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No. ICC-02/05-01/20

Date: 4 October 2021

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Public

Directions on the conduct of proceedings

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

The Office of the Prosecutor
Karim A.A. Khan

Counsel for the Defence
Cyril Laucci

Legal Representatives of Victims
Ms Amal Clooney
Nasser Mohamed Amin Abdalla

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims
Paolina Massidda

**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**
Philipp Ambach

Other

TRIAL CHAMBER I ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ('Ali Kushayb') ('*Abd-Al-Rahman* case'), having regard to Article 64(8)(b) of the Rome Statute (the 'Statute'), issues these Directions on the conduct of Proceedings.

Introduction

1. The present decision constitutes the Chamber's directions for the conduct of proceedings. In issuing this decision, the Chamber has had regard to the practice of other Trial Chambers of this Court.
2. Issues left unaddressed in the present decision and which require intervention by the Chamber will be dealt with in the course of the trial, unless either party considers that there are matters which need to be addressed for trial; in that event, submission may be made at the next status conference.
3. In particular, the Chamber 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 Chamber's obligations under Rule 88(5) of the Rules of Procedure and Evidence (the 'Rules') and the requirements of Regulation 43 of the Regulations of the Court.

Reading of the charges

4. Article 64(8)(a) of the Statute mandates that the charges, as previously confirmed by the Pre-Trial Chamber, are read to the accused. The Chamber announces that this will be done at the commencement of the trial, on 5 April 2022.

Trial Briefs

5. The Prosecution shall serve by 5 January 2022,¹ a detailed Trial Brief, in addition to a list of witnesses it intends to call during the trial and a list of all items it plans to submit as evidence during the trial (the 'List of Evidence').
6. The contents of the Trial Brief shall include:

¹ Transcript of hearing on 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 78, line 11.

-) The principal facts of the Prosecution case;
-) The witnesses who will speak to those facts;
-) Any exhibits relevant to those facts;
-) The propositions of law on which the prosecution proposes to rely.

7. The list of witnesses shall include:

-) the witness pseudonym and identity (including different spellings if applicable);
-) known kinship or other relationship to other witnesses or other relevant persons in this case;
-) summary of anticipated testimony;
-) projected order of calling;
-) estimated length of questioning by the Prosecution;
-) whether testimony is expected to be submitted via Rule 68 of the Rules;
-) anticipated in-court protective measures to be sought, if any; and
-) anticipated requests under Rule 74 of the Rules.

8. Witnesses and evidence may be added to the aforesaid lists after the deadline only with leave of the Chamber.

9. The legal representatives of victims (LRV) may file a trial brief by 7 February 2022.²

10. The Defence shall file a Trial Brief by 4 March 2022.³ The contents thereof shall include:

² Transcript of hearing on 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 80, line 10 to p. 81, line.

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³ Transcript of hearing on 8 September 2021, ICC-02/05-01/20-T-013-ENG, p 78, line 18.

-) An indication of principal matters of fact or law on which issue is taken with the Prosecution;
-) The reasons for such issue being taken;
-) The nature of the accused's defence, including any particular defence under Rule 79 of the Rules on which he intends to rely;
-) Any matters of fact on which the accused intends to rely as part of his defence; and
-) an indication of any point of law (including admissibility of evidence) which will be taken by the Defence.

11. The Chamber reiterates that the provision of a Defence brief does not preclude the Defence from adding other avenues at a later stage if these become evident in the course of the trial or the Defence's investigations.⁴

Opening statements

12. The Chamber will hear the Prosecution's opening statement first, followed by opening statements from the LRV and Defence.
13. The Prosecution will be given the requested six hours to present its opening statements. The Defence will be given the requested nine hours, provided that this includes the statement to be made by the accused. The LRV will be given three hours.
14. The LRV 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.
15. In the interest of streamlining the presentation of these statements, an opening statement must be presented all at one time – the LRV and Defence are not allowed to reserve unused time from their opening statements and continue them later during the trial.

⁴ Transcript of hearing on 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 56, lines 12-15.

16. The LRV and Defence are to inform the Chamber 15 days prior to the commencement of trial whether they intend to present their opening statements at the commencement of the trial or not.
17. The parties and 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 parties and 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 parties and participants will be permitted to use audio/visual material during opening statements.
18. The opening statements shall be presented entirely in public session. The parties and participants are therefore instructed to prepare accordingly.

Presentation of evidence

19. 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 LRV, should leave to do so be granted; and
 - (iii) any presentation of evidence by the Defence.
20. The Chamber's leave must also be sought in order for either party to present 'rebuttal'/'rejoinder' evidence.
21. The Chamber may 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 LRV presentation of evidence and/or of their views and concerns, should leave be granted.

Length and timing of the presentation of evidence by the Prosecution

22. The Chamber will issue a separate decision on the length and timing of the presentation of evidence by the Prosecution after receipt of the Prosecution final list of witnesses.

23. Directions regarding the length of the Defence's presentation of evidence, as well as the LRV presentation of evidence, should leave be granted, if any, will be issued at a later stage of the proceedings.

Documentary, digital or physical evidence

24. The parties shall formally submit documentary, digital or physical evidence to the Chamber in accordance with the procedure detailed below.

25. Generally, the Chamber will recognise the submission of such items without a prior ruling on the admissibility of the evidence. The Chamber will ultimately assess the relevance, probative value and potential prejudice of the evidence (the 'standard evidentiary criteria') as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused, in its judgment pursuant to Article 74 of the Statute. During its deliberations, the Chamber will consider all the standard evidentiary criteria for each item of evidence submitted, though it may not necessarily discuss in the judgment every submitted item.

26. At the same time, while in general it will defer to the judgment assessments of the evidence on the basis of standard evidentiary criteria, it will make discrete determinations on the admissibility of specific evidence or categories of evidence in accordance with requirements of the Statute.

27. On this point, the Chamber observes that Rule 64(1) of the Rules requires the parties and participants to raise issues as to admissibility of evidence, including on any of the standard evidentiary criteria, at the time when the evidence is submitted to the Chamber or immediately after such an issue becomes known.⁵

28. The Chamber in its discretion may decide to rule on any such specific objection in advance of the judgment, particularly when it is necessary for a fair and expeditious trial as mandated by Article 64(2) of the Statute.

⁵ 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, para. 48.

29. In this regard, the Chamber recalls that the legal framework of the Court contains a number of exclusionary rules which mandate that certain evidence is inadmissible in the proceedings. Rulings on the potential application of any such rule must be rendered separately from, and preliminarily to, the assessment of evidence for a decision under Article 74 of the Statute.⁶
30. Further, the Chamber recognises that specific issues may arise where it will be necessary to rule on an evidentiary challenge at the time it is raised in order to provide clarity to the parties and participants, to avoid the calling of unnecessary evidence or to otherwise advance the fairness or efficiency of the trial proceedings.
31. For clarity, the following is a summary of the procedure to be followed with respect to the formal submission of documentary evidence:
- i) The parties and participants will formally request the submission of evidence either via the applicable procedures as specified in the relevant sections of the present decision or, for items used during a hearing, by sending an email to the Chamber and the other parties and participants clearly identifying these items no later than one working day after the conclusion of the testimony of the relevant witness;
 - ii) no later than three working days following receipt of the email in item (i) above, the other party and 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 item (ii) above, the tendering party or participant may send a second email indicating its position on the arguments raised by the other party or participant. The Chamber will then send a final email identifying which items are recognised as being formally submitted evidence;

⁶ For example, Rule 63(3) of the Rules mandates that rulings on admissibility shall be made by the Chamber when an application is made by a party or the Chamber by its own motion under Article 69(7) of the Statute. (This Article sets out procedural bars to the admission of evidence obtained in violation of the Statute or of internationally recognised human rights under specified circumstances.) The Chamber will rule on these issues, as appropriate, in the course of the trial or at the end of the proceedings. The Chamber will take a similar approach to other procedural requirements, including those arising under Rules 68 (prior recorded testimony of a witness), 71 (evidence of the prior or subsequent sexual conduct of a victim or witness) and 72 (evidence in cases of sexual violence) of the Rules.

- iv) the Registry will then reflect all formally submitted items in the eCourt metadata. The Registry must also submit reports for each witness who testifies, indicating which items have been formally submitted by the parties and participants in relation to that witness. The email exchanges referenced in items (i) to (iii) above are to be annexed to this filing, applying redactions as appropriate.
32. Through this process each item of evidence which is submitted (in batches or otherwise) will be formally recognised as submitted. Its status as submitted will accordingly be reflected in the eCourt metadata of each item of evidence.⁷
33. 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.

Witnesses

(1) Order of questioning

34. The calling party will conduct its questioning of the witness first, followed by the questioning by the LRV, if any, and thereafter questioning by the non-calling party.
35. The LRV is not required to provide an advance written note of the specific questions they intend to ask⁸ – a general advance notification that they intend to pose questions suffices. The necessity or propriety of questions asked will be addressed on a case-by-case basis.
36. In this regard, the Chamber stresses that the LRV'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 LRV's questioning

⁷ Similarly see *Bemba et al.* Appeals Judgment, ICC-01/05-01/13-2275-Red, para. 600.

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

is limited to matters relevant to the personal interests of the victims. This may, for instance, include questions about harms which the witness personally suffered or harms of other victims which the witness observed. Such questions may also relate to any future reparations proceedings which may occur.⁹

37. Questioning by the non-calling party is not limited to issues raised during the questioning by the calling party. Indeed, the Chamber will allow inquiry into additional matters. During this questioning the non-calling party may, for example, seek to ask questions related to the credibility of a witness, the reliability of the evidence presented, as well as mitigating and/or aggravating circumstances. However, the questioning by the non-calling party is not without limitation, notably in that the questions posed must be demonstrably relevant to the issues in the case or to the credibility or the testimony of the witness. Further, the Chamber will ensure that the questioning by the non-calling party is conducted in accordance with its responsibility for the protection of victims and witnesses under Article 68 of the Statute.
38. The calling party may re-examine the witness after questioning by the non-calling party has concluded provided the questions are limited to issues which arose from this examination.
39. The Chamber may pose questions to the witness at any time including after the conclusion of the questioning by the parties and participants.
40. The Defence has the right to be the last to question a witness, if necessary.

(2) Use of materials during the questioning

41. As a rule, parties and participants can only use during their questioning materials which have been previously disclosed. The party or participant intending to use any documents shall ensure that electronic, searchable copies of the documents have

⁹ Regulation 56 of the Regulations of the Court.

been uploaded into eCourt prior to their use, in accordance with the eCourt Protocol.¹⁰

42. The calling party or participant will provide by email to the Chamber and the other party and participants, at least five days before a witness commences testifying, a list (hereinafter: ‘List of Material’) setting out:
- i) the materials it intends to use during the questioning of the witness;
 - ii) any passages intended to be used within any lengthy document; and
 - iii) whether the materials are intended to be tendered as evidence, including under Rule 68 of the Rules, where appropriate.
43. The opposing party shall, by way of email, no later than two days prior to the start of the witness’s testimony, provide notice of its objection to the use of any material with the witness. This is without prejudice to the possibility to object, during the testimony, to the manner in which the material is presented to the witness.
44. The non-calling party or participant will provide, by way of email to the Chamber and the other party and participants, at least one day before they commence their questioning of the witness, a list of any materials they intend to use during questioning. Exceptionally, if the materials were not already disclosed, copies shall be attached to the email. Objections to the use of any material by the non-calling party shall be raised orally, prior to the start of the examination of the non-calling party.
45. The Registry shall inform the parties and participants of the relevant procedure in relation to the use of audio-visual recordings during hearings. In principle, video or audio recordings may only be used in court if a transcript, and translation if applicable, are available. The party or participant intending to use a video or audio recording shall indicate in its List of Material the sections of the transcript, if any, corresponding to the excerpts of the material it intends to use; as well as, if applicable, the corresponding sections of the translation. To avoid taking up hearing

¹⁰ The parties and participants are expected to provide the ERN of the material when indicating them in accordance with the following paragraph. Should the item exceptionally not have been uploaded into the eCourt system yet, the parties and participants are expected to indicate this fact in the procedure set out in the following paragraph.

time to address these matters, the parties and participants shall consult to try and resolve any disagreement as to the transcription or translation of the excerpts. If the disagreement cannot be resolved, the parties and participants shall notify the Chamber by email.

(3) Prior recorded testimony under Rule 68

46. The Chamber recalls that the Prosecution has been ordered to file its final list of witnesses it intends to call by 5 January 2022 and to indicate whether it seeks leave to introduce any prior recorded testimony of a witness under Rule 68(2) and (3) of the Rules.

47. The Prosecution shall file applications pursuant to Rule 68(2) and (3) of the Rules as soon as possible and latest by the deadline set for the final list of witnesses. The applications shall be filed together with:

- i) copies of the previously recorded testimony or hyperlink to same;
- ii) other material referred to in the previously recorded testimony, without which the testimony would not be understandable, if this material is available to the Prosecution; and
- iii) a specification as to whether the Prosecution seeks to ask further questions to the witness and the specific time sought for such examination, and an indication of the topics to be addressed orally with the witness.

48. Concerning applications pursuant to Rule 68(3) of the Rules, the Chamber will issue preliminary rulings ahead of the relevant in-court testimony. The final determination will be made at the time of the appearance of the witness before the Chamber and when all conditions of Rule 68(3) have been fulfilled. The Chamber expects the calling party to streamline its questioning considerably when the introduction of the previously recorded testimony is allowed.

(4) Expert witnesses

49. The Chamber recalls that the Prosecution has been ordered to file its final list of witnesses it intends to call by 5 January 2022 and to indicate whether it intends to call a witness as an expert.

50. 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 party or participant may file a notice indicating whether it challenges the qualifications of the witness as an expert.
51. Submitted expert reports must satisfy the procedural prerequisites of Rule 68 of the Rules.
52. Where parties wish to introduce expert evidence on the same issue at trial, the Chamber will, hear this evidence grouped together, if possible, in order to enhance the expeditiousness of the proceedings. The Chamber will determine at what stage in the proceedings it will hear such evidence. Alternatively, in accordance with Regulation 44 of the Regulations of the Court, the Chamber may itself identify and instruct experts on the issue after seeking submissions.
53. The Chamber may provide specific instructions should the parties decide to call expert witnesses on the same issues.

Witness preparation or familiarisation

54. The Chamber will permit witness preparation in accordance with the protocol attached as Annex A.

Introduction of evidence other than through a witness

55. A party or participant wishing to tender evidence without it being introduced through a witness shall file a written application containing:
- i) a short description of the content of each item;
 - ii) in the case of a lengthy document, an index of the most relevant portions of the document or recording; and
 - iii) a short description of its relevance, and *prima facie* probative value.
56. Before submitting the application, the tendering party or participant shall first inquire whether the opposing party or participant consents or objects to the

tendering of the items and include this information in the table. The opposing party's or participant's reasons do not need to be included in the table.

In-court protective measures and special measures

57. Applications for in-court protective or special measures pursuant to Rules 87 and 88 of the Rules shall be made as soon as possible.

58. The Prosecution shall file a motivated application seeking relevant in-court protective measures pursuant to Rule 87 of the Rules for all Prosecution witnesses for whom it is reasonably foreseeable that protective measures are required no later than 25 February 2022. This will allow the Chamber to receive submissions on any request and the VWU to fulfil its mandate in due time. The Chamber will rule on these applications as much as possible in advance of the witnesses' appearance, with the possibility to modify any determination on protective measures subject to further information provided by the VWU immediately prior to the testimony as necessary.

Use of private and/or closed session¹¹

59. Insofar as possible, witness testimony shall be given in public. If in-court protective measures are in place for a witness, parties and participants shall at all times be cautious and ensure that questions asked during public sessions do not compromise these measures.

60. 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.

61. It is the responsibility of examining counsel to ensure that the use of private and/or closed sessions is limited to what is strictly necessary. As such, examining counsel shall immediately request moving back to open session when the reasons that motivated the use of private and/or closed session are no longer present.

62. To the extent possible, parties and participants are directed to group identifying questions together and to ask these questions at the beginning of the testimony in

¹¹ For private sessions, the public in the gallery is not removed, but no audio-visual broadcast is made to the gallery or outside the Court. Closed sessions are held entirely *in camera*.

order to avoid unnecessary recourse to private and/or closed sessions. Similarly, other questions necessitating recourse to private and/or closed session are to be grouped as much as possible. The Chamber further encourages parties and participants to consider, in appropriate cases, the use of codes, which may further avoid recourse to private and/or closed sessions.

63. In case the calling party or participant anticipates that a private and/or closed session will be needed, it shall, when submitting the List of Material for a witness, indicate the information which it considers cannot be discussed in open session (topics, names, places, etc.). The calling party or participant may supplement this information upon receipt of the emails containing the documents of the non-calling parties or participants.

Public versions of filings

64. Pursuant to Regulation 23 *bis* of the Regulations of the Court, filings shall be in principle public and only marked as confidential, or *ex parte*, if duly justified. The parties and participants shall file public and confidential redacted versions together with any confidential or *ex parte* filing (to the extent possible, at the same time, and if not, no later than five days after the filing). Where the basis for the original classification no longer exists, the parties and participants shall request reclassification or file lesser redacted versions, to ensure that their respective filings are as publicly available as possible.

Transcripts

(1) Public redacted versions of transcripts

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

by the Registry.¹² Discrete requests for additional redactions may also exceptionally be proposed in the context of this review.

67. Within 10 days of receiving the proposed lesser-redacted version or additional redactions, the other parties or participants may raise any objections. Should no objections to the proposed lesser-redacted version or additional redactions be made, the Registry shall file it in the record of the case with the appropriate document number designation.

(2) Corrections to transcripts

68. The Registry shall inform the parties and participants of the relevant procedure for preparing requests for verification of the transcripts. The Registry shall apply eventual corrections to the transcripts in accordance with its transcript verification methods.

In-court redactions

69. Requests for redactions pursuant to Regulation 21(8) of the Regulations of the Court 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 parties and participants. The request must clearly identify the word(s) to be redacted and the timestamps of the real-time transcript. Such requests must be made as soon as possible, and no later than 15 minutes after the information was revealed.

70. The parties and participants have five 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.

71. This procedure applies unless otherwise ordered. The parties' and participants' agreement on any redaction is not binding on the Chamber. Moreover, due to the

¹² When the English and French versions of a transcript are notified on different days, the latter of the two notification dates triggers this timeline.

impracticability of making a detailed assessment within 30 minutes of an ongoing hearing, such redactions are also without prejudice to a revised assessment.

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

Email decisions

73. The Chamber notes that, to expedite decisions or in order to react to urgent circumstances, the Chamber may issue rulings by way of email sent to the parties and participants. In order to ensure that the principles of fairness and publicity are respected, the Chamber finds it appropriate to adopt a system whereby these email decisions are systematically put on the record of the case.

74. The Chamber therefore directs the Registry to file all email decisions on the case record in quarterly reports starting on 1 November 2021. The Registry shall simultaneously file public and confidential versions of these reports. When a decision concludes a chain of emails, these emails shall also be filed in the record of the case.

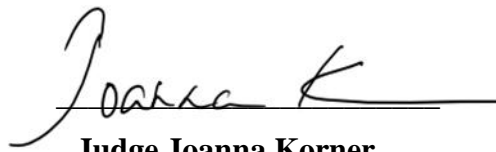
75. Parties and participants are also instructed to frame their email submissions in a way that makes their publication possible. In exceptional circumstances, when emails cannot be made public at all, the sender shall indicate this clearly in the subject line of the email. Further, the Registry is instructed 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 address or other private or personal information. The Registry shall consult the parties and participants on the redactions applied. In case of disagreement, the Chamber will rule.

76. The Chamber will provide the Registry with the email decisions issued up to this day so that they can be put on the case record. Going forward, the Chamber will copy the Registry in any email decision to be published.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ADOPTS the aforementioned directions concerning the conduct of proceedings; and

ADOPTS the Protocol on witness preparation as attached in Annex A.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 4 October 2021

At The Hague, The Netherlands