

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: *English*

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

Date: **14 December
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 Response to Prosecution request for an order giving effect to conditions of testimony for United Nations staff”, 24 September 2015, ICC-02/11-01/15-236-Conf

Source: Defence of Mr Charles Blé Goudé

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Eric MacDonald

Counsel for the Defence of Mr Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Counsel for the Defence of Mr Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Legal Representatives of the Victims

Ms. Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massidda
Mr. Enrique Carnero Rojo

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence of Mr Blé Goudé (“Defence”) hereby responds to the “Prosecution request for an order giving effect to conditions of testimony for United Nations staff”, filed on 3 September 2015 (“Prosecution Request”).¹
2. In its Request, the Office of the Prosecutor (“Prosecution”) requests Trial Chamber I (“Chamber”) to issue an order which would give effect to certain measures required by the United Nations as conditions for waiving the immunity from legal process of two United Nations staff – witnesses P-0414 and P-0428 – to the extent necessary to allow them to testify in the trial proceedings.
3. Pursuant to two letters from the Under-Secretary-General for Legal Affairs (the “Secretary-General”) to the Prosecution dated [REDACTED] and [REDACTED] 2015 respectively (the “Waivers”),² the Secretary-General waives the immunity from legal process in favour of both witnesses on the cumulative conditions that:
 - a. A UN representative be permitted to attend the hearing(s) at which both witnesses will provide their oral testimonies before the Chamber;
 - b. Such representative be permitted, [REDACTED], to consult with and be consulted by the relevant witness in the course of his/her testimony, and that he or she may be permitted to make submissions to the Chamber that P-0414 and P-428 not be required to answer a question or supply certain information if doing so would either:
 - i. Endanger the safety or security of [REDACTED], or
 - ii. Prejudice the security [REDACTED], or

¹ ICC-02/11-01/15-204.

² ICC-02/11-01/15-204-Conf-Anx2, p. 2; ICC-02/11-01/15-204-Conf-Anx4, p.2.

iii. Breach an obligation of confidentiality which it is incumbent upon (i) the United Nations [REDACTED], to respect.

4. Two further letters from the Secretary-General to the Prosecution dated [REDACTED] and [REDACTED] 2015 (“Cover Letters”)³ contain additional restrictions, [REDACTED]. These restrictions, if [REDACTED], would also have a major impact on the possibility for the Defence to [REDACTED].
5. The Defence opposes the Prosecution Request in part in so far as certain conditions demanded by the United Nations impact upon Mr Blé Goudé’s rights to a fair trial and the truth finding nature of ICC-proceedings. Additionally, the Defence submits that [REDACTED].

II. Confidentiality

6. Pursuant to regulation 23*bis* (2) of the Regulations of the Court, the Defence requests that the present response be received and marked as “confidential”, as it refers to the confidential annexes to the Prosecution Request.

III. Submissions and analysis

III.1. The question of the assistance at trial of a United Nations representative

7. The Defence notes that article 16(2) of the “Negotiated Draft Relationship Agreement between the International Criminal Court and the United Nations” adopted on 7 September 2004 (“Relationship Agreement”)⁴ provides for the possibility for an official of the United Nations who appears as a witness before the Court, to be assisted by a representative of the United Nations. Now that certain Pre-Trial and Trial Chambers have previously authorised the presence of a representative of the United Nations in the court

³ ICC-02/11-01/15-204-Conf-Anx1; ICC-02/11-01/15-204-Conf-Anx3.

⁴ Resolution ICC-ASP/3/Res.1.

room during the testimony of an official of the organisation,⁵ the Defence does not raise “an objection” to the presence of a representative of the United Nations in the court room during the testimonies of Witnesses P-0414 and P-0428.

8. However, the “assistance” to be provided from such a representative in the course of a testimony, which scope and feasibility in practice are very unclear, cannot but negatively affect the fair conduct of the proceedings and must therefore be subject to strict safeguards.
9. Based on the Waivers, the purpose of the Secretary-General’s decision to waive the immunity from legal process enjoyed by both witnesses is to allow them [REDACTED].⁶ If the United Nations representative is permitted to [REDACTED], the truth finding nature of the ICC proceedings will be infringed. Such a mechanism would equate to giving said representative the right to disrupt the relevant testimonies in order to coach the relevant witness. The potential instrument for the Chamber, as a safeguard measure, to not allow such ‘UN’ intervention without prior leave of the Chamber would not alter that fact. It would be unacceptable to allow private discussions to take place in the course of the testimony, and ultimately decisions to be made between a UN representative and UN official, while the latter is already on the witness stand, as to the best way to answer a specific question.
10. Furthermore, the recent directions on the conduct of proceedings in the present case adopted by the Chamber do not allow for witnesses on the stand to consult with the calling party or being able to consult with a third person.⁷ Although the United Nations representative is not a calling party, there is no

⁵ Trial Chamber II, “Decision on the Prosecution’s Application to Add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537)”, dated 3 November 2009, ICC-01/04-01/07-1590; Pre-Trial Chamber I, Transcript of 15 November 2006, ICC-01/04-01/06-T-37-ENG (ET WT).

⁶ ICC-02/11-01/15-204-Conf-Anx2, page 2; ICC-02/11-01/15-204-Conf-Anx4, page 2.

⁷ Trial Chamber I, “Directions on the conduct of the proceedings”, dated 3 September 2015, ICC-02/11-01/15-205 (“Conduct of Proceedings Directions”).

reason to allow *any* witness consultation while the witness is on the stand and the Prosecution has failed to justify the Secretary-General's request in this respect.

11. The Defence therefore submits that the United Nations representative should under no circumstances be allowed to communicate directly with the witnesses in question once he/she is testifying in the court room. Hence, the Defence prays the Chamber to deny the Prosecution Request to give effect to that specific condition required by the United Nations.
12. Moreover, in the Waivers, the Secretary-General conditions his decision to waive the immunity enjoyed by Witnesses P-0414 and P-0428 upon his representative being permitted to make submissions to the Chamber on the questions that may be asked to both witnesses. In particular, the Secretary-General requests that his representative be allowed to make submissions to the Chamber in order to have the witness not to answer a question or to supply certain information if answering a question would either: (i) endanger the safety or security of [REDACTED]; (ii) prejudice the security [REDACTED]; or (iii) breach an obligation of confidentiality which it is incumbent upon the United Nations [REDACTED] to respect.⁸
13. The Defence also opposes the United Nations representative being permitted to make submissions to the Chamber [REDACTED], since the Chamber is competent to make such assessments during the trial and since such submissions might be prejudicial to the rights of the Accused and might also affect the truth finding process. It should be reminded that the United Nations is not a party or participant to the proceedings and therefore should not have a privileged position in the case.

III.2. The impossibility to [REDACTED]

⁸ ICC-02/11-01/15-204-Conf-Anx2, page 2; ICC-02/11-01/15-204-Conf-Anx4, page 2.

14. In any event, the Defence refutes the additional conditions contained in the Cover Letters, where the Secretary General intends to impose on the trial even more restrictive measures, expressing his understanding that:

- [REDACTED]:
 - i. [REDACTED];
 - ii. [REDACTED];
 - iii. [REDACTED];
 - iv. [REDACTED].
- In conducting the examination and any re-examination of Witnesses P-0414 and P-0428, [REDACTED].

15. As a preliminary comment, the Defence observes that these additional “understandings” are not included in the Waivers and therefore do not form part of the Secretary-General’s conditions, the non-satisfaction of which would call into question the willingness of the United Nations to waive the immunity from legal process of Witnesses P-0414 and P-0428. The further restrictions contained in the Cover Letters should therefore not be considered as binding [REDACTED].

16. First, the Defence finds it highly unreasonable for the Secretary General to require [REDACTED] in so far as:

- a. certain terms of the above conditions, such as [REDACTED], are even broader than the terms of the Waivers, arbitrary in terms of being

extremely subjective, and fall beyond the ambit of “confidential information” within the meaning of Article 64(6)(c) of the Rome Statute. Therefore, the Prosecution’s and Chamber’s compliance with these further restrictions would adversely impact the total conduct of the proceedings in that [REDACTED];

- b. the parties and participants themselves are bound by a confidentiality obligation. Therefore restricting [REDACTED], contravenes the nature of ICC proceedings;
- c. it would be prejudicial to or inconsistent with the rights of the Accused and a fair and impartial trial to [REDACTED]. Also, the Secretary-General provides no compelling reasons for such a restriction [REDACTED].

17. Secondly, these conditions are likely to result in information known to the relevant witnesses and relevant to the case being [REDACTED]. The fact that [REDACTED] will prevent the Defence from [REDACTED].

18. Similarly, the Defence will be prevented from having access to [REDACTED]. Ultimately, this will adversely impact the truth finding process. It runs contrary to paragraph 33 of the Conduct of Proceedings Directions adopted by the Chamber which requires all questioning to “contribute to the ascertainment of the truth”.

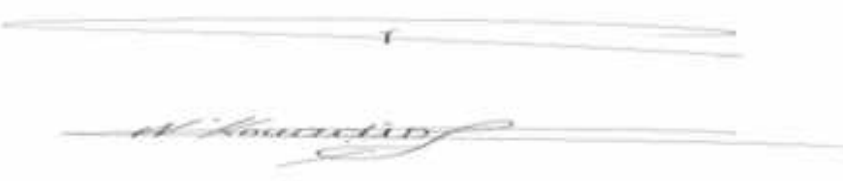
19. Consequently, the Defence respectfully requests the Chamber to hold that the Under-Secretary-General’s understanding expressed in the Cover Letters are not binding to the proceedings.

RELIEF SOUGHT

For the foregoing reasons, the Defence respectfully prays the honourable Chamber to:

DENY the Prosecution Request in part, in that it would allow the representative to [REDACTED]; and to being permitted to make submissions to the Chamber during the testimony;

HOLD that the Secretary-General's understandings expressed in the Cover Letters are not binding.

A handwritten signature in dark ink, appearing to read 'Mr. Knoop', is centered within a rectangular box. The signature is written in a cursive style with a horizontal line extending to the right.

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

Dated this
14 December 2015
At The Hague, the Netherlands