

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 31 August 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 and CHARLES BLÉ GOUDÉ***

**Public
With one public annex**

Decision adopting the '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'

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 Knoop
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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

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Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verill

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')¹ of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Articles 54(1)(b) and (3)(f), 67(1) and 68(1) of the Rome Statute ('Statute'), Regulations 92 to 96 of the Regulations of the Registry, Articles 4, 8(4) and 29 of the Code of Professional Conduct for counsel, and Articles 66 to 68 of the Code of Conduct for the Office of the Prosecutor, issues the following 'Decision adopting the "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"'.

I. Procedural History

1. On 6 March 2012, in the case of *The Prosecutor v. Laurent Gbagbo* ('Gbagbo case'), Pre-Trial Chamber III adopted protocols on the disclosure of the identity of witnesses of other parties and on the use of confidential information in the course of investigations.² It further regulated contact between a party and witnesses from the opposing party.³
2. On 6 May 2014, in the case of *The Prosecutor v. Charles Blé Goudé* ('Blé Goudé case'), Pre-Trial Chamber I adopted similar protocols.⁴
3. On 4 December 2014, in the *Gbagbo* case, the Single Judge held a status conference during which protocols concerning: (1) the disclosure of the

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 Annex to the Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, ICC-02/11-01/11-49-Anx.

³ Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, ICC-02/11-01/11-49, paras 29-32.

⁴ Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, ICC-02/11-02/11-67 with one public Annex.

identity of witnesses of the other party or participants; (2) the handling of confidential information in the course of investigation, contacts with witnesses of the opposing party; and (3) inadvertent disclosure, were discussed.⁵

4. On 18 December 2014, the Single Judge instructed the parties, the Legal Representative of Victims ('LRV') and the Victims and Witnesses Unit ('VWU') to submit written observations on the aforementioned protocols by 20 February 2015.⁶
5. On 20 February 2015, the Office of the Prosecutor ('Prosecution') and the Defence team for Mr Gbagbo ('Gbagbo Defence') filed proposed protocols (respectively 'Prosecution Proposed Protocol' and 'Gbagbo Defence Proposed Protocol') along with submissions thereon (respectively 'Prosecution Observations' and 'Gbagbo Defence Observations').⁷ The LRV filed its submissions on that same date ('LRV Observations').⁸
6. On 27 February 2015, the VWU filed its observations ('VWU Observations').⁹
7. On 11 March 2015, the Chamber issued a decision granting the Prosecution's requests to join the *Gbagbo* case and the *Blé Goudé* case.¹⁰

⁵ Transcript of Hearing dated 4 December 2014, ICC-02/11-01/11-T-27-Conf-Eng ET.

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

⁷ Prosecution's Proposed Protocol on the « *divulgence de l'identité des témoins lors des enquêtes, l'utilisation de matériel confidentiel pendant les enquêtes, la divulgation d'information par inadvertance et les contacts entre une partie et un témoin de la partie adverse* », ICC-02/11-01/11-777-Conf with one public annex ; *Soumissions de la Défense relative à l'adoption des : 1. Protocole régissant la divulgation de l'identité des témoins de la partie adverse ou du représentant légal des victimes ; 2. Protocole régissant l'utilisation de matériel confidentiel par les parties et le représentant légal des victimes pendant les enquêtes, 3. Protocole portant sur la divulgation de matériel qui ne devait pas être divulgué ou qui aurait dû être divulgué dans une version expurgée 4. Protocole régissant les contacts entre une partie et un témoin de la partie adverse*, ICC-02/11-01/11-778-Conf, with confidential annex. A public redacted version of the Gbagbo Defence Observations was filed on 23 March 2015 (ICC-02/11-01/11-778-Red).

⁸ 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), 20 February 2015, ICC-02/11-01/11-776.

⁹ Victims and Witnesses Unit's observations on the « *divulgence de l'identité des témoins lors des enquêtes, l'utilisation de matériel confidentiel pendant les enquêtes, la divulgation d'information par inadvertance et les contacts entre une partie et un témoin de la partie adverse* » pursuant to Order ICC-02/11-01/11-739, ICC-02/11-01/11-788 (notified on 2 March 2015).

8. On 17 March 2015, the Single Judge instructed the Defence team for Mr Blé Goudé ('Blé Goudé Defence') to submit any observations on the aforementioned protocols by 9 April 2015 (the Gbagbo Defence and the Blé Goudé Defence are hereinafter collectively referred to as 'Defence').¹¹
9. On 9 April 2015, the Blé Goudé Defence filed its observations ('Blé Goudé Defence Observations').¹²

II. Analysis

10. The Single Judge has given considerable weight to the parties' agreements. Where there has been no disagreement, the Chamber has generally accepted the proposed procedure, at times with minor modifications to ensure clarity and with a view to harmonising protocols amongst Trial Chambers. With respect to issues on which agreements were not reached, the Single Judge carefully considered the parties' competing submissions. In doing so, it has balanced the rights of the accused pursuant to Articles 64(2) and 67 of the Statute and the protection of the safety, physical and psychological well-being, dignity and privacy of witnesses under Article 68(1) of the Statute.

A. Definition of the term 'witness'

11. Paragraph I (e) of the Prosecution's Proposed Protocol reads as follows:

[TRANSLATION] The term 'witness' shall refer to a person whom a party or the [LRV] intends to call to testify or whose statement the party or the

¹⁰ 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).

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

¹² Defence Observations on the Protocol on handling of confidential information, ICC-02/11-01/15-27-Conf.

[LRV] intends to rely upon, provided that such intention has been conveyed to the non-calling party or to the [LRV].¹³

12. The Gbagbo Defence argues that this definition should be broadened to include potential witnesses whose identities have not yet been disclosed, but who have already made statements.¹⁴
13. The Blé Goudé Defence agrees with the Gbagbo Defence and submits that the Prosecution's proposal is too restrictive, as it would oblige the Defence to disclose their case strategies before the completion of the Prosecution case.¹⁵
14. The Single Judge finds that the definition suggested by the Defence is too broad and would lead to application of the Protocol to individuals who are only remotely linked to the Court and/or who are not likely to be called to testify. In the view of the Single Judge, this would not usefully serve the purpose of the Protocol, which is mainly intended to protect the safety of witnesses and preserve the integrity of investigations.
15. The Single Judge further notes that the fact that the calling party intends to call a witness or to rely upon his/her statement may become known to the non-calling party as a result of the filing of a list of witnesses or when the witness himself/herself informs the investigating party. Thus, in line with the Court's previous jurisprudence on this issue,¹⁶ the Single Judge considers

¹³ Prosecution Proposed Protocol, ICC-02/11-01/11-777-AnxA, para. I(e) [footnotes omitted]; Prosecution Observations, paras 15-16.

¹⁴ Gbagbo Defence Proposed Protocol, ICC-02/11-01/11-778-Conf-Anx, page 2.

¹⁵ Blé Goudé Defence Observations, ICC-02/11-01/15-27-Conf, paras 9-12.

¹⁶ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Annex to Decision on adoption of a 'Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant', 12 December 2014, ICC-01/04-02/06-412-AnxA, para. II(3)(f) ('Ntaganda Protocol'); Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Annex to the Decision on the Protocol on the handling of confidential information and contact between a party and witnesses of the opposing party, 18 February 2013, ICC-02/05-03/09-451-Anx, para. 26(d); Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Annex to the Decision on the Protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-01/11-449-Anx, para. 1. It is noted that Trial Chamber V adopted an equivalent decision in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, which is to be found at ICC-01/09-02/11-469.

that the definition of the term witness, for the purpose of the Protocol, should read as follows:

The term 'witness' shall refer to a person whom a party or the LRV intends to call to testify or whose statement the party or the LRV intends to rely upon, provided that such intention has been conveyed to the non-calling party or the LRV by means that establish a clear intention on behalf of the calling party or the LRV to rely upon the individual as a witness.

B. Disclosure of the identity of witnesses not being called by that party in the course of investigations

- 1) *The need to inform the VWU prior to the mission when, in the course of an investigation, it is necessary to disclose the identity of a witness in the ICCPP or who has otherwise been relocated with the assistance of the Court*

16. Paragraph II (c) of the Prosecution's Proposed Protocol reads as follows:

[TRANSLATION] Should the investigating party or participant need to disclose the identity of a witness who is in the ICCPP or who has otherwise been relocated with the assistance of the Court, during the course of specific investigations related to that witness, the investigating party or participant shall liaise with the Victims and Witnesses Unit ('VWU'), to the extent possible prior to the mission in which such disclosure may take place. It shall communicate the details of the place, time and, to the extent possible, the person(s) that the party or participant intends to contact and to whom it intends to disclose the identity in question. Additionally, the way disclosure will take place will be discussed with the VWU, which shall provide the investigating party or participant with its best practices and advice in relation to the specific information communicated by that party or participant.¹⁷

17. The Prosecution submits that the proposed provision mirrors that adopted in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'). The Prosecution further submits that, considering, in the present case, the limited number of witnesses admitted to participate in the ICCPP or who have been relocated with the assistance of the Court, if any, it will not

¹⁷ Prosecution Proposed Protocol, ICC-02/11-01/11-777- AnxA, para. II(c).

over-burden the investigative planning of the Defence or be inconsistent with the rights of the accused.¹⁸

18. The Gbagbo Defence submits that the proposed procedure would prove inefficient, as the need to mention the name of a witness from the opposing party would likely arise only during the course of an interview, and in any case, after the beginning of the mission. The Gbagbo Defence argues that paragraph II(d) of the Prosecution Proposed Protocol, regulating the procedure to be followed by the investigating party or the LRV when an individual they meet understands that an individual mentioned during the interview is involved with the Court or is a witness, would provide sufficient safeguards.¹⁹

19. The Blé Goudé Defence concurs with the Gbagbo Defence and submits that the Gbagbo Defence's proposal would prove to be more efficient than that put forward by the Prosecution. Alternatively, the Blé Goudé Defence suggests that monthly meetings be organised with the VWU to discuss the upcoming investigations of the Defence in relation to protected and relocated witnesses.²⁰

20. Mindful of its obligation to protect the safety, physical and psychological well-being, dignity and privacy of witnesses in accordance with Article 68(1) of the Statute and noting that, in the present case, the disputed provision concerns a very limited number of witnesses, if any, the Single Judge finds that the Prosecution's proposal shall be retained.

21. The Single Judge finds that this provision provides the Defence with sufficient flexibility for the degree of unpredictability inherent in the course

¹⁸ Prosecution Observations, ICC-02/11-01/11-777-Conf, para. 19.

¹⁹ Although the Defence has slightly reworded the Prosecution's (Gbagbo Defence Proposed Protocol, ICC-02/11-01/11-778-Conf-Anx, pages 4-5). *See also*, Gbagbo Defence Observations, ICC-02/11-01/15-778-Red, paras 9-11.

²⁰ Blé Goudé Defence Observations, ICC-02/11-01/15-27-Conf, paras 13-14.

of investigations.²¹ Indeed, the obligation applies only in respect of 'specific investigations related to that witness'. Further, the requirement that the VWU must be informed of the place and time of the interview must be understood broadly and does not impose on the party an obligation to communicate the exact location and time of the interview.

22. The Single Judge notes the concern of the Gbagbo Defence that informing the VWU of the disclosure of the identity of *any* protected witnesses, *e.g.* those not in the ICCPP, but who are protected, for example by use of a pseudonym, would be hard to implement, because all of the important Prosecution witnesses have a pseudonym and played a leading role during the crisis. Thus, the Gbagbo Defence argues that it cannot avoid mentioning them during the interviews it conducts.²²

23. The Prosecution avers that nothing prevents the Defence from mentioning the names of Prosecution witnesses during its investigations, but that it is merely prevented from disclosing the fact that these individuals are witnesses.²³

24. The Single Judge considers that the VWU, as the entity of the Court in charge of the protection of witnesses, shall be informed when the identity of any protected witnesses has been disclosed, as disclosure may change the risk profile of the individual. Hence, if a party intends to disclose or has disclosed the identity of a witness who is not in the ICCPP or who has not been relocated with the assistance of the Court, but who is protected in any other manner by the VWU, it shall inform the VWU that such disclosure will occur or has occurred, as soon as possible.

²¹ The investigating party must indeed communicate the person(s) that the party or participant intends to contact and to whom it intends to disclose the identity in question *to the extent possible*.

²² Gbagbo Defence Proposed Protocol, ICC-02/11-01/11-778-Conf-Anx, page 4.

²³ Prosecution Observations, ICC-02/11-01/11-777-Conf, para. 2.

25. Finally, the Single Judge notes that, in the context of its submissions on the need to inform the VWU prior to any mission in which it intends to disclose the identity of an ICCPP witness, the Gbagbo Defence argued that it is likely that the need to mention the identity of a witness or that an individual *is a witness* of the opposing party will only arise during the interview, and in any case, after the beginning of a mission.²⁴ The Single Judge therefore finds it appropriate to stress that, in accordance with paragraph 10 of the Protocol, the investigating party shall, under no circumstances, reveal a protected witness's *involvement* with the Court.

2) *Investigating the place of residence of protected witnesses*

26. The Prosecution suggests the inclusion of a provision regulating the manner in which the non-calling party can investigate the location of protected witnesses other than ICCPP witnesses or witnesses relocated with the assistance of the Court.²⁵ The Prosecution submits that there may be valid reasons to locate witnesses of the opposing party, such as, for example, instances in which a witness from the opposing party says that he lives alone when he actually lives with another witness called to testify on the same facts.²⁶

27. The Gbagbo Defence disagrees with the inclusion of such a provision and suggests, on the contrary, that such a practice should be prohibited. It

²⁴ Gbagbo Defence Proposed Protocol, ICC-02/11-01/11-778-Conf-Anx, page 4. The Defence indicated: '*Il est par exemple probable que le besoin de mentionner le nom d'un témoin de l'autre partie/sa qualité de témoin de l'autre partie ne se fasse sentir qu'en cours d'interrogatoire [...]*' (emphasis added).

²⁵ The Prosecution's proposal reads as follows: *Lorsqu'il se révèle nécessaire, pour des raisons précises, de déterminer où se trouvent des témoins protégés non admis au Programme de protection, la partie qui enquête ou le représentant doit informer la Chambre et l'UVT avant de débiter ses recherches. Parmi les raisons susmentionnées, on peut citer le besoin d'enquêter sur la crédibilité d'un témoin, lorsqu'il existe des motifs raisonnables de soupçonner que le lieu où il se trouve indique l'existence d'une association significative avec une autre personne. La partie qui enquête ou le représentant ne doit effectuer aucune recherche pour déterminer où se trouvent les témoins protégés, admis au Programme de protection, réinstallés avec l'assistance de la Cour ou dont la Chambre a décidé de tenir le lieu de résidence secret*, Prosecution Proposed Protocol, ICC-02/11-01/11-777-AnxA, para. II(e).

²⁶ Prosecution Observations, ICC-02/11-01/11-777-Conf, para. 21.

submits that there is no reason for a party to attempt to locate a witness from the opposing party.²⁷

28. The Single Judge notes that, in accordance with the Chamber's adopted redaction regime, recent contact information of witnesses may be redacted on an ongoing basis, so as to protect witnesses' safety, dignity, privacy and well-being.²⁸ In light of this, the Single Judge considers that should a specific reason arise in which a party or the LRV considers it necessary to investigate the whereabouts of a witness, it may seek authorisation from the Chamber.

3) The responsibility of the calling party or of the LRV to secure the consent of witnesses prior to their involvement with the Court

29. The Gbagbo Defence disagrees with the inclusion of a provision imposing an obligation on the calling parties that witnesses they intend to call provide their informed consent (preferably in writing), either prior to being involved with the Court or when providing a statement. The Gbagbo Defence argues that such a provision pertaining to how the calling party conducts interviews with its own witnesses should not be included in a protocol intended at regulating the contacts between a witness and the opposing party, and that the way the calling party conducts interviews is regulated by the usual professional practices.²⁹

30. Having noted the view put forward by the VWU concerning the desirability that witnesses be informed from the outset that their involvement with the Court may entail them being the subject of investigations and the concomitant importance of obtaining their consent,³⁰ and noting that the Prosecution and the Blé Goudé Defence did not object to the inclusion of

²⁷ Gbagbo Defence Observations, ICC-02/11-01/15-778-Red, paras 12-14.

²⁸ Protocol establishing a redaction regime in the case of *The Prosecutor v. Laurent Gbagbo*, 15 December 2014, ICC-02/11-01/11-737-Anx, paras 33-35.

²⁹ Gbagbo Defence Observations, ICC-02/11-01/15-778-Red, paras 15-16.

³⁰ VWU Observations, ICC-02/11-01/11-788, paras 1-3.

such provision,³¹ the Chamber considers that the provision shall be retained in the Protocol.

C. Use of confidential information by the parties and the LRV in the course of investigations: the requirement to apply to the Chamber in order to use photographs depicting witnesses

31. The Prosecution suggests the adoption of a provision stipulating that visual and non-textual material depicting witnesses shall only be used when there is no other investigative avenue available. No such material should reveal the involvement with the Court of the person depicted and should only be shown together with material of the same kind.³² The Prosecution notes that this provision was adopted in the *Ntaganda* case and sees no reason to depart from it.³³

32. The Gbagbo Defence suggests an alternative proposal which does not oblige the investigating party or the LRV to show such material together with other material of the same kind³⁴

33. The Blé Goudé Defence concurs with the Gbagbo Defence and submits that the provision as proposed by the Prosecution is unclear as, *inter alia*, it does not indicate which materials of the same kind must be shown in tandem with visual and non-textual material depicting witnesses.³⁵

³¹ Prosecution Observations, ICC-02/11-01/11-777-Conf, paras 24-25; Blé Goudé Defence Observations, ICC-02/11-01/15-27-Conf.

³² Prosecution Proposed Protocol, ICC-02/11-01/11-777-AnxA, para. III (c).

³³ Prosecution Observations, ICC-02/11-01/11-777-Conf, paras 26-28.

³⁴ *Concernant l'utilisation de documents audio-visuels elle ne doit se faire que quand il n'existe pas d'autre moyen d'enquête alternatif satisfaisant. La partie ou le représentant qui enquête doit présenter à la personne interrogée de tels documents avec précaution en évitant de mettre en avant le ou les témoins de l'autre partie ou du représentant et en évitant de présenter des éléments qui révéleraient leur relation avec la Cour à moins que la Chambre n'en dispose autrement. Comme pour les autres informations confidentielles, un compte-rendu détaillé de sa communication doit être conservé par la partie qui enquête ou le représentant. Les membres du public ne doivent pas garder de copie – électronique ou matérielle – des documents audio-visuels qui leur auront été présentées : Gbagbo Defence Observations, ICC-02/11-01/11-778-Red, paras 19-20; Gbagbo Defence Proposed Protocol, ICC-02/11-01/11-778-Conf-Anx, page 8.*

³⁵ Blé Goudé Defence Observations, ICC-02/11-01/15-27-Conf, paras 15-16.

34. Mindful of its obligation to protect the safety and well-being of witnesses pursuant to Article 68 of the Statute, the Single Judge agrees with the Prosecution, and sees no reason to depart from the provision as adopted in the *Ntaganda* case.

D. Inadvertent Disclosure: the restriction on sharing inadvertently disclosed material with the accused

35. The Prosecution proposes the inclusion of a provision restricting the dissemination of inadvertently disclosed material to the accused.³⁶ It submits that the purpose of this provision is to curtail the further dissemination of inadvertently disclosed material, disclosure which occurred as a result of a mistake.³⁷ It further argues that, as opposed to Counsel, the accused are not bound by the Code of Professional Conduct for counsel, which sets out the principle of respect of professional secrecy and confidentiality of information.³⁸ Finally, the Prosecution avers that such a restriction is supported by the Court's case law.³⁹

36. The Gbagbo Defence disagrees with the proposed restriction on sharing inadvertently disclosed material with the accused. In its view, material is principally disclosed to an accused, not his Counsel. Further, it is not for the Defence to ensure that no mistake has occurred in the disclosure of the documents received. The Gbagbo Defence stresses its duty to inform the accused of the charges in detail and suggest an alternative proposal which does not contain such a restriction.⁴⁰

37. The Blé Goudé Defence concurs with the Gbagbo Defence.⁴¹

³⁶ Prosecution Proposed Protocol, ICC-02/11-01/11-777-AnxA , para. IV(b).

³⁷ Prosecution Observations, ICC-02/11-01/11-777-Conf, para. 30.

³⁸ Prosecution Observations, ICC-02/11-01/11-777-Conf, paras 31-33.

³⁹ Prosecution Observations, ICC-02/11-01/11-777-Conf, paras 34-36.

⁴⁰ Gbagbo Defence Observations ICC-02/11-01/11-778-Red, paras 23-25; Gbagbo Defence Proposed Protocol, ICC-02/11-01/11-778-Conf-Anx, pages 8-9.

⁴¹ Blé Goudé Defence Observations, ICC-02/11-01/15-27-Conf, para. 17.

38. The Single Judge is of the view that inadvertently disclosed material requires specific measures regulating its use, as it is understood that it should never have been disclosed in the first place. As inadvertently disclosed material may have a serious impact on the security of witnesses, the Single Judge considers, in accordance with Article 68(1) of the Statute, and in line with the Court's jurisprudence,⁴² that the team member of the receiving party noticing or having been informed of the inadvertent nature of the information disclosed shall prevent its further dissemination, including with the accused and, to the extent possible, with other members of the team.

E. Contacts between a party and witnesses not being called by that party

39. In this section of the Protocol, the Single Judge has largely drawn from the *Ntaganda* Protocol. However, with respect to the substance, where parties agreed on departing from the *Ntaganda* Protocol, the Chamber has included the proposed changes to reflect these agreements.

1) Contact between the LRV and witnesses from the parties

40. The Prosecution, the Gbagbo Defence and the Blé Goudé Defence all agree that the LRV should not be authorised to contact the parties' witnesses.⁴³

41. The LRV disagrees with this position and submits that: i) there is no apparent reason why she should not contact a party's witness since the parties are permitted to contact LRV witnesses; ii) it is inconsistent with the jurisprudence of Trial Chambers V and VI, and thus contrary to the intention to achieve uniformity of the already existing protocols applicable

⁴² *Ntaganda* Protocol, ICC-01/04-02/06-412-AnxA, para. 13. See also Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Annex to Decision on adoption of a 'Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant', 12 December 2014, ICC-01/04-02/06-412, paras 21-23.

⁴³ Prosecution Observations, ICC-02/11-01/11-777-Conf, paras 37-43; Gbagbo Defence Observations, ICC-02/11-01/11-778-Red, para. 27; Blé Goudé Defence Observations, ICC-02/11-01/15-27-Conf, paras 18-21.

before the Court; and iii) it may be necessary for the LRV to contact a witness in order to seek judicial protection of the personal interests of victims authorised to participate in the proceedings.⁴⁴

42. As indicated above, the Chamber finds it appropriate to aim, to the extent possible, at harmonising protocols amongst Trial Chambers. However, noting that under the statutory scheme, the LRV, as participant to the proceedings, does not have a responsibility comparable to that of the parties and noting additionally that all parties agree on this issue, the Chamber finds that the LRV should not be permitted to contact a party's witness. However, in accordance with paragraph 4 of the Protocol, nothing prevents the LRV from seising the Chamber with a request, should the need to contact a specific witness arise.

43. Further, the Chamber considers that, should the LRV be authorised to call witnesses, the Protocol shall foresee the possibility for the parties to contact said witnesses. Consequently, the scope of this section of the Protocol has been expanded to include the possibility for a party to contact a witness of the LRV through the addition of the words 'or [of] the LRV' as necessary.

2) The involvement of the VWU in case of contact with witnesses from the opposing party

44. The Gbagbo Defence submits that all contacts with witnesses, whether protected or not, shall occur through the VWU, which additionally should organise all logistical arrangements for their interviews.⁴⁵ It further suggests that the VWU should be present at interviews and that it should produce a report if the witness refuses to be audio-recorded.⁴⁶

⁴⁴ LRV Observations, ICC-02/11-01/11-776, paras 9-21.

⁴⁵ Gbagbo Defence Observations, ICC-02/11-01/11-778-Red, paras 29-97; Gbagbo Defence Proposed Protocol, ICC-02/11-01/11-778-Conf-Anx, pages 10-13.

⁴⁶ Gbagbo Defence Observations, ICC-02/11-01/11-778-Red, para. 39; Gbagbo Defence Proposed Protocol, ICC-02/11-01/11-778-Conf-Anx, page 14.

45. The VWU strongly opposes this suggestion. It clarifies that facilitating the investigative activities of the parties is not part of its mandate, and that it does not have the appropriate logistical means and financial capacity to do as proposed,⁴⁷ but indicates that it is ready to intervene upon a Chamber's order and where the situation so requires.⁴⁸ Finally, the VWU opposes the inclusion of a provision stating that, should a witness refuse to be recorded during interview, a representative of the VWU shall assist in making a report of the interview.⁴⁹

46. The Single Judge concurs with the VWU that it should not be made responsible for organising logistical arrangements for the parties' investigations. The Single Judge considers that the language suggested in the Prosecution Proposed Protocol is sufficient, and that the VWU shall be involved only in organisational matters relating to contacting witnesses participating in the ICCPP. Accordingly, the Single Judge rejects the Gbagbo Defence's proposals.

47. Further, and for the same reason, the Chamber considers it is not practicable that a representative of the VWU attends witness interviews and produce a report, should a witness refuse to be audio-recorded. It thus rejects the amendment to paragraph V(p) of the Prosecution Proposed Protocol, as suggested by the Gbagbo Defence.

48. Finally, and in accordance with the Court's jurisprudence,⁵⁰ the Chamber finds that a party intending to interview a witness who has been relocated with the assistance of the Court shall inform the VWU.

⁴⁷ VWU Observations, ICC-02/11-01/11-788, paras 4-6.

⁴⁸ VWU Observations, ICC-02/11-01/11-788, para. 7.

⁴⁹ VWU Observations, ICC-02/11-01/11-788, para. 8. The Chamber has noted that the LRV supports VWU's position (LRV Observations, ICC-02/11-01/11-776, para. 7).

⁵⁰ *Ntaganda* Protocol, ICC-01/04-02/06-412-AnxA, para. 36.

3) *Objections to the interview*

49. The Gbagbo Defence submits that the Prosecution's proposed paragraphs V(g) and (h) stipulating that the calling party can object to one of the witnesses it intends to call being interviewed by the non-calling party shall be deleted, as it considers that the calling party shall not be entitled to such a right and that the witness only can object to an interview.⁵¹

50. The Chamber partially agrees with the Gbagbo Defence to the extent that such an objection should be exceptional and sufficiently justified. However, it sees no harm in including the proposals of the Prosecution, as they provide a safeguard, namely that the investigating party can seize the Chamber when it insists on proceeding to the interview despite the calling party's objection.

51. Hence, the Chamber considers that the Prosecution's proposed language should be retained in the Protocol.

4) *Presence during the interview*

52. The Chamber has noted that the parties agree that: i) the calling party is entitled to be present during the interview, be it at its own request or at the witness's request; and ii) the investigating party can object to the calling party's request or to the witness's request to have a representative of the calling party present during the interview.⁵²

53. However, the Chamber fails to see any valid reason for which the investigating party could object to the presence of a representative of the calling party being present, if the latter is present at the request of the witness. Further, the Chamber considers that it should be the witness's

⁵¹ Gbagbo Defence Observations, ICC-02/11-01/11-778-Red, para. 38; Gbagbo Defence Proposed Protocol, ICC-02/11-01/11-778-Conf-Anx, page 12.

⁵² Prosecution Proposed Protocol, ICC-02/11-01/11-777-AnxA, paras V (i) to V (k); Gbagbo Defence Proposed Protocol, ICC-02/11-01/11-778-Conf-Anx, paras j-l.

choice to have a representative of the calling party present during the interview. Consequently, and in line with the jurisprudence of other Chambers⁵³ the Chamber has amended paragraph V (i) to V (k) of the Prosecution Proposed Protocol.⁵⁴

5) The appropriate measures when investigating witnesses of the opposing party allege that they suffered sexual violence, where it is apparent that the witness has not revealed the sexual violence to his or her family

54. Paragraph V (q) of the Prosecution Proposed Protocol stipulates that when a witness alleges that he/she suffered sexual violence which he/she did not report to his/her family, the investigating party cannot mention it to the witness's family.⁵⁵

55. The Prosecution submits that the Chamber should balance the rights of the accused and those of witnesses and take into account the limited value, if any, of asking a family member questions concerning alleged sexual violence against a witness, especially when the family member is not aware of it. The Prosecution avers that the investigating party will not be advanced by knowing that the family member is not aware of it, as it already knew they were not. On the contrary, the impact on the victim can be devastating. The Prosecution further argues that a similar provision has been adopted in the *Ntaganda* case and that there is no reason to depart from it.⁵⁶

56. The Gbagbo Defence submits that a provision which prohibits mentioning to a family member that a witness has been subjected to sexual violence should

⁵³ *Ntaganda* Protocol, ICC-01/04-02/06-412-AnxA, para. 40. See also, Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Annex to the Decision on the Protocol on the handling of confidential information and contact between a party and witnesses of the opposing party, 18 February 2013, ICC-02/05-03/09-451-Anx, paras 26-28; Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Annex to the Decision on the Protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-01/11-449-Anx, para. 10.

⁵⁴ Annex to the present decision, para. 41.

⁵⁵ Prosecution Proposed Protocol, ICC-02/11-01/11-777-AnxA, para. IV (q).

⁵⁶ Prosecution Observations, ICC-02/11-01/11-777-Conf, paras 44-51. The Chamber has noted that the LRV supports the position expressed by the Prosecution (LRV Observations, ICC-02/11-01/11-776, para. 8).

not be included in the Protocol, as it argues that it would unduly limit its ability to investigate. Should the Chamber be minded to adopt said provision, the Defence suggests, in the alternative, an amended proposal.⁵⁷

57. The Chamber is mindful of the Defence's argument that, in general, it should be authorised to question a witnesses' family to test the witnesses' credibility. However, the Chamber considers that the utmost caution should be exercised when investigating victims of sexual violence, who are particularly vulnerable witnesses. Further, the Chamber agrees with the Prosecution that the added value of questioning the family of the witness on an event it about which it is not aware will likely not advance the investigating party, who will generally have other means to investigate the credibility of a witness. Hence, the Chamber considers that the Prosecution's proposal should be retained.

⁵⁷ Gbagbo Defence Observations, ICC-02/11-01/11-778-Red, paras 40-42; Gbagbo Defence Proposed Protocol, ICC-02/11-01/11-778-Conf-Anx, page 14.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

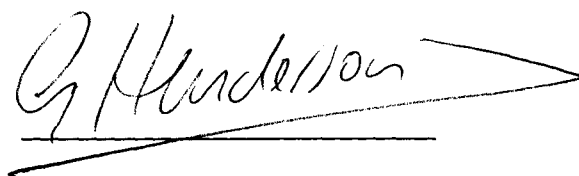
ADOPTS the Protocol, as set out in the annex to the present decision;

INSTRUCTS the Prosecution to file a public redacted version of the Prosecution Observations within 15 days of notification of this decision;

INSTRUCTS the Gbagbo Defence to file a public redacted version 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 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, appearing to read 'G Henderson', is written over a horizontal line. A long, thin, upward-pointing arrow-like stroke extends from the end of the signature.

Judge Geoffrey Henderson, Single Judge

Dated 31 August 2015

At The Hague, The Netherlands