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No. ICC-02/11-01/15 OA9

Date: 31 July 2017

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 Redacted Version

Judgment

**on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of
29 November 2016**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Laurent Gbagbo
Mr Emmanuel Altit
Mr Agathe Bahi Baroan

Legal Representatives of Victims
Ms Paolina Massida

Counsel for Charles Blé Goudé
Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Laurent Gbagbo against the oral decision of Trial Chamber I of 29 November 2016 (ICC-02/11-01/15-T-107-Conf-Eng, pp. 1-2),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1. The Victims' Request to Extend the Time Limit is rejected. The Victims' Response to Request for Leave to Reply is disregarded.
2. Mr Gbagbo's Request for Leave to Reply is rejected.
3. The parties and participants are ordered to file public versions of their filings in this appeal as soon as possible.
4. The oral decision of Trial Chamber I of 29 November 2016 (ICC-02/11-01/15-T-107-Conf-Eng, pp. 1-2) is reversed and Mr Gbagbo's Request to Lift Redactions is remitted to the Trial Chamber for it to decide on the request.

REASONS

I. KEY FINDING

1. In the Trial Chamber's assessment of whether redactions to disclosable information are justified, there should be no burden placed on the defence. Rather, the Trial Chamber should consider the reasons for authorising the redactions being sought and, in reaching its overall decision as to whether they are justified, and in balancing the appropriate factors, should give the defence an opportunity to make submissions. This may entail receiving submissions from the defence on the impact that non-disclosure would have on the fairness of the proceedings. Although the defence may have an interest in presenting such submissions, there is no burden to meet in that regard. In addition, the Trial Chamber must bear in mind that the defence is at a

disadvantage in being able to make a case given its inability to access the withheld information.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

2. On 15 December 2014, Trial Chamber I (“Trial Chamber”), in the case of Mr Laurent Gbagbo (“Mr Gbagbo”), issued the “Decision on the Protocol establishing a redaction regime” (“Redactions Decision”), annexed to which was the protocol referred to (“Redactions Protocol”).¹

3. On 6 March 2015, the Trial Chamber in the same case issued the “Decision on victim participation”² (“Decision on Victim Participation”). On 8 June 2015, the victims participating in the proceedings (“Victims”) filed, in respect of 12 applications by victims to participate in proceedings, the “Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the applications of dual status individuals”³ (“Victims’ First Request”).

4. On 23 June 2015, Mr Gbagbo,⁴ the Prosecutor,⁵ and Mr Charles Blé Goudé (“Mr Blé Goudé”) filed responses to this request.⁶ The Victims filed a reply on 26 June 2015⁷ and, on the same day, the Registry filed its observations.⁸ On 7 July 2015, the Victims filed the “Second request to maintain redactions to the identifying and

¹ [ICC-02/11-01/11-737](#), and [ICC-02/11-01/11-737-AnxA](#).

² [ICC-02/11-01/11-800](#).

³ [ICC-02/11-01/15-85](#).

⁴ “Réponse de la Défense à la «Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the application of dual status individuals» (ICC-02/11-01/15-85) déposée par la Représentante légale des victimes le 8 juin 2015”, [ICC-02/11-01/15-98](#).

⁵ “Prosecution’s Response to the Common Legal Representative’s Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the applications of dual status individuals”, [ICC-02/11-01/15-99](#).

⁶ “Defence Response to the ‘Request to maintain redactions to the identifying and contact information of intermediaries mentioned in the applications of dual status individuals’ (ICC-02/11-01/15-85)”, [ICC-02/11-01/15-100](#).

⁷ “Reply to Defence responses ICC-02/11-01/15-98 and ICC-02/11-01/15-100”, ICC-02/11-01/15-106-Conf. A public redacted version was registered the same day ([ICC-02/11-01/15-106-Red](#)).

⁸ “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)”, [ICC-02/11-01/15-107](#).

contact information of the intermediaries mentioned in the applications of dual status individuals”⁹ (“Victims’ Second Request”).

5. On 2 September 2015, the Single Judge of the Trial Chamber issued the “Decision on the Legal Representative of Victims’ requests to maintain redactions to information relating to certain intermediaries”¹⁰ (“Decision 202 of 2 September 2015”).

6. On 18 March 2016, the Prosecutor filed the “Prosecution request for the lifting of certain redactions in the victim applications of nine dual status witnesses”.¹¹ On 29 March 2016, the Victims filed a response opposing that request. Their response included a request to maintain certain redactions in four other applications, including that in relation to witness P-0350¹² (“Victims’ Third Request”). On the same day, Mr Gbagbo also filed a response both supporting the Prosecutor’s request and requesting the lifting of redactions in all applications to participate by victims to identifying information of intermediaries who were also prosecution witnesses.¹³

7. On 30 March 2016, the Prosecutor filed notice of disclosure to, *inter alia*, Mr Gbagbo, pursuant to rule 77 of the Rules of Procedure and Evidence (“Rules”), of various documents,¹⁴ including the application by witness P-0350 to participate as a victim in the proceedings.¹⁵

8. The Prosecutor responded to Mr Gbagbo’s 29 March 2016 request on 4 April 2016¹⁶ and to the Victims’ Third Request on 6 April 2016, *inter alia*, not opposing the

⁹ [ICC-02/11-01/15-126](#).

¹⁰ [ICC-02/11-01/15-202](#).

¹¹ [ICC-02/11-01/15-465](#).

¹² “Response to ICC-02/11-01/15-465 and request to maintain certain redactions in the victim applications of dual status individuals”, [ICC-02/11-01/15-473](#).

¹³ “Réponse de la Défense à la «Prosecution request for the lifting of certain redactions in the victim applications of nine dual status witnesses» (ICC-02/1101/15-465) et requête de la Défense aux fins de la levée de ces mêmes expurgations dans toutes les demandes de participation des victimes lorsqu’elles portent sur l’identité d’intermédiaires qui sont en même temps témoins de l’Accusation”, ICC-02/11-01/15-474-Conf. A public redacted version was also registered on 29 March 2016 ([ICC-02/11-01/15-474-Red](#)).

¹⁴ “Prosecution’s Communication of Evidence Disclosed to the Defence on 18 March 2016 and 24 March 2016”, [ICC-02/11-01/15-478](#) (“Prosecutor’s March 2016 Disclosure of Evidence”).

¹⁵ ICC-02/11-01/15-478-Conf-AnxE.

¹⁶ “Prosecution Response to the Gbagbo Defence *Réponse de la Défense à la ‘Prosecution request for the lifting of certain redactions in the victim applications of nine dual status witnesses’* (ICC-02/11-01/15-465) et requête de la Défense aux fins de la levée de ces mêmes expurgations dans toutes les

Victims' request regarding witness P-0350.¹⁷ Mr Gbagbo filed a response to the Victims' Third Request on 7 April 2016,¹⁸ which was followed by a request by the Victims to strike it from the record.¹⁹

9. On 29 April 2016, the Prosecutor filed a further request for the lifting of redactions to four applications by victims,²⁰ in relation to which Mr Blé Goudé sent an email to the Chamber,²¹ and Mr Gbagbo²² and the Victims²³ filed responses.

10. On 9 May 2016, the Trial Chamber issued 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)"²⁴ ("Decision 506 of 9 May 2016"). This decision, *inter alia*, granted the Victims' request to maintain redactions in the application in relation to witness P-0350.²⁵

11. On 25 November 2016, Mr Gbagbo sent an email to the Prosecutor requesting that she lift the redaction to the name of the intermediary in witness P-0350's application to participate in the proceedings ("P-0350 Intermediary") as well as the name of the organization to which that person belonged.²⁶ The Prosecutor responded to Mr Gbagbo by email, stating that the Victims did not wish the redactions to be lifted and that Mr Gbagbo would need to make an oral request in court, "which the

demandes de participation des victimes lorsqu'elles portent sur l'identité d'intermédiaires qui sont en même temps témoins de l'Accusation", [ICC-02/11-01/15-480](#).

¹⁷ "Prosecution response to the Office of Public Counsel for Victims' 'Response to ICC-02/11-01/15-465 and request to maintain certain redactions in the victim applications of dual status individuals' (ICC-02/11-01/15-473)", [ICC-02/11-01/15-481](#).

¹⁸ "Defence response to the 'Response to ICC-02/11-01/15-465 and request to maintain certain redactions in the victim applications of dual status individuals' (ICC-02/11-01/15-473)", [ICC-02/11-01/15-482-tENG](#).

¹⁹ "Motion to strike document (ICC-02/11-01/15-482) from the case record", 8 April 2016, [ICC-02/11-01/15-483](#).

²⁰ "Prosecution request for the lifting of certain redactions in four victim applications", [ICC-02/11-01/15-493](#).

²¹ See [Decision 506 of 9 May 2016](#), para. 11, as designated in paragraph 10 of this judgment.

²² "Response of the Defence to the 'Prosecution request for the lifting of certain redactions in four victim applications' (ICC-02/11-01/15-493)", 6 May 2016, [ICC-02/11-01/15-501-tENG](#).

²³ "Response to the Prosecution request for the lifting of certain redactions in four victim applications (ICC-02/11-01/15-493)", 6 May 2016, ICC-02/11-01/15-500-Conf-Exp. A public redacted version was registered on the same day ([ICC-02/11-01/15-500-Red](#)).

²⁴ [ICC-02/11-01/15-506](#).

²⁵ [Decision 506 of 9 May 2016](#), para. 27 and p. 13.

²⁶ Annex to "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)": "Email adressé par la Défense de Laurent Gbagbo au Procureur en date du 25 novembre 2016 à 14 heures 09", ICC-02/11-01/15-822-Conf-Anx (OA9).

Prosecution will not oppose”.²⁷ A second email stated that the Prosecution did not object to the lifting of the redaction.²⁸

12. On 28 November 2016, Mr Gbagbo applied orally, in closed session before the Trial Chamber, for the lifting of the redactions²⁹ (“Mr Gbagbo’s Request to Lift Redactions”). On the same day, a written response by way of email was sent by the Victims to the Chamber and parties³⁰ (“Victims’ Response to Request to Lift Redactions”).

13. On 29 November 2016, the Trial Chamber, in closed session, rendered an oral decision on Mr Gbagbo’s Request to Lift Redactions³¹ (“Impugned Decision”).

14. On 5 December 2016, Mr Gbagbo applied for leave to appeal the Impugned Decision³² (“Application for Leave to Appeal”). Responses were filed by the Prosecutor³³ [REDACTED]³⁴ and, on 2 February 2017, the Trial Chamber rendered the “Decision on the request for leave to appeal the oral decision of 29 November 2016”³⁵ (“Decision Granting Leave to Appeal”) granting leave to appeal.

B. Proceedings before the Appeals Chamber

15. On 13 February 2017, Mr Gbagbo filed his document in support of the appeal³⁶ (“Mr Gbagbo’s Document in Support of the Appeal”).

²⁷ “Prosecution’s filing of e-mails into the record in compliance with Appeals Chamber’s Order ICC-02/11-01/15-816-Conf OA9”, ICC-02/11-01/15-819-Conf-AnxA (OA9).

²⁸ “Prosecution’s filing of e-mails into the record in compliance with Appeals Chamber’s Order ICC-02/11-01/15-816-Conf OA9”, ICC-02/11-01/15-819-Conf-AnxB (OA9).

²⁹ ICC-02/11-01/15-T-106-Conf-Eng, pp. 1-5.

³⁰ Submission in compliance with Order ICC-02/11-01/15-816-Conf OA9”, ICC-02/11-01/15-820-Conf-AnxA (OA9).

³¹ ICC-02/11-01/15-T-107-Conf-Eng, pp. 1-2.

³² “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.

³³ “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”, 9 December 2016, ICC-02/11-01/15-772-Conf.

³⁴ [REDACTED].

³⁵ ICC-02/11-01/15-790-Conf.

³⁶ “Document in support of the appeal against the oral decision of the Chamber on 29 November 2016, denying the Defence motion for lifting of a redaction made by the Prosecution to point 24 of P-0350’s application for participation”, ICC-02/11-01/15-809-Conf-tENG (OA9).

16. Noting that this document referred to emails that were not part of the record of the case, the Appeals Chamber ordered, on 21 February 2017, that the parties and Victims file those emails into the record.³⁷ This was duly done on 21³⁸ and 22 February 2017.³⁹

17. On 24 February 2017, the Prosecutor⁴⁰ and Victims⁴¹ filed their responses to Mr Gbagbo's Document in Support of the Appeal ("Prosecutor's Response to the Document in Support of the Appeal" and "Victims' Response to the Document in Support of the Appeal", respectively).

18. On 2 March 2017, Mr Gbagbo filed a request for leave to reply to the Victims' Response to the Document in Support of the Appeal⁴² ("Mr Gbagbo's Request for Leave to Reply"). On 7 March 2017, the Victims filed a response to this request⁴³ ("Victims' Response to Request for Leave to Reply"), followed by a request to retroactively extend the time limit for the filing of that response⁴⁴ ("Victims' Request to Extend the Time Limit").

³⁷ "Order on the filing of e-mails", ICC-02/11-01/15-816-Conf (OA9).

³⁸ "Prosecution's filing of e-mails into the record in compliance with Appeals Chamber's Order ICC-02/11-01/15-816-Conf OA9", ICC-02/11-01/15-819-Conf (OA9).

³⁹ "Submission in compliance with Order ICC-02/11-01/15-816-Conf OA9", ICC-02/11-01/15-820-Conf (OA9) – filed by the OPCV; "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)", ICC-02/11-01/15-822-Conf (OA9) – filed by Mr Gbagbo.

⁴⁰ "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", ICC-02/11-01/15-826-Conf (OA9).

⁴¹ "Response to Mr Gbagbo's document in support of the appeal against the oral decision of 29 November 2016", ICC-02/11-01/15-827-Conf (OA9).

⁴² "Application for leave to reply to the 'Response to Mr Gbagbo's document in support of the appeal against the oral decision of 29 November 2016' filed by the Legal Representative of Victims on 24 February 2017 (ICC-02/11-01/15-827-Conf)", ICC-02/11-01/15-830-Conf-tENG (OA9).

⁴³ "Response to Mr Gbagbo's Request for Leave to Reply to the Legal Representative 'Response to Mr Gbagbo's document in support of the appeal against the oral decision of 29 November 2016 (ICC-02/11-01/15-827-Conf)'" , ICC-02/11-01/15-840-Conf (OA9).

⁴⁴ "Request to retroactively extend the time limit for the Legal Representative's 'Response to Mr Gbagbo's Request for Leave to Reply to the Legal Representative 'Response to Mr Gbagbo's document in support of the appeal against the oral decision of 29 November 2016'" (ICC-02/11-01/15-840-Conf)", ICC-02/11-01/15-845-Conf (OA9).

III. PRELIMINARY ISSUES

A. The Victims' Request to Extend the Time Limit

19. As seen above, Mr Gbagbo's Request for Leave to Reply was in relation to the Victims' Response to the Document in Support of the Appeal. Regulation 34 (c) of the Regulations of the Court, as amended on 6 December 2016, provides as follows:

(c) A request for leave to reply shall be filed within three days of notification in accordance with regulation 31 of the response. The participants may respond to the request for leave to reply within two days. A Chamber may grant the request to file a reply within such time as it may specify in its order.

20. Mr Gbagbo's Request for Leave to Reply was filed on 2 March 2017, within the aforementioned three day time limit. Any response to that request was thereafter due within two days, by 6 March 2017.⁴⁵ The Victims' Response to Request for Leave to Reply was filed on 7 March 2017, after the deadline of 6 March 2017, followed the next day by the Victims' Request to Extend the Time Limit. In the latter document, the Victims argue that

retroactively extending the time limit for the Response is justified by the importance of the matters addressed in the Appeal for the victims authorised to participate in this case, and the potential repercussions that the ruling may have on the trial proceedings. Moreover, an extension of time after the lapse of the time limit in this instance will not derail the proceedings from their intended course.⁴⁶

21. They acknowledge that their filing came after the time limit and that this "was due to an internal oversight"; the "Legal Representative deeply regrets and sincerely apologizes for this unfortunate outcome".⁴⁷

⁴⁵ See regulation 33 on calculation of time limits: "1. For the purposes of any proceedings before the Court, time shall be calculated as follows: (a) Days shall be understood as calendar days; (b) The day of notification of a document, decision or order shall not be counted as part of the time limit; (c) Where the day of notification is a Friday, or the day before an official holiday of the Court, the time limit shall not begin to run until the next working day of the Court; (d) Documents shall be filed with the Registry, at the latest, by 4pm on the first working day of the Court following expiry of the time limit. 2. Documents shall be filed with the Registry between 9am and 4pm The Hague time or the time of such other place as designated by the Presidency, a Chamber or the Registrar, except where the urgent procedure foreseen in regulation 24, sub-regulation 3 of the Regulations of the Registry applies. 3. Unless otherwise ordered by the Presidency or a Chamber, documents, decisions or orders received or filed after the filing time prescribed in sub-regulation 2 shall be notified on the next working day of the Court."

⁴⁶ Victims' Request to Extend the Time Limit, para. 2.

⁴⁷ Victims' Request to Extend the Time Limit, para. 12.

22. Regulation 35 (2) of the Regulations of the Court provides that “[a]fter the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control”. Otherwise, regulation 29 (1) provides that, “[i]n the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice”. Regulation 29 (2) provides that “[t]his provision is without prejudice to the inherent powers of the Chamber”.

23. The Victims did not refer to regulation 35 (2) of the Regulations of the Court in their request, nor did they make any submissions as to why they were unable to file their request within the time limit “for reasons outside [their] control”. Time limits are in place in order to ensure that proceedings may proceed smoothly and expeditiously. Although there can be reason to extend time limits, including retroactively, “an internal oversight” is very unlikely to satisfy this. The Appeals Chamber considers that insufficient reasons have been advanced justifying acceptance of the response and it is otherwise not in the interests of justice to do so. In these circumstances, the Appeals Chamber rejects the Victims’ Request to Extend the Time Limit and consequently disregards the Victims’ Response to Request for Leave to Reply.

B. Mr Gbagbo’s Request for Leave to Reply

24. The Victims argue in response to the Document in Support of the Appeal that Mr Gbagbo’s appeal should be dismissed *in limine*.⁴⁸ These arguments are summarised further below, when addressing this particular request. Mr Gbagbo has requested leave to reply in relation to those arguments. He submits that, in relation to the first two grounds of appeal, the arguments presented by the Victims “do not strictly amount to a response to the Defence’s arguments raised on appeal and so constitute new arguments [which] entitle the Defence to reply”.⁴⁹ In relation to the third ground of appeal, he argues that, again, the Victims raise new arguments in

⁴⁸ Victims’ Response to the Document in Support of the Appeal, paras 1-4, 17-21.

⁴⁹ Mr Gbagbo’s Request for Leave to Reply, para. 16.

seeking to annul the Decision Granting Leave to Appeal and he is therefore entitled to reply.⁵⁰

25. Regulation 24 (5) of the Regulations of the Court provides:

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

26. The Appeals Chamber considers that the issues raised by the Victims could have reasonably been anticipated by Mr Gbagbo. In this regard, Mr Gbagbo could have foreseen and decided to argue before the Appeals Chamber the question as to whether the issues raised under the first two grounds of appeal arise out of the Impugned Decision given the preceding litigation in respect of the matter raised on appeal. It is noted in this regard that the Appeals Chamber is frequently called upon to rule on the scope of the issues that may be raised before it. Whether Mr Gbagbo decided to address this point on appeal was for him to decide, based on the strategy he wished to adopt. The same applies in respect of the third ground of appeal, given the manner in which leave to appeal was granted by the Trial Chamber in respect of that issue.⁵¹ The Appeals Chamber otherwise sees no other reason to grant leave to reply in this case, bearing in mind also the need for appellate proceedings to proceed expeditiously. Accordingly, Mr Gbagbo's Request for Leave to Reply is rejected.

C. Confidential nature of this appeal

27. All of the filings in this appeal are currently confidential, based on the fact that much of the relevant trial record is confidential. In the interest of the publicity of proceedings, the parties are ordered to file, as soon as possible, public redacted versions of their filings.

28. Pursuant to rule 158 (2) of the Rules, read with article 83 (4) of the Statute, judgments of the Appeals Chamber "shall be delivered in open court." As the proceedings in the present appeal are confidential, the Appeals Chamber delivers this

⁵⁰ Mr Gbagbo's Request for Leave to Reply, para. 25.

⁵¹ See Decision Granting Leave to Appeal, para. 7, excerpted in paragraph 33 of this judgment.

judgment by way of notification to the parties and participants (regulations 31 and 32 of the Regulations of the Court).

IV. MERITS

29. Mr Gbagbo raises three grounds of appeal. First, that the “Chamber erred in law by not requiring the LRV to justify why the redaction should remain in place, thereby reversing the burden of proof as regards redactions”.⁵² Second, that the “Chamber erred in law by failing to heed the Parties’ agreement concerning the lifting of the redaction”.⁵³ And third, that “[t]he Chamber committed an error of fact by failing to regard the matter of intermediaries as a ‘live issue’”.⁵⁴

A. The Victims’ Request to Dismiss *In Limine*

30. The Victims submit that the first two grounds of appeal “do not arise from the Impugned Decision but clearly from prior relevant rulings and therefore are not properly before the Appeals Chamber”.⁵⁵ The Victims

note[] the lack of sufficient reasoning of the Decision granting leave to appeal and submit[] 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.⁵⁶

31. The Victims argue that the Impugned Decision “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”.⁵⁷ They submit that “the Appeals Chamber enjoys discretion in accepting the Pre-Trial or Trial Chamber’s

⁵² Mr Gbagbo’s Document in Support of the Appeal, p. 5.

⁵³ Mr Gbagbo’s Document in Support of the Appeal, p. 6.

⁵⁴ Mr Gbagbo’s Document in Support of the Appeal, p. 7. The heading of the third ground of appeal reads in full as follows: “The Chamber committed an error of fact by failing to regard the matter of intermediaries as a ‘live issue’, whereas said persons appear to have played a significant part in the choice of the victims and witnesses appearing in court and the manner in which their evidence is given; this is particularly striking as regards the witnesses who testified on [REDACTED]. Accordingly, the lifting of the redaction of the name of the intermediary is indispensable for the Defence to be able to investigate and put pertinent questions to the witnesses its [*sic*] cross-examines, so as to gain a clearer picture of the role of the intermediary and his or her possible influence on the witnesses, the role and influence being a ‘live issue’”.

⁵⁵ Victims’ Response to the Document in Support of the Appeal, para. 20.

⁵⁶ Victims’ Response to the Document in Support of the Appeal, para. 2.

⁵⁷ Victims’ Response to the Document in Support of the Appeal, para. 19.

determination of what is an appealable issue” and that the first two grounds should be dismissed *in limine*.⁵⁸ In relation to the third ground of appeal, the Victims argue

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. 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”. 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.⁵⁹

32. The Appeals Chamber notes that in relation to the first two grounds of appeal, as argued by the Victims, similar issues to the matters raised in these grounds of appeal (redaction of the name of intermediaries in applications to participate by victims) had been ruled upon in prior decisions. The Impugned Decision, however, rules on a specific request brought by Mr Gbagbo, and leave to appeal was granted in relation to the issues raised by him. The Appeals Chamber considers that these grounds of appeal are properly before it.

33. In respect of the third ground of appeal, the Appeals Chamber observes that in granting leave to appeal, the Trial Chamber stated:

With regard to the third issue, the Chamber considers that it is subsumed in the first issue. Indeed, the Chamber did not inquire on its own motion what role the intermediary in question may have played in the selection of witnesses, if any, or whether that person may have exercised any influence on the testimony of said witnesses. Instead, the Chamber deemed that it is for the party asking the lifting of the redaction to demonstrate there were grounds to suspect possible malfeasance on the part of the intermediary. The Chamber therefore took no position on the factual question raised in the third issue.⁶⁰

34. Mr Gbagbo thereafter filed his appeal containing three grounds, in which the third ground (set out above in paragraph 29) reflects the third issue in the Decision Granting Leave to Appeal. The Appeals Chamber considers that it is not clear from the Decision Granting Leave to Appeal that the Trial Chamber did not grant leave to appeal in relation to the third issue. Indeed, the Trial Chamber concluded its decision

⁵⁸ Victims’ Response to the Document in Support of the Appeal, para. 20.

⁵⁹ Victims’ Response to the Document in Support of the Appeal, para. 21.

⁶⁰ Decision Granting Leave to Appeal, para. 7.

as a whole by ‘granting the request’, such request having sought leave, *inter alia*, in relation to the third issue. The Appeals Chamber considers that there is no reason to dismiss this ground of appeal *in limine*. It will address within this judgment how it should be dealt with on its merits.

35. In sum, the Appeals Chamber rejects the Victims’ request to dismiss the three grounds of appeal *in limine*.

B. The Impugned Decision

36. The Impugned Decision was delivered by way of an oral ruling and reads as follows:

Before starting with the questioning of the witness, I'd like to read an oral decision on the request of the Defence of Mr Gbagbo to have the identity of the intermediary related to Witness 350 lifted.

This request is from 28 November 2016. 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 redaction 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. The main objective of the redaction is the same to protect these individuals from intimidation or interference and not to prejudice ongoing or further investigations.

In fact, in her observations, the LRV stated that, and I quote, “Lifting these redactions would affect the activities of the legal representative in the field because the disclosure of the information is very likely to lead to the intermediaries ceasing to cooperate with the Court and, in turn, to the victims disengaging from proceedings.” End of quote. The redaction protocol further states that, and I quote again, “Nonetheless, the current determination under Rule 81(2) of the Rules can be reassessed at a later stage should circumstances change or new information emerge.” This is paragraph 39 of decision 737. However, at this stage, the Defence has not substantiated why the name of the said intermediary has become a live issue in this case. Thus far, the Defence appears to be on a fishing expedition exercise and its allegation remains wholly unfounded. So far, as noted by the LRV, the Defence has not pointed out the relevance of this person's identity for the Defence case. In fact, the Defence requests amounts [*sic*] to requesting the lifting of all redactions of intermediaries, both of the LRV and the Prosecution in order to, and I quote, “Find out what the persons might have done,” end of quote, in T-106 of the Defence submissions.

Accordingly, the request to lift this redaction is rejected.⁶¹

C. Second ground of appeal

37. The Appeals Chamber considers it appropriate to answer the second ground of appeal before considering the first. The thrust of the argument under the first ground of appeal is that the Victims should have been required to substantiate their wish to maintain the relevant redactions as opposed to Mr Gbagbo being required to substantiate his request to lift the redactions. If the Appeals Chamber finds that there was no legal basis for the Victims to make the submissions on redactions that they did, then the approach taken to Mr Gbagbo's Request to Lift Redactions would potentially be different. It is therefore appropriate to answer the second ground of appeal first.

1. Submissions of the parties and participants

(a) Mr Gbagbo's submissions

38. Mr Gbagbo argues that, according to paragraph 5 of the Redactions Protocol, the discussion of redactions must take place *inter partes*, that is, between the defence and the Prosecutor, and where the parties agree to the lifting of redactions, they must then be lifted.⁶² He argues, therefore, that the Trial Chamber erred in allowing the Victims to make submissions on the matter.⁶³ Mr Gbagbo further argues that the Chamber erred in according to the Victims an exorbitant role, which greatly extends beyond that which is granted to them by the Statute.⁶⁴

(b) The Prosecutor's response

39. The Prosecutor clarifies that she did not "agree" to the disclosure within the terms of the Redactions Protocol, but she merely expressed her lack of opposition.⁶⁵ She argues that the Statute provides for victim participation in instances such as this one, referring to article 68 (3) of the Statute, and rules 87 (1) and 93 of the Rules.⁶⁶ Furthermore, the Prosecutor observes that the Trial Chamber had already ruled that the Victims were best placed to advise on any lifting of redactions on the applications

⁶¹ ICC-02/11-01/15-T-107-Conf-Eng, pp. 1-2.

⁶² Mr Gbagbo's Document in Support of the Appeal, para. 20.

⁶³ Mr Gbagbo's Document in Support of the Appeal, para. 21.

⁶⁴ Mr Gbagbo's Document in Support of the Appeal, para. 21.

⁶⁵ Prosecutor's Response to the Document in Support of the Appeal, para. 33.

⁶⁶ Prosecutor's Response to the Document in Support of the Appeal, para. 34.

for participating victims.⁶⁷ Accordingly, the Prosecutor states that, although the Redactions Protocol does not expressly foresee the Victims' participation, the Trial Chamber did not err in seeking the views of the Victims.⁶⁸

(c) The Victims' response

40. The Victims submit 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".⁶⁹ The Victims argue that, in any event, "*inter partes* agreements are not binding on the Chamber; 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".⁷⁰

2. Determination by the Appeals Chamber

41. Mr Gbagbo raises two separate issues: whether the Trial Chamber failed to respect the agreement of the parties under the Redactions Protocol; and, whether the Trial Chamber improperly expanded the role of the Legal Representative of the Victims.

42. The Appeals Chamber notes that it is unclear whether there was, indeed, an *inter partes* agreement to lift the redactions in question, as argued by Mr Gbagbo. In relation to the proceedings before the Trial Chamber, the Prosecutor indicated that she would not "oppose" the lifting of the redactions or even agreed to it,⁷¹ while she argues on appeal that she did not "agree" to the lifting of the redactions "within the terms of the Redactions Protocol".⁷² Without deciding on this issue, the Appeals Chamber recalls, generally, 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 Court⁷³ and to ensure the confidentiality of information, and that the

⁶⁷ Prosecutor's Response to the Document in Support of the Appeal, para. 34.

⁶⁸ Prosecutor's Response to the Document in Support of the Appeal, para. 36.

⁶⁹ Victims' Response to the Document in Support of the Appeal, para. 30.

⁷⁰ Victims' Response to the Document in Support of the Appeal, para. 31.

⁷¹ ICC-02/11-01/15-819-Conf-AnxA, p. 2; ICC-02/11-01/15-T-106-Conf-Eng, p. 5, lines 23-25.

⁷² Prosecutor's Response to the Document in Support of the Appeal, para. 33.

⁷³ See Appeals Chamber, *Prosecutor v. Germain Katanga*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for

Trial Chamber is the “ultimate arbiter” in case of disagreement among the parties and the participants in that regard.⁷⁴ These principles also apply to the present case where the Prosecutor did not, in fact, lift the redactions as requested by Mr Gbagbo (which clearly would have signalled agreement), and instead responded to Mr Gbagbo’s request by instructing him to “submit an oral request to that effect [...] which the Prosecution [would] not oppose”.⁷⁵ Therefore, the Appeals Chamber finds that the Trial Chamber did not err in law by failing to respect the parties’ agreement to lift the redactions to the identifying information of the P-0350 Intermediary, as alleged by Mr Gbagbo.

43. The Appeals Chamber further finds that Mr Gbagbo’s argument regarding the extension of the role of the Victims in this case beyond that contemplated in the Statute has no merit. As argued by the Prosecutor, pursuant to rule 93 of the Rules, the Trial Chamber may invite submissions from the participating victims concerning their views on “any issue”. In this case, the Trial Chamber gave the Victims the opportunity to make submissions on the non-disclosure of the name and organisation of the relevant intermediary. The Appeals Chamber also recognises that the victims will sometimes be in a better position to assess the risk to victims and their intermediaries and there is, therefore, an interest in the Trial Chamber receiving their submissions.

44. As such, the Appeals Chamber finds no merit in Mr Gbagbo’s second ground of appeal and it is therefore dismissed.

Authorisation to Redact Witness Statements”, 13 May 2008, [ICC-01/04-01/07-475 \(OA\)](#) (“*Katanga OA Judgment*”), paras 54-56.

⁷⁴ See Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’”, 8 October 2010, [ICC-01/04-01/06-2582 \(OA18\)](#) (“*Lubanga OA18 Judgment*”), para. 51, referring to Appeals Chamber, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the appeal of the Prosecutor against 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 of Pre-Trial Chamber I’”, 26 November 2008, [ICC-01/04-01/07-776 \(OA7\)](#), paras 93-98.

⁷⁵ ICC-02/11-01/15-819-Conf-AnxA, p. 2.

D. First and third grounds of appeal

1. *Submissions of the Parties and Participants*

(a) Mr Gbagbo's submissions

45. In relation to the first ground of appeal, Mr Gbagbo argues that the Trial Chamber erred in law by not requiring the Victims to justify why the redactions should remain in place, thereby reversing the burden of proof regarding redactions.⁷⁶ He argues that, as a rule, witness statements and applications for participation from 'dual status' victims must be free of redactions.⁷⁷ Only by way of an exception to that rule, argues Mr Gbagbo, can a redaction be allowed to remain in place. In such circumstances, the party seeking the redaction must justify it, showing its necessity.⁷⁸ Mr Gbagbo argues that, here, the Victims did not show that the revelation of the name of the intermediary in question could jeopardise the intermediary's safety or in any way affect the work of the Legal Representative of Victims.⁷⁹ Finally, he says that disclosure to the defence and disclosure to the public are not the same, as the defence is bound by professional and ethical duties.⁸⁰

46. As to the third ground of appeal, Mr Gbagbo argues that the Trial Chamber committed an error of fact by failing to regard the matter of intermediaries as a "live issue". In support, he argues that questions put to a prior witness – [REDACTED] – [REDACTED], revealed factual discrepancies between the witness' application for participation as a victim and evidence given in court.⁸¹ He further alleges that [REDACTED].⁸² Mr Gbagbo then refers to the *Lubanga*, *Katanga*, and *Bemba* cases, arguing that the reasons for disclosure of the intermediaries' names in those cases are applicable here.⁸³

(b) The Prosecutor's response

47. In relation to Mr Gbagbo's first ground of appeal, the Prosecutor argues that the Trial Chamber correctly required the Victims to respond via e-mail to Mr Gbagbo's

⁷⁶ Mr Gbagbo's Document in Support of the Appeal, p. 5.

⁷⁷ Mr Gbagbo's Document in Support of the Appeal, para. 15.

⁷⁸ Mr Gbagbo's Document in Support of the Appeal, para. 15.

⁷⁹ Mr Gbagbo's Document in Support of the Appeal, para. 16.

⁸⁰ Mr Gbagbo's Document in Support of the Appeal, para. 17.

⁸¹ Mr Gbagbo's Document in Support of the Appeal, para. 23.

⁸² Mr Gbagbo's Document in Support of the Appeal, paras 24-29.

⁸³ Mr Gbagbo's Document in Support of the Appeal, paras 32-41.

application in order to justify the redactions.⁸⁴ She argues that the Victims effectively justified the necessity of maintaining the redactions in that email⁸⁵ and that their justification for the redactions is supported by reasons which the Victims had presented earlier in the Victims' Third Request.⁸⁶ The Prosecutor submits that these reasons were not "general", as argued by Mr Gbagbo and, in any event, "the level of detail, or sufficiency, of the LRV's submissions falls outside the scope of this appeal".⁸⁷

48. The Prosecutor also argues that Mr Gbagbo confuses the Victims' burden to justify the redactions with the 'evidential' burden to support his factual allegations.⁸⁸ The Prosecutor submits that, in that regard, the Trial Chamber "merely expressed its view that the Defence submissions were bereft of any foundation", and that this does not mean that the Victims were "exempted from discharging [their] burden".⁸⁹

49. The Prosecutor responds to the third ground of appeal by arguing that the Trial Chamber's conclusion that Mr Gbagbo's submissions were unsubstantiated was reasonable.⁹⁰ She further argues that on appeal Mr Gbagbo improperly makes new arguments which were not before the Trial Chamber, and that such arguments should be dismissed on that basis.⁹¹ Finally, the Prosecutor argues that the use of pseudonyms obviates the need to lift the redactions.⁹²

(c) The Victims' response

50. The Victims respond to Mr Gbagbo's first ground of appeal by arguing that the Trial Chamber did not commit an error of law in requiring Mr Gbagbo to provide reasons justifying the lifting of the redactions to the identity of the intermediary.⁹³ Referring to the Decision 202 of 2 September 2015 and Decision 506 of 9 May 2016, they submit that the Trial Chamber "did not reverse the burden of proof that was set

⁸⁴ Prosecutor's Response to the Document in Support of the Appeal, para. 11.

⁸⁵ Prosecutor's Response to the Document in Support of the Appeal, para. 12, referring to Victims' Response to Request to Lift Redactions, p. 2.

⁸⁶ Prosecutor's Response to the Document in Support of the Appeal, para. 13, referring to Victims' Third Request, paras 35-44.

⁸⁷ Prosecutor's Response to the Document in Support of the Appeal, para. 15.

⁸⁸ Prosecutor's Response to the Document in Support of the Appeal, p. 9.

⁸⁹ Prosecutor's Response to the Document in Support of the Appeal, para. 17.

⁹⁰ Prosecutor's Response to the Document in Support of the Appeal, para. 20.

⁹¹ Prosecutor's Response to the Document in Support of the Appeal, para. 27.

⁹² Prosecutor's Response to the Document in Support of the Appeal, para. 29.

⁹³ Victims' Response to the Document in Support of the Appeal, para. 22.

out in its previous rulings”.⁹⁴ First, the Victims submit that Mr Gbagbo’s contention that he “cannot prove the relevance of the information for which [he] seeks to have the redactions lifted in the absence of said information is a circular argument”.⁹⁵ They then refer to the jurisprudence of other international criminal tribunals to illustrate their point that “applied redactions can be lifted with a properly grounded request”.⁹⁶

51. Second, the Victims argue that “the professional and ethical obligations referred to by the Defence are inapposite to the issue raised in the First ground of appeal”.⁹⁷ They acknowledge that there is a difference between disclosing confidential information to the Defence and disclosing the same information to the public, but submit that “a party or participant’s general obligation to maintain confidentiality cannot suffice to decide on a particular request to lift redactions”.⁹⁸

52. Furthermore, the Victims argue that victims’ application forms for participation in the proceedings, 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”.⁹⁹ They argue that, “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 to discover and collect evidence that appears itself as exculpatory in nature and/or in any way material for the preparation of the Defence”.¹⁰⁰ Therefore, the Victims submit that the Prosecutor, 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)”.¹⁰¹

⁹⁴ Victims’ Response to the Document in Support of the Appeal, para. 23.

⁹⁵ Victims’ Response to the Document in Support of the Appeal, para. 33.

⁹⁶ Victims’ Response to the Document in Support of the Appeal, para. 33.

⁹⁷ Victims’ Response to the Document in Support of the Appeal, para. 34.

⁹⁸ Victims’ Response to the Document in Support of the Appeal, para. 35.

⁹⁹ Victims’ Response to the Document in Support of the Appeal, paras 25-28.

¹⁰⁰ Victims’ Response to the Document in Support of the Appeal, para. 27.

¹⁰¹ Victims’ Response to the Document in Support of the Appeal, para. 28.

53. In relation to the third ground of appeal, the Victims respond that Mr Gbagbo makes new factual arguments on appeal, and that such arguments are outside the scope of the appeal and should be dismissed on that basis.¹⁰² Even assuming that they fall within the scope of the appeal, the Victims submit that Mr Gbagbo's arguments are "wholly unsubstantiated".¹⁰³ The Victims further propose that the use of pseudonyms is sufficient to facilitate the defence's investigations and the ability to prepare for trial.¹⁰⁴

2. *Determination by the Appeals Chamber*

54. As stated above, the first ground of appeal is that "the Chamber erred in law by not requiring the LRV to justify why the redaction should remain in place, thereby reversing the burden of proof as regards redactions".¹⁰⁵

55. The Appeals Chamber recalls that, regarding errors of law, it

will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusion as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.¹⁰⁶

¹⁰² Victims' Response to the Document in Support of the Appeal, paras 38-40.

¹⁰³ Victims' Response to the Document in Support of the Appeal, para. 41.

¹⁰⁴ Victims' Response to the Document in Support of the Appeal, para. 42.

¹⁰⁵ Mr Gbagbo's Document in Support of the Appeal, p. 5.

¹⁰⁶ Appeals Chamber, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, [ICC-02/05-03/09-295 \(OA2\)](#), para. 20; Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "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'", 21 May 2014, [ICC-01/11-01/11-547-Red \(OA4\)](#), para. 49; Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Public redacted document, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, [ICC-01/04-01/06-3121-Red \(A5\)](#), para. 18; Appeals Chamber, *Prosecutor v. Simone Gbagbo*, "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'", 27 May 2015, [ICC-02/11-01/12-75-Red \(OA\)](#) ("S. Gbagbo Admissibility Judgment"), para. 40; Appeals Chamber, *Prosecutor v. Uhuru Muigai Kenyatta*, "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'", 19 August 2015, [ICC-01/09-02/11-1032 \(OA5\)](#), para. 23.

A decision is “materially affected” by an error of law if the Trial Chamber “would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error”.¹⁰⁷

56. As a preliminary point, the Appeals Chamber notes that the Victims argue that application forms for victim participation under rule 89 of the Rules are not prior witness statements under rule 76 of the Rules, even if made by a ‘dual status’ individual and, further, that they fall “outside of [the Prosecutor’s] disclosure obligations under rule 77 of the Rules”.¹⁰⁸ The Appeals Chamber recalls that written applications for the participation of victims in the proceedings shall contain, to the extent possible, *inter alia*, “[a] description of the harm suffered resulting from the commission of any crime within the jurisdiction of the Court”, “[a] description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victim believes to be responsible”, and “[a]ny relevant supporting documentation, including names and addresses of witnesses”.¹⁰⁹ Under rule 89 (1) of the Rules, the Registry is under an obligation to provide copies of such applications to the defence and to the Prosecutor. The Registry applies redactions to the copies provided to the defence when the Registry deems it necessary.¹¹⁰ Nevertheless, the fact that victims’ applications are provided to the defence by the Registry under rule 89 (1) of the Rules does not mean that they cannot be the subject of separate disclosure obligations of the Prosecutor once they are in her possession or control, in particular if the copies that have been provided to the Prosecutor contain lesser redactions than those provided to the defence or no redactions at all. Depending on the circumstances, and in particular if the Prosecutor decides to call the victims in question as witnesses (so-called ‘dual status’ victims), she may determine that the applications in question are disclosable under rule 77 of the Rules, as being material to the preparation of the defence, in which case any limitations to the disclosure of the applications, including the redaction of particular information contained therein,

¹⁰⁷ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’”, 13 July 2006, [ICC-01/04-169 \(OA\)](#), para. 84; [S. Gbagbo Admissibility Judgment](#), para. 41.

¹⁰⁸ Victims’ Response to the Document in Support of the Appeal, para. 25.

¹⁰⁹ Regulation 86(2)(c), (d), and (e) of the Regulations of the Court.

¹¹⁰ E.g. [Decision on Victim Participation](#), para. 51.

would need to be authorised under the Statute or rules 81 or 82 of the Rules, as the case may be. Accordingly, contrary to the Victims' position, the Appeals Chamber finds that applications for participation of 'dual status' victims may indeed fall within the scope of the Prosecutor's disclosure obligations under rule 77 of the Rules. These obligations, as a whole, must be interpreted broadly.¹¹¹ The Appeals Chamber also notes that the Prosecutor, for her part, acknowledges that her disclosure obligations include victims' application forms for 'dual status' individuals.¹¹²

57. Regarding the question raised under the first ground of appeal – whether the Trial Chamber erred in not requiring the Victims to justify why the redactions should remain in place, thereby reversing the burden – the Appeals Chamber notes that this issue arose in the context of the Prosecutor's disclosure of the application for participation of the victim known as P-0350 in March 2016 to Mr Gbagbo. The Prosecutor stated that the application was disclosed “pursuant to the Chamber's Decision on victim participation, and more broadly under rule 77 of the Rules, after it came to the Prosecution's attention in mid-March 2016 that [the witness in question] enjoyed dual status”.¹¹³ She went on to state that, following consultation with the Victims on redactions, the application was disclosed to Mr Gbagbo.¹¹⁴ The redactions in dispute were included at the request of the Victims.¹¹⁵ In Decision 506 of 9 May 2016, the Trial Chamber granted the request of the Victims¹¹⁶ that the redactions to the identifying information of, *inter alia*, the P-0350 Intermediary and the name and location of the organisation to which he or she belongs, be maintained.¹¹⁷ In so doing, the Trial Chamber gave the following reasons:

¹¹¹ Appeals Chamber, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled ‘Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’”, 28 August 2013, [ICC-02/05-03/09-501 \(OA4\)](#) (“*Banda and Jerbo OA4 Judgment*”), para. 38; Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008”, 11 July 2008, [ICC-01/04-01/06-1433 \(OA11\)](#), paras 77-78.

¹¹² Prosecutor's Response to the Document in Support of the Appeal, para. 35.

¹¹³ [Prosecutor's March 2016 Disclosure of Evidence](#), para. 6, and ICC-02/11-01/15-478-Conf-AnxE, p. 3.

¹¹⁴ [Prosecutor's March 2016 Disclosure of Evidence](#), para. 6.

¹¹⁵ Prosecutor's Response to the Document in Support of the Appeal, para. 33.

¹¹⁶ [Victims' Third Request](#), paras 46-48.

¹¹⁷ [Decision 506 of 9 May 2016](#), paras 24, 27 and p. 13.

[t]he Chamber notes the Prosecutor's submission that the relevant intermediaries are not Prosecutor's witnesses and that the Defence does not seek lifting of redactions of identifying information of intermediaries who are *not* Prosecutor's witnesses. Accordingly, the Chamber grants the LRV request.¹¹⁸

The Trial Chamber made no further findings in relation to the P-0350 Intermediary.

58. Mr Gbagbo requested the lifting of the redactions pertaining to the P-0350 Intermediary for the first time in an e-mail to the Prosecutor sent on 25 November 2016,¹¹⁹ and then by way of a formal application to the Trial Chamber, heard orally on 28 November 2016.¹²⁰ Following the oral application, the Trial Chamber gave the opportunity to the Prosecutor and the Victims to make submissions.¹²¹ As noted above, in the Impugned Decision, the Trial Chamber recalled the Victims' argument that lifting the redactions would "affect the activities of the legal representative in the field".¹²² The Trial Chamber then ruled that, at that stage, Mr Gbagbo had "not substantiated why the name of the said intermediary [had] become a live issue in this case".¹²³ The Trial Chamber further reasoned that Mr Gbagbo's "allegation" was "wholly unfounded", that he had not "pointed out the relevance of [the P-0350 Intermediary's] identity for the Defence case", and that his request amounted "to requesting the lifting of all redactions of intermediaries" to "find out what the persons might have done".¹²⁴ Accordingly, the Trial Chamber rejected the request.¹²⁵

59. The Prosecutor argues that the Trial Chamber employed the correct procedure in requesting submissions from the Victims, that the Victims in turn justified the redactions in question, and that the Trial Chamber therefore correctly required the Victims to demonstrate the necessity of the redactions.¹²⁶ The Appeals Chamber finds that this argument is based on a misunderstanding of the Impugned Decision. Although the Impugned Decision does recall the observations of the Victims,¹²⁷ a plain reading of it shows that the Trial Chamber rejected Mr Gbagbo's Request to Lift

¹¹⁸ [Decision 506 of 9 May 2016](#), para. 27.

¹¹⁹ See paragraph 11 above.

¹²⁰ See paragraph 12 above.

¹²¹ Mr Gbagbo's Request to Lift Redactions, p. 5, lines 16-20.

¹²² Impugned Decision, p. 2, line 2.

¹²³ Impugned Decision, p. 2, lines 8-9.

¹²⁴ Impugned Decision, p. 2, lines 8-15.

¹²⁵ Impugned Decision, p. 2.

¹²⁶ Prosecutor's Response to the Document in Support of the Appeal, paras 10-15.

¹²⁷ Impugned Decision, p. 2, lines 1-4.

Redactions based on what it determined was Mr Gbagbo's failure to meet the burden of substantiation. This reading of the Impugned Decision is supported by the Decision Granting Leave to Appeal, which observes that "the system put in place by the Chamber places the burden of demonstrating the need for lifting the redactions on the party requesting such lifting".¹²⁸

60. The Appeals Chamber agrees with Mr Gbagbo that, in the circumstances, the Trial Chamber's approach was erroneous. As stated above, the Prosecutor disclosed the relevant application to Mr Gbagbo pursuant to rule 77 of the Rules. The redactions in dispute were inserted at the request of the Victims,¹²⁹ and the Prosecutor expressly stated that she would not oppose Mr Gbagbo's Request to Lift Redactions.¹³⁰ The Appeals Chamber emphasises that there is a distinction between the determination of whether information is material to the preparation of the defence – an assessment under rule 77 of the Rules – and whether redactions are justified under the Statute or rules 81 or 82 of the Rules, based on the appropriate balancing of all relevant factors.¹³¹ In general, the Appeals Chamber considers that, where the Prosecutor has made a determination that information is disclosable under rule 77 of the Rules, such information must be disclosed, subject to any concerns as set out in the Statute and in rules 81 and 82 of the Rules.

61. In assessing the justification for redactions, the Appeals Chamber recalls its holding that:

The overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception rather than the rule.¹³²

It follows from this principle that, in the Trial Chamber's assessment of whether redactions to disclosable information are justified, there should be no burden placed on the defence. Rather, the Trial Chamber should consider the reasons for authorising the redactions being sought and, in reaching its overall decision as to whether they are justified, and in balancing the appropriate factors, should give the defence an

¹²⁸ Decision Granting Leave to Appeal, para. 8.

¹²⁹ Prosecutor's Response to the Document in Support of the Appeal, para. 33.

¹³⁰ ICC-01/11-01/15-819-Conf-AnxB; ICC-02/11-01/15-T-106-Conf-Eng, p. 5, lines 23-25.

¹³¹ [*Banda and Jerbo OA4 Judgment*](#), paras 35-37.

¹³² [*Katanga OA Judgment*](#), para. 70.

opportunity to make submissions.¹³³ This may entail receiving submissions from the defence on the impact that non-disclosure would have on the fairness of the proceedings. Although the defence may have an interest in presenting such submissions, there is no burden to meet in that regard. In addition, the Trial Chamber must bear in mind that the defence is at a disadvantage in being able to make a case given its inability to access the withheld information.

62. After the initial decision is taken on redactions, the Appeals Chamber considers that, again, there is no statutory basis – nor is there any practical reason – for imposing a burden on the defence should it later seek the lifting of redactions to information which is otherwise disclosable. Rather, the Trial Chamber in such circumstances should consider whether the justification continues to exist to maintain the redactions. Indeed, given the paramount need to ensure full disclosure, the Trial Chamber itself, with the assistance of the Prosecutor, should keep such matters under review and a decision on redactions may be amended at a later date if circumstances change.¹³⁴ In its review, the Trial Chamber should give the defence an opportunity to make submissions, which may include whether, in the defence’s view, there are changed circumstances which impact upon how the withheld information fits within the overall defence case. However, the defence has no burden to meet in that regard.

63. In this case, the Appeals Chamber finds that it was incompatible with the principle that full disclosure should be the rule to place the burden on Mr Gbagbo to substantiate why the identity of the P-0350 Intermediary was, or had become, a “live issue” in the case. Rather, the Trial Chamber should have inquired as to whether there continued to be justification to maintain the redactions in question, including whether there was a legal basis for such a ruling. The Appeals Chamber finds that there is no indication in the Impugned Decision that the Trial Chamber considered whether the

¹³³ [Katanga OA Judgment](#), paras 71-73.

¹³⁴ [Katanga OA Judgment](#), para. 73 c); Appeals Chamber, *Prosecutor v. Germain Katanga*, “Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, [ICC-01/04-01/07-476 \(OA2\)](#), para. 64; [Lubanga OA18 Judgment](#), para. 58.

reasons underlying its initial decision to grant the redactions in question continued to exist.¹³⁵

64. The Appeals Chamber therefore finds that the Trial Chamber committed an error of law in placing the burden of demonstrating the need for lifting the redactions in question on Mr Gbagbo. The Appeals Chamber further finds that, as Mr Gbagbo's request was rejected on the basis that he failed to discharge the burden placed upon him, the error materially affected the Impugned Decision.


65. In relation to the third ground of appeal, namely that the Trial Chamber erred in failing to regard the matter of intermediaries as a "live issue", the Appeals Chamber finds that, given the error identified under the first ground of appeal, as described above, the Appeals Chamber need not reach a decision on this ground.

V. APPROPRIATE RELIEF

66. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules).

67. In the present case, the Appeals Chamber, having found that the Impugned Decision was materially affected by an error of law, finds it appropriate to reverse the Impugned Decision and remit the question of whether the redactions should be maintained to the Trial Chamber. In the process of deciding this question, the Trial Chamber should first receive submissions from the parties and participants.

Done in both English and French, the English version being authoritative.



Judge Piotr Hofmański
Presiding Judge

Dated this 31st day of July 2017

At The Hague, The Netherlands

¹³⁵ In this regard, the Appeals Chamber notes that, at the time of the Impugned Decision, more than a year had passed since Decision 202 of 2 September 2015, and some of the circumstances justifying those redactions had already changed (*see* [Decision 506 of 9 May 2016](#), para. 18).