

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-02/11-01/15
Date: 11 January 2016

TRIAL CHAMBER I

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

SITUATION IN CÔTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ***

Public Document

**Redacted Version of the Response to the "Victims and Witnesses Unit's
submissions in relation to the implementation of the Unified Protocol on the
practices used to prepare and familiarise witnesses for giving testimony at trial
(ICC-02/11-01/15-355-Anx)" (ICC-02/11-01/15-375)**

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that the request by the Victims and Witnesses Unit (the “VWU”) in relation to the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial (the “Witness Familiarisation Protocol”) should be granted in part.

2. In particular, the Legal Representative agrees with the VWU on the convenience of conducting the necessary in-court protection measures and vulnerability assessments in the field, prior to the arrival of the witness at the location of testimony, provided that the performance of said assessments is conducted by a psychologist *in situ* and not via video-link. However, she contends that deviating from paragraph 41 of the Witness Familiarisation Protocol is not necessary because the combined reading of paragraphs 20 and 41 of said Protocol adequately covers the issue at stake.

3. By contrast, the Legal Representative disagrees with the VWU’s suggestion for the witnesses to complete the statement reading in the field, prior to their arrival at the location of testimony. Save for exceptional circumstances, the safety and well-being of the witnesses and the genuineness of their testimony will be better ensured by providing them with their statements upon arriving in The Hague, instead of doing so in the field.

II. Confidentiality

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially because it makes reference to submissions filed under the same classification. A public redacted version is filed simultaneously.

¹ See the “Directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015, p. 24.

III. Background

5. On 16 April 2012, the Registry filed the “Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony” (the “Draft Witness Familiarisation Protocol”),² and the “Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses” (the “Draft Vulnerable Witnesses Protocol”)³ in the pre-trial phase of the *Gbagbo* case.

6. On 30 July 2014, the Registry filed a modified version of the Draft Witness Familiarisation Protocol,⁴ and of the Draft Vulnerable Witnesses Protocol⁵ in the pre-trial phase of the *Blé Goudé* case.

7. On 26 February 2015, the Prosecution and the Legal Representative filed before Trial Chamber I (the “Chamber”) their joint submissions on the Draft Witness Familiarisation Protocol in the *Gbagbo* case.⁶

8. On the same date, the Gbagbo Defence and the Prosecution jointly proposed a protocol concerning witness preparation (the “Draft Witness Preparation Protocol”),⁷ to which the Legal Representative agreed on 6 March 2015.⁸

² See the “Annex 1: Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony”, No. ICC-02/11-01/11-93-Anx1, 16 April 2012 (the “Draft Witness Familiarisation Protocol”).

³ See the “Annex 2: Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses”, No. ICC-02/11-01/11-93-Anx2, 16 April 2012 (the “Draft Vulnerable Witnesses Protocol”).

⁴ See the “Annex 1: 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*”, No. ICC-02/11-02/11-110-Anx1, 30 July 2014.

⁵ See the “Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses”, No. ICC-02/11-02/11-110-Anx2, 30 July 2014.

⁶ See the “Joint submission of the Prosecution and the Legal Representative of Victims on the proposed familiarisation protocol”, No. ICC-02/11-01/11-783, 26 February 2015.

⁷ See the “Annexe: Soumissions de l’Accusation et de la Défense relatives à l’adoption du protocole de préparation des témoins”, No. ICC-02/11-01/11-784-Anx, 26 February 2015 (the “Draft Witness Preparation Protocol”).

9. On 27 February 2015, the Gbagbo Defence,⁹ and the VWU¹⁰ filed their respective submissions on the Draft Witness Familiarisation Protocol. On the same date, the VWU objected to the amendments proposed by the Gbagbo Defence to the Draft Vulnerable Witnesses Protocol.¹¹

10. On 6 March 2015, the Legal Representative¹² and the Prosecution¹³ filed observations, *inter alia*, on the Draft Vulnerable Witnesses Protocol, supporting the proposal made by the VWU.

11. On the same date, the Gbagbo Defence filed observations on the Draft Vulnerable Witnesses Protocol, along with its suggested protocol on vulnerable witnesses.¹⁴

12. After the joinder of the *Gbagbo* and *Blé Goudé* cases,¹⁵ the VWU filed additional submissions to the Draft Witness Familiarisation Protocol on 13 March 2015,¹⁶ in response to amendments proposed by the Gbagbo Defence.

⁸ See the “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)”, No. ICC-02/11-01/11-802-Red, 12 March 2015, para. 39.

⁹ See the “Annex to Soumissions de la Défense relatives à l’adoption du Protocole « pratique de familiarisation des témoins en vue de leur déposition »”, No. ICC-02/11-01/11-786-Anx, 27 February 2015.

¹⁰ See the “Annex 1 to the 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”, No. ICC-02/11-01/11-791-Anx1, 2 March 2015 (dated 27 February 2015).

¹¹ See the “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”, No. ICC-02/11-01/11-789, 2 March 2015 (dated 27 February 2015).

¹² See the “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)”, *supra* note 8, paras. 36-38.

¹³ See the “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”, No. ICC-02/11-01/11-798, 6 March 2015.

¹⁴ See the “[REDACTED]”, No. ICC-02/11-01/11-803-Conf-Anx, 6 March 2015.

13. On 30 April 2015, the Blé Goudé Defence filed its observations on the Draft Witness Preparation Protocol and the Draft Witness Familiarisation Protocol,¹⁷ and its observations on the Draft Vulnerable Witnesses Protocol, along with its suggested protocol on vulnerable witnesses.¹⁸

14. On 4 May 2015, the Blé Coudé Defence filed an addendum to its observations on the Draft Witness Preparation Protocol and the Draft Witness Familiarisation Protocol.¹⁹

15. On 3 December 2015, the Chamber issued the “Decision on witness preparation and familiarisation”,²⁰ *inter alia* directing the VWU to apply the Witness Familiarisation Protocol annexed to the decision (the “Witness Familiarisation Protocol”).²¹

16. On 4 December 2015, the Chamber issued the “Decision on Protocol on vulnerable witnesses”,²² *inter alia* directing the VWU to facilitate the testimony of vulnerable witnesses in accordance with the decision and the Draft Vulnerable Witnesses Protocol filed by the VWU in the *Blé Goudé* case (the “Vulnerable Witnesses Protocol”).²³

¹⁵ See the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” (Trial Chamber I), No. ICC-02/11-01/15-1, 11 March 2015.

¹⁶ See the “Victims and Witnesses Unit’s submission pursuant to Order ICC-02/11-01/11-807”, No. ICC-02/11-01/15-2, 13 March 2015.

¹⁷ See the “[REDACTED]”, No. ICC-02/11-01/15-50-Conf, 30 April 2015.

¹⁸ See the “[REDACTED]”, No. ICC-02/11-01/15-51-Conf-Anx, 30 April 2015.

¹⁹ See the “[REDACTED]”, No. ICC-02/11-01/15-54-Conf, 4 May 2015.

²⁰ See the “Decision on witness preparation and familiarisation” (Trial Chamber I), No. ICC-02/11-01/15-355, 3 December 2015 (dated 2 December 2015).

²¹ See the “Annex to Decision on witness preparation and familiarisation” (Trial Chamber I), No. ICC-02/11-01/15-355-Anx, 3 December 2015 (dated 2 December 2015) (the “Witness Familiarisation Protocol”).

²² See the “Decision on Protocol on vulnerable witnesses” (Trial Chamber I), No. ICC-02/11-01/15-357, 4 December 2015.

²³ See the “Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses”, *supra* note 5 (the “Vulnerable Witnesses Protocol”).

17. On 23 December 2015, the VWU filed a request to deviate from the Witness Familiarisation Protocol (the “Request”).²⁴

18. Pursuant to regulation 24(2) of the Regulations of the Court and the order of the Chamber reducing the deadline to respond to the Request,²⁵ the Legal Representative respectfully submits the following response.

IV. Submissions

1. Regarding the conduct of in-court protection measures and vulnerability assessments in the field

19. The Legal Representative submits that the deviation from paragraph 41 of the Witness Familiarisation Protocol requested by the VWU is not necessary in order to conduct in-court protection measures and vulnerability assessments in the field, prior to the arrival of the witness at the location of testimony.²⁶

20. Admittedly, paragraph 41 of the Witness Familiarisation Protocol provides that an “[a]ssessment [for special measures] by the VWU Psychologist” is given “upon arrival [of the vulnerable witness] at the location of testimony”.²⁷

21. However, paragraph 20 of the Witness Familiarisation Protocol entrusts the VWU with conducting a “preparatory assessment” in consultation with the entity calling the witness in order to “[d]etermine[s] appropriate measures to prepare the

²⁴ See the “Victims and Witnesses Unit’s submissions in relation to the implementation of the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial (ICC-02/11-01/15-355-Anx)”, No. ICC-02/11-01/15-375, 23 December 2015 (the “Request”).

²⁵ See the e-mail received from Trial Chamber I on 17 December 2015 at 14h07.

²⁶ See the Request, *supra* note 24, para. 1.

²⁷ See the Witness Familiarisation Protocol, *supra* note 21, para. 41.

vulnerable witness for trial".²⁸ In this regard, paragraph 41 clarifies that a "[f]urther assessment [...] which builds upon the preliminary assessment as indicated in section 1.2" is provided "upon arrival at the location of testimony".²⁹

22. Accordingly, the Legal Representative submits that that the VWU may use the "preparatory assessment" foreseen in paragraph 20 of the Witness Familiarisation Protocol in order to conduct in-court protection measures and vulnerability assessments in the field. This is consistent with the obligation on the parties to "[a]lert the VWU as early as practicable if they intend to call a vulnerable witness or if they identify the need for procedural protective and/or special measures".³⁰

23. The Legal Representative notes that the wording of paragraphs 20 and 41 of the Witness Familiarisation Protocol was suggested by the VWU³¹ and adopted by the Chamber after dismissing the changes suggested by the Defence.

24. In particular, [REDACTED],³² the Gbagbo Defence agreed to the substance of paragraph 20 as submitted by the VWU,³³ but proposed that paragraph 41 should leave it to the choice of vulnerable witnesses to undergo a further assessment upon their arrival at the location of testimony.³⁴ Said suggestion was not agreed upon by the Chamber.³⁵

²⁸ *Idem*, para. 20.

²⁹ *Ibid.*, para. 41.

³⁰ *Ibid.*, para. 19.

³¹ See the Draft Witness Familiarisation Protocol, *supra* note 2, paras. 21 and 43; the "Annex 1: 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*", *supra* note 4, paras. 20 and 42; and the "Annex 1 to the 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", *supra* note 10, paras. 20 and 48.

³² See the "[REDACTED]", *supra* note 17, paras. 36-42; and the "[REDACTED]", *supra* note 19.

³³ See the "Annex to Soumissions de la Défense relatives à l'adoption du Protocole « pratique de familiarisation des témoins en vue de leur déposition »", *supra* note 9, para. 20.

³⁴ *Idem*, para. 46.

³⁵ See the "Decision on witness preparation and familiarisation", *supra* note 20, para. 27.

25. Similarly, the Chamber [REDACTED].³⁶ The Chamber found it appropriate to maintain instead the text of the Draft Vulnerable Witnesses Protocol submitted by the VWU,³⁷ after clarifying that “[t]he assessment shall serve to evaluate the mental health status of the witness and his/her capacity to appear before the Court”.³⁸

26. Against this background, the Legal Representative agrees with the VWU on the convenience to advance the assessments foreseen in the Witness Familiarisation Protocol as much as possible. Considering the high number of witnesses to be called to testify during the trial, it appears reasonable to assess them in the field in order not to delay unnecessarily the proceedings. Moreover, as noted by the VWU, these assessments may be updated later as necessary, in particular once the witnesses arrive at the location of testimony.³⁹

27. However, the Witness Familiarisation Protocol only refers expressly to the VWU Psychologist’s presence when addressing the witnesses’ assessment at the location of testimony.⁴⁰ Moreover, the Request fails to clarify whether the VWU Psychologist will meet the witnesses in person as well during the assessments conducted before their arrival in The Hague.⁴¹

28. In these circumstances, the Legal Representative stresses the importance of ensuring the actual presence of the VWU Psychologist when performing all the assessments, not only those conducted upon the witness’ arrival at the location of testimony. Actually meeting the assessed witnesses instead of conducting the assessment via video-link will not only assist the VWU in its decision whether to

³⁶ See the “[REDACTED]”, *supra* note 14, para. 8; and the “[REDACTED]”, *supra* note 18, para. 8.

³⁷ See the Draft Vulnerable Witnesses Protocol, *supra* note 3, para. 8. See also the “Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses”, *supra* note 5, para. 7.

³⁸ See the “Decision on Protocol on vulnerable witnesses”, *supra* note 22, para. 17.

³⁹ See the Witness Familiarisation Protocol, *supra* note 21, para. 41; and the Request, *supra* note 24, para. 1. See also the Vulnerable Witnesses Protocol, *supra* note 23, para. 9.

⁴⁰ See the Witness Familiarisation Protocol, *supra* note 21, paras. 20 and 41.

⁴¹ See the Request, *supra* note 24, para. 1.

recommend the adoption of protective and special measures for the witnesses, but will also reduce the risk of litigation in this regard.

29. Accordingly, the Legal Representative supports the possibility for the VWU to conduct in-court protection measures and vulnerability assessments in the field pursuant to the Witness Familiarisation Protocol, prior to the arrival of the witnesses at the location of testimony and provided that the VWU Psychologist is actually present. This approach would be consistent with the Vulnerable Witnesses Protocol adopted by the Chamber,⁴² and with past submissions filed by the VWU.⁴³

2. Regarding the statement reading in the field

30. The Legal Representative submits that the deviation from paragraph 79 of the Witness Familiarisation Protocol requested by the VWU in order for the witnesses to read their statements in the field, prior to the arrival of the witness at the location of testimony,⁴⁴ should not be established as a general rule but applied on a case by case basis considering the situation of each particular witness. Otherwise, the reading of statements in the field may jeopardise the safety and well-being of the witnesses and/or the genuineness of their testimony.

31. Regarding the danger to the witnesses' safety arising from reading their statements in the field, the Legal Representative clarifies that, in spite of not being consulted or informed by the parties,⁴⁵ she agreed to the Draft Witness Preparation Protocol because, *inter alia*, said Protocol provided that the possibility for the parties

⁴² See the Vulnerable Witnesses Protocol, *supra* note 23, paras. 7-8.

⁴³ See, for instance, the "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", *supra* note 11, para. 2.

⁴⁴ See the Request, *supra* note 24, para. 2.

⁴⁵ See the "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)", *supra* note 8, para. 39.

to give the witnesses the opportunity to read their statements in the field was subject to the consideration of the witnesses' safety.⁴⁶

32. Indeed, it is generally more difficult to ensure a witness' safety in the field than at the location of testimony because there usually are more security implications in the former than in the latter. It suffices to consider the safety implications generally faced by the different services of the Court when meeting witnesses in the field, such as the risk of third persons becoming aware of the witness' cooperation with the Court or of any other confidential information regarding the witness. The provision of a confidential document to the witnesses during said meetings – *i.e.* their statements – would further increase the risk to their safety.

33. In addition, there are usually more limited services available to ensure the witnesses' safety in the field than at the location of testimony. The premises of the Court in The Hague certainly provide a safer environment for the witnesses to read their statements than the situation countries where the crimes have allegedly been committed or any other place where they witnesses may be located.

34. Moreover, the Legal Representative submits that the witnesses' well-being will be better ensured if the statement reading takes place upon their arrival in The Hague and not in the field because there are more services available for this purpose in the former than in the latter.

35. In particular, vulnerable witnesses may need support and assistance during and/or after reading their statements, but specialised care is guaranteed to them at all times only upon their arrival at the location of testimony.⁴⁷ Accordingly, reading the

⁴⁶ See the Draft Witness Preparation Protocol, *supra* note 7, paras. 8-9 and 17. See also the "[REDACTED]", *supra* note 17, p. 20.

⁴⁷ See the Witness Familiarisation Protocol, *supra* note 21, para. 39; and the Vulnerable Witnesses Protocol, *supra* note 23, paras. 12-14.

statement in the field may unnecessarily jeopardise the well-being of vulnerable witnesses.

36. Similarly, dual status individuals may maintain contact with the Legal Representative after re-reading their statements and prior to testifying,⁴⁸ but the assistance that said individuals may require from their counsel can only be guaranteed at all times upon the witnesses' arrival at the location of testimony. Indeed, the Legal Representative is not permanently based in the field. Accordingly, reading the statement in the field may unnecessarily jeopardise the possibility for the Legal Representative to effectively comply with her obligations under the Code of Professional Conduct for counsel.

37. Lastly, the Legal Representative submits that there is a higher risk that the witnesses may discuss their testimony with other persons if they read their statements before travelling to the location of testimony. Reading the statements in the field increases the risk of "contamination" of the witness' evidence because the witnesses are more open to uncontrolled interaction with third persons before arriving in The Netherlands. In fact, the Chamber has allowed the separate accommodation of witnesses at the location of testimony acknowledging the existence of the risk of evidence being tainted by contact even during testimony.⁴⁹

38. Accordingly, the Legal Representative supports the possibility for the VWU to conduct the statement reading in the field only in exceptional circumstances, and if all reasonable measures have been taken to reduce the security risks and ensure the witness' well-being when reading the statement.

⁴⁸ See the Witness Familiarisation Protocol, *supra* note 21, para. 32.

⁴⁹ See the "Decision on witness preparation and familiarisation", *supra* note 20, para. 26; and the Witness Familiarisation Protocol, *supra* note 21, paras. 35-36.

V. Conclusion

39. For the foregoing reasons, the Common Legal Representative respectfully requests the Chamber to grant the Request to the extent indicated in paragraphs 29 and 38 *supra*.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 11th day of January of 2016

At The Hague, The Netherlands