

**Cour
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**International
Criminal
Court**

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

Date: 10 June 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***

PUBLIC

Public redacted version of "Defence Observations on the Prosecution's requests to apply non-standard redactions to documents related to P-0114, and to maintain redactions to documents related to P-0316 and P-0402," 1 April 2015 ICC-02/11-01/15-17-Conf

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. Pursuant to the Single Judge's "Order setting deadlines for submissions on certain pending matters,"¹ the Defence of Mr. Charles Blé Goudé ('the Defence') submits to Trial Chamber I ('the Chamber') its observations on the Prosecution's request on redactions identified in paragraph 8 of the Order.
2. The observations provided herewith shall be made on a confidential basis due to the references to confidential material that shall be made herein.
3. The Defence kindly requests the Chamber to reject the Prosecution's requests to maintain and authorise redactions related to witnesses P-0402 and P-0114 respectively because these redactions undermine the adversarial process by not allowing the Accused to confront the evidence against him as guaranteed by article 68(5) of the Rome Statute ('the Statute'), which limits the extent of redactions. The Defence further contends it is not in a position to make observations concerning the prejudice the redactions to documents related to P-0316 would cause the Accused because the latest redacted versions of the documents have not been made available to the Defence.

II. Procedural History

4. On 6 February 2015, the Prosecution requested authorisation to maintain redactions to two documents related to witness P-0316 and three documents related to witness P-0402.²

¹ICC-02/11-01/15-7, p.8.

²ICC-02/11-01/11-761.

5. On 16 February 2015, the Defence for Mr. Gbagbo requested the Chamber to reject the Prosecution request.³
6. On 25 February 2015, the Chamber found that the Prosecution had failed to substantiate its redaction request in regards to witnesses P-0316 and P-0402, and informed the Prosecution that their redaction request would be rejected unless it provided the Chamber with justifications for the sought after redactions.⁴
7. On 27 February 2015, the Prosecution filed its request for the Chamber to apply non-standard redactions to two documents related to P-0114,⁵ to which the Defence of Mr. Gbagbo responded on 23 March 2015.⁶
8. On 5 March 2015, the Prosecution submitted "Prosecution's further request for authorisation to maintain redactions to documents related to P-0316 and P-0402,"⁷ to which the Defence for Mr. Gbagbo responded on 27 March 2015.⁸
9. On 11 March 2015, the Chamber decided to join the cases against Laurent Gbagbo and Charles Blé Goudé.
10. On 17 March 2015, the Chamber ordered the Defence of Mr. Blé Goudé to make any observations on the Prosecution's requested redactions to documents related to witnesses P-0316, P-0402, and P-0114 by 2 April 2015.⁹

³ ICC-02/11-01/11-768.

⁴ ICC-02/11-01/11-782-Red p. 14.

⁵ ICC-02/11-01/11-787-Conf-Red.

⁶ ICC-02/11-01/15-10-Conf.

⁷ ICC-02/11-01/11-797-Conf-Red.

⁸ ICC-02/11-01/15-15-Conf-Red.

⁹ ICC-02/11-01/15-7, p.8.

III. Submissions

11. The Defence respectfully submits that the Chamber should reject the Prosecution's request for non-standard redactions in relation to the witnesses P-0316, P-0402, and P-0114 for three primary reasons: (1) the Prosecution did not follow the Protocol establishing a redaction regime in the case of the *Prosecutor v. Laurent Gbagbo* in its requests, (2) the Prosecution did not meet its burden in establishing the need for redactions due to the objectively justifiable risk to the safety of the witnesses or to the third parties concerned, and (3) the redactions would constitute a serious prejudice to the Accused given that the Accused has been deprived of knowing the scope and the effect of the redactions.

12. Moreover, in relation to witness P-0316, the Prosecution did not disclose to the Defence the latest redacted versions of the witness's witness statement and the screening notes.¹⁰ The Defence therefore requests for the disclosure of the latest version of these documents, and an extension of time within one week after receipt of the latest redacted version pursuant to Regulation 35(2) to make observations in regards to the possible prejudice if any the Defence would suffer in relation to P-0316.

IV. Applicable Law

13. Under Rule 81(4) of the Rules of Procedure and Evidence (R.P.E.), full disclosure of evidence to the Defence may be limited where it would

¹⁰ The Prosecution disclosed to the Defence of Mr. Gbagbo the relevant documents on 6 February 2015. ICC-02/11-01/11-797-Conf-Red, para. 18.

compromise the safety of witnesses, victims, their families or “any other person at risk on account of activities of the Court.”¹¹

14. However this rule must be interpreted in conjunction with article 68 of the Statute which expressly conditions the use of protective measures such that they are never “prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.”¹²

15. Therefore, Chambers have consistently interpreted narrowly Rule 81(4), and have found that *full* disclosure to the defence is the norm, and any deviation must be justified and authorised under the Statute.¹³ This limited authorisation of redactions ensures that the accused’s right to adversarial proceedings is respected, and that the equality of arms is ensured by allowing both parties to inspect and “comment on the evidence adduced by the other party.”¹⁴

16. In determining whether to authorise a request for non-disclosure, the Court must find that all of the following five criteria have been met:

- i) the existence of an 'objectively justifiable risk to the safety of the person concerned or which may prejudice further or ongoing investigations ;
- ii) the risk must arise from disclosing the particular information to the Defence;
- iii) the infeasibility or insufficiency of less restrictive protective measures;

¹¹ See ICC-01/04-01/07-475, para. 1

¹² Article 68(1) of the Rome Statute.

¹³ ICC-02/11-01/11-737 para. 9 citing *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11-458 ('Ruto Redaction Decision'), para. 9; *The Prosecutor v. Germain Katanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor 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-01/04-01/07-475, OA, ('Katanga OA Judgment'), para. 70; *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568 ('Lubanga OA 3 Judgment'), paras .36-39.

¹⁴ See ICC-01/04-01/07-475, para. 57 citing *Rowe and Davis v. the U.K.*, [GC] no. 28901/95, ECHR 2000-II, 16 February 2000, para. 60.

- iv) an assessment as to whether the redactions sought are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial;
- v) the obligation to periodically review the decision authorising the redactions should circumstances change.¹⁵

17. The onus is on the Prosecution to substantiate the necessity of redactions due to the existence of an objectively justifiable risk, which arises from disclosing the particular information to the Defence.¹⁶ This burden is more difficult to satisfy at the trial stage of the proceedings than during the pre-confirmation stage.¹⁷

- a. **With respect to documents related to witnesses P-0316, P-0402 and P-0114, the Prosecution failed to follow the established redaction protocol in its requests, and therefore the Chamber should not authorise the redactions with respect to the three witnesses**

18. Under the “Protocol establishing a redaction regime in the case of *the Prosecutor v. Laurent Gbagbo*,”¹⁸ a request for authorisation of non-standard redactions will be subject to a case-by-case review after the receipt of an application justifying the requested redaction (‘application-based procedure’). The application-based procedure requires that the party seeking to apply redaction must submit an application with a “chart indicating the location of the redaction, its category and the justification.”¹⁹

19. In the instant case, the request for authorisation for redactions to documents related to the witnesses P-0316, P-0402, and P-0114 are all requests that are subject to the non-redaction application-based procedure.²⁰ Thus, the Defence should have been provided with a redacted version of the application and the chart, which indicates the location of the

¹⁵ ICC-02/11-01/11-737, para. 11 *citing* Katanga OA Judgment, ICC-01/04-01/07-475.

¹⁶ *See ibid citing* ICC-01/04-01/07-475, para. 97.

¹⁷ *Ibid*, para. 68.

¹⁸ ICC-02/11-01/11-737-AnxA

¹⁹ *Ibid*, para. 49.

²⁰ *See* ICC- 02/11-01/11-782-Red, para. 27; ICC-02/11-01/11-787, para. 1.

redaction, its category and justification. Neither the Defence of Mr. Blé Goudé nor the Defence of Mr. Gbagbo have received this chart.²¹

20. By not following the procedure outlined in the established in the Protocol, the Defence is deprived of information necessary to make submissions as to the prejudice that may stem from applying these redactions. A redacted version of the chart which includes the justification for each redaction and its category would give the Defence the necessary tools to assess the scope and the consequences of the redactions to the documents related to the three aforementioned witnesses. In order to mitigate this prejudice, the authorisation for the request for redactions should be rejected in its entirety or in the alternative until the Defence is provided with these charts.

b. The Prosecution has failed to satisfy its burden in proving that an objectively justifiable risk to the witnesses or innocent third party exists and can only be obviated by the redactions

21. For authorisation of a redaction under rule 81(4), the Prosecutor must show first that a danger exists, which constitutes an objectively justifiable risk to the safety of the person concerned, and that second the risk *arises* from disclosing that particular information to the defence.²² Therefore, the redaction must be necessary in order to reduce the risk.²³ In *the Prosecutor v. Katanga and Ngudjolo*, the Chamber found that there is a difference between disclosing the information to the public at large and to the defence, and therefore the Chamber should consider whether the danger can be obviated by disclosing the information confidentially to the parties.²⁴ Similarly, in another decision in *the Prosecutor v. Katanga and*

²¹See ICC-02/11-01/15-10Conf, para. 28; ICC-02/11-01/15-15Conf, para. 15.

²² ICC-01/04-01/07-475, para. 71.

²³ Ibid, para. 72.

²⁴ ICC-01/04-01/07-475, para. 71.

Ngudjolo,²⁵ the Court found that simply disclosing the redacted information to a certain number of persons in the OTP does not automatically put the persons at risk because the Prosecution must be assumed to be capable of keeping information confidential.²⁶

- i. No risk to witness P-0316 would be obviated by authorizing the redactions because the stated risks do not stem from their disclosure to the defence

22. In the instant case, the Prosecution filed additional observations in relation to its request for authorisation to maintain redactions to the following two documents related to P-0316:

- a. [REDACTED];
- b. [REDACTED].

23. The Prosecutor contended that the [REDACTED].²⁷ According to the Prosecution, the witness is [REDACTED].²⁸ The Prosecution held that the witness has [REDACTED].²⁹ The Prosecution claimed that the risk is objectively justifiable because [REDACTED].³⁰

24. [REDACTED] cannot be deemed an “objectively justifiable risk” that stems from disclosing the relevant information to the defence. Like in *Katanga*, the Chamber should distinguish between a risk that is created by disclosing information to the public at large and a risk that would be created by disclosing information to the Defence.

²⁵ ICC-01/04-01/07-3057.

²⁶ Ibid. 13.

²⁷ ICC-02/11-01/11-797-Conf-Red, para. 11.

²⁸ ICC-02/11-01/11-797-Conf-Red, para. 11.

²⁹ ICC-02/11-01/11-797-Conf-Red, para. 10.

³⁰ ICC-02/11-01/11-797-Conf-Red, para. 12.

25. In the instant case, the risk seems to exist regardless of whether the information is disclosed to the Defence, and therefore it cannot be deemed strictly necessary to authorise the redactions in order to reduce the risk [REDACTED]. To justify its request for redactions, the Prosecution gives [REDACTED].³¹ The [REDACTED] do not follow from the disclosure, the risk does not even [REDACTED]. The Prosecution fails to demonstrate why [REDACTED] warrant maintenance of redactions. It is difficult to see how [REDACTED].

26. In addition to the lack of nexus between the risk and the disclosure of the redacted information to the Defence, the Chamber, like the Court in *Katanga*, should consider the ethical obligations of the parties to not disclose confidential information. Defence counsel is bound by Article 8(4) of the Code of Professional Conduct for Counsel, which expressly forbids Counsel from revealing confidential information. Given the Prosecution's failure to satisfy its burden in proving the necessity of redactions in addition to the safeguard provided by the code of professional conduct, the Prosecution's request should be denied.

ii. No risk to witness P-0402 would be obviated by authorising the requested redactions because the stated risks do not stem from their disclosure to the defence

27. In relation to witness P-0402, the Prosecution requested to maintain redactions relevant to three documents that contain information that may identify [REDACTED].³²

³¹ ICC-02/11-01/11-797-Conf-Red, para. 12.

³² See ICC-02/11-01/11-761, para. 19.

28. In its request, the Prosecution made it impossible for the Defence to assess these “objective factors”, as the paragraph is incomprehensible as a result of all redactions. The first “objective factor” reads as follows:

“Firstly, [REDACTED]. As outlined in the witness’ statement, [REDACTED]. [REDACTED]. By virtue of [REDACTED], the witness [REDACTED] therefore find themselves particularly exposed and vulnerable should any persons wish to harm them as a result of the witness’ cooperation with the Court.”³³

29. The second reason for justifying the redactions stems from [REDACTED]. The witness’ surname has led pro-Gbagbo elements to target him in the past. The third [REDACTED] consideration enumerated by the Prosecution stems from [REDACTED].³⁴

30. The Defence maintains that it is not able to meaningfully make observations with regard to the first objective factor that [REDACTED]. The redactions make it impossible to ascertain the risk involved, and therefore the Court should find as it did in its 25 February 2015 decision, that such a redaction is not substantiated and “compromise[s] the Chamber’s ability to protect the safety of witnesses and victims and members of their families.”³⁵

31. The second and third [REDACTED] considerations upon which the Prosecution expounds do not constitute objectively justifiable risks that stem *specifically* from the possible disclosure of the redacted information to the Defence as required by the established case law of the Court. On the

³³ ICC-02/11-01/11-797-Conf-Red, para. 26.

³⁴ Ibid, para. 28.

³⁵ ICC-02/11-01/11-782-Red, para. 19

contrary, the [REDACTED]. This asserted risk will continue to exist regardless of whether the information is disclosed to the Defence. Moreover, the suggested risk could be obviated by simply disclosing it to the Defence, and making it confidential to the public at large. The Defence as mentioned above has an obligation to not disclose the information.

iii. No risk to witness P-0114 would be obviated by authorizing the requested redactions because the stated risks do not stem from their disclosure to the defence

32. The Prosecutor requested in relation to witness P-0114 non-standard redactions with respect to the witness statement [REDACTED].

33. Though P-0114 [REDACTED], the Prosecution maintains that there are tangible objective risks to [REDACTED].

34. The testimony of witness P-0114 is relevant [REDACTED].³⁶

35. Witness P-0114 allegedly encountered [REDACTED].³⁷ [REDACTED].³⁸ [REDACTED].³⁹ [REDACTED].⁴⁰

36. Here, like in the Prosecution's request for the redactions in relation to P-0316 and P-0402, the Prosecution has failed to substantiate how these objective risks to witness P-0114 [REDACTED] would stem from the disclosure of the redactions to the Defence. In fact, similar to witness P-0316, the alleged [REDACTED]. [REDACTED], they exist independently of any disclosure of the information to the Defence. Therefore, witness P-0114 [REDACTED] would continue to face such risks regardless of the

³⁶ ICC-02/11-01/11-787-Conf-Red, para. 8. [REDACTED]. See metadata to CIV-OTP-0003-0716.

³⁷ ICC-02/11-01/11-787-Conf-Red, para. 11

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ See ICC-02/11-01/11-787-Conf-Red, paras.14, 16..

disclosure to the Defence, and are thereby unnecessary. Lastly, the Defence refers to its aforementioned submissions regarding its obligations to not disclose confidential material.

- c. The Prosecution's request for maintaining and authorizing the non-standard redactions with respect to witness P-0316, P-0402 and P-0114 should be rejected because they would cause serious prejudice to the accused**

37. In the alternative, the Defence respectfully submits that the several criteria the Court uses to determine whether non-disclosure can be authorized demonstrate the exceptional nature of such authorisation. Non-disclosure can only be allowed if it is strictly necessary lest it unduly prejudice the Defence's ability to assess the reliability relevance, and validity of the evidence. Thus, every redaction impacts upon this ability, and the capability of the Defence to challenge it. Thus, the Presiding Judge in the instant case held in the *Gbagbo* case that contrary to recent contact information, "historical contact information...may be of assistance in the preparation of the defence case."⁴¹ The Defence submits that in the instant case the authorization of the redactions with respect to all three witnesses would prejudice the Defence's ability to confront the evidence against the Accused.

- i. The Defence has not received the latest redacted versions of the documents related to witness P-0316, and therefore it is unable to make adequate submissions in regards to the possible prejudice it would suffer as a result of non-disclosure*

38. In its requests, the Prosecution claimed that no prejudice would result in the Chamber authorizing the redactions to P-0316 because it had disclosed to the Defence of Mr. Gbagbo the identity of the witness.⁴² However, the

⁴¹ ICC-02/11-01/11-782-Red, para. 23.

⁴² ICC-02/11-01/11-797-Conf-Red, para. 19.

Prosecution has not provided the Defence of Mr. Blé Goudé with the most recent redacted version of the documents related to witness P-0316, and therefore his identity remains unknown for the purposes of these Defence observations.

39. The redactions as they stand constitute a great prejudice to the Defence given that they strip the Accused of his fundamental right to confront the witnesses against him. The Defence therefore kindly requests that the Chamber order the release of the most recent redacted versions of the two documents related to P-0316, namely [REDACTED], so that it can make observations in regards to the prejudice it may potentially incur as a result of authorising those most recent redactions.

40. Thus, the Defence requests an extension of time pursuant to regulation 35(2) of the Regulations of the Court. Regulation 35(2) requires that the parties seeking an extension of time after the time limit has lapsed must show that the reasons for not filing on time were outside their control. In the instant case, the Prosecutor did not disclose to the Defence the relevant necessary documents for it to make submissions on the prejudice the most recent redactions will cause Accused. This oversight was outside the Defence's control.

ii. The Defence would suffer prejudice if the information in relation to witness P-0402 were to remain redacted

41. In relation to the documents related to witness P-402, the Prosecution submitted that the Accused would face no prejudice as the identity and the identifying information of the witness has been revealed.⁴³ In its submissions dated 5 March 2015, the Prosecution redacted the reason for

⁴³Ibid, para. 31.

applying the redactions by stating that they are necessary “in order to protect the information of the witness, namely [REDACTED].”⁴⁴

42. By only having access to the redacted reasons for applying the redactions, the Defence is not able to engage in an adversarial debate. The Defence which is in the best position to defend the interests of the Accused, is incapable of rebutting the Prosecution’s assertions because it has not been given access to the necessary information. Thus, these redactions infringe on the Accused’s right to the equality of arms, and are thereby prejudicial.

43. While the reasons for the redactions are not available to the Defence, it is clear from reading the latest witness statement of P-0402, that they encompass [REDACTED].⁴⁵

44. Firstly, [REDACTED],⁴⁶ which this Court has acknowledged is important for the preparation of the Defence. More importantly, [REDACTED].⁴⁷ [REDACTED].

45. In relation to Blé Goudé, [REDACTED].⁴⁸

iii. The Defence will suffer prejudice if the information related to witness P-0114 were to be redacted

46. The Prosecution has requested non-standard redactions with regards to the documents related to witness P-0114, and once again its reasons for the redactions are themselves greatly redacted.⁴⁹ For example, the Prosecution

⁴⁴Ibid, para.22.

⁴⁵ICC-02/11-01/11-761, para. 19.

⁴⁶CIV-OTP-0068-0169, paras.11, 26.

⁴⁷CIV-OTP-0068-0169, paras. 53-54.

⁴⁸CIV-OTP-0068-0169, para. 37

⁴⁹ICC-02/11-01/11-787-Conf-Red, para. 18-19.

[REDACTED]. The Prosecution further submits that the Accused suffers no prejudice because [REDACTED]⁵⁰

47. Similar to the requests for redactions in relation to P-0402, the Defence again is not able to engage in an adversarial debate because the meaning of [REDACTED] is unclear. Moreover, the Prosecution submits that “the crux of the testimony of witness P-0114 is not in relation to events that [REDACTED].”⁵¹ Given this redaction, the Defence is unable to ascertain about which other events or circumstances this witness may potentially testify. This will greatly prejudice the Defence in its preparations because it will find it is unable to prepare for at least a portion of the witness’ testimony. Unlike mere current contact information, this information will be pertinent to Defence preparations.

V. Relief Requested

48. For the foregoing reasons, the defence respectfully requests the honourable Chamber to grant the following requests:

- a. Order the release of the latest redacted versions of the redacted documents related to witness P-0316, namely documents [REDACTED]
- b. Grant the Defence request for an extension time of one week after receipt of the latest redacted version⁵² to respond to the possible prejudice that the most recent redacted versions of the documents related to P-0316 would cause

⁵⁰ ICC-02/11-01/11-787-Conf-Red , para. 18

⁵¹ Ibid, para. 19.

⁵² See *infra* sub A.

- c. Reject both the Prosecution's request for the authorisation to maintain the redactions to documents related to P-0402, and the request for authorisation to apply non-standard redactions to documents related to P-0114



A handwritten signature in dark ink, appearing to read 'G.J.A. Knoops', is centered within a rectangular box. The signature is written in a cursive, flowing style.

Geert-Jan Alexander Knoops and Claver N'dry

Counsels for Charles Blé Goudé

Dated this 10 June 2015

at The Hague, the Netherlands