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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

Prosecution submissions on the conduct of proceedings and the modalities of victim participation at trial

Source: **The Office of the Prosecutor**

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

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Introduction

1. The Office of the Prosecutor ("Prosecution") submits observations on the conduct of proceedings pursuant to Rule 140 of the Rules of Procedure and Evidence ("Rules") and on modalities of victim participation at trial, as ordered by Trial Chamber VI ("Chamber").[1]

Procedural Background

2. On 12 March 2015, the Chamber issued its Order instructing the Parties, Legal Representatives of Victims ("Legal Representatives"), and the Registry to submit observations on the items addressed in the Order by 7 April 2015.[2]

3. In accordance with the Order,[3] on 25 March 2015 the Prosecution informed the Chamber, the Defence and Legal Representatives by way of email that it intended to raise additional issues in its observations in relation to: (i) the procedure to introduce video evidence at trial; (ii) the timing and procedure of a "no case to answer" motion; and (iii) the scope of an unsworn statement by the Accused during trial. On 30 March 2015 the Prosecution informed the Chamber, the Defence and Legal Representatives that it additionally sought to address the scope and timing of disclosure by the Defence in its observations.

4. On 2 April 2015, notified on 7 April 2015, the Defence filed a request to postpone the date of trial by five months, to 2 November 2015.[4] On 7 April, the Prosecution applied for a variation of the Chamber's Order requiring the

[1] ICC-01/04-02/06-507 ("Order").
[2] Order.
[3] Order, para.19.
[4] The Chamber provided the Prosecution with a courtesy copy of the filing on 2 April 2015.

provision of the order of the Prosecution's first witnesses until the Defence's request for a five-month delay has been decided.[5]

Prosecution's Submissions

A. Opening Statements

(i) Time required

5. The charges relate to a period of more than one year, with 18 counts and several alleged modes of liability. In order to address the charges and anticipated evidence clearly and comprehensively for the Chamber, the Defence and the participants, the Prosecution requests that it be allotted four hours for its opening statement.

(ii) Audio-visual aids

6. As noted during the 17 February 2015 Status Conference, the Prosecution intends to use visual aids during its opening statement.[6] The Prosecution's visual presentation will be uploaded on its laptop.[7] The Prosecution will need a team of at least three people if the opening statements will be held in Bunia.[8]

7. In its opening statement, the Prosecution intends to show material that has already been disclosed. Following the jurisprudence of other cases at the Court, the underlying material therefore need not be disclosed again in advance of the opening statement.[9] Should the Parties or Legal Representatives opt to use any

[5] ICC-01/04-02/06-544-Conf-Exp.
[6] *See* ICC-01/04-02/06-T-18-CONF-ENG, p.28, lns.6-9 (private session).
[7] The laptop will be connected to the courtroom's network, if opening statements are held in The Hague, or to a projector and screens, with audio support, if the opening statements are held in Bunia.
[8] ICC-01/04-02/06-404-Conf-Exp-Anx, p.4. The Registry's technical representative will not be in a position to provide assistance to the teams in running visual presentations, not only because the person is not familiar with the content of the presentation but also because he or she will be fully occupied running all technical aspects of the Courtroom.
[9] *See* ICC-01/09-01/11-847-Corr, para.4 ("Ruto General Directions 1"); ICC-01/09-01/11-900, para.11 ("*Ruto* General Directions 2").

visual aids where the underlying materials have not already been disclosed, copies of such material should be provided to the Chamber, Parties and participants at least five days before the date of the opening statements.[10]

(iii) Private or closed session

8. The Prosecution currently foresees the need to have infrequent recourse to private session during its opening statement.[11] The Prosecution will seek to limit the need for private session as much as possible.

B. Prosecution's Case

(i) Order of witnesses

9. The Prosecution proposes that it indicate, via email, the next witnesses it intends to call on a monthly basis.[12] The Prosecution will provide updated, confirmed witness schedules on a weekly basis.[13] The same procedure will be applicable during the Defence case.

(ii) Self-incrimination of witnesses

10. The issue of self-incrimination may arise in relation to a number of Prosecution witnesses. The Registry should make all necessary arrangements to provide independent legal advice from a qualified lawyer to witnesses who may incriminate themselves during their testimony.[14] Once a lawyer has been appointed by the Registry, the latter should inform the Party calling the witness, who should then be responsible for providing the lawyer with any prior statements or interview transcripts by the witness as well as any other relevant

[10] *See Ruto* General Directions 1, para.4 and *Ruto* General Directions 2, para.11.
[11] *See* ICC-01/04-02/06-T-18-CONF-ENG, p.28, lns.4-5 (private session).
[12] *See Ruto* General Directions 1, para.12; ICC-01/05-01/08-1023, para.30 ("*Bemba* Directions for the conduct of Proceedings").
[13] *See Bemba* Directions for the conduct of Proceedings, para.30.
[14] *See Ruto* General Directions 1, para.29.

material.[15] When the witness in question is also a victim, that victim's Legal Representative should provide this advice.[16]

11. The Party calling such a witness should notify the Victims and Witnesses Unit ("VWU") and the Chamber as soon as practicable if it believes that the witness may give self-incriminating statements during his or her testimony.[17] If the witness considers that he or she requires an assurance under rule 74(3)(c) of the Rules, the advising lawyer should seize the Chamber with a relevant application, notifying the Prosecution thereof.[18]

12. The Prosecution should then present its views to the Chamber in such time as to allow the Chamber to rule before the commencement of the witness' testimony.[19]

13. The lawyers undertaking the rule 74 notification should also inform the witness, in advance of his or her first appearance before the Chamber, of the offence defined in article 70(1)(a) of the Rome Statute ("Statute") for the purposes of rule 66(3) of the Rules.[20]

(iii) In-court protective measures

14. The procedure set out in the Familiarisation Protocol proposed by the Prosecution, Defence and Legal Representatives[21] should be adopted with regard to requests for in-court protective measures. The proposed Familiarisation Protocol provides that:

> Any request for in-court protective and special measures will promptly be brought to the attention of the Chamber by the calling

[15] ICC-01/04-01/07-1665-Corr, para.54 ("*Katanga* Directions for the conduct of proceedings").
[16] ICC-01/04-01/06-T-110-CONF-ENG, p.2, lns.23-25 (open session).
[17] *See Ruto* General Directions 1, para.29.
[18] *See Ruto* General Directions 1, para.29.
[19] *See Ruto* General Directions 1, para.29.
[20] *See* ICC-01/04-01/06-T-110-CONF-ENG, p. 5, lns.1-3 (open session); *Katanga* Directions for the conduct of proceedings, para.55.
[21] ICC-01/04-02/06-448-Anx1.

> party. Upon consultation with the VWU, the entity calling the witness will, if applicable, file a motion to request protective measures to be granted by the Chamber. Should the entity calling the witness and the VWU not agree on the request for protective measures, the VWU will draw this matter to the attention of the Chamber pursuant to Regulation 41 of the Regulations of the Court, irrespective of the motion filed or not filed by the entity calling the witness.[22]

15. Such an application should be made in such time as to enable consultation with the VWU and responses to the application, pursuant to rules 87(1) and (2) of the Rules, as well as the Chamber's ruling on the application before the commencement of testimony of the witness concerned.[23] In any event, such an application should be made no later than one month before the commencement of testimony.[24] In exceptional cases, upon good cause being shown, applications for protective measures that are not filed within this timeframe, including applications by witnesses themselves, may be considered.[25]

16. The application should be filed confidentially, but not *ex parte*.[26] The information which the applying Party seeks to withhold from the other Party should be provided in an *ex parte* annex to the application.[27]

C. Scope, order and mode of questioning

17. Unless otherwise directed by the Chamber in the interests of justice, evidence at the trial should be presented in the following sequence: (i)evidence for the Prosecution; (ii) evidence for the victims;[28] (iii) evidence for the Accused; (iv) Prosecution evidence in rebuttal; (v) the Accused's evidence in rejoinder; (vi) evidence ordered by the Chamber; and (vii) any further relevant information

[22] ICC-01/04-02/06-448-Anx1, para.57.
[23] *See Ruto* General Directions 1, para.30.
[24] *See Ruto* General Directions 1, para.30.
[25] *See Ruto* General Directions 1, para.30.
[26] *See Ruto* General Directions 1, para.30.
[27] *See Ruto* General Directions 1, para.30.
[28] *See* Section G below.

that may assist the Chamber in determining an appropriate sentence if the Accused is found guilty on one or more of the charges.

Order of examination of witnesses

18. The Prosecution submits that, in line with the procedure adopted in all the trials before this Court to date, the calling Party, rather than the Chamber, should question witnesses first.

19. The Prosecution has been interviewing witnesses in relation to the charges it brought against the Accused for a number of years. It is familiar with the accounts of each of its witnesses and it selected the witnesses it will rely upon based on its knowledge of the case and how each witness fits with the rest of the case. The Prosecution has also carefully considered the authentication of documentary, video and other material through each of its witnesses. As a result, the Prosecution is best placed to play the principal role in eliciting the relevant information from its witnesses. The same applies in relation to the Defence and its witnesses.

20. The proposed system, moreover, is the one that best fits the specific features of the Court's system, where the duty to investigate and prosecute is conferred on the Prosecution.

21. The Chamber has the power to ask witnesses questions at any stage of their testimony.[29] This is an important tool at the disposal of the Chamber. By asking the witnesses questions, the Parties are able to gauge which aspects of a witness' testimony are of particular interest to the Chamber. Judicial questioning is an extension of the Chamber's truth-seeking function, and judges can ask questions

[29] *See Ruto* General Directions 1, para.17; *Katanga* Directions for the conduct of proceedings, para.14; ICC-01/04-01/06-T-104-ENG, p.37, ln.25- p.38, ln.3 (open session).

whenever they consider it appropriate.[30] Judicial questioning *after* the examination by the Parties and/or participants is particularly efficient since the Chamber would have heard all the evidence elicited.[31]

22. The Prosecution submits that witnesses should be examined as follows:[32] (i) the Party calling the witness shall conduct an examination-in-chief; (ii) the opposing Party may subsequently conduct the cross-examination; and (iii) the Party calling the witness may then conduct a re-examination.

23. As noted above, the Judges may put any questions to the witness at any stage, although, as advanced, the Prosecution considers that it will be more efficient for the Chamber to put questions to the witness once it has heard the totality of the evidence elicited by the parties. This will enable the Chamber to focus its questions on those areas that the Chamber considers have not been sufficiently explored during questioning by the parties. Where an application has been made and leave granted, in accordance with the procedure set out below,[33] the Legal Representative may ask questions of a particular witness after the Prosecution has finished its examination-in-chief or cross-examination, as the case may be.[34]

24. According to rule 140(2)(d) of the Rules, the Defence has the right to be the last to examine a witness. This means that if a witness was not called by the Accused, the latter shall have the right to ask additional questions of the witness after he or she was re-examined by the Party calling him or her. Final questions are limited to matters raised since the Defence last had the opportunity to question

[30] ICC-01/04-01/06-T-104-ENG, p.37, ln.25- p.38, ln.3 ; *Ruto* General Directions 1, para.16.
[31] Further, as noted in *Lubanga*, the general evidence in the case is not restricted to the facts and circumstances described in the charges and any amendments to the charges, and under article 69(3) of the Statute the Chamber is entitled to request the submission of all evidence that it considers necessary for the determination of the truth, *see* ICC-01/04-01/06-2360, para.41.
[32] *See Ruto* General Directions 1, paras.13,15; *Bemba* Directions for the conduct of Proceedings, para.8; *Katanga* Directions for the conduct of proceedings, paras.15-16; ICC-01/04-01/06-T-104-ENG, p.37, lns.3-20 (open session).
[33] *See* Section G below.
[34] *See Ruto* General Directions 1, para.16.

the witness. If the Defence does not exercise its right to cross-examine a particular witness, it also waives its right to ask final questions of that witness, unless new matters are raised by additional questions of the Chamber or the participants after the examination-in chief.[35]

Scope and mode of questioning

25. The Parties should organise their presentation of evidence in a way that avoids the unnecessary repetition of evidence already on the record. The Parties should avoid lengthy, complicated, or compound questions that tend to confuse the witness. The Chamber should prohibit inappropriate, misleading, or irrelevant questions.

26. Where practicable, the Parties should avoid paraphrasing the testimony or statement of the witness, but shall quote the directly relevant passage and indicate the exact page numbers (including ERNs where applicable), paragraph numbers, and/or relevant lines. The Parties should restrict such quotations to situations when it is strictly necessary for the understanding of the question.

27. The Parties may put to a witness the evidence obtained from a previous witness, provided that the identity of that witness is not given. Parties may not ask witnesses to comment on the credibility of other witnesses. The credibility of a witness may be impeached by any Party, including the Party calling the witness.

28. Objections to the form of questioning or other matters should be timely, specific, and brief. A Party waives an objection when not made in a timely manner.

29. Hearsay evidence is admissible.

[35] *See Katanga* Directions for the conduct of proceedings, paras.79-80.

(a) Examination-in-chief

30. The Party conducting an examination-in-chief shall use non-leading questions, except in respect of preliminary matters that are necessary to provide background or context, and which are not in dispute; or in respect of other areas that the Chamber may deem appropriate.[36]

Refreshing the memory of a witness

31. Where a witness demonstrates an inability to independently recall a particular fact, the calling Party may, *inter alia*, use the previously recorded testimony of the witness to refresh the witness' recollection, regardless of whether the previously recorded testimony has been admitted into evidence.

32. A Party shall first establish that the witness cannot recall a particular issue, and that his or her testimony has been previously recorded. Subsequently, the calling Party should provide the witness with an opportunity to read the identified paragraphs, or read said paragraphs to the witness. The calling Party must further ascertain whether the witness' recollection has been refreshed, and if so, may examine the witness again on the matter at issue.

False testimony under solemn declaration

33. During the examination, the Chamber may, at the request of a Party, repeat the witness's duty to tell the truth and the consequences that may result from a failure to do so. If a Party makes such a request, the application will be made outside the hearing of the witness.

[36] *See* ICC-01/04-01/06-2127, para.23.

Hostile or adverse witnesses

34. The calling Party may request that the Chamber declare its witness "hostile" or "adverse" if the Party believes that the witness is not desirous of telling the truth to the Court at the instance of the Party calling him.

35. Prior to applying to declare a witness "hostile" or "adverse", the calling Party may request to refresh the witness's memory from his prior statement(s) about issues on which the witness's evidence has deviated, following the procedure set out above. If the witness disputes the correctness of the prior statement, the calling Party may question the witness on the reason for the deviation.

36. The Chamber will determine whether there is an objective basis for a witness to be declared "hostile" or "adverse", including on the basis of one or more of the following factors: (i) whether the witness has been hostile in general demeanour; (ii) whether there is an impression of evasiveness on the part of the witness; (iii) whether the present testimony of the witness before the Court has been in whole, or in part, deliberately or systematically inconsistent with a previously recorded statement or testimony in relation to a material issue or issues before the Court; and (iv) whether the witness has been systematically adverse to the calling Party not only by deliberately impugning the credibility of the case of the calling Party but also by appearing systematically to support the case of the Party opposed in interest to the calling Party.

37. If declared "hostile" or "adverse", the calling Party will be permitted to cross-examine the witness on all issues considered relevant, including his or her credibility and character.

(b) Cross-examination

38. The cross-examining Party may ordinarily use leading questions.[37]

39. Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining Party, to the subject-matter of that case.[38] The Chamber may, in the exercise of its discretion, permit enquiry into additional matters.[39]

40. The cross-examining Party is required to put to a witness, who is able to give evidence relevant to the case for that Party, the nature of its case that is in contradiction to the witness's evidence.[40] However, the cross-examining Party is required only to put the general substance of its case conflicting with the evidence of the witness, and not every detail that the Party does not accept.

41. Additionally, the cross-examining Party is required to put to the witness any facts or evidence upon which it intends to rely to impeach the credibility of the witness, in order to give the witness an opportunity to respond thereto.[41] Failure to do so may result in the Chamber disregarding or assigning less weight to the impeaching evidence.

[37] *See* ICC-01/04-01/06-2127, para.23; *Katanga* Directions for the conduct of proceedings, para.74.
[38] *See Ruto* General Directions 2, para.20.
[39] See also, *Ruto* General Directions 2, para.20: "The Chamber will decide whether a given line of questioning is reasonable on a case-by-case basis. The Chamber is of the view that it is within the cross-examining party's discretion to determine whether a given issue should, or need not be explored with the witness. The Chamber stresses, however, that its refusal to require a cross-examiner to cross-examine any witness in any particular manner must carry no expectation that a cross-examiner may freely seek the recall of any witness whom he or she had not fully questioned on an earlier occasion."
[40] *See Katanga* Directions for the conduct of proceedings, para.70.
[41] *See Ruto* General Directions 2, para.19; ICC-01/04-01/06-T-122-CONF-ENG, p.45, ln.23 – p.46, ln.8 (open session).

(c) Re-examination, re-cross-examination, and further re-examination

42. The re-examination of a witness should be conducted under the same conditions as the examination-in-chief and should be limited to the issues raised during cross-examination.[42] Ordinarily, this will conclude the witness's testimony.

43. On an exceptional basis and upon a showing of good cause, the Chamber may authorise the re-cross-examination and further re-examination of a witness on limited and specific issues. Any questioning after further re-examination should be restricted to matters raised in re-cross-examination.[43]

(d) Evidence of consistent pattern of conduct

44. Evidence of consistent pattern of conduct or similar facts is admissible to the extent that it is relevant to the matter at hand.

45. An action cited as a similar fact need not necessarily constitute an offence. The evidence of actions referred to in the different counts of the Updated Document Containing the Charges ("Updated DCC") may serve as evidence of similar facts with respect to each of the allegations.

D. Documentary Evidence

(i) Use of material during questioning

46. Parties should only seek to question a witness on documents that are relevant to that witness's testimony. It is for a Party to demonstrate a clear connection between the exhibit and the substance of the testimony of that witness.

[42] *Katanga* Directions for the conduct of proceedings, paras.77-78.
[43] *Kupreskic et al.*, IT-95-16, Decision on Order of Presentation of Evidence, 21 January 1999.

47. Five working days prior to the witness's appearance, the Party calling the witness should provide the Chamber, the Registry, the other Party and participants with a list of the documents or material it intends to use with the witness during the examination-in-chief.[44] The list can be communicated by e-mail.[45] It is the duty of the calling Party to notify the Chamber, the Registry, the other Party and participants as soon as possible of any changes thereto. In addition, witness preparation notes and any attendant log should be distributed to the other Party and, for dual status witnesses, to the participants as soon as practicable after the conclusion of the preparation session and prior to the commencement of the witness' evidence.

48. Objections by the other Party to the use of particular documents, if any, should be filed no later than two working days before the examination, or – in exceptional circumstances - made orally.

49. Three working days prior to the expected commencement of cross-examination, the cross-examining Party should provide the Chamber, the Registry, and the other Party with a list of the documents it intends to use during cross-examination.[46] Where necessary, the other Party may request a short adjournment in order to examine the material.

50. If any of the documents that the calling or cross-examining Party wishes to use during the witness' appearance are not included on the original list, it must apply for leave of the Chamber to use them with the witness, showing good cause.[47]

51. As a rule, Parties can only use documents during their examinations that have been properly disclosed. If a cross-examining Party wishes to use material that

[44] *See Ruto* General Directions 1, para.27.
[45] *See Ruto* General Directions 1, para.27.
[46] *Bemba* Directions for the conduct of Proceedings, para.16.
[47] *See Ruto* General Directions 1, para.22.

has not been disclosed in advance, it may only do so with leave of the Chamber. In that case, the Party should provide copies of the material to the Chamber, the other Party and participants no later than 24 hours before the commencement of the cross-examination.

(ii) Admission of material tendered through a witness as evidence

52. Pursuant to article 69(4) of the Statute, the Chamber will not admit evidence that it considers to be without relevance and probative value.[48] It is for the submitting Party to demonstrate the relevance and probative value of the evidence.

53. If a clear connection between an exhibit and the substance of a witness' testimony is demonstrated, the Chamber may admit that exhibit into evidence.[49] Individual applications should be made in respect of each item of evidence which a Party seeks to admit through a witness.

(iii) Admission of material as evidence from the bar table

54. There is no rule prohibiting the admission into evidence of documents merely because the source or custodian was not called to testify. The Party submitting the evidence should however demonstrate *prima facie* that the evidence is authentic.

55. The Parties may submit evidence from the bar table via more than one application and at any point during trial proceedings. However, Parties are encouraged to submit such evidence in as practicable and efficient a manner as possible.

56. Bar table applications should generally include for each document or group of documents a paragraph relevant to: (i) the description of the document(s); (ii) the

[48] *See* ICC-01/04-01/06-1981, para.33.
[49] *See Ruto* General Directions 1, para.26.

authenticity/reliability of the document(s); and (iii) the relevance and probative value of the document(s).[50]

(iv) Admission of prior recorded testimony

Rule 68(2)

57. In accordance with rule 68(2) of the Rules, a Trial Chamber may admit, in whole or in part, the evidence of a witness who is not present before the Chamber, in the form of previously recorded testimony, including statements taken under rule 111 of the Rules, interviews recorded pursuant to rule 112 of the Rules, or any other previously recorded testimony ("previously recorded testimony").

58. Motions for the admission of previously recorded testimony pursuant to rule 68(2) may be submitted to the Chamber at any time during the trial, provided that sufficient notice is given to the other Party. The application should address the applicable scenario envisaged under rule 68(2) of the Rules together with any supporting material, and be accompanied by a copy of the previously recorded testimony indicating precisely which passages the Party calling the witness wishes to tender into evidence. If these passages contain references to other material that is available to the Party calling the witness, they should equally be attached to the application. The other Party should have ten days following the notification of the application to raise any objections.

Rule 68(3)

59. In accordance with rule 68(3) of the Rules, a Trial Chamber may admit, in whole or in part, the evidence of a witness who is present before the Chamber, in the form of previously recorded testimony.

[50] *See Ruto* General Directions 1, para.27; *Katanga* Directions for the conduct of proceedings, para.101.

60. Motions for the admission of previously recorded testimony pursuant to rule 68(3) should, in principle, be submitted to the Chamber at least 21 days before the witness is scheduled to appear.[51] The application should be accompanied by a copy of the previously recorded testimony indicating precisely which passages the Party calling the witness wishes to tender into evidence.[52] If these passages contain references to other material that is available to the Party calling the witness, they should equally be attached to the application.[53] The other Party and the Legal Representatives, where applicable, should have ten days following the notification of the application to raise any objections.[54]

61. The witness should attest at the hearing that his or her previously recorded testimony accurately reflects what the witness would say if examined. The Parties may be directed to read a summary, or the relevant parts of the witness' previously recorded testimony into the record of the proceedings.

E. Charges

62. The Prosecution proposes that the Accused should provide a certification ahead of the commencement of trial that he read and understood the Updated DCC, rather than the Decision on the Confirmation of Charges.[55] The Prosecution agrees that the counts section of the Updated DCC (section H-ii) should be read to the Accused at the commencement of trial pursuant to article 64(8)(a).[56]

F. Agreements as to evidence

63. The Prosecution submitted an initial list of proposed facts to the Defence on 3 April 2015. The Parties agreed that the Prosecution will provide a second list of

[51] *See Ruto* General Directions 1, para.28.
[52] *See Ruto* General Directions 1, para.28.
[53] *See Ruto* General Directions 1, para.28.
[54] *See Ruto* General Directions 1, para.28.
[55] *See Ruto* General Directions 1, para.6.
[56] *See Ruto* General Directions 1, para.5.

proposed agreed facts to the Defence on 8 April 2015. Pursuant to the Chamber's Order,[57] the Prosecution will provide a list of proposed agreed facts to the Chamber by 6 May 2015 and notify the Legal Representatives.

64. Pursuant to article 69(6) of the Statute, a Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof. At the request of a Party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated or agreed facts, or of the authenticity of evidence from other proceedings of the Court relating to matters at issue in the current proceedings.

G. Modalities of victim participation at trial

(i) Participation in opening and closing statements

65. The Prosecution submits that the Legal Representatives should be entitled to make opening and closing statements as they have been authorised to do in previous cases.[58]

(ii) Participation in hearings

66. The Legal Representatives should be entitled to attend trial hearings whether they are public, private or closed session. Attendance at *ex parte* hearings should be decided on a case by case basis.[59]

67. The Appeals Chamber has defined the framework for the participation of victims, holding that "participating victims are not Parties to the proceedings",[60]

[57] Order, para.14.
[58] *See Katanga* Directions for the conduct of proceedings, paras.1-2; ICC-01/05-01/08-T-32-ENG; ICC-01/05-01/08-T-364-ENG; ICC-01/04-01/06-T-107-ENG; ICC-01/04-01/06-T-356-ENG; *Ruto* General Directions 1, para.4.
[59] *See* ICC-01/04-01/06-1119, para.113; ICC-01/09-02/11-498, para.70; ICC-01/04-01/07-1788-tENG, paras.69-71.
[60] ICC-01/04-01/07-2288, para.39.

and do not have an unfettered right to lead or challenge evidence.[61] They are required to demonstrate why their interests are affected by the evidence or issue and it is then up to the Chamber to decide whether or not to allow such participation.[62]

(iii) Presentation of views by individual victims

68. The Prosecution submits that as a general principle, victims should submit their views and concerns via their Legal Representatives. If any individual victims would like to present their views and concerns directly to the Chamber, the Legal Representatives should seek authorisation before the close of the Prosecution's case through a written application.[63] The Chamber should grant such applications only where the victims' testimony could make a genuine contribution to the ascertainment of the truth.[64] After making the solemn undertaking, the victim should be questioned by the Legal Representative[65] TheLegal Representative of the victim testifying may also allow the other Legal Representative to ask questions.[66] After this, the Prosecution will have an opportunity to examine the victim, followed by the Defence.[67]

69. Should the Chamber grant such authorisation, the victim(s) should be called after the Prosecution has concluded its case.[68]

(iv) Authorisation to question a witness or present evidence

70. Should a Legal Representative wish to question a witness, the Legal representative should apply to the Chamber, by means of a filing, notified to the

[61] ICC-01/04-01/06-1432, para.99.
[62] ICC-01/04-01/06-1432, para.99.
[63] *See Katanga* Directions for the conduct of proceedings, para.25.
[64] *See Katanga* Directions for the conduct of proceedings, para.20.
[65] *See Katanga* Directions for the conduct of proceedings, para.31.
[66] *Katanga* Directions for the conduct of proceedings, para.31.
[67] *Katanga* Directions for the conduct of proceedings, para.32.
[68] *See Katanga* Directions for the conduct of proceedings, para.24.

Parties, fourteen days in advance of the relevant witness' testimony.[69] After the examination-in-chief, and without the witness being present, the Parties should be given an opportunity to make oral submissions on such a request prior to the Chamber's oral ruling on the application.[70]

71. If, after examination-in-chief by the Party calling the witness, the Chamber is of the view that the matters raised in the proposed question(s) of the victims have not been sufficiently addressed by the witness, it may authorise the Legal Representative to put the question(s) before cross-examination commences.[71]

72. When the Legal Representatives did not anticipate putting questions to a particular witness, but during examination-in-chief by the Party calling the witness, an unforeseen issue arises that directly pertains to the interests of the victims, the Legal Representatives may submit a question to the Chamber, which may decide to put it to the witness, if it considers this necessary for the ascertainment of the truth or to clarify the testimony of the witness.[72] If the victims wish to have certain evidence produced in the courtroom they should file a written application setting out the reasons why their personal interests are affected and should satisfy the Chamber that such evidence is necessary for the determination of the truth within the terms of article 69(3) of the Statute, in which case the *Chamber* will order its submission.[73]

73. As a matter of principle, Legal Representatives should not be able to call witnesses other than the victims they represent.[74] However, in case the Legal

[69] See *Ruto* General Directions 1, para.19; *Bemba* Directions for the conduct of Proceedings, para.18. 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, *Ruto* General Directions 1, para.19.
[70] *See Ruto* General Directions 1, para.19.
[71] *See Katanga* Directions for the conduct of proceedings, para.88.
[72] *See Katanga* Directions for the conduct of proceedings, para.89.
[73] *See* ICC-01/05-01/08-1470 ("*Bemba* Order on submission of evidence"), paras.14 and 14(a); *Katanga* Directions for the conduct of proceedings, paras.46-47.
[74] *See Katanga* Directions for the conduct of proceedings, para.45.

Representatives have identified persons other than participating victims, who may be able to give evidence to the Chamber about issues that concern the victims' interests, they may bring this to the Chamber's attention.[75] If the Chamber considers that the proposed witness may indeed provide the Chamber with important information that was not hitherto included in the evidence called by the Parties, it may decide to call the witness on its own motion, in accordance with articles 64(6)(b),(d) and 69(3) of the Statute.[76]

(v) Scope and mode of questioning

74. The Legal Representatives should only be authorised to question a witness to the extent relevant to the victims' interests.[77] The scope of questioning is therefore limited to questions that have the purpose of clarifying the witness' evidence and to elicit additional facts.[78]

75. The Legal Representatives should conduct their questioning in a neutral manner and avoid leading or closed questions, unless specifically authorised by the Chamber to use such questions.[79] If the Legal Representatives are authorised to challenge the credibility or accuracy of a witness' testimony, leading, closed as well as questions challenging the witness' reliability may be allowed, subject to the same limitations outlined in relation to cross-examination.[80]

[75] *See Katanga* Directions for the conduct of proceedings, para.45.
[76] *See Katanga* Directions for the conduct of proceedings, para.46.
[77] *See Bemba* Directions for the conduct of Proceedings, para.20.
[78] *See Bemba* Directions for the conduct of Proceedings, para.20.
[79] *See* ICC-01/04-01/06-2127, paras.29-30; *Katanga* Directions for the conduct of proceedings, para.91.
[80] *See Katanga* Directions for the conduct of proceedings, para.91.

H. Other issues

(i) Recourse to private and/or closed session

76. Insofar as possible, witness testimony should be given in public.[81] Recourse to private and/or closed session will at times be unavoidable, in particular for protected witnesses. Requests for private and/or closed sessions should specify the reasons justifying the request in a neutral and objective fashion, if possible referring to the points that will be touched upon.[82] To the extent that this does not unduly inhibit the sequence of questioning, Parties and participants should endeavour to group together identifying questions.[83]

77. A "Protection information sheet" ("PIS") as adopted in *Ruto*,[84] is unlikely to be effective in the context of the current case for the reasons set out below.

78. The listing of specific information, such as names of persons or locations, on a PIS with the expectation that the witness will refer to the number assigned to such information, rather than to the name itself, could prove difficult. This will certainly be the case with a number of Prosecution witnesses who are either not literate, require assistance to read, and/or are vulnerable. Moreover, the number of names of places or persons which would need to be elicited in private session could be very lengthy. This could lead to testimony that is difficult to follow with cross-reference to the PIS. Lastly, eliciting biographical information at the outset of a witness' testimony, rather than having it included in a PIS, can help witnesses feel at ease in an unfamiliar Court setting.

79. Indeed, the Chamber in *Ruto* held that "[t]he PIS will only be used when it is more convenient to use it without undue need to go into private or closed

[81] *See Bemba* Directions for the conduct of Proceedings, para.23.
[82] *See Bemba* Directions for the conduct of Proceedings, para.23.
[83] *See Bemba* Directions for the conduct of Proceedings, para.23.
[84] *Ruto* General Directions 2, para.32.

session to discuss isolated items of protected information. In other instances, the Chamber will continue to use closed or private sessions when it is safer or more convenient to do so. When the Chamber is of the view that it is safer or more convenient to go into closed session, the PIS system will not be used."[85]

(iii) Production of public redacted transcripts

80. The calling Party should propose public redacted versions of any confidential transcripts no later than four weeks after the conclusion of a witness' testimony. The other Party will have two weeks to review and provide its position on the proposed public redacted version.

81. Requests for corrections to the transcript should be submitted, within five working days from the notification of the edited version of the transcript, to the responsible person within the Registry.[86] The requests should be based on the edited version of the transcript and contain a table providing: (i) full reference of the transcript, date and the case name, (ii) the passage extracted from the edited version of the transcript, containing the discrepancies to be reviewed, (iii) pages and lines of the passage from the edited version of the transcript, and (iv) the language originally used by the speaker.[87]

I. Additional Issues

(i) The procedure to introduce video evidence at trial

82. As early as practicable, a Party should provide the other Party, participants and the Chamber with copies of the specific video excerpts which it intends to use. The Party should indicate the corresponding transcription excerpts from the relevant transcription of the video. The other Party should then be required to

[85] *Ruto* General Directions 2, para.32.
[86] *See Ruto* General Directions 1, para.34.
[87] *See Ruto* General Directions 1, para.34.

state whether it agrees with the transcription of the excerpts or raise any areas of disagreement. The Registry, as a neutral third Party should resolve any disagreements as to the transcription. The interpreters can then use this agreed text when the video is played in court.

83. The procedure outlined above will avoid putting interpreters and stenographers in the "arduous" and "very difficult"[88] position of having to interpret the dialogue in a video in real time upon hearing it for the first time, which reduces the reliability of the interpretation. This is because the sound quality of the videos varies and the videos include a number of speakers, at times overlapping and speaking different languages at a much quicker pace than Counsel and witnesses are required to speak at in Court. A proper review of such videos requires listening to the segments multiple times. It is virtually impossible to capture accurately what is being said on a video when it is played only once, at most twice, during a Court session.

84. If a Party or participant detects problems with the transcript on issues of apparent real significance, they should note the page and line number and raise the matter orally with the Chamber so that it will appear on the record.[89] Minor errors should be reported via email to the relevant section of the Registry immediately after the hearing, copying the other Party, participants and the Chamber.[90] Enduring difficulties should be raised with the Chamber during the next court hearing or as soon as the problem is identified, providing the page and line numbers together with a brief explanation of the suggested difficulty.[91]

[88] ICC-01/04-01/07-T-176-CONF-ENG, p.17, lns.13-14, p.44, lns.9-10 (open session).
[89] *See* ICC-01/04-01/06-1974, para.56(d).
[90] *See* ICC-01/04-01/06-1974, para.56(d).
[91] *See* ICC-01/04-01/06-1974, para.56(d).

(ii) The timing and procedure of a "no case to answer" motion

85. As stated in *Ruto*, it is for each individual Trial Chamber to consider whether or not a "no case to answer" motion is apposite for the proceedings before it.[92] Should the Chamber permit the Defence to enter such submissions (asserting that there is no case for it to answer at the end of the Prosecution's presentation of evidence), and consistent with the approach set out in *Ruto*, the following principles should apply: (i) the test should be whether there is evidence on which a reasonable Trial Chamber *could* convict;[93] (ii) it should only be necessary to satisfy the test in respect of one mode of liability for each count;[94] (iii) the Chamber should not consider questions of reliability or credibility relating to the evidence, save where the evidence in question is incapable of belief by any reasonable Trial Chamber;[95] (iv) the Defence should notify the Chamber orally no later than the last day of the Prosecution's case (or the completion of the presentation of any evidence by the Legal Representative or as requested by the Chamber, as applicable) of its intention to file a "no case to answer" motion;[96] (v) the motion should be filed no later than 14 days after providing the oral notice of intention. It should not exceed 40 pages in length and should specify the particular counts being challenged;[97] and (vi) responses by the Prosecution and the Legal Representatives should be filed within 14 days after notification.[98]

[92] ICC-01/09-01/11-1334, para. 17 ("*Ruto* principles and procedure on no case to answer motion").
[93] *See Ruto* principles and procedure on no case to answer motion, para.32.
[94] *See Ruto* principles and procedure on no case to answer motion, para.32.
[95] *See Ruto* principles and procedure on no case to answer motion, para.32.
[96] *See Ruto* principles and procedure on no case to answer motion, para.37.
[97] *See Ruto* principles and procedure on no case to answer motion, para.37.
[98] *See Ruto* principles and procedure on no case to answer motion, para.37.

(iii) The scope of an unsworn statement by the Accused during trial

86. Pursuant to article 67(1)(h) of the Statute, the Accused has a right to make an unsworn oral or written statement in his defence. An unsworn statement is not subject to a solemn undertaking and therefore does not constitute evidence.[99]

87. Should the Accused wish to make an unsworn statement, he should inform the Chamber, which will decide on the appropriate moment and modalities for making the statement.[100] Should the Accused's unsworn statement refer to evidence and/or the merits of the case, the Prosecution should be entitled to produce evidence in rebuttal if warranted. Therefore, the timing of any statement should allow for the Prosecution to be able to do so if needed.

(iv) The scope and timing of disclosure by the Defence

88. The procedure to be followed in relation to disclosure by the Defence should reflect that imposed on the Prosecution, as set out in greater detail below.

(a) The scope of disclosure by the Defence

89. Regulation 54 of the RoC permits the Chamber to order advance disclosure of summaries of evidence, copies of witness statements from the witnesses whom the defence intends to call, the number and the identities of those witnesses, and the issues and defences the accused intends to raise.[101] Rule 79(4) of the Rules further illustrates that the Chamber has the power to order advance disclosure of any evidence other than the defences that the accused intends to rely on.[102]

[99] *See* ICC-01/05-01/08-2860, para.8.
[100] *See Katanga* Directions for the conduct of proceedings, para.12.
[101] *See* ICC-01/04-01/06-1235-Corr-Anx1, para.32.
[102] *See* ICC-01/04-01/06-1235-Corr-Anx1, para.35.

Witness statements

90. The Defence should disclose its witness statements, with appropriate standard redactions, or authorised non-standard redactions. Should the Chamber allow summaries of such statements to be disclosed instead[103] the Chamber should ensure that the summaries provide sufficient detail to enable (i) an understanding of the nature of the witnesses' testimony and how it relates to the charges; and (ii) the preparation of a meaningful questioning of the witnesses.[104]

91. In *Lubanga,* the Presiding Judge acknowledged that the Prosecution should be afforded a "reasonably opportunity" to prepare for cross-examination of a witness in relation to whom a five-line summary had been provided.[105]

Grounds excluding criminal responsibility

92. Rule 79(2) of the Rules establishes that if the Accused is going to raise the existence of an alibi or a ground for excluding criminal responsibility, notification thereof "shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond. The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence".[106]

93. During the 17 February 2015 Status Conference, Defence Counsel noted that "without prejudice to a final decision", the Defence does not intend to raise an alibi or other specific defences.[107] If the Accused intends to put forward any

[103] *See* ICC-01/05-01/08-2141, para.28 ("*Bemba* Decision on defence disclosure and related issues"); ICC-01/04-01-07-2388, para.60 ("*Katanga* Decision on disclosure by the Defence").
[104] *See Bemba* Decision on defence disclosure and related issues, para.28.
[105] ICC-01/04-01/06-T-239-Red3-ENG, p.50, lns.2-3. The Presiding Judge also noted that if the Prosecution is not informed of the substantive areas on which a Defence witness is going to testify the Prosecution may require adjournments for adequate time to prepare, *see* ICC-01/04-01/06-T-239-Red3-ENG, p.50, lns.4-14.
[106] In *Katanga*, the Chamber considered that "under Rule 79(1) and (2) the defence teams have the responsibility to notify their intention, if any, to raise a defence to the Prosecution and the Chamber as soon as a determination to rely on such ground has been made", *see Katanga* Decision on disclosure by the Defence, para.46.
[107] ICC-01/04-02/06-T-18-CONF-ENG, p.16, lns.15-23 (open session).

ground excluding criminal responsibility in relation to any or all of the charges, the Defence should be in a position to know so at this stage. Therefore, the Defence should raise any such ground now, without further delay to avoid justified requests for adjournment.

Outline of the Defence case

94. In a number of other cases, Trial Chambers have ordered the Defence to file an outline of the legal and factual issues that it intends to raise during the presentation of its evidence.[108] This would be useful to enable the Prosecution to prepare for the Defence case.

(b) The timing of disclosure by the Defence

95. Once a decision has been taken by the Defence that a book, document, photograph or other tangible object in the possession or control of the Defence is to be used by the Defence as evidence at trial, it should be served forthwith on the Prosecution.[109]

96. Final disclosure by the Defence should take place three months before the scheduled start of its case. The identity of Defence witnesses should be disclosed at this time. Any requests for redactions or delayed disclosure should be made at the latest two weeks before the date on which disclosure is due.

97. Shorter deadlines[110] will not suffice for the Prosecution to respond to the Defence's case without the need for adjournment. The Defence in this case has already indicated that it is "very likely to call at least as many witnesses as the

[108] ICC-01/04-01/06-1235-Corr-Anx1, para.41 and ICC-01/04-01/06-1313, para 13. *See Bemba* Decision on defence disclosure and related issues, para.33; *Katanga* Decision on disclosure by the Defence, para.58.
[109] *See* ICC-01/04-01/06-2192-Red, para.64; *Katanga* Decision on disclosure by the Defence, para.50. As set out in *Lubanga*, "[t]he defence has a clear responsibility to avoid the delays that otherwise may well result from well-founded applications to adjourn, to enable investigation of defence material following a tardy approach to Rule 78 of the Rules by the accused", *see* ICC-01/04-01/06-2192-Red, para.65.
[110] *See Bemba* Decision on defence disclosure and related issues, para.36; *Katanga* Decision on disclosure by the Defence, pp.22-23.

Prosecution, probably more".[111] Should this be the case, two or three weeks would be inadequate for the Prosecution to undertake necessary preparation.

98. The same procedures and timelines set out in above[112] should apply in relation to Defence witnesses, including with regard to (i) requests for in-court protective measures; (ii) the provision of lists of documents to be used during examination-in-chief; and (iii) the provision of witness schedules. The outline of the Defence case should be provided immediately upon conclusion of the Prosecution case.

Conclusion

99. The Prosecution respectfully submits its observations on the conduct of proceedings and the modalities of victim participation at trial.

Fatou Bensouda,
Prosecutor

Dated this 7th day of April 2015
At The Hague, The Netherlands

[111] ICC-01/04-02/06-T-18-CONF-ENG, p.15, lns.8-10 (open session).
[112] *See* Sections B and D.