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**International
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Court**



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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

Common Legal Representative's Submissions on the conduct of the proceedings

Source: Office of Public Counsel for Victims

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

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Detention Section

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Other

I. INTRODUCTION

1. The Common Legal Representative of 592 victims authorised to participate in the present case¹ submit her observations on the conduct of the proceedings.

2. Preliminarily, the Common Legal Representative notes that the Prosecution and the Defence filed joint submissions on the conduct of the proceedings (the “Joint Submissions”),² without consulting with the legal representatives of victims. In this regard, the Common Legal Representative recalls the general instruction by the Chamber according to which consultation among participants is encouraged throughout the proceedings.³ The Common Legal Representative regrets that the parties did not consider important to involve the legal representatives in the discussions on a matter of common interest, such as the conduct of the proceedings.

3. The Common Legal Representative recalls the previous submissions filed in preparation for the status conference held on 23 May 2016⁴ and, in particular, the fact that she favours the recently adopted practices in the *Bemba et al.* and in the *Gbagbo and Blé Goudé*⁵ trials aiming at enhancing the efficiency and expeditiousness of the proceedings.

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; and the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 24 December 2015, pp. 20-22.

² See the “Joint Prosecution and Defence submissions on the conduct of the proceedings”, No. ICC-02/04-01/15-486, 30 June 2016 (the “Joint Submissions”).

³ See the transcript of the hearing held on 23 May 2016, No. ICC-02/04-01/15-T-25-ENG ET WT 23-05-2016 1-39 NB T, page 3, lines 22-23.

⁴ See the “Common Legal Representative’s submissions pursuant to the “Order Scheduling First Status Conference and Other Matters”, No. ICC-02/04-01/15-437, 18 May 2016.

⁵ See the “Decision adopting amended and supplemented directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-498-Anx A, 4 May 2016.

II. SUBMISSIONS

4. The Common Legal Representative supports the recent practice on the submission of evidence, according to which each item presented is to be considered submitted and the assessment of the relevance, probative value and potential prejudice of each item of evidence shall be assessed at the time of rendering the judgement pursuant to article 74(2) of the Rome Statute;⁶ the favour for orality in the proceedings, according to which the arguments of the participants and their requests are to be presented in the courtroom as much as feasible;⁷ the simplified practice for the legal representatives to request authorisation to question witnesses;⁸ and the mode of questioning⁹ and use of documents.¹⁰

5. Concerning the matters raised in the Joint Submissions, the Common Legal Representative indicates *infra* her position, following the order of items chosen by the parties.

a. Opening statements

6. The Common Legal Representative underlines that the opening statements represent a unique opportunity for the victims to convey to the Chamber their views and concerns, and particularly to make use of their right to explain the reasons for their participation.

⁶ See the “Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf)” (Trial Chamber VII), No. ICC-01/05-01/13-1285, 24 September 2015, paras. 8-16 and para. 17. See also the “Decision on the submission and admission of evidence” (Trial Chamber I), No. ICC-02/11-01/15-405, 29 January 2016, para. 12.

⁷ See the oral decision issued by Trial Chamber I, transcript of the hearing held on 28 January 2016, No. ICC-02/11-01/15-T-9-ENG ET, p. 36, lines 10-18.

⁸ See the oral decision issued by Trial Chamber I, transcript of the hearing held on 3 February 2016, No. ICC-02/11-01/15-T-13-CONF-ENG ET (still classified as confidential but rendered in open session), p. 2, lines 17-25.

⁹ See the “Decision adopting amended and supplemented directions on the conduct of the proceedings” Anx A, *supra* note 5, para. 15-17 and paras. 27-32.

¹⁰ *Idem*, paras. 34-38 and paras. 43-47.

7. With regard to the length of opening statements, the Common Legal Representative estimates that a total of 2 hours and a half will be sufficient for both teams to present the views and concerns of their clients. The legal representatives will endeavour to consult in advance in order to avoid repetitions of arguments and present submissions which will not be duplicative.

8. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions for material to be used during the opening statements and objections thereto.¹¹

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

9. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions.¹² However, she wishes to underline the importance for the victims and the affected communities that an explanation of the charges against the Accused is provided at the start of the trial. Indeed, considering the renewed interest in the proceedings following the surrender of Mr Ongwen, it is likely that media coverage will be extensive the day of the start of the trial.

c. Sequence of presentation of evidence and presentation of views and concerns by victims

10. The Common Legal Representative agrees on the proposed sequence of presentation of evidence in the Joint Submissions.¹³

11. However, the Common Legal Representative recalls that legal representatives are entitled to call witnesses other than victims provided that they show that said

¹¹ See the Joint Submissions, *supra* note 2, para. 7.

¹² *Idem*, paras 8 and 9.

¹³ *Ibid.*, para. 10.

evidence is relevant, non-duplicative and contributes to the establishment of the truth.

12. In this regard, the jurisprudence established that witnesses called by the legal representatives shall be able to provide important information that was not hitherto included in the evidence presented by the parties, and shall make a genuine contribution to the determination of the truth.¹⁴ In particular, Trial Chamber II considered whether the testimony “[i] *affects the victim’s personal interests; (ii) is relevant to the issues of the case; (iii) contributes to the determination of the truth; and (iv) whether the testimony would be consistent with the rights of the accused, in particular the right to adequate time and facilities to prepare a defence*”.¹⁵ The Chamber further directed the legal representative to file a schedule of the anticipated testimonies, detailing their expected lengths and the order in which they may appear.¹⁶ The Common Legal Representative favours this approach and indicates that she will be in a position of filing a request for calling witnesses towards the end of the Prosecution case when she will be able to better assess if the proposed testimony complies with the above mentioned criteria.

13. In light of the jurisprudence mentioned *supra*, the Common Legal Representative submits that legal representatives must be granted the opportunity to request the Chamber to call as witnesses not only the victims they represent, but also any other person who could provide relevant information for the establishment of the truth.

¹⁴ See the “Decision on the Modalities of Victim Participation at Trial” (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010, paras. 94-97. See also the practice of Trial Chamber I which appointed an expert on names and other social conventions in the DRC following the legal representatives’ submissions in this regard. See the “Instructions to the Court’s expert on names and other social conventions in the Democratic Republic of Congo” (Trial Chamber I), No. ICC-01/04-01/06-1934, 5 June 2009, para. 12.

¹⁵ See the “Decision on the participation of victims in the trial proceedings” (Trial Chamber IV), No. ICC-02/05-03/09-545, 20 March 2014, para. 25. See also, the “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial’” (Appeals Chamber), No. ICC-01/04-01/07-2288 OA11, 16 July 2010, para. 40.

¹⁶ See the “Decision on the participation of victims in the trial proceedings”, *supra* note 15, para. 26.

14. Secondly, the Common Legal Representative recalls the important distinction between victims submitting their views and concerns in person, and victims providing testimony under oath.¹⁷ In the *Lubanga* case, Trial Chamber I recognised “[t]he unequivocal statutory right for victims to present their views and concerns in person when their personal interests are affected [...] if the Court considers that course appropriate [and in as much as it does not] undermine the integrity of these criminal proceedings”.¹⁸

15. In this regard, the Common Legal Representative reiterates her previous submissions in relation to the procedure to be adopted for the presentation of views and concerns by victims.¹⁹

16. The Common Legal Representative informs the Chamber that, at present, she is not in a position to identify amongst the victims she represents the ones for whom she would either seek the Chamber’s authorisation to call as witnesses or otherwise request to appear in person before the Chamber to present their views and concerns. This determination can only be made at a later stage of the proceedings, taking into account the relevant interests of the victims and the extent and type of evidence on which the Prosecution will rely on at trial.

d. Scheduling of witnesses

17. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions.²⁰

¹⁷ See the “Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial” (Trial Chamber I), No. ICC-01/04-01/06-2032-Anx, 26 June 2009, paras. 17 and paras. 25-27.

¹⁸ *Idem*.

¹⁹ See the “Common Legal Representative’s submissions pursuant to the “Order Scheduling First Status Conference and Other Matters”, *supra* note 4, paras. 6-11.

²⁰ See the Joint Submissions, *supra* note 2, paras. 13 - 15.

e. Order for questioning of witnesses

18. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions.²¹

f. Protective measures

19. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions.²²

20. However, the Common Legal Representative underlines that, the non-calling party and the participants have also responsibilities with regard to the identification, protection and respect of the well-being and dignity of witnesses, and consequently legal representatives may raise specific concerns they may have with the Chamber, especially for those who may be traumatised or vulnerable.²³ Moreover, with regard to dual status individuals, Trial Chamber I ordered their legal representative to request, by way of a written filing, any additional protective measures, at the latest eight days in advance of their testimony, but acknowledged that in some circumstances it may have to be done at the last minute.²⁴

21. The Common Legal Representative submits that any request for in-court protective measures should be made as soon as possible to allow the VWU to fulfil its mandate, and to give the other party and the legal representatives an opportunity to respond to such a request without jeopardising its implementation. The Common

²¹ See the Joint Submissions, *supra* note 2, paras. 16 - 17.

²² See the Joint Submissions, *supra* note 2, paras. 18 – 20.

²³ See, *inter alia*, the “Decision on various issues related to witnesses’ testimony during trial” (Trial Chamber I), No. ICC-01/04-01/06-1140, 29 January 2008, para. 36.

²⁴ See the oral decision issued by Trial Chamber I during the hearing held on 28 January 2009, No. ICC-01/04-01/06-T-110-Red3-ENG CT WT, pp. 14-17. The Trial Chamber noted in particular that in exceptional circumstances where the legal representative cannot but request additional protective measures at the last minute, any such request could be done orally but should in any event be preceded by an email to the Chamber and to the parties, and followed by a written filing in due course.

Legal Representative also notes that protective and special measures in accordance with rules 87 and 88 of the Rules of Procedure and Evidence could also become necessary on short notice before or in the course of the testimony or appearance of a witness/victim.

g. **Self-incrimination**

22. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions.²⁵

h. **Use of material during the questioning of witnesses**

23. The Common Legal Representative agrees on the general principle according to which parties and participants should only seek to use material relevant to the particular witness' testimony, as well as on the provision of list of material to be used per witness.²⁶

24. However, since she favours the approach according to which all material presented should be considered submitted, the Common Legal Representative argues that there is no need to indicate whether the parties or the participant intend to tender the material as evidence.²⁷

25. The Common Legal Representative also submits that, during their questioning, the parties and the participant may always seek to use additional material other than the one included on the list submitted, provided that they can

²⁵ See the Joint Submissions, *supra* note 2, paras. 21-24.

²⁶ See the Joint Submissions, *supra* note 2, paras. 25, 26 and 28.

²⁷ *Idem*, para. 26 and 28. Cfr. Decisions quoted *supra*, note 6.

demonstrate the relevance of said additional material and the reasons for non-inclusion on the original list.²⁸

i. **Questioning of witnesses**

26. The Common Legal Representative agrees on the general principle according to which questions shall be clear and directly relevant to the charges. She agrees as well as on the use of prior statements during the course of the testimony,²⁹ either to a) refreshing the witness memory or b) confronting the witness with earlier statements that appear to contradict or be inconsistent with the witness' sworn testimony.³⁰

27. Moreover, the Common Legal Representative submits that questions related to reparations should also be allowed during trial proceedings. In this regard, pursuant to regulation 56 of the Regulations of the Court, "*the Trial Chamber may hear the witness and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial*". Trial Chamber II, for instance, decided that it may consider exercising its discretion pursuant to said regulation to hear witnesses and examine evidence.³¹ Trial Chamber I and III similarly decided that they "*may allow such evidence to be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination*".³²

²⁸ See the "Decision adopting amended and supplemented directions on the conduct of the proceedings", *supra* note 5, para. 36.

²⁹ See the Joint Submissions, *supra* note 2, paras. 30 and 31.

³⁰ See the "Decision adopting amended and supplemented directions on the conduct of the proceedings", *supra* note 5, para. 41.

³¹ See the "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, para. 60.

³² See the "Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings" (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 30 June 2010, para. 28 and the "Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, paras. 119-122. See also the "Decision adopting amended and supplemented directions on the conduct of the proceedings", *supra* note 5, para. 26.

28. The Common Legal Representative contends that the implementation of regulation 56 of the Regulations of the Court at trial enhance the expeditious conduct of the proceedings for the benefit of all parties and participants. Further, it also prevents – or at least limit instances of – recalling witnesses at a later stage, which would notably ensure that the Court avoids re-traumatisation of the witnesses concerned. Should the legal representatives be authorised to put such questions to witnesses at trial, the Common Legal Representative underlines that in any event the Chamber retains control on the questions asked and the parties always can object to questions should they deem it necessary.

j. Testimony of expert witnesses

29. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions which, she contends, shall apply also to the participants in the proceedings, as well as on the Prosecution's additional submission for admission of the relevant statement pursuant to rule 68(2) (a) or (b) of the Rules of Procedure and Evidence in case the other party and participant accept said statement and expert's qualification.³³

k. Procedure for the formal submission of material

30. The Common Legal Representative recalls her submission according to which all material presented should be considered submitted.³⁴

³³ See the Joint Submissions, *supra* note 2, para. 49.

³⁴ See *supra* para. 4.

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

31. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions.³⁵

m. E-court

32. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions.³⁶

n. Private and closed session

33. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions.³⁷

o. Transcripts of hearings

34. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions.³⁸

p. Defence disclosure

35. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions.³⁹

³⁵ See the Joint Submissions, *supra* note 2, paras. 52 and footnote 49.

³⁶ *Idem*, paras. 54-56.

³⁷ *Ibid.*, para. 57.

³⁸ *Ibid.*, paras. 58 and 59.

³⁹ *Ibid.*, para. 60.

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

36. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions.⁴⁰

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

37. The Common Legal Representative agrees on the procedure proposed in the Joint Submissions.⁴¹

Respectfully submitted.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 6th day of July 2016

At The Hague, The Netherlands

⁴⁰ *Ibid.*, paras. 61-62.

⁴¹ *Ibid.*, paras. 63-64.