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**International
Criminal
Court**

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No.: **ICC-02/05-01/20**
Date: **1 September 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

**Victims’ joint submissions on the matters identified
in the “Order scheduling first status conference”**

Source: Office of Public Counsel for Victims
Legal Representatives of the Victims

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

Mr Karim A.A. Khan
Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci
Mr Iain Edwards

Legal Representatives of the Victims

Ms Amal Clooney
Mr Nasser Mohamed Amin Abdalla
Ms Paolina Massidda

Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Sarah Pellet
Ms Ludovica Vetrucchio

**The Office of Public Counsel for the
Defence****States' Representatives****Amicus Curiae****REGISTRY****Registrar**

Mr Peter Lewis

Counsel Support Section**Victims and Witnesses Unit**

Mr Nigel Verrill

Detention Section**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. PROCEDURAL BACKGROUND

1. On 9 July 2021, Pre-Trial Chamber II issued its decision confirming the charges against Mr Abd-Al-Rahman and committing him for trial.¹
2. On 21 July 2021, the Presidency assigned the case to Trial Chamber I (the “Chamber”).²
3. On 16 August 2021, the Chamber issued the “Order scheduling first status conference” (the “Order”),³ instructing the parties and participants to file, by 1 September 2021, their submissions on the following matters in preparation for trial:
 - A. Commencement date of the trial.
 - B. Anticipated evidence.
 - C. Agreed facts under Rule 69 of the Rules.
 - D. Languages to be used by the parties, participants, and the witnesses the parties intend to call.
 - E. Disclosure of outstanding material in the Prosecution’s possession and related issues.
 - F. Disclosure by the Defence, including whether the Defence intends to advance a defence in accordance with Rules 79 and 80 of the Rules.
 - G. Provision of trial briefs.
 - H. Motions requiring resolution prior to the commencement of trial.
 - I. Estimated length of opening statements.
 - J. Update and forecast on (additional) applications by victims to participate in the proceedings.

¹ See the “Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-433](#), 9 July 2021 (the “Decision confirming the charges”).

² See the “Decision constituting Trial Chamber I and referring to it the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*” (Presidency), [No. ICC-02/05-01/20-440](#), 21 July 2021.

³ See the “Order scheduling first status conference” (Trial Chamber I), [No. ICC-02/05-01/20-451](#), 16 August 2021.

4. In addition, the Chamber indicated that the parties and participants may “express their wish to add further items to the list and indicate whether parts of the status conference should be held *ex parte*”.⁴ It further instructed that “[s]hould the parties and participants be of the view that any matters ought to be resolved before the status conference, they should bring these to the Chamber’s attention promptly”.⁵

5. Pursuant to the Order, Counsel representing victims participating in the proceedings⁶ (the “Legal Representatives”) submit observations on the matters identified by the Chamber.

II. SUBMISSIONS

(A) Commencement date of the trial

6. Victims have informed the Legal Representatives of their wish that the trial should begin as soon as practicable. During various meetings, victims also expressed their view that trial proceedings should be carried out in an expeditious manner and made clear their strong opposition in delaying the commencement of the trial any further, having waited for justice for more than 17 years. As one victim put it, “*the court should try [the defendant] in the shortest time possible and without delay as a delay will allow ... others to commit other crimes*”. And another victim noted that: “*he must be tried as soon as possible and expeditiously because his [associates] remain. The delay of his trial scares and frustrates us as refugees, especially the Fur tribe*”.

7. The Legal Representatives believe that it is for the Prosecutor to explain when he thinks the trial can begin, taking into account disclosure obligations, the rights of the defence and other relevant circumstances. However, the Legal Representatives acknowledge the current situation linked to the COVID-19 pandemic which may have an impact on the start date. In particular, they are aware of the difficulties the

⁴ *Idem*, para. 3.

⁵ *Idem*, para. 4.

⁶ See the “Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests” (Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-398](#), 20 May 2021.

Prosecution team has been encountering when trying to interview victims represented by a Legal Representative who are willing to provide relevant evidence in the case. The Legal Representatives also understand that the Prosecution team is currently in the process of carrying out additional investigations with a view to potentially adding new charges, as they indicated they would do at the confirmation hearing⁷ following victims' requests,⁸ and some victims have stated that if charges are expanded this would potentially justify a delay.

(B) Anticipated evidence

8. The Legal Representatives wish to notify the Chamber that, subject to the Chamber's rulings on modalities of victim participation, they may request leave to call witnesses in the course of the proceedings and/or to have victims appear in person to present their views and concerns. This determination will be made at a later stage of the proceedings, taking into account the evidence presented during the course of the trial and victims' associated views and concerns.⁹

9. In this regard, the Legal Representatives recall the clear distinction that the Court has drawn in its jurisprudence between the right for legal representatives to call victims to provide evidence and the right of victims to present their views and concerns through an unsworn statement before the Chamber.¹⁰ In the *Lubanga* case,

⁷ See the transcripts of the hearing held on 26 May 2020, No. [ICC-02/05-01/20-T-009-Red-ENG WT](#), p. 43, lines 10-14 (Mr Nicholls: "*And just finally I'll respond to one point raised by the various representatives for the victims, because you've raised it. We will 100 per cent continue to investigate. We are guided by the evidence and the law and our burdens that we must meet. And when and if we meet those burdens, it will sustain additional charges, we will present them to the Chamber and it will be up to the Chamber to decide*").

⁸ See e.g., the "Public Redacted Version of 'Written submissions pursuant to rule 121(9) of the Rules of Procedure and Evidence', 21 May 2021, ICC-02/05-01/20-405-Conf" (Pre-Trial Chamber II), No. [ICC-02/05-01/20-405-Red](#), 24 May 2021, paras. 11-25, 39, and the "Public Redacted Version of ICC-02/05-01/20-403-Conf Victims' Submissions under Rule 121(9) of the Rules of Procedure and Evidence" (Pre-Trial Chamber II), No. [ICC-02/05-01/20-403-Red](#), 24 May 2021, paras. 1, 40-50. See also, the transcripts of the hearing held on 25 May 2020, No. [ICC-02/05-01/20-T-008-Red-ENG WT](#), pp. 20-21.

⁹ See the "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), No. [ICC-01/04-01/07-1788-tENG](#), 22 January 2010, paras. 86-96. See also the "Decision on Directions for the Conduct of the Proceedings" (Trial Chamber III), No. [ICC-01/05-01/08-1023](#), 19 November 2010, para. 5.

¹⁰ See e.g., 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](#), 26 June 2009, paras. 25-27. See also 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. 7-11.

Trial Chamber I recognised “[t]he 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” as long as it does not “undermine the integrity of these criminal proceedings”.¹¹

10. In the *Bemba* case, legal representatives were allowed to apply both for some of their clients to present their views and concerns in person before the Chamber and for some to provide evidence at trial.¹² Trial Chamber III emphasised that the “[t]hreshold to grant applications by victims to give evidence is significantly higher than the threshold applicable to 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”¹³ in the form of unsworn statements.¹⁴ The presentation of views and concerns of six victims was also authorised in the *Ntaganda* case.¹⁵

11. For the presentation of views and concerns, the Chamber may envisage the possibility for victims to either present their views in person, or in writing. In the case of an appearance in person, the Legal Representatives suggest adopting the procedure established in the *Bemba* and *Ntaganda* cases, according to which the legal representatives and then the judges (but not the parties) would ask questions to the

¹¹ See 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](#), 26 June 2009, para. 17.

¹² 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. See also, the “Decision on victims’ representation and participation” (Trial Chamber V), [No. ICC-01/09-01/11-460](#), 3 October 2012, paras. 56-58; the “Decision on victims’ representation and participation” (Trial Chamber V), [No. ICC-01/09-02/11-498](#), 3 October 2012, paras. 55-57; and 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.

¹³ 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 12, para. 20. See also, the “Public redacted version of ‘Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns’ (10 February 2017, ICC-01/04-02/06-1780-Conf)” (Trial Chamber VI), [No. ICC-01/04-02/06-1780-Red](#), 15 February 2017, para. 10.

¹⁴ 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, para. 7.

¹⁵ See the “Public redacted version of ‘Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns’ (10 February 2017, ICC-01/04-02/06-1780-Conf)” (Trial Chamber VI), [No. ICC-01/04-02/06-1780-Red](#), 15 February 2017, para. 49.

victims.¹⁶ In light of the importance for victims to be able to express their views and to share their experience with the judges, the Legal Representatives favour their appearance in person (either by video-link or at the seat of the Court) rather than in writing where this is possible and requested by a participating victim.

12. In relation to the right to call witnesses, the Legal Representatives will request the appearance before the Chamber for only those witnesses who are able to provide testimony that has not been included in the evidence presented by the parties and who can make a genuine contribution to the determination of the truth.¹⁷ In granting such right, Trial Chamber I considered 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”.¹⁸

13. As for the procedure to be followed, legal representatives have consistently been instructed to file a written request towards the expected end of the Prosecution case,¹⁹ explaining the relevance of the victim’s evidence or views and concerns for the proceedings; how the victim’s evidence or views and concerns would assist in the Chamber’s determination of the truth; the estimated time for the appearance, and whether they need to be afforded in-court protective measures. Such requests have

¹⁶ See the “Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08”, *supra* note 10, paras. 7-8. See also, the “Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims”, *supra* note 1212, para. 7; and the transcripts of the hearing held on 1 March 2017, [No. ICC-01/04-02/06-T-198-Red2-ENG WT](#) p. 3, lines 8-20.

¹⁷ See the “Decision on the Modalities of Victim Participation at Trial” (Trial Chamber II), [No. ICC-01/04-01/07-1788-tENG](#), 22 January 2010, paras. 94-97; “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 (relating to participating victim-witnesses).

¹⁸ See the “Decision on the participation of victims in the trial proceedings”, *supra* note 12, para. 25.

¹⁹ See the “Preliminary Directions for any LRV or Defence Evidence Presentation” (Trial Chamber IX), [No. ICC-02/04-01/15-1021](#), 13 October 2017. See also, the “Decision on the conduct of proceedings” (Trial Chamber VI), [No. ICC-01/04-02/06-619](#), 2 June 2015, para. 69; the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber IX), [No. ICC-02/04-01/15-497](#), 13 July 2016, para. 9; 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; the “Decision on Directions for the Conduct of the Proceedings” (Trial Chamber III), [No. ICC-01/05-01/08-1023](#), 19 November 2010, para. 5; and the “Decision adopting amended and supplemented directions on the conduct of the proceedings” (Trial Chamber I), [No. ICC-02/11-01/15-498-Anx A](#), 4 May 2016, paras. 18-21.

included a description of the topics to be addressed by each victim.²⁰ The Legal Representatives posit that there is no reason to depart from the procedure adopted in previous cases and respectfully submit that said procedure should be followed.

14. In relation to expert witnesses, recently in the *Ongwen* case, Trial Chamber IX authorised the Common Legal Representatives to call four experts to present evidence on different topics²¹ – namely on victimisation of the affected communities; issues related to children, youth and in particular former child soldiers; issues related to rape, sexual and gender-based crimes; and Acholi culture.²² In the context of the present case, there are many topics on which experts could potentially testify, the majority of which are of direct relevance to the interests of the victims. Said subject-matters may include, *inter alia*, the calling of experts on the victimisation of the affected communities, and the immediate and long-term consequences of victimisation – such as psychological trauma, post-traumatic disorder and intergenerational harm, and issues relating to sexual and gender-based crimes.

15. On the issue of submission of documentary and other non-testimonial evidence, the principles of being relevant to the victims' interests, non-duplicative and contributing to the determination of the truth should equally apply.²³

(C) Agreed facts

16. The Legal Representatives contend that the need to consider the interests of the victims with regard to any agreement between the parties as to facts or evidence in a given case is clearly reflected in rule 69 of the Rules. Pursuant to this provision, the *“Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interest of justice, in*

²⁰ 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 17 **Error! Bookmark not defined.**, paras. 12-15.

²¹ See the “Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests” (Trial Chamber IX), [No. ICC-02/04-01/15-1199-Red](#), 6 March 2018.

²² *Idem*.

²³ See the “Decision adopting amended and supplemented directions on the conduct of the proceedings” (Trial Chamber I), [No. ICC-02/11-01/15-498-Anx A](#), 4 May 2016, para. 20.

particular the interests of the victims".²⁴ The rule guards against any agreement between the parties becoming effective and binding in a manner detrimental to the victims' interests. Furthermore, it falls squarely within the power of a Trial Chamber under article 69(3) of the Statute "to request the submission of all evidence that it considers necessary for the determination of the truth".

17. This reading of rule 69 is supported by the jurisprudence of the Court in which victims have been authorised to submit their observations on the facts and evidence agreed between the parties before the Chamber made its decision.²⁵ In the *Lubanga* case, Trial Chamber I ordered the parties to prepare a draft schedule of agreed facts which would then be served on participating victims, and it authorised victims to submit their observations on the facts and evidence agreed between the parties.²⁶ In the present case, the Legal Representatives have already filed notifications to the Pre-Trial Chamber on agreed facts.²⁷

18. This approach is in line with the legal framework of the Court. First, it enables victims to comprehend issues covered by any agreements between the parties and to envisage the potential impact that they could have on their interests, as well as on the proceedings as a whole. Second, the notification of agreements to victims prior to any decision on the merits by the Chamber will contribute to the effective and meaningful participation of victims at trial. Lastly, providing victims with the possibility to submit their views and concerns in relation to such agreed facts will also contribute to the overall fairness of the proceedings. While the Legal Representatives need not be included in the discussions amongst the parties, any agreement reached between them

²⁴ Emphasis added.

²⁵ See e.g., the "Decision on agreements between the parties" (Trial Chamber I), No. [ICC-01/04-01/06-1179](#), 20 February 2008, paras. 11 and 13.

²⁶ *Idem*.

²⁷ See the "Notification on behalf of Applicant Victims on the "Joint Prosecution and Defence submission on agreed facts", No. [ICC-02/05-01/20-304](#), 16 March 2021; and the "Notification on behalf of Applicant Victims on the "Second Joint Prosecution and Defence submission on agreed facts", No. [ICC-02/05-01/20-352](#), 19 April 2021.

under rule 69 should be notified to the Legal Representatives for observations in a timely manner.

(D) Languages

19. The Legal Representatives anticipate using the same languages used during the pre-trial stage. They also inform the Chamber that the languages mostly spoken by the victims are Fur, Arabic and English. In case of appearance before the Chamber, it is most likely that they will use Fur or Arabic. The Arabic spoken and understood by the majority of the victims is the Sudanese one. Therefore, the Legal Representatives stress the importance of providing interpretation in Arabic, as spoken in the relevant parts of Sudan to the extent possible.

(G) Provision of trial briefs

20. The Legal Representatives note the practice in previous cases of authorising legal representatives of participating victims to file trial briefs should they wish to do so.²⁸ The Legal Representatives posit that there is no reason to depart from the procedure adopted in previous instances and respectfully submit that this right should also be granted in the present case.

(I) Estimated length of opening statements

21. The Legal Representatives estimate that one hour in total for each Legal Representative will be sufficient to present the views and concerns of victims in opening statements. The opening statements represent a unique opportunity for the victims to convey their views and concerns to the Chamber, and particularly to make use of their right to explain the reasons for and significance of their participation.

22. The Legal Representatives also wish to inform the Chamber that they are considering the possibility for individual victims to directly present their views and concerns during the opening statements and if this is the case the Legal

²⁸ See the "Decision Setting the Commencement Date of the Trial" (Trial Chamber IX), [No. ICC-02/04-01/15-449](#), 30 May 2016, para. 8. See also, the "Decision Setting the Commencement Date of the Trial" (Trial Chamber V), [No. ICC-01/14-01/18-589](#), 16 July 2020, para. 16.

Representatives would request additional time commensurate with the number and nature of such proposed interventions.

23. In accordance with the practice developed in other cases, all 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.²⁹ In addition, participants are normally requested to make written objections, if any, in relation to such material.³⁰ The Legal Representatives request that this procedure be followed in the present case and that they should benefit from such disclosure and the right to make objections to it if necessary.

(J) Update and forecast on (additional) applications by victims to participate in the proceedings

24. The Legal Representatives inform the Chamber that, following the Decision confirming the charges, new applications collected have already been transmitted to the Registry and that further applications are being collected and will be transmitted to the Registry on a rolling basis.

25. Numerous victims have expressed their wish to participate in the proceedings. Nonetheless, the collection of new applications has proven to be challenging due to a number of factors including the current situation linked to the COVID-19 pandemic, the security situation in the region and in IDP and refugee camps in Darfur and Chad, where a high number of potential victims still reside, and the fact that the Court does not yet have a field presence in Sudan (and specifically in Darfur), or in Chad. In

²⁹ See the "Initial Directions on the Conduct of the Proceedings" (Trial Chamber IX), [No. ICC-02/04-01/15-497](#), 13 July 2016, para. 8. See also the "Decision on the conduct of proceedings" (Trial Chamber VI), [No. ICC-01/04-02/06-619](#), 2 June 2015; para. 10; 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; and the instruction issued by Trial Chamber I, transcripts of the hearing held on 16 January 2009, [No. ICC-01/04-01/06-T-104-ENG ET WT](#), pp. 45-47.

³⁰ 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, para. 11. See also, the instruction issued by Trial Chamber I, transcripts of the hearing held on 16 January 2009, [No. ICC-01/04-01/06-T-104-ENG ET WT](#), pp. 45-47.

particular, in relation to the Court's activities in Sudan, the Legal Representatives inform the Chamber that the Registry is still in the initial phase of securing cooperation from the relevant agencies and assessing the situation on the ground. Consequently, proper outreach efforts in the affected communities are extremely challenging. Therefore, the Legal Representatives reserve their right to eventually raise this matter with the Chamber if the situation has not substantially improved in the near future.

26. Concerning the victims already authorised to participate in the case at the pre-trial stage, the Legal Representatives note that all of them fall within the scope of the case by virtue of the confirmation of all charges against the accused. Therefore, in accordance with the current jurisprudence,³¹ they shall be automatically admitted at the trial stage without the need of a *de novo* determination of their status.

27. Concerning the new applications for participation received after the confirmation proceedings, the Legal Representatives favour the approach already adopted at the pre-trial stage concerning the procedure for admission of victims to participate in the proceedings.³² This approach allows for the handling of victims' applications in an efficient manner and expedites the proceedings. Moreover, in light of the potential high number of victims, the Legal Representatives also favour the use of the simplified application form already used at the pre-trial stage which does not require the signature of the applicant.³³

28. In this regard – while in accordance with regulation 85(3) of the Regulations of the Court victims are encouraged to file their applications before the start of the stage of the proceedings in which they wish to participate – the Legal Representatives request that the Chamber permit victims to also do so throughout the proceedings. In light of the current COVID-19 pandemic – and in order not to prejudice the right of

³¹ See e.g., the “Decision on victim participation” (Trial Chamber I), [No. ICC-02/11-01/11-800](#), 6 March 2015, para. 41.

³² The Legal Representative refers in particular to the adoption of the system in which applications are assessed as falling in Categories A, B or C. See the “Decision establishing the principles applicable to victims' and representation during the Confirmation Hearing” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-259](#), 18 January 2021.

³³ See the “Decision on the Registry's Request for Authorisation to use a Modified Standard Application Form for Victim Participation” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-198](#), 4 November 2020.

victims to participate in the proceedings – the Legal Representatives suggest that the Chamber set an appropriate timeline for victims to file their applications prior to the start of the trial but, in addition, leaves open the possibility for victims to do so throughout the trial, at least until the end of the presentation of evidence by the Prosecution. This approach has been adopted in the Court’s recent cases.³⁴ For the purpose of proper administration of new applications presented during the trial, the Legal Representatives suggest that the Registry is instructed to transmit to the Chamber collected application forms on a rolling basis at periodic intervals, and in a manner focused on minimising disruptions to the proceedings to the extent that this is possible.³⁵

Matters under item (E), (F) and (H)

29. The Legal Representatives have no submissions to make on matters under items (E), (F) and (H) of the Order which are to be primarily addressed by the Prosecution and the Defence. The Legal Representatives reserve the right to make observations at the hearing on these items following the parties’ relevant submissions.

Other matters

30. Concerning the invitation by the Chamber to address further items,³⁶ the Legal Representatives wish to respectfully raise a few matters related to the conduct of the proceedings.

³⁴ See e.g., the “Decision on request for extension of deadlines for the final transmission of victim applications for participation at trial” (Trial Chamber X), [No. ICC-01/12-01/18-880](#), 12 June 2020, para. 13; and the “Decision Setting the Commencement Date of the Trial” (Trial Chamber V), [No. ICC-01/14-01/18-589](#), 16 July 2020, para. 20.

³⁵ See the “Decision on request for extension of deadlines for the final transmission of victim applications for participation at trial” *supra* note 34, para. 13.

³⁶ See the Order, *supra* note 3, para. 3.

Protocols to be adopted at trial

31. The Legal Representatives have no observations on the e-court protocol³⁷ and on the protocol for handling confidential information and contacting witnesses of other parties or participants,³⁸ as already adopted at the pre-trial stage of the case.

32. In relation to a protocol on redactions to be adopted at trial by the Chamber, the practice has shown that in the course of the proceedings – and particularly at trial – lifting of redactions in application forms or in documents attached to application forms or related to victims may become a live issue. Therefore, the Legal Representatives suggest that certain categories of information such as contact information of victims and information identifying intermediaries should be considered as falling in the standard category redactions without the need for specific approval by the Chamber. In addition, in accordance with the established practice,³⁹ the Legal Representatives indicate that the relevant legal representative(s) should be consulted on any request for lifting redactions which may impact on previous rulings granting said redactions in application forms and related material of participating victims and that they shall be afforded an opportunity to challenge any such request before the Chamber.

33. The Legal Representatives also favour the adoption of a Protocol on dual status individuals as implemented in other cases before the Court.⁴⁰ These Protocols reflect

³⁷ See Annex I to the “Order on Disclosure and Related Matters” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-116-Anx1](#), 17 August 2020.

³⁸ See Annex II to the “Order on Disclosure and Related Matters” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-116-Anx2](#), 17 August 2020.

³⁹ See e.g., the “Decision on Prosecutor’s requests for lifting of certain redactions in victim application forms (ICC-02/11-01/15-465 and ICC-02/11-01/15-493)” (Trial Chamber I), [No. ICC-02/11-01/15-506](#), 9 May 2016. See also, the “Decision on Defence request for lifting of redactions in documents related to victims authorised to present evidence” (Trial Chamber VI), [No. ICC-01/04-02/06-1835](#), 24 March 2017.

⁴⁰ 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 and 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](#), with [Anx1](#), 23 January 2015. See also, the “Decision adopting mechanisms for exchange of information on individuals enjoying dual status”, with one public annex (Trial Chamber I), [No. ICC-02/11-01/15-199](#) and [Anx](#), 31 August 2015; the “Decision on Protocols to be Adopted at Trial” (Trial Chamber IX), [No. ICC-02/04-01/15-504](#), 22 July 2016; the “Decision on the ‘Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the

the efforts of various Chambers to create a uniform practice and have proved to be workable Court-wide. They also take into account the specific circumstances of individuals enjoying dual status of participating victims and witnesses. Furthermore, the *Chambers Practice Manual* recommends that a protocol specifically governing dual status individuals may be appropriate.⁴¹ In this regard, Trial Chamber IX also emphasised that: “[...] *special considerations apply to such witnesses and that something like a protocol is required to regulate the exchange of information regarding them*”.⁴² Accordingly, the Legal Representatives suggest that the Chamber adopts a protocol on dual status individuals similar to the one adopted in the *Ongwen*⁴³ and in the *Yekatom & Ngaissona* cases.⁴⁴

34. Furthermore, the Legal Representatives highlight the need to protect the safety and well-being of witnesses in the present case, including participating victims. As Trial Chamber V noted in the *Ruto & Sang* and in the *Kenyatta* cases, much of a witness’ apprehension about testifying may result from “[...] *anxiety about giving evidence in what may feel like a foreign and even hostile environment, a lack of confidence in their ability to communicate and articulate their experiences, and/or apprehension over the unfamiliar experience of being challenged during cross-examination*”.⁴⁵

35. In the particular circumstances of the present case, it is likely that a significant number of witnesses will be highly vulnerable. Witness familiarisation is thus essential to reduce the psychological burden of testifying in an environment completely different from the one in which witnesses live and that they are used to. The protocol adopted in the *Ongwen* case “[...] *reflects the jurisprudence on familiarisation and its related*

opposing party or of a participant’, the ‘Dual Status Witness Protocol’, and related matters” (Trial Chamber X), [No. ICC-01/12-01/18-674](#), 19 March 2020.

⁴¹ See the [Chambers Practice Manual](#), fourth edition, 29 November 2019, para. 79.

⁴² See the “Decision on Protocols to be Adopted at Trial” (Trial Chamber IX), [No. ICC-02/04-01/15-504](#), 22 July 2016, para. 31.

⁴³ See the Annex to the “Decision on Protocols to be Adopted at Trial” (Trial Chamber IX), [No. ICC-02/04-01/15-504-Anx2](#), 22 July 2016.

⁴⁴ See Annex 2 to the “Decision on Protocols at Trial” (Trial Chamber V), [ICC-01/14-01/18-677-Anx2](#), 8 October 2020.

⁴⁵ See the “Decision on witness preparation” (Trial Chamber V), [No. ICC-01/09-01/11-524](#), 2 January 2013, para. 37; and the “Decision on witness preparation” (Trial Chamber V), [No. ICC-01/09-02/11-588](#), 2 January 2013, para. 41.

*procedures and also takes into account the practices and experiences concerning witnesses appearing before the Court. The protocol aims to outline the procedures that serve the best interests of witnesses and provide for sustainable working solutions for all entities involved”.*⁴⁶

In this regard, the *Chambers Practice Manual* also recommends that the Trial Chamber adopt a “*familiarisation protocol governing the period of time shortly before a witness commences his/her testimony*”.⁴⁷ The Legal Representatives suggest that the Chamber also adopt a similar Witness Familiarisation Protocol in these proceedings.

Site visit

36. The Legal Representatives stress the importance of making judicial proceedings transparent and accessible in the country where the crimes were committed – thereby providing maximum access to a large public, including victims and affected communities.

37. While holding proceedings in Sudan is not currently feasible for logistical and security reasons, the Legal Representatives request that the Chamber consider holding a judicial site visit at an appropriate time – ideally once it is fully acquainted with the Prosecution’s case. In the *Ongwen* case, Trial Chamber IX considered that holding a site visit “*would be useful and appropriate*”⁴⁸ after having heard part of the evidence presented at trial and taking note of the parties’ and participants’ observations, and proceeded accordingly.⁴⁹

38. Adopting such a process in this case would help to ensure the effective participation of victims, and some victims have already expressed their wish that the judges visit the places where the crimes were committed in order to fully understand their experience and suffering.

⁴⁶ See Annex 1 of the “Decision on Protocols to be Adopted at Trial” (Trial Chamber IX), [No. ICC-02/04-01/15-504-Anx1](#), 22 July 2016, para. 2.

⁴⁷ See the [Chambers Practice Manual](#), fourth edition, 29 November 2019, para. 78.

⁴⁸ See the “Decision on Judicial Site Visit to the Republic of Uganda” (Trial Chamber IX), [No. ICC-02/04-01/15-1020](#), 13 October 2017, para. 5.

⁴⁹ See the “Annex to the Registration into the Record of the Case of the Site Visit Report pursuant to Trial Chamber Decision ICC-02/04-01/15-1211 of 27 March 2018” (Trial Chamber X), [No. ICC-02/04-01/15-1292-Anx](#), 27 June 2018.

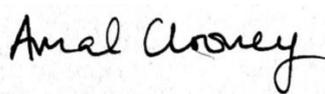
Matters related to the conduct of the proceedings

39. Finally, in relation to the modalities of participation of victims at trial, the Legal Representatives favour orality in the proceedings on key issues throughout the trial.⁵⁰ The Legal Representatives further advocate for the simplified practice to request to question witnesses,⁵¹ the mode of questioning,⁵² and use of documents.⁵³ In particular, they suggest adopting the procedure implemented in the *Ongwen* and in the *Yekatom & Ngaiissona* cases in which the legal representatives “[were] not required to provide an advance written note of any questions they intend to ask – applications to question may be presented orally just prior to questioning, and the necessity or propriety of questions asked will be addressed on a case-by-case basis”.⁵⁴ This approach has proved to be effective, while ensuring a fair and expeditious trial for both parties and participants.

Respectfully submitted,



Paolina Massidda



Amal Clooney



Nasser Mohamed Amin
Abdalla

Dated this 1st day of September 2021

At The Hague (The Netherlands), London (U.K.) and Cairo (Egypt)

⁵⁰ See the oral decision issued by Trial Chamber I, transcripts of the hearing held on 28 January 2016, [No. ICC-02/11-01/15-T-9-ENG ET](#), p. 36, lines 10-18.

⁵¹ See the oral decision issued by Trial Chamber I, transcripts of the hearing held on 3 February 2016, [No. ICC-02/11-01/15-T-13-Red3-ENG CT](#), p. 2, lines 17-25.

⁵² See the “Decision adopting amended and supplemented directions on the conduct of the proceedings” (Trial Chamber I), [No. ICC-02/11-01/15-498-Anx A](#), 4 May 2016, paras. 15-17 and 27-32.

⁵³ *Idem*, paras. 34-38 and 43-47.

⁵⁴ See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber IX), [No. ICC-02/04-01/15-497](#), 13 July 2016, para. 10; and the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber V, Single Judge), [No. ICC-01/14-01/18-631](#), 26 August 2020, para. 18.