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No.: **ICC-02/11-01/15**

Date: **22 January 2018**

**TRIAL CHAMBER I**

**Before:** Judge Cuno Tarfusser, Presiding Judge  
Judge Olga Herrera-Carbuccia  
Judge Geoffrey Henderson

**SITUATION IN CÔTE D'IVOIRE**

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

**Public**

**Defence Response to the “Legal Representative’s Application for the introduction of documentary evidence under paragraphs 43-44 of the Amended Directions on the conduct of the proceedings” (ICC-02/11-01/15-1088)**

**Source:** Defence Team for Laurent Gbagbo

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

**Office of the Prosecutor**

Ms Fatou Bensouda, Prosecutor  
Mr James Stewart

**Counsel for the Defence of Laurent Gbagbo**

Mr Emmanuel Altit  
Ms Agathe Bahi Baroan

**Counsel for the Defence of Charles Blé Goudé**

Mr Geert-Jan Alexander Knoops  
Mr Claver N'Dry

**Legal Representatives of Victims**

Ms Paolina Massidda

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparations**

**Office of Public Counsel for Victims**

**Office of Public Counsel for the Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Section**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## **I. Procedural history**

1. On 15 December 2017, the Legal Representative of Victims filed an “Application for the introduction of documentary evidence under paragraphs 43-44 of the Amended Directions on the conduct of the proceedings”<sup>1</sup> concerning an annex to her application.

## **II. Applicable law**

2. The Defence notes that the LRV’s application is based primarily on paragraphs 43 and 44 of the Directions on the conduct of proceedings – as evidenced by the application’s very title – even though these two paragraphs relate to the introduction of documentary evidence by the Parties and therefore do not apply to the LRV:

In the interest of the efficiency of the proceedings, **the parties** are encouraged to introduce documentary evidence other than testimonial (i.e. documents and audio-visual material), whenever feasible. They may introduce documentary evidence directly, without producing it by or through a witness.<sup>2</sup>

3. It should be noted in these conditions that the only possible legal basis for the LRV’s application would be paragraph 20 of the Directions on the conduct of proceedings, which provides that

additionally, for any proposed witness, or an application to submit nontestimonial evidence, including documentary evidence, the LRV shall give concise information as to why the testimony of the proposed witness or the piece of evidence: (a) is relevant to the victims’ interests and to the matters at issue in the case, (b) would contribute to the determination of the truth and not be repetitive of evidence already before the Chamber, and, as such, would not be inconsistent with the rights of the accused and a fair and expeditious trial.<sup>3</sup>

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<sup>1</sup> ICC-02/11-01/15-1088.

<sup>2</sup> ICC-02/11-01/15-498-AnxA, para. 43.

<sup>3</sup> ICC-02/11-01/15-498-AnxA, para. 20.

### **III. Discussion**

#### **1. Rejection of the LRV's application to admit Annex B of her request**

4. The document which the LRV requests to be submitted is a list of names of persons who were allegedly killed during the post-election crisis and who are said to be of Nigerien nationality. The list was allegedly sent to the LRV by the Embassy of the Republic of Niger in Côte d'Ivoire on 13 December 2017.

5. Several remarks can be made about this list:

6. First, the list is not dated, so it is impossible to know when it was produced.

7. Second, it is impossible to know where the information on the list comes from.

8. Third, it is impossible to know when and by whom the information was collected.

9. Fourth, it should be noted that the elements in the list are very imprecise and do not provide any real information about the alleged victims. Of the 48 names on the list, only one person's full date of birth is given; for 12 of the names on the list, only an approximate year of birth is given; and no information is provided about the dates of birth of all the other persons named.

10. Fifth, it is absolutely impossible to verify any of the information concerning the names on the list, since no relevant documents (for example, identity documents) are attached to the list.

11. Sixth, for most of the persons concerned, no information is given about the place, cause or date of death or those responsible for the deaths of the Nigeriens.

Hence, for none of the 48 persons named (with the exception of four) is the precise place of death given. For none of the persons listed is any specific information given about those responsible for their deaths: for 43 of the persons listed no perpetrator is given and for the 5 others the information is vague. No explanation is given for the deaths of 41 of the 48 persons and the date of death is not given for 25 of the 48 persons.

12. Under these circumstances:

13. 1) How can the LRV claim that the list has any **probative value**?

14. After all there is no information to confirm the existence of the persons listed.

15. Assuming that they do exist, the information in the list does not in any way verify the facts or circumstances of the alleged deaths of the persons listed. This information is therefore impossible to verify or corroborate and, accordingly, has no probative value.

16. 2) How can the LRV claim that the list has any **relevance**?

The List is relevant to a number of issues in this case including: (i) the widespread and systematic character of the attack against the civilian population; and (ii) the targeting and persecution of civilians on political, racial, national, ethnic, cultural and religious grounds.<sup>4</sup>

How would the alleged deaths (which are impossible to verify) of around 40 persons determine the existence of an “attack against the civilian population” when we do not know whether 25 of them died during the post-election crisis and it appears that the cause of death for 41 of them is unknown. On what basis does the LRV consider that the list can determine that the 48 persons were targeted “on political, racial, national, ethnic, cultural grounds” when no indication is given as to the

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<sup>4</sup> ICC-02/11-01/15-1088, para. 11.

circumstances and causes of the deaths. It should also be noted that no information is given about the ethnicity, religion or political opinions of the persons listed.

17. Claiming, as the LRV does, that “the document provides relevant information on the extent of the victimisation suffered by a specific category of civilians targeted during the post-election crisis” is purely gratuitous, since (1) no document is provided which verifies the nationality of the alleged victims and (2) no information is given which verifies that their nationality was the reason for their deaths. The fact that persons of the same nationality were killed during the period given (which is impossible to verify, since no information about the date of death is given in most cases) does not mean that their nationality was the cause of their death.

18. Lastly, in an effort to provide assurance of the utility of the document, the LRV claims that

among the Economic Community of West-African States (ECOWAS), and together with Mali and Burkina Faso, the Republic of Niger suffered the highest number of casualties among its citizens residing in Côte d’Ivoire during the post-election crisis of 2010-2011.<sup>5</sup>

The document at no point establishes whether the persons listed in it were allegedly killed (1) during the post-election crisis or (2) because of their nationality or (3) that the Nigeriens constituted a target group.

19. The LRV hastily presents the document as support for her case while providing no evidence that the Nigeriens were targeted for their nationality or even that the Nigeriens were seen by the key figures in the crisis as a homogenous group. These are downright uncorroborated claims.

20. It should be noted that even when the LRV claims that Niger “together with Mali and Burkina Faso, [...] suffered the highest number of casualties among its

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<sup>5</sup> ICC-02/11-01/15-1088, para. 13.

citizens residing in Côte d'Ivoire during the post-election crisis of 2010-2011", it does so without providing any evidence: nor do either of the two references given in footnotes corroborate that.

21. It therefore appears that the LRV wishes to give this unusable document – i.e. with no probative value – a meaning that can by no means be drawn from its content.

22. Lastly, the admission of this document would violate the rights of the Defence. As the LRV has decided not to call any witnesses, it will be impossible for the Defence to discuss this document with a witness and assess its value.

23. It cannot be argued that the Defence itself can call to the stand a member of the High Council for Nigeriens Abroad to ask him or her under what circumstances the list was drawn up. That would effectively be asking the Defence to do the work of the LRV; i.e. to provide the Chamber with all information of use for the document to be assessed. And that would place the burden on the Defence to prove that a document has no probative value, which is contrary to the logic of trial proceedings and would call into question the concept of presumption of innocence.

**2. In the unlikely event that the document is admitted, the LRV should disclose a non-redacted version to the Defence**

24. The document which the LRV seeks to be admitted was sent to the Defence in a redacted version only. The LRV justifies these redactions by claiming that: "Pursuant to regulation 23bis(2) of the Regulations of the Court, Annex A is filed confidential *ex parte* only available to the Chamber as it contains the contact details of certain individuals."<sup>6</sup>

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<sup>6</sup> ICC-02/11-01/15-1088, para. 4.

25. First, it should be noted that the LRV does not cite any legal basis to justify redaction. No reference is made either to the Protocol establishing a redaction regime or to any other source (precedent, Chamber practice, etc.). In other words, for the LRV, the fact that a document contains the “contact details of certain individuals” would alone, and without any legal basis, be sufficient reason not to disclose it in full to the Defence.

26. Second, it should be recalled that it is a matter of principle that all documents must be disclosed in non-redacted form to the other Parties and participants. In particular, when it comes to documents containing evidence against the accused, it is essential that he or she can inspect them in their entirety in order to check, analyse and investigate further the accusations made. In order to fully exercise their right to prepare their defence, the accused must be able to investigate all the evidence disclosed to them.

27. Therefore, it is the Party or participant wishing to make a redaction who bears the burden of proof in justifying the need for that redaction or, in the present case, in proving why certain information should be withheld from the Defence. In the present case, the LRV does not justify how it would be a problem to communicate the “contact details of certain individuals” to the Defence – who are, after all, subject to the same rules of ethics and confidentiality as the other Parties.

28. Under these circumstances, in the absence of any objective justification given by the LRV, the Chamber should order the LRV to disclose to the Defence a non-redacted version of the document she is seeking to have admitted.



**FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I TO:**

- **Reject** the LRV's application

**In the unlikely event that the Chamber admits the document,**

- **Order** the LRV to disclose a non-redacted version of the document to the Defence.

[signed]

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Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 22 January 2018

At The Hague, Netherlands