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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

**SITUATION IN UGANDA
IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Public

Joint Prosecution and Defence submissions on the conduct of proceedings

Source: The Office of the Prosecutor
The Defence for Dominic Ongwen

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

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I. Introduction

1. The Prosecution and Defence propose jointly, pursuant to article 64 of the Rome Statute (“Statute”) and rule 140 of the Rules of Procedure and Evidence (“Rules”), that the Chamber adopt the following submissions on the conduct of the proceedings. These submissions draw on previous decisions on the conduct of proceedings and on the modalities of the victims’ participation issued by other Trial Chambers at this Court,¹ and incorporate practices followed by the *ad hoc* international criminal tribunals.²
2. Where there are disagreements, the parties have inserted a comment box directly below the relevant paragraph with their individual submissions.

II. Request for a page limit extension

3. Pursuant to regulation 37(2) of the Regulations of the Court, the parties request a short, six-page, page limit extension for this joint submission. Its *inter partes* nature reduces the overall page count for the Chamber, relative to two individual submissions.

¹ See, e.g., ICC-01/09-01/11-847-Corr (“Ruto general directions 1”); ICC-01/09-01/11-900 (“Ruto general directions 2”); ICC-01/09-02/11-867 (“Kenyatta decision on conduct”); and ICC-01/05-01/08-1023 (“Bemba directions on conduct”); ICC-01/04-01/07-1665-Corr (“Katanga directions for the conduct of proceedings”); ICC-01/04-01/06-T-104-ENG ET, pp.35-38 (“Lubanga oral decision on rule 140”); ICC-01/04-02/06-619 (Ntaganda directions on conduct and victims’ participation”); ICC-01/04-02/06-1342 (“Ntaganda supplemental decision on matters related to the conduct of proceedings”); ICC-01/05-01/13-1209 (“Bemba *et al.* directions on conduct”); ICC-01/05-01/13-1249 (“Bemba *et al.* clarification on directions on conduct”); ICC-02/11-01/15-205, (“First Gbagbo *et al.* directions on conduct”); ICC-02/11-01/15-498-AnxA (“Revised Gbagbo *et al.* directions on conduct”).

² The Prosecution has added specific, footnoted references to some of these decisions in the relevant sections.

III. Submissions

a. Opening statements

4. The opening statements should be presented in the following order:
 - (i) Prosecution;
 - (ii) Legal representatives of the victims ("LRVs");
 - (iii) Defence;

5. The Prosecution clarifies its earlier submissions on the length of time it will require to make its opening statement.³ It will require five hours.⁴ The Prosecution and Defence propose that the Defence is granted no more time than this to present its opening statement, and no more than half this time split between the LRVs. It is not necessary for the parties and participants to use the entirety of their allotted time.

6. The Defence and LRVs may save part or all of the time allotted to their opening statements for a statement at the beginning of their case-in-chief.⁵ This time should not repeat arguments made during the opening statements unless it demonstrates inconsistencies in the evidence presented by the Prosecution and/or the LRVs with the evidence the Defence and/or LRVs intends to present.

7. Any audio-visual aids such as videos, photographs, and maps that the parties and participants intend to use during their opening statements should be notified

³ ICC-02/04-01/15-438, para.24.

⁴ On the basis that Prosecution witness P-0403, whose witness examination summary statement was disclosed on 14 June 2016 (ICC-02/04-01/15-467), will be permitted to testify.

⁵ First *Gbagbo et al.* directions on conduct, para.10.

and disclosed at least eight days before the start of the trial. Any objections to the use of this material should be filed five days before the start of trial.⁶

b. Reading the charges to the accused at the start of trial

8. The Pre-Trial Chamber confirmed 70 charges against the accused.⁷ The Prosecution and Defence estimate that the disposition of the confirmation decision would take up to three hours to read out at the start of trial pursuant to article 64(8)(a).
9. To promote the efficiency of proceedings, the Prosecution and Defence propose instead that the Chamber: (i) asks the accused to provide a certification before the start of trial that he has read and understands the nature of the charges against him;⁸ (ii) confirms with the accused at the start of the hearing that he waives his right to be read the charges; and (iii) summarises the charges against the accused for the public.⁹ The Chamber should also afford the accused an opportunity to make an admission of guilt or to plead not guilty.¹⁰

c. Sequence of the presentation of evidence

10. Evidence at the trial should be presented in the following sequence:
 - (i) Prosecution;
 - (ii) LRVs, where authorised by the Chamber;
 - (iii) Defence;
 - (iv) Prosecution evidence in rebuttal;
 - (v) Defence evidence in rejoinder;

⁶ *Bemba et al.* directions on conduct, para.7.

⁷ ICC-02/04-01/15-422-Red, pp.71-104.

⁸ *Ntaganda* directions on conduct and victims' participation, para.9.

⁹ See, e.g., ICC-02/04-01/15-T-20-ENG, pp.5-7.

¹⁰ Article 64(8)(a) of the Statute.

11. With respect to point (ii) above, the Prosecution and Defence submit that as a general principle victims should submit their views and concerns via their legal representatives. However, if any individual victims would like to present their views and concerns directly to the Chamber, their legal representatives should seek authorisation at least 30 days before the close of the Prosecution's case.¹¹ The Chamber should grant such applications only where the victims' testimony could make a genuine contribution to the ascertainment of the truth in relation to the charges.¹² After making the solemn undertaking, the victim should be questioned by their legal representative,¹³ followed by the Prosecution, the other LRVs and then the Defence.¹⁴
12. In accordance with articles 64(6)(b) and 69(3) of the Statute, the Chamber may order the production of any evidence it considers necessary for the determination of the truth at any time during the case.

d. Scheduling of witnesses

13. On the first day of every month, the party calling witnesses should provide to the Chamber, the non-calling party and the LRVs a list via e-mail of the witnesses it expects to call in the following calendar month and the order in which it proposes to call them. The calling party should notify the Chamber, the non-calling party and the LRV as soon as possible of any changes to the order of witnesses.
14. Requests for witnesses to testify by video-link pursuant to rule 67 should be filed at least 30 days before the anticipated date of the witness' testimony, to leave

¹¹ *Katanga* directions for the conduct of proceedings, para.25.

¹² *Katanga* directions for the conduct of proceedings, para.20.

¹³ *Katanga* directions for the conduct of proceedings, para.31.

¹⁴ *Katanga* directions for the conduct of proceedings, para.32.

enough time for the Registry to make the necessary arrangements if the relief sought is granted.

15. Parties should be prepared to continue with their case, even if less time than estimated is required for a particular witness.¹⁵

e. Order of questioning of witnesses

16. Witnesses should be questioned as follows, pursuant to rule 140(2):

- (i) The party calling the witness;
- (ii) The non-calling party;
- (iii) The party calling the witness to conduct a limited re-examination; and
- (iv) The Defence, which has the right to examine the witness last.

17. Where an application has been made and leave granted, the LRVs may also ask questions of a particular witness. The LRVs should question after the Prosecution.¹⁶

Additional Prosecution submissions

If the Defence does not exercise its right to question a particular witness, it thereby waives its right to ask final questions of that witness, unless new matters are raised by the Chamber or the LRVs after questioning by the Prosecution.

Questioning by the non-calling party should not last longer than that of the calling party.

¹⁵ *Bemba et al.* directions on conduct, para.15.

¹⁶ See *Katanga* directions for the conduct of proceedings, para.88; *Ruto* general directions 1, para.16.

Additional Defence submissions

As a general rule, the non-calling party is expected to take no more than twice the amount of time for its questioning as the calling party took in its questioning of the witness.¹⁷ The Chamber may extend or reduce this time by a motion from a party or *proprio motu*, and after hearing oral arguments from the parties.

f. Protective measures

18. The parties should make requests for in-court protective measures for witnesses as soon as possible,¹⁸ and no later than 30 days before the start date of their testimony,¹⁹ to allow the Chamber to receive submissions on the request and to allow the Victims and Witnesses Section to fulfil its mandate. With a showing of good cause, late requests for protective measures, including requests by witnesses themselves, should be considered.²⁰
19. Parties should consult with the Victims and Witness Section before filing their requests for in-court protective measures. They should be filed confidentially. Any information that the calling party seeks to withhold from the other party should be provided in an *ex parte* annex to the request, which should include the justification for the *ex parte* designation.²¹
20. The Prosecution's submissions in relation to special measures for witnesses were filed on 17 June 2016.²² The Defence considers the VWU protocol comprehensive and flexible to suit the needs of witnesses and thus did not make a filing on this protocol.

¹⁷ First *Gbagbo et al.* directions on conduct, para.36; *Bemba et al.* directions on conduct, para. 14.

¹⁸ See *Bemba et al.* directions on conduct, para.24.

¹⁹ See *Ruto* general directions 1, para.30.

²⁰ See *Ruto* general directions 1, para.30.

²¹ See *Ruto* general directions 1, para.30; First *Gbagbo et al.* directions on conduct, para.63; *Bemba et al.* directions on conduct, para.25.

²² ICC-02/04-01/15-480.

g. Self-incrimination

21. A party calling a witness who may give self-incriminating statements during their testimony should notify the Victims and Witnesses Section and the Chamber as soon as practicable.
22. The Registry should make all necessary arrangements to provide to these witnesses independent legal advice from a qualified lawyer.²³ When the witness in question is also a victim, that victim's legal representative should provide this advice.²⁴ Once a lawyer has been appointed by the Registry, the latter should inform the party calling the witness, who should then provide the lawyer with any prior statements or transcripts of interviews given by the witness as well as any other relevant material.²⁵
23. If the witness requires assurance under rule 74(3)(c) of the Rules, the advising lawyer should seize the Chamber with an application, notifying the parties thereof. The parties should have an opportunity to present their views on the matter in such time as to allow the Chamber to rule before the start of the witness' testimony.²⁶
24. The advising lawyer should also be responsible for informing the witness of the offence defined in article 70(1)(a), in accordance with rule 66(3).²⁷

²³ See *Ruto* general directions 1, para.29.

²⁴ ICC-01/04-01/06-T-110-Red3-ENG, p.2, lns.23-25.

²⁵ *Katanga* directions for the conduct of proceedings, para.54.

²⁶ See *Ruto* general directions 1, para.29.

²⁷ *Bemba et al.* directions on conduct, para.19.

h. Use of materials during the questioning of witnesses

25. Parties should only seek to use materials during witness questioning that are relevant to that witness' testimony. It is for a party to demonstrate a clear connection between the material and the substance of the testimony of that witness. When no relation between the document and the witness has been established, the Chamber should not allow the presentation of the document or certain related questions.²⁸

Disclosure of materials for use during questioning by the calling party

26. The calling party should provide to the Chamber, the Registry, the non-calling party and the LRVs via email a list of materials it intends to use with the witnesses. This list should include an indication of whether the party intends to tender the material as evidence. In case of lengthy materials, the calling party should indicate specifically which part, or parts, it intends to use.

27. If the Chamber grants the Prosecution's request for authorisation to conduct witness preparation,²⁹ which the Defence opposes,³⁰ a list of persons who attended the witness preparation session and all disclosable information arising from the session should be distributed to the Chamber, the other party and the LRVs as soon as practicable after the conclusion of the session and prior to the start of the witness' testimony.

Additional Prosecution submissions

The calling party should provide the list referred to in paragraph 26 at least five days prior to a witness' appearance.

²⁸ See, e.g., *Ntaganda* directions on conduct and victims' participation, para.31.

²⁹ ICC-02/04-01/15-472.

³⁰ ICC-02/04-01/15-473.

Any objection by the non-calling party to the use of particular materials referred to in the list specified in paragraph 26 should be made no later than two days before the calling party starts its questioning.

If the questioning by the non-calling party engages issues that could not reasonably have been anticipated by the calling party, the calling party should notify the Chamber and the non-calling party of any additional material, including material not on its list of evidence, it intends to use with the witness in its re-examination as soon as practicable and apply to the Chamber for leave to use them, showing good cause.

Additional Defence submissions

The calling party should provide list of materials it intends to use with the witnesses coming to testify in the following week by 16h00 on the Monday of each week.

Any objections thereto shall be notified by 13h00 on the following Thursday. If the material the calling party wishes to use during questioning was not included in its list of evidence, the calling party shall apply for leave from the Chamber to add this material to its list, showing good cause as to why this material was unavailable prior to its submission of its list of evidence. The Chamber will decide on the application after having heard from the non-calling party and the LRVs.³¹

The Defence submits that the second and third paragraphs of the Prosecution's additional submissions directly above should not form part of this protocol.

³¹ First *Gbagbo et al.* directions on conduct, para.43.

Instead, the Chamber should be seized on a case-by-case basis.

The Prosecution's provision of material following the witness preparation session should be distributed no later than 48 hours before the witness is expected to testify.

Finally, the Defence disputes the necessity of paragraph 27 because witness preparation, as proposed by the Prosecution, goes against the general practice of the trial chambers at the ICC and believes that the Prosecution's request should not be granted.³²

Disclosure of materials for use during questioning by the non-calling party

28. A non-calling party intending to use materials during its questioning of the witness should provide a list of the materials to the Chamber, the Registry, the other party and the LRVs before the start date of the witness' testimony. The party should ensure that electronic copies of the materials are uploaded to e-court.³³ If the documents are not already part of the case record, digital copies should be provided to the Chamber, the other party and the LRVs. The list should also indicate whether the non-calling party wishes to tender any of the documents into evidence. Objection to the use of any of the documents during questioning should be raised orally, prior to the start of the questioning by the non-calling party.

Additional Prosecution submissions

The non-calling party should provide its list no later than 24 hours before the start date of the witness' testimony.

³² See ICC-02/04-01/15-286, para. 13(c).

³³ *Bemba et al.* directions on conduct, para.21.

Additional Defence submissions

The non-calling party should provide its list no later than the morning of the start date of the witness' testimony.³⁴

29. If the non-calling party wishes to use any additional materials during the questioning of the witness that were not disclosed as provided for above, it should apply to the Chamber for leave to use them, showing good cause. If necessary, the calling party should be granted a short adjournment to examine the material and register any objections.³⁵

i. Questioning of witnesses

30. Questions should be clear and directly relevant to the charges. The parties should avoid lengthy, complicated or compound questions, which may confuse the witness. The Chamber may prohibit inappropriate or misleading questions. No party may conduct an inefficient examination of a witness, even if such an examination falls within the average estimated time per witness.³⁶

31. The parties should avoid paraphrasing the witness' testimony or prior recorded testimony, and instead quote the passage and indicate the page numbers (including ERN numbers where applicable), paragraph numbers and/or relevant lines. The parties shall restrict its quotations of the witness' (prior recorded) testimony to situations when it is strictly necessary for the understanding of a proper and relevant question.

³⁴ This change draws from *Ruto* general directions 1, para.24, *Ntaganda* directions on conduct and victims' participation, para.33, and *First Gbagbo et al.* directions on conduct, para.44, cf. *Bemba et al.* directions on conduct, para.21.

³⁵ See *Ruto* general directions 1, para. 24.

³⁶ *Bemba et al.* directions on conduct, para.15.

32. The credibility of a witness may be impeached by any party, including the party calling the witness.

Additional Prosecution submissions

Parties may not ask witnesses to comment on the credibility or testimony of other witnesses.

Additional Defence submissions

Parties may ask witnesses to comment on the credibility of witnesses.

33. Objections to the form of questions or other matters should be timely, specific and brief. A party waives an objection when not made in a timely manner. The objecting party should consider, before addressing the substance of its objection, whether it is appropriate to discuss the reasons for objecting in the presence of the witness, and provide the Chamber an opportunity to decide whether the matter is best dealt with in the absence of the witness.

Questioning by the calling party

34. The party calling a witness should use non-leading questions, except on preliminary matters necessary to provide background or context, any other matter that is not contested, or where such questions are otherwise deemed appropriate by the Chamber or agreed to by the opposing party.³⁷

Questioning by the non-calling party

35. The non-calling party or parties may use leading questions to focus a witness' testimony.

³⁷ See, e.g., *Ntaganda* supplemental decision on matters related to the conduct of proceedings, para.19.

36. Such questioning should be limited to issues raised during the questioning of the calling party, matters related to the witness' credibility, and matters related to the case for the non-calling party if the witness is competent to answer it. The Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

Additional Defence submissions

Such questioning should include matters related to the credibility of other witness.

37. The non-calling party should put to a witness who is competent to give evidence related to the case for that party the parts of its case that are in contradiction to the witness' evidence. The non-calling party should put to the witness any fact or material upon which it intends to rely to impeach the credibility of the witness to give the witness an opportunity to respond.

Additional Prosecution submissions

Failure by a party to put their case to the witness should result in the Chamber disregarding or assigning less weight to those parts of its case, or the facts or material.

Additional Defence submissions

The Defence does not agree with the Prosecution submission directly above. Failure by a party to put its case to a witness, and the weight assigned to a witness' testimony, is at the sole discretion of the Chamber.

Re-examination

38. The re-examination of a witness should be conducted under the same conditions as initial questioning by the calling party and be limited to issues raised for the first time after that questioning.
39. Where the Chamber asks questions that raise entirely new matters after questioning by the parties and participants, the parties should be entitled to further question the witness on those new matters.³⁸

Questions under rule 140(2)(d) of the Rules

40. Any final questions by the Defence under rule 140(2)(d) should be limited to matters raised since the Defence last had the opportunity to question the witness.

Additional Defence submissions

Any final questions may also include issues related to the witness's credibility.

Questions by the LRV

41. LRVs should only question a witness to the extent relevant to the represented victims' interests. The scope of questioning is therefore limited to questions that clarify the witness' evidence or elicit additional facts.³⁹ Questioning by the LRVs should not be repetitive of questioning by the parties.

Additional Prosecution submissions

Questions relevant to reparations should be allowed if they may avoid recalling witnesses at a later stage in proceedings and provided they do not violate the right of the accused to a fair and expeditious trial.⁴⁰

³⁸ See *Prosecutor v. Kupreskic et al*, IT-95-16, Decision on Order of Presentation of Evidence, 21 January 1999.

³⁹ *Bemba* directions on conduct, para. 20; ICC-01/04-01/06-2127, para.26.

⁴⁰ *Ntaganda* directions on conduct and victims' participation, para.67.

Additional Defence submissions

The Defence submits that requiring testimony about reparations before an article 74 judgment violates article 66(1) of the Rome Statute. The desire to conduct an expeditious trial cannot infringe on Dominic Ongwen's fair trial rights.

Refreshing witness memory

42. Where a witness demonstrates an inability to independently recall a particular fact, the calling party may, *inter alia*, use the witness' prior recorded testimony to refresh their recollection, regardless of whether the previously recorded testimony has been formally submitted into evidence.
43. Before using the witness' prior recorded testimony, a party should establish that the witness cannot recall a particular issue and that their testimony has been previously recorded. The calling party should then provide the witness with an opportunity to read the relevant lines or paragraphs, or read them to the witness.

False testimony under solemn declaration

44. During questioning, the Chamber may, at the request of a party, repeat to the witness their duty to tell the truth and the consequences that may result from a failure to do so. If a party makes such a request, the application will be made outside the hearing of the witness.

Adverse witnesses

45. The calling party may request the Chamber to declare its witness "adverse" if the party believes that the witness is unwilling to tell the truth at the instance of the party calling him.

Additional Defence submissions

The calling party may request the Chamber to declare its witness adverse in exceptional circumstances.⁴¹

46. Prior to applying to declare a witness adverse, the calling party may request to refresh the witness' memory from their prior recorded testimony about the issue on which the witness' evidence has deviated, following the procedure set out above. If the witness disputes the correctness of the prior recorded testimony, the calling party may question the witness on the reason for the deviation.

47. The Chamber may determine whether there is an objective basis for a witness to be declared adverse, including on the basis of one or more of the following factors:

- (i) The general demeanour of the witness has been hostile to the calling party;
- (ii) The witness appears evasive;
- (iii) The present testimony of the witness before the Court has been in whole or in part deliberately or systematically inconsistent with a prior recorded statement or testimony in relation to a material issue or issues before the Court;
- (iv) The witness has been systematically adverse to the calling party not only by deliberately impugning the credibility of the case of the calling party but also by appearing systematically to support the case of the party opposed in interest to the calling party.⁴²

48. If the witness is declared adverse, the calling party will be permitted to question the witness on any issues it considers relevant to this characterisation, including

⁴¹ First *Gbagbo et al.* directions on conduct, para. 40.

⁴² *Ntaganda* directions on conduct and victims' participation, para.47.

their credibility.⁴³ Requests to declare a witness adverse should be made in the absence of the witness.⁴⁴

Additional Prosecution submissions

If the witness is declared adverse, the calling party should also be permitted to question the witness on their character.⁴⁵

j. Testimony of expert witnesses

49. Within thirty days of the disclosure of the expert witness' statement and/or report,⁴⁶ the non-calling party should file a notice indicating whether:

- (i) It accepts the expert witness' statement and/or report without qualification;
- (ii) It desires a short formal interview with the expert witness; or
- (iii) Portions of the statement and/or report including the qualifications of the witness as an expert are contested and will be the subject of questioning by the non-calling party and, if so, which parts;.

Additional Prosecution submissions

If the opposing party accepts the expert witness' statement and/or report, the Chamber should consider formally submitting into evidence the statement and/or report without calling the expert witness to testify live pursuant to rule 68(2)(a) or (b).

⁴³ *Ntaganda* directions on conduct and victims' participation, para.49.

⁴⁴ *Ntaganda* directions on conduct and victims' participation, para.48.

⁴⁵ *Ntaganda* directions on conduct and victims' participation, para.49; cf *First Gbagbo et al.* directions on conduct, paras 40-41 (having no such stipulation on the questioning of adverse (hostile) witnesses).

⁴⁶ The Prosecution must disclose all material it intends to rely on at trial by 6 September 2016: ICC-02/04-01/15-449, p.7.

Additional Defence submissions

The Defence notes that it shall be opposing the applicability of rule 68 as amended by the ASP in Resolution ICC-ASP/12/Res.7.

k. Procedure for the formal submission of material

50. If the calling party demonstrates a clear connection between material and the substance of a witness' testimony during the witness' testimony, it may request that material to be formally submitted within the meaning of article 74(2) of the Statute.⁴⁷

51. The application for any material that a party seeks to formally submit should be made at the time of its presentation to the witness, or at least before the end of the questioning. Any objections should be raised at that time. A party waives its right to object to the formal submission of material if they do not raise an objection at that time.⁴⁸

Additional Defence submissions

The Party seeking to formally submit evidence should confirm via email the day after questioning all the documents that it sought to introduce through the witness.

⁴⁷ See, e.g., ICC-01/05-01/13-1285, para.16.

⁴⁸ The Prosecution submits that this is a more streamlined approach than making requests for the formal submission of material by email. See, e.g., ICC-01/05-01/13-1423.

1. Applications for the formal submission of material other than through witnesses

52. The parties may submit material without presenting it through a witness.⁴⁹ This procedure promotes efficiency in the proceedings.

Additional Prosecution submissions

There is no rule prohibiting the formal submission into evidence of materials merely because the source or custodian was not called to testify.⁵⁰ For example, the Prosecution will seek to introduce into evidence material related to LRA radio communications intercepted by the Ugandan government in this manner, in light of its voluminous nature.

Additional Defence submissions

In principle, parties and participants must submit evidence through witnesses.

53. Such applications must include, for each document, group of documents or other material, a paragraph relevant to: (i) the description of the material; (ii) the authenticity/reliability of the material; and (iii) the relevance and probative value of the material. Applications may be filed at any point during the parties' presentation of evidence (including during rebuttal/rejoinder).

Additional Defence submissions

Such applications must also include: (iv) the reason the material is not being introduced through a witness; (v) the date on which the material was disclosed to

⁴⁹ See, e.g., Revised *Gbagbo et al.* directions on conduct, para.43.

⁵⁰ ICC-02/11-01/15-573-Red, para.9.

the Chamber and the parties; and (vi) if applicable, an index of the most relevant sections of the material.⁵¹

m. E-court

54. The trial proceedings should be conducted using e-court. All materials should be handled through e-court.

55. Parties should ensure that the materials uploaded into the e-court system have the required metadata and, where applicable, are searchable through Optical Character Recognition (OCR).

56. A hardcopy may be used by a party only where the party has failed, due to unforeseen circumstances, to upload the material to e-court. When the use of a hardcopy is permitted, the party is responsible for producing copies for the Chamber, the witness, the opposing party, the Registry, and the court interpreters and stenographers.

n. Private and closed session

57. Witness testimony should be given in public as much as possible. Recourse to private and/or closed session will at times be unavoidable, in particular for witnesses with protective measures. Requests to go into a private or closed session should specify the reason(s) justifying the request in a neutral and objective fashion, if possible referring to the points that will be touched upon. The parties should endeavour to group together identifying questions to the extent that it does not unduly inhibit the sequence of questioning.

⁵¹ See First *Gbagbo et al.* directions on conduct, para. 58 and *Ntaganda* directions on conduct and victims' participation, para. 52 (the Defence notes that this standard was not changed in *Ntaganda* supplemental decision on matters related to the conduct of proceedings); cf Revised *Gbagbo et al.* directions on conduct, para.44.

o. Transcripts of hearings

58. The calling party should propose a public redacted version of any confidential transcript no later than 21 days after the notification of the edited confidential version of the transcript. Within 10 days of receiving the proposed redacted version, the other party and participants may raise any objections. Proposals of public redacted versions can be extremely time-consuming, particularly in the midst of other trial preparation, or if the assigned counsel is required to be in court during this period, or if a substantial portion of the testimony was in private session. Twenty-one days is a reasonable time-frame that balances the interests of the parties and the public – who will likely already have access to a redacted version of the transcript.⁵²

59. Requests for corrections to the transcript should be submitted to the Registry within 21 days from the notification of the edited version of the transcript.⁵³ These requests should be based on the edited version of the transcript and contain a table providing: (i) the full reference of the transcript, the date and the case name; (ii) the passage extracted from the edited version of the transcript, containing the discrepancies to be reviewed; (iii) the pages and lines of the passage from the edited version of the transcript; and (iv) the language originally used by the speaker.⁵⁴

⁵² See *Bemba et al.* directions on conduct, para.27.

⁵² *Bemba et al.* directions on conduct, para.27.

⁵³ *Ntaganda* supplemental decision on matters related to the conduct of proceedings, para.23.

⁵⁴ *Bemba et al.* directions on conduct, para. 28.

p. Defence disclosure

60. The Prosecution and Defence propose that specific directions related to the scope and timing of disclosure by the Defence – in addition to the Chamber’s decision on the Prosecution’s request to order the Defence to comply with rule 79⁵⁵ – including of witness statements and an outline of the defence case, be addressed at the close of the Prosecution’s case.

q. In-court transcription and translation of sound recordings at trial

61. Sound recordings of LRA radio communications intercepted by the Ugandan government are key evidence that the Prosecution intends to adduce to prove the charges against the accused.⁵⁶ The Prosecution intends to play these sound recordings to several witnesses. The sound recordings, which are in Acholi, are of variable quality, and they contain the voices of LRA commanders often conversing quickly, in coded language. There are at times overlapping voices, speaking at a much faster pace than normally permitted in Court.

62. For these reasons, the Prosecution and Defence submit that the stenographers and interpreters should not transcribe and translate, or interpret these sound recordings when they are played to witnesses.⁵⁷ It would put staff in the difficult position of having to interpret the complex dialogue in these sound recordings in real time, hearing it for the first time.⁵⁸ The Prosecution and Defence submit that under the circumstances, any real-time court record of the sound recordings would not be reliable. Instead, the Prosecution and Defence submit that the identifying details of the sound recording being played to the witness are

⁵⁵ ICC-02/04-01/15-460.

⁵⁶ See, e.g., the Prosecution’s pre-confirmation brief, ICC-02/04-01/15-375-AnxC-Red, paras.59-72.

⁵⁷ This practice was adopted in the *Ruto et al.* case, when sound recordings in Kalenjin were played to witnesses. See, e.g., ICC-01/09-01/11-T-103-CONF-ENG at pp.30-35 (open session).

⁵⁸ See ICC-01/04-01/07-T-176-Red-ENG, p.17, lns.13-14, p.44, lns.9-10.

recorded, as well as the witness' subsequent interaction with the sound recording, including the witness' comments and any annotations they might make to a draft transcript.⁵⁹

Additional Prosecution submissions

Before any party plays a sound recording to a witness, it will clearly identify the transcript (and translation if appropriate) of the recording and ensure that the transcript can be followed by the Chamber, the parties and participants and the witness while the sound recording is being played.

Additional Defence submissions

For completeness of the record, the party playing the audio recording must submit transcripts in the original version and English translation to be annexed to the court transcript no later than 21 days from the notification of the edited transcript. The non-calling party and participants will have 10 days from the notification of the proposed annexes to the transcript to lodge objections to the content of the transcripts of the audio recording. After hearing from the parties, the Registry must certify the content of the proposed annexes.

r. Unsworn statement of the accused pursuant to article 67(1)(h)

63. In accordance with article 67(1)(g) of the Statute, the accused has the right to remain silent, without such silence being a consideration in the determination of guilt or innocence.

64. The accused also has the right to make an unsworn oral statement in his defence under article 67(1)(h) of the Statute. Should the accused decide to exercise this right, the Defence shall file a notice with the Chamber, prior to the start of its

⁵⁹ See, e.g., ICC-01/09-01/11-T-103-CONF-ENG at pp.30-35 (open session).

presentation of evidence, if any. Thereafter, the Chamber will rule on the appropriate moment and modalities for the accused to exercise this right. As such a statement would not constitute evidence, the Prosecution may address it in its closing brief, or in the course of its closing statement, but will not be permitted to produce (new) evidence in rebuttal.⁶⁰

IV. Conclusion

65. The Prosecution and Defence request that the Chamber adopt these submissions on the conduct of the proceedings.



Fatou Bensouda
Prosecutor



Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 30th day of June 2016
At The Hague, Netherlands

⁶⁰ See *Ntaganda* directions on conduct and victims' participation, para.19; First *Gbagbo et al.* directions on conduct, paras.24-25.