

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: 21 May 2015

TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN CÔTE D'IVOIRE

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

Public Document

Further Submissions on the Conduct of the Proceedings

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 11 March 2015, Trial Chamber I (the “Chamber”) issued the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters”,¹ joining the cases and deciding, *inter alia*, to hold a status conference on 21 April 2015, establishing a provisional agenda thereof, and requesting the parties and the participants to submit their observations on said agenda no later than 14 April 2015.

2. On 14 April 2015, the Common Legal Representative filed her Submissions on the Provisional Agenda for the Status Conference to be held on 21 April 2015.²

3. During the status conference held on 21 April 2015, the Chamber indicated that the parties and the participants could file further submissions on the conduct of the proceedings by 21 May 2015.³

4. On 8 May 2015, the Prosecution filed its Observations on the Conduct of the Proceedings (the “Prosecution’s Observations”).⁴

5. In accordance with the instructions of the Chamber, the Common Legal Representative of the victims admitted to participate in the proceedings,⁵ respectfully submits the following additional observations.

¹ See the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” (Trial Chamber I), No. ICC-02/11-01/15-1, 11 March 2015.

² See the “Submissions on the Provisional Agenda for the Status Conference to be held on 21 April 2015”, No. ICC-02/11-01/15-36, 14 April 2015.

³ See the transcripts of the status conference held on 21 April 2015 (open session), No. ICC-02/11-01/15-T-1-CONF-ENG ET, p. 56, line 21 to p.57, line 1.

⁴ See the “Prosecutions’ Observations on the Conduct of the Proceedings”, No. ICC-02/11-01/15-59, 8 May 2015 (the “Prosecution’s Observations”).

⁵ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, para. 61.

II. Additional Submissions on the Conduct of the Proceedings

6. The Common Legal Representative reiterates her submissions filed on 14 April 2015.

7. The Common Legal Representative indicates that she agrees with the proposal to adopt a Protocol on the Conduct of the Proceedings as contained in Annex A of the Prosecution's Observations filed on 8 May 2015. Therefore, she will limit her submissions in this matter on issues that in her opinion are not addressed in said Observations.

8. As a preliminary matter, the Common Legal Representative indicates that it is advisable to adopt a Protocol on the Conduct of the Proceedings once the Chamber has issued its decision on the modalities of participation of victims at trial in order to incorporate all directions eventually applicable *mutatis mutandis* to the Common Legal Representative.⁶

1) *Observations on alibi or grounds excluding criminal responsibility*⁷

9. The Common Legal Representative is aware that rule 79 of the Rules of Procedure and Evidence imposes the disclosure of the existence of an alibi or grounds excluding criminal responsibility only to the Prosecution. However, in order for the victims she represents to be able to participate meaningfully at trial, the intention of the Defence shall also be notified to her.

10. Indeed, advancing an alibi or a ground for excluding criminal responsibility may result in an acquittal decision, and as such has a clear impact on the interests of the victims, including the possibility to be entitled to reparations.

⁶ Reference is made mainly to the procedures proposed in points IV, VIII, IX, XIII of Annex A to the Prosecution's Observations, see *supra* note 4.

⁷ See the Prosecution's Observations, *supra* note 4, paras. 9-10.

11. The Common Legal Representative submits that these defences would have a clear impact during the trial since they would be dealt with by the Chamber in determining whether there is evidence beyond reasonable doubt to convict the Accused of the crimes charged. In this regard, she submits that, in accordance with the jurisprudence of the Court, *“the issue of the guilt or innocence of the persons charged [...] is not only relevant, but it also affects the core interests of those granted the procedural status of victim [...], because this issue is closely linked to the satisfaction of their right to justice”*.⁸

12. Moreover, the founding texts of the Court make it clear that *“the accused’s right to a fair trial is not necessarily compromised by the imposition on him or her of an obligation to reveal in advance and in appropriate circumstances, details of the defences and the evidence to be presented, and the issues that are to arise”*.⁹ Although the use of this discretionary power by a relevant Chamber shall never derogate from the accused’s right to a fair and impartial hearing in which his or her rights are fully safeguarded,¹⁰ the Common Legal Representative contends that ordering such a disclosure to her does not jeopardise the rights of the Accused but instead ensures a fair and expeditious conduct of the proceedings.

13. In this regard, in the *Lubanga* case, Trial Chamber I ordered the Defence to furnish to the participants *“three weeks in advance of the trial with a document setting out in general terms the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise (and including by way of an alibi or grounds for excluding criminal responsibility under Rule 79 of the Rules)”*.¹¹

⁸ See the “Decision on the Set of Procedural Rules 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, para. 42. See also the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” (Pre-Trial Chamber II), No. 02/04-01/05-252, 10 August 2007, paras. 9 to 11.

⁹ See the “Decision on disclosure by the defence” (Trial Chamber I), No. ICC-01/04-01/06-1235-Corr-Anx1, 20 March 2008, para. 31.

¹⁰ *Idem*, paras. 33-35. See also in this sense the “Decision on the starting date of the defence presentation of evidence and related issues” (Trial Chamber III), No. ICC-01/05-01/08-2221, 24 May 2012, para. 11.

¹¹ See the “Decision on disclosure by the defence”, *supra* note 9, para. 41(b).

2) *Observations on the timing and manner to make requests for in-court protective measures (pursuant to rules 87 and 88 of the Rules of Procedure and Evidence)*¹²

14. In the *Lubanga* case, Trial Chamber I underlined that “*pursuant to Rule 87 of the Rules, the responsibility for filing applications for protective measures lies primarily with the party calling a witness*”, based on the information already in its possession and supplemented, as appropriate, by any relevant information provided by the Victims and Witnesses Unit (the “VWU”) or any further new information.¹³ In this regard, as first ruled by Trial Chamber I, the VWU is in charge during the familiarisation process to determine and implement any protective measures which may be necessary.¹⁴ Moreover, with regard to dual status individuals, Trial Chamber I ordered their legal representative to request, by way of a written filing, any additional protective measures, at the latest eight days in advance of their testimony, but acknowledged that in some circumstances it may have to be done at the last minute.¹⁵ In any event, Trial Chamber I also highlighted that the non-calling party and the participants have responsibilities with regard to the identification, protection and respect of the well-being and dignity of witnesses, and consequently, encouraged them to raise, at an early stage, any specific concerns they may have with the Chamber, especially for those who may be traumatised or vulnerable.¹⁶

¹² See point VI of Annex A to the Prosecution’s Observations, see *supra* note 4.

¹³ See the “Decision on the prosecution’s oral request regarding applications for protective measures” (Trial Chamber I), No. ICC-01/04-01/06-1547, 9 December 2008, para. 6. For examples of protective measures, see for instance the “Decision on the “Request for the conduct of the testimony of witness CAR-OTP-WWWW-0108 by video-link”” (Trial Chamber III), No. ICC-01/05-01/08-947-Red, 12 October 2010; Oral Decision issued by Trial Chamber III, transcript of the hearing held on 14 January 2011, No. ICC-01/05-01/08-T-47-Red2-ENG CT2 WT, pp. 45-46.

¹⁴ See the “Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial” (Trial Chamber I), No. ICC-01/04-01/06-1049, 30 November 2007, paras. 49 and 53.

¹⁵ See the oral decision issued by Trial Chamber I during the hearing held on 28 January 2009, No. ICC-01/04-01/06-T-110-Red3-ENG CT WT, pp. 14-17. The Trial Chamber noted in particular that in exceptional circumstances where the legal representative cannot but request additional protective measures at the last minute, any such request could be done orally but should in any event be preceded by an email to the Chamber and to the parties, and followed by a written filing in due course.

¹⁶ See the “Decision on various issues related to witnesses’ testimony during trial” (Trial Chamber I), No. ICC-01/04-01/06-1140, 29 January 2008, para. 36.

15. The Common Legal Representative submits that any request for in-court protective measures should be made as soon as possible to allow the VWU to fulfil its mandate, and to give the other party and the legal representative an opportunity to respond to such a request without jeopardising its implementation. The Common Legal Representative also notes that protective and special measures in accordance with rules 87 and 88 of the Rules of Procedure and Evidence could also become necessary on short notice before or in the course of the testimony or appearance of a witness/victim.

16. The Common Legal Representative will endeavour to inform the Chamber of the need for any such measures as soon as possible and, if already feasible, in her request, if any, to call witnesses or victims to present their views and concerns in person.

3) Observations as to the procedure to be adopted should self-incrimination issues arise (rule 74 of the Rules of Procedure and Evidence)¹⁷

17. In light of the jurisprudence of the Court, the Common Legal Representative notes the existence of two distinct procedures for witnesses who may incriminate themselves during their testimony and who do – or do not – participate in the proceeding as victims.¹⁸ Regarding the specific situation of individuals benefiting from the dual status of victim and witness, the Common Legal Representative submits that the existing jurisprudence should be adopted in the present case, namely that the notification of the provisions of rule 74 of the Rules of Procedure and Evidence should be undertaken by their current lawyer, *i.e.* the legal representative herself.¹⁹ For all other witnesses, a suitable qualified lawyer, familiar with the

¹⁷ See point VII of Annex A of the Prosecution's Observations, *supra* note 4.

¹⁸ In the *Ruto and Sang* case, the Trial Chamber indeed determined a specific procedure for independent legal advice provided from a qualified lawyer to witnesses who do not participate in the proceeding as victims and who may incriminate themselves during their testimony. See the "Decision on the Conduct of Trial Proceedings (General Directions)" (Trial Chamber V(a)), No. ICC-01/09-01/11-847-Corr, 9 August 2013, para. 29.

¹⁹ See the oral decision issued by Trial Chamber I during the hearing held on 28 January 2009, No. ICC-01/04-01/06-T-110-Red3-ENG CT WT, pp. 2-3: "*The Bench will therefore assume that this advice*

provisions of the legal texts of the Court and the operation of the relevant criminal national law shall be made available by the Registry.

4) *Observations on Admission of Evidence*²⁰

A. Admission of Documents Tendered through a witness

18. In the *Ruto and Sang* case, Trial Chamber V(a) indicated that “each item of evidence shall, in principle, be introduced by the tendering party through a witness, whose testimony has a connection with that item of evidence”.²¹ The Chamber underlined that objections by other parties or participants, if any, shall be filed no later than two days before the testimony, or made orally where appropriate.²²

19. Concerning evidence to be presented by the legal representative, as set out, for instance, by Trial Chamber II “[i]f the evidence which the Legal Representatives wish to tender is closely linked to the testimony of a named witness, the application must be submitted in sufficient time prior to said witness’s testimony to allow the Chamber and the parties to take proper note of the application’s content”.²³

20. The Common Legal Representative submits that there is no reason to depart from this practice.

B. ‘Bar Table’ Applications

21. The jurisprudence of the Court has established the possibility for the legal representatives to tender other material as evidence in the case “*through the bar*

has been given and that no difficulties are anticipated unless the matter is raised by the representative or the witness. The representative will be asked to certify at an appropriate stage that notification of the provisions of Rule 74 has been given and this should be done in writing.”

²⁰ See point IX of Annex A of the Prosecution’s Observations, *supra* note 4.

²¹ See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 18, para. 26.

²² *Idem*, paras. 23 and 26.

²³ See the “Decision on the Modalities of Victim Participation at Trial” (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010, paras. 98-101.

table”.²⁴ In the *Ruto and Sang* case, the Trial Chamber established, similarly to the directions issued by Trial Chamber II,²⁵ that the party tendering evidence without it being introduced by a witness “shall submit an application accompanied by a table, providing a short description of the content of each document, averment of its authenticity, an indication of the reason for not tendering the document through a witness (if that is the case), an index of the most relevant portions of the document, as well as a description of its relevance and intended probative value”.²⁶

22. Concerning the possibility for legal representatives wished to propose the presentation of documentary evidence, Trial Chamber II decided, *inter alia*, the following procedure: “[t]hey must make a written application to the Chamber showing how the documents they intend to present are relevant and how they may contribute to the determination of the truth. This application, along with the evidence they wish to present,

²⁴ See the “Decision on the request by the legal representative of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 for admission of the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo as evidence” (Trial Chamber I), No. ICC-01/04-01/06-2135, 22 September 2009, paras. 18-35; the “Corrigendum to Decision on the legal representative's application for leave to tender into evidence material from the “bar table” and on the Prosecution's Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9)” (Trial Chamber I), No. ICC-01/04-01/06-2694-Corr, 9 March 2011, para. 12. See also the “Decision on the Modalities of Victim Participation at Trial”, *supra* note 23, paras. 98-101; and the “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, 20 November 2009, paras. 95-102. In the Decision on victims' representation and participation, Trial Chamber V recognised the possibility for the victims to present evidence and set out a procedure in this regard, without however distinguishing between the presentation of evidence through a witness or “through the Bar table”. See the “Decision on victims' representation and participation” (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012, para. 76. In the *Bemba* case, Trial Chamber III did not expressly rule on this specific issue but tended to follow, in practice, the jurisprudence developed by Trial Chambers I and II. See the “Decision on the admission of material from the “bar table”” (Trial Chamber I), No. ICC-01/04-01/06-1981, 24 June 2009; and the “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, *supra* note 24, paras. 98-102.

²⁵ See the “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, *supra* note 24, paras. 98-102. In the *Bemba* case, Trial Chamber III did not expressly rule on this specific issue and tended to follow, in practice, the jurisprudence developed by Trial Chambers I and II.

²⁶ See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 18, para. 27. See also the “Decision on the Bar Table Motion of the Defence of Germain Katanga” (Trial Chamber II), No. ICC-01/04-01/07-3184, 21 October 2011, paras. 14-16.

*must be notified to the parties and other participants for their observations”.*²⁷ The Common Legal Representative submits that said approach should apply in the present case.

Respectfully submitted.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 21st day of May 2015

At The Hague, the Netherlands

²⁷ See the “Decision on the Modalities of Victim Participation at Trial”, *supra* note 23, para. 99.