

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-02/11-01/15
Date: 14 September 2018

TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Confidential

**Response to the "Requête de la Défense concernant la suite de la procédure après le dépôt par le Procureur et par la RLV de leur réponse à la requête de la Défense afin qu'un jugement d'acquittement soit prononcé en faveur de Laurent Gbagbo."
(ICC-02/11-01/15-1208-Conf)**

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. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ regrets the attitude of the Defence of Mr Gbagbo adopted throughout the entire trial to minimise or nullify the importance of the participation of victims in the proceedings as autonomous actors. As shown throughout the entire trial, victims have similar but distinct interests from the Prosecution. Indeed, the very interest of the Prosecutor in the trial proceedings before the Court is to bring evidence with the aim to prove that the accused is criminally responsible under the Statute for the crimes charged, beyond reasonable doubt.² In contrast, besides the interest to receive reparations,³ which is far from being the sole motivation of victims,⁴ the core interest of victims in the proceedings is to effectively exercise their rights to truth and justice. These rights have been generally recognised by international human rights law,⁵ the doctrine⁶ and the

¹ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015; and the “Decision on victims’ participation status” (Trial Chamber I), No. ICC-02/11-01/15-379, 7 January 2016, p. 23.

² 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 OA9 OA10, 11 July 2008, para. 93.

³ In this sense, see AMBOS (K.), “El Marco Jurídico de la Justicia de Transición”, Tenus, Bogotá, 2008, notes 107-112. See also the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly of the United Nations in its resolution 60/147 in the 64th plenary meeting, UN Doc. A/RES/60/147, 16 December 2005, para. 21.

⁴ See the Note prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven, in accordance with paragraph 2 of Sub-Commission resolution 1996/28, UN Doc. E/CN.4/1997/104, 16 January 1997, pp. 2-5. See also the Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997, pp. 3-31. See also the “Decision on victims’ participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 98.

⁵ See IACHR, *La Cantuta v. Peru*, Judgment of 29 November 2006, Series C, 162, para. 222; *Vargas-Areco v. Paraguay*, Judgment of 26 September 2006, Series C, 155, paras. 153; *Almonacid-Arellano et al v. Chile*, Judgment of 26 September 2006, Series C, 154, para. 148; *Moiwana Community v. Suriname*, Judgment of 15 June 2005, Series C, 124, para. 204; and *Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Series C, 7, paras. 162-166 and 174. See also ECHR, *Hugh Jordan v. UK*, Application 24746/94, Judgment of 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, Application 25803/94, Judgment of 28 July 1999, para. 79; *Kurt v. Turkey*, Application 24276/94, Judgment of 25 May 1998, para. 140; *Selcuk and Asker v. Turkey*, Application 23184/94, Judgment of 24 April 1998, para. 96; *Aydin v. Turkey*, Application

constant jurisprudence of Chambers as essential for the persons directly affected by the crimes under the jurisdiction of the Court.⁷

2. The participation of victims in the proceedings before the Court is a necessary mechanism to implement their right to justice and is an essential element of the full realisation of the other elements of that right, namely to know the truth and to obtain reparations.⁸ Such participation can only be deemed meaningful, as opposed to purely symbolic, if victims are entitled to positively contribute to the search for the truth – which may, in turn, eventually lead to the punishment of given individuals and the reparation of the harm caused. In this respect, any form of positive contribution from victims appears indispensable for the accomplishment of the Court's function.⁹

3. The recurrent allegation from the Defence that throughout the trial it has faced not only one prosecutor but two, reflects at the very least a misconception of the role of victims in the proceedings. As noted *supra*, said role cannot be compared or

23178/94, Judgment of 25 September 1997, para. 103; and *Aksoy v. Turkey*, Application 21987/93, Judgment of 18 December 1996, para. 98.

⁶ See DONAT-CATTIN (D.), "Article 68", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, C.H. Beck, Hart, Nomos, München, Oxford, Baden-Baden, 3rd Edition, 2016, pp. 1690-1691; NAQVI (Y.), "The Right to the Truth in International Law: Fact or Fiction?", in (2006) *ICRC International Review*, 88, pp. 267-268; MENDEZ (J.), "The Right to Truth", in JOYNER (Ch.) (ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights' Proceedings of the Siracusa Conference*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257; and AMBOS (K.), *op. cit. supra* note 3, pp. 42-44.

⁷ See e.g. "Decision on victims' participation in trial proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-449, 6 February 2015, paras. 52-56; the "Decision on the conduct of proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-619, 2 June 2015, paras. 63-70; and the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I), No. ICC-01/04-01/07-474, 15 May 2008, paras. 31-44.

⁸ See DONAT-CATTIN (D.), *op. cit., supra* note 6, pp. 1686 and 1698-1700. See also e.g. 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 2, para. 97; the "Decision on victims' representation and participation" (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012, para. 10; the "Decision on victims' representation and participation" (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012, para. 9; the "Decision on common legal representation of victims for the purpose of trial" (Trial Chamber III), No. ICC-01/05-01/08-1005, 10 November 2010, para. 9(a); and the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *idem*, para. 53.

⁹ See DONAT-CATTIN (D.), *idem*, p. 1687.

confused with the role of the Prosecution. Victims possess an autonomous role stemming from the internationally recognised rights to truth, justice and reparations which translates into a set of procedural prerogatives in criminal proceedings. The exercise of these rights and prerogatives does not turn victims into a “second Prosecutor”.

4. Consequently, the Legal Representative submits that the part of the Request seeking the dismissal *in limine* of portions of the Response that allegedly do not concern *stricto sensu* the victims' views and concerns must be dismissed because unfounded in law and, in any case, not substantiated.

5. In turn, the part of the Request seeking a two-week postponement of the hearing scheduled for 1 October 2018 on the basis of the Response should be dismissed for lacking any merit.

6. The Legal Representative addresses in this response only the parts of the Defence's Request related to her Response to the Defence Submissions (the “Request”).¹⁰ However, this approach does not entail that she agrees with any of the said Submissions.

II. Confidentiality

7. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially following the classification chosen by the Defence and because it makes reference to submissions bearing the same level of classification. A public redacted version will be filed in due course.

¹⁰ See the “Requête de la Défense concernant la suite de la procédure après le dépôt par le Procureur et par la RLV de leur réponse à la requête de la Défense afin qu'un jugement d'acquittement soit prononcé en faveur de Laurent Gbagbo.”, No. ICC-02/11-01/15-1208-Conf, 12 September 2018, paras. 58-66 and p. 19 (the “Request”).

III. Background

8. On 4 June 2018, the Chamber issued the "Second Order on the further conduct of the proceedings" (the "Second Order"),¹¹ authorising the Defence to file submissions on the specific factual issues for which, in its view, the evidence presented is insufficient to sustain a conviction and in respect of which, accordingly, a full or partial judgment of acquittal would be warranted.¹²

9. On 22 June 2018, the Single Judge decided to, *inter alia*, reschedule to 1 October 2018 the hearing originally scheduled for 10 September 2018 for the parties and participants to further illustrate or complete their submissions, as well as to respond to each other's submissions and to any questions by the Chamber.¹³

10. On 23 July 2018, both Defence teams filed their submissions (the "Defence Submissions").¹⁴

11. On 10 September 2018, the Legal Representative filed her response to the Defence Submissions (the "Response").¹⁵

12. On 12 September 2018, the Defence of Mr Gbagbo requested, *inter alia*, that the Chamber (i) dismisses *in limine* the parts of the Response that do not concern *stricto*

¹¹ See the "Second Order on the further conduct of the proceedings" (Trial Chamber I), No. ICC-02/11-01/15-1174, 4 June 2018 (the "Second Order").

¹² *Idem*, para. 10.

¹³ See the "Decision extending the time limit for responses to Defence submissions and rescheduling the hearing to be held on 10 September 2018" (Trial Chamber III, Single Judge), No. ICC-02/11-01/15-1189.

¹⁴ See the "Blé Goudé Defence No Case to Answer Motion", No. ICC-02/11-01/15-1198-Conf-Corr, 6 August 2018; and the "Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée", No. ICC-02/11-01/15-1199, 23 July 2018, with confidential annexes 1, 2, 3, 4, 5, 6 and 7 (the "Defence Submissions").

¹⁵ See the "Response to Defence Submissions on the specific factual issues for which the evidence presented could be insufficient to reasonably support a conviction (ICC-02/11-01/15-1198-Conf and ICC-02/11-01/15-1199)", No. ICC-02/11-01/15-1206-Conf, 10 September 2018 (the "Response").

sensu the victims' views and concerns, and (ii) in the alternative, two supplementary weeks to analyse the Response.¹⁶

13. On the same day, the Chamber set 14 September 2018 as the deadline for responding to the Request.¹⁷

IV. Submissions

1. The Defence's Request to reject *in limine* the Response is unfounded

14. The Legal Representative submits that the part of the Request seeking the dismissal *in limine* of portions of the Response that allegedly do not concern *stricto sensu* the victims' views and concerns must be dismissed because unfounded in law.

15. Firstly, the Defence argues that the Legal Representative has turned into a "*second Prosecutor*" by submitting the Response.¹⁸ However, pursuant to regulation 24(2) of the Regulations of the Court, victims enjoy the right to present their views and concerns with regard to any submission filed by the parties in order to defend their interests in the proceedings, regardless of whether the victims' views and concerns are supportive or contrary to the submissions made by either party to the proceedings. The possibility for victims to present their views and concerns with regard to any submission filed by the parties is not *per se* prejudicial to or inconsistent with the rights of the accused. Moreover, the Second Order expressly provided for the Legal Representative to respond to the Submissions.¹⁹

16. Secondly, the Defence claims that, by submitting the Response, the Legal Representative has acted as an auxiliary to the Prosecutor ("*un auxiliaire du*

¹⁶ See the Request, *supra* note 10.

¹⁷ See the e-mail received from Trial Chamber I on 12 September 2018 at 16h09.

¹⁸ See the Request, *supra* note 10, para. 61.

¹⁹ See the Second Order, *supra* note 11, p. 7.

Procureur"),²⁰ systematically going beyond the question of the victims' personal interests.

17. In this regard, notwithstanding the fact that the Defence's arguments *supra* clearly contradict each other - how can a participant be at the same time a "second Prosecutor" and an "auxiliary to the Prosecutor"? -, the Legal Representative reiterates, as indicated *supra*,²¹ that the Defence still misunderstands the role played by the victims in these proceedings.

18. In fact, the Defence only supports its contention with its own opinion and the partial quotation of a decision issued by a different Chamber in a different case.²² However, the Legal Representative notes that Trial Chamber III in the *Bemba* case not only found that "[v]ictims are participants rather than parties to the trial and shall not be considered as a support to the prosecution",²³ but also that "[a]s they [the victims] have a unique role, separate from that of the parties, their participation can assist the Chamber in its determination of the truth".²⁴ More importantly, the Appeals Chamber found in the *Katanga and Ngudjolo* case that "[i]f victims are requested to testify on the role of the accused in the crimes charged, this does not make them 'supplementary prosecutors in the case'".²⁵

19. The possibility expressly given by the Chamber to the Legal Representative to respond to the Submissions²⁶ is fully consistent with the legal findings quoted *supra*.

²⁰ See the Request, *supra* note 10, para. 61.

²¹ See *supra* para. 3.

²² See the Request, *supra* note 10, paras. 58 and 61.

²³ See the "Decision on Directions for the Conduct of the Proceedings" (Trial Chamber III), No. ICC-01/05-01/08-1023, 19 November 2010, para. 17.

²⁴ *Idem*.

²⁵ 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'" (Appeals Chamber), No. ICC-01/04-01/07-2288 OA11, 16 July 2010, para. 113.

²⁶ See the Second Order, *supra* note 11.

20. Thirdly, contrary to the Defence's contention,²⁷ the Legal Representative has not always sided with the Prosecution during the course of this trial. The victims of the crimes allegedly committed by Mr Gbagbo and Mr Blé Goudé and that are authorised to participate in this trial have a personal interest in obtaining justice and reparation for the crimes and subsequent harms they suffered from. As a consequence, the victims' interests are often supported by the measures adopted by the Prosecution to fulfil its duties pursuant to article 54(1) of the Statute. However, the Legal Representative's mandate is to defend her clients' interests,²⁸ and she only supports the Prosecution's course of conduct as far as this is the best way to fulfil said mandate.

21. Therefore, the Legal Representative is not "*biased*" in favour of the Prosecution.²⁹ In fact, in many occasions since the start of these proceedings, she has disagreed with the Prosecution's oral or written submissions to better protect the victims' personal interests.³⁰ In this regard, contrary to the Defence's assertion,³¹ the Legal Representative has addressed only the Defence Submissions because she was not given the opportunity to submit her observations on the Trial Brief and the Response was not the document to do so.

22. Fourthly, in the exercise of her autonomous role to defend her clients' interests within the statutory framework of the Court, the Legal Representative requested and was granted leave to examine 34 witnesses (including 16 victims participating in the

²⁷ See the Request, *supra* note 10, para. 61.

²⁸ See the Code of Professional Conduct for counsel, *inter alia*, articles 9(3), 14 and 15(1).

²⁹ Cf. the Request, *supra* note 10, para. 64.

³⁰ See e.g. the "Response to the 'Prosecution's application for protective and/or special measures for Witnesses P-0362, P-0554, P-0567, P-0568, P-0407, P-0185, and P-0404, for testimony by means of video-link technology for Witnesses P-0362 and P-0293, and for a change in the order of witnesses with respect to Witness P-0554' (ICC-02/11-01/15-1050-Conf-Corr)", No. ICC-02/11-01/15-1054-Conf, 19 October 2017, para. 17; and the "Response to ICC-02/11-01/15-465 and request to maintain certain redactions in the victim applications of dual status individuals", No. ICC-02/11-01/15-473, 29 March 2016.

³¹ See the Request, *supra* note 10, para. 64.

proceedings) and to submit documentary evidence.³² Said requests were often challenged by the Defence,³³ but cannot be contested at this stage. All the evidence provided by said witnesses upon examination by the Legal Representative and the document presented by the latter are properly in the record of the case.³⁴ In these circumstances, the Defence's argument that the Legal Representative's reliance on said evidence in her Response amounts to "[u]ne rupture totale de l'équité du procès"³⁵ is asinine, especially where the Defence refers itself to said evidence in its Submissions.

23. In this regard, the Appeals Chamber ruled in the *Katanga and Ngudjolo* case that

"As the Appeals Chamber previously decided in the Lubanga case, victims may be permitted to participate in the proceedings by submitting evidence pertaining to the guilt or innocence of the accused. Evidence on the conduct of the accused is encompassed within the general category of evidence pertaining to the guilt or innocence of the accused which victims may be permitted to submit. The Appeals Chamber finds no reason to distinguish between different categories of evidence that victims may or may not be requested to present".³⁶

³² The Chamber granted leave for the Legal Representative to examine Witnesses P-0547, P-0536, P-0441, P-0579, P-0238, P-0513, P-0350, P-0117, P-0555, P-0108, P-0433, P-0436, P-0438, P-0459, P-0109, P-0172, P-0237, P-0580, P-0582, P-0581, P-0364, P-0363, P-0297, P-0381, P-0567, P-0568, P-0407, P-0185, P-0404, P-0105, P-0554, P-0184, P-0410, and P-0564. See also the "Decision on the common legal representative of victims' application to submit one item of documentary evidence" (Trial Chamber I), No. ICC-02/11-01/15-1188, 19 June 2018.

³³ See e.g. the "Réponse de la Défense à la « Legal Representative's Application for the introduction of documentary evidence under paragraphs 43-44 of the Amended Directions on the conduct of the proceedings » (ICC-02/11-01/15-1088)", No. ICC-02/11-01/15-1103, 22 January 2018.

³⁴ See the "Decision on the submission and admission of evidence" (Trial Chamber I), No. ICC-02/11-01/15-405, 29 January 2016.

³⁵ See the Request, *supra* note 10, para. 62.

³⁶ See *supra* note 25, para.

24. Lastly, the Defence's request for the Legal Representative to provide "[u]n véritable argumentaire auquel la Défense pourrait répondre point par point"³⁷ is clearly misplaced and must be dismissed. It is obvious that the only "argumentaire" relevant to this case are the charges confirmed by the Pre-Trial Chamber and the evidence presented so far by the parties and participant during the trial. The Response correctly addresses the views and concerns of the victims in relation to the Defence Submissions.

25. In any case, the Request is not substantiated and is too vague.

26. The Defence describes the Response as composed of three parts,³⁸ but fails to identify which of said part(s) (or any other) must be dismissed. The Defence simply requests the dismissal *in limine* of "[t]ous les développements de la RLV qui ne soient pas l'expression des « vues et préoccupations des victimes »" or "[l]es parties de la réponse de la RLV qui ne concernent pas stricto sensu les vues et préoccupations des victimes".³⁹

27. These expressions can only be read to mean that the Defence does not request the dismissal *in toto* of the Response. However, they are not precise enough for the Chamber to adopt such a drastic measure as the dismissal of parts of the Response *in limine*, i.e. without considering the merits thereof.

28. In fact, the very lack of clarity of this part of the Request merits alone its dismissal *in limine*. Indeed, drawing from the approach adopted by the Appeals Chambers of the *ad hoc* tribunals in this type of situations, the Request cannot be expected to be considered if it is obscure, vague, or suffers from obvious insufficiencies.⁴⁰

³⁷ See the Request, *supra* note 10, para. 63.

³⁸ *Idem*, para. 60.

³⁹ *Ibid.*, para. 65 and p. 19.

⁴⁰ See ICTY, *Prosecutor v. Limaj et al.*, Appeals Judgement, Case No. IT-03-66-A, 27 September 2007, para. 15; ICTY, *Prosecutor v. Perišić*, Appeals Judgement, Case No. IT-04-81-A, 28 February 2013, para.

2. The alternative Defence's Request to postpone the 1 October 2018 hearing is without merit

29. The Legal Representative submits that the part of the Request seeking a two-week postponement of the hearing scheduled for 1 October 2018 on the basis of the Response must be dismissed for lacking any merit.

30. The Defence requests two weeks “[p]our qu’elle puisse prendre connaissance et analyser les arguments de la RLV”,⁴¹ and argues that, absent the requested postponement of the hearing, the Chamber may reach a decision “[s]ans que les arguments de la RLV aient fait l’objet d’un débat contradictoire”.⁴² However, being 101 pages long, the Response can be read (and in fact the Defence has already read it) and arguments can be prepared in the three weeks that will elapse between its notification to the Defence and the scheduled hearing. Moreover, the Defence will be able to provide its views on the Response orally during said hearing, as originally indicated by the Chamber.⁴³

12; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Appeals Judgement, Case No. ICTR-98-42-A, 14 December 2015, para. 35.

⁴¹ *Idem*, p. 19.

⁴² *Ibid.*, para. 66.

⁴³ See *supra* para. 9.

V. Conclusion

31. For the foregoing reasons, the Legal Representative respectfully requests the Trial Chamber to dismiss the Request.

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 14th day of September of 2018

At The Hague, The Netherlands