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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Cuno Tarfusser
Judge Olga Herrera-Carbuccia

SITUATION IN THE REPUBLIC OF COTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public Document

**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)**

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. PROCEDURAL BACKGROUND

1. On 4 November 2014, Trial Chamber I (the “Chamber”) held its first status conference, during which the Chamber encouraged the parties and participants to enter into discussions on the protocols to be used at trial.¹

2. On 4 December 2014, the Chamber held its second status conference, during which the Chamber sought the views of the parties and participants *inter alia* on the following protocols: i) Protocol concerning the disclosure of the identity of witnesses of the other party (the “Protocol on witness identities”); ii) Protocol concerning the handling of confidential information in the course of investigations (the “Protocol on confidential information”); iii) Protocol concerning contacts with witnesses of the opposing party (the “Protocol on contact with witnesses”); iv) Proposed mechanisms for exchange of information on individuals with dual status (the “Protocol on dual status witnesses”); v) Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses (the “Protocol on vulnerable witnesses”); and vi) Unified protocol on the practices used to prepare and familiarise witnesses for giving testimony (the “Familiarisation Protocol”) together with the witness preparation protocol (the “Witness preparation Protocol”) (hereafter referred to as “the Protocols”).²

3. On 18 December 2014, the Single Judge of Trial Chamber I (the “Single Judge”) directed the parties, the Legal Representative of Victims and the Victims and Witnesses Unit (the “VWU”) to conclude their discussions on the Protocols and to make any further submissions on the Protocol on witness identities, the Protocol on confidential information and the Protocol on contact with witnesses by 20 February 2015, and on the Protocol on dual status witnesses, the Protocol on vulnerable

¹ See the transcript of the status conference held on 4 November 2014, No. ICC-02/11-01/11-T-25-CONF-ENG ET, p. 26, lines 3-16 (open session).

² See the transcript of the status conference held on 4 December 2014, No. ICC-02/11-01/11-T-27-CONF-ENG ET, pp. 17, 19, 30, 35 and 47 (open session).

witnesses, the Familiarisation Protocol and the Witness Preparation Protocol by 27 February 2015 (the “Order”).³

4. Pursuant to the Order, the Principal Counsel of the Office of Public Counsel for Victims, acting as Common Legal Representative of the victims authorised to participate in the case (the “Common Legal Representative”),⁴ joined the discussions held by the parties on the abovementioned protocols and submits her observations on the Protocol on witness identities, the Protocol on confidential information, the Protocol on inadvertent disclosure and the Protocol on contact with witnesses.

II. SUBMISSIONS OF THE COMMON LEGAL REPRESENTATIVE

5. For the sake of clarity and judicial economy, the Common Legal Representative provides comments only on the controversial issues she has identified in the Protocols resulting from the discussions held between the parties.

1. On the definitions provided for in the Protocols

6. The Common Legal Representative does not oppose using the term “*représentant légal des victimes*” or “*représentant*” in the Protocols instead of the term “*participant*” commonly used in the protocols applicable in other cases before the Court. By contrast, the Common Legal Representative disagrees with the proposal made by the Defence during the consultations to also add the expression “*d’autres*

³ See the “Order setting deadlines for the filing of submissions on outstanding protocols” (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-739, 18 December 2014, para. 8.

⁴ See the “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012, pp. 25-26; and the “Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-384, 6 February 2013, pp. 22-23.

représentants éventuels des victimes” in the definition of this term.⁵ In this regard, should the Defence insist on the inclusion of said expression, the Common Legal Representative contends that the addition proposed by the Defence as formulated is unclear insofar it could refer to any representative of victims, including persons not having a legal standing before the Chamber. If the intent of the Defence were to cover the possibility of newly appointed legal representatives in the future, the Common Legal Representative submits that the term “*représentant*” is broad enough to encompass any additional or alternative legal representative of victims that may be appointed following the eventual decision of the Chamber on the system of legal representation of victims.

2. On the Protocol on contact with witnesses

7. The Common Legal Representative disagrees with the position expressed by the Defence during the discussions on the need to involve the VWU in any contact with all witnesses, regardless of their protected or vulnerable condition. In this regard, the Common Legal Representative considers that the Defence’s position is inconsistent with the mandate and resources of the VWU, and agrees with the Prosecution that the assistance of the latter must be required to establish contact only with witnesses participating in the ICC Protection Programme.⁶

8. Similarly, the Common Legal Representative agrees with the position expressed by the Prosecution on the obligation to protect the dignity, well-being and privacy of particular groups of victims when they are interviewed, in particular victims of gender crimes.⁷ In this regard, the Common Legal Representative agrees with the Prosecution that the disclosure of the identity of victims of gender crimes

⁵ The proposed text circulated by the Defence read as follows: “Le terme « ~~participant~~ » « *représentant légal des victimes* » désigne le représentant légal commun des victimes et d’autres représentants éventuels des victimes-ainsi que les membres de leurs équipes”.

⁶ See the Protocol on contact with witnesses proposed by the Prosecution, paras. e) and f).

⁷ *Idem*, para. q).

should take place only with the consent of the victim and only after all alternative investigative measures have been exhausted.⁸

9. However, the Common Legal Representative strongly disagrees with the position expressed by the Prosecution and the Defence during the discussions according to which the legal representative should not be entitled to seek to contact and/or meet the witnesses of the parties prior to the trial.⁹ Indeed, there is no apparent reason why a party could contact a witness called by the Common Legal Representative without the latter being allowed to do the same regarding the witnesses called by the parties.

10. Furthermore, the Common Legal Representative observes that the abovementioned limitation is inconsistent with protocols on the same matter adopted in other cases.

11. In the *Ruto and Sang* case and in the *Kenyatta* case, Trial Chamber V decided that the parties and the legal representative of victims would apply a protocol on contacts with witnesses that did not expressly prevent the legal representative of victims from contacting or interviewing witnesses of the parties before the trial.¹⁰ In fact, these protocols were intended for both the pre-trial and the trial stages, with only a few provisions expressly making reference to specific stages of the proceedings.¹¹ Moreover, these protocols on contact with witnesses were meant to be applied in the same manner regarding witnesses called by the parties and those

⁸ See “Annex A: 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’” (Trial Chamber VI), No. ICC-01/04-02/06-412-AnxA, 12 December 2014 (the “*Ntaganda Protocol*”), para. 25.

⁹ See the versions of the Protocol on contact with witnesses proposed by the Prosecution and by the Defence, introduction (“*Le présent Protocole régit les conditions selon lesquelles une partie qui enquête peut contacter les témoins de la partie adverse. Il vise à définir un ensemble de lignes directrices générales et devrait être appliqué en fonction de chaque situation*”).

¹⁰ See the “Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call” (Trial Chamber V), No. ICC-01/09-01/11-449-Anx, 24 August 2012; and the “Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call” (Trial Chamber V), No. ICC-01/09-02/11-469-Anx, 24 August 2012.

¹¹ *Idem*, para. 16 and para. 16, respectively.

called by the legal representative of victims, since the term “witness” was defined in the protocols as “[a] *person whom a party or participant intends to call to testify during the trial proceedings*”.¹² This definition has also been retained in the Protocol on contact with witnesses discussed by the parties in this case.¹³

12. More clearly, the protocol recently adopted by Trial Chamber VI in the *Ntaganda* case on “Contact between a Party or Participant and Witnesses of the Opposing Party or a Participant” (the “*Ntaganda* Protocol”) confirms the possibility for the legal representative of victims to seek contact with the witnesses of the parties prior to the trial.¹⁴ The title of the protocol already supports said possibility.

13. The Common Legal Representative notes that the Protocol on contact with witnesses discussed in this case appears to be based on the *Ntaganda* Protocol. Indeed, the structure and content of these two documents are almost identical. However, all the references to the term “*participant*” in the *Ntaganda* Protocol have been removed in the texts on contact with witnesses discussed by the Prosecution and the Defence.¹⁵

14. The Prosecution and the Defence do not provide valid reasons justifying this diverging approach in the current case. To the contrary, the Common Legal Representative contends that the Protocol on contact with witnesses discussed by the parties does not assist in harmonising the existing protocols applicable before the Court. Given the content of the protocols in the *Ruto and Sang* case, the *Kenyatta* case and the *Ntaganda* case discussed in paragraphs 11 and 12 above, the versions of the Protocol on contact with witnesses submitted by the Prosecution and the Defence run contrary to the intention stated by the Single Judge to “*achiev[e] some degree of*

¹² *Ibid.*, para. 1 and para. 1 (emphasis added), respectively.

¹³ See the definitions common to all Protocols proposed by the Prosecution, para. e).

¹⁴ See the *Ntaganda* Protocol, *supra* note 8, section VI.

¹⁵ *Cf.* the versions of the Protocol on contact with witnesses proposed by the Prosecution and by the Defence with the *Ntaganda* Protocol, *supra* note 8, paras. 31, 33-36 and 38-45.

uniformity with regard to protocols used at trial level”¹⁶ and to have “an overall protocol which can be applied uniformly throughout the Court system”¹⁷.

15. More importantly, granting the Common Legal Representative the possibility to interview witnesses of the parties prior to trial does not mean making her position equal to that of the Prosecution and the Defence. The Prosecution must contact witnesses to fulfil its duty to establish the truth and to satisfy its onus to prove the guilt of the Accused.¹⁸ In turn, the Defence may contact witnesses when making use of the legal guarantees afforded to the Accused.¹⁹ By contrast, the Common Legal Representative may find it necessary to contact witnesses in order to seek judicial protection of the personal interests of victims authorised to participate in the current proceedings.²⁰

16. As established in the jurisprudence of the Court,²¹ the victims play a role in the proceedings different from the Prosecution, and their participation may be an important factor in helping the Chamber to better understand the contentious issues

¹⁶ See the transcript of the status conference held on 4 November 2014, No. ICC-02/11-01/11-T-25-CONF-ENG ET, p. 26, lines 5-7 (submissions made in open session).

¹⁷ See the transcript of the status conference held on 4 December 2014, No. ICC-02/11-01/11-T-27-CONF-ENG ET, p. 28, lines 4-5 (submissions made in open session).

¹⁸ See Rome Statute, articles 54(1)(a) and 66(2).

¹⁹ *Idem*, article 67(1)(e).

²⁰ *Ibid.*, articles 68(3) and 75(3).

²¹ See, for instance, the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, paras. 31-44; the “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008” (Appeals Chamber), No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, paras. 93-98; the “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007” (Appeals Chamber), No. ICC-02/05-177 OA OA2 OA3, 2 February 2009, para. 55; the “Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims” (Trial Chamber I), No. ICC-01/04-01/06-2127, 16 September 2009, para. 24; the “Corrigendum - Directions for the conduct of the proceedings and testimony in accordance with rule 140” (Trial Chamber II), No. ICC-01/04-01/07-1665-Corr, 1 December 2009, paras. 82-91; the “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial’” (Appeals Chamber), No. ICC-01/04-01/07-2288 OA11, 16 July 2010, paras. 39-40; and the “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings” (Appeals Chamber), No. ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012, para. 67.

of the case –in this case, the four incidents contemplated in the confirmed charges against Mr. Gbagbo–, and thereby to consider the victims’ personal interests in truth, justice and reparations. Accordingly, the Common Legal Representative contends that the victims authorised to participate in the proceedings are not mere spectators thereof and, as such, she must be allowed to establish contact with witnesses in the current proceedings in order to ensure the satisfaction of the victims’ personal interests. In particular, contacting the witnesses prior to the trial may be necessary to determine whether their testimony may affect the personal interests of her clients and, if so, whether the Common Legal Representative will request authorisation to question said witnesses, to submit additional evidence for the determination of the harm suffered by the victims, etc.

17. The Common Legal Representative notes that the abovementioned analysis may have been the reason why the Prosecution has not opposed the contact between the legal representatives of victims and the witnesses called by the parties in the *Ntaganda* case. In fact, the issue at stake was not raised by the Prosecution four months ago in the *Ntaganda* case upon collecting the views of the legal representatives of victims.²² In these circumstances, the Prosecution’s different approach in the current case lacks any apparent justification.

18. This inconsistent approach by the Prosecution is even less understandable considering the incorporation in its suggested Protocol on contact with witnesses of the same clauses included in the *Ntaganda* Protocol, which provide i) that meeting or interviewing a witness can only be done if the latter consents to it,²³ and ii) that the party who intends to call the witness may object to the contact with said witness and raise the issue before the Chamber.²⁴

²² See the “Prosecution’s Proposed Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Opposing Party”, No. ICC-01/04-02/06-392, 31 October 2014, para. 6.

²³ Cf. the Protocol on contact with witnesses proposed by the Prosecution, para. a) with the *Ntaganda* Protocol, *supra* note 8, para. 33.

²⁴ Cf. the Protocol on contact with witnesses proposed by the Prosecution, paras. g) and h) with the *Ntaganda* Protocol, *supra* note 8, paras. 38-39.

19. In the view of the Common Legal Representative, subjecting her eventual contact with any witness intended to be called by the parties to the latter's consent suffices to minimise the risk of any possible abuse of the Protocol on contact with witnesses.²⁵

20. In addition, as already found by the Pre-Trial Chamber in this case, “[b]oth parties and the legal representative(s) of victims, if any, are all equally under the obligation, albeit based on distinct provisions, to respect witnesses in the course of their investigations”.²⁶ In this regard, the Common Legal Representative notes that she is bound by the Code of Professional Conduct for counsel.²⁷

21. For all the reasons provided above, the Common Legal Representative contends that the Protocol on contact with witnesses should provide her with the possibility to meet and/or interview the witnesses called by the parties. For this purpose and consistently with the protocols adopted in the *Ruto and Sang, Kenyatta* and *Ntaganda* cases, the Common Legal Representative suggests adding the term “*représentant*” as included between brackets in the Protocol on contact with witnesses proposed by the Prosecution.

²⁵ See the Protocol on contact with witnesses proposed by the Prosecution, para. g).

²⁶ See 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” (Pre-Trial Chamber III, Single Judge), No. ICC-02/11-01/11-49, 6 March 2012, para. 27.

²⁷ See the Code of Professional Conduct for counsel, Resolution ICC-ASP/4/Res.1, 2 December 2005, article 1.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Trial Chamber to take notice of the extent of her disagreement with the Protocols on witness identities, confidential information, inadvertent disclosure and contact with witnesses discussed by parties, and in particular to order the inclusion of references to the Common Legal Representative in the Protocol on contact with witnesses, as suggested in paragraph 21 above.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 20th day of February 2015

At The Hague, The Netherlands