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No.: **ICC-02/11-01/11**
Date: **25 February 2015**

TRIAL CHAMBER I

Before: **Judge Geoffrey Henderson, Single Judge**

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO

Public redacted version

Decision on the Prosecution request pursuant to Regulation 35 of the Regulations and on the maintenance of redactions

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

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

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

Others

Judge Geoffrey Henderson, acting as Single Judge on behalf of Trial Chamber I (respectively, 'Single Judge' and 'Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Laurent Gbagbo* ('*Gbagbo* case'), having regard to Articles 64(6)(f) and 68(1) of the Rome Statute, Rules 81 and 82 of the Rules of Procedure and Evidence, and Regulation 35(2) of the Regulations of the Court ('Regulations'), issues the following 'Decision on the Prosecution request pursuant to Regulation 35 of the Regulations and on the maintenance of redactions'.

I. Procedural History

1. On 17 November 2014, the Chamber issued the 'Order setting the commencement date for the trial and the time limit for disclosure', directing, *inter alia*, the Office of the Prosecutor ('Prosecution') to disclose to the defence team for Mr Gbagbo ('Defence') 'all Rule 76 and Rule 77 material on a rolling basis, to disclose all Article 67(2) material as soon as practicable, and in any event to provide full disclosure of all material to the Defence no later than 6 February 2015.[1]

2. On 15 December 2014, the Single Judge issued the 'Decision on the Protocol establishing a redaction regime' ('Decision on the Redaction Protocol'), deciding that that the parties shall apply the protocol set out in Annex A thereto ('Redaction Protocol').[2]

3. On 6 February 2015, the Prosecution filed the 'Prosecution's request pursuant to regulation 35 for variation of time limit to redisclose certain documents with fewer redactions and Prosecution's request for authorisation to maintain redactions', in which it seeks the Chamber to (i) extend the deadline pursuant to Regulation 35 of the Regulations for

[1] ICC-02/11-01/11-723.
[2] ICC-02/11-01/11-737 and Annex A.

disclosure of 2115 documents previously disclosed with redactions to the metadata only ('First Request'); and (ii) authorise the maintenance of redactions that were made previously in relation to the names of investigators conducting ongoing investigations in the case of *The Prosecutor v. Charles Blé Goudé* ('*Blé Goudé* case') and of material falling under Category D of the Redaction Protocol ('Second Request', and together, 'Prosecution Request').[3]

4. On 9 February 2015, the Chamber ordered that any responses to the Prosecution Request be filed by 16 February 2015.[4]

5. On 11 February 2015, the Prosecution informed the Chamber, Defence and participants that 'it will be in a position to redisclose [the documents relevant to the First Request] to the Defence, in accordance with the new redactions protocol, on Monday 16 February 2015 – midday'.[5] On 16 February 2015, the Prosecution effected this disclosure.[6]

6. Also on 16 February 2015, the Defence responded to the Prosecution Request, submitting, *inter alia,* that the Second Request should be rejected in its entirety.[7]

[3] ICC-02/11-01/11-761 and Annexes A-O, *ex parte* Prosecution only.
[4] Email communication from the Trial Chamber to parties and participants on 9 February 2015 at 14:23.
[5] Email communication from the Prosecution to parties and participants on 12 February 2015 at 17:27.
[6] Prosecution's Communication of Evidence Re-disclosed to the Defence on 16 February 2015, ICC-02/11-01/11-770, with confidential Annexes A, B and C available to the Defence and Legal Representatives of Victims ('Prosecution Metadata Disclosure').
[7] *Réponse de la Défense à la* « Prosecution's request pursuant to regulation 35 for variation of time limit to redisclose certain documents with fewer redactions and Prosecution's request for authorisation to maintain redactions » (ICC-02/11-01/11-761), ICC-02/11-01/11-768-Conf. A public redacted version was filed on 16 February 2015 and notified on 17 February as ICC-02/11-01/11-768-Red.

II. Submissions

i. First Request

7. The Chamber notes that, with respect to the First Request, while the Prosecution was seeking an extension of the time until 6 March 2015 to redisclose to the Defence the metadata of 2115 documents with lesser redactions, it has since effected this disclosure in full.[8] In making submissions on this issue, the Defence noted the Prosecution's commitment to redisclose the relevant documents by 16 February 2015 and accepted to receive them on this date.[9]

ii. Second Request

8. The Prosecution argues that revealing the identity of investigators in ongoing investigations in the *Blé Goudé* case to the Defence at this stage 'is likely to impact upon the Prosecution's ability to conduct its investigations' by drawing attention to the movement of Prosecution staff and thereby to potential witnesses. The Prosecution avers that the redaction of investigators' names will not result in unfairness to the Defence as 'the Defence already has the ability to cross-reference the involvement of investigators across the documents' based on the Prosecution's pseudonym regime.[10]

9. With respect to the second limb of the Second Request, the Prosecution seeks the Chamber to authorise non-standard redactions to the following: (i)

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[8] Prosecution Metadata Disclosure, ICC-02/11-01/11-770. The Prosecution noted at paragraph 2 thereto that the total number of documents disclosed on 16 February 2015 is 2114, and not 2115, because one document was already re-disclosed on 6 February 2015.
[9] Defence Response, ICC-02/11-01/11-768-Conf, paras 8-11. *See also* Email communication from the Prosecution to parties and participants on 12 February 2015 at 17:27.
[10] Prosecution Request, ICC-02/11-01/11-761, paras 11-13.

reference in [REDACTED] Witness P-0234 to [REDACTED];[11] (ii) references in, [REDACTED] Witness P-0316 to information that may identify the current location of the witness and the witness' family;[12] (iii) reference to the possible name of a video's source provided by the United Nations in a transcript (CIV-OTP-0053-0113) and partial translation (CIV-OTP-0053-0203) of said video, consistent with a redacted video already provided to the Defence;[13] (iv) information in connection with Witness P-0435 relating to social media accounts, for the purposes of ongoing investigations in the *Blé Goudé* case;[14] and (v) references [REDACTED] Witness P-0402 to information that may identify the current location of the witness and the witness' family.[15]

10. The Defence argues that the Chamber should dismiss the Second Request as the Prosecution did not respect the procedure set out in the Redaction Protocol. For the redactions requested under Category D, the Defence submits that the Prosecution failed to transmit to the Defence a redacted version of the mandatory table providing the location of the redactions requested, as well as the related category and justification.[16] As a result, the Defence is unable to assess the scope and the impact of the redactions the Prosecution seeks to apply.[17]

11. In the alternative, the Defence requests that the Chamber reject the Second Request for lack of justification. The Defence indicates that the Prosecution

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[11] *See* Prosecution Request, ICC-02/11-01/11-761, para. 15 and Annex K. The Chamber notes that the Prosecution requests non-standard redactions pursuant to 'Category D' of the Redaction Protocol. While the Redaction Protocol does not clearly stipulate non-standard redactions as being under a separate 'Category D', the Chamber accepts this categorisation.
[12] *See* Prosecution Request, ICC-02/11-01/11-761, para. 16 and Annex L.
[13] *See* Prosecution Request, ICC-02/11-01/11-761, para. 17 and Annex M.
[14] *See* Prosecution Request, ICC-02/11-01/11-761, para. 18 and Annex N.
[15] *See* Prosecution Request, ICC-02/11-01/11-761, para. 19 and Annex O.
[16] Defence Response, ICC-02/11-01/11-768-Conf, paras 21-24, referring to Redaction Protocol, ICC-02/11-01/11-737-AnxA, para. 49. *See also*, Defence Response, ICC-02/11-01/11-768-Conf, para. 16.
[17] Defence Response, ICC-02/11-01/11-768-Conf, paras 15-18.

failed to justify the redactions requested, notably to the material in relation to Witnesses P-0316, P-0402 and P-0234.[18] The Defence argues that an adversarial debate cannot take place as it does not have access to the information necessary to making submissions on the appropriateness of the redactions requested and the scope of the prejudice the Defence would suffer from if they were to be applied.[19]

12. Finally, the Defence invites the Chamber to reject the Second Request because the relief sought by the Prosecution would impact negatively on the Defence investigations.[20] It contends that even the smallest redaction has an impact on the Defence's capacity to assess the relevance, the reliability and the importance of the material the Prosecution intends to rely on at trial and, hence, it has an impact on the Defence's capacity to challenge the Prosecution's case.[21] Accordingly, the Defence submits that the information covered by the redactions sought is relevant, even if it may appear insignificant, and should therefore not be authorised.[22]

III. Analysis

13. On the issue of the First Request, given the views expressed by the Defence and the fact that the relevant disclosure has now been effected, the Chamber does not consider this matter requires any further ruling.

14. In respect of the Second Request, the Single Judge recalls in the Decision on the Redaction Protocol that '[c]hambers of this Court have consistently emphasised that disclosable material should be served in full and any redactions need to be justified and authorised individually under the

[18] Defence Response, ICC-02/11-01/11-768-Conf, para. 19. *See also* paras 20, 27 and 32-35.
[19] Defence Response, ICC-02/11-01/11-768-Conf, paras 28-31. *See also* para. 44.
[20] Defence Response, ICC-02/11-01/11-768-Conf, paras 46-47.
[21] Defence Response, ICC-02/11-01/11-768-Conf, paras 40-41.
[22] Defence Response, ICC-02/11-01/11-768-Conf, paras 41-42.

provisions of the Statute',[23] with the onus on the Prosecution to establish that such redactions are warranted.[24] The specific requirements to authorise non-disclosure of information are premised on: i) the existence of an 'objectively justifiable risk'[25] to the safety of the person concerned or which may prejudice further or ongoing investigations;[26] ii) the risk must arise from disclosing the particular information to the Defence;[27] iii) the infeasibility or insufficiency of less restrictive protective measures;[28] 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';[29] and v) the obligation to periodically review the decision authorising the redactions should circumstances change.[30]

15. On the issue of the first limb of the Second Request, (concerning the request to maintain redactions to the names of investigators until the completion of investigations in the *Blé Goudé* case), the Single Judge recalls its finding in the Decision on the Redaction Protocol that investigators' identifying information shall be covered by a temporary standard redaction 'until the

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[23] ICC-02/11-01/11-737, para. 9, referring to *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, 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.
[24] *Katanga* OA Judgment, ICC-01/04-01/07-475 OA, para. 97.
[25] *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 71.
[26] *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 97.
[27] *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 71(b).
[28] *Lubanga* OA 3 Judgment, ICC-01/04-01/06-568, para. 37; Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, OA 5 ('*Lubanga* OA5 Judgment'), para. 33.
[29] *Lubanga* OA 5 Judgment, ICC-01/04-01/06-773, para. 34.
[30] *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 73(c); *The Prosecutor v. Germain Katanga,* Appeals Chamber, Judgment on the appeal of Mr Germain Katanga 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-01/04-01/07-476 OA 2, para. 64.

disclosure of the last witness interviewed or contacted by that investigator'.[31] This is based on the premise that '[n]otwithstanding the fact that investigators might be relied on in the course of the Defence case or in the context of other proceedings, the Chamber is of the view that risks to witnesses are minimal after their identity has been disclosed'. The Single Judge held further that if the Prosecution seeks a longer timeframe than that conferred by the standard redaction timelines, it may file a request for non-standard redactions.[32]

16. The Single Judge recalls that the Prosecution disclosed its list of witnesses in the present case on 6 February 2015,[33] having previously indicated that it would not be making any applications for delayed disclosure.[34] Accordingly, the Single Judge considers that the reason for maintaining redactions to the names of investigators no longer exists and that, in normal circumstances, ought to be lifted.

17. Notwithstanding, the Single Judge notes that, in the case at hand, on 16 December 2014, the Prosecution filed the 'Prosecution's Request to join the cases of *The Prosecutor v. Laurent GBAGBO* and *The Prosecutor v. Charles BLE GOUDÉ*' [sic] ('Joinder Request'),[35] which the Chamber is currently seised of. Accordingly, and without prejudice to any decision ultimately rendered on the Joinder Request, the Single Judge considers it appropriate to maintain the redactions to names of investigators contained in Annexes A-J of the Prosecution Request until the Joinder Request is ruled upon, and, if granted, until the disclosure of the identity of the last witness interviewed or

[31] Decision on the Redaction Protocol, ICC-02/11-01/11-737, para. 35, Redaction Protocol, ICC-02/11-01/11-737-AnxA, para. 25.
[32] Decision on the Redaction Protocol, ICC-02/11-01/11-737, para. 35.
[33] Prosecution's submission of its List of Witnesses and List of Evidence, ICC-02/11-01/11-759 and Annex A.
[34] Email from Prosecution to Chamber and Defence and LRV on 16 January 2015 at 11:12. *See also* Decision on the Redaction Protocol, ICC-02/11-01/11-737, para. 24.
[35] ICC-02/11-01/11-738.

contacted by the relevant investigator in the *Blé Goudé* case. If the Joinder Request is not granted, the Chamber will issue a subsequent decision on the matter. In so ordering, the Single Judge is satisfied that the pseudonym regime employed by the Prosecution will mitigate any potential prejudice faced by the Defence.

18. In respect of the remainder of the non-standard redactions sought under the Second Request, the Single Judge finds the Prosecution's justifications to be unsatisfactory. The Prosecution does not provide the Chamber with any details of the existence of an 'objectively justifiable risk' to the safety of the person concerned or which may prejudice further or ongoing investigations, where appropriate. Nor does it outline relevant information to guide the Chamber's assessment of the Second Request, such as a summary containing the profile of the witness, his or her relevance to the case, relevant security information or protective measures currently in place, or an overall assessment to justify the measures requested. Rather, the Second Request is sparse and lacking in detail.

19. The Single Judge wishes to emphasise that, in the future, requests for non-standard redactions ought to provide supporting material to justify the request rather than merely stating their basis. Failure to do so compromises the ability of the Single Judge to assess any redaction application and risks, if redactions are applied, causing undue prejudice to the Accused. On the other hand, unmotivated applications for redactions compromise the Chamber's ability to protect the safety of witnesses and victims and members of their families.

20. Notwithstanding these deficiencies, in light of the Chamber's own mandate under Article 68(1) of the Statute, the Single Judge will proceed to consider each request on a case-by-case basis.

21. *Redaction Chart for Witness P-0234*: In relation to the requested redactions outlined at Annex K, the Single Judge does not consider that any legal basis or sufficient justification has been provided [REDACTED]. Accordingly, the Single Judge does not authorise the requested redaction unless the Prosecution provides specific justification linked to the individual in question, including with regard to factors outlined above at paragraph 18, within seven days of the present decision being issued.

22. *Redaction Chart for Witness P-0316*: In relation to the requested redactions outlined at Annex L, the Single Judge notes that footnote 8 of the Prosecution Request, which purports to refer to the authorisation of Pre-Trial Chamber I ('Pre-Trial Chamber') in relation to previous non-disclosure of the witness's identity, is incomplete. Notwithstanding, it appears that the Single Judge of the Pre-Trial Chamber did indeed previously authorise the non-disclosure of the identity of Witness P-0316 due to objectively justifiable risk to the safety of the witness.[36]

23. The Single Judge notes in this connection that, in the Decision on the Redaction Protocol, it was held that 'witnesses' recent contact information would not ordinarily be relevant to the preparation of the Defence and may be permitted as an ongoing redaction on the basis of potential risk posed to witnesses from dissemination of such information'. Historical contact information, by contrast, 'may be of assistance in the preparation of the

[36] [REDACTED].

Defence's case', particularly when relating to the period of the charges.[37] [REDACTED], rendering the requested redactions non-standard.[38]

24. Accordingly, the Single Judge considers that the requested redactions require adequate justification. Indeed, as the Defence argues, the onus is on the Prosecution to demonstrate the existence of a tangible and objective risk to the witness.[39] In the absence of any further submissions from the Prosecution to clarify the current level of risk to Witness P-0316, and given the relevance of historical contact information to the preparation of the Defence, the Single Judge shall not authorise the requested redactions unless the Prosecution provides specific justification linked to the individual in question, including with regard to factors outlined above at paragraph 18 (such as current protective measures in place) within seven days of the present decision being issued.

25. *Redaction Chart for items CIV-OTP-0053-0113 and CIV-OTP-0053-0203*: In relation to the requested redaction outlined at Annex M, the Single Judge notes that the stated justification provided in the Second Request for the redaction is 'in order to maintain consistency with the redaction made to the video [CIV-OTP-0044-0738] already disclosed to the Defence'.[40] The Prosecution does not include any explicit statement of the legal basis or justification for the initial redactions; accordingly, the Single Judge shall not authorise the requested redaction unless the Prosecution provides the legal basis and accompanying specific justification, within seven days of the present decision being issued.

[37] Decision on the Redaction Protocol, ICC-02/11-01/11-737, para. 46.
[38] Redaction Protocol, ICC-02/11-01/11-737-AnxA, para. 34.
[39] Defence Response, ICC-02/11-01/11-768-Conf, paras 36-37.
[40] Prosecution Request, ICC-02/11-01/11-761, para. 17.

26. *Redaction Chart for Witness P-0435*: In relation to the requested redactions outlined at Annex N, the Single Judge notes that the Prosecution's request on this matter is premised on the need to ensure it can continue to conduct ongoing investigations in the *Blé Goudé* case. Despite the inadequate justification provided by the Prosecution in this regard, in light of the pending Joinder Request and the reasoning of the Single judge outlined above in relation to the names of investigators, the Single Judge considers it appropriate to maintain the requested redactions until the Joinder Request is ruled upon, and, if granted, until any revised final disclosure deadline is ordered. If the Joinder Request is not granted, the Chamber will issue a subsequent decision on the matter. The Single Judge considers that non-disclosure of the information identified does not significantly impact on the readability of the documents in question, and finds that the risk of prejudice to the Defence in imposing the requested redactions is low.

27. *Redaction Chart for Witness P-0402*: In relation to the requested redactions outlined at Annex O, the Single Judge notes that, as in relation to Witness P-0316, [REDACTED], rendering the redactions non-standard.[41] Accordingly, the Single Judge considers that the requested redactions require adequate justification. However, while the Prosecution notes that the witness 'has expressed concerns about his safety…due largely to the fact that [REDACTED],[42] it has failed to demonstrate an objective risk to the witness. In the absence of any further submissions from the Prosecution to clarify the current level of risk to Witness P-0402, and given the relevance of historical contact information to the preparation of the Defence, the Single Judge shall not authorise the requested redactions unless the Prosecution provides justification, including with regard to factors outlined above at paragraph 18

[41] Redaction Protocol, ICC-02/11-01/11-737-AnxA, para. 34.
[42] Prosecution Request, ICC-02/11-01/11-761, para. 19.

(such as current protective measures in place) within seven days of the present decision being issued.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE

MAKES NO FURTHER ORDER on the First Request;

AUTHORISES the maintenance of redactions to investigators' names in Annexes A-J of the Prosecution Request pending the Joinder Request being ruled upon, and, if granted, until the disclosure of the identity of the last witness interviewed or contacted by the relevant investigator in the *Blé Goudé* case. If the Joinder Request is not granted, the Chamber will issue a subsequent decision on the matter;

AUTHORISES the requested redactions outlined at Annex N of the Prosecution Request pending the Joinder Request being ruled upon, and, if granted, until any revised final disclosure deadline is ordered. If the Joinder Request is not granted, the Chamber will issue a subsequent decision on the matter; and

REJECTS the remainder of the Prosecution Request, unless the Prosecution provides the Chamber with justification for the redactions sought in Annexes K, L, M, and O within seven days of the present decision being issued.

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

Judge Geoffrey Henderson

Single Judge

Dated 25 February 2015

At The Hague, The Netherlands