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TRIAL CHAMBER I

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

Public redacted version of "Prosecution's Response to the Counsel for Laurent Gbagbo's *"Requête aux fins de levée de mesures de protection, de levée d'expurgations et de reclassification de pièces, documents et transcrits, nécessaires à la préparation et à la bonne conduite des enquêtes"* (ICC-02/11-01/15-1173-Conf)", 13 June 2018, ICC-02/11-01/15-1185-Conf

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The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Eric MacDonald

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 Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution agrees in part and opposes in part the Gbagbo Defence Request (“Request”).¹ In general, the Prosecution agrees on the grounds that the statements and annexes of all rule 68(2) witnesses and those rule 68(3) witnesses who testified in open session without protective measures should be re-classified as public. The Prosecution will also review certain groups of documents for the purposes of re-classifying them as public. The Prosecution opposes the remaining Defence requests on the grounds that they are overly broad, unnecessary, and not justified by the relevant rulings and protocols in the case.

Confidentiality

2. This filing is classified as “Confidential”, pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, as it is a response to a Confidential Defence filing and refers to evidence and information that is not yet available to the public. The Prosecution will file a public redacted version in due course.

Submissions

- I. **The Prosecution agrees to re-classify most rule 68 witness statements as public and review groups of documents for public re-classification.**
3. The Prosecution agrees to part of the Defence Request. First, the Defence requests that those statements submitted under rule 68(2) and 68(3) be re-classified as public to the extent possible.² In general, the Prosecution agrees to re-classify most of these statements and annexes as public, as described below, and with the caveat that some additional standard redactions, for example to names of investigators who still work for the OTP, or recent contact information of victims and witnesses, will be necessary. Second, the Prosecution will conduct a review of certain groups of evidence for re-classification as public, as described below.

¹ ICC-02/01-01/15-1173-Conf (“Request”).

² ICC-02/11-01/15-1173-Conf at section 2.4.

a. Statements and annexes of all 14 rule 68(2) witnesses should be re-classified as public.

4. The Prosecution agrees with the Defence³ that the 14 rule 68(2) witnesses should have their written statements and annexes re-classified as public.⁴ This is the case for those 13 witnesses for whom no protective measures were sought as well as for the one witness who was denied protective measures.⁵ Public versions of these witness statements will of course include limited redactions pursuant to the Redaction Protocol,⁶ such as to names of OTP investigators still employed by the OTP, to recent contact information of victims and witnesses, and precise locations where victims and witnesses reside. The Prosecution recommends the Chamber authorise the change in classification of these witness statements and annexes to public.

b. Statements and annexes of 20 rule 68(3) witnesses who testified in open session without protective measures should be re-classified as public.

5. The Prosecution also agrees with the Defence⁷ that the 20 rule 68(3) witnesses who testified in open session without protective measures should have their written statements and annexes re-classified as public.⁸ This is the case for those witnesses for whom no protective measures were sought as well as those seven witnesses who were denied protective measures. Public versions of these witness statements will of course include limited redactions pursuant to the Redaction Protocol,⁹ such as to names of OTP investigators still employed by the OTP, to recent contact information of victims and witnesses, and precise locations where victims and witnesses reside. The Prosecution recommends the Chamber

³ Request, Section, 2.4.1.

⁴ These 14 witnesses include: P-0479, P-0489, P-0360, P-0573, P-0594, P-0590, P-0294, P-0543, P-0426, P-0471, P-0428, P-0380, P-0476, and P-0266.

⁵ ICC-02/11-01/15-1155-Conf.

⁶ ICC-02/11-01/11-737-AnxA.

⁷ Request, Section, 2.4.2.1

⁸ These 20 witnesses include: P-0414, P-0578, P-0230, P-0107, P-0555, P-0588, P-0589, P-0106, P-0172, P-0237, P-0580, P-0582, P-0364, P-0363, P-0297, P-0362, P-0381, P-0567, P-0568, and P-0105.

⁹ ICC-02/11-01/11-737-AnxA.

authorise the change in classification of these witness statements and annexes to public.

6. For the reasons submitted below, however, the Prosecution is not in a position to re-classify as public those six rule 68(3) statements of victims or witnesses who testified in private or closed session, or with protective measures.

c. The Prosecution will re-examine the confidential classification of FDS documents and certain RTI documents with an effort to re-classify them as public.

7. Although the Prosecution disagrees with the Defence's characterisation that the confidential classification can only be used in cases of "extreme necessity",¹⁰ the Prosecution is committing to review two groups of submitted evidence with an effort to re-classify them as public: (1) FDS documents, and (2) *files conducteur* of RTI broadcasts. In the first category, there are approximately 839 documents submitted in evidence from various FDS sources, 831 of which have been marked confidential. In the second category, there are approximately 149 submitted documents that have been marked confidential. Reviewing and likely re-classifying these approximately 1,000 documents should assist the Defence in their use of these documents in their investigations. The Prosecution is open to reviewing the confidentiality classifications of additional document collections, on a case-by-case basis.
8. There is no good reason, however, why the Defence cannot comply with the relevant Protocol¹¹ ("Confidentiality Protocol"), particularly the section on using confidential documents during its investigation,¹² with respect to the remaining submitted confidential documents and any confidential rule 77 documents. This Confidentiality Protocol is binding on all Parties, as well as the LRV, and in no way prohibits questioning of witnesses with confidential information. Rather, the

¹⁰ Request, Section 2.5.

¹¹ ICC-02/11-01/15-200-Anx.

¹² ICC-02/11-01/15-200-Anx, at Section III.

Party wishing to do so must simply keep a record of it¹³ – hardly the burdensome or prejudicial task the Defence portrays in its Request.¹⁴

II. The Defence's remaining requests are unnecessary, overly broad, and not justified by the relevant rulings and Protocols.

9. The Defence's remaining requests should be rejected as unnecessary, overly broad, and unsupported by the relevant rulings and Protocols in this case. The Request alleges the Defence does not have necessary measures for preparing¹⁵ or conducting¹⁶ its investigations, but the Defence has failed to show any actual prejudice from not having the relief requested. It is also surprising that the Defence implies that it has yet to earnestly prepare for its investigations, despite having been representing Mr Gbagbo and conducting witness interviews on his behalf since before his transfer to the Court.¹⁷ These requests are rooted in similar concerns the Chamber recently rejected in its 2 February 2018 order:

The Chamber notes that the Defence for Mr Gbagbo seems to rely on the assumption not only that all the Defence work on the case is yet to be done, notwithstanding the fact that these proceedings have been ongoing for several years (and that Lead Counsel for Mr Gbagbo has been in place since the very beginning), but also that the clock for this work has yet to start running. The Chamber finds this perspective grounded on a distorted conception of the relevant procedural framework, hardly reconcilable not only with the principle of the expeditiousness of the proceedings, but also with the overall notion of fairness of the trial.¹⁸

10. It cannot be the case, now, five months after the last Prosecution witness has testified, that the Defence is determining how to properly conduct its investigation. In any event, the remainder of the Request should be denied because it is not in compliance with the relevant Protocols and rulings in this case, as elaborated in the paragraphs below.

¹³ ICC-02/11-01/15-200-Anx, para. 23.

¹⁴ Request, para. 13.

¹⁵ Request, section II(1).

¹⁶ Request, section II(2).

¹⁷ Indeed, Defence for Mr Gbagbo emailed several Defence witness statements to the OTP Info Desk in July 2011, well before Mr Gbagbo's first appearance on 5 December 2011. *See*, e.g. CIV-OTP-0200-2503; CIV-OTP-0200-2554; CIV-OTP-0200-2557; CIV-OTP-0200-2595; CIV-OTP-0200-2596; CIV-OTP-0200-2602; CIV-OTP-0200-2608; CIV-OTP-0200-2612; CIV-OTP-0200-2614; CIV-OTP-0200-2770; CIV-OTP-0200-2773; CIV-OTP-0200-2774; and CIV-OTP-0200-2785.

¹⁸ ICC-02/01-01/15-1124, para. 9.

a. The Prosecution is complying with its ongoing obligations under the Redaction Protocol to lift redactions that are no longer justified.

11. Contrary to the argument put forward in the Defence's Request,¹⁹ the Prosecution is in compliance with its ongoing obligations under the Redaction Protocol²⁰ to lift redactions that are no longer justified. The Prosecution has re-visited some of its redactions, lifted redactions and re-disclosed lesser redacted versions of evidence. In particular, the Prosecution frequently re-disclosed lesser redacted witness statements and their annexes prior to that witnesses' testimony after a deeper analysis of that statement was conducted.²¹
12. In addition, and mindful of specific Defence requests,²² the Prosecution has also lifted a substantial number of redactions from material disclosed from the separate ongoing investigation into alleged crimes committed by other parties to the 2010 to 2011 post-election violence in Côte d'Ivoire ("CIV2 Investigation"). [REDACTED].²³ [REDACTED].²⁴ [REDACTED].²⁵ [REDACTED].
13. With respect to all other standard redactions in both CIV1 and CIV2 material, although the Defence has no burden to justify them, the Prosecution is not aware of (and the Defence has not shown) any change in circumstances which impact upon how the withheld information fits within the overall defence case.²⁶ According to the Protocol, the majority of the standard redaction categories (for

¹⁹ Request, para. 15.

²⁰ ICC-02/11-01/11-737-AnxA.

²¹ See, e.g. CIV-OTP-0013-0108-R03 (P-0108); CIV-OTP-0019-0211-R04 (P-0106); CIV-OTP-0005-0002-R03 (P-0045); CIV-OTP-0020-0033-R04 (P-0117); CIV-OTP-0020-0064-R04 (P-0107); CIV-OTP-0020-0335-R03 (P-0109); CIV-OTP-0021-084-R04 (P-0088); CIV-OTP-0028-0481-R02 (P-0164); CIV-OTP-0028-0550-R04 (P-0172); CIV-OTP-0029-0656-R03 (P-0185); CIV-OTP-0032-0011-R04 (P-0184); CIV-OTP-0043-0461-R04 (P-0316); CIV-OTP-0044-2628-R03 (P-0230); CIV-OTP-0046-0275-R04 (P-0363); CIV-OTP-0046-1236-R03 (P-0297); CIV-OTP-0046-1271-R03 (P-0362); CIV-OTP-0048-1503-R03 (P-0238); CIV-OTP-0071-2215-R03 (P-0407); CIV-OTP-0077-0128-R02 (P-0555); CIV-OTP-0077-0153-R03 (P-0554); CIV-OTP-0081-0380-R02 (P-0237); CIV-OTP-0089-0655-R01 (P-0114); CIV-OTP-0071-2240-R02 (P-0513); CIV-OTP-0081-0468-R02 (P-0582); CIV-OTP-0048-1675-R04 (P-0350); CIV-OTP-0057-1345-R02 (P-0433); CIV-OTP-0058-0289-R02 (P-0436); CIV-OTP-0058-0586-R02 (P-0459); CIV-OTP-0069-0069-R02 (P-0568); CIV-OTP-0071-0437-R02 (P-0364); CIV-OTP-0019-0306-R04 (P-0112 statement disclosed in advance of P-0117's testimony).

²² Request, para. 17.

²³ Trial Rule 77 package 107 disclosed on 25 January 2018; Trial Rule 77 package 109 disclosed on 2 February 2018.

²⁴ Trial Rule 77 package 113 disclosed on 25 May 2018; Trial Rule 77 package 114 disclosed on 1 June 2018.

²⁵ Request, para. 21.

²⁶ ICC-02/11-01/15-915-Red, para. 62.

example A.2, A.3, A.5, A.7, B.1, B.2, B.3, B.4, and C) require the redactions to be maintained on an ongoing basis.²⁷ Nowhere in the Protocol does it indicate that standard redactions must be lifted at the close of the Prosecution's case. Rather, the Protocol specifies three conditions under which redactions must be lifted: (i) by the disclosing Party in accordance with the timeline set out per category; (ii) by agreement between the Parties; or (iii) an order of the Chamber deciding otherwise.²⁸

14. In full awareness of the Appeals Chamber's decision that the Prosecution has the burden to justify each redaction,²⁹ the Prosecution is prepared to re-examine on a case-by-case basis any additional specific redactions for which the Defence raises concerns, but does not have the resources nor the legal obligation to do so in response to a blanket request to revisit every single redaction to every piece of evidence disclosed, whether incriminatory, or pursuant to rule 77 or article 67(2).³⁰

b. There has been no change in circumstances to justify re-classification to public of those testimonies, statements, and annexes of witnesses who testified in private or closed session, or with protective measures.

15. The Prosecution is aware that 20 of its 82 live witnesses were provided in-court protective measures in the form of a pseudonym and face and/or voice distortion, or closed session.³¹ These measures are necessary, justified, and proportionate. The Prosecution is not aware of, and the Defence has not shown, a change in circumstances justifying the Chamber re-visiting these measures for any of these 20 witnesses. These measures were granted by the Chamber after a careful consideration of the applicable rules, after both Parties and often the victims

²⁷ See, e.g. ICC-02/11-01/11-737-AnxA, paras. 18, 21, 27, 32, 35, 38, 42, 45, 47 (indicating that redactions to information shall be ongoing for these standard categories).

²⁸ ICC-02/11-01/11-737-AnxA, para. 13.

²⁹ ICC-02/11-01/15-915-Red, para. 62.

³⁰ Request, para. 16.

³¹ Request, para. 29.

(through VWU) had a chance to be heard, and cannot simply be removed because the Defence would find it more convenient for their investigation.

16. The Prosecution notes its particular concern about the Request's objection to the closed session granted for seven victims or witnesses [REDACTED].³² [REDACTED]³³ [REDACTED].³⁴ [REDACTED]. There is no lesser psychological harm to these witnesses and victims if their testimonies are made public now versus when they testified last November.

17. The same is true for [REDACTED] P-0117, P-0350, and P-0513, whom the Chamber found to be vulnerable after considering submissions from the Parties and VWU:

As to Witness 117, 513, and 350, the Chamber grants the request, the requested in-court protective measures. The Chamber considers that due to the traumatic events they suffered, they are vulnerable and may indeed be exposed to retraumatisations if they were to testify publicly, also in light of their family and residence circumstances. As stated by the VWU, in respect of Witness 513, the risk both for their security and their dignity, privacy, physical, and psychological well-being might effectively be at least mitigated by the adoption of the in-court protective measures by preventing their public exposure as a witness.³⁵

18. [REDACTED]. [REDACTED].³⁶ [REDACTED].³⁷ [REDACTED].

19. The Defence's surprising request to publicise not only the identity [REDACTED],³⁸ [REDACTED], suggests, in the Prosecution's submission, a reckless disregard for their dignity, safety, and psychological well-being. If such disclosures were to be made, the identity [REDACTED].

20. The Trial Chamber's decisions on protective measures for crime base witnesses in *Ntaganda*³⁹ and *Ongwen*⁴⁰ are instructive. In *Ntaganda*, crime base witnesses' identities were generally not publicised during either the Prosecution or Defence phase of trial. Sexual violence victims were given particular protective measures, including pseudonyms and having their complete testimony heard in closed

³² Request, paras. 31-35.

³³ [REDACTED].

³⁴ ICC-02/11-01/15-1060, para. 10. Notably, the Defence for Blé Goudé did not oppose this request.

³⁵ T-103-CONF-ENG-CT, p. 80.

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ Request, para. 33.

³⁹ ICC-01/04-02/06-1714-Red; ICC-01/04-02/06-1083-Red; ICC-01/04-02/06-1160-Red2.

⁴⁰ ICC-02/04-01/15-612-Red.

session. In *Ongwen*, the Chamber ordered pseudonyms and face distortion *vis-à-vis* the public for 45 Prosecution witnesses,⁴¹ primarily on the basis of preserving the privacy, dignity, and psychological well-being of these witnesses. Considering the Statute provides a presumption that protects the legitimate interests of victims of sexual violence,⁴² the Chamber in *Ongwen* granted protective measures to nine sexual violence victims “with a view to protecting primarily the witnesses’ state of mind and dignity”.⁴³ As in the present case, there were no change of circumstances in *Ntaganda* or *Ongwen* that justified a mid-trial departure from the protective measures granted.

21. Furthermore, the Chamber in the present case re-affirmed the need to protect vulnerable SGBV victims and witnesses when it rejected the Defence request for leave to appeal the decision granting protective measures.⁴⁴ As the Confidentiality Protocol indicates, “[i]t is essential that whenever possible, the investigating party or the LRV avoid the security risk of disclosing to a member of the public the identity of the witnesses” whose identity have not been made public or who are covered by protective measures.⁴⁵ Accordingly, these witness statements and their annexes should remain confidential, and the granted protective measures should be maintained.

c. The Defence does not need public redacted versions of transcripts in order to put facts cited therein to witnesses during interviews.

22. The Prosecution opposes the final portion of the Defence request whereby the Defence claims to need public redacted versions of transcripts in order to conduct its witness interviews for several reasons.⁴⁶ First, in its 2 February 2018 order, the Chamber has already noted its concern with this Defence argument:

The Chamber has noted with concern the submissions by the Defence for Mr. Gbagbo, in particular the reiterated statements to the effect that it is not yet in a position to properly assess

⁴¹ ICC-02/04-01/15-612-Red.

⁴² ICC-02/04-01/15-612-Red, para. 16.

⁴³ ICC-02/04-01/15-612-Red, para. 22.

⁴⁴ ICC-02/11-01/15-771.

⁴⁵ ICC-02/11-01/15-200-Anx, paras. 6, 9.

⁴⁶ Request, para. 25.

“the Prosecutor’s case”, or to examine the Prosecutor’s evidence, including due to the fact that corrected versions of the transcripts have not yet been made available; that it is only once it will dispose of all the corrected transcripts that it will *inter alia* be able to analyse “*en profondeur*” the witnesses’ testimonies; that only once it has completed this analysis ... will it be able to decide whether or not to file a motion requesting to exclude one or more of the charges.. ; that, once this decision will have been made, it will require at least six additional months to investigate; and, finally, that only at that stage will the Defence be in a position to provide the Chamber and the parties with its list of witnesses.⁴⁷

23. Second, since the Request, one additional public redacted transcript has become available,⁴⁸ bringing the number of outstanding transcripts to only 12 of the 82 Prosecution witnesses who testified. The Defence has not, and indeed cannot, show any actual prejudice from not having public redacted versions of transcripts of these 12 witnesses. Third, [REDACTED].⁴⁹ Simply put, the Defence is perfectly able to put the facts of such transcripts to those persons being interviewed without citing the transcript itself or revealing their identity or that they were in fact witnesses in the case. For example, instead of confronting a witness with a confidential transcript of an account of a murder, the interviewer can ask the witness a variety of facts of the account, such as whether they know the decedent, the perpetrator, or what happened to a particular individual at a particular date, time, and location. These are basic interviewing skills that should not prohibit any attorney or investigator from eliciting information from a witness, and exploring the basis of knowledge of that witness.

⁴⁷ ICC-02/01-01/15-1124, para. 9.

⁴⁸ ICC-02/11-01/15-T-133-Red-FRA CT.

⁴⁹ [REDACTED].

Conclusion

24. For the foregoing reasons, the Prosecution requests that the Chamber grant in part and dismiss in part the Request of the Gbagbo Defence.



Fatou Bensouda, Prosecutor

Dated this 11th day of July 2018

At The Hague, The Netherlands