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**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 Modalities of Victims' Participation at Trial

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 modalities of victims’ participation by 21 May 2015.³

4. On 8 May 2015, the Prosecution filed its Observations on the Modalities of Victim Participation at Trial (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 “Prosecution Observations on the Modalities of Victim Participation at Trial”, No. ICC-02/11-01/15-60, 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 Modalities of Victims' Participation at Trial

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

7. The Common Legal Representative indicates that she generally agrees with the points addressed in the Prosecution's Observations filed on 8 May 2015. Therefore, she will limit her submissions in this matter to the issues she disagrees with.

8. Moreover, the Common Legal Representative indicates that it is advisable to consider the decision eventually adopted by the Chamber on the modalities of participation of victims at trial for the subsequent adoption of the Protocol on the Conduct of the Proceedings suggested by the Prosecution.⁶

1) Observations on the presentation of views and concerns of victims and testimony by individual victims⁷

9. The Common Legal Representative is aware that pursuant to article 69(3) of the Rome Statute and the jurisprudence of the Court, individual victims may be called to testify by the Chamber at the request of the Common Legal Representative,⁸

⁶ See the "Annex A to the Prosecution's Observations on the Conduct of the Proceedings", No. ICC-02/11-01/15-59-AnxA, 8 May 2015.

⁷ See the Prosecution's Observations, *supra* note 4, paras. 9-14.

⁸ See 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 OA09 OA10, 11 July 2008, para. 99; the "CORRIGENDUM - Directions for the conduct of the proceedings and testimony in accordance with rule 140" (Trial Chamber II, Presiding Judge), No. ICC-01/04-01/07-1665-Corr, 1 December 2009, paras. 45-46; the "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010, para. 86; 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, para. 111; the "Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims" (Trial Chamber III), No. ICC-01/05-01/08-2138, 23 February 2012, para. 18; and the "Decision on the participation of victims in the trial proceedings" (Trial Chamber IV), No. ICC-02/05-03/09-545, 20 March 2014, paras. 24-25.

as a consequence of the conclusion of the Appeals Chamber according to which victims are not considered full parties to the proceedings.⁹

10. However, the Prosecution does not address accurately the conditions in which victims may be called to appear as witnesses.

11. Firstly, it has to be recalled the important role granted to the legal representatives in requesting that victims be called as witnesses. In this regard, the Prosecution merely indicates that “[t]he Appeals Chamber has confirmed that this [the power, under article 69(3), to request submission of all evidence that the Chamber considers necessary for the determination of the truth] includes a Trial Chamber’s authority to request victims to testify”,¹⁰ but fails to notice that, in the same finding, the Appeals Chamber also indicated that “[i]f the Victims demonstrate that the testimony they wish to give affects their personal interests, the Trial Chamber may request them to submit such evidence, if this is ‘necessary for the determination of the truth’”.¹¹

12. More clearly, Trial Chamber IV in the *Banda* case stated that “[a]rticle 69(3) of the Statute does not create a systematic victim’s right to give evidence or request the attendance of witnesses – it merely provides a basis for inviting the Chamber to exercise its discretion to request a victim’s, or anyone else’s, attendance to testify”.¹²

13. Consequently, the Common Legal Representative submits that the practice of Chambers has clearly recognised that the legal representatives may bring to the attention of the Bench information on the possibility for victims she represents to serve as witnesses at trial.

⁹ See the “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, *supra* note 8, paras. 3 and 93-94.

¹⁰ See 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’”, *supra* note 8, para. 111.

¹¹ *Idem* (emphasis added).

¹² See the “Decision on the participation of victims in the trial proceedings”, *supra* note 8, para. 24 (emphasis added).

14. Secondly, the Common Legal Representative stresses the importance of distinguishing between victims submitting their views and concerns in person, and victims with dual status providing testimony under oath.¹³

15. Taking this difference into account, expressly noticed in the Prosecution's Observations by reference to the jurisprudence of the Court,¹⁴ the Common Legal Representative reiterates that, whereas victims appearing to give evidence as witnesses will reveal their identity, victims appearing before the Chamber to present their views and concerns through unsworn statements should not be automatically required to lift their anonymity.¹⁵

16. By contrast, "[t]he Prosecution opposes, in all circumstances, the LRV's proposal that victims authorised to appear in court to present their views and concerns 'should not automatically be required to lift their anonymity' [...] The Prosecution sees no reason to depart from this Court's established jurisprudence requiring victims appearing directly before the Chamber to relinquish their anonymity".¹⁶

17. In this regard, the Common Legal Representative submits that the two decisions cited by the Prosecution as the "*established jurisprudence*" referred to above are inapposite. One of said decisions imposes an obligation to disclose the victims' identity to the parties, but refers exclusively to victims testifying at trial, not to victims submitting their "views and concerns" pursuant to article 68(3) of the Rome Statute.¹⁷ And the remaining decision, while concerning *inter alia* victims submitting

¹³ See the "Submissions on the Provisional Agenda for the Status Conference to be held on 21 April 2015", *supra* note 2, paras. 13-15.

¹⁴ See the Prosecution's Observations, *supra* note 4, footnote 24, referring to the "Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims", *supra* note 8, para. 20.

¹⁵ See the "Submissions on the Provisional Agenda for the Status Conference to be held on 21 April 2015", *supra* note 2, para. 16.

¹⁶ See the Prosecution's Observations, *supra* note 4, footnote 20.

¹⁷ See the "CORRIGENDUM - Directions for the conduct of the proceedings and testimony in accordance with rule 140", *supra* note 8, para. 22 c).

their views and concerns in person, leaves open the possibility for the Chamber to allow said victims to remain anonymous *vis-à-vis* the parties.¹⁸

18. In light of the jurisprudence mentioned above, the Common Legal Representative reiterates that the anonymity of victims submitting their views and concerns in person must not be discarded from the outset, but should be considered on a case-by-case basis, depending on the security situation of the victims concerned.¹⁹

2) *Observations on the presentation of other evidence*²⁰

19. The Common Legal Representative reiterates her observations in this matter filed on 14 April 2015,²¹ and opposes the Prosecution's contention that "[i]n principle, the LRV should not be permitted to request the Chamber to hear witnesses other than the victims she represents".²²

20. The Common Legal Representative notes that the Prosecution only makes reference to one decision in support of its submission,²³ failing to mention other decisions of equal relevance,²⁴ even in the same case.²⁵

¹⁸ See the "Decision on the participation of victims in the trial proceedings", *supra* note 8, para. 19 ("*[p]articipation by anonymous victims will depend on the impact such participation may have on the rights of the accused, and whether the participation would have a significant impact on the conduct of the proceedings. For instance, victims requiring access to non-public information; victims who are granted leave to present their views and concerns in person; and victims called to testify may be required to relinquish their anonymity*").

¹⁹ See *supra* note 15.

²⁰ See the Prosecution's Observations, *supra* note 4, paras. 15-16.

²¹ See the "Submissions on the Provisional Agenda for the Status Conference to be held on 21 April 2015", *supra* note 2, paras. 25-26

²² See the Prosecution's Observations, *supra* note 4, para. 16.

²³ *Idem*, referring to the "CORRIGENDUM - Directions for the conduct of the proceedings and testimony in accordance with rule 140", *supra* note 8, para. 45.

²⁴ See e.g. the "Decision on the Modalities of Victim Participation at Trial", *supra* note 8, para. 94.

²⁵ In this regard, see the "Decision on the 'Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth -Analysis Chart'" (Trial Chamber III), No. ICC-01/05-01/08-682, 29 January 2010, para. 25 ("*Counsel has an obligation to bring any apparently relevant jurisprudence to the attention of the Bench, particularly in a situation such as the present when the prosecution was one of the parties involved in a nearly identical issue before another Chamber of this Court*").

21. In fact, decisions subsequent to the one relied upon by the Prosecution have clarified that the legal representatives may request the Chamber to call *any person* to testify.

22. In the *Katanga and Ngudjolo Chui* case, the Appeals Chamber ruled that “[t]here may be instances where, in requesting to present their views and concerns and after having substantiated this request pursuant to article 68 (3) of the Statute, victims bring to the Trial Chamber evidence that the Trial Chamber may consider necessary for the determination of the truth [...] If the Trial Chamber is of the view that the evidence in question should be submitted, it will then decide on the appropriate measures that must be taken, in particular to protect the right of the accused to ‘have adequate time and facilities for the preparation of the defence’”.²⁶

23. This judgment was relied upon by Trial Chamber IV in the *Banda* case to conclude that “[t]he CLR may bring evidence to the attention of the Chamber during the trial proceedings. The Chamber will make its determination on a case by case basis”.²⁷

24. In light of the jurisprudence mentioned above, the Common Legal Representative submits that she must be granted the opportunity to request the Chamber to call as witnesses not only the victims she represents but also any other person who could provide relevant information for the establishment of the truth.

²⁶ See 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’”, *supra* note 8, para. 40.

²⁷ See the “Decision on the participation of victims in the trial proceedings”, *supra* note 8, paras. 27-28.

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