

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: *English*

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

Date: **09 April 2015**

TRIAL CHAMBER I

Before:

**Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Bertram Schmitt**

SITUATION IN COTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE***

Confidential

Defence Observations on the Protocol on handling of confidential information

Source: Defence of Mr Charles Blé Goudé

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

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I. INTRODUCTION

1. The Defence for Charles Blé Goudé ('Defence') recognises that Trial Chamber I ('Chamber'), being mindful of Mr Blé Goudé's rights, will give these submissions equal weight to those of the parties and participants even though it was not able to partake in the meetings conducted between them.
2. Noting this, the Defence generally endorses the views and concerns of the Defence for Laurent Gbagbo in filing 778-Conf and 778-Conf-Anx. The Defence submits these observations to elaborate further on specific issues of the proposed protocol.

II. CONFIDENTIALITY

3. The Defence files these observations as confidential since they deal with materials filed confidentially by the Prosecution and Defence for Laurent Gbagbo. A public redacted version will be filed in due course.

III. PROCEDURAL HISTORY

4. On 4 December 2014, the Single Judge held a status conference in the former *Gbagbo* case to discuss certain protocols in the case.¹
5. On 18 December 2014, the Single Judge ordered the parties and participants to submit observations on the *Protocol on handling of confidential information* ('Protocol') by 20 February 2015.²

¹ ICC-02/11-01/11-T-27-CONF-ENG.

² ICC-02/11-01/11-739.

6. On 20 February 2015, the Defence for Laurent Gbagbo,³ the Prosecution⁴ and Legal Representative for Victims (LRV)⁵ filed their respective observations on the Protocol. The VWU filed its observations on 2 March 2015.⁶
7. On 17 March 2015, the Single Judge ordered that the Defence file any observations on the Protocol by 9 April 2015.⁷

IV. OBSERVATIONS

General Definitions

8. The Defence argues that the definition of the term “représentant” is defined too narrowly in the Prosecution’s proposal.⁸ The Defence stresses that Prosecution’s proposal, and the LRV’s comments about the Gbagbo Defence’s argument, are inconsistent with the meaning of the Protocol (i.e. protecting people and information). The expanded definition supplied by the Gbagbo Defence properly covers all persons under the auspices of the LRV, not just the LRV himself or herself, and holds them accountable for their actions.
9. The Defence submits that the definition of “témoin” is too narrowly defined in the Prosecution’s proposal. The Defence fails to see a coherent reason for the Prosecution’s insistence that the Gbagbo Defence’s suggestion should not be followed. The Prosecution proposes that “témoin” should be:

[T]oute personne qu’une partie ou le représentant souhaite appeler à témoigner ou toute personne sur les déclarations¹ desquelles une partie ou le représentant souhaite s’appuyer et à condition que ladite intention ait été communiquée à la partie adverse ou au représentant.⁹

³ ICC-02/11-01/11-778-Conf and ICC-02/11-01/11-778-Conf-Anx.

⁴ ICC-02/11-01/11-777-Conf and ICC-02/11-01/11-777-Anx.

⁵ ICC-02/11-01/11-776.

⁶ ICC-02/11-01/11-788.

⁷ ICC-02/11-01/15-7.

⁸ ICC-02/11-01/11-778-Conf-Anx, page 2.

⁹ ICC-02/11-01/11-777-AnxA, section I(e).

10. In the *Ruto and Sang* and the former *Kenyatta* cases ('Kenya Cases'), the definition of a witness was:

[A] witness is a person whom a party or participant intends to call to testify during the trial proceedings, provided that such intention has been conveyed to the non-calling party, either by the calling party including the individual on its filed witness list, or by the witness informing the non-calling party that he or she has agreed to be called as another party's witness, or by any other means that establish a clear intention on behalf of the calling party to call the individual as a witness and that this individual has consented thereto.¹⁰

11. By restricting the definition of "témoin" in this case to persons whose names have been disclosed as being witness as such, the proposed prosecution protocol, and the Prosecution by extension, would require the Defence and the Gbagbo Defence to disclose their case strategies before the Prosecution's case-in-chief is complete. Once a witness gives a statement to one of the parties, he or she should be seen as a witness who gave testimony, and such person should be considered a witness until such time that the Defence discloses its list of witnesses, or the Defence informs the Prosecution that they have decided not to call the witnesses after an inquiry to the Defence.

12. The definition as proposed by the Prosecution can only prejudice the Defence teams. In the aforementioned Defence proposal, the only possible prejudice to the Prosecution is that it might have to make an unexpected phone call and wait a few days for an interview if a proposed interviewee states that he or she has given a statement to one of the Defence teams.

¹⁰ ICC-01/09-01/11-449-Anx, para. 1 and ICC-01/09-02/11-469-Anx, para. 1.

*Protocol régissant la divulgation de l'identité des témoins lors des enquêtes*¹¹

13. The Defence agrees with the Gbagbo Defence commentary on paragraphs “c” and “d” found at page 4 in the annex to filing 778.¹² Paragraph “c” as proposed by the Prosecution is unworkable. It is absolutely impossible to determine whether or not the Defence will need to use the name of a protected or relocated witness during its investigations. More practical and effective ways exist to control and alleviate this issue, as shown by the re-worded provision for paragraph “d” supplied by the Gbagbo Defence.¹³ Interviews are fluid, and unforeseen circumstances may occur. Counsel or investigators should not have to stop interviews because they did not foresee the possible discussion of a protected or relocated witness two weeks before the interview.
14. As an alternative to paragraph “c” on page 4 of Filing 778-Conf-Anx, the Defence proposes that if the Chamber deems it necessary, the Defence would prefer a meeting every other month with VWU to discuss its upcoming investigations in relation to protected and relocated witnesses. These meetings would be general in nature and forward looking. If issues have arisen since the previous meeting, VWU would be able to advise Defence teams in regards to protected and relocated witnesses.

The Use of Material Depicting Witnesses

15. One of the Prosecution's proposed provisions is over burdensome and confusing.¹⁴ The sentence, “*De plus, ces matériaux visuels tels des photographies identifiant des témoins ne seront montrées qu’avec d’autres matériaux ou*

¹¹ Even though the Defence uses the title found in the Prosecution's submission, the Defence agrees with the proposed title change from the Gbagbo Defence.

¹² ICC-02/11-01/11-778-Conf-Anx, pg.4.

¹³ ICC-02/11-01/11-778-Conf-Anx, pgs 4-5.

¹⁴ See ICC-02/11-01/11-777-Conf, para. 26. See also ICC-02/11-01/11-777-AnxA, pg. 5.

photographies du même type."¹⁵ is ambiguous. Does the Prosecution propose that the Defence conducts its interviews and investigations with a photo-array? Does the Prosecution propose the same with video or audio material? Is the Defence expected to have standard visual materials to present to witnesses? If so, who approves such material?

16. The Defence concurs with the Gbagbo Defence's proposal.¹⁶ It is simple and effective. It requires the parties and participants to use best practices in their activities. Unlike as the Prosecution argues, there is reason to depart from the wording of the new provision regarding "matériaux visuels" adopted in the *Ntaganda* case that the Prosecution is now requesting the Chamber to apply in the instant case. As stated above, these provisions are unclear and overly burdensome.

Protocole régissant l'utilisation de matériel confidentiel par les parties et le représentant pendant les enquêtes

17. The Defence believes that the wording for paragraph "c" on page 9 of the Gbagbo Defence's filing 778-Conf-Anx is worded more properly and offers less confusion than the one proposed by the Prosecution.

Contact with an Opposing Party's Witness

18. The Defence agrees with the position forwarded by both the Gbagbo Defence and Prosecution in relation to contacting witnesses of the opposing party.¹⁷

¹⁵ *Ibid.*

¹⁶ See ICC-02/11-01/11-778-Conf-Anx, pg. 9.

¹⁷ ICC-02/11-01/11-777-Conf, paras 37-43 and ICC-02/11-01/11-778-Conf-Anx, Section V commentary, pg. 11 of 16.

The Defence uses these paragraphs to reply to the comments made by the OPCV in its filing from 20 February 2015.¹⁸

19. The Defence notes that the OPCV exaggerates the extent of the meaning behind the protocol in the Kenya Cases.¹⁹ Trial Chamber V decided on the Protocol for the Kenya Cases on 24 August 2012.²⁰ Importantly, the LRVs for the Kenya Cases **did not have access to confidential information** in their respective cases until after 3 October 2012.²¹ As an example, it is a far stretch to state that the LRVs could have requested an interview with a confidential witness on 15 September 2012 when the LRV 1) did not know the witness's identity and 2) did not have access to the witness statements and/or transcripts.

20. Additionally, the absence of the LRV (i.e. participant) in those sections of the Kenya Cases' protocol shows that the LRV was left out of this section purposefully. As the Chamber will note, the term "participant" is used in the Kenya Cases' protocol, but is left out of sections 1 and 2.²² Common principles of construction and interpretation, i.e. plain language meaning, dictate that when something is mentioned in parts of a document, but left out of other parts, it is the intention of the drafter to omit that "something" in the section. The opposite suggestion by OPCV is thus incorrect.

21. Finally, the commentary of the Gbagbo Defence in regards to paragraphs "h" and "i" on page 12 of this section in the annex for filing 778 speaks to the truth of the matter. The purpose of this trial and court is to seek the truth. The parties or participants should not be allowed to block an interview between a

¹⁸ ICC-02/11-01/11-776, paras 9-21.

¹⁹ See ICC-02/11-01/11-776, paras 11, 14 and 21.

²⁰ ICC-01/09-01/11-449 with associated annex and ICC-01/09-02/11-469 with associated annex.

²¹ See ICC-01/09-01/11-460, paras 63-69 and ICC-01/09-02/11-498, paras 63-68.

²² See generally ICC-01/09-01/11-449-Anx and ICC-01/09-02/11-469-Anx.

witness and the party requesting the interview. . *Therefore, in the instant proposal, only the potential witness and the VWU should be able to block ultimately an interview for safety/security reasons, notwithstanding the expansive definition of witness proposed by the Defence.* This ultimate veto power of the potential witness and VWU to prevent an interview by the other party should be subject to the parties and participants being notified of any potential interviews.

V. RELIEF

22. The Defence requests the Chamber to adopt the above changes to the Protocol detailed above and proposed in the observations of the Gbagbo Defence in Filing 778 and its annex.




Mr. Knoops, Lead Counsel and Mr. N'Dry, Co-Counsel

Dated this 9 April 2015

At The Hague, the Netherlands