



Original: **English**

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

Date: 5 July 2018

TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ***

Public

Decision on Mr Gbagbo's Request for lifting of redactions and reclassification of documents in the record (confidential filing no. 1173) and related orders

Decision 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 Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Legal Representatives of Victims

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Pieter Vanaverbeke

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Articles 64(2), 64(6), 67 and 68 of the Rome Statute (“Statute”), Rules 76, 77, 81, 82, 84, 87 and 88 of the Rules of Procedure and Evidence (“Rules”) and Regulations 23bis and 42 of the Regulations of the Court (“Regulations”), issues this decision on the “*Requête aux fins de levée de mesures de protection, de levée d’expurgations et de reclassification de pièces, documents et transcrits, nécessaires à la préparation et à la bonne conduite des enquêtes*” submitted by the Defence for Mr Gbagbo on 1 June 2018 (“Defence Request”).¹

Procedural history

1. On 1 June 2018 the Defence for Mr Gbagbo submitted its Request, petitioning the Chamber to adopt a number of measures aimed at allowing it to openly make reference to Prosecutor witnesses’ testimonies and statements, as well as to documents submitted and/or disclosed by the Prosecutor, in the context and for the purposes of the conduct of its investigations. More specifically, the Defence for Mr Gbagbo requests the Chamber:

- (i) to review the protective measures granted to Prosecutor’s witnesses, both those having testified entirely *viva voce* and those whose statements have been admitted under Rule 68(3) of the Rules, with a view to determining whether those measures are still warranted and, in the negative, to revoke them (“First Request”);
- (ii) to order the Registry to make public redacted versions of all transcripts still classified as confidential available to all parties and participants (“Second Request”);

¹ ICC-02/11-01/15-1173-Conf.

- (iii) to reclassify as public the statements admitted under Rule 68(2)(b) and Rule 68(3) for those witnesses who were not granted protective measures and to order the Prosecutor to propose public redacted versions of statements of witnesses for whom protective measures are still warranted ("Third Request") ;
- (iv) to order the Prosecutor to review all the documents classified as confidential, with a view to determining whether they can be reclassified as public (including in respect of information relating to the chain of custody) and, in the negative, to propose a public redacted version ("Fourth Request");
- (v) to order the Prosecutor to review all the redactions applied to material disclosed to the Defence, with a view to lifting them if they are no longer warranted ("Fifth Request").

2. On 13 June 2018 the Prosecutor² and the LRV³ responded, both requesting that the Request be only granted in part.

3. The Prosecutor agrees that the statements submitted under Rule 68(2) and 68(3) of the Rules for witnesses not having benefited from protective measures should be reclassified as public (subject to a limited amount of standard redactions in accordance with the relevant Protocol) and committed to review two specific groups of items of evidence submitted.

4. The LRV submits that the Defence Request should be rejected in so far as it refers to the reclassification as public of the testimony given by dual-status Witnesses P-0350, P-0404, P-0407, P-0442, P-0513, P-0547, P-0579 and that only prior statements admitted under Rule 68(3) of those dual-status witnesses who testified in public session without protective measures (i.e., Witnesses P-0555 and P-0582) could be reclassified as public. The LRV also requests to be consulted in the event that the

² ICC-02/11-01/15-1185-Conf.

³ ICC-02/11-01/15-1183-Conf.

Chamber were to decide that the testimonies and prior statements of dual-status witnesses having been granted protective measures be made public in redacted form.

5. The Defence for Mr Blé Goudé did not file a response.

Determinations by the Chamber

6. The Defence Request is aimed at obtaining from the Chamber orders and measures implementing the principle of the publicity of the proceedings. The Defence for Mr Gbagbo submits that, with a view to being able to effectively and efficiently prepare and conduct their investigations, it is necessary that all the exceptions to the principle still existing on items and elements included in the record as confidential or redacted be reviewed and redactions lifted, unless the Prosecutor can show that their maintenance is required because of “*une raison impérieuse*”. In its view, the restrictive procedures adopted by the Chamber in respect of the use of confidential information in the course of investigations⁴ would result in the Defence being prevented from adequately testing the reliability of testimonies given by witnesses benefitting from protective measures.

7. Since the early stages of this trial,⁵ the Chamber has held that the paramount principles of the publicity and transparency of the proceedings require that any restriction to those principles must be viewed as an exception and therefore strictly limited to what is necessary to safeguard other interests also protected under the Statute. The Chamber agrees that effectiveness of investigations is one of the interests served by the principle. Accordingly, disclosable material should be served in full, redactions need to be justified and authorised under the provisions of the

⁴ “Protocol on disclosure of the identity of witnesses of other parties and of the LRV in the course of investigations, use of confidential information by the parties and the LRV in the course of investigations, inadvertent disclosure and contacts between a party and witnesses not being called by that party” (ICC-02/11-02/15-200-Anx, “Protocol”).

⁵ ICC-02/11-01/11-737 and annexes.

Statute, and the disclosing party is required to review and lift redactions applied should circumstances change. This principle has been reiterated and clarified in light of various circumstances having arisen at various stages of these proceedings: in particular, the Chamber recalls the Appeals Chamber's finding to the effect that "given the paramount need to ensure full disclosure, the Trial Chamber itself, with the assistance of the Prosecutor, should keep such matters under review and a decision on redactions may be amended at a later date if circumstances change" and that, while the Defence should be given an opportunity to make submissions, it has no burden to meet in that regard.⁶ The Defence Request will be assessed and determined in light of those principles and guidelines.

On the First Request

8. Pursuant to Regulation 43 of the Regulations, the variation of an existing protective measure requires from the Chamber to obtain all relevant information as well as, to the extent that it is possible, the consent of the person in respect of whom the application to rescind or vary the protective measure has been made. The Chamber notes that the determination to grant protective measures in these proceedings, including the determination to have some of the testimonies entirely heard *in camera*, has always been made in light of the professional security assessment submitted by the VWU and that this professional assessment has also always taken into account the views of the person for whom the protective measures had been requested.

9. The Chamber agrees that it is appropriate to review the existing protective measures in light of updated information on the current situation of each witness and of any relevant developments which might have occurred since the time of the granting of the measure. For this reason, the VWU is directed to submit to the Chamber updated security assessments of all witnesses for whom protective

⁶ ICC-02/11-02/15-915-Red, para. 62.

measures have been granted. However, at this stage of the proceedings, the Chamber considers that this information is not urgent for the preparation of the Defence.

10. The Chamber takes the view that the Protocol provides the Defence with a tool allowing them to use confidential information in the context of their investigations, subject only to the adoption of a number of precautionary measures. These measures had been prescribed as a result of a careful consideration of the need to appropriately balance all relevant interests, including the principle of the publicity of the proceedings and the ability of the defence to conduct meaningful investigations, and assessed as reasonable and justified. The Chamber considers that is still the case and sees no reason to depart from that assessment; accordingly, the Defence is directed to comply with the relevant provisions of the Protocol.

On the Second Request

11. The Chamber notes that, at the time of the Request, only fourteen transcripts were not available in public redacted form. Since then, the Registry has indicated⁷ that all the public redacted versions of the transcripts have been notified and are available to the Chamber, the parties and participants. Accordingly, the Second Request is moot.

On the Third Request

12. Both the Prosecutor and the LRV agree that the statements submitted under Rules 68(2)(b) and 68(3) of the Rules of witnesses not having been granted protective measures be reclassified as public, subject to a limited number of standard redactions.

13. The Chamber agrees, grants the Third Request and orders the Prosecutor to prepare and file in the record of the case public redacted versions of the relevant statements.

⁷ Email by the Court Officer to the Chamber, parties and participants on 4 July 2018 at 12:50 hours.

On the Fourth and the Fifth Request

14. Both the Fourth and the Fifth Request are aimed at having the Chamber order the Prosecutor to undertake a systematic review of both the documents in the record and the material disclosed to the Defence currently classified as confidential and to either reclassify them as public or to provide public redacted versions, as well as to assess whether existing redactions continue to be necessary. In light of their object, it is appropriate to consider the Fourth and the Fifth Request jointly.

15. The Chamber notes the statement of the Prosecutor to the effect that she has been and still continues to review the case file, with a view to determining whether it is possible to reclassify confidential documents as public and if redactions adopted at an earlier stage of the proceedings are still justified in light of subsequent developments.

16. The information available to the Chamber (in particular, the Prosecutor's notices of disclosure periodically filed into the record of the case, the latest dated 3 July 2018⁸) confirm that the Prosecutor has been and still is indeed engaged in an ongoing process of review and that lesser redacted versions of documents have been and continue to be disclosed to the Defence. The Chamber agrees with the Prosecutor that the amount of documents included in the record and/or disclosed in this case make it necessary to establish priorities with a view to identifying the order in which documents still classified as confidential or only available in redacted form will be subject to this review and that a sweeping order to the Prosecutor is not the appropriate way to proceed. With a view to ensuring that documents considered of immediate importance by the Defence are reviewed on a priority basis, the Chamber directs the Defence to indicate to the Prosecutor for which documents, or sets and categories of documents, they consider it important that the review be undertaken and completed on a priority basis, and the Prosecutor to comply with these

⁸ For those notified in 2018, see: ICC-02/11-01/15-1096; ICC-02/11-01/15-1118; ICC-02/11-01/15-1135; ICC-02/11-01/15-1160; ICC-02/11-01/15-1171; ICC-02/11-01/15-1193.

indications in determining the order in which the review is carried out. The Chamber trusts that this system will allow the parties to achieve the ultimate goal – ie, to limit redactions on the materials in the case record to those which are strictly necessary, in accordance with the relevant principles and guidelines established since the early days of these proceedings.

17. Finally, the Chamber notes that the Fifth Request also refers to documents collected by the Prosecutor in the context of another investigation, the so-called “CIV2”, which have been disclosed to the Defence in redacted form. The Chamber recalls its “Decision on Prosecution application for non-standard redactions to material related to another and ongoing investigation in the Côte d’Ivoire situation” dated 1 February 2018,⁹ pointing out that “it is incumbent upon the Prosecutor to properly substantiate the need for redactions” and stressing the failure by the Prosecutor to do so in respect of the material referred to in that application. The Chamber notes that no application for redactions to “CIV2” material has been submitted by the Prosecutor since the 1 February 2018 Decision and that any forthcoming application will be decided in accordance with the Protocol and the 1 February 2018 Decision.

FOR THE FOREGOING REASONS, THE CHAMBER, HEREBY

GRANTS Mr Gbagbo’s First Request and, accordingly, **ORDERS** the VWU to submit updated security assessments for Witnesses P-0097, P-0109, P-0114, P-0117, P-0185, P-0190, P-0238, P-0321, P-0350, P-0404, P-0407, P-0441, P-0442, P-0501, P-0513, P-0520, P-0536, P-0547, P-0554, P-0579, P-0607;

DIRECTS the Defence for Mr Gbagbo to comply with the Protocol governing the use of confidential information in the context of their investigations;

⁹ ICC-02/11-02/15-1109-Red.

NOTES that public redacted versions of transcripts in the case still classified as confidential at the time of the request (T-206, T-207, T-208, T-209, T-210, T-211, T-212, T-213, T-214, T-215, T-216, T-217, T-218, T-220) have been in the meantime finalised by the Registry and made available to the Chamber, parties and participants and, accordingly, **DISMISSES** Mr Gbagbo's Second Request as moot;

GRANTS Mr Gbagbo's Third Request and, accordingly, **ORDERS** the Prosecutor to prepare and submit into the record of the case on an expedited basis public redacted versions of the statements of those witnesses admitted under Rules 68(2) and 68(3) of the Rules who were not granted protective measures;

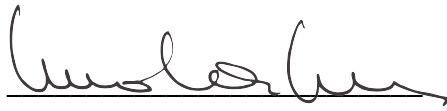
PARTIALLY GRANTS Mr Gbagbo's Fourth and Fifth Request and, accordingly, **ORDERS** the Prosecutor to continue with her ongoing review all the documents submitted in the record of the case and/or disclosed to the Defence currently classified as confidential or redacted, with a view to indicating which of those documents can be reclassified as public and to providing public redacted version where appropriate;

ORDERS the Prosecutor to determine the order of the documents to be reviewed in accordance with indications to be provided by the Defence;

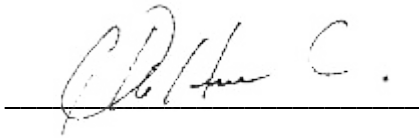
ORDERS the Prosecutor to review the material relating to the CIV2 investigation disclosed to the Defence in redacted form in light of the principles and guidelines set forth in the 1 February 2018 Decision;

ORDERS the Prosecutor, the Defence for Mr Gbagbo and the LRV to file public redacted versions of their respective filings related to this decision as soon as practicable.

Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Geoffrey Henderson

Dated 5 July 2018

At The Hague, The Netherlands