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Pénale  
Internationale**

**International  
Criminal  
Court**



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No.: ICC-02/11-01-15

Date: 14 April 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**

**Submissions on the Provisional Agenda for  
the Status Conference to be held on 21 April 2015**

**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” (the “Decision”),<sup>1</sup> 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. Accordingly, the Common Legal Representative of the victims admitted to participate in the proceedings,<sup>2</sup> respectfully submits the following observations.

## **II. Submissions on items identified by the Chamber in the provisional agenda<sup>3</sup>**

### **1) Regarding issues under item d)**

3. The Common Legal Representative reiterates her observations according to which she is currently not in a position to identify amongst the victims she represents the ones for whom she would either seek the Chamber’s authorisation to call as witnesses or otherwise request to appear in person before the Chamber to present views and concerns.<sup>4</sup>

4. Nevertheless, the Common Legal Representative is in a position to inform the Chamber that the languages mostly used by the victims are French, Djoula and Bambara, and that in case of appearance, it is most likely that they will use one of said languages.

### **2) Regarding issues under item f)**

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<sup>1</sup> No. ICC-02/11-01/15-1, 11 March 2015 (the “Decision”).

<sup>2</sup> No. ICC-02/11-01/11-800, 6 March 2015, para. 61.

<sup>3</sup> See the Annex to the Decision, *supra* note 1.

<sup>4</sup> No. ICC-02/11-01/11-706, 27 October 2014, para. 34; No. ICC-02/11-02/11-210, 9 February 2015, para. 20.

5. The Common Legal Representative shares the submissions on the conduct of the proceedings recently filed by the legal representatives in the *Ntaganda* case,<sup>5</sup> as well as the submissions on related procedural matters recently filed by the Prosecution in the *Bemba et al.* case.<sup>6</sup> Given the page limit applicable to the present submissions, the Common Legal Representative limits her observations to the modalities of victims' participation at trial and she will present further submissions on matters not addressed in the present document in the course of the scheduled status conference.

– *Opening and Closing Statements by the Common Legal Representative*

6. The right for legal representatives of victims to make opening and closing statements originates plainly from the legal texts of the Court and was upheld, on a constant basis, by the various Chambers, both at the pre-trial<sup>7</sup> and at the trial stages.<sup>8</sup>

7. With regard to the length of opening statements in particular, in the Kenyan cases, Trial Chamber V followed the approach of Trial Chambers I,<sup>9</sup> II<sup>10</sup> and III,<sup>11</sup> and

<sup>5</sup> No. ICC-01/04-02/06-543, 7 April 2015, especially paras. 11-33.

<sup>6</sup> No. ICC-01/05-01/13-859-AnxD, 20 March 2015.

<sup>7</sup> See *inter alia* No. ICC-02/11-01/11-384, 6 February 2013, para. 51; No. ICC-01/09-01/11-249, 5 August 2011, para. 89; No. ICC-01/05-01/08-320, 12 December 2008, paras. 101-108; No. ICC-01/04-01/07-474, 13 May 2008, para. 144; and No. ICC-01/04-01/06-462-tEN, 22 September 2006, pp. 6-7. Finally, in a different context, Pre-Trial Chamber II even envisaged “*participation (at least) in the form of “opening and closing statements” [that] can be granted to a victim whether or not that victim is assisted by a Legal Representative*”. See No. ICC-02/04-01/05-134, 1 February 2007, paras. 1 and 11.

<sup>8</sup> A good illustration of this practice can be found in the jurisprudence of Trial Chamber III, which even decided to grant the legal representative of victim applicants, whose status had not yet been decided for the purpose of trial, the right to make opening statements, in order not to prejudice these individuals who may later be granted participating status. See No. ICC-01/05-01/08-1020, 19 November 2010, paras. 22-23. See also No. ICC-01/05-01/08-807-Corr, 30 June 2010, para. 27; No. ICC-01/04-01/07-1788-tENG, 22 January 2010, para. 68 and p. 44. The jurisprudence developed in the Kenyan cases also provides a good illustration: in defining the stages of the proceedings constituting “critical junctures” involving victims’ interests where the legal representative may make representations in person significant to his representation of the victims, the non-exhaustive list drawn by the Chamber included the opening statements and the closing statements. See No. ICC-01/09-01/11-900, 3 September 2013, paras. 29 and 31. In the same vein, touching upon the presence of the accused in the courtroom, see also No. ICC-01/09-02/11-830, 18 October 2013, paras. 123-124.

<sup>9</sup> No. ICC-01/04-01/06-T-104-ENG ET WT, 16 January 2009, pp. 58-59.

<sup>10</sup> No. ICC-01/04-01/07-T-76-Red-ENG CT2 WT, 3 November 2009, page 26, lines 5 *et seq.* See also No. ICC-01/04-01/07-1788-tENG, 22 January 2010, para. 68 and p. 44; and No. ICC-01/04-01/07-1665-Corr, 20 November 2009, p. 9. Regarding the closing statement, see *inter alia* No. ICC-01/04-01/06-2722, 12

authorised the legal representative to make opening and closing statements at trial.<sup>12</sup> Trial Chamber V went further and stated that it “[m]ay invite individual victims [...] to present their views and concerns during opening and closing statements”.<sup>13</sup>

8. Based on the practice of the Trial Chambers, the Common Legal Representative respectfully requests the Chamber to be granted 30 minutes to make her opening statements. The Common Legal Representative further notes that, in accordance with the practice developed in other cases, parties and participants are usually directed to disclose, before the start of the trial, copies of the material they intend to rely on during their opening statements, unless said material is on the Prosecution’s list of evidence.<sup>14</sup> In addition, parties and participants are requested to make written objections, if any, in relation to said material, as ordered by the Chamber.<sup>15</sup>

9. In light of said jurisprudence, the Common Legal Representative submits that she should benefit from said disclosure and from the possibility to make objections, if any.

10. Finally, the Common Legal Representative notes that in accordance with the practice of the Trial Chambers, opening statements are presented first by the Prosecution, followed by the legal representatives of victims and then by the Defence. She submits that there is no need to depart from said practice in the present case.

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April 2011, paras. 7–8; No. ICC-01/04-01/07-3274, 20 April 2012, paras. 4-12; and No. ICC-01/04-01/07-3218-tENG, 15 December 2011.

<sup>11</sup> No. ICC-01/05-01/08-807-Corr, 12 July 2010, para. 27. See also No. ICC-01/05-01/08-T-30 ET WT, 21 October 2010, pp. 6-7; and No. ICC-01/05-01/08-1020, paras. 22-23.

<sup>12</sup> Nos. ICC-01/09-01/11-460 ICC-01/09-02/11-498, 3 October 2012, respectively paras. 56, 73, and paras. 55 and 72.

<sup>13</sup> No. ICC-01/09-01/11-460, 3 October 2012, para. 73.

<sup>14</sup> No. ICC-01/09-01/11-847-Corr, para. 4. See also No. ICC-01/04-01/06-T-104-ENG ET WT, 16 January 2009, pp. 45-47.

<sup>15</sup> No. ICC-01/09-01/11-900, 3 September 2013, para. 11. See also No. ICC-01/04-01/06-T-104-ENG ET WT, 16 January 2009, pp. 45-47.

– *Attendance and participation of the Common Legal Representative at public, private, closed and ex parte hearings*

11. The right of legal representatives to attend all hearings stems directly from rule 91(2) of the Rules of Procedure and Evidence. It is further supported by a constant jurisprudence developed by the Trial Chambers.<sup>16</sup> In light of the practice allowing the legal representatives to attend private and closed sessions and determining their attendance to *ex parte* hearings on case-by-case basis, the Common Legal Representative submits that her ability to attend all sessions goes to the heart of her mandate in order to be in a position to follow the proceedings and efficiently represent her clients.<sup>17</sup> In this regard, the Common Legal Representative wishes to underline, once again, and as already recognised by the Chamber,<sup>18</sup> that she is bound by the Code of Professional Conduct of Counsel, as much as counsels for the Defence and for the Prosecution.

12. Finally, the Common Legal Representative wishes to recall the good practices adopted by Trial Chamber II and III in order to minimise non-public hearings, which could be implemented in the present case.<sup>19</sup>

– *Timing and manner for the Common Legal Representative to seek authorisation for individual victims to present their views and concerns to the Chamber*

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<sup>16</sup> No. ICC-01/04-01/06-1119, 18 January 2008, para. 113. See also No. ICC-01/04-01/06-2340, 11 March 2010. Trial Chamber III followed the same approach. See No. ICC-01/05-01/08-807-Corr, 12 July 2010, paras. 27 and 40; No. ICC-01/09-02/11-498, 3 October 2012, para. 70; No. ICC-01/04-01/07-1788-tENG, 22 January 2010, paras. 69-71.

<sup>17</sup> In this regard, Trial Chamber I held that “[t]he presence of the representatives of participating victims during the evidence of defence witnesses when the court is sitting in closed session is an essential part of their right to participate in the proceedings, unless it is demonstrated that this will be inconsistent with the rights of the accused and a fair and expeditious trial. [...] The absence of the legal representatives from the Chamber could markedly undermine their ability to discharge their professional obligations to their clients because they would be unaware of potentially important evidence given during closed-session hearings”. See No. ICC-01/04-01/06-2340, 11 March 2010, para. 39.

<sup>18</sup> No. ICC-02/11-01/11-749, 19 January 2015, para. 22.

<sup>19</sup> No. ICC-01/04-01/07-T-189-ENG, 20 September 2010, p. 13, line 1 to p. 16, line 17. These good practices were also adopted by Trial Chamber III. See No. ICC-01/05-01/08-1023, 19 November 2010, paras. 23-25.

13. As a preliminary matter, the Common Legal Representative wishes to underline the important distinction drawn in the jurisprudence of the Court to date between the right for legal representatives to call victims to give evidence and the right of victims to present their views and concerns in person before the Chamber.<sup>20</sup>

14. In the *Lubanga* case, Trial Chamber I recognised “[t]he unequivocal statutory right for victims to present their views and concerns in person when their personal interests are affected [...] if the Court considers that course appropriate [and in as much as it does not] undermine the integrity of these criminal proceedings”.<sup>21</sup> Trial Chamber I also drew a distinction between the process of victims expressing their views and concerns and the process of victims giving evidence.<sup>22</sup>

15. However, it is in the *Bemba* case that for the first time the legal representatives were allowed to both apply for some of their clients to present their views and concerns in person before the Chamber (or via video-link) and to call some victims to give evidence at trial.<sup>23</sup> In the Kenyan cases, the same rights were also granted to the legal representative.<sup>24</sup> Trial Chamber III emphasised that the “[t]hreshold to grant applications by victims to give evidence is significantly higher than the threshold applicable to applications by victims to express their views and concerns in person. For this reason, victims who fail to reach the threshold to be authorised to give evidence may still be permitted to express their views and concerns in person”.<sup>25</sup> The Chamber noted that victims presenting their views and concerns are presenting unsworn statements to the Chamber.<sup>26</sup>

<sup>20</sup> No. ICC-01/05-01/08-2220, 24 May 2012, paras. 7-8 and paras. 9-11.

<sup>21</sup> No. ICC-01/04-01/06-2032-Anx, 9 July 2009, paras. 17, 25-27.

<sup>22</sup> *Idem*, paras. 17, 25-27. See also No. ICC-01/04-01/07-1788-tENG, 22 January 2010, paras. 69-71.

<sup>23</sup> No. ICC-01/05-01/08-2138, 22 February 2012, para. 20.

<sup>24</sup> Trial Chamber V envisaged it in the Kenyan cases, but no specific decision has been issued so far detailing the procedure that the legal representative may follow to call victims to share their views and concerns or to present evidence. See Nos. ICC-01/09-01/11-460 ICC-01/09-02/11-498, 3 October 2012, respectively paras. 55-57 and paras. 56-58. See also No. ICC-02/05-03/09-545, 20 March 2014, paras. 22-41.

<sup>25</sup> No. ICC-01/05-01/08-2138, 22 February 2012, para. 20.

<sup>26</sup> No. ICC-01/05-01/08-2220, 24 May 2012, para. 7.

16. In this regard, the Common Legal Representative recalls the established jurisprudence to date and argues for the possibility of diverging from it on one particular aspect. The fact that victims will relinquish their identity when appearing to give evidence as witnesses is in perfect line with the general rules and proceedings applying to all the parties and participants at the trial stage.<sup>27</sup> However, the Common Legal Representative submits that victims appearing to present their views and concerns before the Chamber through unsworn statements should not automatically be required to lift their anonymity. Instead, said issue should be considered on a case-by-case basis, depending on the security situation of the victims concerned.

17. The Common Legal Representative agrees on the principle established according to which victims who will appear before the Chamber should be the best-placed to give evidence or to present views and concerns, and that their appearance will not be cumulative with what has already been presented in the case.<sup>28</sup> The Common Legal Representative observes that there is no need to depart from the procedure established to date in other cases, corresponding essentially to the filing by the legal representative of a written request towards the end of the Prosecution case,<sup>29</sup> explaining why the individuals concerned are considered to be best placed to reflect the interests of the victims, the relevance of the victim's evidence/views and concerns to the charges, how the victim's evidence/views and concerns would assist in the Chamber's determination of the truth in this case, the estimated time for the appearance, and whether they need to be afforded in-court protective measures. Such a request could append a detailed summary/statement of the aspects that will be eventually addressed by each victim, in one of the working languages of the

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<sup>27</sup> No. ICC-01/05-01/08-2027, 21 December 2011, paras. 12-15, and 19. The Common Legal Representative underlines the appropriateness of the timing set by Trial Chamber III for the legal representative to transmit the identities of the victims concerned, and corresponding to the moment when the Chamber will have granted the victims permission to testify, not before.

<sup>28</sup> *Idem*, paras. 12-15.

<sup>29</sup> No. ICC-01/05-01/08-1935, 21 November 2011, para. 3. See also No. ICC-01/05-01/08-1023, 19 November 2010, para. 5.



Court.<sup>30</sup> She further suggests that the Chamber establishes a disclosure calendar, if need be, in light of her requests.<sup>31</sup> The parties were afforded the right to present observations on said request before the Chamber ruled on it.<sup>32</sup>

18. For the presentation of views and concerns, the Chamber may envisage the possibility for victims to either present their views in person or in writing; in the case of the appearance in person, the Common Legal Representative suggests adopting the procedure as in the *Bemba* case, so that the legal representatives would guide the victims through their presentation by only facilitating it, eventually with a few questions, and that the victims will not be questioned by the parties but by the Judges eventually.<sup>33</sup>

19. In light of the importance for victims to be able to express their views and to share their experience with the judges, the Common Legal Representative favours their appearance in person (either by video-link or in The Hague) rather than the writing procedure.

20. In relation to the right of legal representatives to call witnesses – other than victims, the jurisprudence has underlined that witnesses called by the legal representatives shall be able to provide important information that was not hitherto included in the evidence presented by the parties, and shall make a genuine

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<sup>30</sup> No. ICC-01/05-01/08-2027, 21 December 2011, paras. 12-15.

<sup>31</sup> *Idem*.

<sup>32</sup> This procedure has applied in the *Bemba* case for both victims' requests to present their views and concerns or evidence. In particular in the *Lubanga*, *Katanga and Ngudjolo Chui* and *Bemba* cases, some victims were allowed to be called by the legal representatives to give evidence or to present views and concerns. In these circumstances, victims were giving evidence under oath. In addition to the summary/statement provided by the legal representatives with his/her request, the victims' application forms (in full or with necessary redactions) were also filed confidentially. See No. ICC-01/04-01/06-2032-Anx, 9 July 2009, paras. 26, 28, 33, 39 and 44. See also No. ICC-01/04-01/07-1665-Corr, 20 November 2009, paras. 20-32.

<sup>33</sup> No. ICC-01/05-01/08-2220, 24 May 2012, paras. 7-8. See also No. ICC-01/05-01/08-2138, 22 February 2012.

contribution to the determination of the truth.<sup>34</sup> In particular, the Chamber will consider whether the testimony “[i] affects the victim’s personal interests; (ii) is relevant to the issues of the case; (iii) contributes to the determination of the truth; and (iv) whether the testimony would be consistent with the rights of the accused, in particular the right to adequate time and facilities to prepare a defence”.<sup>35</sup> The Chamber further directed the legal representative to file a schedule of the anticipated testimonies, detailing their likely lengths and the order in which they may appear.<sup>36</sup> The Common Legal Representative favours this approach and indicates that she will be in a position of filing a request for calling witnesses towards the end of the Prosecution case when she will be able to better assess if the proposed testimony complies with the above mentioned criteria.

– ***Procedure by which the Common Legal Representative should seek authorisation in order to question witnesses or present/introduce evidence at trial***

21. The Common Legal Representative recalls that rule 91(3)(a) of the Rules of Procedure and Evidence provides that the legal representatives may question witnesses, experts and the accused,<sup>37</sup> and the unique role of the legal representatives in the determination of the truth as emphasised by the Chambers.<sup>38</sup>

22. It is submitted that the procedure according to which the legal representative should file a discrete written application, notified to the parties, at least seven days before the witness is scheduled to testify,<sup>39</sup> could be applied in the present case,

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<sup>34</sup> No. ICC-01/04-01/07-1788-tENG, 22 January 2010, paras. 94-97. Trial Chamber I appointed an expert on names and other social conventions in the DRC following the legal representatives’ submissions in this regard. See No. ICC-01/04-01/06-1934, 5 June 2009, para. 12; No. ICC-01/04-01/06-1793, 20 March 2009.

<sup>35</sup> No. ICC-02/05-03/09-545, 20 March 2014, para. 25.

<sup>36</sup> *Idem*, para. 26.

<sup>37</sup> No. ICC-01/09-02/11-498, 3 October 2012, paras. 75-76; No. ICC-01/05-01/08-807-Corr, 12 July 2010, para. 40.

<sup>38</sup> No. ICC-01/05-01/08-1023, 19 November 2010, para. 17.

<sup>39</sup> Trial Chambers I and III noted that “[i]t may be necessary for the representatives to delay submitting applications to ask questions until 7 days before the relevant witness testifies, once the extent of the evidence to be given, and the issues, are clear”. See No. ICC-01/05-01/08-807-Corr, 12 July 2010, paras. 37 and 102. See also No. ICC-01/05-01/08-1005, 10 November 2010, para. 39. See No. ICC-01/04-01/06-T-119-Red4-ENG CT2 WT, 5 February 2009, p. 1. See also No. ICC-01/09-01/11-847-Corr, 9 August 2013, paras. 19 and

whenever possible. Furthermore, the Common Legal Representative submits that said application should indicate an outline of the areas of examination identified as concerning the personal interests of the victims, together with the provision of documents proposed to be used during the examination, or references thereto, where appropriate.<sup>40</sup> The Common Legal Representative is aware of the jurisprudence developed by Trial Chamber III according to which the legal representatives were to file a list of specific questions.<sup>41</sup> However, in light of the practice observed in said case, she respectfully submits that identifying in advance a specific list of questions is not a realistic nor an effective option in the current proceedings, in as much as precise questions will largely depend on the questions asked by the calling party and by the Chamber and on the answers provided by the witnesses themselves. Consequently, she contends that, in order to efficiently participate at trial, to adequately fulfil her mandate and to avoid duplicating questions, it is in the interest of the expeditiousness of the proceedings for her to submit areas of questions anticipated to touch upon the personal interests of the victims represented rather than specific lists of questions. This corresponds to the dynamic process which characterises witness questioning and preserves the right of the parties to object to any of the questions, as well as the authority of the Chamber to not admit some of the questions.<sup>42</sup> Trial Chamber I adopted said approach, underlining that “[i]n principle, the parties do not have an obligation to disclose their lines of questioning in

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21: “When the Legal Representative wishes to examine a witness, he is directed, as general rule, to apply to the Chamber, by means of filing, notified to the parties, seven days in advance. In the event of unexpected changes to the witness schedule or unanticipated issues raised during testimony, the seven-day period can be altered as necessary. The application of the Legal Representative should provide reasons for separate questioning apart from the questioning by the Prosecution and include an outline of areas for examination. Documents proposed to be used during the examination, or references thereto, where appropriate, should also be provided at this time, in accordance with the regular procedure for parties discussed below. After the examination-in-chief the parties will be given an opportunity to make oral submissions, without the witness being present, and the Chamber will issue an oral ruling on the application”.

<sup>40</sup> No. ICC-01/09-01/11-847-Corr, 9 August 2013, para. 19. The Chamber also specified that “[i]n the event of unexpected changes to the witness schedule or unanticipated issues raised during testimony, the seven-day period can be altered as necessary”.

<sup>41</sup> No. ICC-01/05-01/08-807-Corr, 12 July 2010, para. 102 h); No. ICC-01/05-01/08-1005, 10 November 2010, para. 3; No. ICC-01/05-01/08-1023, 19 November 2010, para. 18.

<sup>42</sup> See also No. ICC-01/04-01/06-1140, 29 January 2008, paras. 32-33: “Since witness questioning is a dynamic process, in principle, the parties are not under a legal obligation to disclose their lines of questions in advance”.

*advance, since the course a party takes will depend to a significant extent on the issues raised, and the answers given, during the evidence of the witness. However, the Trial Chamber appreciates that exceptions may be necessary, particularly in order to protect traumatised or vulnerable witnesses and in these circumstances the Trial Chamber may order the parties and participants to disclose in advance the questions or the topics they seek to cover during their questioning".*<sup>43</sup>

23. The Common Legal Representative wishes further to note that her ability to seek the Chamber's authorisation to question witnesses is intimately linked to the reception, in a timely manner, of the list of witnesses and the order in which the Prosecution or the Defence are going to call them, as ruled in the *Katanga and Ngudjolo Chui* case,<sup>44</sup> and in the *Ruto and Sang* case.<sup>45</sup>

24. Turning to the introduction of evidence, the Common Legal Representative refers to the constant jurisprudence of the Court and in particular to the terms used by Trial Chamber I according to which "[t]he right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right [...] to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69(3) of the Statute. Rule 91(3) of the Rules enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant). The Rule does not limit this opportunity to the witnesses called by the parties. It follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth".<sup>46</sup>

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<sup>43</sup> *Idem*, para. 33.

<sup>44</sup> No. ICC-01/04-01/07-1788-tENG, 22 January 2010, p. 45; No. ICC-01/04-01/07-1665-Corr, 20 November 2009, para. 8, p. 10.

<sup>45</sup> No. ICC-01/09-01/11-847-Corr, 9 August 2013, para. 12.

<sup>46</sup> No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 98. See also No. ICC-01/04-01/06-1119, 18 January 2008, para. 108; No. ICC-01/04-01/07-1788-tENG, 22 January 2010, paras. 82-84.

25. The Common Legal Representative notes that based on the jurisprudence established in the *Lubanga* case by both Trial Chamber I and the Appeals Chamber,<sup>47</sup> Trial Chamber V granted the legal representatives the right to submit a discrete application for the presentation of evidence, considering in particular that it would determine pursuant to articles 64(6)(d) and 69(3) of the Rome Statute, “[w]hether the proposed evidence is relevant to the personal interests of victims, may contribute to the determination of the truth and whether it would be consistent with the rights of the accused and a fair and impartial trial”.<sup>48</sup> In this regard, the Chamber specified that its decision would intervene after having granted the parties an opportunity to provide observations on such requests.<sup>49</sup>

26. In the *Ruto and Sang* case, Trial Chamber V(A) indicated that the legal representative shall provide reasons for a separate presentation of evidence apart from the case presentation by the Prosecution<sup>50</sup> and if granted, such evidence shall be presented at the end of the Prosecution case.<sup>51</sup> In the *Bemba* case, Trial Chamber III specified that the presentation of evidence by the legal representatives was to take

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<sup>47</sup> No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 104: “With these safeguards in place, the Appeals Chamber does not consider that the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is inconsistent with the onus of the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial”.

<sup>48</sup> No. ICC-01/09-02/11-498, 3 October 2012, para. 77.

<sup>49</sup> *Idem*.

<sup>50</sup> No. ICC-01/09-01/11-847-Corr, 9 August 2013, paras. 19 and 21: “If the Legal Representative seeks to present evidence, he shall provide reasons for a separate presentation of evidence apart from the case presentation by the Prosecution. If leave is granted for presentation, such evidence shall be presented at the end of the Prosecution case”. See also No. ICC-02/05-03/09-545, 20 March 2014, paras. 22-41: “The jurisprudence of the Appeals Chamber has confirmed the possibility for victims to “bring to the Trial Chamber evidence that the Trial Chamber may consider necessary for the determination of the truth”. The Appeals Chamber has held that the exercise of a Chamber’s discretionary power to request evidence is linked to the requirements of article 68(3) of the Statute such that the Chamber must be satisfied that the personal interests of the victim are affected: [...] It is only if the Trial Chamber is persuaded that the requirements of article 68(3) have been met, and, in particular, that it has been established that the personal interests of the victims are affected, that the Chamber may decide whether to exercise its discretionary powers under the second sentence of article 69(3) of the Statute “to request the submission of all evidence that it considers necessary for the determination of the truth”. [...] The 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”.

<sup>51</sup> No. ICC-01/09-01/11-847-Corr, 9 August 2013, para. 21.

place before the Defence began its presentation of evidence, if any.<sup>52</sup> According to the procedure established in that case, the legal representative shall file a written application containing a description of the nature of the proposed evidence, the manner and estimated time needed to present it, the personal interests of victims concerned, its relevance, how it is supposed to assist the Chamber's determination of the truth, information regarding anonymity issues, the effect on the rights of the accused and the fairness of the trial, disclosure issues, and the protective measures to be requested.<sup>53</sup> The Chamber also specified that the Prosecution and the Defence were to be invited to file their observations on such applications within seven days of notification.<sup>54</sup> The Common Legal Representative submits that said procedure could be applied in the present case.

– *Scope, order and manner of questioning by the Common Legal Representative*

27. The Common Legal Representative submits that the following principles adopted to date by the Trial Chambers should also apply in the present case: there is a presumption in favour of a neutral form of questioning which may be displaced in favour of a more closed form of questioning, along with the use of leading or challenging questions, depending on the issues raised and the interests affected;<sup>55</sup> the questions should not be repetitive or duplicative of questions already asked by the calling party or only if the witness did not really give a full answer; questioning should cover matters related to the victims' interests, that have the purpose of clarifying the witness' evidence and to elicit additional facts – notwithstanding their relevance to the guilt or innocence of the Accused;<sup>56</sup> questions can relate to reparations if the Chamber were to decide that regulation 56 of the Regulations of the Court should apply; questions could go beyond matters in controversy between the parties and pertain to the credibility and/or accuracy of the witness' testimony if the

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<sup>52</sup> No. ICC-01/05-01/08-1935, 21 November 2011, para. 3.

<sup>53</sup> *Idem*.

<sup>54</sup> *Ibid*.

<sup>55</sup> No. ICC-02/05-03/09-545, 20 March 2014, para. 33.

<sup>56</sup> No. ICC-01/05-01/08-1023, 19 November 2010, para. 20.

Common Legal Representative demonstrates this line of questioning is directly relevant to the interests of victims she represents.<sup>57</sup>

28. As emphasised by Trial Chambers I, II and III, “[a]s a matter of general principle, questioning by the Legal Representatives on behalf of victims who participate in the proceedings must have as its main aim the ascertainment of the truth. [...] Nevertheless, their participation may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background”.<sup>58</sup>

29. In the *Ruto and Sang* case, Trial Chamber V(A) allowed the cross-examiner to put questions to the witness which go sensibly beyond the scope of the examination-in-chief, falling in the latter’s discretion to determine whether a given issue should or need not be explored with the witness (for instance on aspects of the cross-examiner’s case). The Chamber however decided to proceed on a case-by-case basis in order to determine whether given lines of questioning are reasonable and whether the questions are appreciably relevant. The Chamber also clarified that such an approach of the cross-examination does not imply that the cross-examiners will be free to recall any witness whom they have not fully questioned on an earlier occasion.<sup>59</sup> In the *Lubanga* case, Trial Chamber I also set the right for the parties and the legal representatives to put questions to the witnesses going beyond what was raised during any examination-in-chief, or the examination by the Chamber.<sup>60</sup>

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<sup>57</sup> No. ICC-01/04-01/06-2127, 16 September 2009, paras. 21, 24, 26 and 28-30. See also No. ICC-01/04-01/07-1665-Corr, 20 November 2009, paras. 82-91. See also No. ICC-01/04-01/06-1119, 18 January 2008, paras 108-111; No. ICC-01/05-01/08-807-Corr, 12 July 2010, paras. 30-40.

<sup>58</sup> *Idem*.

<sup>59</sup> No. ICC-01/09-01/11-900, 3 September 2013, para. 20.

<sup>60</sup> See *inter alia* No. ICC-01/04-01/06-T-253-Red2-ENG CT WT, 4 5 March 2010, pp. 3 *et seq.*; No. ICC-01/04-01/06-T-254-Red3-ENG CT WT, 5 March 2010, pp. 70 *et seq.* See also No. ICC-01/04-01/06-1140, 29 January 2008, paras. 32-33; No. ICC-01/04-01/06-T-107-ENG, 26 January 2009, pp. 72-73.

30. The Common Legal Representative submits that said approach of Trial Chambers V(A) and I should apply in the present case, as much as the Chamber retains control over the lines of questioning in situations calling for its intervention.

31. In addition, the Common Legal Representative submits that questions related to reparations should also be allowed during trial proceedings. In this regard, pursuant to regulation 56 of the Regulations of the Court, “[t]he Trial Chamber may hear the witness and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial”. Trial Chamber II for instance decided that it may consider exercising its discretion pursuant to said regulation to hear witnesses and examine evidence.<sup>61</sup> Trial Chambers I and III similarly decided that they “[m]ay allow such evidence to be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination”.<sup>62</sup>

32. The Common Legal Representative submits that the implementation of regulation 56 of the Regulations of the Court at trial would favour the expeditious conduct of the proceedings for the benefit of all parties and participants. Further, it would also prevent – or at least limit instances of – recalling witnesses at a later stage, which would notably ensure that the Court avoids re-traumatisation of the witnesses concerned.<sup>63</sup>

33. The Common Legal Representative further submits that she should be authorised to question witnesses called by the Prosecution after the latter has finished its examination-in-chief, before the Defence starts its cross-examination.<sup>64</sup>

### **3) Regarding issues under item h)**

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<sup>61</sup> No. ICC-01/04-01/07-1788-tENG, 22 January 2010, para. 60.

<sup>62</sup> No. ICC-01/05-01/08-807-Corr, 12 July 2010, para 28; No. ICC-01/04-01/06-1119, 18 January 2008, paras. 119-122.

<sup>63</sup> No. ICC-01/04-01/06-1119, 18 January 2008, para. 120.

<sup>64</sup> See *inter alia* No. ICC-01/09-01/11-847-Corr, 9 August 2013, para. 16.



34. The Common Legal Representative submits that, in light of the judicial economy pursued by a joinder of proceedings, decisions and orders previously issued in the proceedings against the Accused shall continue to have effect *mutatis mutandis* in the joint proceedings. Moreover, as ordered by the Chamber in the Decision, “[a]ll public documents and other material on both the Blé Goudé and Gbagbo case records [shall] be included on the joint case record”.<sup>65</sup>

35. Alternatively, based on the jurisprudence in the *Katanga and Ngudjolo Chui* case, the Common Legal Representative submits that upon being notified of all decisions rendered in the case of the co-prosecuted person, the Defence of Mr. Blé Goudé and the Defence of Mr. Gbagbo could be granted the opportunity by the Chamber to file either a request for reconsideration or, alternatively, for leave to appeal concerning any given decision provided that “*their respective interests are affected*” by such a decision.<sup>66</sup> The Common Legal Representative further argues that before issuing the Decision, the Chamber only adopted a limited number of rulings in the *Gbagbo* case that may arguably have an impact upon the interests of Mr. Blé Goudé.<sup>67</sup> As a consequence, a deadline of 15 days may suffice for the Defence of Mr. Blé Goudé to submit requests for reconsideration or, alternatively, for leave to appeal against said decisions, if any.

#### **4) Regarding issues under item i)**

36. The Common Legal Representative reiterates her submissions according to which it is a common interest of the entirety of the victims that the trial proceedings in the present case start as soon as practicable and without any undue delay.<sup>68</sup>

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<sup>65</sup> See the Decision, *supra* note 1, para. 72.

<sup>66</sup> No. ICC-01/04-01/07-259, 10 March 2008, pp. 4 and 5.

<sup>67</sup> See *e.g.* No. ICC-02/11-01/11-737, 15 December 2014; No. ICC-02/11-01/11-749, 19 January 2015; No. ICC-02/11-01/11-800, 6 March 2015.

<sup>68</sup> No. ICC-02/11-01/15-19, 2 April 2015, para. 29; No. ICC-02/11-02/11-210, 9 February 2015, paras. 22-25 and 43; No. ICC-02/11-02/11-206, 4 February 2015, paras. 22-23.

37. During various meetings held with the Common Legal Representative, victims expressed their wish for trial proceedings to be carried out in an expeditious manner, and made clear their strong opposition to any delay in the commencement of the trial. The Common Legal Representative indicates that the trial should start before the end of the year and that end of October seems a reasonable date. She will present further observations thereon once the parties have presented submissions in this regard.

### **III. Submissions on other issues arising from the provisional agenda**

38. The Common Legal Representative respectfully submits that in addition to the issues for which she has been ordered to present submissions, issues under item b) and e) of the provisional agenda are also directly relevant to the victims' interests.

#### **1) Regarding issues under item b)**

39. The Common Legal Representative reiterates her submissions according to which should the Prosecution intend to seek variation of any of the protective measures already implemented, or to request for protective measures to be applied, the Common Legal Representative must be properly informed in advance.<sup>69</sup> This is necessary in order to preserve the security, safety and well-being of the victims concerned and to prevent any potential risk in this regard, in conformity with article 68(1) of the Rome Statute. It is also necessary to enable the Common Legal Representative to properly discharge her professional obligations under the Code of Professional Conduct for counsel, and in particular the duty to "*take into account [her] client's personal circumstances and specific needs*".<sup>70</sup>

40. Moreover, the Common Legal Representative recalls the proposed Protocol on the exchange of information on individuals with dual status submitted to the

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<sup>69</sup> No. ICC-02/11-01/11-706, 27 October 2014, para. 42; No. ICC-02/11-02/11-210, 9 February 2015, para. 40.

<sup>70</sup> See the Code of Professional Conduct for counsel, No. ICC-ASP/4/Res.1, article 9(2).

Chamber and her submissions on the Protocol concerning contacts with witnesses of the opposing party.<sup>71</sup>

## 2) Regarding issues under item e)

41. The need to take into consideration the interests of the victims with regard to any agreement between the Defence and the Prosecution as to facts or evidence in a given case is clearly reflected in rule 69 of the Rules of Procedure and Evidence. Pursuant to this provision, the *“Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interest of justice, in particular the interests of the victims”*.<sup>72</sup> The Common Legal Representative submits that the language of said provision expressly suggests that no agreement between the parties may become effective and binding in a manner detrimental to victims’ interests. Moreover, providing victims with the possibility to submit their views and concerns in relation to said agreements would benefit the overall effectiveness of the proceedings. Furthermore, it clearly falls within the power of a Trial Chamber under article 69(3) of the Rome Statute *“to request the submission of all evidence that it considers necessary for the determination of the truth”*.

42. This reading of rule 69 of the Rules of Procedure and Evidence is supported by the jurisprudence of the Court. In particular, in the *Lubanga* case, Trial Chamber I ordered that the parties *“[t]o prepare a draft schedule of agreed facts”* and that *“[t]he draft schedule is to be served on participating victims”*.<sup>73</sup> In said case, victims were authorized to submit their observations on the facts and evidence agreed between the parties within a deadline specified by the Chamber.<sup>74</sup>

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<sup>71</sup> No. ICC-02/11-01/11-790-Anx1-Corr, 4 March 2015; No. ICC-02/11-01/11-776, 20 February 2015, paras. 7-21.

<sup>72</sup> Rules of Procedure and Evidence, rule 69 (emphasis added).

<sup>73</sup> No. ICC-01/04-01/06-1179, 20 February 2008, para. 11.

<sup>74</sup> *Idem*, para. 13.

43. The Common Legal Representative submits that said approach is the most consistent with the legal framework of the Court. First, it enables victims to comprehend issues covered by any agreements between the parties and to envisage the potential impact that they could have on their interests as well as on the proceedings as a whole. Second, the notification of agreements to the victims prior to any decision on the merits by the Chamber would contribute to the effectiveness and the meaningfulness of victims' participation at trial. Indeed, the Common Legal Representative would have an opportunity to make specific submissions on how the interests of participating victims might be affected by the proposed agreements. Consequently, the Common Legal Representative submits that should agreements between the parties under rule 69 of the Rules of Procedure and Evidence be reached, such agreements should be notified to the victims for eventual observations.

#### **IV. Proposed issue to be added to the agenda of the Status Conference**

44. In light of the submissions of the Defence of Mr. Blé Goudé on the proposed Protocol on dual status witnesses and on the proposed Protocol on handling of confidential information,<sup>75</sup> the Common Legal Representative respectfully requests the Chamber to add the item of the Proposed Protocols to the agenda of the status conference in order for the parties, the participants and the Registry to provide their final comments on the matter before any decision is taken by the Chamber.

Respectfully submitted.



**Paolina Massidda**  
**Principal Counsel**

Dated this 14<sup>th</sup> day of April of 2015

At The Hague, the Netherlands

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<sup>75</sup> No. ICC-02/11-01/15-26-Conf, 9 April 2015; No. ICC-02/11-01/15-27-Conf, 9 April 2015.