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Pénale
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**International
Criminal
Court**

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Date: 7 April 2015

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Document

Joint submissions on the conduct of proceedings

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. On 12 March 2015, Trial Chamber VI (the “Chamber”) issued its “Order requesting submissions on the conduct of proceedings pursuant to Rule 140 of the Rules and on modalities of victims’ participation at trial”,¹ instructing the parties, the Legal Representatives of Victims and the Registry to present submissions on several issues by 7 April 2015.² The Chamber also requested to be informed by 25 March 2015 should the parties, the Legal Representatives of Victims and the Registry intend to raise any additional issues in their submissions.³

2. On 25 March 2015, the Prosecution informed the Chamber that it intends to raise three additional issues in its submissions on the conduct of the proceedings, namely: the procedure to introduce video evidence at trial; the timing and procedure of a “no case to answer” motion; and the scope of an unsworn statement by the accused during trial.⁴ The same day, the Defence and the Legal Representatives of Victims informed the Chamber that they do not intend to raise additional issues in their submissions.⁵

3. On 30 March 2015, the Prosecution informed the Chamber that it intends to raise an additional issue in its submissions on the conduct of the proceedings, namely: the scope and timing of disclosure by the Defence.⁶

4. In accordance with the Chamber’s instructions, the Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Child soldiers (the “Legal Representatives”) hereby present these joint

¹ See the “Order requesting submissions on the conduct of proceedings pursuant to Rule 140 of the Rules and on modalities of victims’ participation at trial” (Trial Chamber VI), No. ICC-01/04-02/06-507, 12 March 2015.

² *Idem*, p. 10.

³ *Ibid.*, para. 19.

⁴ See the email sent by Ms Nicole Samson on 25 March 2015 at 4.22 pm.

⁵ See the email sent by Ms Margaux Portier on 25 March 2015 at 4.10 pm and the email sent by Ms Sarah Pellet and Mr Dmytro Suprun on 25 March 2015 at 5.04 pm.

⁶ See the email sent by Ms Nicole Samson on 30 March 2015 at 9.49 am.

submissions on the issues listed in the Order. The Legal Representatives reserve their right to present, at a later stage, observations in response to the Prosecution's submissions on the four additional issues it intends to raise in its submissions on the conduct of the proceedings.

II. JOINT SUBMISSIONS

(1) Opening and Closing Statements by the Legal Representatives

5. The right for legal representatives of victims to make opening and closing statements⁷ originates plainly from the legal texts of the Court and was upheld, on a constant basis, by the various chambers of the Court, both at the pre-trial⁸ and at the trial stages.⁹ In particular, rule 89(1) of the Rules of Procedure and Evidence provides

⁷ See *inter alia*, the "Ordonnance relative aux modalités de présentation des conclusions orales" (Trial Chamber II), No. ICC-01/04-01/07-3274, 20 April 2012, paras. 4-12.

⁸ See *inter alia*, the "Corrigendum to the Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-384, 6 February 2013, para. 51; the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-01/11-249, 5 August 2011, para. 89; the "Fourth Decision on Victims' Participation" (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-320, 12 December 2008, paras. 101-108; 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, para. 144 and the "Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing" (Pre-Trial Chamber I), No. ICC-01/04-01/06-462-tEN, 22 September 2006, pp. 6-7. Finally, in a different context, Pre-Trial Chamber II even envisaged "*participation (at least) in the form of 'opening and closing statements' [that] can be granted to a victim whether or not that victim is assisted by a Legal Representative.*" See the "Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/05-134, 1 February 2007, paras 1 and 11.

⁹ A good illustration of this practice can be found in the jurisprudence of Trial Chamber III, which even decided to grant the legal representative of victims' applicants, whose status had not yet been decided for the purpose of trial, the right to make opening statements, in order not to prejudice these individuals whom may later be granted participating status. See the "Decision on the legal representation of victim applicants at trial" (Trial Chamber III), No. ICC-01/05-01/08-1020, 19 November 2010, paras. 22-23. See also the "Corrigendum to the Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings" (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 30 June 2010, para. 27; the "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, para. 68 and p. 44. The jurisprudence developed in the Kenyan cases also provides a good illustration: in defining which stages of the proceedings could constitute "critical junctures" involving victims interests at which the LRV may make representations in person significant to his representation of the victims, the non-exhaustive list drawn by the Chamber included the opening statements and the closing statements.

that “the Chamber shall then specify the proceedings and manner in which [victims’] participation is considered appropriate, which may include making opening and closing statements.” Trial Chamber I in the *Lubanga* case, considered in this regard “that Rule 89(1) of the Rules is clear in its effect when it provides that victims’ participation may include opening and closing statements, particularly given this is not inconsistent with any other part of the Rome Statute framework.”¹⁰

6. With regard to the length of opening statements in particular,¹¹ Trial Chamber II in the *Katanga and Ngudjolo Chui* case granted 40 minutes to the two legal representatives of victims who had to divide it equally amongst themselves.¹² Trial Chamber III in the *Bemba* case adopted Trial Chamber I’s approach¹³ and granted one hour to the two legal representatives of victims to be divided amongst them.¹⁴ In the Kenyan cases, Trial Chamber V also followed the approach of Trial Chambers I, II and III and authorised the legal representative of victims to make opening and

See the “Decision No. 2 on the Conduct of Trial Proceedings (General Directions)” (Trial Chamber V(a)), No. ICC-01/09-01/11-900, 3 September 2013, paras. 29 and 31. In the same vein, touching upon the presence of the accused in the courtroom, see also the “Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial” (Trial Chamber V(B)), No. ICC-01/09-02/11-830, Trial Chamber V(b) 18 October 2013, paras. 123-124.

¹⁰ See the “Decision on victims’ participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 117. See also the transcripts of the hearing held on 16 January 2009, Trial Chamber I, No. ICC-01/04-01/06-T-104-ENG ET WT, p. 61.

¹¹ See the “Order requesting submissions on the conduct of proceedings pursuant to Rule 140 of the Rules and on modalities of victims’ participation at trial”, *supra* note 1, para. 4.

¹² See the oral decision issued during the Status conference held on 3 November 2009, Trial Chamber II, No. ICC-01/04-01/07-T-76-Red-ENG CT2 WT, page 26, line 5 et seq. See also the “Decision on the Modalities of Victim Participation at Trial”, *supra* note 9, para. 68 and p. 44; the “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, 20 November 2009, p. 9. Regarding the closing statement, see *inter alia* the “Order on the timetable for closing submissions” (Trial Chamber I), No. ICC-01/04-01/06-2722, 12 April 2011, paras. 7–8; the “Ordonnance relative aux modalités de présentation des conclusions orales”, *supra* note 7, paras. 4-12; the “Order on the arrangements for the submissions of the written and oral closing statements (regulation 54 of the Regulations of the Court)” (Trial Chamber II), No. ICC-01/04-01/07-3218-tENG, 15 December 2011.

¹³ See the transcripts of the status conference held by Trial Chamber I on 16 January 2009, *supra* note 10, pp. 58-59.

¹⁴ See the “Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”, *supra* note 9, para. 27. See also the oral decision issued in the course of the hearing held on 21 October 2010, Trial Chamber III, No. ICC-01/05-01/08-T-30 ET WT, pp. 6-7; the “Decision on the legal representation of victim applicants at trial”, *supra* note 9, paras. 22-23.

closing statements at trial.¹⁵ In particular, in the *Ruto and Sang* case the legal representative was granted two hours to do so, on the same basis as the parties.¹⁶ Trial Chamber V went further and stated that it “*may invite individual victims [...] to present their views and concerns during opening and closing statements.*”¹⁷

7. Based on the practice of the Trial Chambers in other cases, the Legal Representatives respectfully request the Chamber to be each granted 30 minutes to make their opening statements. They underline the importance of the participation of victims during the first days of trial through opening statements even more so since the opening statements may be held in Bunia.¹⁸

8. The Legal Representatives inform the Chamber that they will not need to have recourse to private or closed session, and that they will not need special logistical or technical arrangements, nor special material for the purposes of their opening statements.¹⁹ The Legal Representatives further note that in accordance with the practice developed in other cases, parties and participants are usually directed to disclose, before the start of the trial, copies of the material they intend to rely on during their opening statements, unless said material is on the Prosecution’s list of evidence.²⁰ In addition, in accordance to said practice, parties and participants are

¹⁵ See the two “Decision on victims’ representation and participation” (Trial Chamber V), No. ICC-01/09-01/11-460 and No. ICC-01/09-02/11-498, 3 October 2012, respectively paras. 56, 73 and paras. 55 and 72.

¹⁶ See the “Decision on the Conduct of Trial Proceedings (General Directions)” (Trial Chamber V(a)), No. ICC-01/09-01/11-847-Corr, 9 August 2013, para. 4.

¹⁷ See the “Decision on victims’ representation and participation”, (Trial Chamber V), No. ICC-01/09-01/11-460, para. 73.

¹⁸ See the “Recommendation to the Presidency on holding part of the trial in the State concerned” (Trial Chamber VI), No. ICC-01/04-02/06-526, 19 March 2015.

¹⁹ In this regard, the Legal Representatives refer in particular to the *Ruto and Sang* jurisprudence. See also the “Decision No. 2 on the Conduct of Trial Proceedings (General Directions)”, *supra* note 9, paras. 6 and 11.

²⁰ See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 16, para. 4. See also the transcripts of the status conference held by Trial Chamber I on 16 January 2009, *supra* note 10, pp. 45-47.

requested to make written objections, if any, in relation to said material, as ordered by the Chamber.²¹

9. In light of said jurisprudence, the Legal Representatives respectfully submit that they should benefit from said disclosure and from the possibility to make objections, if any.

10. Finally, the Legal Representatives note that in accordance with the practice of the Trial Chambers in other cases, opening statements are presented first by the Prosecution, followed by the legal representatives of victims and then by the Defence. They submit that there is no need to depart from said practice in the present case.

(2) Issues related to the Prosecution's case

a) Observations as to how long in advance the Prosecution should indicate the next witnesses it intends to call

11. In the *Katanga and Ngudjolo Chui* case,²² Trial Chamber II indicated that “*each party presenting evidence shall inform the Chamber, the other parties and the participants of the exact order of witnesses due to testify and the scheduled date of their appearance at trial. This schedule shall be updated at the end of each week and provide the exact planning for the coming two weeks.*”²³ In the *Ruto and Sang* case, Trial Chamber V(a) decided that after the commencement of evidence of the first witness at trial, the Prosecution shall provide by email addressed to the Chamber regular witness schedules, on a monthly basis.²⁴

²¹ See the “Decision No. 2 on the Conduct of Trial Proceedings (General Directions)”, *supra* note 9, para. 11. See also the transcripts of the status conference held by Trial Chamber I on 16 January 2009, *idem*, pp. 45-47.

²² See the “Decision on the Modalities of Victim Participation at Trial”, *supra* note 9, p. 45.

²³ See the “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, *supra* note 12, para. 8, page 10.

²⁴ See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 16, para. 12.

12. The Legal Representatives underline that witness schedule is fundamental for the efficient preparation of possible questioning of witnesses and that it ought to be communicated sufficiently in advance to allow such preparation. In light of the jurisprudence of the Court, the Legal Representatives submit that the Prosecution should therefore indicate the next witnesses it intends to call as soon as possible, and at the latest two weeks in advance. In any event, they request that such a notification is effected simultaneously to the Chamber, the Defence and the Legal Representatives.

b) Observations as to the procedure to be adopted should self-incrimination issues arise (rule 74 of the Rules of Procedure and Evidence)

13. In light of the jurisprudence of the Court, the Legal Representatives note the existence of two distinct procedures for witnesses who may incriminate themselves during their testimony and who do – or do not – participate in the proceeding as victims.²⁵ Regarding the specific situation of individuals benefiting from the dual status of victim and witness, the Legal Representatives submit that the existing jurisprudence should be adopted in the present case, namely that the notification of the provisions of rule 74 of the Rules of Procedure and Evidence should be undertaken by their current lawyers, *i.e.* the legal representatives themselves.²⁶ For all other witnesses, a suitable qualified lawyer, familiar with the provisions of the legal texts of the Court and the operation of the relevant criminal national law shall be made available by the Registry.

²⁵ In the *Ruto and Sang* case, the Trial Chamber indeed determined a specific procedure for independent legal advice provided from a qualified lawyer to witnesses who do not participate in the proceeding as victims and who may incriminate themselves during their testimony. See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 16, para. 29.

²⁶ See the oral decision issued by Trial Chamber I during the hearing held on 28 January 2009, No. ICC-01/04-01/06-T-110-Red3-ENG CT WT, pp. 2-3: “*The Bench will therefore assume that this advice has been given and that no difficulties are anticipated unless the matter is raised by the representative or the witness. The representative will be asked to certify at an appropriate stage that notification of the provisions of Rule 74 has been given and this should be done in writing.*”

c) Observations on the timing and manner to make requests for in-court protective measures (pursuant to rules 87 and 88 of the Rules of Procedure and Evidence)

14. In the *Lubanga* case, Trial Chamber I underlined that “pursuant to Rule 87 of the Rules, the responsibility for filing applications for protective measures lies primarily with the party calling a witness”, based on the information already in its possession and supplemented, as appropriate, by any relevant information provided by the Victims and Witnesses Unit (the “VWU”) or any further new information.²⁷ In this regard, as first determined by Trial Chamber I, the VWU is in charge during the familiarisation process to determine and implement any protective measures which may be necessary.²⁸ Moreover, with regard to dual status individuals, Trial Chamber I ordered their legal representative to request, by way of a written filing, any additional protective measures, at the latest eight days in advance, but acknowledged that in some circumstances it may have to be done at the last minute.²⁹ In any event, Trial Chamber I also highlighted that the non-calling party and the participants have responsibilities with regard to the identification, protection and respect of well-being and dignity of witnesses, and consequently, encouraged them to raise, at an early stage, any specific concerns they may have with the Chamber, especially concerning those who may be traumatised or vulnerable.³⁰

15. In the *Ruto and Sang* case, while recalling the general principle of publicity of the Court’s proceedings, Trial Chamber V(a) directed the parties to file on a

²⁷ See the “Decision on the prosecution’s oral request regarding applications for protective measures” (Trial Chamber I), No. ICC-01/04-01/06-1547, 9 December 2008, para. 6. For example of protective measures, see for instance the “Decision on the “Request for the conduct of the testimony of witness CAR-OTP-WWWW-0108 by video-link”” (Trial Chamber III), No. ICC-01/05-01/08-947-Red, 12 October 2010; Oral Decision issued by Trial Chamber III, Transcripts of the hearing held on 14 January 2011, No. ICC-01/05-01/08-T-47-Red2-ENG CT2 WT, pp. 45-46.

²⁸ See the “Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial” (Trial Chamber I), No. ICC-01/04-01/06-1049, 30 November 2007, paras. 49 and 53.

²⁹ See the transcripts of the hearing held by Trial Chamber I on 28 January 2009, *supra* note 26, pp. 14-17. Trial Chamber noted in particular that in exceptional circumstances where the legal representative cannot but request additional protective measures at the last minute, any such request could be done orally but should in any event be preceded by an email to the Chamber and to the parties, and followed by a written filing in due course.

³⁰ See the “Decision on various issues related to witnesses’ testimony during trial” (Trial Chamber I), No. ICC-01/04-01/06-1140, 29 January 2008, para. 36.

confidential basis (but not *ex parte*) applications for protective measures in such time as to enable the consultation with the VWU and responses to the application – pursuant to rule 87(1) and (2) of the Rules of Procedure and Evidence – as well as the Chamber's ruling on the application before the commencement of testimony of the witness concerned, and, in any event, no later than one month before the commencement of testimony (save in exceptional cases and notably when the applications are made by the witnesses themselves). The Chamber specified that the information the applying party seeks to withhold from the other party shall be provided in an *ex parte* annex to the application, if it contains information that could jeopardise an ongoing investigation.³¹

16. The Legal Representatives submit that any request for in-court protective measures should be made as soon as possible to allow the VWU to fulfil its mandate, and to permit the other party and the Legal Representatives to be given an opportunity to respond to such a request without jeopardising its implementation. The Legal Representatives also note that protective and special measures in accordance with rules 87 and 88 of the Rules of Procedure and Evidence could also become necessary on short notice before or in the course of the testimony or appearance of a victim/witness, and that the Chamber and the VWU shall be prepared to promptly react in those circumstances. Indeed, as described in the *Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses* adopted in the present case, vulnerability assessments are conducted by the VWU not only before travel to the location of testimony/appearance but also at this very location.³²

17. The Legal Representatives will endeavour to inform the Chamber as soon as possible, and if already feasible in their request to call witnesses or victims to present

³¹ See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 16, para. 30.

³² See the “Annex 1 to the Victims and Witnesses Unit’s submission of the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses pursuant to Order n° ICC-01/04-02/06-416”, No. ICC-01/04-02/06-445-AnxI, 5 February 2015.

their views and concerns in person, of the need of any such measures. In relation to individuals benefiting from dual status, in light of the Protocols adopted by the Chamber,³³ the Legal Representatives recall that the Prosecution should also verify whether it intends to make an application for protective or special measures under rules 87 and 88 of the Rules of Procedure and Evidence and communicate this to the legal representative.³⁴ Further, the calling party and the legal representative in case of individual benefiting from dual status will be provided by the VWU with a copy of the recommendation of the vulnerability assessment performed by said Unit.³⁵

(3) Scope, order and mode of questioning by the Legal Representatives

a) Observations on the scope of cross-examination

18. In the *Ruto and Sang* case, Trial Chamber V(a) allowed the cross-examiner to put questions to the witness which go sensibly beyond the scope of the examination-in-chief, falling in the latter's discretion to determine whether a given issue should or need not be explored with the witness (for instance on aspects of the cross-examiner's case). The Chamber however decided to proceed on a case-by-case basis in order to determine whether given lines of questioning are reasonable and whether the questions are appreciably relevant. The Chamber also clarified that such an approach of the cross-examination does not imply that the cross-examiners will be free to recall any witness whom they have not fully questioned on an earlier occasion. In the *Lubanga* case, Trial Chamber I also set the right for the parties and the

³³ See the "Decision adopting the Protocol on dual status witnesses and the Protocol on vulnerable witnesses" (Trial Chamber VI), No. ICC-01/04-02/06-464, 18 February 2015.

³⁴ See the "Victims and Witnesses Unit's submission of the proposed mechanisms for exchange of information on individuals enjoying dual status pursuant to Order n° ICC-01/04-02/06-416", No. ICC-01/04-02/06-430-Anx1, 23 January 2015. p. 2.

³⁵ See the "Corrigendum to Victims and Witnesses Unit's submission of the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses pursuant to Order n° ICC-01/0402/06-416", No. ICC-01/04-02/06-445-Corr-Anx, 2 March 2015.

legal representatives to put questions to the witnesses going beyond what was raised during any examination-in-chief, or the examination by the Chamber.³⁶

19. The Legal Representatives submit that said approach of Trial Chambers V(a) and I should apply in the present case, as much as the Chamber retains control over the lines of questioning in situations calling for its intervention.

20. In addition, the Legal Representatives submit that questions related to reparations should also be allowed during trial proceedings. In this regard, pursuant to regulation 56 of the Regulations of the Court, *“the Trial Chamber may hear the witness and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial.”* Trial Chamber II for instance decided that it may consider exercising its discretion pursuant to said regulation to hear witnesses and examine evidence.³⁷ Trial Chamber I and III similarly decided that they *“may allow such evidence to be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination.”*³⁸

21. The Legal Representatives submit that the implementation of regulation 56 of the Regulations of the Court at trial would favour the expeditious conduct of the proceedings for the benefice of all parties and participants. Further, it would also prevent – or at least limit instances of – recalling witnesses at a later stage, which would notably ensure that the Court avoids re-traumatisation of the witnesses

³⁶ See *inter alia*, the transcripts of the hearings held on 4 and 5 March 2010, Trial Chamber I, No. ICC-01/04-01/06-T-253-Red2-ENG CT WT, pp. 3 *et seq* and No. ICC-01/04-01/06-T-254-Red3-ENG CT WT, pp 70 *et seq*. See also the “Decision on various issues related to witnesses' testimony during trial”, *supra* note 30, paras. 32-33 and the oral decision of Trial Chamber I, No. ICC-01/04-01/06-T-107-ENG, 26 January 2009, pp. 72-73.

³⁷ See the “Decision on the Modalities of Victim Participation at Trial”, *supra* note 9, para. 60.

³⁸ See the “Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”, *supra* note 9, para 28 and the “Decision on victims' participation”, *supra* note 10, paras. 119-122.

concerned.³⁹ Should the Legal Representatives be authorised to put such questions to witnesses at trial, they underline that in any event the Chamber retains control on the questions asked and the parties always can object questions should they deem it necessary.

22. With regard to the questioning order, and in light of the existing jurisprudence, the Legal Representatives submit that they should be authorised to question witnesses called by the Prosecution after the latter has finished its examination-in-chief and before the Defence.⁴⁰

(b) Observations on the existence of an obligation for the cross-examining party to confront a witness with all matters then known pertaining to the witness' credibility upon which that party wish to rely

23. In the *Ruto and Sang* case, Trial Chamber V(a) underlined the need to explore with witnesses during cross-examination all issues relating to their credibility, as a basic rule of fairness should the cross-examiner be inclined to make an issue out of them later in the case.⁴¹ Trial Chamber I also underlined that “*parties are under an obligation to put such part of their case as is relevant to the testimony of a witness, inter alia, to avoid recalling witnesses unnecessarily.*”⁴²

24. The Legal Representatives submit that said approach should be applied in the present case, in as much as the cross-examiner is already aware of all relevant information in this regard. Should this not be the case, the Chamber, or the party or

³⁹ See the “Decision on victims' participation”, *supra* note 10, para. 120.

⁴⁰ See *inter alia*, the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 16, para. 16.

⁴¹ See the “Decision No. 2 on the Conduct of Trial Proceedings (General Directions)” (Trial Chamber V(a)), *supra* note 9, paras. 19 and 20. See also the Oral Decision issued by Trial Chamber III in the course of the hearing held on 26 January 2011, No. ICC-01/05-01/08-T-54-Red2-ENG CT WT, pp. 21-23.

⁴² See the “Decision on various issues related to witnesses' testimony during trial”, *supra* note 30, para. 32.

participant concerned should be allowed, in the interests of the establishment of the truth, to recall some witnesses.⁴³

(4) Procedures related to documentary evidence

(a) Observations on the use of material during questioning

25. In light of the disparate Court's jurisprudence existing in this regard to date,⁴⁴ the Legal Representatives wish to draw the attention of the Chamber on the line of reasoning underpinning any such procedure: "[i]n order to allow the opposing party sufficient time to prepare itself for cross-examination, the list of documents shall be communicated well in advance of the day during which the witness is scheduled to start giving his or her testimony".⁴⁵

26. The Legal Representatives consequently submit that notification of material to be used during questioning should be done at least seven days in advance by the parties and participants.⁴⁶ The Legal Representatives submit that a shorter time-line would encroach on their and the parties' ability to prepare meaningfully for questioning.⁴⁷ The Legal Representatives note that their timely access to the material

⁴³ See *inter alia*, the "Redacted version of "'Decision on 'Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169' (ICC-01/05-01/08-3138-Conf-Red) and 'Defence Urgent Submissions on the 5 August Letter (ICC-01/05-01/08-3139-Conf)" of 2 October 2014" (Trial Chamber III), No. ICC-01/05-01/08-3154-Red, 10 October 2014, paras. 25-27: "*The Chamber notes that 'fresh' evidence includes not only evidence which was not available at the closing of the case but also evidence that was previously available but the importance of which was revealed only in light of new evidence. In determining whether to reopen a case to allow for the admission of 'fresh' evidence, the Chamber must first consider whether, with reasonable diligence, the evidence could have been identified and presented prior to the dosing of evidence. Further, in determining whether there are sufficient grounds to recall a witness, the Chamber shall consider whether good cause to recall the witness has been demonstrated. [...]*"

⁴⁴ See the "Directions for the conduct of the proceedings and testimony in accordance with rule 140", *supra* note 12, paras. 103 and 108. See also the "Decision on the Conduct of Trial Proceedings (General Directions)", *supra* note 16, 22-25.

⁴⁵ See the "Directions for the conduct of the proceedings and testimony in accordance with rule 140", *supra* note 12, para. 103.

⁴⁶ See the "Decision on various issues related to witnesses' testimony during trial", *supra* note 30, para. 34.

⁴⁷ Trial Chamber II stressed the importance of allowing the Legal Representatives and the parties to prepare meaningfully for questioning. See the "Directions for the conduct of the proceedings and testimony in accordance with rule 140", *supra* note 12, para. 8.

to be used during questioning has been recognised throughout the cases⁴⁸ and is of paramount importance for their ability to submit their request to question the concerned witnesses. All relevant documents should be transmitted to the Legal Representatives in full, and in any case in the same form provided to the Defence.⁴⁹

(b) Observations on the procedure for admission of material tendered through a witness as evidence

27. In the *Ruto and Sang* case, Trial Chamber V(a) indicated that “each item of evidence shall, in principle, be introduced by the tendering party through a witness, whose testimony has a connection with that item of evidence.”⁵⁰ The Chamber underlined that objections by other parties or participant, if any, shall be filed no later than two days before the examination, or made orally where appropriate.⁵¹ In the *Bemba* case, Trial Chamber III determined the following procedure: “[w]hen submitting their respective lists of documents intended to be used during the questioning of each witness [...] the parties shall identify the specific material intended to be submitted as evidence during the questioning of a witness. Any objections as regards the relevance or admissibility of the material that the parties identify as intended to be submitted as evidence shall be provided with detailed reasons for preparation purposes by way of an email sent to the opposing party and participants and copied to the Chamber as soon as practicable and before the hearing at which the document is to be submitted as evidence. The objection shall then be formally raised in court at the time the material is submitted to the Chamber. [...] Whenever the parties do not raise an objection as regards the relevance or admissibility of an item which is submitted, it will be admitted into evidence and receive an EVD-T number, following consideration by the Trial Chamber. [This procedure] does not preclude the parties from requesting the

⁴⁸ See also, *inter alia*, the oral Decision issued by Trial Chamber II in the course of the hearing held on 27 November 2009, No. ICC-01/04-01/07-T-86-Red-ENG WT, pp. 1-2.

⁴⁹ See the oral Decision issued by Trial Chamber I in the course of the hearing held on 22 January 2009, No. ICC-01/04-01/06-T-105-ENG ET WT, p. 43, line 1 to p. 44, line 18. See also the “Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”, *supra* note 9, para. 49.

⁵⁰ See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 16, para. 26.

⁵¹ *Idem*, paras. 23 and 26.

*submission as evidence of any item, listed or not, either in the course of the questioning of a witness or at a later stage during the proceedings through a motion.”*⁵²

28. Concerning evidence heard before the Pre-Trial Chamber in particular, Trial Chamber I for instance decided that they *“cannot be introduced automatically into the trial process simply by virtue of having been included in the List of Evidence admitted by the Pre-Trial Chamber, but instead it must be introduced, if necessary, de novo. The parties (and where relevant, the participants) can agree convenient mechanisms for the introduction of undisputed evidence.”*⁵³

29. Moreover, in relation in particular to the introduction of prior recorded testimony in accordance with rule 68(b) of the Rules of Procedure and Evidence, Trial Chamber I instructed the initiating party to file an application to that effect, at least 21 days before the witness was scheduled to appear. The other party and the legal representative were given by the Chamber 10 days to raise any objections.⁵⁴ Trial Chamber II simply decided that *“[w]hen a party intends to submit as evidence the statement(s) of a witness called to testify, this intention and any subsequent objection should be made known in writing, pursuant to the conditions established [with regard to evidence tendered through a witness].”*⁵⁵

30. The Legal Representatives submit that the above-mentioned procedure established by the jurisprudence of the Court should be followed by the parties and participants, in addition to the following direction: *“[i]f lengthy documents are tendered,*

⁵² See “Order on the procedure relating to the submission of evidence” (Trial Chamber III), No. ICC-01/05-01/08-1470, 31 May 2011, paras. 7 *et seqq.*

⁵³ See the “Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted” (Trial Chamber I), No. ICC-01/04-01/06-1084, 13 December 2007, para. 8.

⁵⁴ See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 16, para. 28.

⁵⁵ See “Order on the procedure relating to the submission of evidence”, *supra* note 52, para. 10.

the party tendering it shall clearly identify which passages it wants to submit into evidence, and the entirety of the witnesses' statements does not need to be submitted."⁵⁶

31. Finally, concerning evidence to be presented by the Legal Representatives, as set out by Trial Chamber II for instance, "[i]f the evidence which the Legal Representatives wish to tender is closely linked to the testimony of a named witness, the application must be submitted in sufficient time prior to said witness's testimony to allow the Chamber and the parties to take proper note of the application's content."⁵⁷

(c) Observations on admission of other material as evidence in the case

32. The jurisprudence of the Court has established the possibility for the legal representatives to tender other material as evidence in the case "through the bar table".⁵⁸ In the *Ruto and Sang* case, similarly to the directions issued by Trial Chamber II,⁵⁹ the Trial Chamber established that the party tendering evidence

⁵⁶ See the "Partly Dissenting Opinion of Judge Kuniko Ozaki on the Order on procedure relating to the submission of evidence" (Trial Chamber III), No. ICC-01/05-01/08-1471, 31 May 2011.

⁵⁷ See the "Decision on the Modalities of Victim Participation at Trial", *supra* note 9, paras. 98-101.

⁵⁸ See the "Decision on the request by the legal representative of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 for admission of the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo as evidence" (Trial Chamber I), No. ICC-01/04-01/06-2135, 22 September 2009, paras. 18-35; the "Corrigendum to Decision on the legal representative's application for leave to tender into evidence material from the "bar table" and on the Prosecution's Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9)" (Trial Chamber I), No. ICC-01/04-01/06-2694-Corr, 9 March 2011, para. 12. See also the "Decision on the Modalities of Victim Participation at Trial", *supra* note 9, paras. 98-101; the "Directions for the conduct of the proceedings and testimony in accordance with rule 140", *supra* note 12, paras. 95-102. In the Decision on victims' representation and participation, Trial Chamber V recognised the possibility for the victims to present evidence and set out a procedure in this regard, without however distinguishing between the presentation of evidence through a witness or "through the Bar table". See the "Decision on victims' representation and participation" (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012, para. 76. In the *Bemba* case, Trial Chamber III did not expressly rule on this specific issue and tends to follow, in practice, the jurisprudence developed by Trial Chambers I and II. See the "Decision on the admission of material from the "bar table"" (Trial Chamber I), No. ICC-01/04-01/06-1981, 24 June 2009; the "Directions for the conduct of the proceedings and testimony in accordance with rule 140", *supra* note 12, paras. 98-102.

⁵⁹ See the "Directions for the conduct of the proceedings and testimony in accordance with rule 140", *supra* note 12, paras. 98-102. In the *Bemba* case, Trial Chamber III did not expressly rule on this specific issue and tends to follow, in practice, the jurisprudence developed by Trial Chambers I and II. See *supra* note 58.

without it being introduced by a witness “shall submit an application accompanied by a table, providing a short description of the content of each document, averment of its authenticity, an indication of the reason for not tendering the document through a witness (if that is the case), an index of the most relevant portions of the document, as well as a description of its relevance and intended probative value”.⁶⁰ The Chamber underlined that prior to submitting such an application, the tendering party shall seek the consent of the opposing party to tender the document through this method or an indication of the opposing party's objection together with the grounds for any such objection. Such applications shall be preferably filed before the commencement of trial.⁶¹ The Legal Representatives generally favour such a procedure.⁶²

33. When Legal Representatives wish to propose the presentation of documentary evidence, Trial Chamber II *inter alia* decided the following procedure: “[t]hey must make a written application to the Chamber showing how the documents they intend to present are relevant and how they may contribute to the determination of the truth. This application, along with the evidence they wish to present, must be notified to the parties and other participants for their observations.”⁶³ The Legal Representatives submit that said approach should apply in the present case.

⁶⁰ See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 16, para. 27. See also the “Decision on the Bar Table Motion of the Defence of Germain Katanga” (Trial Chamber II), No. ICC-01/04-01/07-3184, 21 October 2011, paras. 14-16.

⁶¹ See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 16, para. 27.

⁶² In addition, the Legal Representatives refer *inter alia* to the jurisprudence of Trial Chamber I regarding the approach followed by Trial Chambers to the admissibility of documents tendered through the bar table. See the “Decision on the admission of material from the “bar table”, *supra* note 58, para. 33.

⁶³ See the “Decision on the Modalities of Victim Participation at Trial”, *supra* note 9, para. 99.

(5) Other modalities of victims' participation at trial⁶⁴

(a) Attendance and participation of the Legal Representatives at public, private, closed and ex parte hearings

34. The right of legal representatives to attend hearings stems directly from rule 91(2) of the Rules of Procedure and Evidence. It is further supported by a constant jurisprudence developed by the Trial Chambers. In the *Lubanga* case, Trial Chamber I held that: “[t]he Trial Chamber may, proprio motu or upon request by any of the parties or participants, permit victims to participate in closed and ex parte hearings, depending on the circumstances. Whether or not participation by victims could exceptionally encompass hearings that are ex parte, victims only (e.g. when considering protective measures) is an issue that can only be resolved by reference to the facts of the particular application.”⁶⁵ The Trial Chambers in the Kenyan cases and Trial Chamber II in the *Katanga and Ngudjolo Chui* case ruled that the legal representatives shall be entitled to attend public hearings, as well as closed and private sessions. Attendance to *ex parte* hearings was determined by the Chamber on a case-by-case basis.⁶⁶

35. In light of the practice before the Court allowing the legal representatives to attend private and closed session,⁶⁷ the Legal Representatives submit that their ability to attend public, private and closed sessions goes to the heart of their mandate in order to be in a position to follow the proceedings and efficiently represent their

⁶⁴ The issue regarding the possibility for Legal Representatives to make opening and closing statements is addressed *supra*, Part II (1).

⁶⁵ See the “Decision on victims' participation”, *supra* note 10, para. 113. See also the “Decision on the defence observations regarding the right of the legal representatives of victims to question defence witnesses and on the notion of personal interest -and- Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses” (Trial Chamber I), No. ICC-01/04-01/06-2340, 11 March 2010. Trial Chamber III followed the same approach. See the “Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”, *supra* note 9, paras. 27 and 40.

⁶⁶ See the “Decision on victims' representation and participation”, *supra* note 58, para. 70. See also the “Decision on the Modalities of Victim Participation at Trial”, *supra* note 9, paras. 69-71.

⁶⁷ See *supra* notes 65 and 66.

clients.⁶⁸ In this regard, the Legal Representatives wish to underline that they are bound by the Code of Professional Conduct of Counsel, as much as counsels from the Defence and from the Prosecution.

36. Finally, the Legal Representatives wish to draw the attention of the Chamber on the good practices adopted by Trial Chamber II and III in order to minimise non-public hearings, which could be implemented in the present case: *“the Chamber calls upon all parties and participants not to request that the Court go into private session unless there is a serious and established risk and, insofar as possible, to endeavour to have testimony given in public. [...] The Chamber would also call upon all parties and participants to ensure [...] to bring together all the identifying questions and to ask these identifying questions at the beginning of the testimony [...]. These are all protected items of information that require the Court to go into private session.”*⁶⁹

(b) Timing and manner for the Legal Representatives to seek authorisation for individual victims to present their views and concerns to the Chamber

37. Regarding the procedure by which the Legal Representatives should seek authorisation for individual victims to present their views and concerns in person before the Chamber, the Legal Representatives wish to underline the important distinction drawn in the jurisprudence of the Court to date between the right for

⁶⁸ In this regard, Trial Chamber I held that “[t]he presence of the representatives of participating victims during the evidence of defence witnesses when the court is sitting in closed session is an essential part of their right to participate in the proceedings, unless it is demonstrated that this will be inconsistent with the rights of the accused and a fair and expeditious trial. [...] The absence of the legal representatives from the Chamber could markedly undermine their ability to discharge their professional obligations to their clients because they would be unaware of potentially important evidence given during closed-session hearings.” See the “Decision on the defence observations regarding the right of the legal representatives of victims to question defence witnesses and on the notion of personal interest -and- Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses”, *supra* note 65, para. 39.

⁶⁹ See the Transcript of the hearing held on 20 September 2010, Trial Chamber II, No. ICC-01/04-01/07-T-189-ENG, page 13, line 1 to page 16, line 17. These good practices were also adopted by Trial Chamber III. See the “Decision on Directions for the Conduct of the Proceedings” (Trial Chamber III), No. ICC-01/05-01/08-1023, 19 November 2010, paras. 23-25.

legal representatives to call victims to give evidence and their right to call victims to present their views and concerns.⁷⁰

38. In the *Lubanga* case, Trial Chamber I recognised “*the unequivocal statutory right for victims to present their views and concerns in person when their personal interests are affected [...] if the Court considers that course appropriate [and in as much as it does not] undermine the integrity of these criminal proceedings.*”⁷¹ Trial Chamber I also drew a distinction between the process of victims expressing their views and concerns and the process of victims giving evidence: “*The former is, in essence, the equivalent of presenting submissions, and although any views and concerns of the victims may assist the Chamber in its approach to the evidence in the case, these statements by victims (made personally or advanced by their legal representatives) will not form part of the trial evidence. In order for participating victims to contribute to the evidence in the trial, it is necessary for them to give evidence under oath from the witness box. There is, therefore, a critical distinction between these two possible means of placing material before the Chamber.*”⁷²

39. However, it is in the *Bemba* case that for the first time the legal representatives were allowed to both apply for some of their clients to present their views and concerns in person before the Chamber (or via video-link) and to call some victims to give evidence at trial.⁷³ In the Kenyan cases, the same rights were also granted to the legal representative.⁷⁴ Trial Chamber III emphasised that the “*threshold to grant applications by victims to give evidence is significantly higher than the threshold applicable to*

⁷⁰ See the “Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08” (Trial Chamber III), No. ICC-01/05-01/08-2220, 24 May 2012, paras. 7-8 and paras. 9-11.

⁷¹ See the “Order issuing public redacted version of the “Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial”” (Trial Chamber I), No. ICC-01/04-01/06-2032-Anx, 9 July 2009, paras. 17, 25-27.

⁷² *Idem*, paras. 17, 25-27. See also the “Decision on the Modalities of Victim Participation at Trial”, *supra* note 9, paras. 69-71.

⁷³ See the “Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims” (Trial Chamber III), No. ICC-01/05-01/08-2138, 22 February 2012, para. 20.

⁷⁴ See the two “Decision on victims’ representation and participation”, *supra* note 15, respectively paras. 55-57 and paras. 56-58. See also the “Decision on the participation of victims in the trial proceedings” (Trial Chamber IV), No. ICC-02/05-03/09-545, 20 March 2014, paras. 22-41.

applications by victims to express their views and concerns in person. For this reason, victims who fail to reach the threshold to be authorised to give evidence may still be permitted to express their views and concerns in person."⁷⁵ The Chamber noted that victims presenting their views and concerns are presenting unsworn statements to the Chamber.⁷⁶

40. In this regard, the Legal Representatives wish to draw the attention of the Chamber on the established jurisprudence to date and on the possibility to diverge from it on one particular aspect: that victims will relinquish their identity when appearing to give evidence is in perfect line with the general rules and proceedings applying to all the parties and participants at the trial stage.⁷⁷ However, the Legal Representatives submit that victims who will be granted the right to make unsworn statements before the Chamber, presenting views and concerns, should not automatically be forced to relinquish their anonymity but instead, that the matter should be considered on a case-by-case basis, depending on the security situation of the victims concerned.

41. Trial Chamber II also underlined the need for the victims chosen to be best-placed to give evidence or to present views and concerns that will not be cumulative with what has already been presented in the case.⁷⁸ The procedure, as established to date in other cases, corresponds essentially to the filing by the legal representative of

⁷⁵ See the "Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims", *supra* note 73, para. 20.

⁷⁶ See the "Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08", *supra* note 70.

⁷⁷ See the "Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims" (Trial Chamber III), No. ICC-01/05-01/08-2027, 21 December 2011, paras. 12-15, and 19. The Legal Representatives underline the appropriateness of the timing set by Trial Chamber III for the legal representative to transmit the identities of the victims concerned, and corresponding to the moment when the Chamber will have granted the victims permission to testify, not before.

⁷⁸ *Idem*, paras. 12-15

a written request towards the end of the Prosecution case,⁷⁹ explaining why the individuals concerned are considered to be best placed to reflect the interests of the victims, the relevance of the victim's evidence/views and concerns to the charges, how the victim's evidence/views and concerns would assist in the Chamber's determination of the truth in this case. Such a request could append a detailed summary/statement of the aspects that will be eventually addressed by each victim, in one of the working languages of the Court.⁸⁰ For the presentation of views and concerns as unsworn statements, Trial Chamber III envisaged the possibility for victims to either present their views in person or in writing and requested the legal representatives to also indicate the estimated time needed in their request, and whether they need to be afforded in-court protective measures. The parties were afforded the right to present observations on said request before the Chamber rule on it.⁸¹

42. Concerning victims presenting their views and concerns via unsworn statements, Trial Chamber III decided that the legal representatives would guide them through their presentation by only facilitating it, eventually with a few questions, and that the victims will not be questioned by the parties but by the Judges eventually.⁸² The *Bemba* case is the only one in which such a participation by victims happened to date.⁸³

⁷⁹ See the "Order regarding applications by victims to present their views and concerns or to present evidence" (Trial Chamber III), No. ICC-01/05-01/08-1935, 21 November 2011, para. 3. See also the "Decision on Directions for the Conduct of the Proceedings", *supra* note 69, para. 5.

⁸⁰ See the "Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims", *supra* note 77, paras. 12-15.

⁸¹ This procedure has applied throughout the case for both victims' requests to present their view and concerns or evidence. In particular in the *Lubanga, Katanga and Ngudjolo Chui and Bemba* cases, some victims were allowed to be called by the legal representatives to give evidence or to present views and concerns. In these circumstances, victims were giving evidence under oath. In addition to the summary/statement provided by the Legal Representatives with his/her request, the victims' application forms (in full or with necessary redactions) were also filed confidentially. See the "Order issuing public redacted version of the "Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial"", *supra* note 71, paras. 26, 28, 33, 39 and 44. See also the "Directions for the conduct of the proceedings and testimony in accordance with rule 140", *supra* note 12, paras. 20-32.

⁸² See the "Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08", *supra* note 70. See also the "Order on the implementation of Decision on the supplemented

43. The Legal Representatives submit that, when appropriate, victims should be allowed to give evidence or to present views and concerns in person rather than in writing. They further suggest that the Chamber establishes a disclosure calendar, if need be, in light of their requests.⁸⁴

44. In addition, the Legal Representatives draw the attention of the Chamber on the fact that the jurisprudence of the Court recognised the right of legal representatives to call witnesses – other than victims. In this regard, Trial Chamber II underlined that witnesses called by the legal representatives of victims shall be able to provide important information that was not hitherto included in the evidence presented by the parties, and shall make a genuine contribution to the determination of the truth.⁸⁵ Trial Chamber IV decided upon the following procedure for application formulated by the legal representative to call a witness: the chamber will consider whether the testimony “(i) affects the victim’s personal interests; (ii) is relevant to the issues of the case; (iii) contributes to the determination of the truth; and (iv) whether the testimony would be consistent with the rights of the accused, in particular the right to adequate time and facilities to prepare a defence.”⁸⁶ The Chamber further directed the legal representative to file at the earliest opportunity a schedule of the anticipated testimonies, detailing their likely lengths and the order in which they may appear.⁸⁷ The Legal Representatives favour this approach which undoubtedly would contribute to the determination of the truth.

applications by the legal representatives of victims to present evidence and the views and concerns of victims”, *supra* note 73.

⁸³ Trial Chamber V envisaged it in the Kenyan case, but no specific decision has been issued so far detailing the procedure that the legal representative may follow to call victims to share their views and concerns or to present evidence. See the two “Decision on victims’ representation and participation”, *supra* note 15.

⁸⁴ See *supra* note 79.

⁸⁵ See the “Decision on the Modalities of Victim Participation at Trial”, *supra* note 9, paras. 94-97. Trial Chamber I appointed an expert on names and other social conventions in the DRC following the Legal Representatives’ submissions in this regard. See the “Instructions to the Court’s expert on names and other social conventions in the Democratic Republic of Congo” (Trial Chamber I), No. ICC-01/04-01/06-1934, 5 June 2009, para. 12 and the “Analyse relative à l’attribution et aux composantes du nom en République démocratique du Congo”, No. ICC-01/04-01/06-1793, 20 March 2009.

⁸⁶ See the “Decision on the participation of victims in the trial proceedings”, *supra* note 74, para. 25.

⁸⁷ *Idem*, para. 26.

(c) Procedure by which the Legal Representatives should seek authorisation in order to question witnesses or present evidence at trial

45. Regarding the procedure by which the legal representatives of victims should seek authorisation in order to question witnesses, the Legal Representatives recall the terms of rule 91(3)(a) of the Rules of Procedure and Evidence and the way in which the jurisprudence of the various Chambers of the Court have interpreted it.

46. Indeed, the Trial Chambers have instructed the legal representatives, on a constant basis, to submit a discrete written application, notified to the parties, at least seven days before the witness is scheduled to testify.⁸⁸ As emphasised by Trial Chamber III, the legal representatives *“have a unique role, separate from that of the parties, [and] their participation [through questions put to the witnesses] can assist the Chamber in its determination of the truth”*.⁸⁹

47. Regarding issues a legal representative could address when questioning a witness, the Legal Representatives submit that they should be requested to provide in their request to the Chamber an outline of the areas of examination identified as concerning the personal interests of the victims, together with the provision of documents proposed to be used during the examination, or references thereto, where

⁸⁸ Trial Chamber I and III noted that *“it may be necessary for the representatives to delay submitting applications to ask questions until 7 days before the relevant witness testifies, once the extent of the evidence to be given, and the issues, are clear.”* See the *“Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”*, *supra* note 9, paras. 37 and 102. See also the *“Decision on common legal representation of victims for the purpose of trial”* (Trial Chamber III), No. ICC-01/05-01/08-1005, 10 November 2010, para. 39. See the Transcripts of the hearing held by Trial Chamber I on 5 February 2009, No. ICC-01/04-01/06-T-119-Red4-ENG CT2 WT, p. 1. See also the *“Decision on the Conduct of Trial Proceedings (General Directions)”*, *supra* note 16, paras. 19 and 21: *“When the Legal Representative wishes to examine a witness, he is directed, as general rule, to apply to the Chamber, by means of filing, notified to the parties, seven days in advance. In the event of unexpected changes to the witness schedule or unanticipated issues raised during testimony, the seven-day period can be altered as necessary. The application of the Legal Representative should provide reasons for separate questioning apart from the questioning by the Prosecution and include an outline of areas for examination. Documents proposed to be used during the examination, or references thereto, where appropriate, should also be provided at this time, in accordance with the regular procedure for parties discussed below. After the examination-in-chief the parties will be given an opportunity to make oral submissions, without the witness being present, and the Chamber will issue an oral ruling on the application.”*

⁸⁹ See the *“Decision on Directions for the Conduct of the Proceedings”*, *supra* note 69, para. 17.

appropriate.⁹⁰ The Legal Representatives are aware of the jurisprudence developed by Trial Chamber III according to which the legal representatives were to file a list of specific questions to ask the witness.⁹¹ In light of the practice observed in said case, the Legal Representatives respectfully submit that identifying in advance a specific list of questions is not a realistic nor an effective option, in as much as precise questions will largely depend on the questions asked by the calling party and by the Chamber and on the answers provided by the witnesses themselves. The Legal Representatives consequently submit that in order to efficiently participate at trial, to adequately fulfil their mandate and to avoid duplicating questions, it is in the interest of the expeditiousness of the proceedings for them to submit areas of questions anticipated to touch upon the personal interests of the victims represented rather than specific list of questions. This corresponds to the dynamic process which characterises witness questioning.⁹² Trial Chamber I adopted said approach, underlining that *“in principle, the parties do not have an obligation to disclose their lines of questioning in advance, since the course a party takes will depend to a significant extent on the issues raised, and the answers given, during the evidence of the witness. However, the Trial Chamber appreciates that exceptions may be necessary, particularly in order to protect traumatised or vulnerable witnesses and in these circumstances the Trial Chamber may order the parties and participants to disclose in advance the questions or the topics they seek to cover during their questioning”*.⁹³

⁹⁰ See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 16, para. 19. The Chamber also specified that “[i]n the event of unexpected changes to the witness schedule or unanticipated issues raised during testimony, the seven-day period can be altered as necessary.”

⁹¹ See the “Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”, *supra* note 9, paragraph 102 h); the “Decision on common legal representation of victims for the purpose of trial”, *supra* note 88, paragraph 3 and the “Decision on Directions for the Conduct of the Proceedings”, *supra* note 69, para. 18.

⁹² See also the “Decision on various issues related to witnesses’ testimony during trial”, *supra* note 30, paras. 32-33: *“Since witness questioning is a dynamic process, in principle, the parties are not under a legal obligation to disclose their lines of questions in advance.”*

⁹³ *Idem*, para. 33.

48. Finally, the Legal Representatives submit that the right to question witnesses also includes the right to question experts or the accused, as clearly recognised by Trial Chambers I, II, III and V.⁹⁴

49. The Legal Representatives wish to underline again that their ability to seek the Chamber's authorisation to question witnesses is intimately linked to the reception, in a timely manner, of the list of witnesses and the order in which the Prosecution or the Defence are going to call them.⁹⁵

50. Turning to the introduction of evidence, the Legal Representatives refer to the constant jurisprudence of the Court and in particular to the terms used by Trial Chamber I according to which *"the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right [...] to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69(3) of the Statute. Rule 91(3) of the Rules enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant). The Rule does not limit this opportunity to the witnesses called by the parties. It follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth."*⁹⁶

51. The Legal Representatives note that based on the jurisprudence established in the *Lubanga* case by both Trial Chamber I and the Appeals Chamber,⁹⁷ Trial

⁹⁴ See the "Decision on victims' representation and participation", *supra* note 58, paras. 75-76 and the "Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings", *supra* note 9, para. 40.

⁹⁵ See *supra* paras. 11 and 12.

⁹⁶ 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. 98. See also the "Decision on victims' participation", *supra* note 10, para. 108 and the "Decision on the Modalities of Victim Participation at Trial", *supra* note 9, paras. 82-84.

⁹⁷ 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", *idem*, para. 104: *"With these safeguards in place, the Appeals Chamber does not consider that the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence*

Chamber V granted the legal representatives the right to submit a discrete application for the presentation of evidence, considering in particular that in accordance with the procedure put in place, it would determine pursuant to articles 64(6)(d) and 69(3) of the Rome Statute, “*whether the proposed evidence is relevant to the personal interests of victims, may contribute to the determination of the truth and whether it would be consistent with the rights of the accused and a fair and impartial trial*”.⁹⁸ In this regard, the Chamber specified that its decision would intervene after having granted the parties an opportunity to provide observations on such requests.⁹⁹

52. In the *Ruto and Sang* case, Trial Chamber V(a) indicated that the legal representative shall provide reasons for a separate presentation of evidence apart from the case presentation by the Prosecution¹⁰⁰ and if granted, such evidence shall be presented at the end of the Prosecution case.¹⁰¹ In the *Bemba* case, Trial Chamber III specified that the presentation of evidence by the legal representatives was to take place before the Defence began its presentation of evidence, if any.¹⁰² The Chamber also further detailed the procedure to be followed by the legal representative. Their written application ought to contain a description of the nature

is inconsistent with the onus of the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial.”

⁹⁸ See the “Decision on victims’ representation and participation”, *supra* note 58, para. 77.

⁹⁹ *Idem*.

¹⁰⁰ See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 16, paras. 19 and 21: “*If the Legal Representative seeks to present evidence, he shall provide reasons for a separate presentation of evidence apart from the case presentation by the Prosecution. If leave is granted for presentation, such evidence shall be presented at the end of the Prosecution case.*” See also the “Decision on the participation of victims in the trial proceedings”, *supra* note 74, paras. 22-41: “*The jurisprudence of the Appeals Chamber has confirmed the possibility for victims to “bring to the Trial Chamber evidence that the Trial Chamber may consider necessary for the determination of the truth”. The Appeals Chamber has held that the exercise of a Chamber’s discretionary power to request evidence is linked to the requirements of article 68(3) of the Statute such that the Chamber must be satisfied that the personal interests of the victim are affected: [...] It is only if the Trial Chamber is persuaded that the requirements of article 68(3) have been met, and, in particular, that it has been established that the personal interests of the victims are affected, that the Chamber may decide whether to exercise its discretionary powers under the second sentence of article 69(3) of the Statute “to request the submission of all evidence that it considers necessary for the determination of the truth”. [...] The CLR may bring evidence to the attention of the Chamber during the trial proceedings. The Chamber will make its determination on a case by case basis.*”

¹⁰¹ See the “Decision on the Conduct of Trial Proceedings (General Directions)”, *supra* note 16, para. 21.

¹⁰² See the “Order regarding applications by victims to present their views and concerns or to present evidence”, *supra* note 79, para. 3.

of the proposed evidence, the manner and estimated time needed to present it, the personal interests of victims concerned, its relevance, how it was supposed to assist the Chamber's determination of the truth, information regarding anonymity issues, the effect on the rights of the accused and the fairness of the trial, disclosure issues, and the protective measures to be requested.¹⁰³ The Chamber also specified that the Prosecution and the Defence were to be invited to file their observations on such applications within seven days of notification.¹⁰⁴ The Legal Representatives submit that said principles should apply in the present case.

(d) Scope and manner of questioning by the Legal Representatives

53. Regarding the scope and mode of questioning by the Legal Representatives,¹⁰⁵ the latter submit that the following principles adopted to date by the Trial Chambers should apply in the present case: there is a presumption in favour of a neutral form of questioning which may be displaced in favour of a more closed form of questioning, along with the use of leading or challenging questions, depending on the issues raised and the interests affected; the questions should not be repetitive or duplicative of questions already asked by the calling party or only if the witness did not really give a full answer; questioning should cover matters related to the victims' interests, that have the purpose of clarifying the witness' evidence and to elicit additional facts – notwithstanding their relevance to the guilt or innocence of the accused;¹⁰⁶ questions can relate to reparations if the Chamber were to decide that regulation 56 of the Regulations of the Court should apply; questions could go beyond matters in controversy between the parties and pertain to the credibility and/or accuracy of the witness' testimony if the Legal Representatives demonstrate this line of questioning is directly relevant to the interests of victims they represent.¹⁰⁷

¹⁰³ *Idem.*

¹⁰⁴ *Ibid.*

¹⁰⁵ See the "Decision on the participation of victims in the trial proceedings", *supra* note 74, paras. 22-41.

¹⁰⁶ See the "Decision on Directions for the Conduct of the Proceedings", *supra* note 69, para. 20.

¹⁰⁷ See the "Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims" (Trial Chamber I), No. ICC-01/04-01/06-2127, 16 September 2009, paras. 21, 24, 26 and 28-30. See also

54. As emphasised by Trial Chambers I, II and III, “[a]s a matter of general principle, questioning by the Legal Representatives on behalf of victims who participate in the proceedings must have as its main aim the ascertainment of the truth. [...] 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.”¹⁰⁸

Respectfully submitted,



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Dated this 7th Day of April 2015

At The Hague, The Netherlands

the “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, *supra* note 12, paras. 82-91. See also the “Decision on victims’ participation”, *supra* note 10, paras 108-111 and the “Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”, *supra* note 9, paras. 30-40.

¹⁰⁸ *Idem.*