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THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Kuniko Ozaki
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chang-ho Chung

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public

Public redacted version of "Prosecution's response to Laurent Gbagbo's document in support of appeal of the 29 November 2016 oral decision on redactions to the application form of Witness P-0350", 24 February 2017, ICC-02/11-01/15-826-Conf

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The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Helen Brady

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Legal Representatives of the Victims

Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Appeals Chamber should reject Laurent Gbagbo’s appeal¹ against Trial Chamber I’s decision² denying his request³ to lift the redaction of information identifying a Registry Intermediary mentioned in Witness P-0350’s application form.⁴ The Appellant’s three grounds of appeal do not correctly represent the procedure followed by the Chamber or the Decision and disregard the relevant law and jurisprudence. The Trial Chamber followed the correct procedure and reasonably exercised its discretion in assessing the Defence’s submissions.

2. *First*, the Chamber did not exempt the Legal Representative of Victims (“LRV”) from the burden of justifying the necessity of the redaction. Instead, upon the Defence Request for disclosure, the Trial Chamber requested the LRV—who had originally applied for the redaction—to provide submissions justifying its continuation. The LRV provided such justification (First Ground).

3. *Second*, in reaching its Decision, the Trial Chamber weighed the relevant factors and interests at stake and considered all relevant arguments before it, including the Defence’s submissions—devoid of any evidence—as to the relevance of the requested information to this case (Third Ground).

4. *Third*, the Chamber did not err by disregarding the alleged “agreement” between the Parties as to the requested disclosure and instead paying heed to the LRV’s observations and the consequences that lifting the requested redaction may have on its interests (Second Ground). The Chamber, which remained the ultimate

¹ ICC-02/11-01/15-809-Conf OA9 (“Appeal”). Mr Gbagbo is referred to as “the Appellant”.

² ICC-02/11-01/15-T-107-CONF-ENG ET, 29 November 2016, p. 1, ln. 14 to p. 2, ln. 16 (“Decision”).

³ ICC-02/11-01/15-T-106-CONF-ENG ET 28 November 2016, p. 2, ln. 25 to p. 4, ln. 24 (“Defence Request”).

⁴ The intermediary mentioned in the application form of Witness P-0350 will be referred to as “Registry Intermediary”.

arbiter of which information can or cannot be withheld from the Defence, scrupulously complied with the statutory texts and the relevant jurisprudence.⁵

5. Nor is this appeal the appropriate avenue to supplement the Defence's unsupported Request with speculative allegations which post-date the Request. Submissions which were not before the Trial Chamber, informing the Decision, should be dismissed *in limine*.

Level of Confidentiality

6. The Prosecution files this submission as "Confidential" pursuant to regulation 23bis(2) of the Regulations of the Court, since it responds to a submission of the same classification.

Submissions

I. Preliminary Observations

7. The Prosecution notes at the outset that both the Trial Chamber—in the Decision⁶—and the Appellant—both in his Request⁷ and Appeal⁸—agree that the redactions applied to the identifying information of the Registry Intermediary were 'standard redactions'. As such, the Defence Request triggered the procedure set out

⁵ See in particular [ICC-01/04-01/07-475 OA](#) ("Katanga AD on Prosecution's Appeal against First Redaction Decision"), paras. 56, 71, 73, 97; [ICC-01/04-01/07-476 OA2](#) ("Katanga AD on Katanga's Appeal against First Redaction Decision"), para. 64; [ICC-01/04-01/06-568 OA3](#) ("Lubanga AD on Disclosure Restrictions"), para. 37; [ICC-01/04-01/06-773 OA5](#) ("Lubanga AD on Redactions"), para. 33.

⁶ Decision, p. 1, lns. 17-25: "The redaction protocol – and obviously, after having heard orally and in writing the other parties and participants – the redaction protocol provides a legal basis for the redactions of names and contact information of intermediaries when disclosure would put them or the ongoing investigation at risk. Referring to decision 737, annex A, paragraphs 26 to 30, and decision 202. Although the redaction protocol refers mainly to the intermediary of a calling party, the same applies to the LRV's intermediaries".

⁷ ICC-02/11-01/15-822-Conf-Anx ("Defence E-mail 25 November 2016").

⁸ Appeal, paras. 15, 20, where the Appellant refers to paragraph 5 of [ICC-02/11-01/11-737-AnxA](#) ("Redactions Protocol"). Although this paragraph belongs to the section "General Principles", the procedure set out therein refers to "standard redactions". See [ICC-02/11-01/11-737](#) ("Decision on Redactions Protocol"), para. 21.

in paragraph 5 of the Redactions Protocol, “thereby creating an obligation for the disclosing party to justify the redaction in question”.⁹

8. However, in prior decisions in this case, the Trial Chamber had determined that redactions to the identifying information of intermediaries mentioned in application forms of dual status individuals were ‘non-standard’¹⁰ and therefore followed the procedure set out in paragraphs 48 to 50 of the Redactions Protocol, where the “disclosing party [must seek] an application justifying the requested redactions”. Consequently, the LRV filed three applications justifying the redaction of such information (First, Second and Third Requests)¹¹ and the Trial Chamber subsequently ruled on these applications (Decisions 202 and 506).¹² In its Third

⁹ [Redactions Protocol](#), para. 5: “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 an obligation for the disclosing party to justify the redaction in question following, *mutatis mutandis*, the procedure specified at paragraphs 48-50 below”.

¹⁰ [ICC-02/11-01/15-202](#) (“Decision 202”), para. 18: “the redactions sought do not fall under any of the standard categories of the Redaction Protocol”. The Trial Chamber endorsed this approach in [ICC-02/11-01/15-506](#) (“Decision 506”), para. 16.

¹¹ See [ICC-02/11-01/15-85](#) (“First Request”) filed on 8 June 2015, where the LRV argued that the requested redactions of intermediaries mentioned in 12 application forms of dual status individuals fell within category B.3. of the Redactions Protocol (“innocent third parties”) or, in the alternative, as non-standard redactions (category C of the Redactions Protocol). See [ICC-02/11-01/15-126](#) (“Second Request”) filed on 7 July 2015, where the LRV applied for similar redactions as in its First Request with respect to another individual with dual status. See also [ICC-02/11-01/15-473](#) (“Third Request”) filed on 29 March 2016, where the LRV opposed the Prosecution’s request to lift redactions with respect to intermediaries mentioned in the application forms who are also Prosecution witnesses ([ICC-02/11-01/15-465](#) or “Prosecution Request for Lifting of Redactions”) and further requested redactions to the identifying information of intermediaries in application forms of four dual status individuals, including Witness P-350. See Third Request, paras. 4, 26, 46.

¹² See [Decision 202](#), paras. 19-21, where the Single Judge granted the LRV’s First and Second Request. He referred to the LRV and Registry submissions that there was a risk that the intermediaries may be perceived as potential witnesses or collaborators with the Court and their identification thus poses a real risk to the safety, dignity, privacy and well-being of the intermediaries and the applicants, and could jeopardise the activities of the VPRS in the field. The Single Judge added that “the Defence has not demonstrated how the identity or contact information of these intermediaries is relevant to any known issues in this case”, that the redactions are limited and the ruling is without prejudice to the lifting of the redactions if the redacted information becomes relevant to a live issue. Moreover, he ordered substituting the identities of intermediaries with pseudonyms to facilitate the Defence investigations. See also [Decision 506](#), where the Trial Chamber granted the Prosecution’s request to lift the redactions of identifying information of intermediaries mentioned in application forms of dual status individuals who are also Prosecution witnesses (Decision 506, paras. 14-21) and related information (Decision 506, paras. 28-31); it rejected in part the LRV’s Third Request for redactions of intermediaries mentioned in two application forms (Decision 506, paras. 24-26: the intermediary related to Witness P-0442 is also a Prosecution witness, and, as the name of the intermediary related to Witness P-0188 had already been disclosed, the Defence could identify the organisation to which it belongs) and granted the LRV’s Third Request regarding redactions to the application forms of Witnesses P-0350 and P-0489, because the intermediaries were not Prosecution witnesses (Decision 506, para. 27).

Request, the LRV applied for the redaction of the identifying information of the Registry Intermediary,¹³ thus discharging its burden to justify the requested redaction. The Chamber granted the LRV's Third Request with respect to the Registry Intermediary in Decision 506.¹⁴

9. Notwithstanding the above, considering that the procedure for both 'standard' and 'non-standard' redactions equally requires the 'disclosing party' to justify the redaction at some point in the process,¹⁵ and that the LRV has justified the redactions twice (when the LRV applied for the redactions¹⁶ and now),¹⁷ the Appeals Chamber need not review in this appeal the Trial Chamber's categorisation of these redactions as 'standard'. Rather, the scope of the appeal is largely confined to the correctness of the procedure followed by the Chamber—namely, if the LRV was required to discharge its burden to justify the redaction upon the Defence Request, following the procedure set out in paragraphs 5 and 48 to 50 of the Redactions Protocol.¹⁸

II. First Ground of Appeal: The Chamber correctly required the LRV to justify the necessity of the redaction

10. The Appellant's First Ground of Appeal lacks merit: *first*, the Trial Chamber did not exempt the LRV from its burden of demonstrating the necessity of the redactions; *second*, the LRV effectively justified the redactions; and *third*, the Appellant confuses the LRV's burden to justify the redactions with the Defence's 'evidential' burden to support its factual allegations. Thus, the Appellant's First Ground must be dismissed.

¹³ [Third Request](#), paras. 4, 26, 46.

¹⁴ [Decision 506](#), para. 27.

¹⁵ Paragraph 5 of the [Redactions Protocol](#) refers to paragraphs 48-50.

¹⁶ [Third Request](#).

¹⁷ ICC-02/11-01/15-820-Conf-AnxA ("LRV E-mail 28 November 2016").

¹⁸ The Appellant presents the First and Second Grounds of Appeal as errors of law or procedure which relate to the procedure followed by the Chamber in reaching its Decision. For the standard of review for errors of law and procedure, see [ICC-01/04-01/06-3121-Red A5](#) ("Lubanga AJ"), paras. 18-20; [ICC-02/11-01/15-744 OA8](#) ("Gbagbo Rule 68 AD"), para. 22. The Appellant presents the Third Ground as an error of fact related to the Chamber's assessment of the Defence submissions in support of its Request. For the standard of review for errors of fact, see *Lubanga AJ*, paras. 21, 24-25; *Gbagbo Rule 68 AD*, para. 23.

a. The Chamber requested the LRV to justify the redactions

11. *First*, the Appellant ignores that the Presiding Judge, after the Defence orally requested the disclosure of the identity of the Registry Intermediary, required the other Parties and participants, and explicitly the LRV, to respond to the Defence Request via e-mail.¹⁹ Thus, the LRV was not exempted from discharging its burden. To the contrary, the LRV was expressly requested to discharge it.

b. The LRV justified maintaining the redactions

12. *Second*, the Appellant further disregards that the LRV in fact justified the *necessity* of maintaining the redactions.²⁰ Indeed, [REDACTED], the LRV explained that:

“[REDACTED].”

13. Further, the LRV referred to the Chamber’s Decisions 202 and 506, which specifically addressed the redactions of the Registry Intermediary. In the LRV’s Third Request, which referred to the Registry Intermediary, the LRV described the information it gathered in its recent mission to Ivory Coast: the volatile situation in the field; the risk of violence uprising in the neighbourhoods where the intermediaries live; the use of social networks to speculate about the proceedings, including about names of witnesses, victims and/or intermediaries; and the capacity

¹⁹ See ICC-02/11-01/15-T-106-CONF-ENG ET, p. 5, lns. 16-20 (“I would propose [...] that the submissions by the other parties and participants would come in writing by noon so that we can take a decision during [sic] and we can continue with this via email [...]”) and p. 6, lns. 6-8 (“I give this opportunity to the legal representative to, by the end of the break, to have in writing something and on the email”). *Contra* Appeal, para. 18 (“la Chambre n’a pas demandé à la RLV de justifier réellement du maintien de l’expurgation”).

²⁰ *Contra* Appeal, paras. 16, 18.

of the pro-Gbagbo network to mobilise supporters.²¹ Based on the above, the LRV argued that:

- i.* the lifting of the redactions would pose an objective risk to the safety of the victims supported by the intermediaries (whether they are called as witnesses or not) and will materially increase the security risks to the intermediaries (individuals and organisations).²² In addition, the intermediaries might reconsider their interaction with the Court and the LRV.²³
- ii.* The risk would result from the disclosure to the Defence, which could reasonably discover the victims' identities—some of them victims of rape who had not informed their families of their participation in the proceedings—while investigating the activities of intermediaries (as each intermediary assists a large number of victims).²⁴
- iii.* The use of pseudonyms would be a proportional measure that would protect the persons concerned without affecting the intelligibility and usability of the relevant applications.²⁵

14. In the email of 28 November 2016, the LRV, after conducting an assessment on the situation of intermediaries in relation to dual status individuals, indicated that those same arguments “remain[ed] valid today”.²⁶

15. Notably, the LRV's submissions were not “general”,²⁷ nor did the LRV equate disclosure to the Defence with disclosure to the public.²⁸ In any event, the level of

²¹ [Third Request](#), paras. 35-36. In para. 33, the LRV also referred to its submissions in its First Request, paras. 26-39, 43-59.

²² [Third Request](#), para. 38.

²³ *Ibid.*, para. 37.

²⁴ *Ibid.*, paras. 39-40.

²⁵ *Ibid.*, paras. 43-44.

²⁶ LRV E-mail 28 November 2016.

detail, or sufficiency, of the LRV's submissions falls outside the scope of this appeal, nor are these topics intrinsically linked to the issues certified by the Trial Chamber,²⁹ which largely relate to the procedure the Trial Chamber followed in deciding on the Defence Request.³⁰ Thus, the Appellant's submissions as to the generality of the LRV's arguments are inapposite and must be dismissed.³¹

c. The Appellant confuses the LRV's legal burden to justify redactions with the Defence 'evidential' burden to substantiate its allegations

16. *Third*, in the Decision, the Trial Chamber considered the LRV and Defence submissions,³² and balanced the different interests at stake,³³ among them, the relevance or significance of the requested information for the Defence which, according to the Appeals Chamber, is a significant factor to determine whether the interests potentially placed at risk outweigh those of the Defence.³⁴

17. In this context, the Chamber reasonably concluded that the Defence had not substantiated the alleged significance of the information for its case.³⁵ By entering

²⁷ *Contra* Appeal, para. 16.

²⁸ *Contra* Appeal, para. 17.

²⁹ *Contra* [Gbagbo Rule 68 AD](#), para. 19.

³⁰ The First and Second Grounds of Appeal relate to the procedure followed by the Chamber, while the Third Ground relates to the Chamber's assessment of the Defence submissions on the relevance of the requested information. *See above* fn. 18 and *below* fn. 35.

³¹ Appeal, paras. 16-17.

³² Decision, p. 2, lns. 1-4 (noting the LRV submissions), lns. 8-15 (noting the Defence submissions).

³³ [Lubanga AD on Disclosure Restrictions](#), para. 36: "In evaluating an application for non-disclosure of the identity of witnesses or of portions of witness statements, a Pre-Trial Chamber must take into account all relevant factors, and will carefully appraise the Prosecution's request on a case-by-case basis". *See also* [Katanga AD on Prosecution's Appeal against First Redaction Decision](#), para. 66; [Katanga AD on Katanga's Appeal against First Redaction Decision](#), paras. 58, 65: "[W]hile the non-disclosure of information for the protection of persons at risk is permissible in principle pursuant to rule 81(4) of the Rules, whether any such non-disclosure should be authorised on the facts of an individual case will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, balancing the various interests at stake."

³⁴ As the Appeals Chamber noted, if "the information concerned is not relevant to the Defence, that is likely to be a significant factor in determining whether the interests of the person potentially placed at risk outweigh those of the Defence. If, on the other hand, the information may be of assistance to the case of the suspect or may affect the credibility of the case of the Prosecutor the [...] Chamber will need to take particular care when balancing the interests at stake". *See* [Katanga AD on Prosecution's Appeal against First Redaction Decision](#), para. 72.

³⁵ Decision, p. 2, lns. 8-12: "the Defence has not substantiated why the name of the said intermediary has become a live issue in this case", "its allegation remains wholly unfounded" [and] "the Defence has not pointed out the relevance of this person's identity for the Defence case". As to the reasonableness of the Chamber's

such a finding, the Chamber merely expressed its view that the Defence submissions were bereft of any foundation. Contrary to the Appellant's contention, this finding does not mean that the LRV was exempted from discharging its burden.³⁶ Crucially, the procedure followed by the Chamber (where it requested submissions from the LRV, and the LRV justified the redactions),³⁷ and the Decision (where the Trial Chamber expressly referred to the LRV and Defence's submissions),³⁸ show the opposite.

18. Hence, while the LRV had the burden to justify the redaction, the Defence—like any litigating Party—had to substantiate its allegations if it wished the Chamber to attribute any weight to them.³⁹ Thus, as the Defence had argued that the Registry Intermediary's identity was relevant to its case, it should have advanced *some* information to substantiate that claim, in particular, being cognisant that the Chamber would consider and weigh all observations.⁴⁰

19. Accordingly, the Trial Chamber did not err in law or procedure. The Appellant's First Ground of Appeal must be dismissed.

assessment of the Defence submissions, *see below* paras. 20-30, responding to the Appellant's Third Ground of Appeal. It should be noted that the Chamber's overall assessment of the different interests at stake is not under appeal. The Appellant's Third Ground exclusively relates to the Chamber's assessment of the Defence submissions as to the relevance of the requested information.

³⁶ Appeal, para. 13. *Contra* Appeal, para. 18 ("*la Chambre fait reposer la charge de la preuve sur la Défense*").

³⁷ *See above* paras. 11-15.

³⁸ Decision, p. 2, lns. 1-15.

³⁹ [ICC-01/11-01/11-565 OA6](#) ("*Al-Senussi* Admissibility AD"), para. 167: "even though the State bears the burden of proof in general, the Appeals Chamber considers that the Pre-Trial Chamber was reasonable in placing an "evidential" burden on the Defence sufficiently to substantiate the factual allegations it was making."

⁴⁰ [Redactions Protocol](#), paras. 49-50. *See* para. 50: "Upon receiving these observations, the Chamber will examine the requested redactions on a case-by-case basis in light of the justifications provided by the disclosing party *and the observations formulated by the receiving party* and thereafter the Chamber will rule on the requested redactions" (emphasis added).

III. Third Ground of Appeal: the Chamber reasonably found that the Defence did not substantiate the relevance of the Registry Intermediary⁴¹

20. In his Third Ground, the Appellant faults the Chamber for not having properly considered the potential significance for the Defence of knowing the identity of the Registry Intermediary.⁴² However, the Appellant fails to show that it was unreasonable for the Chamber to find the Defence submissions in this respect to be “[un]substantiated” and “unfounded”.⁴³ To the contrary, the Chamber’s determination was reasonable. The Third Ground therefore amounts to a mere disagreement with the Chamber’s determination.

a. The Chamber reasonably concluded that the Appellant had not substantiated the relevance of the information requested

21. The Defence’s submissions in support of its Request were vague and lacked any argument as to the relevance of the requested information for the Defence. Much less did they raise a “reasonable doubt” as to possible malfeasance by Registry Intermediaries.⁴⁴ In fact, the Defence failed to identify any such wrongdoing; yet, the Request effectively amounted to a blanket demand for disclosure of *all* Registry Intermediaries.⁴⁵

22. In its Request, the Defence cryptically argued that:

⁴¹ As to the scope of this ground of appeal, *see above* fn. 35. *See also* ICC-02/11-01/15-790-Conf (“Decision ALA”), paras. 2(iii) (“the Chamber erred in fact when it refused to acknowledge the potential significant of knowing the identity of intermediaries, as they appear to have played an important role in the selection of witnesses and the presentation of their testimony”), 7 (“the Chamber deemed that it is for the party asking the lifting of the redaction to demonstrate that there were grounds to suspect possible malfeasance on the part of the intermediary”). The Prosecution addresses the Third Ground after the First Ground because they are related. It also notes that the Appellant has improperly expanded the issue certified for appeal to include factual allegations not referred to by the Trial Chamber.

⁴² Appeal, paras. 23-28.

⁴³ Decision, p. 2, lns. 8-12.

⁴⁴ *Contra* Appeal, para. 41: “il lui est indispensable de connaître le nom de ces intermédiaires lorsqu’il existe un doute raisonnable sur leur comportement”.

⁴⁵ Decision, p. 2, lns. 12-15: “the Defence requests amounts to requesting the lifting of all redactions of intermediaries, both of the LRV and the Prosecution in order to [...] ‘[f]ind out what the persons might have done’”.

“we are not sure [the intermediary] could be involved in the drafting or filling out of other applications for the participation of victims [and] as a result it is indispensable for us to know who this person is and find out what that person might have done”⁴⁶ and “this will make it possible for us to know whether a witness of the Prosecutor was able to be in contact with other witnesses [...] through this intermediary and also with other victims”.⁴⁷

23. In the Decision, the Trial Chamber found that :

“the Defence has not substantiated why the name of the said intermediary has become a live issue in this case”, “its allegation remains wholly unfounded” [and] “the Defence has not pointed out the relevance of this person’s identity for the Defence case”.⁴⁸

24. In light of the above, the Chamber’s assessment was reasonable.

25. Further, the examples provided in the *Lubanga*, *Katanga* and *Bemba* cases are either inapposite or in fact undermine, rather than advance, the Appellant’s arguments.⁴⁹ The jurisprudence shows that unsubstantiated or generalised requests are insufficient to trigger the disclosure of the identities of intermediaries who are at risk on account of their work with the Court. Crucially, in *Lubanga*, even when the role of intermediaries had become a live issue, the Chamber did not order an omnibus disclosure of the identity of *every* intermediary.⁵⁰ Rather, disclosure was to be decided on an individual-by-individual basis,⁵¹ once “[there were] *prima facie* grounds [...] for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question [...]”.⁵² The Chamber declined to order disclosure of the identities of other intermediaries who did not meet these criteria.⁵³

⁴⁶ Defence Request, p. 3, lns. 7-12.

⁴⁷ Defence Request, p. 4, lns. 15-20.

⁴⁸ Decision, p. 2, lns. 8-12.

⁴⁹ *Contra* Appeal, paras. 33-41.

⁵⁰ *Contra* Appeal, paras. 33-35.

⁵¹ [ICC-01/04-01/06-2434-Red2](#), paras. 139-145.

⁵² *Ibid.*, para. 139(b).

⁵³ *Ibid.*, paras. 139(c), 145.

26. The Appellant's references to *Bemba*⁵⁴ and *Katanga*⁵⁵ are similarly inapposite and do not adequately represent the Judgments. Thus, generalised or unsubstantiated allegations, as those of the Defence in this case, were deemed insufficient to lift redactions on intermediaries' identities.

b. The Appellant improperly adds new arguments in the Appeal to substantiate his Request

27. Even following the Decision, the Appellant improperly sought to supplement the unsubstantiated Defence Request with speculative and unfounded arguments, first, in the application for leave to appeal,⁵⁶ and now, in the Appeal.⁵⁷ These submissions post-dating the Request must be dismissed because they did not inform the Chamber's Decision.⁵⁸ The Appellant cannot demonstrate an error in the Decision by faulting the Chamber for not taking into consideration facts that were not put before it. Notably, some of the witnesses referred to in the Appeal had not even testified by then.⁵⁹

⁵⁴ *Contra* Appeal, paras. 37-40. The Appellant misrepresents [ICC-01/05-01/08-3343](#) ("*Bemba* TJ"), para. 342. The Trial Chamber did not find that intermediaries were paid to assist in filling application forms; rather it noted that there was "*conflicting* evidence". In any event, this did not impact on the credibility of the witnesses' testimony (emphasis added) (*contra* Appeal, para. 39). Further, the Chamber only noted that the Defence "had an opportunity to and sometimes did question [the witnesses]" on the role played by intermediaries. The Decision does not prevent the Defence from questioning the witnesses on the intermediaries' role (*contra* Appeal, para. 40).

⁵⁵ *Contra* Appeal, para. 36. The Appellant takes out of context the references to [ICC-01/04-01/07-3436](#) ("*Katanga* TJ"), paras. 124, 256. The Trial Chamber noted but made no finding as to P-28's allegation of wrongdoing by intermediary 183.

⁵⁶ ICC-02/11-01/15-768-Conf, paras. 18-23.

⁵⁷ Appeal, paras. 23-31.

⁵⁸ An appeal is not an opportunity to raise new factual allegations that were not placed before the Trial Chamber (or admitted by the Appeals Chamber as 'additional evidence' on appeal). Proceedings on appeal are not a mere continuation of proceedings before the Pre-Trial or Trial Chamber, but rather a separate and distinct stage of proceedings. They are corrective in nature, not *de novo*, and are conducted with the purpose of reviewing the proceedings before the Pre-Trial or Trial Chamber. See [ICC-01/09-02/11-202 OA](#) ("*Kenya* AD Decision on Updated Investigation Report"), para. 11. As a corrective measure, the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial or Trial Chamber. Facts which postdate the impugned decision fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of proceedings on appeal. Therefore facts which postdate the impugned decision are not relevant for the appeal and are to be rejected *in limine*. See *Kenya* AD Decision on Updated Investigation Report, para. 12.

⁵⁹ P-0117 testified on 2 and 5 December 2016 (see Appeal, fns. 14, 17), and P-0350 testified on 28 and 29 November 2016 (see Appeal, fn. 16).

28. In any event, even if, *arguendo*, this information had been timely put before the Trial Chamber, these allegations would have had no material impact on the Decision. Indeed, the Appellant's submissions that victims spoke with members of certain politically oriented groups fail to show any influence by these alleged groups on the witnesses' evidence. Much less does the Appellant indicate that the Registry Intermediary belongs to these groups.⁶⁰ Nor does the Appellant explain why the Intermediary's identity has now become "relevant to a live issue in the case",⁶¹ in particular, since he largely refers to witness statements to support his contentions⁶²—which he possessed when he did not oppose the redactions regarding the Registry Intermediary in March 2016.⁶³

c. The Appellant could investigate the Registry Intermediary without lifting the redactions

29. Finally, the Defence could have learned whether the Registry Intermediary had assisted other victims/witnesses—which appears to be the main reason underlying the Defence Request⁶⁴—by examining whether the Intermediary's pseudonym also appears in other application forms. Indeed, in granting the LRV Requests, the Trial Chamber specifically ordered that the redacted identities of the intermediaries

⁶⁰ *Contra Appeal*, paras. 23-24.

⁶¹ *Contra Appeal*, para. 26, quoting Decision 202, para. 20 (although the Appellant erroneously refers to para. 21).

⁶² See *Appeal*, fns. 14-16 and 18, referring to the statements of P-0184 (CIV-OTP-0032-0011-R03), P-0297 (CIV-OTP-0041-0412-R02), P-0587 (CIV-OTP-0084-0043-R01) and P-0129 (CIV-OTP-0071-2186-R01), which were disclosed with the relevant references unredacted since 6 February 2015 (P-0129, P-0184 and P-0297) and 19 June 2015 (P-0587).

⁶³ [ICC-02/11-01/15-474-Red](#) ("Gbagbo Defence Request for Lifting of Redactions"). Gbagbo requested that all redactions to identifying information of intermediaries who are also Prosecutor's witness be lifted. The Registry Intermediary is not a witness.

⁶⁴ Defence Request, p. 4, lns. 16-18: "this will make it possible for us to know whether a witness of the Prosecutor was able to be in contact with other witnesses [...] through this intermediary and also with other victims".

concerned should be substituted by pseudonyms to facilitate the Defence investigations and its ability to prepare for trial.⁶⁵

30. Hence, the Decision, by rejecting the Defence Request, had no tangible impact on the Defence's ability to prepare its case.

IV. Second Ground of Appeal: The Chamber did not err when it requested and considered the LRV's submissions

31. The Appellant argues that, since the Redactions Protocol encourages the Parties to agree on disclosure requests and the Prosecution did not oppose the Request, the Chamber erred in law by rejecting the lifting of the requested redaction and thus not honouring the alleged *inter partes* "agreement".⁶⁶

32. In reality, the Appellant challenges the mere fact that the Chamber took into consideration the LRV's views, once the Prosecution and the Defence had allegedly "agreed" on the lifting of the redaction.⁶⁷ For the reasons set out below, this argument not only fails, but also contradicts the Appellant's submissions on the First Ground of Appeal, where he faults the Chamber for not requiring the LRV to justify the redaction.

33. *First*, the Prosecution did not "agree" to the disclosure within the terms of the Redactions Protocol;⁶⁸ it merely expressed its lack of opposition, and referred to the LRV's position opposing the Request;⁶⁹ logically so, since the LRV was better placed to justify the necessity of the redactions it had requested. Indeed, while the Prosecution could explain the consequences of lifting the redactions of the identity

⁶⁵ Decision 202, para. 21. See ICC-02/11-01/15-T-106-CONF-ENG ET p. 5, ln. 25 to p. 6, ln. 2 and ICC-02/11-01/15-819-Conf-AnxB ("Prosecution E-mail 28 November 2016") (where the Prosecution explains where the pseudonyms are in the metadata). See also LRV E-mail 28 November 2016, p. 2 (referring to Decision 202, para. 21, which required the provision of pseudonyms).

⁶⁶ Appeal, paras. 20-22, referring to [Redactions Protocol](#), para. 5. See above fn. 9.

⁶⁷ Appeal, para. 21.

⁶⁸ [Redactions Protocol](#), para. 5.

⁶⁹ Prosecution E-mail 27 November 2016 ("ICC-02/11-01/15-819-Conf-AnxA") and Prosecution E-mail 28 November 2016.

of the Registry Intermediary on its own interests, and those of Witness P-0350, the LRV could address the Chamber on the impact that the disclosure would have on its activities and the well-being of other victims, with whom the Registry Intermediary interacted.

34. *Second*, the statutory texts afford the LRV the right to be heard in instances, such as this one, where participating victims' interests may be affected,⁷⁰ and when the Chamber considers it appropriate.⁷¹ In fact, this Chamber had already ruled, in its Decision on Victims Participation, that the LRV, "being in contact with the victims represented, is best placed to advise on any lifting of redactions on the applications of participating victims".⁷² Accordingly, consistent with the law and jurisprudence, the LRV has applied for redactions on victims' application forms,⁷³ and provided submissions when the lifting of those redactions was requested by a Party.⁷⁴

35. The Prosecution's disclosure obligations (which include victims' application forms for dual status individuals)⁷⁵ do not trump the LRV's right to be heard and to advance its views as to the necessity of the redactions.⁷⁶ Nor is the LRV's position binding on the Chamber.⁷⁷ However, the victims' interests can and should be considered by the Chamber in its ultimate decision as to whether information can be withheld from the Defence. In fact, the Chamber would have not complied with its

⁷⁰ See e.g. Statute, article 68(3); Rule 87(1).

⁷¹ See rule 93: "A Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, inter alia, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate."

⁷² [ICC-02/11-01/11-800](#) ("Decision on Victims Participation"), para. 55.

⁷³ See First, Second and Third Request in fn. 11 *above*.

⁷⁴ See Third Request in fn. 11 *above*.

⁷⁵ [Decision on Victims Participation](#), para. 56. Whether victims' application forms are prior statements, within the terms of rule 76, falls outside the scope of this appeal.

⁷⁶ *Contra* Appeal, para. 20.

⁷⁷ [Decision 506](#), para. 32, noting that "the Chamber [is] the ultimate arbiter of the determination of the amount of information which can or cannot be withheld from the Defence".

duty to consider all relevant factors and interests,⁷⁸ had it disregarded the LRV's views.

36. In sum, although the Redactions Protocol does not expressly foresee the LRV's participation upon a Party's request for disclosure of standard redactions, the Chamber did not err. Rather it complied with the law and case-law when it requested and considered the LRV's submissions.⁷⁹ This procedure does not afford an "exorbitant" role to the LRVs.⁸⁰ Instead, it is consistent with the statutory framework and the jurisprudence.

V. The Trial Chamber followed the correct procedure even if the redactions were non-standard

37. If the Appeals Chamber considers that the redactions of identifying information of Registry intermediaries are 'non-standard', and thus the procedure set out in paragraphs 48 to 50 of the Redactions Protocol directly applies, the Appeal similarly fails because the Appellant cannot show the existence of any changed circumstances since May 2016, when the Trial Chamber granted the LRV requested redactions in Decision 506.⁸¹

38. Indeed, upon the LRV's Third Request, where the LRV justified the necessity of redacting identifying information of the Registry Intermediary, the Trial Chamber conducted an individualised assessment of the requested redactions and, on 9 May

⁷⁸ See above fn. 33.

⁷⁹ The Chamber noted that, although the Protocol refers to the calling party, "the same applies to the LRV's intermediaries". See ICC-02/11-01/15-T-107-CONF-ENG ET, p. 1, lns. 21-23.

⁸⁰ *Contra* Appeal, para. 21.

⁸¹ [Katanga AD on Katanga's Appeal against First Redaction Decision](#), para. 64: "Even if non-disclosure is authorised, this determination must be kept under review and altered should changed circumstances make that appropriate. In this regard, the Prosecutor should assist the Pre-Trial Chamber by bringing to its attention factors that may cause it to reconsider its ruling on non-disclosure." See also [Decision 202](#), para. 20: "This ruling [authorising redactions] 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".

2016, it authorised the redactions.⁸² Notably, the Defence did not oppose the LRV's application with respect to this intermediary.⁸³

39. Although, Decision 506 may be revisited if there is a change in the circumstances underlying the redaction, the Defence did not identify any such change in its Request. Conversely, the LRV showed that the circumstances had not changed and that the same factors justifying the redaction in May 2016 remained valid in November 2016.⁸⁴

40. Thus, even if the redacted information were to be considered 'non-standard', the Trial Chamber complied with the procedure set out in the Redactions Protocol⁸⁵ and the Appeals Chamber's jurisprudence on redactions.⁸⁶

Conclusion

41. For all the reasons set out above, the Appeal should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 18th day of May 2017⁸⁷

At The Hague, The Netherlands.

⁸² [Decision 506](#), para. 27.

⁸³ *Ibid.*, para. 27, noting that "the Defence does not seek lifting of redactions of identifying information of intermediaries who are *not* Prosecutor's witnesses".

⁸⁴ LRV Email of 28 November 2016. *See above* paras. 12-15.

⁸⁵ [Redactions Protocol](#), paras. 48-50.

⁸⁶ *See above* fn. 5.

⁸⁷ This submission complies with regulation 36, as amended on 6 December 2016: [ICC-01/11-01/11-565 OA6](#), para. 32.