



Original: English

No. ICC-01/14-01/18

Date: 26 August 2020

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Initial Directions on the Conduct of the Proceedings

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Kweku Vanderpuye

Counsel for the Alfred Yekatom

Mylène Dimitri
Peter Robinson

Counsel for Patrice-Edouard Ngaissona

Geert-Jan Alexander Knoops

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Bertram Schmitt, acting as Presiding Judge on behalf of Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64, and 67-69 of the Rome Statute (the ‘Statute’), Rules 68, 74, 87-88, and 140 of the Rules of Procedure and Evidence (the ‘Rules’), and Regulations 21(8), 43 and 56 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Initial Directions on the Conduct of the Proceedings’.

I. Procedural history and submissions

1. On 19 March 2020, the Chamber informed the parties that it intended to issue directions on a variety of matters pursuant to Article 64(8)(b) of the Statute in due course. The Chamber indicated that it ‘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’.¹
2. The Chamber takes note of the various submissions made by the Office of the Prosecutor (the ‘Prosecution’),² the Yekatom Defence,³ the Ngaïssona Defence,⁴ the Common Legal Representative of the Former Child Soldiers and the

¹ Order Scheduling First Status Conference, ICC-01/14-01/18-459, para. 7.

² Prosecution’s Observations on the Agenda of the First Status Conference, 8 April 2020, ICC-01/14-01/18-474-Conf (public redacted versions notified on 24 April 2020, ICC-01/14-01/18-474-Red, and 10 June 2020, ICC-01/14-01/18-474-Red2) (the ‘Prosecution Status Conference Submissions’); Prosecution’s Submission of Proposed Directions for the Conduct of Proceedings and Proposed Protocol on Witness Familiarisation, 14 April 2020, ICC-01/14-01/18-476 (with Annexes A and B) (the ‘Prosecution Submissions’).

³ Yekatom Defence Submissions for First Status Conference, 8 April 2020, ICC-01/14-01/18-472 (with confidential Annex A); Yekatom Defence Submission on the Conduct of the Trial, 15 May 2020, ICC-01/14-01/18-519 (the ‘Yekatom Defence Submissions’).

⁴ Defence Submissions pursuant to Trial Chamber V’s “Order Scheduling First Status Conference” (ICC-01/14-01/18-459), 8 April 2020, ICC-01/14-01/18-473-Conf (with confidential *ex parte* Annex 1, only available to the Ngaïssona Defence and the Registry) (public redacted version notified on 5 June 2020); Defence response to the “Prosecution’s Submission of Proposed Directions for the Conduct of Proceedings and Proposed Protocol on Witness Familiarisation”, ICC-01/14/01/18-476, 15 May 2020, ICC-01/14-01/18-521-Conf (with public Annexes A and B) (public redacted version notified the same day, ICC-01/14-01/18-521-Red) (the ‘Ngaïssona Defence Submissions’).

Common Legal Representatives of Victims of Other Crimes (jointly, the ‘CLR V’)⁵ and the Registry.⁶

II. Directions

3. The following constitute the Presiding Judge’s initial directions on the conduct of proceedings. Issues left unaddressed in the present decision and which require intervention by the Chamber will be dealt with in the course of the trial.
4. 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 under Rule 88(5) of the Rules⁷ and Regulation 43 of the Regulations.⁸

A. Reading of the charges⁹

5. In order to ensure the efficiency of the proceedings, the Presiding Judge considers that reading extracts of the confirmed charges to the accused at the commencement of trial is sufficient.¹⁰ Accordingly, the Court Officer will read the numbered counts, minus the statutory provisions, the references to the

⁵ Common Legal Representatives’ joint submissions on the matters identified in the “Order Scheduling First Status Conference”, 8 April 2020, ICC-01/14-01/18-471; Réponse conjointe des Représentants Légaux Communs des Victimes à la « Prosecution’s Submission of Proposed Directions for the Conduct of Proceedings and Proposed Protocol on Witness Familiarisation » (ICC-01/14-01/18-476) et ses annexes, 15 May 2020, ICC-01/14-01/18-520 (the ‘CLR V Submissions’).

⁶ Registry Submissions in View of the Upcoming Status Conference, 8 April 2020, ICC-01/14-01/18-470 (with confidential *ex parte* Annex I, only available to the Prosecution and the Registry; confidential *ex parte* Annexes II and III, only available to the Registry) (confidential redacted version of Annex II notified on 17 April 2020; confidential redacted version of Annex III notified on 8 April 2020 and public redacted version of Annex III notified on 22 May 2020); Registry’s Submissions pursuant to regulation 24*bis* of the Regulations of the Court and in relation to the “Decision on Ngaïssona Defence Requests Related to the Prosecution Submissions on the Conduct of the Proceedings” [ICC-01/14-01/18-491], ICC-01/14-01/18-516-Conf (public redacted version notified the same day).

⁷ Rule 88(5) of the Rules: ‘Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence’.

⁸ Regulation 43 of the Regulations: ‘Subject to the Statute and the Rules, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode and order of questioning witnesses and presenting evidence so as to: (a) Make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth; (b) Avoid delays and ensure the effective use of time’.

⁹ Article 64(8)(a) of the Statute.

¹⁰ See also Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497 (the ‘Ongwen Directions’), para. 6.

Document Containing the Charges and the cross-references to other parts of the Decision on the confirmation of charges (the ‘Confirmation Decision’), which are contained in the Confirmation Decision’s operative part.¹¹

6. The Confirmation Decision remains the authoritative document for the purposes of Article 74(2) of the Statute.

B. Modalities of victim participation in hearings

7. At the outset, the Presiding Judge notes that victims and their CLRV continue to enjoy the procedural rights awarded to them during the pre-trial proceedings¹² – as applicable *mutatis mutandis* to the trial proceedings – with the exception of Pre-Trial Chamber II’s findings regarding the parties’ right to reply to the CLRV’s responses pursuant to Rule 91(2) of the Rules.¹³ The Presiding Judge recalls that, should the parties wish to reply, they must seek the Chamber’s leave, pursuant to Regulation 24 of the Regulations.¹⁴
8. Further rights and directions will be set out in the present decision. In case a direction applies to the parties and the CLRV, the decision will simply make reference to the ‘participants’. The Presiding Judge reserves the right to issue further directions regarding the victims’ participation at a later stage of the proceedings.

¹¹ Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’, 14 May 2020, ICC-01/14-01/18-403-Conf-Corr (with one annex) (corrected public redacted version notified the same day, ICC-01/14-01/18-403-Red-Corr), pp. 104-112. For example, the first count should be read out as follows: ‘Directing attacks against the civilian population in Bangui, including Cattin and the Boeing market, starting on 5 December 2013, on the basis of the conduct pertaining to Counts 2 to 6 and 8’.

¹² Pre-Trial Chamber II, Decision regarding the Registry’s First Assessment Report on Applications for Victim Participation, the Registry’s First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims’ procedural position, 21 June 2019, ICC-01/14-01/18-227-Conf (public redacted version notified the same day, ICC-01/14-01/18-227-Red) (the ‘PTC II Decision on Victim Participation’), paras 37-46.

¹³ PTC II Decision on Victim Participation, ICC-01/14-01/18-227-Red, para. 4: ‘The Prosecutor and the Defence have the right to reply to a response made by the Legal Representatives of Victims pursuant to rule 91(2) of the Rules. In this respect, the Chamber considers that, for the purposes of the diligent and fair conduct of the proceedings, it is appropriate to reduce the applicable time limit to three days effective from notification of the relevant response to the parties, even where the replying party has not filed an initial submission.’

¹⁴ Email from the Chamber, 4 May 2020, at 16:20.

C. Opening statements

9. The Chamber will hear the Prosecution's opening statement first, followed by the CLRV and the Defence's opening statements. Both the CLRV and the Defence teams are expected to decide on the order of their respective presentations amongst themselves.
10. Having considered the scope of the case and the participants' submissions in this regard,¹⁵ the Prosecution will be given six hours to present its opening statements. The Yekatom Defence and Ngaïssona Defence are given three hours each. The CLRV will be given three hours to be divided between them as they see fit.
11. The CLRV 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. However, this decision must be made collectively amongst the respective CLRV and Defence teams.¹⁶ The Chamber will not hear opening statements from the CLRV or the Defence teams at multiple points during the trial.
12. In the interest of streamlining the presentation of these statements, an opening statement must be presented all at one time – the CLRV and Defence are not allowed to reserve unused time from their respective opening statements and continue them later during the trial.
13. The CLRV and Defence are to inform the Chamber by email at the latest 15 days prior to the commencement of trial if they do not intend to present their opening statements at the commencement of the trial.
14. 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

¹⁵ Annex to the Prosecution Submissions, ICC-01/14-01/18-476-AnxA, para. 4; Annex A to the Ngaïssona Defence Submissions, ICC-01/14-01/18-521-AnxA, para. 4; CLRV Submissions, ICC-01/14-01/18-520, para. 11.

¹⁶ See also Trial Chamber VII, *The Prosecutor v. Jean Pierre Bemba Gombo et al.*, Directions on the conduct of the proceedings, 2 September 2015, ICC-01/05-01/13-1209, para. 5.

participants are permitted to use audio/visual material during opening statements.

15. The opening statements shall be presented entirely in public session. The participants are therefore instructed to prepare accordingly.

D. Presentation of evidence

16. 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 CLRV, should leave to do so be granted, in an order to be decided by the CLRV amongst themselves; and (iii) any presentation of evidence by the Defence, in an order to be decided by the Defence teams between themselves. The Chamber's leave must also be sought in order to present 'rebuttal'/'rejoinder' evidence or non-evidentiary 'views and concerns' of participating victims.
17. 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 CLRV and the Defence. The respective CLRV and Defence teams should decide amongst themselves on the order of their questioning.
18. The CLRV are not required to provide an advance written note of any questions they intend to ask.¹⁷ Applications to question a witness may be presented orally just prior to questioning. Mindful of the fair and expeditious conduct of the proceedings, the Chamber will assess the necessity or propriety of questions on a case-by-case basis.
19. In this regard, the Presiding Judge stresses that the CLRV's role is different from the Prosecution's, which must be reflected in the types of questions asked. It is the Prosecution who exclusively carries the burden of proof to establish the alleged crimes. Consequently, and irrespective of whether the Prosecution has elicited information on a certain point relevant to the alleged crimes, the CLRV's questioning is limited to matters relevant to the personal interests of

¹⁷ This is an optional requirement in Rule 91(3) of the Rules.

the victims. This may, for instance, include questions about harms which the witness personally suffered or harms of other victims which the witness observed.¹⁸ Such questions may also relate to future reparations proceedings, if any, pursuant to Regulation 56 of the Regulations.

20. The Presiding Judge reserves his right to issue further directions at a later stage of the proceedings, in particular with regard to the Defence's presentation of evidence, as well as the CLRV's presentation of evidence, should leave be granted.

E. Length and timing of the presentation of evidence

21. In its recent submissions, the Prosecution indicates its intent to rely on 152 witnesses at trial,¹⁹ 109 of whom it intends to call live.²⁰ It further anticipates that approximately 70 witnesses will give their live testimony at the seat of the Court.²¹ Overall, the Prosecution estimates that it needs approximately 400 hours to examine its witnesses.²² The Presiding Judge also takes note of the Ngaiissona Defence's submissions in this regard.²³
22. The Presiding Judge considers that the 400 hour provisional estimate provided by the Prosecution appears to be reasonable. Accordingly, the Presiding Judge sets 400 hours as the maximum time available to the Prosecution to present its case. The limit will be enforced in relation to the Prosecution's case as a whole. This means that if more time than estimated is needed for a particular witness, the Prosecution needs to ensure that less time than anticipated is used with another witness, in order to overall comply with its 400 hours limit.

¹⁸ See also Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, transcript of hearing, 4 April 2017, ICC-02/04-01/15-T-65, p. 55, line 14 to p. 56, line 16.

¹⁹ Prosecution's Submission in Compliance of the Single Judge's "Order to provide a Preliminary Witness List", ICC-01/14-01/18-528, ICC-01/14-01/18-553 (with confidential Annex A, ICC-01/14-01/18-553-Conf-AnxA; and confidential *ex parte* Annex B, only available to the Prosecution, ICC-01/14-01/18-553-Conf-Exp-AnxB) (the 'Preliminary Witness List Submissions'), para. 5.

²⁰ Annex A to the Preliminary Witness List Submissions, ICC-01/14-01/18-553-Conf-AnxA. The Prosecution intends to certify the remainder of the witnesses under Rule 68(2) of the Rules.

²¹ Transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 34, lines 13-14.

²² Prosecution Status Conference Submissions, ICC-01/14-01/18-474-Red2, para. 15.

²³ Defence Observations on "Prosecution's Submission in Compliance of the Single Judge's "Order to provide a Preliminary Witness List", ICC-01/14-01/18-528", 26 June 2020, ICC-01/14-01/18-573-Conf (public redacted version notified on 16 July 2020).

23. This is without prejudice to the Chamber concluding that estimates for certain witnesses need to be revised. This could be the case if, for example, a witness's anticipated testimony is irrelevant or repetitive. In this regard, the Presiding Judge also recalls that the Chamber reserved its right to limit the number of witnesses, if so required to ensure the efficiency of the proceedings and the accused's right to be tried without undue delay.²⁴
24. Having considered the fact that there are two accused in this case, the potential overlaps in questioning, as well as the Court practice that the non-calling party is expected to require only the same amount of time as the calling party to question a witness,²⁵ the Chamber considers it appropriate to allocate a maximum of 200 hours to each of the Defence teams for their questioning.
25. Given the CLRV's 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 Presiding Judge recalls his directions above on the scope of questioning by the CLRV.
26. Questioning must always be conducted in the most efficient manner possible. Where questioning is deemed inefficient, it will be restricted, 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.
27. Directions regarding the length of the Defence's presentation of evidence, as well as the CLRV's presentation of evidence, should leave be granted, if any, will be issued at a later stage of the proceedings.

²⁴ Transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 30, line 24 to p. 31, line 3.

²⁵ *Ongwen* Directions, ICC-02/04-01/15-497, para. 13; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Annex A to the Decision on the conduct of the proceedings, ICC-01/12-01/18-789-AnxA (the '*Al Hassan* Directions'), para. 42.

F. Witness order

28. The participants must provide an overall witness order when they file their final list of witnesses (the ‘Final Witness List(s)’).²⁶ An updated version of this ordered witness list must be sent to the other participants and the 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 the Chamber accordingly.

G. Video-link

29. Although noting the submissions by the Prosecution,²⁷ the Yekatom Defence²⁸ and the Ngaïssona Defence in this regard,²⁹ the Presiding Judge considers that in-person and video-link testimony are equal options to give *viva voce* testimony under the statutory framework, and moreover, that video-link testimony may in certain circumstances be even more conducive to the efficient administration of justice.³⁰
30. Accordingly, the participants are given a certain degree of flexibility in deciding whether they wish for witnesses to appear in-court or via video-link. No request to hear a witness via video-link is necessary. Similarly, no justification for choosing either mode needs to be provided. However, noting that in-court and video-link testimony require different preparations by the Registry, timely notice is essential. Whether a witness is to testify via video-link must be made clear in the Final Witness Lists provided to the other participants and the Chamber.³¹

²⁶ For the Prosecution, this must be done by 9 November 2020. See Decision Setting the Commencement Date of the Trial, 16 July 2020, ICC-01/14-01/18-589, p. 10. Any corresponding deadlines for the CLRV and Defence will be set later in the proceedings.

²⁷ Prosecution Submissions, ICC-01/14-01/18-476-AnxA, paras 46-47.

²⁸ Yekatom Defence Submissions, ICC-01/14-01/18-519, para. 15.

²⁹ Ngaïssona Defence Submissions, ICC-01/14-01/18-521-Red, para. 41.

³⁰ See also 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; *Ongwen* Directions, ICC-02/04-01/15-497, para. 17; *Al Hassan* Directions, ICC-01/12-01/18-789-AnxA, para. 54.

³¹ For the Prosecution, this must be done by 9 November 2020. See Decision Setting the Commencement Date of the Trial, ICC-01/14-01/18-589, p. 10. Any corresponding deadlines for the CLRV and Defence will be set later in the proceedings.

31. The deference given to the participants in this regard is always subject to countervailing considerations, including the logistical burdens on the Registry and the Chamber's overarching obligation to ensure a fair and expeditious trial. Consequently, the Chamber reserves its right to reassess the mode of testimony chosen by the calling participant and to decide otherwise.

H. Rule 68 of the Rules

32. Any relief sought under this provision for a specific witness must be made clear from the Final Witness List provided to the other participants and the Chamber.³²
33. The participants are instructed to file applications under Rule 68(2) and (3) of the Rules as soon as possible, latest by the **deadline set for the Final Witness List**.³³ This does not preclude later applications under Rule 68(2)(c) of the Rules, should a witness become unavailable.
34. Objections to applications under Rule 68(2) and (3) of the Rules, if any, shall be made at the time of their submission, within the applicable deadline under Regulation 34(b) of the Regulations. The Chamber will rule on applications under Rule 68(2) and (3) of the Rules as set out below.³⁴
35. When resorting to Rule 68(3) of the Rules, the Presiding Judge expects the calling participant to streamline its questioning considerably in light of the fact that this provision allows for the formal submission of the witness's previously recorded statement(s).

I. Self-incrimination

36. The calling participant shall notify the Victim and Witnesses Unit (the 'VWU') as soon as it believes that a witness may incriminate himself or herself during their testimony. In case of a dual status witness, the CLRV shall also be informed.

³² See footnote 31.

³³ See footnote 31.

³⁴ See section M. Evidence (1) Submission Approach.

37. The calling participant shall, where foreseeable, give notice about potential requests under Rule 74 of the Rules in the Final Witness List provided to the other participants and the Chamber. Noting that the Prosecution's Final Witness List is due on 9 November 2020,³⁵ the Presiding Judge sets the deadline for the Prosecution's requests to **11 January 2021**.
38. The Registry shall make all necessary arrangements to provide independent legal advice to witnesses who may be at risk of incriminating themselves during their testimony. Unless otherwise ordered by the Chamber, the CLRV shall provide this advice for dual-status witnesses. This is without prejudice to the Chamber's assessment of whether assurances pursuant to Rule 74 of the Rules will be granted.
39. The lawyer advising the witness who may be at risk of self-incriminating during testimony shall seize the Chamber of any application for assurances under Rule 74(3)(c) of the Rules, if required. The participants shall be notified of such an application. The advising lawyer shall be responsible of informing the witness, *inter alia*, of Article 70(1)(a) of the Statute, in accordance with Rule 66(3) of the Rules.

J. Use of materials during the examination of a witness³⁶

40. The participants may only use material which has been disclosed. Otherwise, leave of the Chamber must be sought. 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.
41. 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

³⁵ Decision Setting the Commencement Date of the Trial, ICC-01/14-01/18-589, p. 10.

³⁶ See also *Ongwen* Directions, ICC-02/04-01/15-497, paras 19-23.

the Rules; and (iv) the ERN under which the material can be found in e-court. This list is solely for notice purposes, and does not constitute the formal submission of any document.

42. 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.
43. 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.
44. 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.

K. Private and closed session

45. Insofar as possible, witness testimony shall be given in public. To the extent possible, the participants are directed to group identifying questions together to avoid unnecessary recourse to private and/or closed session. It is the responsibility of the examining counsel to request moving back to open session when the reasons necessitating a private and/or closed session are no longer present. 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.
46. In case the calling participant anticipates that a private and/or closed session will be needed, it shall, at least five days before a witness commences

testifying,³⁷ indicate the specific information which it considers can only be discussed in private and/or closed session (topics, names, places, etc.). The calling participant may supplement this information upon receipt of the emails containing the documents of the non-calling participants, but any such supplement must be done as soon as possible upon receipt of the non-calling participants' emails. These measures serve to provide advance notice to the participants and the Chamber as to what the calling participant considers can only be discussed in private or closed session. They are intended to reduce the need to go into private session and avoid frequently going back and forth between public and private session.

47. The above is without prejudice to the Chamber's assessment during a witness's testimony as to whether private or closed sessions are necessary.

L. In-court redactions

48. Requests for redactions pursuant to Regulation 21(8) of the Regulations shall be sent via email so as not to attract undue attention to any confidential information. The email should be sent to the Chamber's legal staff in the Courtroom, copying the Court Officer and all other participants. The request must clearly identify the words to be redacted and the timestamps of the real-time transcript. Such requests must be made as soon as possible, and no later than 20 minutes after the information was revealed.
49. The participants have two minutes to object. In the absence of any objections, the redaction is presumed to have been approved and can be applied without an extra signature of the Presiding Judge. In case of disagreement, the Presiding Judge will rule on the request in the hearing or shortly thereafter.
50. This procedure applies unless otherwise ordered. The participants' agreement on any redaction is not binding on the Chamber. Moreover, due to the impracticability of making a detailed assessment within 30 minutes of an ongoing hearing, such redactions are also without prejudice to a revised assessment.

³⁷ This information may be provided jointly with the information required under section J above.

51. The Registry is instructed to publish uncontested redactions in periodic reports.

M. Evidence

(1) Submission Approach

52. Article 69(4) of the Statute, as confirmed by the Appeals Chamber,³⁸ gives the Chamber discretion on whether to rule on the admissibility of each piece of evidence upon its submission.³⁹
53. In accordance with the established practice of other chambers,⁴⁰ this Chamber will adopt the so-called ‘Submission Approach’. Consequently, it will not rule on the admissibility of each item of evidence during the course of the proceedings. Rather, the Chamber will assess the standard evidentiary criteria (namely the relevance, probative value and potential prejudice) of each item as part of its holistic assessment when deliberating its judgment pursuant to Article 74(2) of the Statute.⁴¹ It may, however, not necessarily discuss these aspects in

³⁸ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Conf (public redacted version notified the same day, ICC-01/05-01/13-2275-Red) (the ‘*Bemba et al.* Appeals Decision’), paras 576-601; Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution's list of evidence”, 3 May 2011, ICC-01/05-01/08-1386 (the ‘*Bemba Appeals Decision*’), para. 37.

³⁹ It is noted that Article 69(4) of the Statute provides: ‘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’ (emphasis added). *See also Bemba Appeals Decision*, ICC-01/05-01/08-1386, para. 37; *Ongwen Directions*, ICC-02/04-01/15-497, para. 24; Trial Chamber VII, *The Prosecutor v. Dominic Ongwen*, Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, ICC-02/04-01/15-615 (the ‘*Ongwen Decision*’) para. 7; *Al Hassan Directions*, ICC-01/12-01/18-789-AnxA, para. 27.

⁴⁰ *Ongwen Directions*, ICC-02/04-01/15-497, paras 24-26; *Al Hassan Directions*, ICC-01/12-01/18-789-AnxA, paras 27-34; 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.

⁴¹ *Bemba et al. Appeals Decision*, ICC-01/05-01/13-2275-Red, paras, 583, 598. *See also Ongwen Decision*, ICC-02/04-01/15-615, para. 4.

the judgment itself for every item submitted.⁴² During trial, the Chamber will accordingly only recognise the participants' formal submission of evidence.

54. Nonetheless, and noting the parties' submissions in this regard,⁴³ the Presiding Judge recalls that the Court's legal framework contains a number of exclusionary rules, including procedural bars, obstacles and preconditions, which require the Chamber to rule on the admissibility of evidence prior to its assessment of evidence for the purposes of Article 74 of the Statute.⁴⁴
55. In this regard, the Presiding Judge notes, for instance, the procedural bars included in Article 69(7) of the Statute and Rule 63(3) of the Rules (evidence obtained in violation of the Statute or of internationally recognised human rights), as well as in Rule 71 of the Rules (evidence of the prior or subsequent sexual conduct of a victims or witness). The Presiding Judge further recalls the specific procedural mechanism under Rule 72 of the Rules (evidence in cases of sexual violence), which aims at determining whether, under which conditions, and for which purpose, the pertinent evidence may be admissible.⁴⁵
56. Moreover, the Presiding Judge recalls that '[e]vidence which is testimonial in nature is [...] inadmissible [...] when not elicited orally or when the conditions for the introduction of the prior recorded testimony specifically provided for in the Court's applicable law are not met'.⁴⁶ Chambers thus have to rule on applications under Rule 68 of the Rules prior to the assessment of evidence for the purposes of Article 74 of the Statute.
57. The Chamber will rule on the above issues in the course of the trial, as deemed appropriate in the specific circumstances.

⁴² See also *Bemba et al.* Appeals Decision, ICC-01/05-01/13-2275-Red, paras 583-598; *Ongwen* Decision, ICC-02/04-01/15-615, para. 13.

⁴³ Prosecution Submissions, ICC-01/14-01/18-476, paras 17-27; Yekatom Defence Submissions, ICC-01/14-01/18-519, paras 3-14; Ngaissona Defence Submissions, ICC-01/14-01/18-521-Red, paras 14-28.

⁴⁴ See also *Bemba et al.* Appeals Decision, ICC-01/05-01/13-2275-Red, paras 580, 587; *Bemba* Appeals Decision, ICC-01/05-01/08-1386, paras 52-53.

⁴⁵ See also *Bemba et al.* Appeals Decision, ICC-01/05-01/13-2275-Red, para. 581; *Bemba* Appeals Decision, ICC-01/05-01/08-1386, paras 52-53.

⁴⁶ *Bemba et al.* Appeals Decision, ICC-01/05-01/13-2275-Red, para. 581.

58. As regards applications under Rule 68(3) of the Rules, the Chamber will issue preliminary rulings ahead of the relevant in-court testimony. However, in principle, it will make its final determination pursuant to Rule 68(3) of the Rules only when the witness appears before the Chamber and attests to the accuracy of his or her prior recorded testimony sought to be introduced.
59. The Chamber retains its discretion to rule on any other admissibility related issues upfront, when appropriate, particularly if so required in order to ensure the fairness and expeditiousness of the trial.

(2) Applicable procedure for the submission of evidence

60. As held by the Appeals Chamber, ‘evidence is properly before a trial chamber for the purpose of its decision on the guilt or innocence of the accused when it has been submitted in accordance with the procedure adopted by the trial chamber and discussed at trial, unless it is ruled as irrelevant or inadmissible.’⁴⁷ Consequently, this Chamber adopts the following procedure.⁴⁸
61. 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.
62. Bar table applications shall contain (i) a short description of the item (and/or relevant portions therein); and (ii) a short description of the asserted relevance and probative value pursuant to Rule 64(1) of the Rules. Before submitting the application, the tendering participant shall inquire whether the opposing participant consents or objects and include this information in the table. The opposing party’s reasons do not need to be included in this table. This information should be provided to assist the Chamber later in its holistic assessment of the evidence during the deliberation of the judgment.

⁴⁷ *Bemba et al.* Appeals Decision, ICC-01/05-01/13-2275-Red, para. 599.

⁴⁸ *See also Ongwen* Directions, ICC-02/04-01/15-497, paras 27-31.

63. 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 no use of 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 mentioned in part (i) above, and pursuant to Rule 64 of the Rules, the other participants may 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. In accordance with the approach adopted, the issues raised by the participants will be considered during the deliberation of the judgment.
 - (v) The Registry will then reflect all formally submitted items in the e-court metadata.⁴⁹ 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

⁴⁹ 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.

items (i) to (iv) above are to be annexed to this filing, applying redactions as appropriate.

64. 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 or formally submitted, though it is clearly preferable to do both so there is no confusion as to their status.⁵⁰
65. 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.

N. Expert witnesses

66. All expert witnesses must be clearly identified on the Provisional and Final Witness List.⁵¹ 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.
67. Submitted expert reports must satisfy the procedural prerequisites of Rule 68 of the Rules unless no such objections to the submission are raised.⁵²

O. Protective measures

68. Any applications for in-court protective measures pursuant to Rules 87 and 88 of the Rules shall be made as soon as possible to allow the Chamber to receive submissions on the request and to allow the VWU to fulfil its mandate.

⁵⁰ See also 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; *Ongwen Directions*, ICC-02/04-01/15-497, para. 30.

⁵¹ Decision Setting the Commencement Date of the Trial, ICC-01/14-01/18-589, paras 4, 15.

⁵² See also 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. See also *Ongwen Directions*, ICC-02/04-01/15-497, para. 33.

69. The Chamber wishes to rule on these applications in advance of trial whenever possible. Advance rulings give more certainty to upcoming witnesses on what to expect during court proceedings, reduce the need for protective measures litigation 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. These advance rulings are without prejudice to their reconsideration at a later time, should any such reconsideration be warranted, in particular in light of further information provided by the VWU.
70. Noting that the Prosecution's Final Witness List is due on 9 November 2020,⁵³ the Chamber sets the deadline for applications pursuant to Rules 87 and 88 of the Rules to **7 December 2020**.

P. Transcripts

(1) Public redacted versions of transcripts⁵⁴

71. The Registry shall make public the redacted version of the transcripts within two days of the notification of the edited confidential version. This version will exclude the private and/or closed sessions, as well as the passages for which the Chamber ordered redactions to be applied.
72. Thereafter, the calling participant shall review the public redacted version of the transcript and propose a lesser redacted version within 21 days of notification by the Registry.⁵⁵ 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.

⁵³ Decision Setting the Commencement Date of the Trial, ICC-01/14-01/18-589, p. 10.

⁵⁴ See also *Ongwen* Directions, ICC-02/04-01/15-497, para. 37.

⁵⁵ When the English and French versions of a transcript are notified on different days, the latter of the two notification dates triggers this timeline.

(2) Corrections⁵⁶

73. 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.⁵⁷ 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.

Q. Email decisions

74. The Presiding Judge is mindful of the principle of publicity as set forth in Articles 64(7) and 67(1) of the Statute.
75. It is noted that certain decisions have been, and will be issued by way of email to expedite decisions on minor procedural matters or in order to react to urgent circumstances. In order to ensure that the principle of fairness is respected, these decisions are typically furnished to the participants and subsequently placed on the record by way of reference in the Chamber's decisions.
76. In order to further advance the principle of publicity in the future, the Presiding Judge directs the Registry to file all email decisions on the case record in quarterly reports (the 'Report(s) on Email Decisions'), starting on **15 September 2020**.⁵⁸ When a decision concludes a chain of emails, these emails shall also be filed in the record of the case.
77. The Registry is instructed to apply the following redactions: (i) names of Chambers staff members, where applicable; (ii) names of Registry staff members, if deemed necessary by the Registry; and (iii) any personal email

⁵⁶ See also *Ongwen* Directions, ICC-02/04-01/15-497, para. 38.

⁵⁷ When the English and French versions of a transcript are notified on different days, the latter of the two notification dates triggers this timeline.

⁵⁸ The Presiding Judge clarifies that emails relating to the submission of evidence (*see* paragraph 63(v) above) should not be part of the Report(s) on Email Decisions.

address or other private or personal information. The Registry shall consult the participants on the redactions applied. In case of disagreement, the Chamber will rule.

78. The participants are instructed to frame their email requests in a way that makes their publication possible. In exceptional circumstances, when emails cannot be made public at all, the requesting participant shall indicate this in the email.
79. The Chamber will furnish the email decisions issued up to this day to the Registry in due course. Going forward, the Chamber will copy the Registry in any email decision to be published.

FOR THESE REASONS, THE PRESIDING JUDGE HEREBY

ADOPTS the above directions concerning the conduct of the proceedings.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt
Presiding Judge

Dated 26 August 2020

At The Hague, The Netherlands