

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/15
Date: 02 December 2015

TRIAL CHAMBER I

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

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

**Public
With Annex**

Decision on witness preparation and familiarisation

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 Mr 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 Herman von Hebel

Counsel Support Section

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* ('Gbagbo and Blé Goudé case'), having regard to Articles 64(2), 64(3)(a) and 68(1) of the Rome Statute ('Statute') and Rules 16 to 18 of the Rules of Procedure and Evidence ('Rules'), issues by Majority, Judge Henderson partially dissenting, the following 'Decision on witness preparation and familiarisation'.

I. Procedural history

1. On 16 April 2012, in the pre-trial proceedings in the case of *The Prosecutor v. Laurent Gbagbo* ('Gbagbo case'), the Registry filed the 'Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony' ('Draft Familiarisation Protocol').¹
2. On 30 July 2014, the Registry similarly filed a modified version of the Draft Familiarisation Protocol in the pre-trial proceedings in the case of *The Prosecutor v. Charles Blé Goudé* ('Blé Goudé case').²
3. On 4 November 2014, during the first status conference in the *Gbagbo* case, the Chamber encouraged the parties to actively engage in *inter partes* discussions on the protocols to be used at trial, stressing that, where possible, it would be beneficial to achieve 'some degree of uniformity' with regard to the protocols used during the trial.³

¹ Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony, ICC-02/11-01/11-93-Anx1.

² Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial in the case of the *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-110-Anx1.

³ Transcript of hearing on 4 November 2014, ICC-02/11-01/11-T-25-CONF-ENG, page 26, lines 3-7.

4. On 4 December 2014, the Single Judge in the *Gbagbo* case held a status conference during which, a number of protocols, including the Draft Familiarisation Protocol, were discussed.⁴
5. On 18 December 2014, the Chamber in the *Gbagbo* case directed the Office of the Prosecutor ('Prosecution'), the defence for Mr Gbagbo ('Gbagbo Defence'), the Legal Representative of Victims ('LRV') and the Victims and Witnesses Unit ('VWU') to file any submissions on the Draft Familiarisation Protocol or, in the alternative, to file any request for witness preparation along with a proposed protocol, no later than 27 February 2015.⁵
6. On 26 February 2015, the Prosecution and the LRV filed their joint submissions on the Draft Familiarisation Protocol in the *Gbagbo* case.⁶
7. On the same date, the Gbagbo Defence and the Prosecution jointly proposed a protocol concerning witness preparation ('Draft Witness Preparation Protocol').⁷ The LRV agreed to the Draft Witness Preparation Protocol on 6 March 2015.⁸
8. On 27 February 2015, the Gbagbo Defence⁹ and the VWU¹⁰ filed their respective submissions on the Draft Familiarisation Protocol.

⁴ Transcript of hearing on 4 December 2014, ICC-02/11-01/11-T-27-CONF-ENG ET, page 41, line 12 through page 45, line 14.

⁵ Order setting deadlines for the filing of submissions on outstanding protocols, ICC-02/11-01/11-739, page 6.

⁶ Joint submission of the Prosecution and the Legal Representative of Victims on the proposed familiarisation protocol, ICC-02/11-01/11-783 ('Joint Submissions').

⁷ *Soumissions de l'Accusation et de la Défense relatives à l'adoption du protocole de préparation des témoins*, 26 February 2015, ICC-02/11-01/11-784-Conf, with confidential Annex.

⁸ Further submissions of the Common Legal Representative of victims pursuant to the order setting deadlines for the filing of submissions on outstanding protocols (ICC-02/11-01/11-739), 6 March 2015, ICC-02/11-01/11-802-Conf (a public redacted version was filed on 12 March 2015, ICC-02/11-01/11-802-Red), para 40.

⁹ *Soumissions de la Défense relatives à l'adoption du Protocole « pratique de familiarisation des témoins en vue de leur déposition »*, 27 February 2015, ICC-02/11-01/11-786, with confidential Annex ('Gbagbo Defence Submissions').

¹⁰ Victims and Witnesses Unit's submission on the Protocol on the practices to be used to familiarise witnesses for giving testimony pursuant to Order ICC-02/11-01/11-739, 27 February 2015 (notified on 2 March 2015), ICC-02/11-01/11-791 with public Annex ('VWU Submissions').

9. On 11 March 2015, the Chamber rendered a decision joining the *Gbagbo* and *Blé Goudé* cases.¹¹
10. In response to the amendments proposed by the Gbagbo Defence, the VWU, on 13 March 2015, having been authorised to do so,¹² filed additional submissions to the Draft Familiarisation Protocol.¹³
11. On 30 April 2015, the defence for Mr Blé Goudé ('Blé Goudé Defence'), having been ordered to do so,¹⁴ filed its observations on the Draft Witness Preparation Protocol and the Draft Familiarisation Protocol.¹⁵
12. On 4 May 2015, the Blé Goudé Defence filed an addendum to its observations.¹⁶

II. Submissions and Analysis

Witness preparation

13. The Gbagbo Defence and the Prosecution propose a Draft Witness Preparation Protocol¹⁷ based on the witness preparation protocol adopted by Trial Chamber V in the case of *The Prosecutor v. Ruto and Sang* and *The Prosecutor v. Kenyatta*, albeit with slight changes.¹⁸ The Blé Goudé Defence initially argued that the Chamber

¹¹ Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters, ICC-02/11-01/15-1.

¹² Decision authorising the VWU to make additional observations on the Familiarisation Protocol, 10 March 2015, ICC-02/11-01/11-807. *See also* Email from VWU to Chamber on 2 March 2015 at 15:46 requesting leave to file further submissions; Victims and Witnesses Unit's submissions pursuant to Order ICC-02/11-01/11-796, 6 March 2015, ICC-02/11-01/11-799 requesting leave by way of a formal filing as instructed by the Single Judge in its Decision on Requests for an extension of time to submit observations on the outstanding protocols, 4 March 2015, ICC-02/11-01/11-796.

¹³ Victims and Witnesses Unit's submission pursuant to Order ICC-02/11-01/11-807 ('VWU Additional Submissions'), ICC-02/11-01/15-2.

¹⁴ Order setting deadlines for submissions on certain pending matters, 17 March 2015, ICC-02/11-01/15-7.

¹⁵ Defence observations on Witness Preparation and Witness Familiarisation protocols, ICC-02/11-01/15-50-Conf ('Blé Goudé Defence Submissions').

¹⁶ Addendum to "Defence Observations on the Witness Preparation and Witness Familiarisation Protocols" (ICC-02/11-01/15-50-Conf), ICC-02/11-01/15-54-Conf ('Blé Goudé Defence Addendum').

¹⁷ Joint Witness Preparation Protocol, ICC-02/11-01/11-784-Anx.

¹⁸ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V-A, Annex to Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524-Anx; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Annex to Decision on witness preparation, 2 January 2013, ICC-01/09-02/11-588-Anx.

should not adopt a witness preparation protocol that allows the parties to engage in 'witness proofing', which it considers is not provided for in the Court's statutory framework.¹⁹ However, in its additional observations submitted thereafter, it states that, for practical considerations and reasons of efficiency, it does not oppose the adoption of the Draft Witness Preparation Protocol, if the suggested additional safeguards were incorporated therein.²⁰

14. The Blé Goudé Defence reiterates its concerns that undue influence of witnesses should be prevented.²¹

15. While being common practice in common law jurisdictions, the possibility of parties preparing witnesses for their testimony is not provided for explicitly in the Court's statutory framework and cannot be considered a general principle of law within the meaning of Article 21(1)(c) of the Statute.²² However, pursuant to Article 64 of the Statute, the Chamber shall ensure that the trial is fair and expeditious. The Chamber therefore has a significant degree of discretion concerning the procedures it adopts in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses.²³

16. At the outset, the Majority of the Chamber emphasises that the principles of orality and immediacy that govern trial proceedings require that evidence is

¹⁹ Blé Goudé Defence Submissions, ICC-02/11-01/15-50-Conf, paras 12-27.

²⁰ Blé Goudé Defence Addendum, ICC-02/11-01/15-54-Conf, paras 12-19; Blé Goudé Defence Submissions, ICC-02/11-01/15-50-Conf, paras 24-25, 28-35.

²¹ Blé Goudé Defence Addendum, ICC-02/11-01/15-54-Conf, para. 18.

²² *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on witness preparation 2 January 2013, ICC-01/09-02/11-588 ('*Muthaura/Kenyatta* Decision'), para. 30; *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049 ('*Lubanga* Decision'), para 36; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V-A, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524 ('*Ruto/Sang* Decision'), para. 26.

²³ *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Decision on witness preparation, ICC-01/04-02/06-652, ('*Ntaganda* witness preparation decision'), paras 13-14 with further reference to the *Ruto/Sang* Decision, ICC-01/09-01/11-524, para. 27 and *The Prosecutor v. Jean- Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 24 November 2010, ICC-01/05-01/08-1039 ('*Ozaki* Dissenting Opinion' para. 10; and *Muthaura/Kenyatta* Decision, ICC-01/09-02/11-588, para. 31.

brought before the Chamber in a genuine and undistorted manner, leaving it for the Judges to assess any inconsistencies or additional evidence which are, in any case, better tested in the courtroom before the Chamber.²⁴

17. The Majority of the Chamber stresses the inherent risk of witness interference and the truth being distorted. It is also mindful of the potential emergence of new evidence during preparation sessions and ensuing delayed disclosure which could further delay proceedings. The mere exercise of taking a witness systematically through inconsistencies in their statements may lead to conduct which the Majority of the Chamber considers to be impermissible, such as rehearsal, practice and coaching. In addition, this practice could inhibit the entirety of the true extent of an account, and could 'diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness'.²⁵ These concerns are shared by the Majority of the Chamber.

18. The Majority of the Chamber recalls that Trial Chamber I, as previously constituted, and Trial Chamber III barred the calling party from preparing witnesses for testimony before the Chamber.²⁶ The Majority of the Chamber also notes that Trial Chamber V-A²⁷ and Trial Chamber VI²⁸ both agreed to authorise witness preparation invoking the singularity and complexity of the given case,²⁹ including the lapse of time since the occurrence of the alleged facts³⁰ and the large number of potential exhibits.³¹ The Majority of the Chamber further considers the

²⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Trial Chamber VII, Decision on Witness Preparation and Familiarisation ('*Bemba et al.* Decision'), 15 September 2015, ICC-01/05-01/13-1252, para. 25.

²⁵ *Bemba et al.* Decision, ICC-01/05-01/13-1252, para 22 with further reference to the *Lubanga* Decision, ICC-01/04-01/06-1049, paras 51-52.

²⁶ *Lubanga* Decision, ICC-01/04-01/06-1049 and *Bemba* Decision, ICC-01/05-01/08-1016.

²⁷ *Ruto/Sang* Decision, ICC-01/09-01/11-524.

²⁸ *Ntaganda* Witness Preparation Decision, ICC-01/04-02/06-652.

²⁹ *Muthaura/Kenyatta* Decision, ICC-01/09-02/11-588, para. 41 with partly dissenting opinion by Judge Eboe-Osuji.

³⁰ *Ntaganda* Witness Preparation Decision, ICC-01/04-02/06-652, para 18.

³¹ *Ntaganda* Witness Preparation Decision, ICC-01/04-02/06-652, para 18; *Ruto/Sang* Decision, ICC-01/09-01/11-524, para. 33.

recent decision by Trial Chamber VII finding that, with regard to the case at hand, 'it is unnecessary and inappropriate to authorise witness preparation as defined [by Trial Chamber V]'.³²

19. It being at the discretion of each Chamber to adopt the most appropriate procedures for the conduct of the trial,³³ the Majority of the Chamber, mindful of the risks of witness preparation as outlined above, does not consider that the risks of witness preparation in this case are outweighed by any other factors (including the number of proposed witnesses and exhibits and the time lapse between the allegations and the trial). Accordingly, the Majority of the Chamber decides that witness preparation, as a general rule, is not appropriate in this case.

Witness familiarisation

20. The Prosecution and LRV suggest minor modifications to the Draft Familiarisation Protocol, in accordance with the protocol filed in the case of *The Prosecutor v. Bosco Ntaganda*.³⁴ They also submit that relevant provisions of the Draft Familiarisation Protocol should be amended so that witnesses travel and are accommodated separately. In their view, only in exceptional circumstances, following discussion between all the parties and participants, and with the prior approval of the Chamber, should witnesses travel together.³⁵

21. The VWU objects to the amendment proposed by the Prosecution and the LRV and suggests alternative language which would enable witnesses to travel and be accommodated jointly 'whenever this is possible'. The VWU submits, *inter alia*, that the need for witnesses to be separated during travel and accommodation should be the subject of ongoing preparatory discussions and should be

³² *Bemba et al.* Decision, ICC-01/05-01/13-1252, para. 21.

³³ Article 64(2) and (3)(a) of the Statute.

³⁴ Joint Submissions, ICC-02/11-01/11-783, para. 2.

³⁵ Joint Submissions, ICC-02/11-01/11-783, paras 3-6.

addressed to the Chamber only in cases of contention between the 'entity calling the witness' and the VWU.³⁶

22. The Gbagbo Defence, in its submissions and the attached protocol it proposes, suggests a number of amendments to different provisions of the Draft Familiarisation Protocol, including those which pertain to: (i) the initial phase of the familiarisation process (i.e. prior to the witness travelling to the location of testimony), (ii) the familiarisation process itself, in particular those provisions concerning measures to be taken with regard to vulnerable witnesses, and (iii) the phase after the testimony.³⁷ Subject to limited modifications, the Gbagbo Defence appears to agree with the VWU's proposal concerning arrangements for witnesses' travel and accommodation.³⁸

23. In its additional submissions, the VWU opposes all of the amendments proposed by the Gbagbo Defence.³⁹ In particular, it objects to the Gbagbo Defence's proposals on vulnerable witnesses and explains its view as to the respective roles of the entity calling the witness and of the VWU during the familiarisation process, including the protection of witnesses.⁴⁰

24. The Blé Goudé Defence agrees with the amendments proposed by the Prosecution and the LRV, specifically with regard to travel and accommodation arrangements for witnesses.⁴¹ In addition, it proposes a number of changes, should the Chamber decide to adopt two separate protocols on witness familiarisation and witness preparation.⁴²

³⁶ VWU Submissions, ICC-02/11-01/11-791, paras 7-14.

³⁷ Gbagbo Defence Submissions, ICC-02/11-01/11-786, paras 9-36.

³⁸ Annex to Gbagbo Defence Submissions, ICC-02/11-01/11-786-Conf-Anx, pages 13 and 18.

³⁹ VWU Additional Submissions ICC-02/11-01/15-2, paras 8-18 and 19-22.

⁴⁰ VWU Additional Submissions, ICC-02/11-01/15-2, paras 2-7.

⁴¹ Blé Goudé Defence Submissions, ICC-02/11-01/15-50-Conf, para. 27.

⁴² Blé Goudé Defence Submissions, ICC-02/11-01/15-50-Conf, paras 36-42; Blé Goudé Defence Addendum, ICC-02/11-01/15-54-Conf, para. 18.

25. Although it declines to adopt the Draft Witness Preparation Protocol, the Majority of the Chamber considers it useful that witnesses are taken through a process which familiarises them with the functioning of the Court prior to their testimony. It endorses the arrangements proposed by the VWU, a neutral unit within the Registry, to allow witnesses to become accustomed with the layout of the courtroom, the sequence of events during testimony, and the different responsibilities of the various participants at a hearing, a process which includes a courtesy meeting between the witnesses and counsel. However, as a ten-minute courtesy meeting between counsel and the witness may not provide the time needed to cope with the stress and uncertainty prior to their testimony, no firm time limit should be imposed on the witnesses. The Majority of the Chamber endorses the most flexible approach to witness familiarisation in order to accommodate the changing necessities of trial.⁴³

26. Concerning submissions regarding joint travel and accommodation of witnesses, the Chamber is persuaded by the jurisprudence of other trial chambers in the Court that have decided that, in determining the appropriate travel and accommodation arrangements for witnesses, 'fact-sensitive decisions should be made, bearing in mind particularly the personal circumstances of each witness and the areas of evidence they will be addressing'.⁴⁴ In view of its mandate and expertise, the Chamber considers that the VWU is best placed to take such decisions, and if possible, through prior consultation with the calling entity and having regard, in particular, to whether the witness is participating in the Court's protection programme, whether joint travel might compromise confidentiality in respect of the witness's interaction with the Court and the risk of 'contamination'

⁴³ Witness Familiarisation Protocol, Annex to the present decision, para 36.

⁴⁴ *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Decision on witness familiarisation, 17 June 2015, ICC-01/04-02/06-656, para. 13, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, 23 May 2008, ICC-01/04-01/06-1351, para. 31; and *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision on the Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016, para. 15.

of the witness's evidence. The Chamber should only be seized in the event the VWU and the calling party or participant are genuinely unable to agree.

27. The Chamber notes the submissions by the Gbagbo Defence⁴⁵ and the Blé Goudé Defence⁴⁶ seeking specific modifications to the familiarisation process as proposed. The Chamber regards the submissions of the VWU,⁴⁷ in particular those underlining that: (i) the familiarisation process falls within the mandate of the VWU, which is a neutral and impartial unit of the Registry; (ii) the assistance provided by the VWU to witnesses during the familiarisation process -- as well as its specific expertise concerning vulnerable witnesses and the protection of at risk individuals -- has proven to be beneficial to the witnesses and victims whose appearance has been facilitated by the VWU; and (iii) the adoption of the existing version of the protocol as submitted would ensure uniform practice and equal treatment of witnesses appearing before the Court. In light of this, and with regard to the protocol recently adopted in the *Ntaganda* case,⁴⁸ the Chamber has implemented some additional amendments as necessary. Accordingly, the Chamber determines that the VWU shall facilitate the practice of witness familiarisation pursuant to the 'Protocol on Witness Familiarisation' attached in Annex to this decision.

⁴⁵ Gbagbo Defence Submissions, ICC-02/11-01/11-786, paras 9-36.

⁴⁶ Blé Goudé Defence Submissions, ICC-02/11-01/15-50-Conf, paras 38, 40-42; and Blé Goudé Defence Addendum, ICC-02/11-01/15-54-Conf.

⁴⁷ VWU Submissions, ICC-02/11-01/11-791 and VWU Additional Submissions, ICC-02/11-01/15-2.

⁴⁸ *Ntaganda* witness preparation decision, ICC-01/04-02/06-652.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY, UNANIMOUSLY

DIRECTS the parties, the LRV and the VWU to apply the Witness Familiarisation Protocol annexed to this decision;

ORDERS the Prosecution to file, by 15 December 2015, a public version of filing ICC-02/11-01/11-784-Conf, and

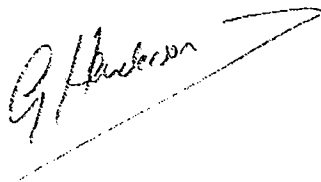
ORDERS the Blé Goudé Defence to file, by 15 December 2015, a public version of filings ICC-02/11-01/15-50-Conf and ICC-02/11-01/15-54-Conf.

BY MAJORITY

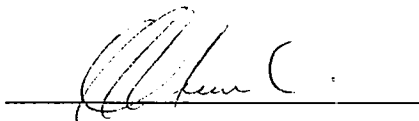
REJECTS the request by the parties and the LRV to adopt a Witness Preparation Protocol.

Judge Henderson appends a partially dissenting opinion.

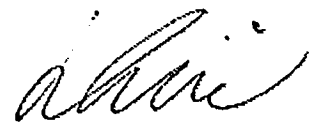
Done in both English and French, the English version being authoritative.



Judge Geoffrey Henderson, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Bertram Schmitt

Dated 02 December 2015

At The Hague, The Netherlands