

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/11-01/15**
Date: **4 December 2015**

TRIAL CHAMBER I

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

Decision on Protocol on vulnerable witnesses

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 Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber I ('Chamber')¹ 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), (3)(a), 67 and 68 of the Rome Statute ('Statute'), Rules 86, 87 and 88 of the Rules of Procedure and Evidence ('Rules') and Regulation 64 of the Regulations of the Registry, issues the following 'Decision on Protocol on vulnerable witnesses'.

I. Procedural History

1. On 16 April 2012, in the case of *The Prosecutor v. Laurent Gbagbo* ('Gbagbo case'), the Victims and Witnesses Unit ('VWU') filed in the record of the case the 'Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses' ('Proposed Protocol').²
2. On 30 July 2014, the VWU filed a similar suggested protocol before Pre-Trial Chamber I in the case of *The Prosecutor v. Charles Blé Goudé* ('Blé Goudé case').³
3. On 4 December 2014, Judge Geoffrey Henderson, acting as Single Judge in the *Gbagbo* case ('Single Judge') held a status conference during which the Proposed Protocol was discussed and the parties indicated that they agreed on it.⁴
4. On 18 December 2014, the Single Judge instructed the parties and the Legal Representative of Victims ('LRV') to submit any final observations on the Proposed Protocol by 27 February 2015.⁵

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber I as composed by the Presidency's 'Decision replacing a judge in Trial Chamber I', 18 March 2015, ICC-02/11-01/15-8-AnxI, and to the chamber in its previous composition.

² ICC-02/11-01/11-93-Anx2.

³ Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses, ICC-02/11-02/11-110-Anx2.

⁴ Transcript of Hearing dated 4 December 2014, ICC-02/11-01/11-T-27-Red-ENG WT, pages 30 and 46.

⁵ Order setting deadlines for the filing of submissions on outstanding protocols, ICC-02/11-01/11-739, para. 2 and page 6.

5. On 27 February 2015, the VWU submitted its observations ('VWU Observations'), whereby it objects to the amendments proposed by the Defence team for Mr Gbagbo ('Gbagbo Defence') during the discussions held among the parties and participants to amend the Proposed Protocol.⁶
6. On 6 March 2015, having been granted an extension of time to do so,⁷ the Office of the Prosecutor ('Prosecution')⁸ and the LRV⁹ submitted their observations (respectively, 'Prosecution Observations' and 'LRV Observations'), indicating that they see no reason to depart from the current practice of the VWU in this and other pending cases.
7. On that same date, the Gbagbo Defence filed its suggested protocol ('Gbagbo Defence Proposed Protocol') along with submissions thereon ('Gbagbo Defence Observations').¹⁰
8. On 11 March 2015, the Chamber issued a decision granting the Prosecution requests to join the *Gbagbo* case and the *Blé Goudé* case.¹¹
9. On 17 March 2015, the Single Judge instructed the Defence team for Mr Blé Goudé ('Blé Goudé Defence', together with the Gbagbo Defence, 'Defence') to submit any observations on the Proposed Protocol by 30 April 2015.¹²

⁶ Victims and Witnesses Unit's submission on the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses pursuant to Order ICC-02/11-01/11-739, ICC-02/11-01/11-789 (notified on 2 March 2015).

⁷ Decision on Request for an extension of time to submit observations on the outstanding protocols, 4 March 2015, ICC-02/11-01/11-796.

⁸ Prosecution's Submissions of the proposed mechanisms for exchange of information on individuals enjoying dual status and on the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses, ICC-02/11-01/11-798.

⁹ 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), ICC-02/11-01/11-802-Conf. A public redacted version was filed on 12 March 2015 (ICC-02/11-01/11-802-Red).

¹⁰ *Soumissions de la Défense portant sur l'adoption du Protocole relatif à la procédure suivie pour évaluer la vulnérabilité des témoins et leur apporter le soutien requis pour faciliter leur déposition* 6 March 2015, ICC-02/11-01/11-803-Conf with one confidential annex.

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, with public Annex A, ICC-02/11-01/15-1 (see also ICC-02/11-01/11-810 and ICC-02/11-02/11-222).

10. On 30 April 2015, the Blé Goudé Defence filed its proposed protocol ('Blé Goudé Defence Proposed Protocol') along with submissions thereon ('Blé Goudé Defence Observations').¹³

II. Submissions

11. The Defence suggests various amendments to the Proposed Protocol. It argues notably that: (i) any intervention from the VWU with witnesses, be it the preparatory assessment (conducted prior to the travel to the location of testimony), the assessment (conducted at the location of testimony) or the post-trial debriefing, may only be conducted with the consent of the witness, upon a request of the calling party and by a specialist chosen with the witness in consultation with the calling party;¹⁴ (ii) the assessment summary should not contain any confidential medical information, nor any indication on the witness's ability to testify, on his/her health state and/or credibility;¹⁵ (iii) the calling party should have a greater role in dealing with vulnerable witnesses; it should in particular receive a summary of the assessment¹⁶ and, in the view of the Blé Goudé Defence, be authorised to challenge it;¹⁷ (iv) the calling party should further be in charge of suggesting special measures;¹⁸ and (v) the VWU's psychologist should not be authorised to interrupt the witness during his/her testimony.¹⁹

¹² Order setting deadlines, ICC-02/11-01/15-7.

¹³ Defence observations on the proposed Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses, ICC-02/11-01/04-51-Conf with one confidential annex.

¹⁴ Gbagbo Defence Observations, ICC-02/11-01/11-803-Conf, paras 18, 28, 38-39 and 44-46; BlØ GoudØ Defence Observations, ICC-02/11-01/15-51-Conf, paras 13-16, 19 and 34-37.

¹⁵ Gbagbo Defence Observations, ICC-02/11-01/11-803-Conf, paras 21-27, 29-31 and 36; BlØ GoudØ Defence Observations, ICC-02/11-01/15-51-Conf, paras 20-23.

¹⁶ Gbagbo Defence Observations, ICC-02/11-01/11-803-Conf, para. 32; BlØ GoudØ Defence Observations, ICC 02/11-01/15-51-Conf, paras 26 and 31.

¹⁷ BlØ GoudØ Defence Observations, ICC-02/11-01/15-51-Conf, para. 24.

¹⁸ Gbagbo Defence Observations, ICC-02/11-01/11-803-Conf, paras 33-35 and 42.

¹⁹ Gbagbo Defence Observations, ICC-02/11-01/11-803-Conf, para. 43; BlØ GoudØ Defence Observations, ICC 02/11-01/15-51-Conf, para. 33.

12. With regard to the catalogue of special measures suggested by the VWU, the Defence opposes certain measures that, it submits, affect the rights of the accused, such as the restrictions on note-taking, the proposal that Judges may sit on the Registry's bench or that the persons present in the courtroom should remove their robes.²⁰
13. The Prosecution and the LRV object in their entirety to the amendments proposed by the Defence, with the exception of the provision of the recommendation of the vulnerability assessment to the party calling the witness.²¹
14. The VWU argues that the parties should not be in charge of designating the expert who conducts the vulnerability assessment and makes recommendations to the Chamber.²² In its view this should be conducted by a neutral VWU specialist.²³ The VWU further clarifies that all assessments are conducted with the witnesses' consent and that any recommendations to the Chamber are transmitted to the calling party.²⁴ Finally, the VWU stresses that any protective or special measures are always ordered by the Chamber, which guarantees that they will not be prejudicial to the rights of the accused.²⁵

III. Analysis

15. As a preliminary matter, the Chamber recalls that during the status conference held on 4 December 2014, the Gbagbo Defence indicated that that it had no specific comments on the Proposed Protocol, which should remain in force as

²⁰ Gbagbo Defence Observations, ICC-02/11-01/11-803-Conf, paras 47-53; Gbagbo Defence Proposed Protocol, ICC-02/11-01/11-803-Conf-Anx, pages 17-20, in particular the yellow highlighted parts; BIØ GoudØ Defence Observations, ICC-02/11-01/15-51-Conf, paras 38-39.

²¹ Prosecution Observations, ICC-02/11-01/11-798, para. 12; LRV Observations, ICC-02/11-01/11-802-Red, paras 37-39.

²² *See above*, para. 11(i).

²³ VWU Observations, ICC-02/11-01/11-789, para. 2.

²⁴ VWU Observations, ICC-02/11-01/11-789, paras 3-5.

²⁵ VWU Observations, ICC-02/11-01/11-789, para. 7.

such.²⁶ The Chamber notes that the Gbagbo Defence informed the Prosecution, the LRV and the VWU only very close to the filing deadline of the extent of the changes it intended to suggest.²⁷ Nonetheless, to reach its decision, the Chamber has carefully reviewed all proposed amendments.

16. The Chamber further recalls that the VWU is part of the Registry, which is a neutral organ of the Court tasked, amongst other things, with the function of '[a]ssisting [witnesses] when they are called to testify before the Court'.²⁸ The Chamber further recalls that Rule 88 of the Rules and Regulation 94 *bis* of the Regulations of the Registry provides that the Chamber, upon request, may order special measures to protect 'vulnerable persons' and to facilitate their appearance before the Court.

17. The Chamber considers that, pursuant to Regulation 94 *bis*(3) of the Regulations of the Registry,²⁹ it is for the VWU, as the entity with a mandate to protect witnesses' well-being – and not for any other expert chosen by the parties – to conduct any assessment with the witness and to recommend any protective and/or special measures it deems necessary. Additionally, in accordance with Regulation 94 *bis*(3), the Chamber finds that the assessment shall serve to evaluate the mental health status of the witness and his/her capacity to appear before the Court and finds therefore appropriate to maintain the text of the Proposed Protocol.³⁰

²⁶ ICC-02/11-01/11-T-27-Red-ENG WT, page 30 and 46. The Defence also indicated that it could 'give its *final* approval upon receipt of the French translation' (ICC-02/11-01/11-T-27-Red-ENG WT, page 30 [emphasis added]), which was received, according to the Defence itself, on 13 February 2015, *i.e.* more than two weeks before the deadline for submission of the observations.

²⁷ Joint request of the Common Legal Representative of victims and the Prosecution for an extension of time to file their submissions on the outstanding protocols, 27 February 2015, ICC-02/11-01/11-785, para. 10; Email from Defence to Chamber, 27 February 2015, 11:37.

²⁸ See Rules 16-19 of the Rules of Procedure and Evidence, in particular Rule 17(2)(b)(ii).

²⁹ Regulation 94 *bis*(3) provides that 'the psychologist within the Registry who works with victims and witnesses' will conduct the psychological assessment of vulnerable persons.

³⁰ Proposed Protocol, ICC-02/11-01/11-93-Anx2, in particular paras 8 and 10.

18. The Chamber further emphasises that, as provided for in the Proposed Protocol³¹ and as clarified further in the VWU Observations,³² any intervention by the VWU shall be conducted with the witnesses' consent and in consultation with the calling party, who shall be kept informed throughout the whole process. As submitted by the VWU,³³ the Chamber finds it appropriate that the calling party is notified of any recommendations made to the Chamber pursuant to the Proposed Protocol.
19. With regard to the Defence's objections to certain special measures proposed by the VWU, the Chamber notes that the special measures listed in the Proposed Protocol are mere suggestions of measures that could be recommended.³⁴ The Chamber will ultimately decide on the appropriateness of any suggested measures and will thereby ensure that the rights of the accused persons are guaranteed, in accordance with, *inter alia*, Article 67(1) of the Statute. Consequently, the Chamber considers that the Proposed Protocol is not prejudicial to the rights of the accused persons and that the amendments suggested by the Defence ought to be rejected.
20. The Chamber considers that the same applies to the possibility for the psychologist to request the Chamber's authorisation to sit in the Courtroom and to intervene, if need be.³⁵ In due course, and if such a request is made by the VWU, the Chamber will decide upon it, giving due consideration to the rights of the accused.

³¹ Proposed Protocol, ICC-02/11-01/11-93-Anx2, paras 7 and 9.

³² VWU Observations, ICC-02/11-01/11-789, para. 5.

³³ Gbagbo Defence Observations, ICC-02/11-01/11-803-Conf, para. 32; BlØ GoudØ Defence Observations, ICC 02/11-01/15-51-Conf, paras 26 and 31; LRV Observations, ICC-02/11-01/11-802-Red, para. 37; VWU Observations, ICC-02/11-01/11-789, para. 5.

³⁴ See the chapeau of the annex: 'Recommendations for special measures *may* include, but are not limited to:' Proposed Protocol, ICC-02/11-01/11-93-Anx2, page 9 (emphasis added).

³⁵ Proposed Protocol, ICC-02/11-01/11-93-Anx2, paras 20-21.

21. Consequently, the Chamber rejects the Defence's proposed amendments. The Chamber notes that the protocol filed in the *Blé Goudé* case is a slightly revised version of the Proposed Protocol although identical in substance. Accordingly, the Chamber decides that the protocol as filed in the *Blé Goudé* case shall apply in the present case.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS the VWU to facilitate the testimony of vulnerable witnesses in accordance with the present decision and the protocol as filed in the *Blé Goudé* case (ICC-02/11-02/11-110-Anx2);

INSTRUCTS the Gbagbo Defence to file a public redacted version of the Gbagbo Defence Observations and of the Gbagbo Defence Proposed Protocol within 15 days of notification of this decision; and

INSTRUCTS the Blé Goudé Defence to file a public redacted version of the Blé Goudé Defence Observations and of the Blé Goudé Defence Proposed Protocol within 15 days of notification of this decision.

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

A handwritten signature in black ink that reads "G Henderson". The signature is written in a cursive style and is positioned above a horizontal line. A long, thin arrow-like stroke extends from the end of the signature, pointing to the right.

Judge Geoffrey Henderson, Presiding Judge

A handwritten signature in black ink that reads "O. Herrera C.". The signature is written in a cursive style and is positioned above a horizontal line.

Judge Olga Herrera Carbuccion

A handwritten signature in black ink that reads "B. Schmitt". The signature is written in a cursive style and is positioned above a horizontal line.

Judge Bertram Schmitt

Dated 4 December 2015

At The Hague, The Netherlands