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Date: 08 May 2015

TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

**Public
With public Annex A**

Prosecution's Observations on the Conduct of the Proceedings

Source: Office of the Prosecutor

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

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Unrepresented Victims

**Unrepresented Applicants
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. During the Status Conference on 21 April 2015, the Trial Chamber ordered the Parties to submit any additional observations on the conduct of the proceedings, as well as on the modalities of the victims' participation, by 21 May 2015.¹
2. By these observations, the Prosecution proposes the adoption of its Protocol on the Conduct of the Proceedings, attached at Public Annex A ("Proposed Protocol"). The Prosecution also addresses additional matters related to the conduct of the proceedings, not covered by the Proposed Protocol.
3. The Prosecution files its observations on the modalities of the victims' participation separately.

II. Submissions

4. The Prosecution proposes that the Trial Chamber adopt the attached Proposed Protocol, which draws on decisions on the conduct of proceedings issued by different Trial Chambers before this Court,² and incorporates practices followed by the *ad hoc* international criminal tribunals.³ The Prosecution has also drawn on the proposed Protocol on the Conduct of the Proceedings, filed on 24 March 2015 by the Prosecution in the *Bemba et al* case ("*Bemba et al* Proposed Protocol"),⁴ and the Prosecution submissions on the conduct of proceedings and the modalities of victim participation at trial, filed on 7 April 2015 in the *Ntaganda* case ("*Ntaganda* Submissions").⁵

¹ ICC-02/11-01/15-T-1-CONF-ENG ET, pp.56-57.

² See, for example, ICC-01/09-01/11-847-Corr ("*Ruto* General Directions 1"); ICC-01/09-01/11-900 ("*Ruto* General Directions 2"); ICC-01/09-02/11-867 ("*Kenyatta* Decision on Conduct"); and ICC-01/05-01/08-1023 ("*Bemba* Directions on Conduct"); ICC-01/04-01/07-1665-Corr ("*Katanga* Directions for the conduct of proceedings"); ICC-01/04-01/06-T-104-ENG ET, pp.35-38 ("*Lubanga* Oral Decision on Rule 140"). In order to assist the Trial Chamber and Parties, the Prosecution has added specific, footnoted references to some of these decisions in the relevant sections of the Proposed Protocol.

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⁴ ICC-01/05-01/13-859-Red, Annex D.

⁵ ICC-01/04-02/06-547.

5. The Prosecution advances submissions below upon additional matters related to the conduct of the proceedings, which are not addressed in the Proposed Protocol.

The timing and procedure of a “no case to answer” motion

6. As stated in the *Ruto* case, it is for each individual Trial Chamber to consider whether or not a “no case to answer” motion is apposite for the proceedings before it.⁶ Should the Chamber permit the Defence to enter such submissions (asserting that there is no case for it to answer at the conclusion of the Prosecution’s presentation of evidence), and consistent with the approach set out in *Ruto*, the following principles should apply: (i) the test should be whether there is evidence on which a reasonable Trial Chamber *could* convict;⁷ (ii) it should only be necessary to satisfy the test in respect of one mode of liability for each count;⁸ (iii) the Chamber should not consider questions of reliability or credibility relating to the evidence, save where the evidence in question is incapable of belief by any reasonable Trial Chamber;⁹ (iv) the Defence should notify the Chamber orally no later than the last day of the Prosecution’s case (or the completion of the presentation of any evidence by the Common Legal Representative or as requested by the Chamber, as applicable) of its intention to file a “no case to answer” motion;¹⁰ (v) the motion should be filed no later than 14 days after providing the oral notice of intention. It should not exceed 40 pages in length and should specify the particular counts being challenged;¹¹ and (vi) responses by the Prosecution and the Common Legal Representative should be filed within 14 days after notification.¹²

⁶ ICC-01/09-01/11-1334 (“*Ruto* principles and procedure on no case to answer motion”), para.17.

⁷ See *Ruto* principles and procedure on no case to answer motion, para. 32.

⁸ See *Ruto* principles and procedure on no case to answer motion, para. 32.

⁹ See *Ruto* principles and procedure on no case to answer motion, para. 32.

¹⁰ See *Ruto* principles and procedure on no case to answer motion, para. 37.

¹¹ See *Ruto* principles and procedure on no case to answer motion, para. 37.

¹² See *Ruto* principles and procedure on no case to answer motion, para. 37.

The scope of an unsworn statement by the accused persons during trial

7. Pursuant to article 67(1)(h) of the Statute, the Accused each have the right to make an unsworn oral or written statement in their defence. An unsworn statement is not subject to a solemn undertaking and therefore does not constitute evidence.¹³
8. Should the Accused wish to make an unsworn statement, including as part of the presentation of Defence opening statements,¹⁴ they should each inform the Chamber, which will decide on the appropriate moment and modalities for making the statement.¹⁵

Alibi or grounds excluding criminal responsibility

9. Rule 79(2) of the Rules of Procedure and Evidence specifies that if the Accused is going to raise the existence of an alibi or a ground for excluding criminal responsibility, notification thereof “shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond. The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence”.¹⁶
10. If either Accused intends to raise an alibi or a ground for excluding criminal responsibility in relation to any or all of the charges, they should raise any such ground in advance of the start of the trial, to avoid justified requests for adjournment.¹⁷

¹³ See ICC-01/05-01/08-2860 (“*Bemba* decision on unsworn statement by the accused”), para.8.

¹⁴ See Proposed Protocol, para.4. See also *Kenyatta* Decision on Conduct, para.7.

¹⁵ See *Katanga* Directions for the conduct of proceedings, para.12.

¹⁶ In *Katanga*, the Chamber consider that “under Rule 79(1) and (2) the defence teams have the responsibility to notify their intention, if any, to raise a defence to the Prosecution and the Chamber as soon as a determination to rely on such ground has been made”: ICC-01/04-01/07-2388 (“*Katanga* Decision on disclosure by the Defence”), para.46.

¹⁷ See ICC-01/04-01/06-1235-Corr-Anx1 (“*Lubanga* Decision on disclosure by the defence”), para. 41(b). See also, within the context of confirmation proceedings, ICC-01/09-01/11-373 (“*Ruto* Confirmation Decision”), para. 108. See also ICTR Rules of Procedure and Evidence (adopted 29 June 1995, entered into force 29 June 1995) UN Doc. ITR/3/Rev.1 (as amended on 10 April 2013), rule 67 (“[a]s early as reasonably practicable and in any event prior to the commencement of the trial”). The Prosecution notes that the Accused Blé Goudé has previously filed a Notice of Alibi (ICC-02/11-02/11-146), to which the Prosecution has responded (ICC-02/11-02/11-148).

Defence disclosure

11. The Prosecution proposes that specific directions related to the scope and timing of disclosure by the Defence, including of witness statements and an outline of the defence case, be addressed at a later date but in advance of the opening statements.

III. Conclusion

12. The Prosecution respectfully submits these observations, pursuant to the Trial Chamber's order.



Fatou Bensouda, Prosecutor

Dated this 8th day of May 2015

At The Hague, The Netherlands