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TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public Redacted Version of Filing No. ICC-02/11-01/15-928-Conf

**Submissions on the need to maintain redacted the identifying information and
the organisation of the intermediary related to Witness [REDACTED]**

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 the redactions authorised by the Chamber in the application form of Witness [REDACTED], in particular the redactions to the intermediary’s identity and organisation,² must remain in place because they are still necessary i) to protect the safety and privacy of victims pursuant to article 68(1) of the Statute; ii) to guarantee the continuous participation of the victims in the proceedings pursuant to article 68(3) of the Statute; and iii) to ensure the Legal Representative’s activities in the field pursuant to article 14 of the Code of Professional Conduct for counsel.

II. Background

2. 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”).³

3. On 29 March 2016, the Legal Representative requested the Chamber to maintain the redactions in the application form of, *inter alia*, Witness [REDACTED] (the “Request to Maintain Redactions”).⁴

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 CIV-OTP-0091-0540-R01 at 0542.

³ 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”).

⁴ See the “Response to ICC-02/11-01/15-465 and request to maintain certain redactions in the victim applications of dual status individuals”, No. ICC-02/11-01/15-473, 29 March 2016 (the “Request to Maintain Redactions”).

4. On 9 May 2016, the Chamber decided, *inter alia*, to maintain the redactions applied in the application form of Witness [REDACTED] to the intermediary's identity and organisation, in light of the fact that said intermediary is not a witness in the case and that the Defence did not seek lifting the redactions of identifying information of intermediaries who are not Prosecution witnesses (the "Witness [REDACTED] Redaction Decision").⁵

5. On 28 November 2016, before the start of Witness [REDACTED]'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 [REDACTED] to complete her application form (the "Mr Gbagbo's Request to Lift Redactions").⁶

6. On the same day, the Legal Representative expressed her opposition to Mr Gbagbo's Request to Lift Redactions.⁷

7. On 29 November 2016, the Chamber orally rejected Mr Gbagbo's Request to Lift Redactions (the "Decision on Mr Gbagbo's Request to Lift Redactions").⁸

8. On 2 February 2017, the Chamber granted Mr Gbagbo's Defence leave to appeal the Decision on Mr Gbagbo's Request to Lift Redactions.⁹

9. On 11 May 2017, the Appeals Chamber found that the Decision on Mr Gbagbo's Request to Lift Redactions is materially affected by an error of law,

⁵ 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 [REDACTED] Redaction Decision").

⁶ 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 ("Mr Gbagbo's Request to Lift Redactions").

⁷ See the e-mail sent by the Legal Representative on 28 November 2016 at 11h54.

⁸ See the transcript of the hearing held on 29 November 2016, No. ICC-02/11-01/15-T-107-CONF-ENG ET2 (reclassified into public session), p. 1, line 14 to p. 2, line 16 (the "Decision on Mr Gbagbo's Request to Lift Redactions").

⁹ 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.

reversed it and remitted the question of whether redactions should be maintained to the Trial Chamber (the “Judgment on the Decision on Mr Gbagbo’s Request to Lift Redactions”).¹⁰

10. On 12 May 2017, the Chamber requested the Prosecution and the Legal Representative to file submissions on the issue raised by the Judgment on the Decision on Mr Gbagbo’s Request to Lift Redactions by 22 May 2017.¹¹

III. Confidentiality

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

IV. Submissions

12. The Legal Representative contends that she has already provided detailed and sufficient reasons to maintain redacted the intermediary’s identity and organisation in the application form of Witness [REDACTED] and that said reasons continue to justify the maintenance of the redactions.¹²

¹⁰ See the “Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016” (Appeals Chamber), No. ICC-02/11-01/15-915-Red OA9, 11 May 2017 (the “Judgment on the Decision on Mr Gbagbo’s Request to Lift Redactions”), para. 67.

¹¹ See the transcript of the hearing held on 12 May 2017, No. ICC-02/11-01/15-T-158-CONF-ENG ET (open session), p. 88, lines 4-8 and p. 89, lines 9-11.

¹² See the Request to Maintain Redactions, *supra* note 4, paras. 35-44; and the e-mail sent by the Legal Representative on 28 November 2016 at 11h54, *supra* note 7.

13. However, following the Judgment on the Decision on Mr Gbagbo's Request to Lift Redactions¹³ and the request of the Chamber,¹⁴ she provides further details on the current justification to maintain the redactions at hand.

14. The Legal Representative submits that the redactions authorised by the Chamber in the application form of Witness [REDACTED], in particular the redactions to the intermediary's identity and organisation,¹⁵ must remain in place because they are still necessary i) to protect the safety and privacy of victims pursuant to article 68(1) of the Statute; ii) to guarantee the continuous participation of the victims in the proceedings pursuant to article 68(3) of the Statute; and iii) to ensure the Legal Representative's activities in the field pursuant to article 14 of the Code of Professional Conduct for counsel. The circumstances that led the Chamber to maintain these redactions have not changed in the meantime. In fact, the privacy and safety of both intermediaries and victims, as well as the Legal Representative's activities in the field related to her possible upcoming presentation of evidence, are more likely to be jeopardised at present if the redactions to the intermediary's identity and organisation in the application form of Witness [REDACTED] are lifted.¹⁶

1. Maintaining the redactions is necessary to protect the safety and privacy of the victims

15. Firstly, the Legal Representative reiterates that revealing the name and organisation of the intermediary mentioned in the application form of Witness

¹³ See the Judgment on the Decision on Mr Gbagbo's Request to Lift Redactions, *supra* note 10, paras. 61-62.

¹⁴ See *supra* note 11.

¹⁵ See the Witness [REDACTED] Redaction Decision, *supra* note 5; and CIV-OTP-0091-0540-R01 at 0542.

¹⁶ See in this regard the "Registry's observations on the 'Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the applications of dual status individuals' (ICC-02/11-01/15-85)", No. ICC-02/11-01/15-107, 29 June 2015, para. 4.

[REDACTED] will pose an objective risk to the safety and privacy of other victims who were assisted by the same intermediary.¹⁷

16. The intermediary mentioned in the application form of Witness [REDACTED] not only assisted Witness [REDACTED], but also other victims who will not be called to testify and who therefore remain anonymous *vis-à-vis* the public and the Defence. In these circumstances, the Legal Representative submits that lifting the current redactions to the identity and organisation of said intermediary will render ineffective the anonymity granted to other victims supported by the same intermediary and/or organisation.

17. Indeed, if the redacted information is disclosed to the Defence, the latter will be able to inquire into the intermediary's activities and those of the intermediary's organisation, and thereby discover the identities of the victims who were also assisted by said intermediary and/or organisation, but who currently remain anonymous for security reasons.

18. The Legal Representative stresses that this is not a far-fetched consequence of the eventual disclosure of the name and organisation of the intermediary mentioned in the application form of Witness [REDACTED]. The Legal Representative relies on a limited number of intermediaries to maintain contact with the victims in the field.¹⁸ Since the Pre-Trial Chamber decided to rely also on collective application forms, intermediaries usually assist groups of victims authorised to participate in the

¹⁷ See the Request to Maintain Redactions, *supra* note 4, paras. 35-40. See also the "Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the applications of dual status individuals", No. ICC-02/11-01/15-85, 8 June 2015, para. 44

¹⁸ See the "Public Redacted Version of Information on Common Legal Representation of Victims in the proceedings", No. ICC-02/11-01/15-53-Red, 15 May 2015, para. 20; the "Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the applications of dual status individuals", *supra* note 17, para. 50; and the "Public redacted Version - Reply to Defence responses ICC-02/11-01/15-98 and ICC-02/11-01/15-100", No. ICC-02/11-01/15-106-Red, 26 June 2015, para. 12.

proceedings.¹⁹ As a consequence, disclosing the identity and organisation of the intermediary mentioned in the application form of Witness [REDACTED] will allow the Defence to identify other victims assisted by the same intermediary and/or organisation, including victims who will not be called to testify and whose identities remain redacted.

19. The fact that the Defence is bound by confidentiality obligations is irrelevant to the need to maintain the redactions in the application form of Witness [REDACTED]. The Chamber decided to maintain redacted *vis-à-vis* the public *and the Defence* the identity of those victims who are authorised to participate but will not provide testimony to the Chamber.²⁰ This procedure for victims who are not called to testify is constant in the Court's practice and is justified as necessary for victims to participate in an effective way without fearing for their safety and well-being.²¹ In this regard, the Legal Representative also notes that said victims have not agreed to the disclosure of their identities to the Defence in these proceedings.²²

20. Moreover, as already concluded by the Chamber, the Defence may effectively conduct its investigations without the need to lift these redactions, since the Prosecution has substituted the name and organisation of the intermediary

¹⁹ See the "Second decision on issues related to the victims' application process" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-86, 5 April 2012, paras. 33-34.

²⁰ See the "Decision on victim participation" (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, paras. 55-57.

²¹ See the "Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims" (Appeals Chamber), No. ICC-01/04-02/12-140 A, 23 September 2013, paras. 16-19; the "Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, 22 January 2008, paras. 130-131; the "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 3 March 2010, paras. 92-93; the "Decision on Disclosure of Victims' Identities" (Trial Chamber IX), No. ICC-02/04-01/15-471, 17 June 2016, paras. 11-14; the "Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims'" (Trial Chamber VIII), No. ICC-01/12-01/15-97-Red, 8 June 2016, para. 13; and *a contrario* the "Public redacted version of 'Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns' (10 February 2017, ICC-01/04-02/06-1780-Conf)" (Trial Chamber VI), No. ICC-01/04-02/06-1780-Red, 15 February 2017, para. 51.

²² See the "Communication of the Common Legal Representative concerning the non-disclosure to the Defence of the identity of participating victims", No. ICC-02/11-01/15-460, 7 March 2016.

mentioned in the application form of Witness [REDACTED] by a unique pseudonym in the application forms of other victims assisted by the same intermediary and/or organisation.²³

21. Furthermore, other victims of gender-based crimes who were assisted by the same intermediary mentioned in the application form of Witness [REDACTED] and who will not be called to testify have not disclosed their participation in the proceedings to their family members for fear of the social stigmatisation attached to the crimes they suffered from. Said victims' right to privacy will be unduly prejudiced if the redactions applied to the intermediary mentioned in the application form of Witness [REDACTED] are lifted *vis-à-vis* the Defence.

22. In this regard, the Legal Representative notes the Appeals Chamber's recent finding that "*the Trial Chamber has an independent duty to take the necessary steps to protect the safety of individuals at risk on account of the activities of the Court*",²⁴ and that "*the victims will sometimes be in a better position to assess the risk to victims and their intermediaries*".²⁵

23. This principle is fully applicable to the present instance particularly because the disclosure of the currently redacted information will result in an increase of the objective risks for the security and well-being of the participating victims. Moreover, the security risk has to be evaluated in the specific context of Côte d'Ivoire, where participating victims continue to reside in places characterised by a mixed composition of pro-Gbagbo and pro-Ouattara supporters or perceived as such.²⁶

²³ See the Intermediaries Redaction Decision, *supra* note 3, para. 21. As reflected in e-Court, the pseudonym for the intermediary of Witness [REDACTED].

²⁴ See the Judgment on the Decision on Mr Gbagbo's Request to Lift Redactions, *supra* note 10, para. 42.

²⁵ *Idem*, para. 43.

²⁶ See the "Communication of the Common Legal Representative concerning the non-disclosure to the Defence of the identity of participating victims", *supra* note 22, para. 9.

24. Furthermore, maintaining the redactions is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Indeed, the intermediary's identity and organisation cannot be said to be a live issue in the case which would justify lifting the redactions in accordance with the previous practice of Chambers. In this regard, the Legal Representative notes that the Defence conceded in its Appeal against the Decision on Mr Gbagbo's Request to Lift Redactions that the intermediary's name was needed in this instance to simply obtain "*a modicum of a lead*".²⁷ This explanation confirms that the Defence does not have any actual need at present to know said information and that, *a fortiori*, the lifting of the redactions may jeopardise the security of the participating victims who may be more exposed.

2. Maintaining the redactions is necessary to ensure the participation of the victims in the proceedings

25. Secondly, the Legal Representative reiterates that revealing the name and organisation of the intermediary mentioned in the application form of Witness [REDACTED] will have a negative impact on the current participation of other victims in the proceedings.²⁸

26. As already noted by the Legal Representative, victims participating in this case and for whom protective measures have been ordered are very likely to disengage from the proceedings if the identity of their intermediaries is disclosed to the Defence.²⁹

²⁷ See the "Document in support of the appeal against the oral decision of the Chamber on 29 November 2016, denying the Defence motion for the lifting of a redaction made by the Prosecution to point 24 of [REDACTED]", No. ICC-02/11-01/15-809-Conf-tENG, 10 March 2017, para. 41.

²⁸ See the Request to Maintain Redactions, *supra* note 4, para. 39.

²⁹ See the "Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the applications of dual status individuals", *supra* note 17, para. 29.

27. In this regard, the Legal Representative wishes to restate that many victims have been authorised to participate on the basis of collective application forms. Consequently, several victims in this case are assisted by the same intermediaries.³⁰

28. In these circumstances, lifting the redactions applied to the identity and organisation of the intermediary mentioned in the application form of Witness [REDACTED] increases the security risk for all the other victims – whether witnesses or not – assisted by the same intermediary, as explained *supra*. Said increase of the security risk will in turn foster some victims' concerns and eventually lead them to abandon their participation in the proceedings out of fear for their security.

29. For instance, the fact that the recent testimony of Witness [REDACTED] was heard in open session has raised concerns among the members of the group of victims [REDACTED].³¹ Some victims within said group, who will not be called to testify and whose identities have not been disclosed to the Defence, have transmitted to the Legal Representative their worries about the chance of being identified in their neighbourhoods as a consequence of the public character of their intermediary's testimony. These concerns for their safety have led some of them to consider abandoning their participation in the proceedings.

30. In this regard, as already stated by the Pre-Trial Chamber,³² article 68(1) of the Rome Statute and rule 81(4) of the Rules of Procedure and Evidence are meant to ensure that the involvement of victims in the proceedings does not lead to a situation where their safety and well-being are put at stake, all the more where they are not called to testify.

³⁰ See *supra* para. 18.

³¹ See the transcript of the hearing held on 2 May 2017, No. ICC-02/11-01/15-T-149-Red-ENG WT (open session), p. 38, lines 10-23.

³² See the "Decision on the Protocol establishing a redaction regime" (Pre-Trial Chamber I), No. ICC-02/11-01/11-737, 15 December 2014, para. 49.

3. Maintaining the redactions is necessary to ensure the effectiveness of the Legal Representative's activities in the field

31. Lastly, the Legal Representative reiterates that her activities in the field will be prejudiced if the redactions applied to the identity and organisation of the intermediary mentioned in the application form of Witness [REDACTED] are lifted.³³

32. As indicated *supra*, the Legal Representative relies on intermediaries, *inter alia*, to communicate with the victims in the field. The intermediaries' assistance is necessary for the Legal Representative to contact her clients, collect their views and concerns, and present them before the Court in a timely and effective manner. Some of them also provide assistance to the Registry of the Court.³⁴ This assistance is particularly important at present, when the Legal Representative is conducting activities in the field related to her possible upcoming presentation of evidence.

33. In this regard, as noted in the past,³⁵ the Legal Representatives submits that the intermediaries might reconsider their interaction with the Court out of a security concern if they are required to disclose their identities even when they are not called to testify, as in the case of the intermediary of Witness [REDACTED].

34. In turn, if the intermediaries decide to not interact with the Court for the reasons explained *supra*, many victims will disengage from the proceedings pursuant to a domino effect.

³³ See the Request to Maintain Redactions, *supra* note 4, para. 37; and the e-mail sent by the Legal Representative on 28 November 2016 at 11h54, *supra* note 7.

³⁴ See the "Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the applications of dual status individuals", *supra* note 17, para. 46.

³⁵ See the "Second request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the applications of dual status individuals", No. ICC-02/11-01/15-126, 7 July 2015, para. 16.

35. In these circumstances, the Legal Representative reiterates that she will not be able to effectively fulfil her duties in the field if the redactions to the name and organisation of the intermediary mentioned in the application form of Witness [REDACTED] are lifted.³⁶

V. Conclusion

36. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to maintain the redactions authorised in the application form of Witness [REDACTED].



Paolina Massidda
Principal Counsel

Dated this 30th day of January 2018

At The Hague, The Netherlands

³⁶ See the e-mail sent by the Legal Representative on 28 November 2016 at 11h54, *supra* note 7. See also the “Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the applications of dual status individuals”, *supra* note 17, para. 56.