

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN CÔTE D'IVOIRE

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

Public Redacted Version

Reply to Defence responses ICC-02/11-01/15-98 and ICC-02/11-01/15-100

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

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I. PROCEDURAL BACKGROUND

1. On 15 December 2014, the Single Judge of Trial Chamber I (the “Single Judge”) adopted the redaction regime to be followed in the case of *The Prosecutor v. Laurent Gbagbo*, and set it out in a redaction protocol (the “Redaction Protocol”).¹

2. On 11 March 2015, Trial Chamber I (the “Chamber”) ordered the joinder of the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé*, deciding *inter alia* that all decisions and orders issued in both cases shall continue to apply, as appropriate and until ordered otherwise, in the joint case.²

3. Between 11 May and 3 June 2015, the Prosecution informed the Common Legal Representative of the eventual disclosure to the Defence teams of Mr. Gbagbo and Mr. Blé Goudé of the applications of 19 dual status individuals as material pursuant to rule 77 of the Rules of Procedure and Evidence, in compliance with the “Order setting the commencement date for trial” issued by the Chamber on 7 May 2015.³

4. On 8 June 2015, the Principal Counsel of the Office of Public Counsel for Victims, acting as Common Legal Representative of the victims admitted to participate in the proceedings (the “Common Legal Representative”),⁴ filed a request to maintain redactions to the identifying and contact information of the

¹ See the “Protocol establishing a redaction regime in the case of *The Prosecutor v. Laurent Gbagbo*” (Pre-Trial Chamber I), No. ICC-02/11-01/11-737-AnxA, 15 December 2014 (the “Redaction Protocol”).

² See the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” (Trial-Chamber I), No. ICC-02/11-01/15-1, 11 March 2015, paras. 68 and 74.

³ See the “Order setting the commencement date for trial” (Trial Chamber I), No. ICC-02/11-01/15-58, 07 May 2015, para. 22.

⁴ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, para. 61.

intermediaries mentioned in the applications of dual status individuals to be disclosed by the Prosecution (the “Request”).⁵

5. On the same date, the Prosecution disclosed to the Defence teams of Mr. Gbagbo and Mr. Blé Goudé 19 items pursuant to rule 77 of the Rules of Procedure and Evidence corresponding to the applications for participation of 19 dual status witnesses, with some redactions marked “B.3. LRV” pursuant to the Request.⁶

6. On 23 June 2015, the Prosecution responded to the Request (the “Prosecution Response”),⁷ submitting that the Prosecution was only the “disclosing party” in the most technical of senses and that it fell on the Common Legal Representative to provide justifications for the “B.3. LRV” redactions.⁸ On the same day, the Defence teams of Mr. Gbagbo and Mr. Blé Goudé filed their responses to the Request, opposing it (the “Responses”).⁹

7. On 24 June 2015, the Common Legal Representative requested leave to reply to three issues addressed in the Responses, namely (i) the alleged lack of impact of the disclosure of the intermediaries’ identities on the victims’ interests, (ii) the Common Legal Representative’s alleged lack of legal standing to request the maintenance of redactions in the current scenario, and (iii) the alleged limitations

⁵ See the “Request to maintain redactions to the identifying and contact information of the intermediaries mentioned in the applications of dual status individuals”, No. ICC-02/11-01/15-85, 08 June 2015 (the “Request”).

⁶ See the “Prosecution’s Communication of Evidence Disclosed to the Defence on 8 June 2015”, No. ICC-02/11-01/15-86, 09 June 2015 (dated 8 June 2015), paras. 1 and 3.

⁷ See the “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”, No. ICC-02/11-01/15-99, 23 June 2015 (the “Prosecution Response”).

⁸ *Idem*, para. 5.

⁹ See the “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”, No. ICC-02/11-01/15-98, 23 June 2015 (the “Gbagbo Response”); and the “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)”, No. ICC-02/11-01/15-100, 23 June 2015 (the “Blé Goudé Response”).

imposed on the Common Legal Representative by the Redaction Protocol (the “Reply Request”).¹⁰

8. On 25 June 2015, the Single Judge granted the Reply Request and set 26 June 2015 as the deadline for filing a reply (the “Decision on Reply Request”).¹¹

9. Pursuant to the Decision on Reply Request, the Common Legal Representative respectfully submits her reply to the Responses.

II. REPLY OF THE COMMON LEGAL REPRESENTATIVE

A. On the alleged lack of impact of the disclosure of the intermediaries’ identifying and contact information on the victims’ interests

10. The Common Legal Representative disagrees with the contention by the Defence of Mr. Gbagbo that the redactions applied by the Prosecution in the applications for participation of dual status individuals are of no interest to the Common Legal Representative, and that only the Prosecution may seize the Chamber if a doubt arises regarding the pertinence of particular redactions in this type of materials.¹²

11. The Common Legal Representative submits that victims authorised to participate in this case have a self-evident interest in any decision as to whether the identities of the intermediaries who helped them in filling in their applications for participation are disclosed to the Defence pursuant to rule 77 of the Rules of Procedure and Evidence.

¹⁰ See the “Application for leave to reply to Defence responses ICC-02/11-01/15-98 and ICC-02/11-01/15-100”, No. ICC-02/11-01/15-102, 25 June 2015 (dated 24 June 2015) (the “Reply Request”).

¹¹ See the e-mail from Trial Chamber I received on 25 June 2015 at 15:34 h (the “Decision on Reply Request”).

¹² See the *Gbagbo* Response, *supra* note 9, para. 25.

12. As reiterated in prior filings before the Chamber,¹³ the intermediaries in Côte d'Ivoire are limited in number and deal with large groups of victims. Only a small number of victims in said groups will be called to testify before the Court.¹⁴ In these circumstances, as advanced by the Registrar, disclosing to the Defence the identity and contact details of the intermediaries contained in the applications of dual status individuals may easily lead to the identification of other victims, who will not testify or appear during the trial.¹⁵

13. In this regard, Chambers have consistently held that victims may have a personal interest in remaining anonymous during the trial and that said interest may be protected.¹⁶ Taking into account the circumstances described above, said interest must be protected, *inter alia*, by not disclosing to the Defence the identity and contact details of the intermediaries contained in the applications for participation of the victims who will testify at trial.

¹³ See the "Registry's Observations on the 'Soumissions conjointes de la Représentante légale des victimes et de la Défense de M. Laurent Gbagbo portant sur certaines questions relatives à la participation des victimes au procès' (ICC-02/11-01/11-748)", No. ICC-02/11-01/11-757, 03 February 2015, para. 9; and the Request, *supra* note 5, paras. 43-44 and 53.

¹⁴ Cf. the transcript of the status conference held on 21 April 2015, No. ICC-02/11-01/15-T-1-CONF-ENG ET, p. 15, lines 19-20 ("[t]he Chamber has noted that the list of witnesses appended to your written submissions now contains a number of 120") (open session), and the Prosecution Response, *supra* note 7, para. 3 ("[t]he Prosecution disclosed 19 applications for participation under rule 77 to both the Gbagbo and Blé Goudé Defence teams").

¹⁵ See the "Registry's Observations on the 'Soumissions conjointes de la Représentante légale des victimes et de la Défense de M. Laurent Gbagbo portant sur certaines questions relatives à la participation des victimes au procès' (ICC-02/11-01/11-748)", *supra* note 13, para. 6.

¹⁶ See the "Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims" (Appeals Chamber), No. ICC-01/04-02/12-140 A, 23 September 2013, paras. 16-19. See also the "Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, paras. 130-131; the "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010, paras. 92-93; the "Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants" (Trial Chamber III), No. ICC-01/05-01/08-699, 22 February 2010, paras. 31-32; the "Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings" (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010, para. 69; and the "Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims" (Trial Chamber III), No. ICC-01/05-01/08-2027, 21 December 2011, paras. 19-20.

B. On the alleged lack of legal standing of the Common Legal Representative to request the maintenance of redactions in the current scenario

14. The Common Legal Representative disagrees with the contentions made by the Defence of Mr. Gbagbo and the Defence of Mr. Blé Goudé that she lacks standing before the Chamber to request the maintenance of redactions in order to protect the safety and well-being of the victims she represents in the current circumstances.

15. The Common Legal Representative wishes to clarify that she has filed her request to maintain redacted the identities and contact details of the intermediaries assisting dual status individuals because the Prosecution has eventually considered itself “[n]ot in a position to provide justifications for redactions to documents originating from the CLR [the applications for participation disclosed to the Defence]”,¹⁷ and has submitted that “[t]he current Redaction Protocol does not foresee such a situation, whereby redactions are effectively applied not by the Prosecution but by the CLR”.¹⁸ In fact, as far as the Common Legal Representative is aware, [REDACTED].¹⁹

16. Consequently, contrary to the Defence’s contentions, the Common Legal Representative neither attempts to replace the Prosecution in deciding the information to be redacted in the applications for participation disclosed to the Defence,²⁰ nor to infringe the Redaction Protocol adopted by the Chamber.²¹

17. The Common Legal Representative has only filed the Request because, in light of the Prosecutor’s perceived “inability” to apply redactions to the applications for participation pursuant to the Redaction Protocol, she feels compelled to protect her

¹⁷ See the Prosecution Response, *supra* note 7, para. 5.

¹⁸ *Idem*.

¹⁹ [REDACTED].

²⁰ See the *Gbagbo* Response, *supra* note 9, paras. 12, 14, 19 and 44; and the *Blé Goudé* Response, *supra* note 9, paras. 24-26 and 43.

²¹ See the *Gbagbo* Response, *supra* note 9, paras. 26 and 44; and the *Blé Goudé* Response, *supra* note 9, para. 12 and 27.

clients' personal interests by requesting the justified redaction of the intermediaries' identities and contact details contained in said documents before this information is disclosed to the Defence. It is in this context that the Common Legal Representative has noted in the Request that the Court has recognized that legal representatives are often well placed to assess the security situation of their clients.²²

18. Moreover, the Common Legal Representative has filed the Request after noting that the Chamber has still not issued a decision on the mechanisms for the exchange of information on individuals with dual status, discussed by the parties and the Common Legal Representative in December 2014 and March-April 2015.²³ However, contrary to the implied contention by the Defence of Mr. Blé Goudé,²⁴ the lack of a protocol on this matter must not be seen as an obstacle for the consideration of the Request by the Chamber. In fact, the Common Legal Representative has already interacted with the parties in this case on issues related to the protection of dual status individuals,²⁵ and a practice has developed in other cases where a protocol has been adopted for this purpose.²⁶

19. Similarly, the lack of an express provision for this purpose in the Redaction Protocol cannot prevent the Chamber from considering the Request. In this regard, it has been repeatedly stated that where the law does not expressly provide for a legal

²² See the Request, *supra* note 5, para. 15.

²³ See the "Order setting deadlines for submissions on certain pending matters" (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-7, 17 March 2015. See also the transcript of the status conference held on 21 April 2015, No. ICC-02/11-01/15-T-1-CONF-ENG ET, p. 4, lines 18-20 (open session).

²⁴ See the *Blé Goudé* Response, *supra* note 9, para. 29.

²⁵ See the "Soumissions conjointes de la Représentante légale des victimes et de la Défense de M. Laurent Gbagbo portant sur certaines questions relatives à la participation des victimes au procès", No. ICC-02/11-01/11-748, 19 January 2015, paras. 9-12; and the "Joint request of the Common Legal Representative of victims and the Prosecution for an extension of time to file their submissions on the outstanding protocols", No. ICC-02/11-01/11-785-Red, 12 March 2015, para. 11.

²⁶ See the "Decision on certain practicalities regarding individuals who have the dual status of witness and victim" (Trial Chamber I), No. ICC-01/04-01/06-1379, 05 June 2008; the "Decision on a number of procedural issues raised by the Registry" (Trial Chamber II), No. ICC-01/04-01/07-1134, 14 May 2009, paras. 32-34; the "Decision on the supplementary protocol concerning the handling of confidential information concerning victims and contacts of a party with victims" (Trial Chamber V), No. ICC-01/09-01/11-472, 12 November 2012; and the "Decision adopting the Protocol on dual status witnesses and the Protocol on vulnerable witnesses" (Trial Chamber VI), No. ICC-01/04-02/06-464, 18 February 2015.

remedy but the issue raised by a participant is of actual relevance to the functions of a Chamber, said issue may be considered by the Chamber under the latter's power and duty to determine the boundaries of its own jurisdiction and competence ("*la compétence de la compétence*" or "*Kompetenz-Kompetenz*").²⁷

20. *A fortiori*, the Common Legal Representative contends, as indicated in her application,²⁸ that the issue raised in the Request – namely, the redaction of the identity and contact details of the intermediaries who assisted dual status individuals in filling in their applications for participation – falls within (i) the Chamber's duty to take appropriate measures to protect the safety and well-being of victims and witnesses under article 68(1) of the Rome Statute, and (ii) the Chamber's power to provide for the disclosure of documents or information not previously disclosed and for the protection of witnesses and victims, pursuant to article 64(3)(c) and (6)(e) of the Rome Statute. The ultimate goal must be to ensure that legitimate interests are duly protected by the Court.

21. Considering all the circumstances mentioned above, the Common Legal Representative submits that she has legal standing to seek the protection of the safety and well-being of her clients by requesting the maintenance of redactions in the applications for participation of dual status individuals disclosed to the Defence.

C. On the alleged limitations imposed on the Common Legal Representative by the Redaction Protocol

22. The Common Legal Representative disagrees with the contention made by the Defence of Mr. Gbagbo that the Redaction Protocol prevents the Common Legal Representative from making submissions on issues arising during the *inter partes*

²⁷ See the "Decision on the Prosecutor's Application that the Pre-Trial Chamber disregard as irrelevant the Submission filed by the Registry on 5 December 2005" (Pre-Trial Chamber II), No. ICC-02/04-01/05-147, 02 February 2007, paras. 22 and 24; and the "Decision on the admissibility of the case under article 19(1) of the Statute" (Pre-Trial Chamber II), No. ICC-02/04-01/05-377, 10 March 2009, paras. 45-46.

²⁸ See the Request, *supra* note 5, para. 10.

disclosure process that may affect the safety and well-being of her clients, be they witnesses or not.²⁹ Moreover, the Common Legal Representative disagrees with the contention made by the Defence of Mr. Blé Goudé that dual status individuals must be considered “primarily” as witnesses because of the Redaction Protocol.³⁰

23. The Common Legal Representative is fully aware that the Redaction Protocol places on the parties the responsibility for requesting authorization to redact and/or for directly redacting any evidentiary material subject to disclosure, including the applications for participation of dual status individuals.³¹ Accordingly, as indicated by the Prosecution,³² the Common Legal Representative has merely provided her views on the convenience of redacting certain information in the applications for participation of dual status individuals disclosed by the latter, in order to ensure the safety and well-being of her clients as victims authorized to participate in the proceedings. In order to facilitate the understanding of said views, the Common Legal Representative has provided her observations along the lines of the Redaction Protocol adopted by the Chamber.³³

24. In these circumstances, the Common Legal Representative strongly disagrees with the restrictive reading of the Redaction Protocol proposed by the Defence of both Accused, whereby the Common Legal Representative is prevented from making submissions on the impact of the Prosecution’s disclosure on her clients’ safety and well-being, unduly emphasizing their witness status.

25. Said reading of the Redaction Protocol is contrary to the deontological obligations of any counsel to defend the interests of his or her clients. More importantly, it contradicts the obligation arising from the Rome Statute for all parties and participants to take appropriate measures to ensure at all times the protection of

²⁹ See the *Gbagbo* Response, *supra* note 9, paras. 13 and 22.

³⁰ See the *Blé Goudé* Response, *supra* note 9, paras. 28 and 34.

³¹ The Common Legal Representative stresses that she was prevented from contributing to the elaboration of the Redaction Protocol. See the Request, *supra* note 5, para. 23.

³² See the Prosecution Response, *supra* note 7, para. 5.

³³ See the Request, *supra* note 5, paras. 12 and 16-17.

victims, be they witnesses or not. In other words, the obligation for the parties and the Common Legal Representative to ensure the protection of victims is not limited by the Redaction Protocol or by the fact that these individuals are also witnesses.

26. In this regard, the Court has repeatedly stated that the duty to protect victims and witnesses is at the core of the Rome Statute, stemming *inter alia* from article 68(1) thereof.³⁴ On this basis, although the Common Legal Representative submitted the Request “[i]n light of the Redaction Protocol”, she did so “pursuant to article 64(2) and (6)(e), as well as article 68(1) of the Rome Statute, and rule 81(4) of the Rules of Procedure and Evidence”.³⁵ It must be noted that none of these provisions prevents the Common Legal Representative from addressing the Chamber on issues affecting her clients – be they witnesses or not – that may arise during the disclosure of evidence by the Prosecution. In fact, the Common Legal Representative submits that said provisions expressly or impliedly call upon the parties and participants to raise before the Chamber any concern they may have about the safety and well-being of victims and witnesses.

27. Consequently, contrary to the Defence’s contentions, the Common Legal Representative is not limited by the Redaction Protocol when it comes to ensuring the safety and well-being of her clients, be they witnesses or not. The Common Legal Representative welcomes the Prosecution’s adoption of the same approach by

³⁴ See the “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007” (Appeals Chamber), No. ICC-01/04-556 OA4 OA5 OA6, 19 December 2008, para. 54 (“[v]ictims should be reminded that their protection and the sustenance of their interests is a recurring theme of the Statute”). See also the “Decision on victims’ participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 129; the “Corrigendum to 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” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-428-Corr, 25 April 2008, para. 27; the “Annex 2 of Decision issuing a confidential and a public redacted version of ‘Decision on disclosure issues, responsibilities for protective measures and other procedural matters’” (Trial Chamber I), No. ICC-01/04-01/06-1311-Anx2, 08 May 2008, para. 95; and the “Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants” (Trial Chamber III), No. ICC-01/05-01/08-699, 22 February 2010, paras. 24-26.

³⁵ See the Request, *supra* note 5, para. 10.

informing the Chamber that the Common Legal Representative is in a better position to provide a justification for the redactions in her clients' applications for participation.³⁶

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Trial Chamber to grant the Request.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 26th day of June of 2015

At The Hague, The Netherlands

³⁶ See the Prosecution Response, *supra* note 7, para. 5.