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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernandez de Gurmendi

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

**Joint Submissions by the Office of the Prosecutor and the Defence regarding the
Procedures to be Adopted for the Presentation of Evidence**

Sources: Office of the Prosecutor
Defence Team of Abdallah Banda Abakaer Nourain
Defence Team of Saleh Mohammed Jerbo Jamus

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

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I. INTRODUCTION

1. Pursuant to the Trial Chamber's order,¹ the Office of the Prosecutor and Defence Counsel for Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus (together the "Parties" or separately a "Party") file these joint submissions on the "procedures which could be adopted for the presentation of evidence on the contested issues to facilitate the fair and expeditious conduct of the proceedings" ("Proposed Procedures").²
2. While the agreement as to evidence submitted under Rule 69 of the Rules of Procedure and Evidence ("Agreed Facts") will "narrow to a very significant extent the issues in dispute between the parties",³ the Parties submit that this narrowing should not significantly affect the procedures to be adopted for the presentation of evidence during the merits phase of proceedings.⁴
3. In preparing the Proposed Procedures, the Parties have assumed that, consistent with the practice of this Court, the modalities for the participation of the legal representatives of victims in proceedings will primarily be dealt with in a separate decision.⁵ Notwithstanding this assumption, the Proposed Procedures do include where relevant and necessary some proposed specific directions to the legal representatives of participating victims ("Legal Representatives") regarding the different ways in which victims may be allowed to intervene in proceedings.

¹ Order requesting submissions on procedures to facilitate the fair and expeditious conduct of the proceedings following the Joint Submission of 16 May 2011, ICC-02/05-03/09-155, 30 May 2011 ("Order").

² *Ibid.*, para. 7. The Parties observe that, while the Trial Chamber notes at paragraph 3 of the Order the possible affect the Agreed Facts (as defined at paragraph 2 above) may have on the disclosure process and the presentation of evidence, at paragraph 7 of the Order the Trial Chamber seeks submissions on procedures for the presentation of evidence alone. Accordingly, these Joint Submissions do not specifically address the disclosure process.

³ Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons, ICC-02/05-03/09-148, 16 May 2011, para. 4.

⁴ See Trial Chamber's observation in the Order at para. 3.

⁵ E.g. *Prosecutor v. Jean-Pierre Bemba Gombo*, *Corrigendum* to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, ICC-01/05-01/08-807-Corr., 12 July 2010.

4. These Proposed Procedures are not intended to be exhaustive and it is anticipated that further decisions will be necessary to deal with other matters related to the presentation of evidence.

II. APPLICABLE LAW

5. Article 64(3)(a) of the Statute provides that:

Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

- (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

6. In addition, the Parties submit that Article 64(8)(b) of the Statute and Rule 140 of the Rules of Procedure and Evidence ("Rules") are relevant when considering procedures to be adopted for the presentation of evidence. These provisions are in the following terms:

Article 64

Functions and powers of the Trial Chamber

[...]

8.(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

Rule 140

Directions for the conduct of proceedings and testimony

1. If the Presiding Judge does not give directions under article 64, paragraph 8, the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge shall issue directions.

III. PROPOSED PROCEDURES

7. The Parties propose that the following procedures are adopted for the presentation of evidence on the contested issues during the merits phase of the trial.

(A) Presentation of Oral Evidence

8. As regards Opening Statements, the Prosecution, Legal Representatives and the Defence should be permitted to make opening statements at the commencement of the trial. In terms of sequence, the statements should be made firstly by the Prosecution, secondly by the Legal Representatives, and, should the Defence elect to make their opening statement at the start of the trial, finally by the Defence. The Defence may defer their opening statement to the opening of the Defence case.
9. The Parties propose that the Prosecution shall present all its incriminating evidence at the beginning of the trial ("Prosecution case").⁶ Subject to obtaining the prior permission of the Trial Chamber in accordance with a procedure to be outlined in a separate decision, any participating victims who wish to testify in person may do so at the end of the Prosecution case.⁷ Should the Defence elect to do so, it will present evidence following the Prosecution's case and any evidence offered by the victims.⁸
10. Nothing in these Proposed Procedures shall limit the right of the accused to make an unsworn oral or written statement in accordance with Article 67(1)(h) of the Statute. If Mr. Banda and/or Mr. Jerbo wish to make an unsworn statement, the Defence shall inform the Trial Chamber. The Chamber will then decide on the appropriate moment and modalities for the making of the statement(s).⁹
11. Each Party or, where relevant, Legal Representative presenting evidence shall notify the Chamber, the other Party and the participants of the anticipated order

⁶ *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Corrigendum Directions for the Conduct of the Proceedings and Testimony in accordance with Rule 140, ICC-01/04-01/07-1665-Corr, 1 December 2009, Annex – Directions for the Conduct of the Proceedings and Testimony ("*Katanga* Directions"), Section I.B, para. 4; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Directions for the Conduct of the Proceedings, ICC-01/05-01/08-1023, 19 November 2010 ("*Bemba* Directions"), para. 5.

⁷ *Katanga* Directions, Section I.B, para. 5; *Bemba* Directions, para. 5.

⁸ *Katanga* Directions, Section I.B, para. 6; *Bemba* Directions, para. 5.

⁹ *Katanga* Directions, Section I.E, para.12; *Bemba* Directions, para. 21.

of witnesses due to testify and the corresponding anticipated dates and length of testimony. The first such schedule shall be notified at least two weeks prior to the start of the Prosecution case; the Prosecution will endeavour, if possible, to provide notice four weeks in advance.¹⁰ This schedule shall be updated at the end of each week and provide the anticipated planning for the following four weeks. Changes to the schedule or the calling order shall be notified to the Chamber, the other Party and the participants as early as possible.¹¹

(B) Questioning of Witnesses: Order, Manner & Scope

12. Subject to further specific orders of the Presiding Judge under Regulation 43 of the Regulations of the Court and the Trial Chamber's power under Rule 140(2)(c) to question witnesses as it considers appropriate, oral evidence at trial shall be presented as set out below. In this regard, the Trial Chamber shall ensure that the rights of the accused are respected at all times and will give the Parties the opportunity to explore any new issue raised by the Trial Chamber to the extent necessary.¹²

13. Rule 140(2) identifies who shall be given an opportunity to question a witness. However, it does not specify the order in which witnesses may be questioned by a Party.¹³ The Parties observe that trial fairness and trial expediency may be best served if the Party who is calling the witness, and is therefore most familiar with that witness, is permitted to question that witness first ("examination-in-chief").¹⁴ The scope of the initial questioning of a witness should be limited to matters

¹⁰ The same notice period will be followed during the Defence case.

¹¹ *Katanga* Directions, Section I.C, para. 8.

¹² *Bemba* Directions, para. 7.

¹³ Rule 140 only states that the Trial Chamber has a right to question a witness before or after a witness is questioned by a party referred to in Rule 140(2)(a) or (b), and that the Defence shall have a right to be the last to examine a witness.

¹⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Oral Decision, ICC-01/04-01/06-T-104-ENG ET WT, 16 January 2009 ("*Lubanga* Oral Decision"), p. 37.

relevant to the three contested issues in the case.¹⁵ It should allow for the evidence to be given freely and without influence from the Party or Legal Representative questioning the witness. Therefore, the Party or Legal Representative questioning the witness should, in principle, not be permitted to lead a witness.¹⁶ However, in the interest of expeditious proceedings, the Party or Legal Representative conducting the initial questioning shall be permitted to lead the witness on any background evidence or on other issues that are not contentious with the prior consent of the opposing Party.¹⁷

14. During the Prosecution case, if a Legal Representative is granted the right to question a witness in accordance with Rule 91(3) of the Rules and any supplemental directions included in a separate decision,¹⁸ the Legal Representative may question the witness to the extent leave has been granted on completion of the Prosecution's examination-in-chief.¹⁹ The Legal Representative shall use, in principle, neutral questions.²⁰ The same procedure shall be followed during the Defence case save that the relevant Legal Representative shall question the witness after the Prosecution.²¹
15. Subsequent questioning pursuant to Rule 140(2)(b) may be conducted by the Party not calling the witness ("cross-examination"). For the avoidance of doubt, during the Prosecution case, any Defence cross-examination would occur after any permitted questioning conducted by the Legal Representatives. During the Defence case, any Prosecution cross-examination would occur immediately following the Defence's examination-in-chief. In the Parties' view, it would be

¹⁵ *Bemba* Directions, para. 12; *Katanga* Directions, Section IV.A, para. 62. Also note that where a victim is granted leave to testify, the scope of questioning will be to the extent leave has been granted.

¹⁶ *Lubanga* Oral Decision, p. 37; *Katanga* Directions, Section IV.A, para. 66.

¹⁷ Opposing Counsel will be best placed to determine whether an issue is controversial or a matter of contention.

¹⁸ As noted in paragraph 3 above, the Parties assume that consistent with prior Court practice certain modalities regarding the participation of victims will be dealt with separately.

¹⁹ *Katanga* Directions, Section II.A, para. 18; *Bemba* Directions, para. 8.

²⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the manner of questioning witnesses by the Legal Representatives of Victims, ICC-01/04-01/06-2127, para. 30; *Katanga* Directions, Section IV.E, para. 91. Note "neutral" questions are also described in some jurisdictions as open or non-leading questions.

²¹ *Katanga* Directions, Section II.C, paras. 37 & 42; *Bemba* Directions, para. 11.

appropriate for the Party conducting cross-examination to be permitted to lead the witness. The scope of cross-examination may include contesting the evidence given by a witness during the initial questioning, challenging its reliability, and impeaching the credibility of the witness. Further and in line with Article 69(3) of the Statute, the Party not calling the witness may also ask questions that go beyond the scope of the witness' initial testimony.²²

16. Following cross-examination and any permitted questioning by the Legal Representatives, the Party calling the witness will have the opportunity to ask further questions of the witness ("re-examination").²³ Any re-examination should, in the Parties' view, be limited to issues that arose out of cross-examination and/or any questioning conducted by the Legal Representatives or the Trial Chamber and should, in principle, not be leading.²⁴
17. The Defence should always have the right to be the last to examine a witness pursuant to Rule 140(2)(d). Any final questioning by the Defence should be limited to those matters that arose in the course of the questioning conducted by the Prosecution or Legal Representatives, or the Trial Chamber. If a witness is one who has been called by the Defence, the final examination should not be leading.
18. Where a non-dual status victim has been granted permission to testify, their Legal Representative will question the witness first.²⁵ Save as otherwise provided in these Proposed Procedures, such questioning will be conducted on the same basis as examination-in-chief. Other Legal Representatives may then question the victim if leave has been granted. The Prosecution may, thereafter, question the victim, followed by the Defence.²⁶ The scope of questioning by the Legal

²² *Prosecutor v. Thomas Lubanga Dyilo*, Decision on various issues related to witnesses' testimony during trial, ICC-01/04-01/06-1140, 29 January 2008 ("*Lubanga* Witness Testimony Decision"), para. 32.

²³ *Lubanga* Oral Decision, p. 37; *Katanga* Directions, Section IV.C, para. 77.

²⁴ *Lubanga* Oral Decision, p. 37.

²⁵ *Katanga* Directions, Section II.B, para. 31.

²⁶ *Ibid*, para. 32.

Representatives shall be determined by the Trial Chamber as part of the grant of leave. The scope of questioning by the Parties shall be as set out in Rule 140(2)(b) of the Rules.

19. Where a witness is called at the instance of the Trial Chamber, the Chamber will question the witness first; then, the Prosecution may question the witness, followed by any Legal Representative who has been granted leave; finally, the Defence will be given the opportunity to question the witness.²⁷

(C) Manner in which Evidence may be Submitted

20. Trial expediency as well as efficient management of the proceedings may best be served if a Party submitting documentary or other material evidence which is not a record of testimonial evidence by a witness, such as audio or video recording ("non-witness related material"), be permitted to do so from the Bar table. In the Parties' view, there should be no requirement that non-witness related material be introduced through a witness for the purposes of authentication, without prejudice to the need to provide for a proper foundation.

Bar Table Motions

21. The Parties propose that each be allowed to offer non-witness related material from the Bar table into evidence at appropriate times during the trial and to file a motion at the end of their respective cases concerning residual non-witness related material not already admitted. The Parties also propose that the Chamber adopts the procedure on the filing of Bar table motions utilized by Trial Chamber II in the *Katanga & Ngudjolo* case.²⁸ The Trial Chamber II procedure requires the tendering Party to send the proposed materials in advance to the opposing Party along with a table conforming to a specified format, so that the opposing Party

²⁷ *Katanga* Directions, Section II.A, paras. 43-44.

²⁸ *Katanga* Directions, Section V.B, paras 101-102.

may enter its observations in the table, thus indicating to the tendering Party whether it objects, agrees to, or takes no position on the admissibility of the materials within a reasonable time. Notwithstanding this procedure, the Parties also remain free to object orally, where appropriate.

(D) Documents Intended to be Used During the Questioning of Witnesses

22. The Parties propose that prior to the questioning of a witness in examination-in-chief, the Party or, where relevant, Legal Representative calling that witness submit, within a particular time-limit to be determined by the Trial Chamber, a list of documents intended to be used during the questioning of the witness.²⁹ The relevant Party or Legal Representative should identify the specific material intended to be submitted as evidence during the questioning of a witness.³⁰
23. The Parties will notify in advance and by email any intention to object to the relevance or admissibility of the material that the opposing Party or, where relevant, Legal Representative identify as intended to be submitted as evidence pursuant to paragraph 22. Any such objection shall then be raised formally in court at the time the material is submitted to the Chamber. However, nothing herein shall preclude a Party from making an objection orally in Court which has not been previously notified. The Party questioning the witness or the Legal Representative will have the right to respond orally to the other Party's objection, including on the ground that the objection is untimely.
24. Whenever the Parties do not raise an objection as regards the relevance or admissibility of an item which is submitted, it may be admitted into evidence and receive an EVD number, following consideration by the Trial Chamber. The

²⁹ *Bemba* Directions, para. 16.

³⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Order on the procedure relating to the submission of evidence, ICC-01/05-01/08-1470, 31 May 2011, para. 7.

Chamber should rule on any objections that are raised to the admissibility of items as evidence in due course.³¹

(E) Submission of Prior Witness Statements and Testimony

25. The Parties propose the following procedure in the event a Party wishes to submit prior witness statements and/or testimony during trial pursuant to Rule 68 of the Rules. The Parties note that they are not at this juncture seeking to obtain wholesale admission of prior recorded statements and testimony of witnesses. However, where admission is sought, then, during the examination of the witness, the Party tendering the statement will tender the statement through the witness and the opposing Party may raise any objections to the admissibility of the statement. The Chamber shall then decide on the admissibility of the statement.³²

26. When a Party intends to submit as evidence the prior statement(s) of a witness called to testify, this intention shall be made known in writing to the opposing Party within a reasonable period prior to the relevant witness' first court appearance. Following receipt of such notice, the opposing Party shall, where relevant, notify the moving Party in writing of any intention to object. The ensuing oral submissions should in principle take place at the beginning of the questioning and after having ensured that the witness does not object to the submission in accordance with Rule 68(b) of the Rules. The statement(s) may be admitted as evidence and accordingly receive an EVD number following consideration by the Chamber of any objections raised.

³¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Order on the procedure relating to the submission of evidence, ICC-01/05-01/08-1470, 31 May, 2011, para 7.

³² *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", ICC-01/05-01/08-1386, 3 May 2011, paras 41-50; Article. 69(4) of the Statute.

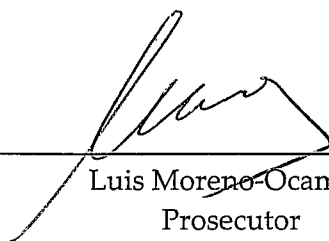
(F) Numbering of Exhibits

27. The Parties propose that all exhibits will receive an EVD number, unless there is an objection, in which case the proposed exhibit will be assigned an MFI number until the Trial Chamber rules on the matter. The item will only be included as an exhibit in the case record if it receives an EVD number.³³
28. In relation to the numbering of videos and video excerpts: if a video recording is admitted into evidence in its entirety, the entire recording will receive an EVD number, subject to any objections. If only a portion of a video recording is admitted into evidence, then the complete video will receive an MFI number and the portion (the extract) will receive a separate EVD number, unless there are objections, in which case the extract will receive a separate MFI number until the issue is determined by the Trial Chamber.³⁴
29. Each MFI number and EVD number assigned in the case shall be unique. For the avoidance of doubt, the same MFI number shall not be used twice even when the item to which it was assigned is subsequently admitted into evidence and thus receives an EVD number.

³³ *Prosecutor v. Thomas Lubanga Dyilo*, Order on Numbering of Evidence, ICC-01/04-01/06-2432, 12 May 2010, paras. 1-5.

³⁴ *Ibid*, para. 6.

Respectfully Submitted,



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Dated this 27th Day of June 2011

At The Hague, The Netherlands



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Dated this 27th Day of June 2011

At Nairobi, Kenya

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At Los Angeles, United States