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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-Carbuccia  
Judge Bertram Schmitt**

**SITUATION IN COTE D'IVOIRE**

**IN THE CASE OF  
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE***

**Public**

**Defence Submission on Victims' Participation**

**Source:      Defence of Mr Charles Blé Goudé**

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

1. In view of the Status Conference held on 21 April 2015, the Legal Representative of Victims (“the LRV”) filed extensive written submissions related to the Victims’ participation to the trial (“the LRV Submissions”).<sup>1</sup>
2. During the above mentioned Status Conference, Trial Chamber I (“the Chamber”) invited 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.<sup>2</sup>
3. The Defence of Charles Blé Goudé (“the Defence”) hereby would like to answer to the LRV Submissions and to file its own observations on this matter.

### I. Procedural history

4. On 11 June 2014, Pre-Trial Chamber I issued a “Decision on victims’ participation in the pre-trial proceedings and related issues”.<sup>3</sup>
5. On 11 December 2014, Pre-Trial Chamber I confirmed the charges against Mr. Blé Goudé<sup>4</sup> while on 20 December 2014, the Presidency referred the case to the Chamber.<sup>5</sup>
6. On 22 December 2014, the Prosecutor requested the Chamber to join the *Gbagbo* and the *Blé Goudé* cases.<sup>6</sup>
7. On 11 March 2015, the Chamber accepted the Prosecutor’s request to join the cases against Laurent Gbagbo and Charles Blé Goudé and scheduled a Status Conference on

<sup>1</sup> Submissions on the Provisional Agenda for the Status Conference to be held on 21 April 2015, 14 April 2015, ICC-02/11-01/15-36.

<sup>2</sup> ICC-02/11-01/15-T-1-CONF-ENG ET 21-04-2015 1/102 NB T, from p. 56 line 20 to p. 57 line 1. See also p. 99 lines 8-22 and from p. 100 line 21 to p. 101 line 8.

<sup>3</sup> Pre-Trial Chamber I, Decision on victims’ participation in the pre-trial proceedings and related issues, 11 June 2014, ICC-02/11-02/11-83.

<sup>4</sup> Pre-Trial Chamber I, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, ICC-02/11-02/11-186. See also Partly Dissenting Opinion of Judge Christine Van den Wyngaert, ICC-02/1102/11-186-Anx.

<sup>5</sup> Corrigendum to the “Decision referring the case of *The Prosecutor v. Charles Blé Goudé* to Trial Chamber I”, ICC-02/11-02/11-193, 20 December 2014 (registered on 22 December 2014), 20 December 2014, ICC-02/1102/11-193-Corr.

<sup>6</sup> Prosecution’s Request to join the cases of *The Prosecutor v. Laurent GBAGBO* and *The Prosecutor v. Charles BLE GOUDÉ*, 22 December 2014, ICC-02/11-02/11-194.

21 April 2015, inviting the parties and participants to file their written submissions on the Status Conference provisional agenda before 14 April 2015.<sup>7</sup>

8. On 14 April 2015, the LRV,<sup>8</sup> the Registry,<sup>9</sup> the Office of the Prosecutor (“the OTP”),<sup>10</sup> the Gbagbo Defence<sup>11</sup> and the Defence<sup>12</sup> filed their written submissions related to the Status Conference provisional agenda.
9. On 21 April 2015, during the Status Conference, the Chamber invited the parties and participants 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.<sup>13</sup>
10. On 8 May 2015, the Office of the Prosecutor (“the OTP”) filed the “Prosecution Observations on the Modalities of Victim Participation at Trial”.<sup>14</sup>

## II. Submission

11. As a preliminary observation, the Defence would like to position the present discussion on victims’ participation in its legal context, i.e. article 68 of the Rome Statute (“the Statute”) and rule 89 to rule 93 of the Rules of Procedure and Evidence (“the RPE”) which set a precise legal framework for victims’ participation. These provisions are indeed based on the principle of participation, from which the concept of participant directly derives. Victims are participants in the proceedings, a status which attributes rights as prescribed by the Statute and the RPE but which also attributes a specific role to play in the proceedings. This role is different from the one attributed to the parties and, to preserve the principles of good administration of

<sup>7</sup> Trial Chamber I, Decision on Prosecution requests to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and related matters, 11 March 2015, ICC-02/11-01/15-1.

<sup>8</sup> ICC-02/11-01/15-36.

<sup>9</sup> Registry’s Observations following 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”, 14 April 2015, ICC-02/11-01/15-37.

<sup>10</sup> Prosecution’s submission on the provisional agenda for the 21 April status conference, 14 April 2015, ICC-02/11-01/15-35-Conf with confidential annex A.

<sup>11</sup> Soumissions de la Défense concernant l’ordre du jour de la conférence de mise en état prévue le 21 avril 2015, 14 April 2015, ICC-02/11-01/15-32-Red with public annex.

<sup>12</sup> Defence Submissions on Agenda Items for the Status Conference of 21 April 2015, 14 April 2015, ICC-02/11-01/15-33 with public annex.

<sup>13</sup> ICC-02/11-01/15-T-1-CONF-ENG ET 21-04-2015 1/102 NB T, from p. 56, line 20 to p. 57, line 1. See also p. 99, lines 8-22 and from p. 100 line 21 to p. 101 line 8.

<sup>14</sup> Prosecution Observations on the Modalities of Victim Participation at Trial, 8 May 2015, ICC-02/11-01/15-60.

justice and fair trial, parties and participants are precluded from departing from their respective role as assigned by the Statute and the RPE.<sup>15</sup>

12. Regarding the principle of participation, article 68(3) of the Statute is utterly clear and concise on the mechanisms governing the victims' participation:

“[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

13. Article 68(3) of the Statute establishes a rule according to which the victims' participation in the proceedings shall never be automatic. Instead of creating a systematic right for victims thereto, the Statute subjects the victims' participation to several conditions. If the conditions are met, the Chamber allows victims to take part in the proceedings under the control of the Chamber. In other words, only when the Chamber considers it appropriate the victims are allowed to participate. The importance of an “*appropriate*” participation is clearly emphasized in the text of article 68(3) which repeats the adjective “*appropriate*” twice.

14. The conditions to be met in order to allow the victims to participate in the proceedings are also precisely captured by article 68(3) of the Statute. First, participation is conditioned by a situation where the personal interests of victims are affected. Second, participation shall not be prejudicial to or inconsistent with the rights of the Accused. Finally, at all stages of the proceedings, victims' participation shall be allowed by the Chamber, if and only if this participation is considered appropriate.

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<sup>15</sup> ICC-01/04-01/07-1665-Corr, 20 November 2009, para. 82: “*The victims are not parties to the trial and certainly have no role to support the case of the Prosecution.*”

i. Participation in opening and closing statements

15. The LRV's submission that "*the right for legal representatives of victims to make opening and closing statements originates plainly from the legal texts of the Court*"<sup>16</sup> is inaccurate. Rule 89(1) of the RPE does not prescribe an absolute right for legal representatives to make opening and closing statements. Instead, it opens a possibility for them to seek authorisation to make opening and closing statements when appropriate:

"[...] the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements."<sup>17</sup>

16. Hence, it appears that the right for the LRV to make opening and closing statements is not automatic, rather it must be specifically requested and allowed by the Chamber.

17. However, it is true that this right has been commonly granted by Trial Chambers, as reminded by the LRV, notably in the *Ruto and Sang* case where Trial Chamber V(A) delivered a very enlightening statement on victims' participation:<sup>18</sup>

"According to the decision, 'at critical junctures involving victims' interests, notably opening and closing statements, the Legal Representative may make [...] representations in person."<sup>19</sup>  
The Chamber specified that in other moments at trial, the Legal Representative is required to request participation by filing with the Chamber."<sup>20</sup>

18. The Defence would like to stress the fact that, in the above mentioned decision, Trial Chamber V(A) adopted views on victims' participation that appear to be quite consistent with the Statute and the RPE's provisions on the matter. Indeed, in accordance with rule 89(1) of the RPE:

"In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the

<sup>16</sup> ICC-02/11-01/15-36, para. 6.

<sup>17</sup> Rule 89(1) of the RPE. Emphasis added.

<sup>18</sup> Trial Chamber V(A), Decision No. 2 on the Conduct of Trial Proceedings (General Directions), 9 September 2013, ICC-01/09-01/11-900.

<sup>19</sup> ICC-01/09-01/11-460, para. 71.

<sup>20</sup> ICC-01/09-01/11-900, para. 29. Emphasis added.

proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.”<sup>21</sup>

19. The LRV, in the instant case, failed to demonstrate why they should be authorised to give an opening statement. In the alternative, when it concerns the length of the opening statement, the LRV submissions refer to decisions in which the victims were granted to give a shorter period of time to give opening statement compared to the period of time granted to the parties.<sup>22</sup> This practise of the Court emphasizes the respective roles of parties and participants. For the foregoing reason, the Defence considers that the LRV should be allotted no more than thirty minutes to make her opening statements.
20. Concerning the order of opening statements, the LRV notes that such opening statements should be presented first by the Prosecution, followed by the LRV and then, by the Defence.<sup>23</sup> As the present order is in line with a common practice before the Court, the Defence sees no reason to contest it.
21. Finally, in accordance with the jurisprudence of the Court, the Defence would like to recall that the opening statements are not considered as evidence for the purposes of the trial.<sup>24</sup>

## ii. Participation in public, private, closed and *ex parte* hearings

22. Pursuant to rule 91(2) of the RPE, the LRV should be entitled to attend trial hearings when they are in public session. The issue of attendance at private, closed and *ex parte* hearings appears to be treated with caution by the Court. In the *Lubanga* case, the Chamber held that:

“[t]he Trial Chamber may, proprio motu or upon request by any of the parties or participants, permit victims to participate in closed and *ex parte* hearings, depending on the circumstances.”<sup>25</sup>

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<sup>21</sup> Emphasis added.

<sup>22</sup> ICC-02/11-01/15-36, paras. 7-8, referring to ICC-01/04-01/07-3274, 20 April 2012, paras. 4-12; ICC-01/04-01/06-2722, 12 April 2011, paras. 7-8; ICC-01/04-01/07-T-76-Red-ENG CT2 WT, 3 November 2009, page 26, lines 5 *et seq.*

<sup>23</sup> ICC-02/11-01/15-36, para 10.

<sup>24</sup> ICC-01/05-01/08-1020, 19 November 2010, para. 23: “*The Chamber recalls that such opening statements, if any, are not considered as evidence for the purposes of the trial.*”

23. Hence, to attend closed and *ex parte* hearings, the LRV needs authorisation from the Chamber. If it is true that Chambers have commonly authorised that the victims attend closed hearings,<sup>26</sup> attendance to *ex parte* hearings has been subjected to a strict case-by-case basis.<sup>27</sup> Even though the ability of the LRV to attend all sessions goes to the heart of her mandate,<sup>28</sup> the preservation of the *ex parte* framework goes to the heart of the Accused's rights and ensures the fairness of the proceedings. For the foregoing reason, the Defence will not oppose the LRV's attendance to private and closed hearings presupposed the Chamber grants it. However, the Defence emphasises the exceptional character of the victims' participation to *ex parte* hearings, which shall be specifically requested and should be granted by the Chamber on a case-by-case basis.

### iii. Presentation of the victims' views and concerns

24. The OTP holds the opinion that the victims should submit their views and concerns *via* the LRV,<sup>29</sup> which appears to be consistent with the role and function of the LRV according to the Statute<sup>30</sup> and the jurisprudence of the Court on victims' participation.<sup>31</sup> The Prosecutor also emphasizes the importance for the victims' participation to comply with the rights of the Defence.<sup>32</sup>

25. The Defence shares this position that the LRV is in the best position to present the views and concerns of the victims as long as article 68(3) of the Statute specifically attributes this role to legal representatives. On a factual note, the Defence would like to recall that the OTP intends to call more than 120 witnesses before the Court.<sup>33</sup> Allowing victims to present their views and concerns *vis-a-vis* such a large and unusual number of testimonies would necessarily impair the Accused's right to a fair,

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<sup>25</sup> ICC-01/04-01/06-1119, para. 113. See also ICC-01/05-01/08-807-Corr, para. 27.

<sup>26</sup> ICC-01/04-01/06-1119, 18 January 2008, para. 113. See also ICC-01/04-01/06-2340, 11 March 2010; ICC-01/05-01/08-807-Corr, 12 July 2010, paras. 27 and 40; ICC-01/09-02/11-498, 3 October 2012, para. 70; ICC-01/04-01/07-1788-tENG, 22 January 2010, paras. 69-71.

<sup>27</sup> ICC-01/09-02/11-498 For a similar approach, see Trial Chamber I, ICC-01/04-01/06-1119, para. 113; and Trial Chamber II, ICC-01/0401/07-1788-tENG, para.71.

<sup>28</sup> ICC-02/11-01/15-36, para. 11.

<sup>29</sup> ICC-02/11-01/15-60, para. 10. See also ICC-02/05-03/09-545, para. 20.

<sup>30</sup> Article 68(3) of the Statute.

<sup>31</sup> ICC-02/05-03/09-545, para. 20; ICC-01/05-01/08-807-Corr, para. 27; ICC-01/04-01/06-2032-Anx, para. 17.

<sup>32</sup> ICC-02/11-01/15-60, para. 10.

<sup>33</sup> ICC-02/11-01/15-35-Conf-AnxA ; See also ICC-02/11-01/15-T-1-CONF-ENG ET 21-04-2015 1/102 NB T, from p. 15, lines 19-25.



impartial and expeditious trial. For the foregoing reasons, the Defence supports the position of the OTP that the views and concerns of the victims should be presented by the LRV.

26. In the alternative, if the Chamber decided to allow victims to present their views and concerns in person or in writing, as requested by the LRV, the Defence would like to recall some principles governing this practise established by the jurisprudence of the Court.

27. In its submissions,<sup>34</sup> the LRV refers to a decision issued by Trial Chamber III in the *Bemba* case,<sup>35</sup> which she seems to have misinterpreted:

“the threshold 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>36</sup>

28. From this specific extract of the above mentioned decision, the LRV appears to derive that victims’ views and concerns, which do not meet the requirements of acceptable evidence may still be heard and taken into consideration by the Chamber. Based upon this reasoning the participants seem to consider that any view and concern presented by the victims is evidence. However, on many occasions, the Court has made clear that the views and concerns of the victims are not part of the trial evidence.<sup>37</sup> In this regard, it is to be noted that victims do not present their views under oath.<sup>38</sup>

29. The LRV then submits that victims presenting their views and concerns before the Court should be allowed to retain their anonymity,<sup>39</sup> emphasizing the fact that this position clearly departs from the established jurisprudence. The Defence strongly opposes this suggestion because it would seriously impair the rights of the Accused. Victims’ views and concerns are indeed unsworn statements made by a limited number of victims after the presentation of the Prosecutor’s case and before the presentation of the Defence’s case. As unsworn statements, their threshold of

<sup>34</sup> ICC-02/11-01/15-36, para. 15.

<sup>35</sup> ICC-01/05-01/08-2138, 22 February 2012.

<sup>36</sup> *Ibid.* para. 20.

<sup>37</sup> ICC-01/04-01/06-2032-Anx, paragraph 25; ICC-01/05-01/08-2138, para 19; ICC-01/05-01/08-2220, 24 May 2012, para. 7.

<sup>38</sup> ICC-01/05-01/08-2220, 24 May 2012, para. 7.

<sup>39</sup> ICC-02/11-01/15-36, para. 16.

credibility is lower than the one required for evidence, as reminded by the LRV in her submissions,<sup>40</sup> and the moment they take place is crucial for the rights of the Accused, as they directly precede the calling of witnesses by the Defence. Hence, there is a clear risk to create the indirect effect that victims' views and concerns would be trial evidence. Although the jurisprudence of the Court clearly distinguishes them, the fact that the same procedural exceptions would apply to dual status witnesses and to victims expressing views may lead to indirectly admit testimonies, which do not meet the threshold of evidence. Besides, giving an unsworn statement under anonymity appears to be an open door to miscarriages of justice since the Defence will not have any opportunity to challenge the credibility of a witness without knowing his/her background, as the anonymity of the victims presenting their views will preclude any investigation on this matter. Finally, the Defence would like to recall the position of the Single Judge in the *Katanga and Ngudjolo* case where he determined that “under no circumstances the Chamber will allow victims to testify anonymously vis-à-vis the Defence.”<sup>41</sup> Since the Court strongly rejects anonymous testimonies from the victims, then such non-admission should be of more importance regarding the unsworn statement of views and concerns.

30. Regarding the procedure to be followed in order to seek from the Chamber the authorisation for victims to present their views and concerns, the Defence agrees with the proposals submitted by the LRV,<sup>42</sup> which are consistent with the jurisprudence of the Court.<sup>43</sup> The Defence would only insist on the rule according to which a written application shall be filed by the LRV before the end of the Prosecution case.

#### iv. Presentation of evidence by victims

31. As mentioned above, victims giving evidence and victims presenting views and concerns are two different issues, which are subject to different thresholds of admissibility.<sup>44</sup> When confronted with victims giving evidence to the Court, the

<sup>40</sup> *Ibid.*, para. 15.

<sup>41</sup> ICC-01/04-01/07-1665-Corr, para. 22. Emphasis added.

<sup>42</sup> ICC-02/11-01/15-36, para. 17.

<sup>43</sup> ICC-01/05-01/08-1935, 21 November 2011, para. 3. See also ICC-01/05-01/08-1023, 19 November 2010, para. 5; ICC-01/05-01/08-2027, 21 December 2011, paras. 12-15.

<sup>44</sup> See para. 26, referring to ICC-01/05-01/08-2138, 22 February 2012, para. 20.

parties and participants are grappling with testimonies, dual status witnesses and article 69(3) of the Statute.

32. Pursuant to article 69(3) of the Statute, the Chamber has the authority to request evidence that it considers necessary for the determination of the truth. The Appeals Chamber ruled that the victims are entitled to invite the Chamber to exercise its power to make such request.<sup>45</sup> However, in the *Banda* case,<sup>46</sup> Trial Chamber IV strictly delimited this possibility left to the victims:

“The Chamber considers that Article 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.”<sup>47</sup>

33. Similarly, in the *Katanga and Ngudjolo* case, the Single Judge set a legal framework for the victims' testimonies.<sup>48</sup> First, it was decided that the Chamber would only “grant applications on behalf of victims whose testimony can make a genuine contribution to the ascertainment of the truth”, consistently with the wording of article 69(3) of the Statute. Therefore, the legal representative has the burden to prove “the relevance of the proposed testimony of the victim in relation to the issues of the case and in what way it may help the Chamber to have a better understanding of the facts”. Second, when deciding whether to allow the legal representative to call victims to testify, the Chamber ruled that concerns related to the rights of the Accused, notably the right to a fair and impartial trial, should stand as guidelines. In this perspective, the Chamber set three important limitations to the possibility for the LRV to call victims as witnesses: “a. The Chamber may not allow the participation by victims to infringe on the right of the accused to be tried without undue delay, in accordance with article 67(1)(c). b. The Chamber will only allow Victim's Legal Representatives to call witnesses to the extent that this does not in effect transform them into auxiliary prosecutors. c. Under no circumstances the Chamber will allow victims to testify anonymously vis-à-vis the Defence.”<sup>49</sup> Third, the Single Judge emphasised the need for the Defence to have adequate time to prepare for the

<sup>45</sup> ICC-01/04-01/07-2288, 16 July 2010, para. 111.

<sup>46</sup> ICC-02/05-03/09-545, 20 March 2014, para. 24.

<sup>47</sup> Emphasis added.

<sup>48</sup> ICC-01/04-01/07-1665-Corr, 20 November 2009, paras. 20-24.

<sup>49</sup> *Ibid.*, para. 22. Emphasis added.

participation by a victim, i.e. such participation shall not constitute an “*unfair surprise*” for the Defence.<sup>50</sup> As a conclusion, the Single Judge held that victims’ testimonies which meet the above mentioned pre-conditions should be allowed as long as they do not undermine the proceedings. Again it should be stressed, no anonymous “testimonies” of victim should be allowed.

34. The Defence deems that the analysis conducted by the Single Judge in the *Katanga and Ngudjolo* case appears as reasonable and respectful of the rights of the Accused as it should be. It gives a balanced consideration of the possibility for the victims to give evidence and the rights of the Defence. For the foregoing reason, the Defence supports the implementation of all the above mentioned conditions<sup>51</sup> in the decision on victims’ participation.
35. Moreover, the Defence approves the order of questioning proposed by the Prosecutor, according to which the victim should be questioned by the LRV, followed by the Prosecution and the Defence.<sup>52</sup>
36. Regarding the suggested right of the LRV to call witnesses other than victims, the Defence would like to recall the principle according to which the LRV should not be allowed to request the Chamber to hear witnesses other than victims she represents, as mentioned by the OTP in its submissions.<sup>53</sup>
37. It is only when the LRV proves to the Chamber that witnesses other than victims may provide important information, which was not hitherto included in the evidence adduced by the parties, that the Chamber may decide to call the witness on its own motion, pursuant to articles 64(6)(b), (d) and 69(3) of the Statute.<sup>54</sup> If the LRV intends to prove so, she must justify the relevance of the proposed testimony in relation to the contentious issues of the case.<sup>55</sup> In such a situation, the parties shall not be deprived of their right to examine the witness.<sup>56</sup>

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<sup>50</sup> *Ibid.* para. 23.

<sup>51</sup> See para. 32.

<sup>52</sup> ICC-02/11-01/15-60, para. 14.

<sup>53</sup> *Ibid.*, para. 16. See also ICC-01/04-01/07-1665-Corr, para. 45.

<sup>54</sup> ICC-01/04-01/07-1665-Corr, para. 46.

<sup>55</sup> *Ibid.*, para. 47.

<sup>56</sup> *Ibid.*, para. 48.

v. Procedure by which the LRV should seek authorisation in order to  
question witnesses or present/introduce evidence at trial

38. Pursuant to rule 91(2)(a) of the RPE, when the LRV wishes to question a witness called by a party, she must make an application to the Chamber. Questioning by the LRV is governed by the principle according to which “[t]he victims are not parties to the trial and certainly have no role to support the case of the Prosecution.”<sup>57</sup> Hence, their possibility to request the Chamber to be allowed to question a witness has been strictly supervised by the Court. Legal representatives who wish to participate during the trial proceedings shall set out in a discrete application the nature and detail of their proposed questions to witnesses at least seven days before the witness is scheduled to testify.<sup>58</sup> It is to be noted that this jurisprudence has been developed in line with the provisions in rule 91(3)(a).<sup>59</sup>

39. However, in her submissions, the LRV intends to depart from this common practise of the Court, requesting the Chamber to be exempted from providing the list of her questions to witnesses.<sup>60</sup> The LRV argues that “*identifying in advance a specific list of questions is not a realistic nor an effective option in the current proceedings*”,<sup>61</sup> although it does not substantiate this statement.

40. The Defence strongly opposes the implementation of this submission in the current proceedings as it would seriously impair the Accused’s rights. The LRV indeed argues that “*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*.”<sup>62</sup> By doing so, the LRV has departed from her role as merely a participant in order to represent the individuals who applied as victims in the present case and from her obligation to limit the scope of her participation to matters that touch upon the personal interests of the victims. Examining by a legal representative does not depend on the examination performed by the calling party or on the cross-

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<sup>57</sup> *Ibid.*, para. 82.

<sup>58</sup> ICC-01/05-01/08-807-Corr, 12 July 2010, para. 102 h); ICC-01/05-01/08-1005, 10 November 2010, para. 3; ICC-01/05-01/08-1023, 19 November 2010, para. 18.

<sup>59</sup> Rule 91(3)(a) of the RPE: “[...] The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber”.

<sup>60</sup> ICC-02/11-01/15-36, para. 22.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

examination performed by the other party. It is related, focused and attached to the personal interests of victims. By stating the contrary, the LRV intends to assume the role of a second prosecutor, which has been prohibited on several occasions by the Court.<sup>63</sup> *“The dynamic process which characterizes witness questioning”*,<sup>64</sup> as qualified by the LRV, implies that parties examine the witness while the LRV may only be allowed to question the witness under certain conditions. The difference between the verbs “to examine” and “to question” is not only semantic. It echoes the fundamental difference between parties and participants to the proceedings. While the parties may examine a witness, the participants may only ask questions that have been communicated to the parties before the witness is scheduled to testify. Besides, if the LRV were not required to communicate her questions to the parties in due time, the parties would lose any possibility to object to such questions. This situation would be unjustifiable in regards to the position of the LRV within the International Criminal Court and to the Accused’s right to a fair trial.

41. The Defence notes that, in her submissions, the LRV mentions a decision issued by Trial Chamber I<sup>65</sup> that, supposedly, supports her request to be exempted from disclosing her lines of questioning in advance.<sup>66</sup> However, the Defence would like to raise the fact that the paragraphs of this decision referred to by the LRV relate to the *“[s]cope of examination by a party not calling a witness”*,<sup>67</sup> and not to the participants, contrary to what the LRV suggests in her submissions. Thus, it would be misleading to consider that Trial Chamber I has recognized a right to the participants not to disclose their lines of questioning whereas it only granted this right to the parties at trial.

#### vi. Scope, order and manner of questioning by the LRV

42. In her submissions, the LRV suggests that Trial Chambers V and I adopted an approach according to which, on a case-by-case basis, the participants would be allowed to put questions to a witness called by a party that go beyond what was raised

<sup>63</sup> ICC-01/04-01/07-1665-Corr, para. 82; ICC-01/05-01/08-1023, 19 November 2010, para. 17.

<sup>64</sup> ICC-02/11-01/15-36, para. 22.

<sup>65</sup> ICC-01/04-01/06-1140, 29 January 2008, paras. 32-33.

<sup>66</sup> ICC-02/11-01/15-36, para. 22, referring to ICC-01/04-01/06-1140, 29 January 2008, paras. 32-33.

<sup>67</sup> ICC-01/04-01/06-1140, 29 January 2008, p. 15.

during the examination-in-chief, or by the examination by the Chamber.<sup>68</sup> The LRV submits that such portended approach should apply in the present case.

43. However, it appears that the decisions and transcripts on which the LRV founds its submissions<sup>69</sup> do not relate to the participants in general or to the LRV in particular. These decisions and transcripts, referenced in footnote 60, which are related to the *Lubanga* case, exclusively deal with the powers of the parties, and not the participants, to ask questions to witnesses. As mentioned below,<sup>70</sup> in the decision issued by Trial Chamber I, in the *Lubanga* case,<sup>71</sup> the paragraphs mentioned are entitled “*Scope of examination by a party not calling a witness*”.<sup>72</sup> These paragraphs absolutely do not concern the power of examination of the participants. The participants are only mentioned, at the end of paragraph 33 of the decision, to remind them that in case of vulnerable witnesses, parties and participants may have to disclose their questions in advance. However, when it concerns the power to examine witnesses, the mentioned paragraphs only refer to the parties and not the participants. Besides, the transcripts referenced in footnote 60 of the LRV Submissions also refer to situations where the parties examine or recall witnesses, and more precisely, they refer to situations involving examination of witnesses by the Prosecution. Once again, the LRV is not mentioned.<sup>73</sup>

44. As a conclusion, the LRV submissions are first to be considered irrelevant. Moreover, they misstate the law. The jurisprudence referred to in footnote 60, contradicts the LRV assertion that “*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.*”

45. In principle, questioning by legal representatives of victims should be limited to questions that have as their purpose to clarify or complement previous evidence given

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<sup>68</sup> ICC-02/11-01/15-36, para. 30.

<sup>69</sup> See footnote 60 of the LRV Submissions: “See *inter alia* No. ICC-01/04-01/06-T-253-Red2-ENG CT WT, 4 5 March 2010 (sic), 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.”

<sup>70</sup> See para. 40.

<sup>71</sup> ICC-01/04-01/06-1140, 29 January 2008, paras. 32-33.

<sup>72</sup> *Ibid.*, p. 15. Emphasis added.

<sup>73</sup> ICC-01/04-01/06-T-253-Red2-ENG CT WT, 4 5 March 2010 (sic), pp. 3 *et seq.*; No. ICC-01/04-01/06-T-254-Red3-ENG CT WT, 5 March 2010, pp. 70 *et seq.*, ICC-01/04-01/06-T-107-ENG, 26 January 2009, pp. 72-73.

by the witness.<sup>74</sup> Although Trial Chamber II, in the *Katanga case*,<sup>75</sup> has authorized the legal representative to ask questions that go beyond matters raised during examination-in-chief, it has subjected this authorization to strict conditions:

- “a) Questions may not be duplicative or repetitive to what was already asked by the parties.
- b) Questions must be limited to matters that are in controversy between the parties, unless the Victims' Legal Representative can demonstrate that they are directly relevant to the interests of the victims represented.
- c) In principle. Victims' Legal Representatives will not be allowed to ask questions pertaining to the credibility and/or accuracy of the witness's testimony, unless the Victims' Legal Representative can demonstrate that the witness gave evidence that goes directly against the interests of the victims represented.
- d) Unless the Chamber specifically gave authorisation under regulation 56 of the Regulations, Victims' Legal Representatives are not allowed to put questions pertaining to possible reparations for specific individuals or groups of individuals.”<sup>76</sup>

46. Besides, such questioning that goes beyond matters raised during examination-in-chief has been restricted to “questions of fact”.<sup>77</sup>
47. Furthermore, the Defence submits that the LRV should not be permitted to put leading questions to the witnesses, but rather in a neutral and open manner, consistently with the practice<sup>78</sup> within the Court and the role of the LRV.
48. Regarding the issue of reparations, the LRV submits that questions related to reparations should also be allowed during trial proceedings,<sup>79</sup> referring to the jurisprudence of Trial Chambers I, II and III.<sup>80</sup> As a preliminary observation, the Defence would like to draw the Chamber's attention to the differences between the French and the English versions of regulation 56 of the Regulations of the Court. While, in the English version, the *“Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations [...] at the same*

<sup>74</sup> ICC-01/04-01/06-2127, 16 September 2009, para. 26; ICC-01/04-01/07-1665-Corr, para. 90.

<sup>75</sup> ICC-01/07-01/07-1665-Corr, *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.* Emphasis added.

<sup>78</sup> ICC-01/04-01/07-1665-Corr, para. 91; ICC-01/04-01/06-2127, para. 28-30.

<sup>79</sup> ICC-02/11-01/15-36, para. 31.

<sup>80</sup> ICC-01/04-01/07-1788-tENG, 22 January 2010, para. 60; 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.



*time as for the purposes of trial*”,<sup>81</sup> under the French version of the same regulation, the Trial Chamber may do so “*dans le même cadre que le procès*”,<sup>82</sup> which could be translated into “within the same framework as the trial”. Therefore, the French version of regulation 56 does not necessarily imply that testimonies and evidence related to reparations may be given in the course of the trial. The issue of reparation presupposes the conviction of the Accused. The Defence therefore submits that hearing testimonies related to reparations whereas the Accused is still presumed innocent would entail high, serious and prejudicial risks of prejudgment of the Accused’s guilt or innocence. Although it is true that Trial Chambers have allowed victims to present evidence related to reparations during trial proceedings, Trial Chamber I has subjected this permission to a strict control:

“The Chamber does not agree with the prosecution's concept of a wholly "blended approach" because there will be some areas of evidence concerning reparations which it would be inappropriate, unfair or inefficient to consider as part of the trial process. The extent to which reparations issues are considered during the trial will follow fact-sensitive decisions involving careful scrutiny of the proposed areas of evidence and the implications of introducing this material at any particular stage. The Trial Chamber may 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. However, the Chamber emphasises that at all times it will ensure that this course does not involve any element of prejudgment on the issue of the defendant's guilt or innocence, and generally that it does not undermine the defendant's right to a fair trial.”<sup>83</sup>

49. Therefore, the Defence hereby submits that, consistently with the aforementioned approach, testimonies and evidence related to reparations should in the first phase not be admitted and in the alternative should this issue be considered with caution and on an exceptional basis as it entails a considerable risk of prejudgment of the Accused’s guilt or innocence.

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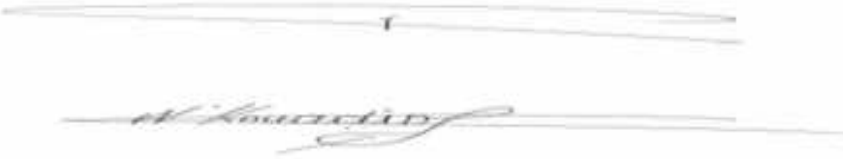
<sup>81</sup> Emphasis added.

<sup>82</sup> Emphasis added.

<sup>83</sup> ICC-01/04-01/06-1119, 18 January 2008, para. 122. Emphasis added.

### III. Conclusion

50. The Defence respectfully submits the aforementioned submissions pursuant to the Chamber's order, and prays that the Chamber adopt its proposed modifications.

A handwritten signature in dark ink, appearing to read 'Mr. Knoops', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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Mr. Knoops, Lead Counsel and Mr. N'Dry, Co-Counsel

Dated this 21 May 2015.

At The Hague, the Netherlands