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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Geoffrey Henderson

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Joint submissions in accordance with the “Order Scheduling a Status Conference and Setting a Provisional Agenda” issued on 21 July 2014

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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 2 December 2013, the Single Judge of Pre-Trial Chamber II (the “Pre-Trial Chamber”) issued the “Decision Concerning the Organisation of the Common Legal Representation of Victims”,¹ appointing two counsel from the Office of Public Counsel for Victims (the “Office” or the “OPCV”) as common legal representatives of the two groups of victims identified in the “Decision Requesting the VPRS and the OPCV to take steps with regard to the legal representation of victims in the confirmation of charges hearing and in the related proceedings”.²

2. On 15 January 2014, the Single Judge of the Pre-Trial Chamber (the “Single Judge”) rendered the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (the “First Decision on victims’ participation”),³ admitting 922 victims applicants listed in annex C thereof to participate in the confirmation of charges hearing and in the related proceedings⁴ and deciding to appoint Ms Sarah Pellet as the common legal representative of the group of former child soldiers and Mr Dmytro Suprun as the common legal representative of the group of victims of the attacks of UPC/FPLC troops.⁵

3. On 7 February 2014, the Single Judge issued the “Second Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related

¹ See the “Decision Concerning the Organisation of the Common Legal Representation of Victims” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-160, 2 December 2013.

² *Idem*, paras. 10, 23 and 25. See also the “Decision Requesting the VPRS and the OPCV to take steps with regard to the legal representation of victims in the confirmation of charges hearing and in the related proceedings” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-150, 20 November 2014.

³ See the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-211, 15 January 2014 (the “First Decision on victims’ participation”).

⁴ See the “Annex C to the Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-211-AnxC, 15 January 2014.

⁵ See the First Decision on victims’ participation, *supra* note 3, paras. 78 and 79 and p. 37.

Proceedings” (the “Second Decision on victims’ participation”),⁶ admitting further 198 victims applicants to participate in the confirmation of charges hearing and in the related proceedings⁷ and deciding that the appointment of Ms Sarah Pellet and Mr Dmytro Suprun shall extend to said victims falling within the two groups as identified in the First Decision on victims’ participation.⁸

4. From 10 until 14 February 2014, the Pre-Trial Chamber held the confirmation of charges hearing in the present case.

5. On 9 June 2014, the Pre-Trial Chamber issued the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda”, deciding to confirm the charges brought against the suspect and to commit him to trial based on the charges as confirmed.⁹

6. On 18 July 2014, the Presidency issued the “Decision constituting Trial Chamber VI and referring to it the case of *The Prosecutor v. Bosco Ntaganda*”, deciding, *inter alia*, to refer the present case to Trial Chamber VI.¹⁰

7. On 21 July 2014, Trial Chamber VI (the “Chamber”) issued the “Order Scheduling a Status Conference and Setting a Provisional Agenda” (the “Provisional Agenda”),¹¹ wherein it scheduled a status conference on 20 August 2014 pursuant to rule 132(1) of the Rules of Procedure and Evidence and instructed “*the parties and*

⁶ See the “Second Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-251, 7 February 2014 (the “Second Decision on victims’ participation”).

⁷ *Idem*, pp. 19-20.

⁸ *Ibid.*, p. 20.

⁹ See the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda” (Pre-Trial Chamber II), No. ICC-01/04-02/06-309, 9 June 2014.

¹⁰ See the “Decision constituting Trial Chamber VI and referring to it the case of *The Prosecutor v. Bosco Ntaganda*” (Presidency), No. ICC-01/04-02/06-337, 18 July 2014.

¹¹ See the “Order Scheduling a Status Conference and Setting a Provisional Agenda” (Trial Chamber VI), No. ICC-01/04-02/06-339, 21 July 2014.

*participants to submit their written observations on the [...] provisional agenda and to inform the Chamber of any items they wish to be added to it by 14 August 2014”.*¹²

8. In accordance with the Provisional Agenda, the Legal Representatives of the victims admitted to participate in the present case (the “Legal Representatives”) respectfully present jointly their submissions.

II. VICTIMS SUBMISSIONS ON ISSUES IDENTIFIED BY THE CHAMBER

9. The Legal Representatives hereby present their submissions on issues arising from points g), h) and i) of the Provisional Agenda as expressly instructed by the Chamber.¹³

1) Regarding issues under point g)

i. Status of the victims admitted to participate at the pre-trial stage

10. The Legal Representatives note that the Pre-Trial Chamber admitted 1120 victim applicants to participate at the pre-trial stage of the proceedings in the present case.¹⁴

11. The Legal Representatives submit that all the victims admitted to participate at the pre-trial stage of the proceedings in the present case should be automatically admitted to participate at the trial stage without their victim status be determined *de novo*.

12. This interpretation has been supported by different Trial Chambers of the Court. In particular, Trial Chambers II and III, in the *Katanga & Ngudjolo Chui*¹⁵ case

¹² *Idem*, p. 6.

¹³ *Ibid.*, para. 7.

¹⁴ See the First Decision on victims’ participation, *supra* note 3 and the Second Decision on victims’ participation, *supra* note 6.

¹⁵ See the “Decision on the treatment of applications for participation” (Trial Chamber II), No. ICC-01/04-01/07-933-tENG, 26 February 2009, p. 23: “*The Chamber decides that the victims authorised by Pre-*

and the *Bemba* case respectively,¹⁶ ruled that victims admitted to participate at the pre-trial stage of the proceedings shall be automatically admitted to participate at the trial stage, without their applications for participation having to be submitted and considered *de novo*. Indeed, according to regulation 86(8) of the Regulations of the Court, “[a] decision taken by a Chamber under rule 89 [of the Rules of Procedure and Evidence] [on the determination of victim status] shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1.”

13. In this regard, the Legal Representatives submit that although certain aspects of the charges as brought by the Prosecution have not been confirmed by the Pre-Trial Chamber,¹⁷ the non-confirmed incidents/acts are of a very limited nature and do not affect, in any manner, the status of the victims admitted to participate at the pre-trial stage of the proceedings.

ii. Procedure to be adopted with respect to victim applicants who did not participate at the pre-trial stage

14. The Legal Representatives submit that any person, organisation or institution meeting the criteria established under rule 85 of the Rules of Procedure and Evidence who did not participate at the pre-trial stage of the proceedings in the present case should be given the possibility to apply for participation at the trial stage within a time-limit and under modalities to be determined by the Chamber. Moreover, any said person, organisation and institution deemed to comply with the criteria under rule 85 of the Rules of Procedure and Evidence should be given the possibility to enjoy the right as enshrined under article 68(3) of the Rome Statute to participate at

Trial Chamber I to participate in the proceedings are authorised to participate in the trial, without their applications having to be re-registered.”

¹⁶ See the “Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants” (Trial Chamber III), No. ICC-01/05-01/08-699, 22 February 2010, para. 22: “Otherwise, as set out above, the victims authorised to participate in the proceedings at the pre-trial stage shall automatically participate at trial, without the need to re-file their applications for assessment by the Trial Chamber”.

¹⁷ See the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda”, *supra* note 9, paras. 12 and 137.

the trial proceedings in an effective and meaningful manner – as opposed to a purely symbolic, including the possibility to contribute to the truth to be established and to the Justice to be done as well as the possibility to tell their story and to have their story heard within the judicial framework.

- The procedure adopted must give full effect to the victims’ right to be heard

15. In this regard, article 68(3) of the Rome Statute provides victims in a clear and non-ambiguous manner with the right to participate through their legal representative(s) in proceedings before the Court when their personal interests are affected. The analysis of the preparatory works of said provision leaves no doubt about the fact that victims may participate at all stages of the proceedings before the Court, including trial proceedings.¹⁸

16. While victims’ interests bear some similarities with the Prosecutor’s ones, victims undoubtedly have an independent role and voice in the Court’s proceedings, including *vis-à-vis* the Prosecutor,¹⁹ and, accordingly, their role cannot be either compared or confused with the one of the Prosecutor.²⁰ Indeed, the very interest of the Prosecutor in the proceedings before the Court is to bring evidence with the aim to prove that the suspect/accused is criminally responsible under the Rome Statute

¹⁸ See, for instance, the Proposals submitted by France, UN Doc. PCNICC/1999/DP.2, 1st February 1999, p. 7; the Proposals submitted by Costa Rica, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999; the Proposals submitted by Columbia, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999. See also BITTI (G.) and FRIMAN (H.), “Participation of Victims in the Proceedings”, in LEE (R.S.) (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc. New York, 2001, pp. 456-474.

¹⁹ See the “DECISION ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6” (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006, para. 51; and the “Decision on “Prosecutor's Application to attend 12 February hearing”” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-155, 9 February 2007, p. 4.

²⁰ See the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” (Appeals Chamber), No. ICC-01/04-01/06-824 OA7, 13 February 2007, para. 55.

for the crimes charged.²¹ In contrast, besides the interest to receive reparations,²² which is far from being the sole motivation of victims,²³ the core interest of victims in the proceedings is to effectively exercise their rights to truth and Justice; these rights having been recognised as essential for the persons directly affected by the crimes committed by international human rights law,²⁴ doctrine²⁵ and the constant jurisprudence of the Court.²⁶

17. In particular, Trial Chamber II held that:

“[a]s a matter of general principle, [the participation of victims through their legal representative] must have as its main aim the ascertainment of the truth. The

²¹ 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.

²² In this sense, see AMBOS (K.), “El Marco Jurídico de la Justicia de Transición”, Tenus, Bogota, 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 No. 60/147 in the 64th plenary meeting, UN Doc. A/RES/60/147, 16 December 2005, para. 21.

²³ 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), 18 January 2008, No. ICC-01/04-01/06-1119, para. 98.

²⁴ See IACHR, *La Cantuta v. Peru*, Judgment of 29 November 2006, Series C, No. 162, para. 222 ; *Vargas-Areco v. Paraguay*, Judgment of 26 September 2006, Series C, No. 155, paras. 153; *Almohacid-Arellano and al v. Chile*, Judgment of 26 September 2006, Series C, No. 154, para. 148; *Comunidad Monvana v. Suriname*, Judgment of 15 June 2005, Series C, No. 124, para. 204 ; and *Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 7, paras. 162-166 and 174. See also ECHR, *Hugh Jordan v. UK*, Application No. 24746/94, 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, Application No. 25803/94, 28 July 1999, para. 79; *Kurt v. Turkey*, Application No. 24276/94, 25 May 1998, para. 140; *Selcuk and Asker v. Turkey*, Application No. 23184/94, 24 April 1998, para. 96; *Aydin v. Turkey*, Application No. 23178/94, 25 September 1997, para. 103; and *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, para. 98.

²⁵ 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*, Nomos, 1999, pp. 876-877; NAQVI (Y.), “The Right to the Truth in International Law Fact or Fiction 9”, in (2006) *ICRC International Review*, No. 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 Siracuse Conference*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257; and AMBOS (K.), “El Marco Jurídico de la Justicia de Transición”, *op. cit. supra* note 22, pp. 42-44.

²⁶ See, for instance, 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, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, paras. 31-44.

victims are not parties to the trial and certainly have no role to support the case of the Prosecution. 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.”²⁷

18. In addition, “[t]he object and purpose of article 68(3) of the Statute and rules 91 and 92 of the Rules [of Procedure and Evidence] is to provide victims with a meaningful role in the criminal proceedings before the Court (including at the pre-trial stage of a case) so that they can have a substantial impact in the proceedings.”²⁸ Accordingly, the participation of victims in the proceedings before the Court shall be “effective and significant as opposed to purely symbolic.”²⁹

19. The participation of victims in the proceedings before the Court in an effective and efficient manner 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.³⁰ Such participation can only be deemed meaningful, rather than purely symbolic, if victims are entitled to positively contribute to the search for the truth – not to retribution or punishment of given individuals. In this respect, any form of positive contribution from victims appears to be crucial for the accomplishment of the Court’s function.³¹

20. The Legal Representatives submit that the possibility to tell their stories and to share their difficult and painful experiences with the judges constitutes one of the

²⁷ See the “Corrigendum Directions for the conduct of the proceedings and testimony in accordance with rule 140” (Trial Chamber II), No. ICC-01/04-01/07-1665-Corr, 1st December 2009, paras. 82-91.

²⁸ See the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case”, *supra* note 26, para. 157.

²⁹ See the “Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, *supra* note 21, 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, 1st December 2010 (dated 10 November 2010), para. 9(a).

³⁰ 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*, Second Edition, 2008, pp. 1279, 1290 and 1291.

³¹ *Idem*, p. 1280.

ways whereby the victims can positively contribute to the search for the truth. For the absolute majority of victims, except a very limited number of them enjoying the dual status of witness and victim, or appearing in person to present their views and concerns, the process of application for participation appears to be the only way to provide an account of their experience which might be of relevance for the search for the truth.

21. Under the Rome Statute, victims have the right not only to tell their story but also to have their story heard within the judicial framework. Indeed, “[i]n the light of the core content of the right to be heard set out in article 68(3) of the Statute, [...] [said provision] imposes an obligation on the Court vis-à-vis victims. The use of the present tense in the French version of the text (“la Cour permet”) makes it quite clear that the victims’ guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively. It follows that the Chamber has a dual obligation: on the one hand, to allow victims to present their views and concerns, and, on the other, to examine them.”³²

22. Given the abovementioned right of victims to tell their story and to have their story heard, as well as the obligation imposed upon the Court vis-à-vis victims, the Legal Representatives submit that victims’ statements contained in their applications for participation, in particular regarding the relevant events and the harm suffered, might be of relevance for the determination of the truth and should be duly considered and taken into account by the Chamber for the purpose of the trial proceedings.

23. Regarding the model of victims’ participation at the trial stage to be adopted in the present case, the Legal Representatives, while being cognisant of the variety of models currently used within the Court, submit that the model to be adopted should be first and foremost in compliance with the right enshrined to victims under

³² See the “DECISION ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6”, *supra* note 19, para. 71.

article 68(3) of the Rome Statute to participate in an effective and meaningful manner in the Court proceedings.³³

24. At the same time, the Legal Representatives are mindful of the need, as pointed out by the Single Judge of Pre-Trial Chamber II, to ensure “*sustainability, effectiveness and efficiency* [of the victims’ application process]” and to employ efforts aimed at “*developing application forms for victims’ participation tailored to the characteristics of the specific case at hand*”,³⁴ given “*the availability of a concise and simplified, individual form* [which] *might significantly assist victims willing to participate in the current case, as well as the VPRS in processing their applications and the Chamber in its assessment of the requirements set forth in rule 85 of the Rules* [of Procedure and Evidence].”³⁵

- There is no reason to depart from the procedure adopted at the pre-trial stage

25. The Legal Representatives are of the view that the model of victims’ application process as adopted at the pre-trial stage of the proceedings in the present case³⁶ should be maintained for the purpose of victims’ participation in the trial proceedings, as it both, on the one hand, will be in compliance with the right of victims to participate in the proceedings under article 68(3) of the Rome Statute and, on the other hand, will significantly assist the VPRS in processing victims’ applications and the Chamber in its assessment of the requirements under rule 85 of the Rules of Procedure and Evidence.

26. In particular, the application form as adopted at the pre-trial stage, although significantly reduced and simplified, still enables victims both to contribute to the search for the truth by providing specific details in relation to the events within the

³³ See *supra* paras. 14-22.

³⁴ See the “Decision Establishing Principles on the Victims’ Application Process” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-67, 28 May 2013, para. 17.

³⁵ *Idem*, para. 18.

³⁶ *Ibid.*, paras. 17-25.

charges and to tell their story and to have their story heard. At the same time, the simplified application form will provide the Chamber with sufficient information in order to determine the victim status, while simplifying the management of information provided by victims. The resulting advantage would be that the amount of time and resources needed for proceeding and assessing victims' applications would be significantly reduced, thereby enabling the Court to deal effectively with a potentially large number of victims.

27. On the other hand, the model of victims' application process as adopted at the pre-trial stage does not imply – as opposed to a “partly collective” approach adopted in the *Gbagbo* case³⁷ – the grouping of the collected applications wherein a contact person is assigned, but instead implies the grouping of the applications in order to “simplify and expedite the decision-making by the Chamber as envisaged by rule 89(4) of the Rules [of Procedure and Evidence]”, wherein “[the Chamber] will assess the applications individually but will take a decision on each distinct group of applicants as established according to appropriate criteria.”³⁸ In this regard, the Legal Representatives submit therefore that the model at hand preserves the individual or individualised character of the victims' participation in compliance with the principle enshrined in article 68(3) of the Rome Statute. At the same time, the model at hand would enable the legal representatives of victims to effectively represent both the common interest of the entirety of the victims and the interest of particular groups of victims, as well as the interest of a particular victim if needed.

28. The Legal Representatives observe that the model of victims' application process combined with the model of legal representation of victims as adopted and implemented at the pre-trial stage has demonstrated in practice its sustainability and effectiveness.

³⁷ See the “Second decision on issues related to the victims' application process” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-86, 5 April 2012, paras. 16-36.

³⁸ See the “Decision Establishing Principles on the Victims' Application Process”, *supra* note 34, para. 34.

29. In addition, the Legal Representatives contend that adopting at the trial stage a new model of victims' application process – different from the one adopted at the pre-trial stage – is very likely to create confusion and to impose an unnecessary and excessive burden on victims, and may ultimately affect the overall effectiveness and the efficiency of the trial proceedings.

30. The Legal Representatives are also of the view that the modalities of victims' application process as adopted at the pre-trial stage of the proceedings in the present case³⁹ should also be maintained for the purpose of victims' participation in the trial proceedings. The Legal Representatives submit that said modalities are consistent with the rights of victims, are in compliance with the legal texts of the Court and are widely supported by the jurisprudence of the Court, with a single exception constituted by the approach adopted in this regard by Trial Chamber V in the Kenyan cases.⁴⁰

31. The Legal Representatives submit that the model of victims' participation as adopted in the Kenyan cases should not be endorsed or applied *mutatis mutandis* in the present case. In particular, should the Kenyan cases model be adopted, the absolute majority of victims in the present case would be deprived of the very meaning of their right enshrined in article 68(3) of the Rome Statute, *i.e.* the possibility both to positively contribute to the search for the truth and to tell their story and to have their story heard,⁴¹ because only few victims would be invited to fill in an application form to present to the Court evidence in relation to the events and the harm they suffered from. But none – neither the parties nor the judges – would ever be in a position to hear the very personal and tragic stories of the other victims, because they would only be invited to register in a manner that is not linked to any judicial context. In other words, should the Kenyan cases model be adopted,

³⁹ *Idem*, paras. 26-44.

⁴⁰ See the "Decision on victims' representation and participation" (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012, paras. 47-54; and the "Decision on victims' representation and participation" (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012, paras. 48-55.

⁴¹ See *supra* paras. 14-22.

for the absolute majority of victims in the present case, the participation in the proceedings before the Court would convert into a purely symbolic one.

2) Regarding issues under point h)

32. The Legal Representatives are not currently in a position to identify the particular victims with respect to whom they would either seek the Chamber's authorization to call as witnesses or otherwise request to appear in person before the Chamber to present views and concerns. This is essentially due to the lack of access by the Legal Representatives to the confidential material registered in the records of the present case, and in particular, to the evidence the Prosecutor intends to use during the presentation of her case. The Legal Representatives anticipate that they would be in a position to provide more specific submissions in this regard as soon as an access to relevant material is provided to them.

33. Nevertheless, the Legal Representatives are in a position to inform the Chamber on the languages spoken by the majority of the victims. Indeed, the languages mostly used by the victims are Swahili, Lingala and Kilendu/Lendu. Therefore, should victims be identified by the Legal Representatives to be called to testify or otherwise appear in person before the Chamber, subject to the evidence presented by the Prosecution, it is most likely that they will use one of said languages.

3) Regarding issues under point i)

34. The Legal Representatives submit that it is of a common interest of the entirety of the victims that the trial proceedings in the present case start as soon as possible and without any undue delay.

35. During various meetings held with the Legal Representatives, victims expressed their wish for trial proceedings be carried out in an expeditious manner, and made clear their strong opposition to any delay in the commencement of the

trial. The Legal Representatives submit that the need for unobstructed and expeditious trial proceedings is particularly relevant in the context of the present case, given that the events constituting the charges took place in 2002-2003. Therefore, the victims have been waiting for Justice to be done for more than eleven years already.

36. As the Assembly of States Parties has recently emphasised, victims have a right *“to expeditious and effective access to justice, protection and support, adequate and prompt reparation for harm suffered, and access to relevant information concerning violations and redress mechanisms”*, all of which *“are essential components of justice”*.⁴²

37. The Legal Representatives reserve their right to present to the Chamber specific views and concerns expressed by the victims regarding the commencement of the trial once the parties have presented submissions in this regard.

III. VICTIMS SUBMISSIONS ON OTHER ISSUES ARISING FROM THE PROVISIONAL AGENDA

38. The Legal Representatives respectfully submit that in addition to the issues under points g), h) and i) with respect to which the victims were expressly invited to present submissions, the victims should also be able to present submissions on other issues arising from the Provisional Agenda as they are of direct relevance to their interests, and in particular on the issues under points b), e) and f).

1) Regarding issues under point b)

39. The Legal Representatives note that a number of victims bearing a dual status of witness and victim are already covered by protective measures currently implemented. The Legal Representatives submit that should the Prosecution intend to seek variation of any of the protective measures already implemented, or to

⁴² See ASP, Resolution No. ICC-ASP/12/Res.5, 27 November 2013, p. 1.

request for protective measures to be applied in relation to other victims, the Legal Representative concerned shall be properly informed in advance. This is necessary in order to preserve the security, the safety and the well-being of the victims concerned and to prevent any potential risk in this regard. It is also necessary to enable the Legal Representatives to properly discharge their professional obligations under the Code of Professional Conduct for Counsel, and in particular the duty to “*take into account [their] client’s personal circumstances and specific needs*”.⁴³

40. The Legal Representatives submit that for the purpose of ensuring an adequate protection of the security, the safety and the well-being of victims, a comprehensive mechanism regulating the exchange of information and contact with individuals benefiting from dual status should be established in due course on the basis of the current jurisprudence of the Court.⁴⁴

2) Regarding issues under point e)

41. The Legal Representatives submit that in accordance with the legal texts of the Court as widely supported by the current jurisprudence of the Court, victims may be invited to take part in the selection process and in the instructions to be given to expert witnesses, should their personal interests be concerned by said expert testimony.

42. Indeed, the provision under regulation 44 of the Regulations of the Court does not limit to the parties only the possibility to take part in the selection process and in the instructions to be given to expert witnesses. In particular, the “joint instruction” of expert witnesses contemplated in regulation 44(2) of the Regulations of the Court specifically covers all “the participants” in the proceedings. This reading of regulation 44 of the Regulations of the Court is supported by the well-developed

⁴³ See the Code of Professional Conduct for counsel, No. ICC-ASP/4/Res.1, article 9(2).

⁴⁴ See, for instance, the “Decision on certain practicalities regarding individuals who have the dual status of witness and victim” (Trial Chamber I), No. ICC-01/04-01/06-1379, 5 June 2008.

practice of different Trial Chambers. Indeed, in the most recent decisions in the Kenyan cases, Trial Chamber V determined that “[t]o the extent that the victims are participating on an issue or as regards evidence which is to be the subject of expert evidence, they are to be given an opportunity to contribute to the expert’s instruction.”⁴⁵ Likewise, in the *Bemba* case, the legal representatives of victims contributed, jointly with the Prosecution, to the selection of three expert witnesses.⁴⁶ The selection process included an agreement on the names of the experts to be jointly instructed and on the *curriculum vitae* for each expert.⁴⁷ In the same case, victims were also afforded the opportunity to make separate instructions.⁴⁸

43. In the context of the present case, there are numerous subject-matters on which experts could testify, the majority of which are of a direct relevance to the interests of the victims. These subject-matters may include, *inter alia*, the calling of experts on child soldiers or in the field of gender crimes, sexual violence, psychological trauma and post-traumatic disorder.

44. Consequently, the Legal Representatives submit that victims should be invited to take part in the consultations leading to the selection of expert witnesses and, accordingly, be informed, as soon as practicable, of the details and the profiles the proposed experts. They are of the view that such a course of action would significantly contribute to the effectiveness of the proceedings as it is very likely to facilitate agreement on the joint instruction of experts.

⁴⁵ See the “Decision on the schedule leading up to trial”, No. ICC-01/09-02/11-451 (Trial Chamber V), 9 July 2012, footnote 29; and the “Decision on the schedule leading up to trial” (Trial Chamber V), No. ICC-01/09-01/11-440, 9 July 2012, footnote 9.

⁴⁶ See the “Prosecution’s Request for Approval of its Proposed Experts and Joint Instructions by the Prosecution and Legal Representatives”, No. ICC-01/05-01/08-681, 28 January 2010.

⁴⁷ *Idem*.

⁴⁸ See the “Decision on the procedures to be adopted for instructing expert witnesses” (Trial Chamber III), No. ICC-01/05-01/08-695, 12 February 2010, p. 8. See also the “Decision on the procedures to be adopted for instructing expert witnesses” (Trial Chamber I), No. ICC-01/04-01/06-1069, 10 December 2007.

3) Regarding issues under point f)

45. The need to take into consideration the interests of the victims with regard any agreement between the Defence and Prosecution as to facts or evidence in a given case is clearly reflected in rule 69 of Rules of Procedure and Evidence. This provision provides that 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”*. The Legal Representatives submit 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 such agreements would benefit to 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.”*

46. The reading of this provision is supported by the jurisprudence of the Court. In particular, in the *Lubanga* case, Trial Chamber I ordered that the parties *“to prepare a draft schedule of agreed facts”* and that *“[t]he draft schedule is to be served on participating victims”*.⁴⁹ 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.⁵⁰

47. The Legal Representatives submit that said approach adopted by Trial Chamber I 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 they could have on their interests as well as on the proceedings as a whole. Second, the notification of agreements to victims

⁴⁹ See the *“Decision on agreements between the parties”* (Trial Chamber I), No. ICC-01/04-01/06-1179, 20 February 2008, para. 11.

⁵⁰ *Idem*, para. 13.

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 Legal Representatives would have an opportunity to make specific submissions on how the interests of participating victims might be affected by the proposed agreements.

48. The Legal Representatives are mindful of the practice of Trial Chamber IV in the *Banda* case. In that case, the Trial Chamber determined that only non-anonymous victims may file submissions on agreements between the parties.⁵¹ This conclusion was reached by the Chamber following the parties' joint submissions wherein they requested the Chamber to deny access to an annex attached to the agreement to those victims who decided not to disclose their identities.⁵² In support of their request, the parties put forward two main arguments: 1) the extent of such participation would violate the fundamental principle prohibiting anonymous accusations; and 2) this restriction should have only a minimal impact on the present proceedings as the majority of the victims are unlikely to have concerns about their identities being provided to the defence.⁵³

49. The Legal Representatives submit that the considerations which led Trial Chamber IV to reach such a conclusion are neither applicable nor relevant in the context of the present case. Indeed, in contrast to the *Banda* case, the overwhelming majority of the victims in the present case the Legal Representatives have met had indicated that they fear for their security and the safety and were reluctant to accept the disclosure of their identities to the Defence. Moreover, the principle of anonymous accusation may only be raised if the Legal Representatives were to

⁵¹ See the "Order requesting observations from the legal representatives on the agreement as to evidence pursuant to Rule 69 of the Rules of Procedure and Evidence" (Trial Chamber IV), No. ICC-02/05-03/09-165, 22 June 2011.

⁵² See the "Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Person", No. ICC-02/05-03/09-148, 16 May 2011.

⁵³ See the "Order requesting observations from the legal representatives on the agreement as to evidence pursuant to Rule 69 of the Rules of Procedure and Evidence" (Trial Chamber IV), No. ICC-02/05-03/09-165, 22 June 2011, paras. 4-5.

decide to present evidence on behalf of anonymous victims, which is not the case when the victims are invited to simply make observations on agreements between the parties in relation to facts and evidence to make sure that their interests are not affected in any manner. No prejudice is therefore likely to be caused to the Defence. In this regard, the identity of victims with a dual status of witness and victim as well as victims who might be authorised to appear in person before the Chamber will be disclosed to the Defence.

50. Consequently, the Legal Representatives submit 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, irrespective of whether or not they decided to disclose their identity to the Defence.

51. Last but not least, the Legal Representatives inform the Chamber of their availability to continue to represent the interests of the participating victims at the trial stage.

Respectfully submitted,



Dmytro Suprun
Common Legal Representative of the
Victims of the Attacks



Sarah Pellet
Common Legal Representative of the
Child soldiers

Dated this 14th day of August 2014

At The Hague, The Netherlands