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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 Document

Redacted version of "Response to Mr Gbagbo's document in support of the appeal against the oral decision of 29 november 2016"

Source: Office of Public Counsel for Victims

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

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I. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that Mr Gbagbo’s appeal (the “Appeal”)² against the oral decision issued by Trial Chamber I (the “Chamber”) on 29 November 2016 (the “Impugned Decision”)³ must be dismissed *in limine* or, in the alternative, as unfounded since the Defence has not demonstrated any error of law or fact committed by the Chamber.

2. In relation to the First and Second grounds of appeal, the Legal Representative notes the lack of sufficient reasoning of the Decision granting leave to appeal and submits that the Chamber did not adequately explain the reasons according to which it considered that the questions raised by the Defence are “issues” in the sense of article 82(1)(d) of the Rome Statute. In particular, the Chamber failed to articulate how the specific findings giving rise to the alleged First and Second grounds of appeal stem from the Impugned Decision, being the latter a mere implementation of prior rulings on the matter.

3. In these circumstances, the Legal Representative submits that the Appeals Chamber should exercise its discretion and dismiss *in limine* the first two grounds of appeal as they do not constitute appealable issues in the sense of article 82(1)(d) of the Rome Statute.

¹ See the “Directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015, p. 24.

² See the “Version publique expurgée du « Document à l’appui de l’appel interjeté à l’encontre de la décision de la Chambre, rendue oralement le 29 Novembre 2016, refusant à la Défense la levée d’une expurgation apposée par l’Accusation au point 24 de la demande de participation de P-0350 » déposé le 13 février 2017 (ICC-02/1101/15-809-Conf)”, No. ICC-02/11-01/15-809-Red OA9, 6 June 2017 (the “Appeal”).

³ See the transcript of the hearing held on 29 November 2016, No. ICC-02/11-01/15-T-107-CONF-ENG ET (closed session), p. 1, line 14 to p. 2, line 16 (the “Impugned Decision”), reclassified as public on 18 May 2017.

4. In relation to the Third ground of appeal – which the Chamber considered subsumed in the first issue – the Legal Representative contends that it should also be dismissed *in limine* for lack of certification as such by the Chamber and therefore for falling outside of the scope of the appeal.

5. In the alternative, should the Appeals Chamber find that the first and second issues are properly before it, the Legal Representative submits that the Chamber did not commit any error of law. On the contrary, the Chamber correctly followed and implemented the system put in place by the Redaction Protocol and its previous rulings of 2 September 2015 and of 9 May 2016.

6. Moreover, should the Appeals Chamber consider that the arguments developed by the Defence in the Third ground of appeal are within the scope of the certified issues, the Legal Representative contends that the Chamber did not commit an error of fact in finding that the Defence had not substantiated why the identity of the intermediary for Witness P-0350 has become a live issue in this case. On the contrary, the Chamber properly assessed all Defence arguments and reasonably concluded that the Defence was conducting “*a fishing expedition*” on the basis of “*wholly unfounded*” allegations.

II. Background

7. On 15 December 2014, the then Single Judge of the Chamber issued the decision adopting the redaction regime to be followed in the case,⁴ as set out in the redaction protocol appended to said decision (the “Redaction Protocol”).⁵

⁴ See the “Decision on the Protocol establishing a redaction regime” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-737, 15 December 2014.

⁵ See the “Protocol establishing a redaction regime in the case of *The Prosecutor v. Laurent Gbagbo*” (Pre-Trial Chamber I), No. ICC-02/11-01/11-737-AnxA, 15 December 2014 (the “Redaction Protocol”).

8. On 2 September 2015, the then Single Judge granted the Legal Representative's request to maintain redactions to the identity and organisation of intermediaries contained in the application forms of dual status individuals (the "Intermediaries Redaction Decision").⁶

9. On 9 May 2016, the Chamber decided, *inter alia*, to maintain the redactions applied in the application form of Witness P-0350 (victim a/10179/14) to the intermediary's identity and organisation, in light of the fact that said intermediary is not a witness in the case (the "Witness P-0350 Redaction Decision").⁷

10. On 28 November 2016, before the start of Witness P-0350's testimony, Mr Gbagbo's Defence made an oral request to lift the redactions to the identity and organisation of the intermediary who assisted Witness P-0350 to complete her application form (the "Redaction Lifting Request").⁸ The Prosecution did not oppose said request,⁹ while the Legal Representative opposed the request.¹⁰

11. On 29 November 2016, the Chamber orally rejected the Redaction Lifting Request, relying on the Redaction Protocol, the Intermediaries Redaction Decision and the Legal Representative's arguments opposing the request.¹¹

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

⁷ See the "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)" (Trial Chamber I), No. ICC-02/11-01/15-506, 9 May 2016, para. 27 (the "Witness P-0350 Redaction Decision").

⁸ See the transcript of the hearing held on 28 November 2016, No. ICC-02/11-01/15-T-106-CONF-ENG ET (private session), p. 2, line 25 to p. 5, line 15 (the "Redaction Lifting Request").

⁹ *Idem*, p. 5, line 25.

¹⁰ See the e-mail sent by the Legal Representative on 28 November 2016 at 11h54. See also the "Redacted version of 'Submission in compliance with Order ICC-02/11-01/15-816-Conf OA9'", No. ICC-02/11-01/15-820-Red OA9, 7 June 2017.

¹¹ See the Impugned Decision, *supra* note 3.

12. On 5 December 2016, Mr Gbagbo's Defence sought leave to appeal the Impugned Decision (the "Request").¹² On 9 December 2016, the Prosecution and the Legal Representative filed their responses, both opposing the Request.¹³

13. On 2 February 2017, the Chamber issued a decision granting leave to appeal the Impugned Decision (the "Decision granting Leave to Appeal"),¹⁴ in respect of the first two issues identified by the Defence, namely: (i) whether "*the Chamber erred in law when it required the Defence to state why the identity of the intermediary is necessary instead of requiring the Legal Representative of Victims to state why the redaction is necessary*" (the "First ground of appeal"); and (ii) whether "*the Chamber erred in law when it disregarded the inter partes agreement to disclose the identity of the intermediary*" (the "Second ground of appeal").¹⁵ In relation to the third issue identified by the Defence, namely (iii) whether "*the Chamber erred in fact when it refused to acknowledge the potential significance 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*" (the "Third ground of appeal"),¹⁶ the Chamber considered it subsumed in the first issue and took no position on the factual question raised therein.¹⁷

14. On 13 February 2017, Mr Gbagbo's Defence filed the Appeal.¹⁸

¹² See the "Demande d'autorisation d'interjeter appel de la 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3) (ICC-02/11-01/15-573-Conf)'", No. ICC-02/11-01/15-591-Conf, 15 June 2016 (the "Request").

¹³ See the "Prosecution's response to Laurent Gbagbo's application for leave to appeal the 29 November 2016 oral decision on the lifting of the redaction to the name of the intermediary of Witness P-0350", No. ICC-02/11-01/15-772-Conf, 9 December 2016; and the "Réponse to the 'Demande d'autorisation d'interjeter appel de la décision de la Chambre rendue oralement le 29 Novembre 2016 refusant à la Défense la levée d'une expurgation apposée par l'Accusation au point 24 de la demande de participation de P-0350 (ICC-02/11-01/15-768-Conf)'", No. ICC-02/11-01/15-774-Conf, 9 December 2016.

¹⁴ See the "Decision on the request for leave to appeal the oral decision of 29 November 2016" (Trial Chamber I), No. ICC-02/11-01/15-790-Conf, 2 February 2017 (the "Decision granting Leave to Appeal").

¹⁵ *Idem*, para. 2.

¹⁶ *Ibid.*, paras. 2 and 5-7.

¹⁷ *Ibid.*, para. 7.

¹⁸ See *supra* note 2.

15. Pursuant to regulation 65(5) of the Regulations of the Court,¹⁹ the Legal Representative files her response to the Appeal.

III. Confidentiality

16. Pursuant to regulation 23bis(2) of the Regulations of the Court, this response is filed confidentially because it makes reference to submissions filed under the same classification. A public redacted version will be filed in due course.

IV. Submissions

A) The Appeal should be dismissed in limine

17. The Legal Representative notes the lack of sufficient reasoning of the Decision granting Leave to Appeal. Indeed, the Chamber limited itself to simply indicate that the first two issues identified by the Defence arise from the Impugned Decision “*as they formed the basis of the Chamber’s determination not to disclose the identity of the relevant intermediary to the Defence*”.²⁰ The Chamber did not explain the reasons why it considered that the questions raised by the Defence are “issues” in the sense of article 82(1)(d) of the Rome Statute and, by doing so, failed to provide sufficient clarity to ground its ruling.²¹

¹⁹ See the “Reasons for the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention (ICC-02/11-01/15-134-Red3)’” (Appeals Chamber), No. ICC-02/11-01/15-172 OA6, 31 July 2015, paras. 16 and 19.

²⁰ See the Decision granting leave to appeal, *supra* note 14, para. 7: “*With regard to the third issue, the Chamber considers that it is subsumed in the first issue*”.

²¹ See the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’” (Appeals Chamber), No. ICC-01/04-01/06-773 OA5, 14 December 2006, para. 20. See also the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” (Appeals Chamber), No. ICC-01/04-01/06-774 OA6, 14 December 2006, para. 30.

18. In particular, having previously rejected the Redaction Lifting Request on the basis that, *inter alia*, it amounted to requesting the lifting of all redactions currently applied to the identity of intermediaries,²² the Chamber should have articulated how the specific findings giving rise to the alleged First and Second grounds of appeal stem from the Impugned Decision and not from the previous rulings on the matter.

19. In this regard, the Legal Representative recalls that the procedure for lifting redactions, either *proprio motu* or upon request of a party or participant if the redacted information becomes relevant to a live issue in the case, was previously established by the Intermediaries Redaction Decision,²³ confirmed by the Witness P-0350 Redaction Decision²⁴ and in line with the Redaction Protocol.²⁵ Moreover, by issuing the Intermediaries Redaction Decision and the Witness P-0350 Redaction Decision, the Chamber decided to maintain redactions requested only by the Legal Representative,²⁶ and sometimes against the views of the Defence and/or the Prosecution.²⁷ Therefore, the Impugned Decision is a mere implementation of those rulings and did not change anything in terms of the applicable burden of proof and the role of the parties and participants in requesting or opposing the lifting of those redactions.²⁸

20. Since the Appeals Chamber enjoys discretion in accepting the Pre-Trial or Trial Chamber's determination of what is an appealable issue,²⁹ the Legal

²² See the Impugned Decision, *supra* note 3, p. 2, lines 12-15.

²³ See the Intermediaries Redaction Decision, *supra* note 6, para. 20 (emphasis added).

²⁴ See the Witness P-0350 Redaction Decision, *supra* note 7, para. 16.

²⁵ See the Decision on the Protocol establishing a redaction regime, *supra* note 4, paras. 26-30.

²⁶ See the Intermediaries Redaction Decision, *supra* note 6, p. 10.

²⁷ See the Witness P-0350 Redaction Decision, *supra* note 7, para. 27.

²⁸ See, *inter alia*, the transcript of the hearing held on 9 March 2016, No. ICC-02/11-01/15-T-27-ENG ET (open session), p. 37, line 19 to p. 38, line 25 and the "Decision on Defence Request for Leave to Appeal the Decision on Article 56 Evidence (Trial Chamber IX)", No. ICC-02/04-01/15-535, 9 September 2016, para. 16.

²⁹ See the "Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber III" (Appeals Chamber), No. ICC-02/04-179 OA, 23 February 2009 and the dissenting opinion of Judge Pikis,

Representative submits that the Appeal should be dismissed *in limine* in relation to the first two grounds of appeal. Said grounds do not constitute appealable issues in the sense of article 82(1)(d) of the Rome Statute because they do not arise from the Impugned Decision but clearly from prior relevant rulings and therefore are not properly before the Appeals Chamber.

21. In relation to the Third ground of appeal, the Legal Representative contends that it should also be dismissed *in limine* because the issue was not certified as such by the Chamber and therefore falls outside of the scope of the appeal.³⁰ To hold otherwise would render nugatory the limiting power granted to the Chamber *a quo* by article 82(1)(d) of the Rome Statute. In particular, the issue addressed in the Third ground of appeal concerns a factual question on which the Chamber “took no position”.³¹ Therefore, a judgment by the Appeals Chamber on said ground of appeal may amount to an advisory opinion, assessing what the Chamber might do in the future. The Appeals Chamber has rightly rejected in the past requests to issue this type of rulings.³²

A) The First and the Second Grounds of Appeal : the Chamber did not commit an error of law (i) in requiring the Defence to state why the identity of the intermediary is necessary; and (ii) in not taking into account the inter partes agreement to disclose the identity of the intermediary

22. In the alternative, should the Appeals Chamber find that the First and Second grounds of appeal constitute appealable issues, the Legal Representative submits that the Chamber did not commit an error of law (i) in requiring the Defence to provide

paras. 8-9. See also the “Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008” (Appeals Chamber), No. ICC-01/04-01/06-1433, 11 July 2008, para. 11 and the dissenting opinion of Judge Song.

³⁰ See the “Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’” (Appeals Chamber), No. ICC-01/09-02/11-1032 OA5, 19 August 2015, para. 28.

³¹ See the Decision granting leave to appeal, *supra* note 14, para. 7.

³² See *supra* note 29.

reasons justifying the lifting of the redactions to the identity of the intermediary;³³ and (ii) in not taking into account the *inter partes* agreement to disclose the identity of the intermediary.³⁴

23. The Chamber correctly followed and implemented the procedure for lifting the redactions to the identity of intermediaries as established in the Intermediaries Redaction Decision and in the Witness P-0350 Redaction Decision. These decisions indeed amended the Redaction Protocol in relation to the lifting of redactions to the identity of intermediaries whose names appear in the application forms of dual status individuals. Accordingly, the Chamber did not reverse the burden of proof that was set out in its previous rulings.

24. In these circumstances, the reference of the Defence to article 5 of the Redaction Protocol³⁵ is, on the one hand, not apposite by virtue of the principle that *lex posterior derogat legi priori*; and, on the other hand, it is in contrast with the Defence own admission that by requesting the lifting of the redaction to the identity of the intermediary for Witness P-0350, it was simply following the procedure set out by article 21 of the Intermediaries Redaction Decision.³⁶

25. Furthermore contrary to the Defence arguments,³⁷ application forms, even if submitted by dual status individuals, are not prior statements under rule 76 of the Rules, nor are they evidence in the possession or control of the Prosecution, thereby falling outside of its disclosure obligations under rule 77 of the Rules.

³³ See the Appeal, *supra* note 2, paras. 13-19.

³⁴ *Idem*, paras. 20-22.

³⁵ See the Appeal, *supra* note 2, paras. 15 and 20. See also the “Version publique expurgée de l’Annex to the Soumission d’un email au dossier de l’affaire par la Défense de Laurent Gbagbo conformément à l’« Order on the filing of e-mails » rendu par la Chambre d’appel le 21 février 2017 (ICC-02/11-01/15-816-Conf)”, No. ICC-02/11-01/15-822-Anx-Red OA9, 6 June 2017.

³⁶ See the Appeal, *supra* note 2, para. 26, quoting para. 21 of the Intermediaries Redaction Decision.

³⁷ *Idem*, paras. 14-15.

26. In this regard, the Appeals Chamber has recently upheld the definition of “prior statements” given by Trial Chamber VI, according to which “*prior statements within the meaning of Rule 76 are made only when witnesses are ‘questioned about their knowledge of the case in the course of its investigation’*”.³⁸ It is self-evident that application forms were not collected by the Prosecution in the course of its investigation - and as such they cannot even be defined as “*evidence subject to disclosure within the legal framework of the Court*”;³⁹ nor were they collected in the context of an investigation into the crimes by any other “*judicial authority*”.⁴⁰ Instead, they were provided to the

³⁸ See the “Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses” (Appeals Chamber), No. ICC-01/04-02/06-1330 OA, 20 May 2016, para. 1 and paras. 11-12. See also the “Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses” (Trial Chamber XI), No. ICC-01/04-02/06-904, 16 October 2015, para. 29 and the “Decision on Request for Disclosure or Securing of Prior Statements Given by Prosecution Witnesses to Domestic Judicial Authorities and International Organisations” (Trial Chamber VII, Single Judge), No. ICC-01/05-01/13-1227, 9 September 2015, para. 9 referring to the jurisprudence of *ad hoc* tribunals: ICTY, Appeals Chamber, *The Prosecutor v. Tihomir Blaskić*, “Decision on the Appellant’s Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings”, 26 September 2000, IT-95-14-A, para. 15 (emphasis added: ‘the usual meaning of a witness statement in trial proceedings **is an account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime**’); ICTR, Trial Chamber, *Prosecutor v. Karemera et al.*, “Decision on Joseph Nzirorera’s Sixth, Seventh and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and Other Measures”, 29 November 2007, ICTR-98-44-T, para. 20; SCSL, Trial Chamber, *Prosecutor v. Brima et al.*, “Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or 68”, 4 May 2005, SCSL-04-16-T, para. 16. See also ICTR, Appeals Chamber, *Niyitegeka v. Prosecutor*, Judgment, 9 July 2004, ICTR-96-14-A, paras. 31-36.

³⁹ See the “Decision on the Defence Requests in Relation to the Victims’ Applications for Participation in the Present Case” (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-01/11-169, 8 July 2011, para. 9. See also in this sense, the “Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial” (Appeals Chamber), No. ICC-01/04-01/07-2288 OA11, 16 July 2010, para. 72: the Prosecutor disclosure obligations under to rule 77 refer to “*evidence which is material for the preparation of the defence, and evidence which will be used at trial*” (Emphasis added).

⁴⁰ See the “Decision on Request for Disclosure or Securing of Prior Statements Given by Prosecution Witnesses to Domestic Judicial Authorities and International Organisations”, *supra* note 38, para. 9. See in particular, the “Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011” (Trial Chamber III), No. ICC-01/05-01/08-2012-Red, 9 February 2012, paras. 100-101: “**Unlike evidence collected to support or challenge the substantive criminal charges in the case, the application forms are administrative in nature and are created through a relationship of confidence between a potential victim and the Registry of the Court**” and “[applications forms] are intended to serve a limited purpose: to provide the Chamber with a basis for determining whether individual victims should be permitted to participate in the proceedings pursuant to rule 89 of the Rules” (Emphasis added).

Prosecution by the Registry,⁴¹ following an order of the Chamber.⁴² In that context, the Pre-Trial Chamber indicated that the only reason why the Prosecution was to be given access to the unredacted versions of application forms was the Prosecution's duty *"with respect to victim protection, pursuant to Articles 54(1)(b) and 68(1) of the Statute, and the fact that applications for participation in proceedings may contain exculpatory information that may be relevant to his investigative duties under Article 54(1)(a) of the Statute"*.⁴³

27. Accordingly, the information contained in the application forms is of relevance for the Prosecution's obligations to investigate exonerating and incriminating circumstances equally in so far as said forms could lead to the Prosecution's determination that victims may possess information to be considered exculpatory within the meaning of article 67(2) of the Rome Statute. Should this be the case, the Prosecution's investigation should extend to cover such information. However, as clarified by the Appeals Chamber, the Prosecution's statutory obligations pursuant to article 67(2) of the Rome Statute and rule 77 of the Rules are only triggered in case the information in the application forms leads the Prosecution

⁴¹ See in particular, the "Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011" (Trial Chamber III), No. ICC-01/05-01/08-2012-Red, 9 February 2012, paras. 100-101: *"Unlike evidence collected to support or challenge the substantive criminal charges in the case, the application forms are administrative in nature and are created through a relationship of confidence between a potential victim and the Registry of the Court" and "[applications forms] are intended to serve a limited purpose: to provide the Chamber with a basis for determining whether individual victims should be permitted to participate in the proceedings pursuant to rule 89 of the Rules"* (Emphasis added).

⁴² See the "First transmission to the Pre-Trial Chamber and the Prosecutor of unredacted versions of applications to participate in the proceedings", No. ICC-02/11-01/11-121, 16 May 2012. See also the "Transmission to the Pre-Trial Chamber and the Prosecutor of consolidated unredacted versions of applications a/20183/12, a/20071/12 and a/20058/12 including supplementary information", No. ICC-02/11-01/11-309, 4 December 2012; the "Third Transmission to the Pre-Trial Chamber and the Prosecutor of unredacted versions of applications to participate in the proceedings", No. ICC-02/11-01/11-364, 18 January 2013; and the "Transmission to the Trial Chamber and the Prosecutor of unredacted versions of 187 applications for participation in the proceedings", No. ICC-02/11-01/15-91, 19 June 2015.

⁴³ See the "Second decision on issues related to the victims' application process" (Pre-Trial Chamber I), No. ICC-02/11-01/11-86, 5 April 2012, paras. 42-43.

to discover and collect evidence that appears itself as exculpatory in nature and/or in any way material for the preparation of the Defence.⁴⁴

28. As such, *“the information provided by the applicants in their applications for participation is not to be disclosed between the parties even if information provided therein can be considered exonerating in nature”*.⁴⁵ In this sense, the Legal Representative submits that the Prosecution, having received the application forms from the Registry for the sole purpose of potentially generating new evidence, cannot disclose the information contained therein without the consent of the victim and/or the third person concerned (*i.e.* the intermediary in the case at hand).

29. In relation to specific information on the identity of victims’ intermediaries, it is even clearer that the Legal Representative must have a say on its disclosure to the Defence. Indeed, as for the intermediary of Witness P-0350, intermediaries play an essential role in assisting the Legal Representative in discharging her duties. Lifting redactions to their identity would affect the activities of the Legal Representative in the field, because the disclosure of said information is very likely to lead either to the intermediaries’ ceasing to cooperate, or substantially limiting their interaction with her and, in turn, to the victims disengaging from the proceedings.

30. Thus, the Legal Representative submits that an agreement between only the Prosecution and the Defence to disclose information contained in the application forms is impermissible in so far as it is not endorsed by the Legal Representative following the consent of the person(s) concerned. In this regard, and in contrast with the argument put forward by the Defence,⁴⁶ the Legal Representative recalls her

⁴⁴ See the “Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial’” (Appeals Chamber), No. ICC-01/04-01/07-2288 OA11, 16 July 2010, para. 81 (footnotes omitted).

⁴⁵ See the “Decision on the Defence Requests in Relation to the Victims’ Applications for Participation in the Present Case”, *supra* note 39, para. 10.

⁴⁶ See the Appeal, *supra* note 2, paras. 21-22.

previous submissions in relation to the use of the expression “*the parties*”⁴⁷ in the Redaction Protocol and how it has been *de facto* understood and subsequently amended as “*parties and participants*” in both the Intermediaries Redaction Decision and the Witness P-0350 Redaction Decision.⁴⁸

31. The Legal Representative also underlines that in any event, *inter partes* agreements are not binding on the Chamber;⁴⁹ even less so when they are related to measures aiming to protect the safety and well-being of victims, which are the ultimate responsibility of the Chamber itself.⁵⁰

32. The Legal Representative further submits that the Defence fails to show how the Chamber erred in law in requiring the Defence to state why the identity of the intermediary at hand was necessary. The Defence merely challenges the validity of the arguments relied upon by the Legal Representative before the Chamber, and concludes that according to the Impugned Decision “*jamais une demande de levée d’expurgation ne sera acceptée par une quelconque Chambre*”.⁵¹ Beyond this broadly

⁴⁷ [REDACTED].

⁴⁸ See the Intermediaries Redaction Decision, *supra* note 6, para. 20 and the Witness P-0350 Redaction Decision, *supra* note 7, para. 16.

⁴⁹ See the “Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call” (Trial Chamber V), No. ICC-01/09-01/11-449, 24 August 2012, para. 5 and the “Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call” (Trial Chamber V), No. ICC-01/09-02/11-469, 24 August 2012, para. 5.

⁵⁰ See the “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007” (Appeals Chamber), No. ICC-01/04-556 OA4 OA5 OA6, 19 December 2008, para. 54 (“[v]ictims should be reminded that their protection and the sustenance of their interests is a recurring theme of the Statute”). See also the “Decision on victims’ participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 129; the “Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-428-Corr, 25 April 2008, para. 27; the “Annex 2 of Decision issuing a confidential and a public redacted version of ‘Decision on disclosure issues, responsibilities for protective measures and other procedural matters’” (Trial Chamber I), No. ICC01/04-01/06-1311-Anx2, 8 May 2008, para. 95; and the “Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants” (Trial Chamber III), No. ICC-01/05-01/08-699, 22 February 2010, paras. 24-26.

⁵¹ See the Appeal, *supra* note 2, para. 16.

speculative allegation, the Defence does not provide any valid reason supporting its assertion that the Chamber made an error of law in allocating the burden of proof on the party or participant requesting the lift of a redaction.

33. Firstly, the Defence's contention that it cannot prove the relevance of the information for which it seeks to have the redactions lifted in the absence of said information is a circular argument.⁵² Following this approach, no redactions to any information would ever be maintained because the very purpose of a redaction is to limit access to the redacted information. Nonetheless, contrary to the Defence's arguments, applied redactions can be lifted with a properly grounded request. As illustrated by the jurisprudence of other international criminal tribunals regarding the disclosure of evidence,⁵³ a party who is prevented from having access to a particular piece of information may rely on the context of said information to show its relevance to the Chamber and, thereby, to gain access to it.

34. Secondly, the professional and ethical obligations referred to by the Defence are inapposite to the issue raised in the First ground of appeal.⁵⁴ These obligations were not at the crux of the decision to impose on the Defence the burden to state why the redacted intermediaries' identity and contact information are necessary for it. Instead, the redactions were authorised because, *inter alia*, the identification of the intermediaries "*could jeopardise the activities of the VPRS in the field*", and this information was not found to be relevant to any known issue in the case.⁵⁵ The Impugned Decision was expressly axed on these arguments, explaining that the objective was also "*not to prejudice ongoing or further investigations*".⁵⁶

⁵² *Idem*, para. 18.

⁵³ See, for instance, ICTR, *Karemera et al. v. Prosecutor*, "Decision on Joseph Nzirodera's Appeal from Decision on Alleged Rule 66 Violation" (Appeals Chamber), 17 May 2010, para. 32; and MICT, *Ngirabatware v. Prosecutor*, "Decision on Augustin Ngirabatware's Motion for Sanctions for the Prosecution and for Order for Disclosure" (Appeals Chamber), 15 April 2014, paras. 12-13.

⁵⁴ See the Appeal, *supra* note 2, para. 17.

⁵⁵ See the Intermediaries Redaction Decision, *supra* note 6, para. 20.

⁵⁶ See the Impugned Decision, *supra* note 3, p. 1, lines 21 and 23-25.

35. Moreover, the Legal Representative does not consider that the disclosure of confidential information to the Defence is the same as disclosing it to the public,⁵⁷ but submits that a party or participant's general obligation to maintain confidentiality cannot suffice to decide on a particular request to lift redactions. Each and every redaction is authorised *in casu* taking into account the party or participant's professional obligations, and normally for several and different reasons.

36. In light of the foregoing, the Chamber did not commit an error of law in disregarding the agreement between the Prosecution and the Defence and rightly took into account in its determination the permanent opposition of the Legal Representative to the lifting of the redaction to the identity of the intermediary for Witness P-0350.⁵⁸

B) The Third Ground of Appeal : the Chamber did not commit a factual error in assessing that knowing the identity of the intermediary at hand is not a "live issue"

37. Should the Appeals Chamber consider that the arguments developed by the Defence in its Third ground of appeal are within the scope of the certified issues, the Legal Representative submits that the Defence does not demonstrate that the Chamber committed an error of fact in finding that the Defence did not substantiate why the identity of the intermediary for Witness P-0350 had become a live issue in the case.⁵⁹

38. The Legal Representative contends that the Defence merely reiterates its disagreement and puts forward new facts on appeal that were not contained in its Redaction Lifting Request and, as such, were not before the Chamber at the time it issued the Impugned Decision. Moreover, some arguments put forward by the Defence relate to witnesses who have not appeared before the Chamber, such as

⁵⁷ See the Appeal, *supra* note 2, para. 17.

⁵⁸ See the Impugned Decision, *supra* note 3, p. 2, lines 1-4.

⁵⁹ See the Appeal, *supra* note 2, paras. 23-41. See the Impugned Decision, *supra* note 3, p. 2, lines 8-10.

[REDACTED], and to witnesses who appeared after P-0350 and therefore clearly post-date the Impugned Decision, such as [REDACTED].⁶⁰

39. The Appeals Chamber has clarified that *“its review is corrective and not de novo. It will therefore not interfere unless it is shown that the Pre-Trial or Trial Chamber committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts”*.⁶¹

40. Accordingly, to take into account any factual matters that were not before the Chamber or that post-date the Impugned Decision would defeat the corrective function of the Appeals Chamber,⁶² and will run against the fact that the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial or Trial Chamber.⁶³

41. Assuming *arguendo* that the new facts put forward by the Defence and related to a non-specified network of intermediaries – allegedly politically engaged and assisting dual status individuals in completing their application forms – can form part of the present appeal,⁶⁴ the Legal Representative argues that the Defence’s submissions in this regard are wholly unsubstantiated and, as such, irrelevant for the resolution of the issue at stake. In particular, the Legal Representative notes that, contrary to the Defence’s allegations: (i) [REDACTED];⁶⁵ (ii) by specifically

⁶⁰ See the Appeal, *supra* note 2, paras. 23-24.

⁶¹ See the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”(Appeals Chamber), No. ICC-01/09-01/11-307 OA, 30 August 2011, para. 56.

⁶² See the “Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’”, No. ICC-01/11-01/11-565, 24 July 2014, paras. 58-59.

⁶³ See the “Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility’” (Appeals Chamber), No. ICC-01/09-01/11-234, 28 July 2011, paras 10. See also the “Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’” (Appeals Chamber), No. ICC-01/11-01/11-547, 21 May 2014, para. 43

⁶⁴ See the Appeal, *supra* note 2, paras. 27-28 and 31.

⁶⁵ See the Appeal, *supra* note 2, para. 24. [REDACTED].

challenging the burden of proof in its Redaction Lifting Request, the Defence was actually challenging the procedure put in place by the Intermediary Redaction Decision;⁶⁶ (iii) [REDACTED].⁶⁷ In any case, the Legal Representative cannot see the relevance of said information in the context of the present appeal and recalls that she and her team were by no means involved in the completion of application forms, which remains the duty of the Registry.

42. The Legal Representative reiterates that, as for the intermediary for Witness P-0350, intermediaries are involved in assisting with the filling in of application forms as it is precisely their role within the Registry's procedure of collecting said forms. As such, the Defence had to justify why the knowledge of the identity of the intermediary at hand became a live issue in the case. Otherwise, as determined by the Chamber,⁶⁸ the provision of pseudonyms to the Defence suffices to facilitate its investigations and the ability to prepare for trial.

43. Furthermore, the Legal Representative notes that the Defence arguments related to the role that the Prosecution's intermediaries allegedly played in other cases,⁶⁹ was also not put before the Chamber and, in any case, it would not have qualified as a relevant fact to be taken into account when deciding whether knowing the identity of the intermediary for Witness P-0350 became a live issue in the case.

44. It is also noteworthy that the Defence itself recognises that the arguments presented before the Chamber were not sufficient to prove that the identity of the intermediary became a live issue in the case. Indeed, the Defence admits in the

⁶⁶ *Idem*, para. 26. See in particular the e-mail sent by the Legal Representative on 28 November 2016 at 11h54, *supra* note 10: "Firstly, the Defence argues that *"we have no justification from the legal representative of the victim to maintain this redaction"*. However, the decisions make it very clear that it is the party requesting the lifting of the redactions the one who should provide reasons for it (decision 202, para. 20). In other words, the decision of the Chamber to maintain the redactions needs no "justification" from the Legal Representative to remain unchanged".

⁶⁷ See the Appeal, *supra* note 2, para. 29.

⁶⁸ See the Intermediary Redaction Decision, *supra* note 6, para. 21.

⁶⁹ See the Appeal, *supra* note 2, paras. 33-40.

Appeal that the intermediary's name was needed in this instance to simply obtain "*un début de piste*".⁷⁰ It therefore goes without saying that the Defence did not possess any substantive reason to justify the lifting of the redaction on the intermediary's name and demonstrates that the request clearly amounted to a fishing expedition.

45. The approach of the Chamber is thus correct and in line with the relevant jurisprudence of the Court, according to which "[u]nless there are substantive reasons for suspecting that the individuals who assisted the applicants in this way attempted to persuade one or more of them to give false evidence, or otherwise misused their position, disclosure of the identities of those who provided assistance is not required".⁷¹

V. Conclusion

46. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to dismiss the Appeal *in limine*. In the alternative, the Legal Representative requests the Appeals Chamber to dismiss the Appeal since the Defence did not show any error of law or fact committed by the Trial Chamber in the Impugned Decision.

⁷⁰ *Idem*, para. 41.

⁷¹ See the "Redacted version of the Corrigendum of Decision on the applications by 15 victims to participate in the proceedings" (Trial Chamber I), No. ICC-01/04-01/06-2659-Corr-Red, 8 February 2011, para. 30. See also the "Redacted Decision on the variation of protective measures under Regulation 42 on referral from Trial Chamber II on 22 July 2009" (Trial Chamber I), No. ICC-01/04-01/06-2209-Red, 16 March 2010, para. 12. In relation to intermediaries of the Prosecution, see the "Redacted Decision on Intermediaries" (Trial Chamber I), No. ICC-01/04-01/06-2434-Red2, 31 May 2010, para. 139(b) and (c).

It is hereby certified that this document contains a total of 6,574 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.⁷²

A handwritten signature in black ink, reading 'Paolina Massidda', with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 7th day of June 2017

At The Hague, The Netherlands

⁷² This statement (75 words), not itself included in the word count, follows the Appeals Chamber's direction. See No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 32. The Legal Representative notes that the Defence did not include a similar statement in its Document in Support of the Appeal.