

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-02/04-01/15

Date: 13 July 2016

**TRIAL CHAMBER IX**

**Before: Judge Bertram Schmitt, Presiding Judge**

**SITUATION IN UGANDA**

**IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN***

**Public**

**Initial Directions on the Conduct of the Proceedings**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

Fatou Bensouda  
James Stewart  
Benjamin Gumpert

**Counsel for the Defence**

Krispus Ayena Odongo

**Legal Representatives of Victims**

Joseph Akwenyu Manoba and Francisco  
Cox  
Paolina Massidda

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Judge Bertram Schmitt**, acting as Presiding Judge on behalf of Trial Chamber IX ('Presiding Judge' and 'Chamber', respectively) of the International Criminal Court issues the following 'Initial Directions on the Conduct of the Proceedings', in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64 and 67-69 of the Rome Statute ('Statute'), Rules 68, 87-88, 134 and 140 of the Rules of Procedure and Evidence ('Rules'), and Regulations 37 and 43 of the Regulations of the Court ('Regulations').

## **I. Background**

1. On 4 May 2016, the Presiding Judge announced that, in accordance with Article 64(8)(b) of the Statute and Rule 140(1) of the Rules, he intended to issue directions on the conduct of the proceedings.<sup>1</sup> The Presiding Judge indicated that '[t]he Chamber may take into account the submissions of the parties on these matters, but reserves the right to give directions in such a manner so as to comply with the principles of expeditiousness and fairness.'<sup>2</sup>
2. On 30 June 2016, the parties filed submissions on the conduct of the proceedings.<sup>3</sup>

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<sup>1</sup> Order Scheduling First Status Conference and Other Matters, ICC-02/04-01/15-432, para. 4. Article 64(8)(b) of the Statute provides that '[a]t the trial, the presiding judge may give directions for the conduct of the proceedings, including to ensure that they are conducted in a fair and impartial manner'. Further, Rule 140(1) of the Rules provides that '[i]f the Presiding Judge does not give directions under article 64, paragraph 8, the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge shall issue directions'.

<sup>2</sup> ICC-02/04-01/15-432, para. 4. The participants were subsequently given multiple reminders that, although submissions on the conduct of the proceedings may be filed, they would not be a prerequisite to issuing the present decision. Email from Trial Chamber IX Communications to the participants, 6 July 2016 at 18:13; Email from Trial Chamber IX Communications to the participants, 1 July 2016 at 10:26; Email from Trial Chamber IX Communications to the participants, 16 June 2016 at 17:34 ('In follow-up to a communication with the Office of the Prosecutor, the Chamber hereby clarifies that there is no official deadline for Rule 140 Observations, since the Chamber has not officially invited such submissions. The parties and participants may provide such observations. However, the reception of such observations is not a precondition for the Rule 140 decision to be issued').

<sup>3</sup> Joint Prosecution and Defence submissions on the conduct of proceedings, ICC-02/04-01/15-486. The parties requested a six page extension for this joint submission, which is granted pursuant to Regulation 37(2) of the Regulations.

3. On 6 July 2016, the Office of Public Counsel for Victims filed submissions on this topic.<sup>4</sup>

## II. Directions

4. The following constitutes the Presiding Judge's initial directions on the conduct of proceedings. Issues left unaddressed in the present decision and which require intervention from the Chamber will be dealt with in the course of the trial.
5. In particular, the Presiding Judge will not regulate the questioning of witnesses in the abstract. The necessity or propriety of any particular question will be dealt with on a case-by-case basis, noting the Presiding Judge's obligations to: (a) make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth and (b) avoid delays and ensure the effective use of time.<sup>5</sup>

### *A. Reading of the charges*

6. As for reading the charges to the accused at the commencement of trial,<sup>6</sup> the Presiding Judge considers that extracts of the confirmed charges are sufficient for this purpose. Accordingly, the Court Officer will read the numbered counts, minus the statutory provisions referenced, which are contained in the confirmation decision's operative part under the 'legal characterisation of the facts' sub-headings.<sup>7</sup> No waiver or written certification that this is sufficient is required; the accused can confirm at the commencement of trial if he understands the charges or if any further reading is necessary.

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<sup>4</sup> Common Legal Representative's Submissions on the conduct of the proceedings, ICC-02/04-01/15-491.

<sup>5</sup> Regulation 43 of the Regulations.

<sup>6</sup> Article 64(8)(a) of the Statute.

<sup>7</sup> Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, pages 71-104. For example, for the first count all that needs to be read out is '1) Attacks against the civilian population as such as a war crime, on or about 10 October 2003, at or near Pajule IDP camp'.

### *B. Opening statements*

7. The Chamber will hear the Office of the Prosecutor's ('Prosecution's') opening statement first, followed by opening statements from the Legal Representatives for Victims ('LRVs') and Defence. The parties will be given five hours to present their opening statements, and the LRVs will be given 2.5 hours to be divided between them as they see fit. The LRVs and Defence may make their opening statements either at the commencement of the trial or just prior to the presentation of their evidence, if any. In the interest of streamlining the presentation of these statements, an opening statement must be presented all at one time – the LRVs and Defence are not allowed to reserve unused time from their opening statements and continue them later during the trial. The LRVs and Defence are to inform the Chamber within 15 days of the commencement of trial if they do not intend to present their opening statements at the commencement of the trial.
8. The participants are directed to indicate by email any material they intend to use in the course of their opening statements to the Chamber and other participants eight days prior to the commencement of trial. Any objections to the use of such material shall be filed five days prior to the commencement of trial. The participants will be permitted to use audio/visual material during opening statements.

### *C. Phases of the trial relating to the presentation of evidence*

9. Subject to Articles 64(6)(b) and 69(3) of the Statute, the trial will be organised into: (i) presentation of evidence by the Prosecution; (ii) any presentation of evidence by the LRVs, should leave to do so be granted, and (iii) any presentation of evidence by the Defence. The Chamber's leave must also be sought in order to present 'rebuttal'/'rejoinder' evidence or non-evidentiary 'views and concerns' of participating victims.

10. As to the order of questioning for Prosecution witnesses, and subject to Rule 140(2)(c) of the Rules, the Prosecution will question the witness first, followed by the LRVs and the Defence. The LRVs are not required to provide an advance written note of any questions they intend to ask<sup>8</sup> – applications to question may be presented orally just prior to questioning, and the necessity or propriety of questions asked will be addressed on a case-by-case basis. Such questions may also relate to any future reparations proceedings which may occur.<sup>9</sup>

*D. Length and timing of the presentation of evidence by the Prosecution*

11. From its most recent provisional witness list, the Prosecution indicates its intent to rely on 115 witnesses at trial (though it only seeks to call 65 of them).<sup>10</sup> The Prosecution estimates that it needs approximately 400 hours to examine its witnesses.<sup>11</sup>
12. The Presiding Judge considers that the 400 hour provisional estimate provided by the Prosecution appears to be reasonable, though this is without prejudice to the Chamber concluding at a later point that estimates for certain witnesses need to be revised. This could be the case if, for example, a witness's anticipated testimony is irrelevant, cumulative or goes solely to factual and/or legal matters which usurp the functions of the Chamber. This 400 hour estimate is an average maximum calculation across the entire Prosecution case and will be enforced subject to the overall course of the proceedings.

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<sup>8</sup> This is an optional requirement in Rule 91(3) of the Rules.

<sup>9</sup> Regulation 56 of the Regulations.

<sup>10</sup> The remaining 50 witnesses are identified by the Prosecution as falling under Article 56 of the Statute and Rule 68(2) of the Rules. Some applications to introduce the prior recorded testimony of these witnesses have been made and will be ruled upon in due course.

<sup>11</sup> Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016, ICC-02/04-01/15-438, para. 16.

13. This is a single accused case, and the Defence does not need twice the amount of time as the Prosecution to question witnesses.<sup>12</sup> The non-calling party, be it the Prosecution or the Defence, is expected to require only the same amount of time as the calling party to question a witness.
14. Given the LRVs' more limited role in the trial proceedings, they are collectively expected to take substantially less time than a questioning party when conducting their questioning. The Chamber will be vigilant in assessing these questions on a case-by-case basis while mindful of the fair and expeditious conduct of the proceedings.
15. Inefficient questioning will not be allowed, even if such questioning does not exceed the applicable time estimates. The participants must always be prepared to continue with the case, even if less time than estimated is required for a particular witness. If the examination of a witness has been concluded, the Chamber expects to immediately commence with the next witness unless otherwise indicated.

*E. Witness order, video-link and Rule 68(3)*

16. The participants must provide an overall witness order when they file their final list of witnesses.<sup>13</sup> An updated version of this ordered witness list must be sent to the other participants and Chamber via email on the first working day of every month. Should the order of witnesses expected to testify in the next 30 days change, the calling participant must immediately inform the other participants and Chamber accordingly.

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<sup>12</sup> The Defence requests this amount of time, but the only authority it provides for such an allotment comes from multi-accused cases. ICC-02/04-01/15-486, para. 17, n. 17 (citing to estimates from the *Gbagbo and Blé Goudé* and *Bemba et al.* cases).

<sup>13</sup> For the Prosecution, this must be done by 6 September 2016. See Decision Setting the Commencement Date of the Trial, 30 May 2016, ICC-02/04-01/15-449, page 7. Any corresponding deadlines for the LRVs and Defence will be set later in the proceedings.

17. As for video-link witnesses, and noting the insignificant differences between in-court and video-link testimony as explained by Trial Chamber VII,<sup>14</sup> the Presiding Judge permits the participants a degree of deference in whether they wish for witnesses to appear in-court or via video-link. No request to hear a witness via video-link is therefore necessary, but the deference given to the participants in this regard is always subject to countervailing considerations, including the relative logistical burdens on the Registry and the Chamber's overarching obligation to ensure a fair and expeditious trial. Whether a witness is to testify via video-link must be made clear from the witness list provided to the other participants and Chamber.
18. As for Rule 68(3) witnesses, that relief is sought under this provision for a specific witness must be made clear from the witness list provided to the other participants and Chamber. As Rule 68(3) allows for the formal submission of the witness's previously recorded statement(s), the Presiding Judge expects the calling participant to streamline its questioning considerably when resorting to this rule.

*F. Use of materials during the examination of a witness*

19. At least five days before a witness commences testifying, the calling participant shall provide the Chamber and other participants with a list, via email, of any material(s) to be used during its examination of that witness. This list shall also indicate: (i) any passages intended to be used within any lengthy document(s); (ii) whether the participant intends to tender the document(s) as evidence; (iii) which tendered evidence, if any, is understood to fall under Rule 68(3) of the Rules and (iv) the ERN under which the material can be found in e-court. This

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<sup>14</sup> Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Video-Link Testimony for Defence Witnesses, 4 March 2016, ICC-01/05-01/13-1697, paras 8-16.



list is solely for notice purposes, and does not constitute the formal submission of any document.

20. At least one day before a witness commences testifying, the non-calling participants shall provide a list of any documents they intend to use during questioning, via email.
21. The participant intending to use any documents shall ensure that electronic, searchable copies of the documents have been uploaded into e-court prior to their use.
22. For the benefit of the judges, three binders must be prepared with hard copy versions – delineated with numbered tabs - of all materials to be used when examining witnesses. When referencing these materials in court, the participants must refer to the documents in these binders both by their tab number and ERN.
23. As regards the use of speech in audio-visual material during the hearing, the participant in question must indicate the ERN of a corresponding working language transcript. The Court interpreters must be sufficiently informed of which part of the transcript corresponds to which part of the audio-visual material being played. In such situations, the interpreters will read only the relevant part of the transcript into the record – they are not required to directly interpret the audio-visual material. Should the participants disagree with the accuracy of the transcription read in court, they may request corrections in accordance with the procedure set out later in the present decision.<sup>15</sup>

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<sup>15</sup> See Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Oral decision on accompanying transcripts for audio and audio-video material played in the court room, 12 October 2015, ICC-01/05-01/13-T-18-Red2-ENG, page 3 lines 5-19.

## G. Evidence

### i. Admissibility of evidence

24. Article 69(4) of the Statute gives the Chamber discretion on whether to rule on the admissibility of each piece of evidence upon its submission.<sup>16</sup> As a general rule, this Chamber will defer its assessment of the admissibility of the evidence until deliberating its judgment pursuant to Article 74(2) of the Statute. When the participants formally submit evidence during trial, all the Chamber will generally do is recognise their formal submission. The Chamber will consider the relevance, probative value and potential prejudice of each item of evidence submitted when deliberating the judgment, though it may not necessarily discuss these aspects for every item submitted in the judgment itself.
25. Such an approach has been adopted in recent cases of this Court<sup>17</sup> and is done, *inter alia*, because: (i) the Chamber is able to assess more accurately the relevance and probative value of a given item of evidence after having received all of the evidence being presented at trial; (ii) a significant amount of time is saved by not having to assess an item's relevance and probative value at the point of submission and again at the end of the proceedings; (iii) there is no reason for the Chamber to make admissibility assessments in order to screen itself from considering materials inappropriately and (iv) there is no reason to assume that professional judges would consider irrelevant or unduly prejudicial material,

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<sup>16</sup> Article 69(4) provides (with emphasis added): The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

<sup>17</sup> Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285. *But see* Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request for admission of documents used during the testimony of Witness P-0933, 27 May 2016, ICC-01/04-02/06-1340, para. 5 (ruling on admissibility at the point of submission).

noting in particular that the requirement of a reasoned judgment<sup>18</sup> enables the participants to verify precisely how the Chamber evaluated the evidence.

26. The Chamber always retains the discretion to rule on admissibility related issues upfront when appropriate, particularly when procedural bars are raised which may foreclose consideration of the standard admissibility criteria.<sup>19</sup>

*ii. Submission of evidence*

27. The participants may submit evidence: (i) in writing through a 'bar table' application; (ii) by email, as set out below, or (iii) orally during the hearing. In accordance with Rule 64(1) of the Rules, any objection to the relevance or admissibility of evidence must generally be made at the first opportunity.

28. Oral submission of evidence used during the hearing should be done exceptionally. As this Chamber is not ruling on the admissibility of items at the point of submission, there is little utility in taking up hearing time to discuss the submission of evidence and any corresponding objections. Instead, the Presiding Judge directs the participants to reduce this discussion of tendered evidence to writing through the following procedure:

- i. When the tendering participant wishes to formally submit items used during a hearing, it is to send an email clearly identifying these items in copy to all other participants, the Chamber and the Court Officer. These emails must be sent no later than one working day after the conclusion of the examination of the relevant witness by all participants.
- ii. No later than three working days following receipt of the email in part (i) above, and pursuant to Rule 64 of the Rules, the other participants may

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<sup>18</sup> Article 74(5) of the Statute.

<sup>19</sup> Examples of such procedural bars include those in Article 69(7) of the Statute and the procedural prerequisites contained in Rule 68 of the Rules.

send emails in response, raising issues related to the relevance or admissibility of the items submitted.

- iii. No later than one working day following receipt of any response emails in part (ii) above, the tendering participant may send a second email indicating its position on the arguments raised by the other participants.
  - iv. The Chamber will then send a final email identifying which items are recognised as being formally submitted.
  - v. The Registry will then reflect all formally submitted items in the e-court metadata.<sup>20</sup> The Registry must also submit reports for each witness who testifies, indicating which items have been formally submitted by all participants in relation to that witness. The email exchanges referenced in items (i) to (iv) above are to be annexed to this filing, applying redactions as appropriate.
29. Consistent with its approach of deferring admissibility considerations, the Chamber will not set limitations on how it will consider any submitted evidence. However, that the participants intend to submit evidence for a particular purpose may nevertheless be relevant in determining whether a procedural bar precludes its submission.
30. In principle, recognising the formal submission of audio-visual material automatically includes recognising the formal submission of any associated transcripts or translations which were duly disclosed. This would be the case irrespective of whether these transcripts/translations were on the list of evidence

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<sup>20</sup> For this purpose, an 'EVD – Admission status at trial' metadata field must reflect the first moment in which any material is recognised as formally submitted by the Chamber. From the way the conduct of proceedings in this case is set out, formally submitting materials again after they have been recognised as formally submitted serves no purpose. Should this occur, the Registry need not reflect any subsequent submission of the document in this metadata field.

or formally submitted, though it is clearly preferable to do both so there is no confusion as to their status.<sup>21</sup>

31. Equally, when a redacted item is recognised as formally submitted, a subsequent unredacted or lesser redacted version of this material is automatically to be considered as formally submitted, subject to any further objections.

### *iii. Expert witnesses*

32. All expert witnesses must be clearly identified on the witness list. As a general rule, challenges to a witness's expertise should be made in writing so that they can be resolved prior to the start of testimony. No later than 30 days before the anticipated testimony of an expert witness, any non-calling participant may file a notice indicating whether it challenges the qualifications of the witness as an expert.
33. Submitted expert reports must satisfy the procedural prerequisites of Rule 68 of the Rules unless no such objections to the submission are raised.<sup>22</sup>

### *H. Protective measures*

34. Any applications for in-court protective measures shall be made as soon as possible to allow the Chamber to receive submissions on the request and to allow the Victims and Witnesses Unit to fulfil its mandate. The Chamber wishes to rule on these applications in advance of trial whenever possible, with any such rulings subject to further information being provided by the VWU. Advance rulings give more certainty to upcoming witnesses on what to expect during court proceedings, reduce the need for protective measures litigation

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<sup>21</sup> Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on 'Prosecution's Fifth Request for the Admission of Evidence from the Bar Table', 14 December 2015, ICC-01/05-01/13-1524, para. 7.

<sup>22</sup> See Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Request for Formal Submission of D23-1's Expert Report Pursuant to Rule 68(2)(b) or, in the Alternative, Rules 68(3) and 67, 19 February 2016, ICC-01/05-01/13-1641, para. 4.

during trial, and provide sufficient time for a second motion to be filed where protective measures may be warranted if/when additional supporting information subsequently becomes available.

35. For all Prosecution witnesses for whom it is reasonably foreseeable that protective or special measures are required, the relevant deadline to file these applications is 28 October 2016.<sup>23</sup>

#### *I. Private and closed session*

36. Insofar as possible, witness testimony shall be given in public. Requests for private and/or closed sessions shall be made in a neutral and objective way, if possible, referring to the topics that will be covered. To the extent possible, the participants are directed to group identifying questions together to avoid unnecessary recourse to private and/or closed session. Requests to redact part of what is said in open session should generally be made via email, so as not to attract undue attention to any confidential information.

#### *J. Transcripts*

37. The Registry shall make public the redacted version of the transcripts within two days of the notification of the edited confidential version. Thereafter, the calling participant shall review the transcript and propose a lesser redacted version within 21 days of notification by the Registry.<sup>24</sup> Within 10 days of receiving the proposed lesser-redacted version, the other participants may raise any objections. Should no objections to the proposed lesser-redacted version be made, the Registry shall file it in the record of the case with the appropriate document number designation.

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<sup>23</sup> This is the deadline for motions requiring resolution prior to the commencement of trial. ICC-02/04-01/15-449, page 7.

<sup>24</sup> When the English and French versions of a transcript are notified on different days, the latter of the two notification dates triggers this timeline.

38. Requests for corrections to the transcript shall be submitted to the Registry within 21 days from the notification of the edited version of the transcript.<sup>25</sup> The requests to the Registry shall refer to the edited version of the transcript and contain a table providing: (i) the full reference of the transcript, date and case name; (ii) the passage extracted from the edited version of the transcript containing the discrepancies to be reviewed; (iii) the pages and lines of the passage to be reviewed and (iv) the language originally used by the speaker. The Registry shall apply any corrections to the transcript in accordance with its normal methods.

**FOR THE FOREGOING REASONS, THE PRESIDING JUDGE HEREBY**

**ADOPTS** the aforementioned directions concerning the conduct of proceedings.



**Judge Bertram Schmitt, Presiding Judge**

Dated 13 July 2016

At The Hague, The Netherlands

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<sup>25</sup> When the English and French versions of a transcript are notified on different days, the latter of the two notification dates triggers this timeline.