

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/15
Date: 13 January 2016

TRIAL CHAMBER I

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

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

Public

**Decision on the request for leave to appeal the '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

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, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ('Gbagbo and Blé Goudé case'), having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues, by Majority, Judge Henderson dissenting, the following 'Decision on the request for leave to appeal the "Decision on witness preparation and familiarisation"'.

I. Procedural history

1. On 2 December 2015, the Chamber, Judge Henderson partially dissenting, issued the 'Decision on witness preparation and familiarisation' ('Impugned Decision'),¹ in which it: (i) rejected, by majority, the joint request of the parties and participants for adoption of a witness preparation protocol in the *Gbagbo and Blé Goudé* case;² and (ii) directed the application of the 'Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial'.³
2. On 14 December 2015, the Office of the Prosecutor ('Prosecution') filed a request for leave to appeal the Impugned Decision on two issues ('Request').⁴
3. On 17 December 2015, the Legal Representative of Victims ('LRV') filed a response to the Request ('LRV Response'),⁵ submitting that the Chamber should grant the Request.

II. Submissions

4. In its Request, the Prosecution seeks leave to appeal the Impugned Decision on two issues:

¹ ICC-02/11-01/15-355, ICC-02/11-01/15-355-Anx; ICC-02/11-01/15-355-Anx1.

² Impugned Decision, ICC-02/11-01/15-355, paras 13-19.

³ Impugned Decision, ICC-02/11-01/15-355, paras 20-27; ICC-02/11-01/15-355-Anx.

⁴ Prosecution's application for leave to appeal the "Decision on witness preparation and familiarisation", ICC-02/11-01/15-363. *See* email communication from the Prosecution to the Chamber on 3 December 2015 at 12:46 requesting an extension of time in which to file the request for leave to appeal, and email communication from Legal Officer of the Chamber to parties and participants on 3 December at 14:48, granting said request.

⁵ Response to the "Prosecution's application for leave to appeal the 'Decision on witness preparation and familiarisation'" (ICC-02/11-01/15-363), ICC-02/11-01/15-366.

- a) 'Whether witness preparation, as a matter of principle and practice, is a critical aspect of a Party's right and ability to present its case in a meaningful, fair and expeditious manner and the Court's truth finding function' ('First Issue'); and
 - b) 'Whether, in the case at hand, the alleged potential risks of witness preparation outweigh the Parties' right to prepare and present their cases and the substantial benefits of witness preparation to a fair and expeditious trial and the well-being of witnesses' ('Second Issue', and together with First Issue, 'Issues').
5. The Prosecution argues that both Issues are appealable. With respect of the First Issue, the Prosecution submits, *inter alia*, that it 'squarely emanates from the [Impugned] Decision'⁶ as it underscores the centrality of witness preparation as a general principle, and is the only decision that pronounces upon the appropriateness of witness preparation in the *Gbagbo and Blé Goudé* case. With respect of the Second Issue, the Prosecution avers that it clearly arises from the Impugned Decision insofar as it entails a balancing of the potential risks of witness preparation against the potential benefits in the present case, which in turn led to the outcome in part (i) of the Impugned Decision.⁷
6. The Prosecution argues that the Issues also significantly affect the fairness of the proceedings, submitting that the rights of parties to prepare and present their cases, as well as the Court's truth-finding function, will be unfairly impacted by the Impugned Decision. The Prosecution argues that it had 'reasonably assumed' that witness preparation would be permitted in the present case, based on the approach of other trial chambers 'in three out of

⁶ Request, ICC-02/11-01/15-363, para. 9.

⁷ Request, ICC-02/11-01/15-363, paras 7-20.

four recent cases’.⁸ The Prosecution avers that it is specifically and unfairly disadvantaged by not being allowed to prepare its witnesses in a case of the complexity and importance of the *Gbagbo and Blé Goudé* case, and which may lead the resulting testimony to ‘lack precision, be incomplete, confused or given in an ill-structured or chaotic manner’.⁹

7. The Prosecution argues that the Issues significantly affect the expeditiousness of the proceedings, because the proceedings in the present case will be lengthier as a result of the ‘very tangible delay caused by unprepared witnesses’.¹⁰ The Prosecution also avers that the Issues will significantly affect the outcome of the trial because the Impugned Decision, in its rejection of witness preparation, has a direct bearing on the evidence that may be elicited from witnesses, and as such, on the Chamber’s truth-finding function.¹¹ Finally, the Prosecution submits that immediate resolution of the Issues may materially advance the proceedings, as the entire case will be affected by the Impugned Decision, and a determination by the Appeals Chamber will ensure the conduct of the trial does not proceed ‘on a flawed basis’.¹²

8. In the LRV Response, it is submitted that the Request satisfies the requirements of Article 82(1)(d) of the Statute, and ought to be granted. The LRV argues that the Request demonstrates that the Issues arise from the Impugned Decision insofar as they address, on one hand, the Chamber’s findings on witness preparation as a general principle, and on the other, its appropriateness in the present case.¹³ The LRV avers that the Request also demonstrates that the Issues significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial, insofar as depriving

⁸ Request, ICC-02/11-01/15-363, para. 25.

⁹ Request, ICC-02/11-01/15-363, paras 26-32.

¹⁰ Request, ICC-02/11-01/15-363, para. 37.

¹¹ Request, ICC-02/11-01/15-363, para. 39.

¹² Request, ICC-02/11-01/15-363, paras 40-44.

¹³ LRV Response, ICC-02/11-01/15-366, paras 9-13.

witnesses of witness preparation sessions is 'intrinsically unfair to them', may result in disruption and delay, and will impact on the Chamber's truth-finding function.¹⁴ The LRV argues that immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings, insofar as it would ensure that the fairness of the entire proceedings is not vitiated by the Impugned Decision.¹⁵

III. Analysis

9. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions.¹⁶ Specifically, the Chamber recalls that the Appeals Chamber has defined an 'issue' under Article 82(1)(d) of the Statute as 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.¹⁷
10. The Chamber does not consider that the First Issue is of the requisite specificity or discreteness to constitute an 'appealable issue'. Indeed, in seeking to appeal whether witness preparation 'as a matter of principle and practice' is central to a party's ability or right to present its case, the Chamber considers that the Prosecution is in fact seeking leave to appeal the entire thrust of the witness preparation section of the Impugned Decision, rather than a discrete aspect thereof.
11. In this vein, the Chamber considers that the First Issue is insufficiently specific and constitutes disagreement with the Impugned Decision as a whole, which

¹⁴ LRV Response, ICC-02/11-01/15-366, paras 14-19.

¹⁵ LRV Response, ICC-02/11-01/15-366, paras 20-22.

¹⁶ See Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record', 10 July 2015, ICC-02/11-01/15-132, para. 3 and footnote 5 thereto.

¹⁷ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

was a decision of a discretionary nature. Accordingly, the Chamber does not consider that the First Issue qualifies as an appealable issue.

12. The Chamber considers that the Second Issue, which pertains to the Chamber's rejection of the witness preparation protocol in the context of the *Gbagbo and Blé Goudé* case, is similarly too wide-ranging to constitute an appealable issue. While the Prosecution seeks review of the weighing exercise conducted by the Chamber in finding that witness preparation, as a general rule, would not be appropriate in the present case,¹⁸ the Chamber considers such a matter to be intrinsically predicated on the First Issue as applied in the *Gbagbo and Blé Goudé* case, and which demonstrates disagreement with the approach taken in the Impugned Decision as a whole. In the absence of identifying any discrete aspects of the Chamber's exercise of its discretion that may require review from the Appeals Chamber, the Chamber considers the Second Issue is also too broad to satisfy the leave to appeal criteria under Article 82(1)(d) of the Statute.

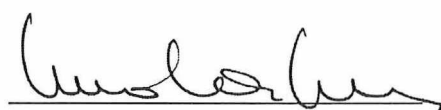
¹⁸ Impugned Decision, ICC-02/11-01/15-355, para. 19.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

REJECTS the Request, by Majority.

Judge Henderson appends a dissenting opinion.

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

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser, Presiding Judge

A handwritten signature in black ink, appearing to read 'O. Herrera Carbuccion', written over a horizontal line.

Judge Olga Herrera Carbuccion

A handwritten signature in black ink, appearing to read 'G. Henderson', written over a horizontal line.

Judge Geoffrey Henderson

Dated 13 January 2016

At The Hague, The Netherlands