, even where victims' applications for participation are concerned.

22. It is the Prosecution, and the Prosecution alone, that has the obligation to disclose to the Defence information falling within the scope of rules 76 and 77 of the Statute²⁴ – even where victims' applications for participation are concerned – and it falls to the Prosecution to “individually assess whether the standard justifications are met for each document disclosed”²⁵ when discharging that obligation.

²⁴ ICC-02/11-01/11-800, para. 56.

²⁵ ICC-02/11-01/11-737, para. 19 [emphasis added].

23. The LRV does not therefore have an official role to play in this procedure. Although the Prosecution is at liberty to consult the LRV on the lifting of any redactions, the LRV cannot be granted a right to veto the Prosecution's final decision, subject to review by the Chamber. If the LRV did have a right to veto when it comes to the lifting of redactions, it would be tantamount to allowing her to have a say in the exercise of the Accused's fundamental rights, which would be out of all proportion to victims' limited right of participation under the Rome Statute.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I TO:

Considering the Redaction Protocol and article 68 of the Statute:

- **Grant** the Prosecution's request;
- **Remind** the Prosecution that it is under the obligation to lift from the documents in its possession redactions of information that is essential for the preparation of the Defence and that it may not "sub-contract" that obligation to the LRV.

[signed]

Emmanuel Altit
Lead Counsel for Laurent Gbagbo

Dated this 6 May 2016
At The Hague, the Netherlands