

1 International Criminal Court
2 Trial Chamber I
3 Situation: Republic of Côte d'Ivoire
4 In the case of The Prosecutor v. Laurent Gbagbo and
5 Charles Blé Goudé - ICC-02/11-01/15
6 Presiding Judge Cuno Tarfusser, Judge Olga Herrera-Carbuccia and
7 Judge Geoffrey Henderson
8 Trial Hearing - Courtroom 1
9 Monday, 17 October 2016
10 (The hearing starts in private session at 11.35 a.m.)
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20 (Open session at 12.17 p.m.)

21 THE COURT OFFICER: [12:17:10] We're in open session, Mr President.

22 PRESIDING JUDGE TARFUSSER: [12:17:19] Thank you. I just want to inform the public
23 that we have been discussing security issues in private session and, therefore, we were in
24 private session. And now we, the Chamber, will decide on what we have discussed and
25 we adjourn the hearing for 30 minutes. Then the purpose would be to start just the

1 beginning information, the preliminary informations with the witness and then adjourn to
2 the afternoon for the first questioning session of the Office of the Prosecutor.

3 This is the road map. So about half an hour. Thank you.

4 THE COURT USHER: [12:18:09] All rise.

5 (Recess taken at 12.18 p.m.)

6 (Upon resuming in open session at 12.54 p.m.)

7 THE COURT USHER: [12:54:21] All rise.

8 Please be seated.

9 PRESIDING JUDGE TARFUSSER: [12:54:52] Court officer, could you please call private
10 session just for a few minutes and then we return in open session.

11 (Private session at 12.55 p.m.)

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9 (Open session at 12.57 p.m.)

10 THE COURT OFFICER: [12:57:57] We are back in open session, Mr President.

11 PRESIDING JUDGE TARFUSSER: [12:58:02] Thank you very much and now we come to
12 the Chamber's oral ruling on the Prosecutor's application for protective measures for
13 Witness 435 and I'm referring to confidential filing 684.

14 On 23 September 2016, the Prosecutor requested: One, in-court protective measures in the
15 form of continued use of pseudonym, voice and image distortion for Witness 435; and two,
16 recourse to in camera proceedings for identifying portions of the testimony with a view to
17 preventing the witness's identity from being disclosed to the public.

18 Information supporting the application was also included in the confidential and
19 confidential ex parte annexes to the filing.

20 On 4 October 2016, the Defence for Mr Blé Goudé and the Defence for Mr Gbagbo
21 responded respectively by confidential filings 703 and 705, both objecting the application.

22 On 13 October 2016, the VWU informed the Chamber that they supported the Prosecutor's
23 application. The Chamber, having considered the information provided by the Prosecutor,
24 the objections submitted by both Defence teams and the VWU's assessment and
25 recommendation, finds that the requested measures are not warranted.

1 The Chamber would like to reiterate yet again that the following factors are all unsuitable
2 to trigger the application of Rule 87:

3 One, generic references to a social context in Ivory Coast, including its alleged polarisation
4 or to the level of attention reserved to this trial by media, social media and ordinary
5 citizens;

6 Two, speculative and hypothetical scenarios;

7 Three, a witness's potential subjective fears and concerns or preferences not substantiated
8 by objective verifiable circumstances;

9 Four, isolated past episodes even when serious.

10 Protective measures resulting in limiting the right of the accused to a public trial can only
11 be granted in the presence of a concrete, objective, identifiable risk suitable to be
12 neutralised or mitigated by the specific requested measure.

13 All witnesses before the Court are neutral and only expected to tell the truth, and
14 appearing in public is part of the responsibility attached to the role.

15 In light of this, the Chamber is disappointed to find in the Prosecutor's application hardly
16 anything going beyond the level of generic hypothetical and vague statements, most of
17 which exclusively rely on the witness or the witness's family's own take of events and
18 circumstances. In particular those surrounding his testimony in Côte d'Ivoire.

19 As regards more specifically the assessment by the VWU, the Chamber notes with
20 astonishment that the assessment is full of inconsistencies and contradictions. As such it
21 can hardly support the final recommendations.

22 Suffice it to note among many such contradictions that on the one hand the VWU finds that
23 developments following the witness's testimony in Ivory Coast show that, and I quote,
24 "Parties are either unwilling or are not capable of implementing a more violent means of
25 retribution," end of quote.

1 On the other hand, that those same developments show that, and I quote again, "Some
2 parties hold ill feeling towards the witness," end of quote and therefore support, quote, "an
3 escalation of threat level," end of quote.

4 Furthermore, the Chamber fails to see how considerations relating to the modality of the
5 witnesses transferred to the seat of the Court may relate to or otherwise affect the need for
6 or appropriateness of in-court protective measures.

7 In the view of the Chamber, the fact that the witness has not only already publicly
8 appeared on the stand in Ivory Coast in the trial against Simone Gbagbo, but also featured
9 in the Ivorian press in connection with other events contradicts the Prosecutor's and the
10 VWU's submissions both as to the existence of a risk and as to the suitability of the
11 requested protective measures to neutralise it.

12 First, no significant adverse consequence has materialised in the month following the
13 witness episode -- exposure in the media, either for him or for his family.

14 To the contrary, some of the episodes referred to by the Prosecutor date back to a period
15 preceding the witness' testimony in Côte d'Ivoire.

16 Second, the Facebook postings and messages targeting the witness and his family, as
17 unpleasant and possibly derogatory as they are, do not go beyond their respective author's
18 perception of P-435's role in the Ivorian proceedings.

19 Accordingly, they fail to reach the threshold of an objective security risk suitable to trigger
20 Rule 87.

21 The Prosecutor seems to make an equation between a comment, albeit unpleasant, or even
22 an insult on the one hand and a threat on the other hand. The Chamber believes that this
23 equation is unwarranted.

24 Third, the previous exposure of the witness in the Ivorian media makes it highly likely that
25 even if protective measures were to be adopted, the very nature and subject matter of his

1 testimony would allow the identification of the witness and therefore neutralise them.

2 If anything, there is a risk that the attempt to shield the public from his identity, whilst
3 unsuccessful, would only result in increasing the type of attention to the witness, which
4 already surfaced following his testimony in Ivory Coast.

5 As put by the VWU and in spite of their final recommendations in favour of in-court
6 protective measures, following his public testimony in Côte d'Ivoire, and I quote again,
7 "There can be little doubt remaining over the nature of the witness' evidence or the identity
8 of those his evidence implicates." End of quote.

9 In light of the above, the Chamber rejects the Prosecutor's application. The Chamber
10 trusts that both the Prosecutor and the VWU will take note, due note of this decision and
11 expects that no more vague, unspecific and unsupported applications and/or
12 recommendations will be submitted.

13 This concludes the Chamber's oral ruling.

14 And as it is 10 past 1 and there is need for a change in the whole assessment of the
15 technology we have here, full of technology but slow, I would now break, have the lunch
16 break and come back in one hour and a half, meaning just after 2.30. Thank you.

17 THE COURT USHER: [13:07:35] All rise.

18 (Recess taken at 1.07 p.m.)

19 (Upon resuming at 2.38 p.m.)

20 THE COURT USHER: [14:38:56] All rise.

21 Please be seated.

22 PRESIDING JUDGE TARFUSSER: [14:39:21] Good afternoon. I would ask the court
23 officer -- the clerk introduce the witness to the stand.

24 MR MACDONALD: [14:39:42] Before we do that, your Honours, I think my colleague --

25 PRESIDING JUDGE TARFUSSER: [14:39:44] I know. I know you want to address -- to

1 have, to have a time to speak with the witness. I know that. But I would just, I would
2 just introduce the witness, give him all the instructions, then just for everybody to know,
3 then I would give you the floor for what you ask me and then I would grant it and adjourn
4 to tomorrow. So we have all the time. Is that okay?

5 MR WAGEMAKERS: [14:40:14] Well, if you explain it to my client, and you will I am
6 sure --

7 PRESIDING JUDGE TARFUSSER: Yeah, yeah, I will.

8 MR WAGEMAKERS: -- we will be good.

9 PRESIDING JUDGE TARFUSSER: Okay.

10 MR WAGEMAKERS: Thank you.

11 MR KNOOPS: [14:40:21] Mr President, before the witness comes in, it can also be at
12 another moment this afternoon, we have also one procedural point to raise, both the team
13 of Mr Altit and our team, regarding the position of counsel in these proceedings of the
14 witness, but we can also defer that issue after you have instructed the --

15 PRESIDING JUDGE TARFUSSER: [14:40:42] I think we should defer it.

16 MR KNOOPS: [14:40:45] Thank you, Mr President.

17 PRESIDING JUDGE TARFUSSER: Thank you.

18 MR KNOOPS: Thank you.

19 PRESIDING JUDGE TARFUSSER: [14:40:46] Thank you.

20 Can you please introduce the witness.

21 (Pause in proceedings)

22 (The witness enters the courtroom)

23 PRESIDING JUDGE TARFUSSER: [14:42:29] Good morning -- well, good afternoon,
24 Mr Witness.

25 WITNESS: CIV-OTP-P-0435

Trial Hearing
WITNESS: CIV-OTP-P-0435

(Open Session)

ICC-02/11-01/15

1 (The witness speaks French)

2 THE WITNESS: [14:42:35] (Interpretation) Good afternoon, Mr President.

3 PRESIDING JUDGE TARFUSSER: [14:42:39] I know that you would like to speak with
4 your lawyer and you will have now, soon after, all the time to do so. But before doing so,
5 I would like to give you all the preliminary information and instructions. Once I have
6 done that, I will give you the time to speak with the lawyer, so you know all what you need
7 to know about your testimony from our side and then you have all the time to speak with
8 your lawyer. Is this okay?

9 THE WITNESS: [14:43:20] (Interpretation) Yes, Mr President.

10 PRESIDING JUDGE TARFUSSER: [14:43:34] Okay. First instruction is to you to speak
11 loudly and slowly.
12 So the first thing is your identification. Can you please identify yourself with name, date
13 and place of birth.

14 THE WITNESS: [14:44:02] (Interpretation) My name is Metch Metchro Moïse Harold
15 Fabrice. I'm born on 19 April 1983 in Cocody.

16 PRESIDING JUDGE TARFUSSER: Cocody Abidjan?

17 THE WITNESS: (Interpretation) Cocody Abidjan.

18 PRESIDING JUDGE TARFUSSER: [14:44:27] And you are Ivorian nationality.

19 THE WITNESS: [14:44:34] (Interpretation) Yes, Mr President.

20 PRESIDING JUDGE TARFUSSER: [14:44:40] Okay. Now I give you some information,
21 the first is about the protective measures. I don't know if you know, but otherwise I tell
22 you now that the Chamber has decided not to grant protective measures and this because
23 you have already for many reasons, but you have already testified publicly in other trials
24 and, therefore, there is in the opinion of the Chamber no need for protective measures. In
25 any case, your family is otherwise protected. So we did not grant the protective measures.

1 But, and here I come to something which was raised by your lawyer this morning about the
2 possibility of self-incrimination, you have been assigned a lawyer, Mr Marcus Wagemakers,
3 to provide you with legal advice about possible self-incrimination.

4 The Prosecutor has indicated that Rule 74 assurances were appropriate in your case.

5 Mr Wagemakers is present with you and, if any concern arises during the course of your
6 testimony, he will be able advise you and to raise concerns, those concerns you might have
7 with the Chamber. Yourself can do this as well.

8 The Chamber gives you the assurance pursuant to Rule 74(3) of the Rules of procedure and
9 evidence that your testimony will not be used either directly or indirectly against you in
10 any subsequent proceedings by this Court, except under Article 70 and 71, which are the
11 offences against the Court if you do not say the truth.

12 Accordingly, if any question is asked by either parties that could lead to your
13 self-incrimination, we will hear your answer in private session, so excluding all the public,
14 and keep this answer, your answer always confidential.

15 The questioning party, the party who is putting this question is responsible for requesting
16 private sessions prior to asking questions that may lead you to incriminate yourself, and
17 obviously your counsel should be alert to intervene if he deems it appropriate. So any
18 possibility of self-incrimination or any question or answer which could lead to
19 self-incrimination will be dealt with separately in private session.

20 You are, and now I am coming to another point and this regards the interpretation, you are
21 testifying in French, and we here need to ensure that we understand your answers, that
22 you understand our questions properly, and therefore we need interpreters, and we have
23 interpreters. And therefore it is important that you speak slowly, like I am doing, that you
24 speak clearly into the microphone and allow some time for correct interpretation.

25 So these are the preliminary informations.

1 Now I want to come to your testimony. You are certainly aware that this Chamber has
2 been established to try the case of the Prosecutor against Mr Gbagbo and Mr Blé Goudé.
3 You are here as a witness, and as a witness you are called to assist the Chamber in the
4 search to find the truth. So you will be asked questions by the Office of the Prosecutor,
5 you will be asked questions by the Defence lawyers, and you might be asked questions also
6 by the Judges.
7 If at any point you have concerns, you would like a break, you are tired, you are not at ease,
8 just address me and we will take care of any issues you address.
9 As a witness -- and I repeat myself, a witness is not a witness to one or the other part,
10 a witness is here to tell what he knows, the fact he knows in a true manner. As a witness
11 in these proceedings, it is obviously your duty to tell the truth, to tell what you know true.
12 So before we start the questioning, but as I said we will start the questioning tomorrow, not
13 today, you are required by law to make a solemn undertaking to this effect. And therefore
14 I would ask you to read the formula you have in front of you.
15 THE WITNESS: [14:52:33] (Interpretation) I solemnly declare that I shall speak the truth,
16 the whole truth and nothing but the truth.
17 PRESIDING JUDGE TARFUSSER: [14:52:43] Thank you very much.
18 And the last thing I have to inform you is that giving false testimony or, said another way,
19 not telling the truth is an offence before this Court and, as such, punishable. Do you
20 understand this?
21 THE WITNESS: [14:53:07] (Interpretation) Yes, your Honour.
22 PRESIDING JUDGE TARFUSSER: [14:53:12] So these are all the preliminary things I had
23 to address you with, and now I would give the floor to your lawyer, who asked to address
24 the Chamber.
25 Yours the floor.

1 MR WAGEMAKERS: [14:53:30] Thank you, Mr President. Yes, I am responsible for this
2 delay, so I owe you some explanation.

3 PRESIDING JUDGE TARFUSSER: [14:53:36] Slowly.

4 MR WAGEMAKERS: [14:53:37] Yes, I will.

5 We took duly notice of your Court's decision not to grant the protective measures as
6 requested by the Prosecutor and me. And after that, well, Defence counsel raised the issue,
7 well, yes, but protective measures and any issue of self-incrimination are two different
8 topics. That's true.

9 So I was a bit -- well, no, I did not find any argument in your decision which related to the
10 connection between the protective measures as requested and the risk of self-incrimination.
11 You refer to, your Honour, to Rule 74 of the Rules. Of course, I saw that, but that is just
12 not good enough, well, not yet in this case. And like I said, when I got involved in this
13 case, I thought, well, let's look where I can find any self-incriminative passages. Well, the
14 question is where are they not.

15 So I would rather rely on Article 19 of the agreement of the privileges and immunities of
16 the International Criminal Court, which provides for a generic immunity for witnesses.

17 And like I set out in my motion, the Ivory Coast did not ratify this supplement to the treaty
18 of Rome. And is it relevant? Well, yes, it is very relevant, because my client is facing
19 very serious crimes in the Ivory Coast and moreover he is not being represented by any
20 legal counsel. So he is responsible for his own defence.

21 So I need more time with my client to determine his position as a witness in this trial, and
22 that is why I ask for a delay and more time to consult with him. Thank you.

23 PRESIDING JUDGE TARFUSSER: [14:55:46] Yes. I, as I said at the beginning, we after
24 this introduction, preliminary introduction by the Chamber, we will suspend, we will
25 adjourn the hearing to tomorrow morning so that you have all the time you need to confer

1 with the client.

2 And therefore I would ask now the court usher to accompany the witness outside.

3 So we see you tomorrow morning.

4 (The witness stands down)

5 PRESIDING JUDGE TARFUSSER: [14:56:41] And as requested, I give the floor to
6 the Defence counsels, because they have a procedural issue to raise. Mr Knoops.

7 MR KNOOPS: [14:56:52] Thank you, Mr President. Mr President, the argument we raise
8 relates to the position of counsel of particularly this witness and maybe also witnesses in
9 general before this Court, counsel of witnesses in general.

10 The counsel in this situation, representing the witness, was given some documents by CSS
11 when he was designated as counsel to represent a witness before this Court.

12 In the letter of designation and the documents annexed to it, we didn't observe that part of
13 it is the unified protocol on preparation and familiarisation of witnesses of
14 3 December 2015, in specific paragraphs 26 and 27.

15 Now, it can be admitted that this paragraph might be multi-interpretal, but for the instant
16 case it is vital, now that the counsel seeks time to consult with the witness, that this
17 protocol, in specific paragraphs 26 and 27, will be interpreted such that it also includes that
18 counsel for this witness cannot have contact with the Prosecution.

19 Very important, we are not aware that this counsel is familiar with the proceedings before
20 this Court. In any event, we can observe that this protocol was not presented to him with
21 his letter of designation. And the reason why we raising this point is simply because
22 others the rationale of the protocol could be circumvented when a counsel of a witness, not
23 the witness itself, but counsel, albeit professionally, would have contact with the Office of
24 the Prosecution pending any decision to testify or not, or to instruct his client/witness on
25 how to answer, et cetera.

1 And the reason why we are saying this is that our team did observe that, prior to the
2 hearing and after the decision of your Chamber, the Office of the Prosecution had direct
3 discussions with the counsel of the witness.

4 It might be professional, we have no reason to doubt that, but still we believe that it is not
5 within the rationale of the protocol and therefore we seek the permission of the Chamber
6 that the Chamber indeed instructs counsel of the witness such that the unified protocol of
7 3 December, paragraphs 26 and 27, will be interpreted as such that also counsel of the
8 witness cannot have direct contact with the calling party. And that's to maintain the
9 integrity of the proceedings, in specific also the potential testimony of this witness.

10 Thank you.

11 PRESIDING JUDGE TARFUSSER: [15:00:45] Thank you.

12 Maître Altit.

13 MR ALTIT: [15:00:47] (Interpretation) Thank you, Mr President.

14 Mr President, your Honours, the Defence for Laurent Gbagbo subscribes to this request and
15 will in due time respond to what has just been said to you by our learned colleague
16 Mr Knoops.

17 PRESIDING JUDGE TARFUSSER: [15:01:13] You mean in due course -- what do you
18 mean by in due course? In due time?

19 MR ALTIT: [15:01:23] (Interpretation) No, no, no. I think, Mr President, that there was
20 a slight problem of interpretation. I shall put it in other words.

21 Mr Knoops spoke on behalf of both the Defence teams and, as a result, the Defence for
22 Laurent Gbagbo subscribes entirely to the request that has just been formulated and put
23 before you.

24 PRESIDING JUDGE TARFUSSER: [15:01:52] Understood.

25 Office of the Prosecutor.

1 MR MACDONALD: [15:02:00] Your Honours, first of all, I'd like to reassure my
2 colleagues - and I am sure counsel appointed for the witness can attest to this, or
3 Mr Von Bóné that has been appointed and maybe others that I am missing - that when we
4 have discussions they always relate to either Articles 74 -- or, Rule 74 matters, like in this
5 case, or in-court protective measures, and discussions about protection and security of the
6 witness, reminding counsel of the different options that are available from the VWU and so
7 on. Never, ever do we discuss the facts of the case.

8 Second, also I note, your Honour, that the protocol itself refers to the witness, but when
9 a court appoints a lawyer and we're all bound by personal code of ethics, office code of
10 ethics, we do not engage in discussions, as referred to by Mr Knoops, discuss the facts of
11 the case.

12 But I think it is totally normal when the calling party is calling a witness and this witness is
13 now in the familiarisation phase we are not speaking to him, we are speaking to his counsel.
14 So independently of anything, there is a buffer. And we are not there to obviously tell the
15 witness what to say. And so far I think the demonstration in court has been shown very
16 easily that we're not telling our witnesses what to say.

17 Thank you, your Honour.

18 PRESIDING JUDGE TARFUSSER: [15:04:05] Thank you very much. I just ask the
19 counsel for the witness to familiarise with the code of familiarisation. I think -- do you
20 want the floor for this?

21 MR WAGEMAKERS: [15:04:17] Yes, thank you.

22 PRESIDING JUDGE TARFUSSER: Okay.

23 MR WAGEMAKERS: It was not provided to me, but of course I know it and I adhere to
24 what the Prosecution office told your Court as well; the contacts were strictly limited as to
25 the protection and protective measures of my client, this witness.

1 PRESIDING JUDGE TARFUSSER: [15:04:37] Thank you very much. I think this is not
2 a very nice discussion, I must say.
3 I, first of all, call strongly, and I think this has been done from the first day, for mutual
4 trust.
5 Mr Knoops, I just want to remind you that also we had a small talk during the lunch break,
6 but we didn't talk about witnesses and, so, I think it can be that parties encounter
7 themselves and speak, but this doesn't -- we should be full of mutual trust that we will not
8 engage outside of the code of ethics which we are, all of us, are bound to. So that's why I
9 think we should not go further into this matter. We are all adults, all professionals and we
10 know which are the Rules and everybody does his job on each side.
11 I now -- and I leave it on -- I leave it here. I will now adjourn the hearing to tomorrow
12 morning at 9.30. You will talk with your client. I am very much confident that tomorrow
13 morning at 9.30 we can start and that we will do everything as somehow possible to protect
14 or to protect the rights of the witness.
15 MR WAGEMAKERS: [15:06:25] I can promise your Court my cooperation on this one.
16 PRESIDING JUDGE TARFUSSER: [15:06:29] Thank you very much.
17 The hearing is adjourned to tomorrow morning, 9.30.
18 THE COURT USHER: [15:06:34] All rise.
19 (The hearing ends in open session at 3.06 p.m.)