

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 18 May 2018

TRIAL CHAMBER I

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

SITUATION IN COTE D'IVOIRE

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

Public

Public Redacted Version of “Blé Goudé Defence Response to “Prosecution’s application for protective measures for Witness P-0428” (ICC-02/11-01/15- 1117-Conf)”, 12 February 2018, ICC-02/11-01/15-1129-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. The Defence of Mr Blé Goudé (the “Defence”) files the present response (the “Response”) to the Prosecution’s application for protective measures for Witness P-0428 dated 1 February 2018 (the “Application”).¹
2. The Office of the Prosecutor (the “Prosecution”) requests the Chamber to grant protective measures to Witness P-0428 as follows: (i) that certain redactions to Witness P-0428’s submitted written statement as detailed in Annex A, be applied in the event that it is publicized; (ii) that parties and participants to the proceedings be prohibited from disclosing Witness P-0428’s identifying to a third party in accordance with rule 87(3)(b) of the Rules; (iii) that the Witness’s pseudonym is used, in lieu of the Witness’s name in accordance with the rule 87(3)(d) of the Rules.²
3. In its Application, the Prosecution argues but fails to substantiate that the requested measures are necessary in light of an objectively justifiable risk.
4. The Defence opposes the Application for the reasons developed below.

II. Confidentiality

5. Pursuant to regulation 23*bis* (2) of the Regulations of the Court, the Defence files the Response as “confidential” as it responds to the Application and its annexes which have been classified as confidential.

III. Procedural history

6. On 15 October 2015, the Prosecution filed the list of the first 20 witnesses it intends to call at trial, including P-0428.³

¹ICC-02/11-01/15- 1117-Conf, together with its confidential Annexes A and B.

²Application, para. 2.

³ ICC-02/11-01/15-294.

7. On 4 May 2016, the Chamber issued its “Decision adopting amended and supplemented directions on the conduct of the proceedings” (“Directions”), which included specific directions to applicants seeking in-court protective measures.⁴
8. On 1 February 2018, the Prosecution filed the Application.⁵

IV. Applicable Law

9. Articles 64(7) and 67(1) of the Rome Statute (the “Statute”) establish the right to a public hearing and therefore a presumption in favor of public proceedings. The public character of the proceedings is considered by the texts as well as the established jurisprudence of the Court as a fundamental right of the Defence.⁶
10. Regulation 20(1) of the Regulations also provides that:

“All hearings shall be held in public [...]”
11. While certain matters may be addressed confidentially to protect, *inter alia*, “confidential or sensitive information” or the “safety and well-being of witnesses”, requests for confidential treatment must be appropriately justified.⁷
12. Articles 68(1) and (2) of the Statute allow the Court to depart from the public character of the proceedings and include special protective measures such as the use of a pseudonym by a witness as well as the prohibition for all the participants in the proceedings from disclosing information to a third party.

⁴ Annex A to “Decision adopting amended and supplemented directions on the conduct of the proceedings (including Separate Opinion of Judge Henderson)”, dated 4 May 2016, ICC-02/11-01/15-498-AnxA, paras 55-58.

⁵ Application.

⁶ *Prosecutor v. Katanga and Ngudjolo Chui*, “Order on protective measures for certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence)”, ICC-01/04-01/07-1667-Red-tENG, para. 9. *See* Article 67 of the Statute.

⁷ *Prosecutor v. Bemba*, “Public Redacted Version of the Chamber’s 11 November 2011 Decision regarding the prosecution’s witness schedule”, ICC-01/05-01/08-1904, para. 18.

However, the use of such measures cannot detract from the fairness of the proceedings,⁸ and they are granted on an exceptional basis. As highlighted by Trial Chamber V(A) in the *Ruto and Sang* case, “applications for protective measures should not be ‘routinely made in the expectation that they will be routinely granted’”.⁹ Granting such protective measures involves a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused.¹⁰ Accordingly, it is considered that “such case-by-case evaluation will involve a particularised analysis of the risk with respect to each witness” (emphasis added).¹¹

V. Submissions

V.1. Preliminary observations

13. The Directions provide, at paragraph 57:

“[t]he parties are instructed to [...] confidentially notify the Chamber, parties and participants of the protective measures sought and the favourable VWU assessment sufficiently in advance of the moment when the protective measures need to be implemented, also with a view to allowing the non-requesting party to submit observations of a case-specific nature whenever appropriate pursuant to Rule 87(2)(d).”¹²

⁸ *Prosecutor v. Lubanga*, “Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses”, ICC-01/04-01/06-1603, para. 17.

⁹ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on ‘Prosecution’s First Request for In-Court Protective Measures for Trial Witnesses’”, ICC-01/09-01/11-902-Red2, para.11, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 24 March 2009, ICC-01/04-01/06-T-153-Red2-ENG, page 63, lines 15 – 17 (actually referring to lines 19-21).

¹⁰ Trial Chamber V(A), *Prosecutor v. Ruto and Sang*, “Second redaction of: Decision on ‘Prosecution's First Request for In-Court Protective Measures for Trial Witnesses’”, dated 11 September 2013, ICC-01/09-01/11-902-Red2, para. 13; Trial Chamber II, *The Prosecutor v. German Katanga and Mathieu Ngudjolo Chui*, Public redacted version of ‘Order on protective measures for certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence)’, 9 December 2009, ICC-01/04-01/07-1667-Red-tENG, paras 8-9.

¹¹ Ntaganda Decision, para. 6.

¹² Emphasis added.

14. Similarly, at paragraph 55:

“Any applications for in-court protective measures, including those made pursuant to Rules 87 and 88 of the Rules, shall be made as soon as possible so as to allow the Victims and Witnesses Unit (“VWU”) to fulfil its mandate.”¹³

15. Given that Witness P-0428 has been on the list of the first 20 witnesses since 15 October 2015, the Prosecution’s late approach is unjustified and detrimental to the rights of the Accused.

V.2. The Prosecution does not identify an objectively justifiable risk

16. In its application, the Prosecution submits one principal reason as to why the present circumstances constitute an alleged risk to Witness P-0428’s safety and why the aforementioned protective measures are therefore necessary. The Prosecution expresses security concerns resulting from the personal circumstances of Witness P-0428, particularly due to [REDACTED].¹⁴

17. Under rule 87 of the Rules it is incumbent for a party seeking protective measures to demonstrate whether the measures sought are necessary in light of an objectively justifiable risk.¹⁵

18. The Chamber already confirmed this stance with respect to an equivalent application in its oral decision dated 19 September 2016. On the 29 August 2016, the Prosecution raised in its application similar arguments to request protective measures for Witness P-0414.¹⁶ The Prosecution claimed that Witness P-0414 was facing security concerns due to [REDACTED].¹⁷

¹³ Emphasis added.

¹⁴ [REDACTED].

¹⁵ ICC, *Prosecutor v. Ongwen*, Decision on the Prosecution’s Application for In-Court Protective and Special Measures, 29 November 2016, ICC-02/04-01/15-612-Red, para.8.

¹⁶ [REDACTED].

¹⁷ [REDACTED].

19. In its oral decision the Chamber rejected the Prosecution's request confirming that "generic references are inadequate to substantiate a risk suitable to trigger the application of Rule 87 of the Rules".¹⁸ More specifically, the Chamber stated that "as regard the personal circumstances of the witness the Chamber takes the view that all of the elements referred to are of a speculative and hypothetical nature as such also unsuitable to warrant the application of Rule 87."¹⁹
20. Moreover, the international criminal jurisprudence also recognized that the threat to witness made at the time of the conflict does not justify protective measures for testimony many years later.²⁰
21. In the Application, the Prosecution does not sufficiently substantiate how P-0428 is facing an objective and precisely identified risk on the basis of her personal circumstances.
22. With respect to Witness P-0428's previous position the Prosecution fails to demonstrate how [REDACTED], could constitute at present an objectively justifiable risk.²¹ The events described by the Prosecution in its Application need to be contextualized. The [REDACTED] to which the Prosecutor is referring in the Application occurred several years ago during the post electoral crisis context and are irrelevant to appreciate a current objectively justifiable risk.
23. The facts related by Witness P-0428 to the investigators concerning the alleged [REDACTED], took place during the months of [REDACTED]. This does not appear as a relevant argument to appreciate the present objectively justifiable risk.

¹⁸ ICC-02/10-01/15-T-74-Conf, p.3, l.2-4.

¹⁹ ICC-02/10-01/15-T-74-Conf, p.3, l.5-7.

²⁰ ICTY, *Prosecutor v. Karadzic*, No. IT-95-5/18-T, Decision on Accused's Motion for Protective Measures for Witness KW007, 19 December 2012, para. 6

²¹ Application, paras.8-12.

24. Besides, and with regards to Witness P-0428's [REDACTED], the Prosecution fails to demonstrate how the public disclosure of her collaboration with the Prosecution would affect her ability to continue [REDACTED].²²

25. The Prosecution emphasized the fact that the Witness became the target of a threat [REDACTED] during the post electoral crisis in Côte d'Ivoire.²³ At present, Witness P-0428 is [REDACTED].²⁴ Her [REDACTED]; therefore, she no longer appears as a potential target of any potential or real threat. The Prosecution argument is therefore obsolete.

26. For the forgoing reasons, the Defence is of the view that the Prosecution does not sufficiently substantiate how P-0428 is facing an objective and precisely identified risk on the basis of her personal circumstances and therefore the Chamber should dismiss the Prosecution's Application.

V.3. The Prosecution fails to prove that the requested measures are proportionate to the rights of the Accused

27. It is also incumbent for the Prosecution to demonstrate that the protective measures are proportionate to the rights of the Accused.

28. As outlined by the Prosecution, evidence provided by witness P-0428 has already been submitted on the record of the case pursuant to rule 68(2)(b).²⁵ Authorizing the Prosecution to introduce the previous recorded testimony without giving the opportunity to the Defense to cross-examine the witness is already affecting the rights of the Accused.

²² Application para.13.

²³ Application para.10.

²⁴ Application para.11.

²⁵ Application para.2.

29. Besides, the public character of the hearing constitutes a fundamental guarantee of the fairness of the trial for the accused. In other words, fair trial-related concerns militate against the identity of witnesses being shielded from the public. Furthermore if the public is unable to access key information pertaining to the testimony of a relevant witness, such as his/her identity or his/her exact role during the crisis, the possibility for the public to fully understand the content of the testimony and the chain of events described will be greatly affected. This will also prevent persons involved in the events to identify inaccurate information given during testimonies.

30. The Defence's knowledge of P-0428's identity should not be systematically used by the Prosecution and perceived as guarantee to the proportionality of the protective measures sought.²⁶ Depending on the circumstances, these alleged safeguards may not always mitigate the prejudice to the Accused resulting from the authorisation of the protective measures requested.

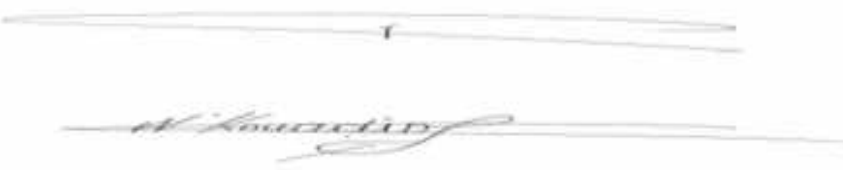
31. Hence, the Defence's view is that the requested measures, if granted, would not be proportionate to the rights of the Accused to a public and fair trial.

RELIEF SOUGHT

32. In light of the foregoing, the Defence respectfully requests the Chamber to **DENY** the Prosecution's Application.

Respectfully submitted,

²⁶ See Application, para 3 and 14.



A handwritten signature in dark ink, appearing to read 'Kooijmans', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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

Dated this

18 May 2018

At The Hague, the Netherlands