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**International
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Court**

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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO
CHUI

URGENT
Public

**Directions for the conduct of the proceedings and testimony in accordance
with rule 140**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

Mr Eric MacDonald

Counsel for Germain Katanga

Mr David Hooper

Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika

Mr Jean-Louis Gilissen

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

Trial Chamber II ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, having regard to articles 64, 67 and 68 of the Rome Statute of the International Criminal Court ("Statute"), rule 140 of the Rules of Procedure and Evidence ("Rules") and regulations 43 and 54 of the Regulations of the Court ("Regulations"), issues the following decision:

A. Directions for the conduct of the proceedings and testimony

1. At the status conference of 3 November 2009, the Chamber ordered the parties and participants to submit their observations in relation to the organisation of the hearings on the merits.¹

2. The Office of the Prosecutor ("Prosecution"),² the Defence for Mr. Katanga³ and the Victims' Legal Representatives⁴ all filed their observations on 6 November 2009. The Defence for Mr. Ngudjolo did not submit formal observations. It did, however, inform the Legal Adviser of the Trial Division that it wished the Chamber to apply rule 140 of the Rules.⁵

3. Apart from a few points, the parties and participants seem to be largely in agreement about how the trial should be conducted. Nevertheless, in order to avoid any ambiguity and to provide clear

¹ ICC-01/04-01/07-T-76-CONF-ENG-CT, p. 27, line 5 et seq.

² "Observations et propositions de l'Accusation sur l'interrogatoire des témoins en audience", 6 November 2009, ICC-01/04-01/07-1610

³ "Defence submissions in respect of the application of Rule 140", 6 November 2009, ICC-01/04-01/07-1606

⁴ "Observations conjointes des Représentants légaux des victimes sur l'ordre de l'interrogation des témoins", 6 November 2009, ICC-01/04-01/07-1605

⁵ Electronic correspondence between the Defence for Mr. Ngudjolo and the Trial Division, 5 November 2009, 17h08

guidance, the Presiding Judge, after consultation with the Chamber, decides to issue detailed directions for the conduct of the proceedings and testimony.

4. With regard to the modalities of the participation by the Legal Representatives of the victims, the Chamber will issue a decision in the coming days. However, in order to inform the Legal Representatives about how they will be able to perform their role during the proceedings on the merits, the Directions include specific instructions on the different ways in which victims may be allowed to intervene in the proceedings.

B. Duration of the Prosecution phase

5. On 7 October 2009, the Prosecution provided a list of all the witnesses it intends to call for the presentation of its case, indicating, for each witness, the themes to which he or she will testify and the expected duration of the examination-in-chief.⁶

6. During a status conference, held on 2 November 2009, the Chamber ordered the Prosecution to submit a new proposal, which would radically reduce the number of hours envisaged for examination-in-chief.⁷

7. On 13 November 2009, the Prosecution submitted its new proposal ("Proposal").⁸ The Proposal mentions 26 witnesses and provides an estimate for the duration of the examination-in-chief of each of them. In total, the Prosecution estimates that it will need 200 hours for the examination-in-chief of its 26 witnesses.

⁶ "Thèmes principaux sur lesquels les témoins de l'Accusation déposeront", 7 October 2009, ICC-01/04-01/07-1514

⁷ ICC-01/04-01/07-T-74-CONF-ENG ET, page 59, lines 13-15

⁸ "Notification de l'Accusation sur la durée des interrogatoires principaux des témoins à charge", 13 November 2009, ICC-01/04-01/07-1636

8. The Chamber observes that the projections of the Prosecution would amount to almost eight hours of examination-in-chief per witness. However, although the Chamber is well aware of the structural and technical differences between the Court's proceedings and those of the *ad hoc* tribunals, most notably with regard to the issue of witness proofing, it is of the view that 4.5 hours per witness on average should suffice. This translates into roughly into a total of 120 hours for the examination-in-chief of the 26 witnesses who are currently on the Prosecution Witness List.

9. The Prosecution is of course free to choose how to allocate the 120 hours between the different witnesses it intends to call.

10. By way of indication, the Chamber informs the parties that for the purposes of cross-examination, each Defence team will be allocated roughly 60 per cent of the time used by the Prosecution for examination-in-chief.

FOR THESE REASONS,

THE PRESIDING JUDGE,

DECIDES to adopt the following Directions for the conduct of the proceedings contained in the annex to the present decision.

DECIDES that the Prosecution will have a total of 120 hours for the examination-in-chief of all the witnesses it intends to call.

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

A handwritten signature in black ink, appearing to read 'Bruno Cotte', is positioned above a horizontal line.

Judge Bruno Cotte
Presiding Judge

Dated this 20 November 2009

At The Hague, the Netherlands

DIRECTIONS FOR THE CONDUCT OF THE PROCEEDINGS AND TESTIMONY

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I. COURSE OF THE PROCEEDINGS

A. Opening and closing statements

1. On the 3rd of November 2009, the Chamber decided upon the length of the opening statements by the Prosecution, the Victims' Legal Representatives and the Defence at the commencement of the trial on the merits, in accordance with regulation 54 of the Regulations.⁹

2. In principle the same order shall be observed for the closing statements. The Chamber will determine the appropriate length for the respective closing statements at a later stage.

B. Phases of the trial

3. The hearings will be organised in different phases. The Chamber may intervene at all times and order the production of all evidence that it considers necessary for the determination of the truth, in accordance with article 64(6)(d) and 69(3) of the Statute.

4. The first phase will consist of the presentation by the Office of the Prosecutor of its case against the accused ("Prosecution case").

5. If there are any participating victims who wish to testify in person, they may petition the Chamber for permission to do so at this stage in accordance with the procedure outlined below.¹⁰

6. The second phase will consist of the presentation by the Defence for both accused of their respective defence case ("Case for the Defence").

⁹ Status conference held on 3 November 2009, ICC-01/04-01/07-T-76-CONF-ENG CT, page 26, line 5 et seq.

¹⁰ II.B Possibility for victims to testify

The Defence for Mr. Katanga will present its case first, followed by the Defence for Mr. Ngudjolo.

7. After both Defence teams have concluded the presentation of their case, the Chamber may decide to call further witnesses.¹¹ This may include the calling of witnesses at the suggestion of the Victims' Legal Representatives.

C. Specific order of calling of witnesses

8. Subject to the authority of the Chamber to determine the mode and order of questioning of witnesses and presenting evidence, each party presenting evidence shall inform the Chamber, the other parties and the participants of the exact order of witnesses due to testify and the scheduled date of their appearance at trial. This schedule shall be updated at the end of each week and provide the exact planning for the coming two weeks.

9. If there are any last-minute changes to the schedule or the calling order, the party in question shall inform the Chamber, the parties and the participants as early as possible.

D. Length of each phase

10. The Chamber will closely monitor the progress of the proceedings. It will determine the length of each phase and will be vigilant that each party adheres to its allotted time. Barring exceptional circumstances, the Chamber will not allow parties to overrun the total number of hours that was assigned for the presentation of their case.

¹¹ I.I.D Witnesses called by the Chamber

11. The Court Officer will keep track of the duration of each phase of the proceedings and the time used by the parties. Moreover, the Court Officer will monitor the duration of questioning of each witness, in accordance with regulation 55 of the Regulations of the Registry. The Court Officer will inform the party examining the witness when it reaches the end of the time allotted to it by the Chamber.

E. Right of the accused to make unsworn statements

12. Nothing in the present Directions is intended to limit the right of the accused to make an unsworn oral or written statement in his or her defence, in accordance with article 67(1)(h) of the Statute. Whenever an accused wishes to make an unsworn statement, he or she shall inform the Chamber, which will decide on the appropriate moment and modalities for making the statement.

F. Time limits

13. The Chamber may at any time vary the time limits which are put in place by the present Directions.

II. ORDER OF QUESTIONING

14. Subject to further specific orders by the Chamber under regulation 43 of the Regulations and without limiting in any way the prerogative of the Chamber to ask questions of whichever witness at any time, evidence at trial shall be presented in the following sequence:

A. Prosecution Case

15. The Prosecution will examine the witness first (examination-in-chief).¹² After that, the Defence for Mr. Katanga will have the opportunity to cross-examine the witness,¹³ followed by the Defence for Mr. Ngudjolo. Defence teams may agree among themselves to change the order in which they cross-examine witnesses called by other participants. The Defence are encouraged to coordinate with each other and, to the extent possible, designate one of them to conduct the cross-examination on behalf of both accused.

16. Following cross-examination by the Defence, the Prosecution will have the opportunity to re-examine the witness in relation to matters that were raised for the first time during cross-examination.

17. Pursuant to rule 140(2)(d), the Defence shall have the right to be the last to question the witness.

18. If Victims' Representatives want to ask questions of a particular witness,¹⁴ after the Prosecution has finished its examination-in-chief, they shall seek permission to do so from the Chamber.¹⁵

¹² For scope and modalities, see IV.A Examination-in-chief/Interrogatoire en chef

¹³ For scope and modalities, see IV.B Cross-examination/Contre-interrogatoire

¹⁴ Rule 91(3) of the Rules

¹⁵ IV.E Questions by Victims' Legal Representatives

B. Possibility for victims to testify

19. As the Chamber explained in its decision on the modalities of victims' participation, victims may under certain circumstances be allowed to participate in the proceedings by way of giving oral testimony. This possibility is subject to authorisation by the Chamber.

1. Conditions

20. As a general principle, the Chamber will only grant applications on behalf of victims whose testimony can make a genuine contribution to the ascertainment of the truth. It is therefore important that the Legal Representative clearly explains the relevance of the proposed testimony of the victim in relation to the issues of the case and in what way it may help the Chamber to have a better understanding of the facts.

21. In determining whether and how the Legal Representatives are allowed to call victims they represent to testify, the Chamber will be guided by the overriding concern that this takes place in an expeditious manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

22. Accordingly, the possibility for the Legal Representatives to call victims who participate in the proceedings to testify in person, is subject to three important limitations:

- a. The Chamber may not allow the participation by victims to infringe on the right of the accused to be tried without undue delay, in accordance with article 67(1)(c).

- b. The Chamber will only allow Victims' Legal Representatives to call witnesses to the extent that this does not in effect transform them into auxiliary prosecutors.
- c. Under no circumstances the Chamber will allow victims to testify anonymously vis-à-vis the Defence.

23. Furthermore, the Chamber must ensure that the Defence have adequate time to prepare, which implies that the participation by a victim may not be the cause of unfair surprise for the Defence, to which it is not able to respond adequately.

24. Bearing in mind these important pre-conditions, the Chamber may authorise the Legal Representatives of the victims to call one or more of their clients in order to testify in person before the Court and give evidence under oath. The Chamber will only allow this after the Prosecution has concluded its case and insofar as it does not undermine the integrity of the proceedings.¹⁶

2. Application for calling a victim to testify

25. When a victim wishes to testify at trial, his or her Legal Representative must file a written application to the Chamber before the completion of the Prosecution case.

26. The application must be accompanied by a signed statement by the victim, containing a comprehensive summary of the testimony that is to be given by the victim. If the Chamber grants the application, the

¹⁶ "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", 26 June 2009, ICC-01/04-01/06-2002-Conf

attached statement shall count as disclosure in accordance with regulation 54(f) of the Regulations.

27. The Chamber urges the Legal Representatives to avoid the need for unnecessary redactions in the said statement. However, if it is necessary to protect the safety, physical or psychological well-being of the victims or third persons who are implicated by the participation of a victim, the Chamber may authorise redactions. Under no circumstances may the Legal Representatives apply redactions without prior authorisation by the Chamber.

28. The application and the statement must be notified to the parties, who will have seven days to make observations. The Chamber will rule on the application and determine the appropriate moment for the victim to testify.

29. In the event the Chamber authorises the application, the Legal Representative must enter into contact with the Victims and Witnesses Unit in order to make all necessary arrangements and discuss any possible security concerns.

3. Criteria for evaluating applications for giving testimony by victims

30. In evaluating applications for participation through oral testimony by victims, the Chamber may take into consideration, among others, the following factors:

- a. Whether the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties.

- b. Whether the topic(s) on which the victim proposes to testify is sufficiently closely related to issues which the Chamber must consider in its assessment of the charges brought against the accused.¹⁷
- c. Whether the proposed testimony is typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify, or whether the victim is uniquely apt to give evidence about a particular matter.
- d. Whether the testimony will likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges.

4. Order of questioning

31. After making the solemn undertaking, the victim will be questioned by the Victim's Legal Representative (examination-in-chief). The Legal Representative of the victim testifying may also allow the other Legal Representative to ask questions.

32. After this, the Prosecution will have an opportunity to examine the victim, followed by the Defence for Mr. Katanga and the Defence for Mr. Ngudjolo. In principle, questioning of the victims should be conducted in a neutral fashion. However, the Chamber may determine on a case-by-case basis that cross-examination, as defined below,¹⁸ by the Prosecution or the Defence is allowed.

¹⁷ "Decision on victims' participation", 18 January 2008, ICC-01/04-01/06-1119, par. 97

¹⁸ IV.B.3 Mode of questioning

C. Case for the Defence

1. Case for Mr. Katanga

33. The Defence for Mr. Katanga will start by examining the witness it has called (examination-in-chief). After that, the Defence for Mr. Ngudjolo will have the opportunity to question the witness.¹⁹

34. Next, the Prosecution will have the opportunity to cross-examine the witness.

35. If the Defence for Mr. Ngudjolo wishes to ask further questions after the Prosecution's cross-examination, it shall seek permission from the Chamber to do so. Questions will be limited to matters raised since it first had the opportunity to question the witness and which pertain to its own case.

36. In conformity with rule 140(2)(d), the Defence for Mr. Katanga shall have the right to be the last to question the witness.

37. If Victims' Legal Representatives want to ask questions of a particular witness, in accordance with rule 91(3) of the Rules, after the Prosecution has cross-examined the witness, they shall seek permission to do so from the Chamber in accordance with the procedure laid down below.²⁰ The Chamber will decide on a case-by-case basis whether it is appropriate for the Victims' Legal Representative to ask questions and determine the moment for asking them, as well as the allowed mode of questioning.

¹⁹ See, for specific directions regarding examination by the co-accused: IV.B.2 and IV.B.3.c) below.

²⁰ IV.E Questions by Victims' Legal Representatives

2. *Case for Mr. Ngudjolo*

38. The Defence for Mr. Ngudjolo will start by examining the witness it has called (examination-in-chief). After that, the Defence for Mr. Katanga will have the opportunity to question the witness.²¹

39. Next, the Prosecution will have the opportunity to cross-examine the witness.

40. If the Defence for Mr. Katanga wishes to ask further questions after the Prosecution's cross-examination, it shall seek permission from the Chamber to do so. Questions will be limited to matters raised since it first had the opportunity to question the witness and which pertain to its own case.

41. In conformity with rule 140(2)(d), the Defence for Mr. Ngudjolo shall have the right to be the last to question the witness.

42. If Victims' Legal Representatives want to ask questions of a particular witness, in accordance with rule 91(3) of the Rules, after the Prosecution has cross-examined the witness, they shall seek permission to do so from the Chamber. The Chamber will decide on a case-by-case basis whether it is appropriate for the Victims' Legal Representative to ask questions and determine the moment for asking them, as well as the allowed mode of questioning.

²¹ See, for specific directions regarding examination by the co-accused: IV.B.2 and IV.B.3.c) below.

D. Witnesses called by the Chamber

1. *Witnesses called by the Chamber proprio motu*

43. If the Chamber decides to hear a witness not called by any party, on the basis of its powers under articles 64(6)(d) and 69(3) of the Statute, it will start examining the witness.

44. After the Chamber has questioned the witness, the Prosecution will have an opportunity to examine the witness, followed by the Defence for Mr. Katanga and the Defence for Mr. Ngudjolo. In principle, questioning of the witness should be conducted in a neutral fashion. However, the Chamber may determine on a case-by-case basis that cross-examination, as defined below,²² by the Prosecution or the Defence is allowed.

2. *Witnesses called by the Chamber at the suggestion of the Victims' Legal Representatives*

45. As a matter of principle, Victims' Legal Representatives will not be able to call witnesses other than the victims they represent.²³ However, in case the Legal 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 take the initiative to bring this to the attention of the Chamber.

46. 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.

²² See IV.B Cross-examination/Contre-interrogatoire, especially paragraphs 7475

²³ See II.B.2 Application for calling a victim to testify

47. As a general rule, the Chamber will only call witnesses whose testimony can make a genuine contribution to the ascertainment of the truth. It is therefore important that the Legal Representatives clearly explain the relevance of the proposed testimony in relation to the contentious issues of the case.

48. When the Chamber has called a witness on the suggestion of one of a Legal Representative, it may allow that Representative to question the witness, either before or after the Chamber examines him or her. The remainder of the examination will follow the same order as for witnesses called by the Chamber *proprio motu*.²⁴

²⁴ 1III.D.1 Witnesses called by the Chamber *proprio motu*.

III. GENERAL ISSUES CONCERNING TESTIMONY

A. Solemn undertaking and warning against self-incrimination

49. Before allowing the examination of a witness to commence, the Presiding Judge will invite the witness to make the solemn declaration in accordance with rule 66 of the Rules and will inform the witness that it is an offence under the Statute to give false testimony which is subject to possible sanctions.²⁵

50. The witness will remain under oath until the end of the proceedings. It will not be necessary that the witness repeat the solemn declaration after each adjournment.

1. Testimony by the accused

51. The accused have the right to make an unsworn oral statement in their defence, in accordance with article 67(1)(h) of the Statute,²⁶ without this affecting their right to remain silent. They cannot therefore be compelled to testify under oath, even if they make an unsworn statement. However, if an accused consents to giving evidence, he or she becomes subject to the same rules as outlined below that are applicable to other witnesses.

²⁵ Rule 66

²⁶ I.E Right of the accused to make unsworn statements

B. Self-incrimination

1. *General principle and procedure*

52. Given the nature of the proceedings before the Court, it may occur regularly that witnesses called to testify against or in defence of the accused, are confronted with questions which may require them to reveal information that could incriminate them. Even when the Prosecution and the Democratic Republic of the Congo ("DRC") provide blanket immunities for all witnesses testifying before the Court, the Chamber is of the view that the possibility cannot be excluded that a witness might expose him or herself to criminal prosecution in other jurisdictions. Indeed, as pointed out by Trial Chamber I, some countries exercise jurisdiction over war crimes, genocide and crimes against humanity wherever and by whomsoever they are committed.²⁷ Whether this is merely a remote theoretical possibility or a matter that must be seriously considered for each and every witness is not something that can be answered in the abstract. At the same time, it cannot be a ground for upsetting the public character of the proceedings and therefore the Chamber cannot systematically provide assurances under rule 74, given the fairly drastic measures this requires.

53. For these reasons, the Chamber instructs the Registry to make all necessary arrangements that witnesses who are not participating as victims in proceedings before the Court²⁸ and who may incriminate themselves in their testimony, are provided with independent legal advice from a qualified lawyer. It would be preferable if this lawyer can speak directly to the witness in a language he or she understands.

²⁷ ICC-01/04-01/06-T-113-ENG, page 2, line 8-10

²⁸ Victims who are called to testify shall receive counsel from their respective Legal Representative

54. The parties calling witnesses are hereby instructed to inform the Victims and Witnesses Unit if they believe that a witness may be making self-incriminating statements during his or her testimony. Once a lawyer has been appointed by the Registry, the latter shall inform the party calling the witness, who shall then be responsible for providing the lawyer with any prior statements or interview transcripts by the witness as well as any other relevant material.

55. The lawyer appointed for this purpose will have the task of explaining the provisions of rule 74 of the Rules as well as any possible consequences that may follow if the witness perjures him or herself before the Chamber, in accordance with rules 66(3) and 70(1)(a) of the Rules. The lawyer must provide this advice in advance of the first appearance of the witness before the Chamber. The Victims and Witnesses Unit shall ensure that during the familiarisation process, the lawyer will be given sufficient time alone with the witness for this purpose.

56. If the witness considers that he or she requires assurance under rule 74(3)(c) of the Rules, the advising lawyer will immediately inform the Chamber and the Prosecution of this request and explain the reasons therefore. The Prosecution shall inform the Chamber within the shortest possible delay of its views on the matter, in accordance with rule 74(4) of the Rules, in order to allow the Chamber to rule on it, if possible before the witness attends.

2. Specific considerations

57. The Chamber notes that on 9 November 2009, the Prosecution informed the Chamber that, in its view, it was not necessary for the

Chamber to notify witnesses of the provisions of rule 74 of the Rules.²⁹ It based this assertion on the basis of its avowal to have ‘no intention’ to prosecute witnesses for any incriminating facts that they may reveal during their testimony and the written undertaking by the DRC that it too would not prosecute witnesses for criminal acts and facts they might reveal during their testimony before the Court.³⁰ Nevertheless, the Prosecution identified three witnesses who might incriminate themselves.³¹ The Chamber therefore invites the Registry to take all necessary steps with regard to these three witnesses, in accordance with the procedure outlined above.

C. Vulnerable Witnesses

58. When a vulnerable witness is called to give testimony, the Chamber may take special measures in accordance with rule 88 of the Rules. Such measures may include the utilisation of a curtain to shield the witness from the view of the accused (albeit not from their counsel). Given the specific layout of the courtroom, it may be necessary to move Mr. Ngudjolo from his usual seat and place him next to Mr. Katanga, behind the same table.

²⁹ “Position de l’Accusation sur la mise en œuvre de la règle 74”, 9 November 2009, ICC-01/04-01/07-1614-Conf

³⁰ ICC-01/04-01/07-1614-Conf, par. 4-5

³¹ ICC-01/04-01/07-1614-Conf-AnxB

IV. SCOPE AND MODE OF QUESTIONING

59. Subject to any amendment or variation by the Chamber or the Presiding Judge under article 64(8) of the Statute or regulation 43 of the Regulations, the Chamber issues the following guidelines regarding the scope and mode of questioning of witnesses.

60. As a general instruction to all the parties appearing before it, the Chamber wishes to highlight the importance of asking succinct and precise questions, which are easily understandable by the person being questioned. Long and compounded questions are to be avoided.

A. Examination-in-chief/Interrogatoire en chef

1. Scope of questioning

61. As stated in rule 140(2)(a), a party submitting evidence by way of a witness, has the right to question that witness.

62. As a matter of principle, the Chamber will only allow questions that are clearly and directly relevant to contested issues. To the extent that a party has provided an indication of the themes it proposes to raise with a certain witness, and subject to any instructions by the Chamber regarding this matter, that party will be expected to confine its examination-in-chief to those themes.

63. Questions concerning the historical background and/or contextual elements of the case should as much as possible be focused on such matters as to which there is disagreement between the parties.

64. To the extent possible, both Defence teams should attempt to coordinate the calling of witnesses. As a matter of principle, the Chamber

will not allow the same witness to be called more than once, unless there are overriding reasons for doing so.

65. When both accused wish to call the same witness, they shall coordinate with each other so as to avoid having to call the witness more than once. The Chamber therefore expects that in such a case the witness will be called by both Defence teams jointly. They shall agree among themselves how to organise the examination-in-chief and re-examination. In principle, all questions on behalf of both accused are to be put during examination-in-chief. The Defence teams may agree to partition the examination-in-chief of a witness or assign one Defence team to conduct the entire questioning. When one Defence team conducts the examination-in-chief on behalf of both accused, the other Defence team shall not have the right to cross-examine the witness.

2. Mode of questioning

66. As a general rule, during examination-in-chief only neutral questions are allowed. The party calling the witness is therefore not allowed to ask leading³² or closed³³ questions, unless they pertain to an issue that is not in controversy.

67. However, if a party declares that the witness it has called has become adverse and the Chamber allows that party to continue questioning the witness, it may be appropriate for that party to cross-examine the witness. In such case, cross-examination must be limited to issues raised during the initial part of the interrogation or contained in the witness' previous statements.

³² Leading question: question framed in such a way as to suggest the answer sought or to assume the existence of facts yet to be established.

³³ Closed question: question framed in such a way that the answer can only be binary (yes or no).

B. Cross-examination/Contre-interrogatoire

1. Scope of questioning

68. It is a general rule and principle of fairness that the party opposing the party calling a witness, has the right to question that witness by way of cross-examination, in accordance with rule 140(2)(b).

69. Cross-examination shall be limited to matters raised during examination-in-chief and matters affecting the credibility of the witness. In addition, where the witness is able to give evidence relevant to the case for the cross-examining party, it may ask questions about such matters, even if they were not raised during examination-in-chief.

70. To the extent that the case of the cross-examining party is in contradiction with the evidence given by the witness during examination-in-chief, that party shall state this clearly to the witness before putting questions on that topic.

71. The Chamber stresses that cross-examination must also contribute to the ascertainment of the truth and is not to be used to obfuscate or delay the fact-finding process. As a general measure of good practice and subject to further specific instructions by the Chamber, parties are encouraged to adhere to the following guidelines when cross-examining:

- a) Questions must pertain to matters of fact that could reasonably be expected to be known to the witness. Unless the witness is called as an expert, parties may not ask witnesses to speculate or explain their opinion about facts not known to them.
- b) Before putting questions about contextual elements and/or the historical context of the case, counsel must state the purpose behind the question and explain how the evidence sought is relevant to the confirmed charges.

- c) Questions probing the credibility of the witness and the accuracy of his or her testimony are allowed, but must be limited to factors that could objectively influence reliability. When the witness has fully answered the question, the party cross-examining the witness will not be allowed to put further questions aimed at impeaching that answer without permission of the Chamber.
- d) If a witness did not provide all his or her testimony orally during examination-in-chief because the testimony was introduced by way of prior recorded testimony under rule 68(b), the cross-examining party must limit questioning to:
 - i. issues contained in the passages of the prior recorded testimony that were relied upon by the party calling the witness, or
 - ii. matters that are relevant to its own case.

The Chamber will not allow cross-examination on matters raised in the previously recorded testimony that have not been tendered into evidence by the party calling the witness.

72. The two Defence teams may agree among themselves if they wish to change the order in which they will cross-examine the witness. To the extent possible, the Chamber encourages them to coordinate so that only one of the Defence teams conducts the cross-examination. However, if the both Defence teams insist on conducting their own cross-examination, the Chamber will be strict in prohibiting repetitive questions and limit the second cross-examination to questions that pertain to matters directly relevant exclusively to its client. Challenges to credibility or accuracy of the witness should, in principle, only be asked by the first Defence team cross-examining the witness.

*2. Obligation to put all questions relevant to the case
of the cross-examining party*

73. Cross-examination allows the party not calling the witness to elicit all further relevant evidence as may be useful for the case of that party or necessary for the determination of the truth. It is therefore incumbent upon the cross-examining party to put all questions it may have for the witness during this occasion. In principle, the Chamber will not allow a party to re-call a witness if it already had the opportunity to cross-examine him or her.

3. Mode of questioning

a) Leading and closed questions allowed

74. The party cross-examining may ask leading and closed questions of a witness. The Chamber insists that cross-examination is conducted in a focused and professional manner. It will not allow unwarranted insinuations or questions that are concealed speeches.

b) Challenging questions allowed

75. It is permissible to challenge the credibility of a witness by way of challenging questions, but cross-examination must at all times remain civil and respectful to the witness. The Chamber will not allow parties to assault the dignity or exploit the vulnerability of witnesses during cross-examination.

c) Specific limitations for cross-examination by co-accused

76. As explained above, the Chamber expects that, as a general rule, parties who have not called a witness will put all questions pertaining to

their case during cross-examination.³⁴ This implies that when a witness called by one accused is subsequently cross-examined by the co-accused (who did not jointly call the witness), the latter Defence has the obligation to put all questions that are relevant to its case at that time. In principle, the cross-examining co-accused will not be allowed to put leading or closed questions in relation to matters that are being raised for the first time, unless the witness is clearly adverse to the co-accused.

C. Re-examination/Interrogatoire supplémentaire

1. Scope of questioning

77. After cross-examination, the party who originally called the witness has the right to ask additional questions of the witness, but only in relation to matters that were raised for the first time during cross-examination, unless the Chamber exceptionally allows other questions.

2. Mode of questioning

78. The same rules that apply to examination-in-chief shall equally apply to re-examination.³⁵

D. Final questions by the Defence

79. According to rule 140(2)(d), the Defence has the right to be the last to examine a witness. This means that if a witness was not called by an 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.

³⁴ See IV.B.2 Obligation to put all questions relevant to the case of the cross-examining party

³⁵ 2 IV.A.2 Mode of questioning

1. Scope of questioning

80. Final questions are limited to matters raised since the Defence last had the opportunity to question 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.

2. Mode of questioning

81. The same rules that apply to examination-in-chief shall equally apply to final questioning.³⁶

E. Questions by Victims' Legal Representatives

82. As a matter of general principle, questioning by the Legal Representatives on behalf of victims who participate in the proceedings must have as its main aim the ascertainment of the truth. The victims are not parties to the trial and certainly have no role to support the case of the Prosecution. Nevertheless, their participation may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background.

83. The following rules apply to questioning by Victims' Legal Representatives of witnesses called by other parties, participants or the Chamber.

³⁶ See IV.A.2 Mode of questioning

*1. Procedure for authorising questions by Victims'
Legal Representatives*

a) Questions under article 75

84. When a Victims' Legal Representative wants to question a witness in relation to matters that pertain to a potential order on reparations in accordance with article 75 of the Statute, the Legal Representative shall make a written application to that effect, which shall be notified to the parties. The application shall provide a written note of the questions, in accordance with rule 91(3)(a). The filing shall further explain the precise purpose and scope of the questions and include any relevant documents that will be used for questioning. Finally, the application shall indicate on behalf of which (group of) victim(s) the questions are being put.

85. The application shall be filed as early as possible in order to allow the Chamber to determine whether it is appropriate for the Defence to make observations. Under normal circumstances the Chamber will only consider applications that were received at least seven days before the witness' first appearance.

86. In case the Chamber grants the application, it will make a ruling under regulation 56 of the Regulations, determining whether and to what extent rule 91(4) of the Rules will apply.

b) Anticipated questions by the Legal Representatives

87. When the Victims' Legal Representatives know in advance that they have certain specific questions for a particular witness, expert or the accused, which do not relate to issues of reparation, they shall notify the Chamber and the Prosecution about this in a written application, at least seven days before the witness appears for the first time. The application

shall indicate which questions the Legal Representative proposes to ask and explain how they relate to the interests of the victims represented. If the Chamber considers that the application must be submitted to the Defence for observations, in accordance with rule 91(3)(a), it may decide to reclassify the application so as to allow the notification thereof to the Defence. In that case, the Defence will have three days to formulate its observations.

88. 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. In deciding whether it is appropriate to grant such authorisation, the Chamber will take into consideration the rights of the accused, the interests of the witness, the need for a fair, impartial and expeditious trial and the need to give effect to article 68(3) of the Statute, in accordance with rule 91(3)(b) of the Rules. The Chamber recalls, in this regard, that this provision also authorises it to put the question to the witness, expert or accused on behalf of the Victims' Legal Representative.

c) Unanticipated questions by the Legal Representatives

89. When the Victims' 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 Victims' 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.

2. *Scope of questioning*

90. In principle, questioning by Victims' Legal Representatives should be limited to questions that have as their purpose to clarify or complement previous evidence given by the witness.³⁷ Nevertheless, Victims' Legal Representatives may be allowed to ask questions of fact that go beyond matters raised during examination-in-chief, subject to the following conditions:

- a) Questions may not be duplicative or repetitive to what was already asked by the parties.
- b) Questions must be limited to matters that are in controversy between the parties, unless the Victims' Legal Representative can demonstrate that they are directly relevant to the interests of the victims represented.
- c) In principle, Victims' Legal Representatives will not be allowed to ask questions pertaining to the credibility and/or accuracy of the witness' testimony, unless the Victims' Legal Representative can demonstrate that the witness gave evidence that goes directly against the interests of the victims represented.
- d) Unless the Chamber specifically gave authorisation under regulation 56 of the Regulations, Victims' Legal Representatives are not allowed to put questions pertaining to possible reparations for specific individuals or groups of individuals.

3. *Mode of questioning*

91. The Victims' Legal Representatives shall conduct their questioning in a neutral manner and avoid leading or closed questions, unless

³⁷ Trial Chamber I, *Prosecution v. Thomas Lubanga*, "Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims", 16 September 2009, ICC-01/04-01/06-2127, par. 26

specifically authorised by the Chamber to deviate from this rule.³⁸ If the Victims' Legal Representative is authorised to challenge the credibility/accuracy of a witness's testimony, leading, closed as well as questions challenging the witness's reliability are allowed, subject to the same limitations as outlined in relation to cross-examination.³⁹

F. Prior recorded testimony

92. When a party wishes to introduce prior recorded testimony in accordance with rule 68(b) of the Rules, it shall file an application to that effect at least 21 days before the witness is scheduled to appear for the first time. The application shall be accompanied with a copy of the prior recorded statement indicating precisely which passages the party calling the witness wishes to enter into evidence.⁴⁰ If these passages contain references to other material that is available to the party calling the witness, they shall equally be attached to the application. If the party intends to still ask questions of the witness that go beyond confirming, clarifying or highlighting the passages of the prior recorded testimony that will be entered in written form, this shall be indicated in the application. In such a case, the party calling the witness shall give an indication of the topics it intends to address orally with the witness.

93. The other parties shall have ten days following the notification of the application to raise any objections.

³⁸ Trial Chamber I, *Prosecution v. Thomas Lubanga*, "Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims", 16 September 2009, ICC-01/04-01/06-2127, par. 28-30

³⁹ IV.B.3.b) Challenging questions allowed

⁴⁰ Note, in *Perisic*, the Trial Chamber asked for a version of the statement or transcript in which the parts on which the party does not rely are redacted. Not really clear what the reason for this is.

94. If the Chamber accepts the application and allows the party calling the witness to ask additional questions, that party shall disclose any documents it may wish to use for the purpose of the examination in accordance with the general rules on using documentary evidence.⁴¹

⁴¹ V.C.1Use of documents for the purpose of examination-in-chief

V. DOCUMENTARY EVIDENCE

A. Introduction of documentary evidence

95. In principle, each item of documentary evidence shall be introduced by the tendering party during a hearing. The opposing party shall have the opportunity to comment upon it.

96. If lengthy documents are tendered, the party tendering it shall clearly identify which passages it wants to submit into evidence.

97. If there is an inherent correlation between an item of documentary evidence and a particular witness, the party calling that witness may introduce the item through that witness. However, in such case, the item may not be referred to prior to its introduction by the witness.

B. Tendering of documentary evidence without being introduced by a witness

1. Principle and criteria for the tendering of documents without being introduced by a witness

98. Documentary evidence that is not a written record of testimonial evidence of a witness may be tendered without being introduced by a witness. This is necessary to avoid the need of having to call large numbers of witnesses for the only purpose of introducing documents.

99. It is especially appropriate for tendering documentary evidence concerning issues that must be proved, but about which there is relatively little controversy between the parties.

100. In deciding whether to authorise the introduction of documentary evidence directly from the bar table, without being introduced by a

witness, the Chamber will take into consideration, among others, the following factors:

- a. The nature and origin of the documentary evidence.
- b. The relevance of the information contained in the document to matters at issue in the case.
- c. Whether the content of the document is easily understandable or requires further explanation or interpretation.
- d. If the information pertains exclusively to the historical background and/or contextual elements of the case, the nature and precision of the information contained in the document, as well as whether it is the only evidence on the matter or whether there are alternative sources of information on the same issue.
- e. The original purpose for which the document was created and to whom it was addressed. For example, whether a document was made in the context of legal proceedings or has a purely private character.
- f. Whether it is possible to ascertain from the content of the document itself what its sources are and whether they can be easily verified.
- g. Whether it is possible to ascertain the method used to compile and process the information contained in the document.
- h. Whether there are any doubts as to the authenticity of the document.

2. *Procedure*

101. When a party wishes to submit several documents into evidence without going through a witness, the tendering party shall submit a table, providing for each document a short description of its content, an index of the most relevant portions, as well as a demonstration of its relevance and probative value.

102. Before submitting the application with the table to the Chamber, the tendering party shall send it to the opposing party, which may enter its observations in the table in relation to each document. It is the responsibility of the tendering party to ensure that the opposing party is given sufficient time to formulate its observations. However, the tendering party may request that the observations are submitted within a reasonable time frame.

C. Use of documents for the purpose of examining a witness

1. Use of documents for the purpose of examination-in-chief

103. The party calling a witness must provide the Chamber, the parties and the participants with a list of documents which they intend to use for the purposes of its examination-in-chief of each witness. In order to allow the opposing party sufficient time to prepare itself for cross-examination, the list of documents shall be communicated well in advance of the day during which the witness is scheduled to start giving his or her testimony. This may under no circumstances be less than three (3) days before the scheduled hearing.⁴² However, depending on the volume and

⁴² Regulation 52(2) of the Regulations of the Registry

number of documents involved, it may be required that more time must be allowed.

104. When the number or size of the documents relied upon are particularly voluminous, the party calling the witness shall provide precise indications as to the passages to which reference will be made.

105. The party calling the witness will be responsible for providing the witness with copies of the documents to which reference will be made during the interrogation sufficiently in advance of the testimony in order to allow the witness to study them.

106. The Chamber expressly forbids parties calling a witness from communicating more documents than they actually intend or are able to use for the purpose of examining the witness.

2. Use of documents for the purpose of cross-examination

107. During cross-examination, use may be made of any document that is already in evidence. This includes the transcripts of witness who have already testified before the Court, subject to applicable protective measures.

108. If a cross-examining party knows in advance that it will make reference to a document that is not already in evidence during cross-examination of a particular witness, it must inform the Chamber and the Court Officer at least three (3) full working days before the scheduled hearing and provide it in electronic form, in accordance with regulation 52(2) of the Regulations of the Registry.

D. Use of documents by the witness to refresh memory

109. In principle, a witness shall testify to what he or she remembers having observed. Witnesses are not allowed to simply read from earlier statements or other documents. However, given the length of time that has passed between the facts relevant to this case and the often traumatic nature of the facts to which the witnesses have to testify, the Chamber may allow witnesses to refer to documents in order to refresh their memory, but only insofar as:

- a) The documents in question contain the personal recollections of the witness, and
- b) Copies of the document have been made available to the opposing party, who may rely on the parts referred to by the witness during cross-examination.

110. It is immaterial whether the documents in question are admissible as evidence or not.

111. If the witness has difficulty with the consultation of the documents in order to refresh his or her memory, the party calling the witness may ask authorisation from the Chamber to assist the witness. In such a case, the party shall avoid suggesting the answer to the witness on the basis of the documents. The party shall furthermore refrain from interpreting or paraphrasing what is contained in the documents.

VI. GENERAL INSTRUCTIONS TO THE PARTIES

A. Referencing and production of cited sources

112. When parties or participants refer to legal authority in their arguments, they shall denote the precise source, title, date, document number and relevant paragraph and/or page number. The Chamber reminds the parties that it is not its task to try and locate the right source when references are deficient.

113. If a party knows in advance of a hearing that it will make reference to authorities from other jurisdictions, it shall bundle them and highlight the relevant passages. This bundle shall be provided to the Chamber before the start of the hearing. If an unanticipated reference is made to sources from other jurisdictions, the parties shall provide the Chamber and each other with a copy of the material, at the latest at the start of the first session of the following day.

B. Identification of speaker and pace

114. When a speaker intervenes for the first time, he or she shall state his or her name and on behalf of which party the intervention is made. Before passing the floor to another member of his or her team, the speaker shall introduce the other person.

115. Considering that the proceedings will be conducted in the two working languages of the Court and that one of the accused currently benefits from interpretation into Lingala, it is of utmost importance that the parties and participants speak clearly and slowly. Before taking over the floor from a previous speaker – especially when the previous speaker

uses the same language – a pause of at least five seconds must be observed.