

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 Charles Blé Goudé
5 ICC-02/11-01/15
6 Presiding Judge Cuno Tarfusser, Judge Olga Herrera Carbuccion and
7 Judge Geoffrey Henderson
8 Trial Hearing - Courtroom 1
9 Tuesday, 14 February 2017
10 (The hearing starts in open session at 11.07 a.m.)
11 THE COURT USHER: [11:08:02] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE TARFUSSER: [11:08:22] Good morning. Good morning
15 everybody here in the public gallery and who is watching us from remote, good
16 morning also to you, counsel.
17 I think we would have liked to start directly with the witness, with the questioning of
18 the witness as usual, but I'm afraid we can't. I don't know if you counsel had the
19 courtesy to send a courtesy copy also to the other parties of what you sent on an ex
20 parte to the Chamber only courtesy copy tonight, if you have done so or not. I
21 presume you have not, I can imagine.
22 MR LAUCCI: [11:09:32] Thank you, Mr President. I sent a courtesy copy to the
23 Office of Prosecutor tonight because, as I explained this morning in my email, I
24 realised only this morning that my report, there was no point keeping it ex parte
25 Prosecution only. So I requested the authorisation this morning to the Chamber.

1 PRESIDING JUDGE TARFUSSER: [11:09:51] Chamber only?

2 MR LAUCCI: [11:09:52] Yes -- no, it was Prosecutor.

3 PRESIDING JUDGE TARFUSSER: [11:09:54] Prosecutor, okay.

4 MR LAUCCI: [11:09:56] And I requested this morning the authorisation to reclassify
5 it as confidential. But I had no opportunity to send a courtesy copy to the other
6 parties and participants and I wanted to express my apologies for this.

7 PRESIDING JUDGE TARFUSSER: [11:10:13] So therefore we have a filing incoming,
8 because it was ordered this morning to make it, to refile it confidential, and we would
9 have done it in any case also if you wouldn't have asked us to do so, because there
10 was nothing to be confidential ex parte.

11 So I think if you think you could explain orally what you, in order to give the
12 possibility to the parties, to the other parties to answer to -- oh, sorry, I'm quick. No?
13 It works for the interpreters -- to give orally what you, to repeat more or less orally
14 your arguments so that the parties can take, can hear you, can hear them and
15 obviously intervene, take the floor on this.

16 Would that be an option, Mr Prosecutor.

17 MR MACDONALD: [11:11:23] And to help the Chamber and my colleagues, I can
18 forward the email that we received, and there is the attachment. They can have a
19 quick look at it also while it's ongoing.

20 MS MASSIDDA: [11:11:34] It has been notified now, it has been notified.

21 MR MACDONALD: [11:11:37] Okay.

22 PRESIDING JUDGE TARFUSSER: [11:11:38] It has been notified now. I can't see it.

23 MS MASSIDDA: [11:11:42] Mr President, it was notified at 10.58.

24 PRESIDING JUDGE TARFUSSER: [11:11:47] Yes, but I can't see it. Maybe only to
25 the Legal Representatives, because I cannot see it here.

1 In any case, we have to do everything to put the Defence in a position so that the
2 Defence can make observations as appropriate. So therefore I would ask you to, first
3 of all, to take the floor and to explain your filing, the content of your filing. Thank
4 you.

5 MR LAUCCI: [11:12:39] I will do so, Mr President. But I will do so in French
6 because the report is filed in French, and that will be easier for me to follow what I
7 have written.

8 PRESIDING JUDGE TARFUSSER: [11:12:50] Pas de problème.

9 MR LAUCCI: [11:12:53] Merci. (Interpretation) So this is the report prepared by
10 the legal advisor under Rule 74 for Witness P-0046 -- Mr President, just a little
11 question. Are we in open session right now?

12 PRESIDING JUDGE TARFUSSER: [11:13:13] We are in open session.

13 MR LAUCCI: [11:13:15] (Interpretation) If I need to go into some of the details of
14 my report that are confidential, it might be that I would request for this to be
15 changed.

16 PRESIDING JUDGE TARFUSSER: [11:13:26] Yes. But I think we should as much
17 as possible remain in open session. If there are details you just do your
18 responsibility. And if there are details you have to say in closed or in private session,
19 please ask me to go in private session, we will do so.

20 MR LAUCCI: [11:13:42] (Interpretation) I shall be prudent in my presentation in
21 the knowledge that the parties will receive the full report at a later stage.

22 PRESIDING JUDGE TARFUSSER: [11:13:51] Also because parties are well aware
23 also if you speak through the lines, we do understand.

24 MR LAUCCI: [11:14:02] (Interpretation) Very well. So I shall be careful not to
25 mention any confidential names from the report, and I shall immediately go to the

1 crux of the matter.

2 I shall not go through the various conditions of my intervention here. The report
3 mentions the potentially self-incriminating nature of matters that were identified by
4 myself and also in discussion with the witness himself. And on this basis a request
5 has been formulated to guarantee that under Rule 74(2) of the Rules of Procedure and
6 Evidence he not be led down the self-incriminating path.

7 And I would recommend to the Chamber that they grant this guarantee before the
8 beginning of his testimony in line with Rule 74(2) and that this guarantee be applied
9 to the totality of the witness's statements or testimony throughout his testimony
10 without any exception whatsoever. In order not to slow matters down, whenever a
11 new question is put to the witness as to whether the guarantee is going to be granted,
12 yes or no, before he answers.

13 So then I'm going to go into the further details of the guarantees requested under
14 Rule 74(3)(c)(1) of the Rules of Procedure and Evidence and the Rule 64(7). And I
15 would like to mention the partial or --

16 PRESIDING JUDGE TARFUSSER: [11:15:38] Slow down please, otherwise we
17 are in --

18 MR LAUCCI: [11:15:42] (Interpretation) I have this horrible habit of speaking too
19 fast, and I apologise and I shall make an effort.

20 PRESIDING JUDGE TARFUSSER: [11:15:54] All in here, don't worry.

21 MR LAUCCI: [11:15:56] (Interpretation) As I was saying, I am requesting that the
22 guarantees be provided to the witness under Rule 74(3)(c)(1) of the Rules of
23 Procedure and Evidence and that these guarantees take effect for them to have a
24 useful -- for them to be of use and that these guarantees be also identified under
25 Rule 74(7), and that these would be put in place.

1 I would request, first and foremost, that we have a closed session, either partial or full,
2 under Rule 67(a). And I understand that this request is not easy to grant in view of
3 the principle of the publicity of debates, of discussions, but I would like to call the
4 attention of the Chamber to the fact that if we are in private session only, then each
5 time a question that might be identifying is put to the witness and we then go into
6 private session, we will be going back and forth from open to closed session and that
7 this might slow the proceedings down.

8 I would request that the measures be taken so that the identity of the witness is not
9 disclosed and the contents of his testimony and statements not be disclosed. And I
10 would like to draw the attention of the Chamber to this point, namely, the OTP as
11 well, that amongst the documents that were transmitted in preparatory form before
12 my speaking to the Court, these documents either bear no mention of their form of
13 classification or they only bear the mention CPI restricted, ICC restricted.

14 So the phrase "ICC restricted" is a description that is not contained within the Registry
15 regulations and it only appears in the administrative instruction 2007-0001 on the
16 policy of the Court, and the title is "Policy of Protection of Information at the ICC,"
17 and it corresponds to a level of classification that is different and less protective than
18 the level of classification as confidential.

19 So I do not know, because I do not have access to this information, I do not know
20 whether internal measures are taken in order to guarantee the confidentiality of the
21 documents, but I have observed that under Section 7 of the administrative instruction
22 of 2007-001, that I mentioned before, the level of classification of the documents must
23 be marked on the documents themselves.

24 And I have observed that these annotations do not appear and that somebody who is
25 reading these documents and who is not in the know would or might conclude that

1 these documents are not of a confidential nature.

2 This is a problem that I have identified as serious. And what is more, the witness
3 told me of an event with regard to another witness who testified before this Chamber,
4 who he identified by his name, who, according to him, all of his statements before the
5 Chamber were published in most of the major Ivorian newspapers a short time
6 thereafter.

7 So this is a source of concern, and this brings me to underscore the necessity for
8 serious measures to be taken in order to ensure the protection of the identity of the
9 witness and the confidentiality of his statements, his statements given prior to the
10 Office of the Prosecutor, but also all of his statements that he might make before the
11 Chamber during his testimony.

12 I have taken note of the instruction of the Chamber indicating to me that the measures,
13 the protective measures are not part of my mandate and so I'm not making any
14 recommendations, apart from saying that whatever the measures that are taken be,
15 they must guarantee the protection of the identity of the witness and make sure that
16 no incriminating information be disclosed publicly.

17 I would like to go on to another matter with regard to what seems to me to be the
18 main instrument that the Court has to guarantee that a witness is not prosecuted on
19 the basis of information that he provides during his testimony. This is Article 19(1)(c)
20 of the agreement on privileges and immunities of the Court. And I observe that the
21 Republic of Côte d'Ivoire is not party to this agreement.

22 I went to see the Registry of the International Criminal Court in order to request that
23 in the absence of the ratification of said agreement on the privileges and immunities
24 of the Court, what the legal basis was to enable a witness testifying before the Court
25 to be able to benefit from this immunity of the Court under Article 19(1)(c) of said

1 agreement, and I only got the answer that there was or is indeed an agreement in
2 place, but that it could not be imparted to me for reasons of confidentiality.

3 I would like to say that this argument is not valid to the extent that as counsel
4 speaking before the Court under Rule 74, I am, by myself, bound by Article 8 of Rules
5 binding counsel to confidentiality and that this information that I am seeking on the
6 legal basis, such as with regard to the immunity of the witness, is very essential in the
7 exercise of my mandate.

8 I would request therefore that the Chamber immediately order that the Registry
9 disclose to me the agreement that they have referred to. And in the meantime, I
10 would like to draw attention to Article 123 of the Ivorian constitution under which
11 only treaties or agreements that have regularly been ratified have superior authority
12 to law and in so doing they protect the witness against any risk of Prosecution before
13 Ivorian courts. And we need to make sure that they contain a guarantee that is
14 equivalent to that of Article 19(1)(c) of the agreement on immunities and privileges of
15 the Court, which was -- it was published in the official journal of the Republic of
16 Côte d'Ivoire.

17 So I would also request the guarantees be provided with regard to non-incrimination
18 under Rule --

19 THE INTERPRETER: Counsel is going too fast.

20 MR LAUCCI: (Interpretation) -- of the Rules of Procedure and Evidence.

21 PRESIDING JUDGE TARFUSSER: [11:24:31] You are going too fast for the
22 interpreters. Please.

23 MR LAUCCI: [11:24:37] (Interpretation) I was saying, and this is the last point, I
24 will have finished, last point in the report: And my request requesting guarantees
25 from the Chamber for the witness to have guarantees for the entirety of his testimony,

1 the guarantees under Rule 74(3)(c)(ii) of the Rules of Procedure and Evidence, so for
2 him not to be incriminated by virtue of what he is going to say before this Chamber,
3 with the exception of Article 70 and 71, of course, of the Statute.

4 I have summarised the totality of my report and I hope that this will enable the
5 parties to better understand what this is all about. I would like to thank the
6 Chamber for having listened to what I have to say.

7 PRESIDING JUDGE TARFUSSER: [11:25:35] Thank you very much.

8 I see Maître Altit on his feet and I give him the floor.

9 MR ALTIT: [11:25:48] (Interpretation) Thank you, Mr President.

10 PRESIDING JUDGE TARFUSSER: [11:25:53] Just to say that in the meantime the
11 filing was filed and it was not the one referred to by the legal representatives, but it
12 was filed while counsel was speaking at 11.16. Thank you.

13 Maître Altit.

14 MR ALTIT: [11:26:10] (Interpretation) Thank you, Mr President. If I understood
15 correctly, the OTP received the report from the counsel of the witness last night or
16 this morning. I didn't quite understand precisely when. But whatever the case may
17 be, we only received it a few minutes ago. So this page, this report is 13 pages in
18 length and there are a number of arguments developed. And before we actually go
19 into the matter, would you allow us 15 minutes for us to be able to read it carefully,
20 analyse it and talk about what is said therein in an informed manner?

21 PRESIDING JUDGE TARFUSSER: [11:26:53] Just to be clear, the first filing came in
22 on the Trial Chamber I communication account at 00.36 this morning. So this is
23 when we received it. I didn't read it at that moment, I must say. I confess I was not
24 sitting there, I didn't read it, but it arrived at that time.

25 So of course you will have the 15 minutes. I thought already, I feared you ask for

1 more, so we come back at 11.45. Thank you.

2 THE COURT USHER: [11:27:37] All rise.

3 (Recess taken at 11.27 a.m.)

4 (Upon resuming in open session at 11.47 a.m.)

5 THE COURT USHER: [11:47:26] All rise.

6 Please be seated.

7 PRESIDING JUDGE TARFUSSER: [11:47:48] Now we are, I'm asking for the
8 observations by the parties on the submissions by counsel of the witness, and I
9 obviously start with the Office of the Prosecutor.

10 Mr MacDonald, yours the floor.

11 MR MACDONALD: [11:48:11] Thank you, your Honour. I don't think the request
12 is much different than other requests that we've faced before, your Honour. First of
13 all, the identity of the witness will be public. There is a number of topics that can be
14 dealt with in public session that do not lead, we believe, to the triggering of Rule 74.
15 Second, I want to note for the record that we'll be relying a lot on documents
16 throughout this examination, documents that the Chamber will see the witness
17 himself was involved in providing to the OTP that were provided by the CIV
18 authorities, so those are known documents already by the CIV authorities that, as the
19 evidence will demonstrate, the witness himself was asked to provide some
20 information to ongoing investigations in the CIV, which he did.

21 And finally, I think that one concern obviously for the witness is maybe his own
22 responsibility, which he addresses indeed in his statement but may further develop
23 here, is any orders he may have received from above. And therefore, for those we
24 can indeed go into private session, not huis clos, but huis clos partiel, private session,
25 so that we can address these issues if need be. So it's on a case-by-case basis like I

1 think we've done in the past, which is not different than with other witnesses, so there
2 is no need for any special regime, I would say, to be put in place. And those
3 passages that are held in confidential session obviously remain confidential until the
4 Chamber decides otherwise.

5 So therefore the CIV authorities do not have access, or anyone outside this courtroom
6 basically does not have access to the information.

7 I understand that my colleague was summarising orally the filing that he filed, indeed
8 that we received a copy at minute 37 this morning, so past midnight, and also I was
9 not reading it, I was trying to fall asleep.

10 The thing is it is indicated, the level of confidentiality. There is again no issue here.

11 While the documents are not marked, we never marked the documents on the paper,
12 their confidentiality levels except for filings via the Court management system, but
13 every piece of evidence that has not been filed as public in the Court record is

14 basically currently confidential in the sense that the Defence and Prosecution and

15 LRVs are well aware of the confidentiality level, and that's what I said to my

16 colleague earlier this morning to try to reassure him on this point. Any, some

17 information may have been made public in certain circumstances, I will not come

18 back on that, and orders may not have been respected, orders of the Chamber by

19 some members of the public. But anything basically that is being reported in papers

20 in Côte d'Ivoire, and I will certainly not comment on the level of accuracy of the

21 reporting, is basically mainly based on public hearings which are retransmitted live

22 on the web with a 30 minutes delay, or sometimes simply deferred after the testimony
23 of the witness.

24 So I don't think I understand the personal, how should I put it this way, concerns that

25 the witness has to his potential responsibility in this case. He's not on trial before the

1 ICC obviously. He's a witness being called by the Prosecution and now in the hands
2 of the Chamber, and that is that.

3 Thank you.

4 PRESIDING JUDGE TARFUSSER: [11:53:01] Thank you very much.

5 Does the LRV want to intervene on this issue?

6 MS MASSIDDA: [11:53:07] No, your Honour. Thank you. We have no
7 submission on the matter.

8 PRESIDING JUDGE TARFUSSER: [11:53:10] Thank you very much.

9 The Defence. Maître Altit.

10 MR ALTIT: [11:53:17] (Interpretation) Thank you, your Honour. Your Honour,
11 ladies and gentlemen, first of all, counsel has requested that guarantees be provided
12 that the witness not be prosecuted. The Defence is not opposed to that request.
13 Secondly, the Defence considers that the practice adopted thus far enabling a witness
14 who benefits from Rule 74 protection to request private session is a reasonable request
15 and is applicable, if need be, to this witness.

16 We now have quite a lot of experience in this type of matter and thus far -- and here,
17 your Honour, correct me if I am wrong, I believe that things have gone well.

18 Thirdly, we believe that the other requests made by counsel go beyond the scope of
19 Rule 74. Indeed, he is requesting protective measures, whereas in fact under Rule 74
20 it is guarantees that are provided. And I would like to repeat what my colleague
21 from the OTP has said, this witness does not benefit from protective measures. Such
22 measures have never been requested nor discussed.

23 Rule 74 can only be used to obtain testimony in closed session or to obtain anonymity
24 of the witness vis-à-vis the outside world. The only useful tool here is private
25 session when necessary under the control of the Chamber and when that is justified,

1 requested and justified.

2 To accept the counsel's requests here, I'm referring to the other requests, would be
3 going against, to go against the principle of the publicity of our hearings and would
4 be sidestepping a testimony which must by definition be public, because it is only
5 publicity that leads to the responsibility of the witness. Such a testimony is a way of
6 an individual taking responsibility vis-à-vis the Chamber, vis-à-vis justice, as well as
7 the entire community.

8 Fourthly, as regards the agreement on privileges and immunities and the Ivorian
9 constitution, the Defence notes that the functions occupied by the witness in
10 Côte d'Ivoire makes it highly improbable that he be prosecuted in Côte d'Ivoire.
11 However, if there were such a risk, indeed, it would be necessary in that case to
12 examine the situation with the Ivorian authorities beforehand, before we begin, in
13 which case then the Defence must also be involved in these discussions.

14 Thank you, your Honour.

15 PRESIDING JUDGE TARFUSSER: [11:57:10] Thank you very much, Maître Altit.
16 Mr Knoops.

17 MR KNOOPS: [11:57:14] Good morning, Mr President, your Honours.

18 Mr President, the counsel for the witness has identified five areas which I will address
19 briefly.

20 First, the rule against auto-incrimination or self-incrimination. The system of
21 Rule 74, as also set out in the travaux préparatoires of the ICC is such that protection
22 against self-incrimination can never be granted beforehand for the totality of the
23 evidence. The rationale of Rule 74 such that this rule can only be applied on an ad
24 hoc basis per question or per situation. Otherwise it would open the door for
25 potential abuse of Rule 74 once a witness could beforehand dictate the applicability of

1 Rule 74 even before the Chamber has heard his evidence.

2 My conclusion therefore is, first, that the request of the counsel for the witness to
3 grant beforehand for the evidence in its totality the applicability of Rule 74 should be
4 denied as being in contravention with a system and rationale of the ICC Rules of
5 Procedure and Evidence.

6 The second area identified by the counsel of the witness relates to the request for
7 closed session. First, there is no evidence before this Court brought that revealing
8 the identity, let alone the evidence of this witness could in any way endanger his
9 person or that of his family. There is no assessment made by VWU, there is no
10 argument put forward to have a closed session of the testimony in its entirety other
11 than the argument that not granting a closed session would potentially slow down
12 the process.

13 Expeditiousness, slowing down the process is not a legal or a jurisprudential criterion
14 for granting a closed session. I refer the Chamber to its earlier rulings and the
15 criteria set forth by these rulings on closed sessions.

16 Danger of having information leaked from the evidence of the witness to the press or
17 the social media, as set forth by counsel of the witness, is likewise not decisive
18 criterion for granting a closed session.

19 Lastly, as to the second area, Mr President, perhaps superfluous to mention, but P-560,
20 Witness P-560 who testified before this Chamber on several areas which could relate
21 to this witness didn't seek for either a closed session or protective measures as
22 requested by this witness.

23 As to the third point, the third area identified by the counsel of the witness, the
24 request for protective measures. As mentioned, there is no request made by the
25 Office of the Prosecution. There was no assessment before the Chamber on VWU as

1 to any potential risk. Witness P-560 didn't seek for those measures either.

2 And lastly, Rule 74(3)(c)(i) does not automatically justify protective measures. They
3 are two different areas which are not covered by Rule 74 as such.

4 Last two areas identified by the counsel of the witness, the reference to the
5 classification of documents before the Chamber, before this Court, and the agreement
6 on immunities and privileges of the Court, I take those two points together.

7 The question here relates to actually one question, namely, can a witness before the
8 Court derive enforceable rights to his benefit from an administrative document which
9 circulates within the Court or an agreement on immunities and privileges which is
10 predominantly a matter of State Parties?

11 Now, my legal view on this issue is that a witness who is testifying before this Court
12 does not automatically can rely on these documents as being enforceable rights which
13 can either be used against him or to his benefit.

14 I think it's for the Chamber to make a decision on the status of those documents. As
15 such, I don't see why they can relate to the evidence the witness can potentially be
16 given before this Court. But from a legal point of view I would say that it's also a
17 principle of public international law that those documents which are mainly
18 addressed to state authorities or authorities of an international organ as such do not
19 automatically trigger enforceable rights for a witness before such an organ.

20 Thank you, Mr President.

21 PRESIDING JUDGE TARFUSSER: [12:04:07] Thank you. Thank you very much.
22 Counsel.

23 MR LAUCCI: [12:04:13] If I have the permission of the Chamber, I would like to
24 make some observations on what has been submitted by the parties.

25 PRESIDING JUDGE TARFUSSER: [12:04:23] Yes, but I don't think that this is -- you

1 have made your submissions. The others made their observation and I think that's it.
2 I think we have to come it a decision on that, and we will come back in, suspend for
3 some time and come back in, to be sure before 12.30 in any case.
4 Thank you. The hearing is adjourned.
5 THE COURT USHER: [12:04:46] All rise.
6 (Recess taken at 12.04 p.m.)
7 (Upon resuming in session at 2.42 p.m.)
8 THE COURT USHER: [14:42:31] All rise.
9 Please be seated.
10 PRESIDING JUDGE TARFUSSER: [14:42:42] Good afternoon. Good afternoon.
11 We have two decisions. The first one is granting the postponement to the Defence,
12 the requested postponement to the Defence to reply to the Prosecution's application
13 to conditionally admit the prior recorded statements. And I'm referring to file 796
14 confidential. So this is granted as requested.
15 And the second decision is that we postpone the hearing to tomorrow morning, 9.30,
16 because the decision on the request by the counsel for the witness is much more
17 complicated than it seems to be and therefore we are still discussing the matter and
18 we postpone therefore to tomorrow morning, 9.30 in order to come up with a decision
19 on these matters. Thank you.
20 Legal Representative.
21 MS MASSIDDA: [14:44:16] Thank you, your Honour. Is my understanding correct
22 that the deadline for the response for Rule 68 applies also to the Legal Representative?
23 PRESIDING JUDGE TARFUSSER: [14:44:26] Of course.
24 MS MASSIDDA: [14:44:26] Thank you very much, your Honour.
25 PRESIDING JUDGE TARFUSSER: [14:44:29] It's a really good understanding.

- 1 Therefore the hearing is postponed to tomorrow morning, 9.30.
- 2 THE COURT USHER: [14:44:39] All rise.
- 3 (The hearing ends in open session at 2.44 p.m.)