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Date: **28 February 2020**

TRIAL CHAMBER X

Before: **Judge Kimberly Prost, Single Judge**

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD

Public

Prosecution observations on conduct of proceedings

Source: **Office of the Prosecutor**

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

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Introduction

1. The Prosecution submits its observations on the conduct of proceedings in accordance with the Chamber's 28 January 2020 order.[1]

2. The Prosecution also incorporates into these observations its reasons for disagreement with the amendments to the Confidentiality Protocol proposed by the Defence.

Procedural History

3. On 20 December 2019, the Single Judge directed the Prosecution and Defence ("Parties"), along with the Legal Representatives of Victims ("Legal Representatives") to make final submissions by 3 February 2020 on the victim participation procedure to be adopted.

4. On 28 January 2020, the Chamber invited the Parties and Legal Representatives to submit their observations on matters relevant to the conduct of proceedings by 27 February 2020.[2]

5. On 31 January 2020, the Prosecution filed its submissions on the victim participation procedure[3] and provided its provisional list of witnesses.[4]

6. On 3 February 2020, the Defence filed its submissions on modalities of victims' participation.[5]

7. On 13 February 2020, the Prosecution and Defence filed their submissions on proposed amendments to the Witness Familiarisation and Preparation Protocols.[6]

[1] ICC-01/12-01/18-566.
[2] ICC-01/12-01/18-566, para. 3.
[3] ICC-01/12-01/18-573.
[4] ICC-01/12-01/18-572.
[5] ICC-01/12-01/18-574.
[6] ICC-01/12-01/18-591, ICC-01/12-01/18-592.

8. On 19 February 2020, the Prosecution met with the Defence and the Legal Representatives to discuss possible areas of agreement on issues relating to the conduct of proceedings and the Confidentiality Protocol. The Prosecution will specify under the appropriate headings below where agreement was reached with the Defence and Legal Representatives. All references to agreements below are to be understood as having been reached during this 19 February 2020 meeting.

9. On 19 February 2020, following this meeting, the Defence sent an email[7] to Trial Chamber X requesting an extension of page limit of the Parties' and Legal Representatives' submissions on the conduct of proceedings to 35 pages and to be allowed to file it one day later than previously ordered, on 28 February 2020. The Defence also indicated that the Parties and Legal Representatives would include reasons for any outstanding areas of disagreement, in particular in relation to the contact protocol, in their submissions on the conduct of proceedings.

10. In an email sent on 20 February 2020[8], the Chamber granted all the requests as specified in the email sent by the Defence on behalf of the Parties and Legal Representatives.

11. On 21 February, the Prosecution and the Defence had another meeting to continue their discussion of possible areas of agreement, but were only able to discuss the Confidentiality Protocol. There were no further discussions on the conduct of proceedings. The Legal Representatives were unable to attend this meeting.

Submissions

A. Procedure for Reading the Charges

[7] Email from the Defence on 19 February 2020 at 16:08.
[8] Email from the Chamber on 20 February 2020 at 09:12.

12. The Prosecution proposes that only pages 451 to 466 of the Decision Confirming the Charges[9] be read. The Prosecution considers that these suffice to meet the requirements of article 64(8)(a) of the Rome Statute ("Statute").

B. Opening Statements

(i) Length

13. The 13 crimes charged relate to a period of ten months and commission under articles 25(3)(c) and (d) of the Statute. The Prosecution, however, is not in a position at present to provide an estimate of the number of hours it will require for its opening statement. The Prosecution will endeavour to provide an estimate on a date closer to 14 July 2020.

14. The Defence or Legal Representatives may choose to deliver their opening statements either after the Prosecution, or right before the commencement of their presentation of evidence. The Prosecution submits, however, that the Defence and Legal Representatives must choose one of these two alternatives: it is not permissible for the Defence or Legal Representatives to divide the time allotted to them between both the commencement of trial and prior to the commencement of their presentation of evidence.[10]

(ii) Communication of material used during the opening statements

15. The Prosecution intends to utilise material that has already been disclosed. In particular, the Prosecution will play an interactive 3D presentation that combines a satellite image with, *inter alia*, images obtained from previously disclosed photos and videos to help the Chamber visualise areas in Timbuktu relevant to the charges against the Accused and situate these locations relative

[9] ICC-01/12-01/18-461-Conf-Corr.
[10] See, for instance, ICC-02/04-01/15-497, para. 7: "In the interest of streamlining the presentation of these statements, an opening statement must be presented all at one time – the LRVs and Defence are not allowed to reserve unused time from their opening statements and continue them later during the trial."

to one another. In any event, the Prosecution will disclose this presentation as a separate item of evidence.

16. Should there be a justifiable reason for using material during the opening statements which have not been previously disclosed, the Parties and Legal Representatives should identify these materials, along with the reasons why they were not previously disclosed, by email to the Chamber and the other Party and Legal Representatives, not later than 15 days before the date of the opening statements.

(iii) Objections to the use of material during the opening statements

17. Any objections to the use of previously undisclosed material as notified above by the other Party or the Legal Representatives shall be filed 10 days prior to the commencement of the trial.

C. Presentation of Evidence

(i) Length and Duration

18. As indicated by its Provisional list of witnesses dated 31 January 2020, the Prosecution intends to call 78 witnesses at trial.[11] The Prosecution estimates that it will need approximately 300 hours to examine these witnesses. The Prosecution submits that the calculation of time should start to run only upon commencement of the questioning of the witness by Prosecution counsel and, in the event of any lengthy objections or legal arguments that may arise during the course of examination, these should be excluded from the tally.

(ii) Notification of the forthcoming witnesses

[11] ICC-01/12-01/18-572.

19. The Prosecution proposes that it indicate, via email, the forthcoming witnesses it intends to call on a monthly basis.[12] The Prosecution will provide updated witness schedules on a weekly basis.[13] The same procedure will be applicable during the Defence case.

D. Calling of Witnesses

(i) Order of witnesses

20. The Parties and Legal Representatives should provide an overall witness order when they file their final list of witnesses. The Prosecution will provide updated witness schedules on a weekly basis.[14] The same procedure will be applicable during the Defence case.

(ii) Order of questioning

21. Unless otherwise directed by the Chamber in the interests of justice, evidence at the trial should be presented in the following sequence: (i) evidence for the Prosecution; (ii) evidence for the victims;[15] (iii) evidence for the Accused; (iv) Prosecution evidence in rebuttal; (v) the Accused's evidence in rejoinder; (vi) evidence ordered by the Chamber; and (vii) any further relevant information that may assist the Chamber in determining an appropriate sentence if the Accused is found guilty on one or more of the charges.

22. The Prosecution submits that witnesses should be examined as follows:[16] (i) the Party calling the witness shall conduct an examination-in-chief; (ii) the opposing Party may subsequently cross-examine the witness; and (iii) the Party calling the witness may then conduct a re-examination.

[12] *See Ruto* General Directions 1, para. 12; ICC-01/05-01/08-1023, para.30 ("*Bemba* Directions for the conduct of Proceedings").
[13] *See Bemba* Directions for the conduct of Proceedings, para. 30.
[14] *See Bemba* Directions for the conduct of Proceedings, para.30.
[15] *See* Section F below.
[16] *See Ruto* General Directions 1, para.13,15; *Bemba* Directions for the conduct of Proceedings, para.8; *Katanga* Directions for the conduct of proceedings, para.15-16; ICC-01/04-01/06-T-104-ENG, p.37, l.3-20 (open session).

23. The Chamber has the power to ask witnesses questions at any stage of their testimony.[17] The Chamber's questions indicate the aspects of their testimonies which, in the Chamber's view, require further examination. Judicial questioning is an extension of the Chamber's truth-seeking function, and judges can ask questions whenever they consider it appropriate.[18] Judicial questioning after the examination by the Parties and/or Legal Representatives is particularly efficient since the Chamber will have heard all the evidence elicited.[19] If the Chamber exercises this power in relation to any witness who has already been questioned by one or more of the Parties, such Party/Parties should be given the opportunity to ask any questions arising from the evidence elicited by the Chamber.

24. Where an application has been made and leave granted, in accordance with the procedure set out below,[20] the Legal Representative may ask questions of a particular witness after the Prosecution has finished its examination-in-chief or cross-examination, as the case may be.[21]

25. According to rule 140(2)(d) of the Rules of Procedure and Evidence ("Rules"), the Defence has the right to be the last to examine a witness. This means that if a witness was not called by the 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. 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

[17] *See Ruto* General Directions 1, para.17; *Katanga* Directions for the conduct of proceedings, para.14; ICC-01/04-01/06-T-104-ENG, p.37, l.25- p.38, ln.3 (open session).
[18] ICC-01/04-01/06-T-104-ENG, p.37, l.25- p.38, l.3 ; *Ruto* General Directions 1, para.16.
[19] Further, as noted in *Lubanga*, the general evidence in the case is not restricted to the facts and circumstances described in the charges and any amendments to the charges, and under article 69(3) of the Statute the Chamber is entitled to request the submission of all evidence that it considers necessary for the determination of the truth, *see* ICC-01/04-01/06-2360, para.41.
[20] *See* Section G below.
[21] *See Ruto* General Directions 1, para.16.

additional questions of the Chamber or the participants after the examination-in-chief.[22]

(iii) Scope and mode of questioning

26. The Parties should avoid unnecessary repetition of evidence already on the record. The Parties should avoid lengthy, complicated, or compound questions that may confuse the witness. The Chamber should prohibit inappropriate, misleading or irrelevant questions.

27. Where practicable, the Parties should avoid paraphrasing the testimony or statement of the witness, but shall quote the directly relevant passage and indicate the exact page numbers (including ERNs where applicable), paragraph numbers, and/or relevant lines. The Parties should restrict such quotations to situations when it is strictly necessary for the understanding of the question.

28. The Parties may put to a witness the evidence obtained from a previous witness, provided that the identity of that witness is not given. Parties may not ask witnesses to comment on the credibility of other witnesses. The credibility of a witness may be impeached by any Party, including the Party calling the witness.

29. Objections to the form of questioning or other matters should be timely, specific, and brief. A Party waives an objection when not made in a timely manner.

30. Hearsay evidence is admissible.

[22] *See Katanga* Directions for the conduct of proceedings, para.79-80.

(1) Examination-in-chief

31. The Prosecution, Defence and Legal Representatives agree that the Party conducting an examination-in-chief shall use non-leading questions, except in respect of preliminary matters. The Prosecution proposes that the leading questions should include questions related to background or context, and/or matters that are not in dispute.[23]

b) Cross-Examination

32. The Prosecution, Defence and Legal Representatives agree that the cross-examining Party may use leading questions.[24]

33. Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining Party, to the subject-matter of that case.[25] The Chamber may, in the exercise of its discretion, permit inquiry into additional matters.[26]

34. The cross-examining Party is required to put to a witness, who is able to give evidence relevant to the case for that Party, the nature of its case that is in contradiction to the witness' evidence.[27] However, the cross-examining Party is required only to put the general substance of its case conflicting with the evidence of the witness, and not every detail that the Party does not accept.

35. Additionally, the cross-examining Party is required to put to the witness any facts or evidence upon which it intends to rely to impeach the credibility of

[23] *See* ICC-01/04-01/06-2127, para.23.
[24] *See* ICC-01/04-01/06-2127, para.23; *Katanga* Directions for the conduct of proceedings, para.74.
[25] *See Ruto* General Directions 2, para.20.
[26] See also, *Ruto* General Directions 2, para.20: "The Chamber will decide whether a given line of questioning is reasonable on a case-by-case basis. The Chamber is of the view that it is within the cross-examining party's discretion to determine whether a given issue should, or need not be explored with the witness. The Chamber stresses, however, that its refusal to require a cross-examiner to cross-examine any witness in any particular manner must carry no expectation that a cross-examiner may freely seek the recall of any witness whom he or she had not fully questioned on an earlier occasion."
[27] *See Katanga* Directions for the conduct of proceedings, para.70.

the witness, in order to give the witness an opportunity to respond thereto.[28] Failure to do so may result in the Chamber disregarding or assigning less weight to the impeaching evidence.

c) Re-examination, re-cross-examination, and further re-examination

36. The re-examination of a witness should be conducted under the same conditions as the examination-in-chief and should be limited to the issues raised during cross-examination.[29]

37. On an exceptional basis and upon a showing of good cause, the Chamber may authorise the re-cross-examination and further re-examination of a witness on limited and specific issues. Any questioning during re-examination should be restricted to matters raised in re-cross-examination.[30]

(iv) Hostile or adverse witnesses

38. The calling party may request that the Chamber declare its witness "hostile" or "adverse"[31] if the party believes that the witness does not wish to tell the truth to the Court at the instance of the party calling him.

39. Prior to applying to declare a witness "hostile" or "adverse", the calling party may request to refresh the witness' memory from his/her prior statement(s) about issues on which the witness' evidence has deviated, following the procedure set out below.[32] If the witness disputes the correctness of the prior statement, the calling party may question the witness on the reason for the deviation.

[28] *See Ruto* General Directions 2, para.19; ICC-01/04-01/06-T-122-CONF-ENG, p.45, ln.23 – p.46, l.8 (open session).
[29] *Katanga* Directions for the conduct of proceedings, para.77-78.
[30] *Kupreskic et al.*, IT-95-16, Decision on Order of Presentation of Evidence, 21 January 1999.
[31] These terms are used synonymously.
[32] *See* para.

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

    (1) Whether the witness has been hostile in general demeanour;

    (2) Whether there is an impression of evasiveness on the part of the witness;

    (3) Whether the present testimony of the witness before the Court has been in whole, or in part, deliberately or systematically inconsistent with a previously recorded statement or testimony in relation to a material issue or issues before the Court;

    (4) Whether 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.

41. If a witness is declared "hostile" or "adverse", the calling party will be permitted to cross-examine him on all issues considered relevant, including his or her credibility and character.

(v) Use of video-link

42. While the Prosecution acknowledges that it would be preferable for all its witnesses to testify in the courtroom, it will have to present a number of witnesses by video-link due to security or significant logistical considerations which prevent them from traveling to The Hague. The Prosecution expects that the Defence will only present similarly constrained witnesses by video-link. The Parties' witness lists should specify which individuals will testify via video-link. The Prosecution and Defence agree on the use of video-link for certain witnesses when necessary, and that this will be specified in the Parties'

witness lists. The Prosecution submits that objections to the use of video-link have to be filed sufficiently in advance.

(vi) Use of documents with witnesses

(1) Documents shown during witness preparation

43. As the Prosecution previously proposed in relation to the Witness Preparation Protocol,[33] the Parties should be allowed to show material to witnesses during preparation sessions even though they have not previously seen them. When providing the list of documents they intend to use with a witness, the Parties should be allowed to provisionally include items in this list which they intend to show during the preparation session for the purpose of ascertaining whether the witness can usefully comment on them during the testimony.

b) Use of material during questioning

44. Parties should only seek to question a witness on documents that are relevant to that witness testimony or documents relevant to the case that the witness may be able to authenticate or comment on. It is for a Party to demonstrate a connection between the exhibit and that witness.

45. Five days prior to the witness's appearance, the Party calling the witness should email[34] the Chamber, the Registry, the other Party and participants a list of the documents or material it intends to use with the witness during the examination-in-chief.[35] It is the duty of the calling Party to notify the Chamber, the Registry, the other Party and participants as soon as possible of any changes thereto. In addition, witness preparation notes and any attendance log should be distributed to the other Party and, for dual status witnesses, to

[33] ICC-01/12-01/18-591, para. 13.
[34] *See Ruto* General Directions 1, para.27.
[35] *See Ruto* General Directions 1, para.27.

the Legal Representatives, as soon as practicable after the conclusion of the preparation session and prior to the commencement of the witness' evidence.

46. Objections by the other Party to the use of particular documents, if any, should be filed no later than two days before the examination, or – in exceptional circumstances - made orally.

47. Three days prior to the expected commencement of cross-examination, the cross-examining Party should provide the Chamber, the Registry, and the other Party with a list of the documents it intends to use during cross-examination.[36] Where necessary, the other Party may request a short adjournment in order to examine the material.

48. If any of the documents that the calling or cross-examining Party wishes to use during the witness' appearance are not included on the original list, it must apply for leave of the Chamber to use them with the witness, showing good cause.[37]

49. As a rule, Parties can only use documents during their examinations that have been properly disclosed. If a cross-examining Party wishes to use material that has not been disclosed in advance, it may only do so with leave of the Chamber. In that case the Party should provide copies of the material to the Chamber, the other Party and participants no later than 24 hours before the commencement of the cross-examination.

c) Refreshing the memory of the witness

50. Where a witness demonstrates an inability to independently recall a particular fact, the calling Party may, *inter alia*, use the previously recorded testimony of the witness to refresh the witness' recollection, regardless of whether the previously recorded testimony has been admitted into evidence.

[36] *Bemba* Directions for the conduct of Proceedings, para.16.
[37] *See Ruto* General Directions 1, para.22.

51. A Party shall first establish that the witness cannot recall a particular issue, and that his or her testimony has been previously recorded. Subsequently, the calling Party should provide the witness with an opportunity to read the identified paragraphs, or read said paragraphs to the witness. The calling Party must further ascertain whether the witness' recollection has been refreshed, and if so, may examine the witness again on the matter at issue.

E. Admission or submission of evidence

(i) General approach

52. As the Appeals Chamber has noted, the Trial Chamber has discretion on how to deal with evidence submitted at trial:

    (1) The Trial Chamber may defer its assessment of the relevance, probative value and potential prejudice of the evidence until its article 74 judgment, when determining the weight to be given to the evidence ("submission regime"); or

    (2) The Trial Chamber may make a formal ruling on the admissibility of the evidence when it is submitted, based on its consideration of the relevance, probative value and potential prejudice of the evidence ("admission regime").[38]

53. Divergent approaches have been taken by various Trial Chambers as regards the submission or admission of evidence. Trial Chambers in *Bemba Article 70*,[39] *Gbagbo*[40] and *Ongwen*[41] have adopted the submission regime.

    Submission regime

[38] ICC-01/05-01/08-1386, para. 37.
[39] ICC-01/05-01/13-1285, para. 9.
[40] ICC-02/11-01/15-405, para. 12-15.
[41] ICC-02/04-01/15-497, para. 25.

54. Under the submission regime, the Trial Chamber does not make individualised rulings on the admissibility of evidence. Instead, it assesses the relevance, probative value and potential prejudice of the evidence "submitted and discussed" together with its weight in its final article 74 judgment, and provided it meets any specific conditions under the Statute or rules. The Trial Chamber need not refer to each item of evidence submitted by the Parties. Article 74(5) of the Statute only requires "a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions".

55. The Appeals Chamber has upheld the legality of the submission regime under article 69(4) of the Statute, noting that articles 64(9)(a) and 69(4) of the Statute "accord the Trial Chamber discretion when admitting evidence at trial."[42] The Appeals Chamber emphasized that "irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings – when evidence is submitted, during the trial, or at the end of the trial."[43]

56. The *Bemba Article 70* Trial Chamber considered that the "proceedings will be conducted **more efficiently** if the Chamber defers its assessment of the admissibility of evidence until deliberating its judgment pursuant to article 74(2) of the Statute."[44]

57. The *Ggabgo* Trial Chamber's decision to adopt the submission regime was based on three factors:

    (1) It is only at the end of trial, once the submission of the evidence will have been completed, that the Chamber will be in the best position to

[42] ICC-01/05-01/08-1386, para. 37.
[43] ICC-01/05-01/08-1386, para. 37.
[44] ICC-01/05-01/13-1285, para. 9; emphasis supplied.

meaningfully assess each item of evidence as submitted throughout the course of the proceedings.

(2) Deferring the Chamber's determination of all the issues concerning a given piece of evidence to the time of judgment will prevent multiple determinations on the same item of evidence made at different stages of the trial.

(3) Deferring the Chamber's determination to the time of judgment will also ensure that all evidence submitted will be subjected to uniform treatment.[45]

58. The Single Judge in *Ongwen* explained that this regime has been adopted in recent cases as "(i) the Chamber is able to assess more accurately the relevance and probative value of a given item of evidence after having received all of the evidence being presented at trial; (ii) **a significant amount of time is saved** by not having to assess an item's relevance and probative value at the point of submission and again at the end of the proceedings; (iii) there is no reason for the Chamber to make admissibility assessments in order to screen itself from considering materials inappropriately and (iv) there is no reason to assume that professional judges would consider irrelevant or unduly prejudicial material, noting in particular that the requirement of a reasoned judgment enables the participants to verify precisely how the Chamber evaluated the evidence."[46]

Admission regime

59. Under the admission regime, the Trial Chamber issues decisions admitting or denying admission to items of evidence when the Parties submit them at trial.

[45] ICC-02/11-01/15-405, para. 12-15.
[46] ICC-02/04-01/15-497, para. 25; emphasis supplied.

The Trial Chamber must then give a reasoned decision on an item by item basis pursuant to rule 64(2) of the Rules.[47]

60. As Judge Henderson stated in his separate opinion on the *Bemba* Article 70 Appeals Judgment, the advantages of the admission regime are three-fold: (1) potentially unreliable evidence is immediately screened out, preventing Parties and Legal Representatives from relying on them, and preventing the trial proceedings from being inundated by large amounts of irrelevant, unauthentic, non-probative (e.g. anonymous hearsay) or otherwise prejudicial evidence; (2) the Parties and Legal Representatives are provided notice as to the purpose for which the evidence has been entered into the case record, that is, what the tendering party aims to prove by it (possibly in conjunction with other evidence); and (3) the Chamber is able to receive all necessary information to make a fully informed evaluation of the exhibit's evidentiary weight.[48]

61. Judge Henderson warned that the submission regime, as adopted by the *Bemba* Article 70 Trial Chamber, "essentially consists in leaving the parties entirely in the dark until the end of the trial and then to withhold any explanation as to why certain exhibits are relied upon and others not mentioned."[49] He noted that analogies to practices of domestic criminal jurisdictions in France, Germany, Belgium, Portugal and Finland are unhelpful as these systems neither conduct criminal investigations and trials in the same adversarial manner as is done at the Court, nor does the Court have the safeguard of an independent nonpartisan investigating judicial officer and a central dossier.[50]

62. Judge Henderson further explained that admissibility rulings "are not meant to be preliminary rulings on what an exhibit may or may not prove" but are

[47] ICC-02/04-01/15-497, para. 59.
[48] ICC-01/05-01/13-2275-Anx, para. 42, 44.
[49] ICC-01/05-01/13-2275-Anx, para. 50.
[50] ICC-01/05-01/13-2275-Anx, para. 51.

instead "designed to differentiate exhibits that have the *potential* to prove something that is relevant to the case from those that do not."[51] He emphasizes that "it is a profound misconception to suggest that it is not possible to make fully informed admissibility rulings before all the evidence is in."[52] He stresses that decisions on relevant, probative value and prejudice are made on the basis of parties' submissions, and parties are responsible for pointing out if these factors must be evaluated in light of evidence which is still to be submitted.[53]

63. The Prosecution submits that both systems offer advantages and disadvantages and will accept whichever evidentiary regime the Chamber deems appropriate and more efficient in the present case. The Prosecution nevertheless notes in this regard that several Trial Chambers have highlighted the efficiency of the submission regime, which in their view saves a "significant" amount of time in court.

(ii) Bar table motions

64. The Prosecution submits that there is no rule prohibiting the admission into evidence of documents merely because the source or custodian was not called to testify. The Party submitting the evidence should however demonstrate that the evidence is *prima facie* authentic.

65. The Parties may submit evidence from the bar table via more than one application and at any point during trial proceedings. However, Parties should be encouraged to submit such evidence in as practicable and efficient a manner as possible.

(iii) Rule 68 motions

[51] ICC-01/05-01/13-2275-Anx, para. 43, italics in the original.
[52] ICC-01/05-01/13-2275-Anx, para. 46.
[53] ICC-01/05-01/13-2275-Anx, para. 46.

a) Rule 68(2)

66. In accordance with rule 68(2) of the Rules, a Trial Chamber may admit, in whole or in part, the evidence of a witness who is not present before the Chamber, in the form of previously recorded testimony, including statements taken under rule 111 of the Rules, interviews recorded pursuant to rule 112 of the Rules, or any other previously recorded testimony ("previously recorded testimony").

67. Motions for the admission of previously recorded testimony pursuant to rule 68(2) of the Rules may be submitted to the Chamber at any time during the trial, provided that sufficient notice is given to the other Party. The application should address the applicable scenario envisaged under rule 68(2) together with any supporting material, and be accompanied by a copy of the previously recorded testimony indicating precisely which passages the calling Party wishes to tender into evidence. If these passages contain references to other material that is available to the calling Party, they should equally be attached to the application. The non-calling Party should have ten days following the notification of the application to raise any objections.

b) Rule 68(3)

68. In accordance with rule 68(3) of the Rules, a Trial Chamber may admit, in whole or in part, the evidence of a witness who is present before the Chamber, in the form of previously recorded testimony.

69. Motions for the admission of previously recorded testimony pursuant to rule 68(3) should, in principle, be submitted to the Chamber at least 21 days before the witness is scheduled to appear.[54] The application should be accompanied by a copy of the previously recorded testimony indicating precisely which

[54] *See Ruto* General Directions 1, para.28.

passages the Party calling the witness wishes to tender into evidence.[55] If these passages contain references to other material that is available to the Party calling the witness, these should be attached to the application.[56] The other Party and the Legal Representatives, where applicable, should have ten days following the notification of the application to raise any objections.[57]

70. The witness should attest at the hearing that his or her previously recorded testimony accurately reflects what the witness would say if examined. The Parties may be directed to read a summary, or the relevant parts of the witness' previously recorded testimony, into the record of the proceedings.

(iv) *The procedure to introduce video evidence at trial*

71. As early as practicable, a Party should provide the other Party, Legal Representatives and the Chamber with copies of the specific video or audio excerpts which it intends to use. The Party should indicate the corresponding transcript excerpts from the relevant transcript of the video. The other Party should then be required to state whether it agrees with the transcript of the excerpts or raise any areas of disagreement. The Registry, as a neutral third Party, should resolve any disagreements as to the transcript. The interpreters can then use this agreed text when the video or audio is played in court.

72. The procedure outlined above will avoid putting interpreters and stenographers in the "arduous" and "very difficult"[58] position of having to interpret in real time the dialogue in a video in real time upon hearing it for the first time, which reduces the reliability of the interpretation. This is because the sound quality of the videos varies and may include a number of speakers, at times overlapping and speaking different languages at a much quicker pace than Counsel and witnesses are required to speak at in court. A

[55] *See Ruto* General Directions 1, para.28.
[56] *See Ruto* General Directions 1, para.28.
[57] *See Ruto* General Directions 1, para.28.
[58] ICC-01/04-01/07-T-176-CONF-ENG, p. 17, l. 13-14, p. 44, l .9-10 (open session).

proper review of such videos requires listening to the segments multiple times. It is virtually impossible to capture accurately what is being said on a video when it is played only once, at most twice, during a court session.

73. If a Party or participant detects problems with the transcript on significant issues, they should note the page and line number and raise the matter orally with the Chamber so that it will appear on the record.[59] Minor errors should be reported via email to the relevant section of the Registry immediately after the hearing, copying the other Party, participants and the Chamber.[60] Enduring difficulties should be raised with the Chamber during the next court hearing or as soon as the problem is identified, providing the page and line numbers together with a brief explanation of the suggested difficulty.[61]

F. Modalities of victims' participation

(i) Participation in opening and closing statements

74. The Legal Representatives should be entitled to make opening and closing statements as they have been authorised to do in previous cases.[62]

(ii) Participation in hearings

75. The Legal Representatives should be entitled to attend trial hearings whether they are in a public, private or closed session. Attendance at *ex parte* hearings should be decided on a case by case basis.[63]

76. The Appeals Chamber has defined the framework for the participation of victims, holding that "participating victims are not Parties to the

[59] *See* ICC-01/04-01/06-1974, para. 56(d).
[60] *See* ICC-01/04-01/06-1974, para. 56(d).
[61] *See* ICC-01/04-01/06-1974, para. 56(d).
[62] *See Katanga* Directions for the conduct of proceedings, para.1-2; ICC-01/05-01/08-T-32-ENG; ICC-01/05-01/08-T-364-ENG; ICC-01/04-01/06-T-107-ENG*;* ICC-01/04-01/06-T-356-ENG; *Ruto* General Directions 1, para.4.
[63] *See* ICC-01/04-01/06-1119, para.113; ICC-01/09-02/11-498, para.70; ICC-01/04-01/07-1788-tENG, para.69-71.

proceedings",[64] and do not have an unfettered right to lead or challenge evidence.[65] They are required to demonstrate why their interests are affected by the evidence or issue and it is then up to the Chamber to decide whether or not to allow such participation.[66]

(iii) Presentation of views by individual victims

77. The Prosecution submits that as a general principle, victims should submit their views and concerns through their Legal Representatives. If any individual victims would like to present their views and concerns directly to the Chamber, the Legal Representatives should seek authorisation through a written application before the close of the Prosecution case.[67] The Chamber should grant such applications only where the victims' testimony could make a genuine contribution to the ascertainment of the truth.[68] After making the solemn undertaking, the victim should be questioned by the Legal Representative.[69] The Legal Representative of the victim testifying may also allow the other Legal Representative to ask questions.[70] After this, the Prosecution will have an opportunity to examine the victim, followed by the Defence.[71]

78. Should the Chamber grant such authorisation, the victim(s) should be called after the Prosecution has concluded its case.[72]

(iv) Authorisation to question a witness or present evidence

79. Should a Legal Representative wish to question a witness called by a Party, the Legal Representative should apply to the Chamber, by means of a filing,

[64] ICC-01/04-01/07-2288, para.39.
[65] ICC-01/04-01/06-1432, para.99.
[66] ICC-01/04-01/06-1432, para.99.
[67] *See Katanga* Directions for the conduct of proceedings, para. 25.
[68] *See Katanga* Directions for the conduct of proceedings, para. 20.
[69] *See Katanga* Directions for the conduct of proceedings, para. 31.
[70] *Katanga* Directions for the conduct of proceedings, para. 31.
[71] *Katanga* Directions for the conduct of proceedings, para. 32.
[72] *See Katanga* Directions for the conduct of proceedings, para. 24.

notified to the Parties, 14 days in advance of the relevant witness' testimony.[73] After the examination-in-chief, and without the witness being present, the Parties should be given an opportunity to make oral submissions on such a request prior to the Chamber's oral ruling on the application.[74]

80. 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.[75]

81. When the 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 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.[76] If the victims wish to have certain evidence produced in the courtroom they should file a written application setting out the reasons why their personal interests are affected and should satisfy the Chamber that such evidence is necessary for the determination of the truth within the terms of article 69(3) of the Statute, in which case the Chamber will order its submission.[77]

82. As a matter of principle, Legal Representatives should not be able to call witnesses other than the victims they represent.[78] However, in case the Legal Representatives have identified persons other than participating victims, who

[73] See *Ruto* General Directions 1, para.19; *Bemba* Directions for the conduct of Proceedings, para.18. The application of the Legal Representative should provide reasons for separate questioning apart from the questioning by the Prosecution and include an outline of areas for examination. Documents proposed to be used during the examination, or references thereto, where appropriate, should also be provided at this time, *Ruto* General Directions 1, para.19.
[74] *See Ruto* General Directions 1, para.19.
[75] *See Katanga* Directions for the conduct of proceedings, para. 88.
[76] *See Katanga* Directions for the conduct of proceedings, para. 89.
[77] *See* ICC-01/05-01/08-1470 ("*Bemba* Order on submission of evidence"), para. 14 and 14(a); *Katanga* Directions for the conduct of proceedings, para. 46-47.
[78] *See Katanga* Directions for the conduct of proceedings, para. 45.

may be able to give evidence to the Chamber about issues that concern the victims' interests, they may bring this to the Chamber's attention.[79] 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.[80]

(v) Scope and mode of questioning

83. The Legal Representatives should only be authorised to question a witness to the extent relevant to the victims' interests.[81] The scope of questioning is therefore limited to questions that have the purpose of clarifying the witness' evidence and to elicit additional facts.[82]

84. The Legal Representatives should conduct their questioning in a neutral manner and avoid leading or closed questions, unless specifically authorised by the Chamber to use such questions.[83] If the Legal Representatives are authorised to challenge the credibility or accuracy of a witness' testimony, leading, closed as well as questions challenging the witness' reliability may be allowed, subject to the same limitations outlined in relation to cross-examination.[84]

G. Protective measures

(i) In-court protective and special measures

85. During the meeting on 19 February 2020, the Prosecution and Defence noted that there were no additional submissions to be made relating to in-court

[79] *See Katanga* Directions for the conduct of proceedings, para.45.
[80] *See Katanga* Directions for the conduct of proceedings, para.46.
[81] *See Bemba* Directions for the conduct of Proceedings, para.20.
[82] *See Bemba* Directions for the conduct of Proceedings, para.20.
[83] *See* ICC-01/04-01/06-2127, para.29-30; *Katanga* Directions for the conduct of proceedings, para. 91.
[84] *See Katanga* Directions for the conduct of proceedings, para. 91.

protective and special measures as these are comprehensively regulated by rules 87 and 88 of the Rules.

(ii) Private/Closed Sessions

86. Insofar as possible, witness testimony should be given in public.[85] Recourse to private and/or closed session will at times be unavoidable, in particular for protected witnesses. The Single Judge will recall the particular security challenges posed to all witnesses because of the specific situation in Mali.[86] While the identities of the Prosecution witnesses will have to be fully disclosed prior to trial, thereby already exposing them to a considerable amount of risk, their exposure to the public will still have to be carefully managed so as to minimize any further threats to their security and safety. The Prosecution will thus have to frequently request private and/or closed sessions throughout the presentation of its case to protect its witnesses.

87. Requests for private and/or closed sessions should specify the reasons justifying the request in a neutral and objective fashion, if possible referring to the points that will be touched upon.[87] To the extent that this does not unduly inhibit the sequence of questioning, Parties and Legal Representatives should endeavour to group together identifying questions.[88]

88. The Chamber may wish to seek the views of the Victims and Witnesses Unit ("VWU") in relation to both in-court protective measures and private/closed sessions.

(iii) Publication of public redacted transcripts

89. The calling Party should propose public redacted versions of any confidential transcripts no later than 45 days after the conclusion of a witness' testimony.

[85] *See Bemba* Directions for the conduct of Proceedings, para. 23.
[86] See, for instance, ICC-01/12-01/18-545-Red2.
[87] *See Bemba* Directions for the conduct of Proceedings, para. 23.
[88] *See Bemba* Directions for the conduct of Proceedings, para. 23.

Experience from prior cases has shown that 30 days is an insufficient period in this regard.[89] The other Party will have 15 days to review and provide its position on the proposed public redacted version.

H. Potential self-incrimination of witnesses

90. The issue of self-incrimination may arise in relation to a number of Prosecution witnesses. The Registry should make all necessary arrangements to provide independent legal advice from a qualified lawyer to witnesses who may incriminate themselves during their testimony.[90] Once a lawyer has been appointed by the Registry, the latter should inform the calling Party, who should then be responsible for providing the lawyer with any prior statements or interview transcripts by the witness as well as any other relevant material.[91] When the witness in question is also a victim, that victim's Legal Representative should provide this advice.[92]

91. The Party calling such a witness should notify VWU and the Chamber as soon as practicable if it believes that the witness may give self-incriminating statements during his or her testimony.[93] If the witness considers that he or she requires an assurance under rule 74(3)(c) of the Rules, the advising lawyer should seize the Chamber with a relevant application, notifying the Prosecution thereof.[94]

92. The Prosecution should then present its views to the Chamber in such time as to allow the Chamber to rule before the commencement of the witness' testimony.[95]

[89] See, for example, ICC-01/04-02/06-1887, para 3-5.
[90] *See Ruto* General Directions 1, para. 29.
[91] ICC-01/04-01/07-1665-Corr, para. 54 ("*Katanga* Directions for the conduct of proceedings").
[92] ICC-01/04-01/06-T-110-CONF-ENG, p.2, l.23-25 (open session).
[93] *See Ruto* General Directions 1, para. 29.
[94] *See Ruto* General Directions 1, para. 29.
[95] *See Ruto* General Directions 1, para. 29.

93. The lawyers undertaking the rule 74 notification should also inform the witness, in advance of his or her first appearance before the Chamber, of the offence defined in article 70(1)(a) of the Statute for the purposes of rule 66(3) of the Rules.[96]

I. Expert witnesses

94. The Parties should identify expert witnesses in their witness lists and specify their area(s) of expertise.

95. Should the Defence wish to challenge any of the Prosecution witnesses' expertise, it should file an omnibus notice of challenge 30 days before the commencement of the Prosecution opening statement on 14 July 2020. The Defence should specify in its notice whether, for all the experts the calling party wishes to rely on: (1) it accepts the reports as being experts' reports; (2) it wishes to cross-examine the proposed expert witnesses; and/or (3) it challenges the qualifications of the witnesses as an expert, or the relevance of all or parts of the report; and, if so, it should indicate which parts.[97] This will enable the Prosecution to determine prior to the commencement of trial which expert witnesses, if any, the Defence intends to challenge, and to prepare accordingly. This will also facilitate the Chamber's work, allowing it to simultaneously resolve all challenges.

96. Should the Defence opt to make their opening statement immediately prior to the commencement of its presentation of evidence, the Prosecution will have a similar period of 30 days prior to the date of the Defence opening statement. Otherwise, the Prosecution will file its omnibus notice of challenge 30 days prior to the commencement of the presentation of Defence evidence.

[96] *See* ICC-01/04-01/06-T-110-CONF-ENG, p. 5, l.1-3 (open session); *Katanga* Directions for the conduct of proceedings, para.55.
[97] ICC-01/04-02/06-619, para. 38.

J. Interpretation and transcripts

97. The Prosecution, Defence and Legal Representatives jointly emphasise that it is the Registry's duty to review and correct transcripts.[98] Under rule 15 of the Rules, the Registrar is tasked with the maintenance of all case records. This review should be conducted on the basis of the audio-visual recording of the hearing. This will ensure that all speech is accurately reflected on the record and that corrections the Parties and Legal Representatives might need to make are minimal. It is imperative that the burden for reviewing and correcting transcripts remain with the Registry, and not be shifted onto the Parties and Legal Representatives. The limited resources of the Parties and Legal Representatives must be devoted to the presentation of their case, and not be unduly strained by the time-consuming task that comprehensive reviews and correction of transcripts entails.

K. Defence notice pursuant to rules 79 and 80 of the Rules

98. Under rules 79 and 80 of the Rules, the Defence should notify the Chamber, the Prosecution and the Legal Representatives of the following:

(1) any intention to raise the existence of an alibi or any grounds for excluding criminal responsibility under article 31 of the Statute;

(2) the specific crimes that these defences cover;

(3) the names of the witnesses and any other evidence upon which it intends to rely in support of these defences; and

(4) as regards the notice of alibi, the place or places at which the Accused claims to have been present at the time of the alleged crime shall be specified.

[98] ICC-01/04-02/06-1342, para. 20: "Although the parties and participants should remain vigilant for material errors which are apparent in the real-time transcripts, it is for the Registry to ensure that a complete and accurate record of proceedings is maintained."

99. The Prosecution submits that the Defence must give such notice prior to the commencement of trial. Rule 80(1) of the Rules explicitly provides that notice of intention to raise a ground for excluding criminal responsibility under article 31(3) of the Statute "shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial."

100. As regards notice of alibi and grounds for exclusion of criminal responsibility under article 31(1) of the Statute, Rule 79(2) of the Rules "shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond." Trial Chambers have consistently interpreted this to mean that notification should be given prior to the commencement of trial.[99] Moreover, Trial Chambers, including the Single Judge of this Trial Chamber, have found that this obligation to provide notice does not infringe upon the Accused's right to remain silent.[100]

101. The Prosecution should be accorded sufficient time after receiving notification to investigate the defences raised and be permitted to amend its lists of evidence and witnesses accordingly to address these defences.

102. The document containing the charges, confirmation hearings and the confirmation decision set out in a detailed manner the parameters of the case and the Prosecution evidence. As highlighted during the status conference on 18 February 2020, the majority of the Prosecution's evidence has been disclosed to the Defence, with standard redactions to most witness identities lifted, with full disclosure, including 60 of the 78 individuals on the Provisional Prosecution witness list.[101]

[99] ICC-02/04-01/15-460, para. 8; ICC-01/05-01/13-1209, para. 8; and ICC-01/04-01/06-1235-Corr-Anx1, para. 29 (a) and (b).
[100] ICC-01/12-01/18-460, para. 10 ; ICC-01/04-01/06-1235, para. 31.
[101] ICC-01/12-01/18-T-011-CONF-FRA ET, p. 44, l.13 – p.48, l.25.

103. The amendment of the charges which the Prosecution seeks is limited, and the scope of the amendment and the supporting evidence are clearly set out in the Prosecution request.[102] Hence the proposed amendment should not prevent the Defence from providing the required notice under rules 79 and 80.

L. Reasons for disagreement with proposed amendments to Confidentiality Protocol

104. As agreed upon by the Parties and Legal Representatives during their 19 February 2020 meeting, and as authorised by the Single Judge through her 20 February 2020 email, the Prosecution submits below its reasons for disagreement with the amendments to the Confidentiality protocol proposed by the Defence.

105. The Prosecution refers to the joint filing,[103] by the Prosecution and the Defence, regarding the points of agreement and disagreement on the proposed amendments to the Confidentiality Protocol.[104]

106. Unlike other protocols, which are to be newly adopted for the purposes of the trial stage of this case (Familiarisation Protocol, Protocol on dual status witnesses),[105] the Confidentiality Protocol already exists on the record of this case. It was adopted, following litigation between the parties, at the pre-trial stage.[106] Prior to the first status conference before the Trial Chamber, the Chamber requested views on the need for any amendment to the Confidentiality Protocol (among other existing protocols),[107] and subsequently encouraged the parties and participants to come up with a joint proposal

[102] ICC-01/12-01/18-568-Conf.
[103] Prosecution and Defence Joint Filing.
[104] Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-01/12-01/18-40-Anx-tENG (English translation) ("Confidentiality Protocol").
[105] *See* ICC-01/12-01/18-562, p. 5 (directing Registry to submit the Familiarisation Protocol and the Protocol on dual status witnesses into the record unless the parties and participants submit objections).
[106] *See* ICC-01/12-01/18-40-tENG (summarising the procedural background, analysing the different proposals and annexing the Confidentiality Protocol that the parties are ordered to comply with).
[107] ICC-01/12-01/18-507, para. 3(H), requesting views on the need for additional protocols or amendments to existing protocols, such as the Confidentiality Protocol.

regarding any amendment to the Confidentiality Protocol.[108] In the Prosecution's submission, however, this was not intended as an opportunity to either re-litigate issues or to propose a major overhaul of the existing text. Rather, any amendments should be circumscribed and tailored to addressing any specific problems that the parties may have encountered when applying the Confidentiality Protocol in practice since its adoption.

107. The Prosecution's proposed amendment to the Confidentiality Protocol reflects this approach, as it is designed to address the provision of any material documenting inadvertent contact with witnesses of an opposing party or participant, such as has been done in this case.[109] With this amendment, the Prosecution proposes modifying paragraph 39 of the Protocol—appearing in the section addressing interviews with witnesses of other parties or participants, and providing that "A video or audio recording of the interview shall be provided to the calling party or participant, to the extent possible, within five days of the interview date"—to expressly indicate that such provision to the calling party or participant applies also to any audio or video recording as well as any type of notes relating to an accidental contact with a witness by a party or participant.[110]

108. The provisions and implementation of the Confidentiality Protocol take increased importance in this case, against the backdrop of the acute security situation in Mali. However, some of the amendments proposed by the Defence, such as the proposed amendment to the definition of confidential information in paragraph 4(d) of the Confidentiality Protocol,[111] the derogation of the express obligation on other relevant persons to comply with the Protocol in paragraph 5,[112] the inclusion of a duty to direct witnesses to

[108] ICC-01/12-01/18-T-008, p. 54, l. 1-6.
[109] *See e.g.:* ICC-01/12-01/18-494.
[110] *See* ICC-01/12-01/18-596, para. 7, referring also to ICC-01/12-01/18-596, para. 43 and ICC-01/12-01/18-518-Red, para.41.
[111] Prosecution and Defence Joint Filing, p. 5, referring also to para. 4(e) of ICC-01/12-01/18-590-AnxA.
[112] Prosecution and Defence Joint Filing, p. 5, referring also to para. 8 of ICC-01/12-01/18-590-AnxA.

identify themselves as such,[113] and the restriction of the obligation in paragraph 27 not to contact or interview witnesses of the opposing party to "knowingly" doing so,[114] have the effect of limiting or amending the provisions of the Confidentiality Protocol in ways that risk defeating the Protocol's stated purpose of protecting "the safety of witnesses, victims and other individuals at risk, as well as the integrity of investigations, in a manner consistent with the rights of suspects and accused."[115]

109. The definition of confidential information in paragraph 4(e) of the Confidentiality Protocol corresponds to the definition in the Chambers Practice Manual,[116] and should be retained in its current form. The current definition already includes qualifiers that ensure it is not unduly broad.[117] Importantly, the current definition covers information transmitted through *inter partes* disclosure, such as witnesses' identifying information, the redactions to which are currently being reviewed and lifted and material disclosed by the Prosecution to the Defence,[118] without further leave from the Chamber in accordance with the Chamber's order.[119] In addition, the Confidentiality Protocol already envisages the modalities in which this confidential information can be used in the course of investigations, setting out "the conditions and procedures in which the disclosure of confidential documents or information to third parties as part of investigative activities by a party or participant is exceptionally permissible".[120] Therefore, there is no need to amend the definition as proposed by the Defence.

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[113] Prosecution and Defence Joint Filing, p. 5, referring also to para. 6 and 7 of ICC-01/12-01/18-590-AnxA.
[114] Prosecution and Defence Joint Filing, p. 7, referring also to para. 30 of ICC-01/12-01/18-590-AnxA.
[115] Confidentiality Protocol, para. 1. *See also* ICC-01/12-01/18-596, para. 6.
[116] Chambers Practice Manual, Annex, para. 4(e).
[117] Confidentiality Protocol, para. 4(e) (emphasis added): "Confidential information" shall mean any information *contained in a confidential document which has not otherwise legitimately been made public*, and any information *ordered not to be disclosed to third parties by any Chamber of the Court*".
[118] *See e.g.:* ICC-01/12-01/18-586-Conf, para. 16; ICC-01/12-01/18-586-Red, para. 16 (It is however understood that identifying information remains confidential and that, for the time being and until [REDACTED], the witnesses' identities constitute confidential information not to be revealed to the public).
[119] ICC-01/12-01/18-546, pp.10-11.
[120] Confidentiality Protocol, para. 6, and following.

110. Under paragraph 5 of the Confidentiality Protocol, the express obligation on other relevant persons to comply with the Protocol's provisions should also be retained because it is necessary and appropriate to extend the obligations in the Protocol to the persons addressed in that paragraph.

111. The Defence's proposed inclusion of a duty by the calling party or participant to direct witnesses to identify themselves as such when approached by the other party of participants,[121] potentially endangers witnesses if they disclose their interaction with the Court to third parties, including persons who they are not familiar with. These persons may or may not be representatives of the other party or participants. In general, witnesses are briefed on the importance of maintaining confidentiality regarding their interaction with the Court as a means of protection in order to mitigate the security risks associated with their interaction with the Court becoming known. The Defence's proposed amendment risks undermining that protection and as a result, it should not be adopted. For the same reasons, the Defence's proposed inclusion of a duty on the calling party or participant "to clearly inform all persons it has met with and/or obtained statements from, as to whether or not it intends to rely on that individual as a witness",[122] should also not be adopted since the purpose of it is to have the witness communicate that status. It is also impractical because the party will not always be in a position to determine that it intends to rely on someone as a witness at the time of contact/ obtaining statement, and in addition, the assessment of whether or not to rely on that person as a witness may change over time (for example in the case of witnesses brought in support of a party's case in rebuttal or if a party is authorised to re-open its case).

112. The Defence proposal to restrict the prohibition on contacting or interviewing witnesses of the opposing party (except as envisaged by the

[121] Prosecution and Defence Joint Filing, p. 5, referring also to para. 7 of ICC-01/12-01/18-590-AnxA.
[122] Prosecution and Defence Joint Filing, p. 5, referring also to para. 6 of ICC-01/12-01/18-590-AnxA.

Protocol),[123] to such instances where this is done "knowingly",[124] is at odds with the definition of witness of the opposing party.[125] It also unduly restricts the prohibition of contacting or interviewing witnesses of the opposing party, which is triggered by the communication of such intention or where this intention is clearly apparent.[126] In addition, the Confidentiality Protocol already envisages the possibility of inadvertent contact in its paragraph 31. Therefore the Defence proposal should not be adopted.

113. As for other Defence proposals, the Prosecution submits that including—in the definition of confidential document under paragraph 4(d) of the Confidentiality Protocol—a reference to the classification of documents being subject to regular review under Articles 64(7) and 67(1) of the Statute is unnecessary as those provisions apply regardless.[127] The Prosecution also submits that the inclusion of a duty to audio-record communications by which a witness is informed of the right to have a representative of the calling party or participant attend the interview,[128] is also unnecessary, as it is the practice to make notes and keep track of such contacts.

114. A number of the amendments proposed by the Defence to the Confidentiality protocol[129] are already regulated by the Protocol on dual status witnesses that the Chamber is minded to adopt.[130] The Prosecution favours maintaining two protocols, even if there is some overlap between them, in the

[123] Confidentiality Protocol, para. 30.
[124] Prosecution and Defence Joint Filing, p. 7, referring also to para. 30 of ICC-01/12-01/18-590-AnxA.
[125] Confidentiality Protocol, para. 4(f) ("Witness" shall mean a person whom a party or participant intends to call to testify or on whose statement a party or participant intends to rely , insofar as the intention of the party or participant to call the witness or to use his or her statement has been clearly communicated to the opposing party. The term "witness" includes expert witnesses).
[126] *See also* ICC-01/12-01/18-T-011-CONF-ENG, pp. 39-42 (partly in private session), in particular p. 41, l. 18-21 (public) ("We do not consider that it's an excuse or that there is no violation of the protocol if a member of the team is not informed that a person is a Prosecution witness. Otherwise, our concern is that there may be further instances of inadvertent contacts with Prosecution witnesses.)
[127] Prosecution and Defence Joint Filing, p. 5, referring also to para. 4(d) of ICC-01/12-01/18-590-AnxA. *See e.g.* Prosecution and Defence Joint Filing, p. 2-3 (agreeing there is no need to include a provision referring to article 67(2) of the Statute and Rules 76 and 77 of the Rules), referring also to para. 8 of ICC-01/12-01/18-590-AnxA.
[128] Prosecution and Defence Joint Filing, p. 7, referring also to para. 39 of ICC-01/12-01/18-590-AnxA.
[129] Prosecution and Defence Joint Filing, pp. 5-7, referring also to para. 5(a), 36 and 48 of ICC-01/12-01/18-590-AnxA.
[130] ICC-01/12-01/18-562, para. 6, citing ICC-02/04-01/15-504-Anx2.

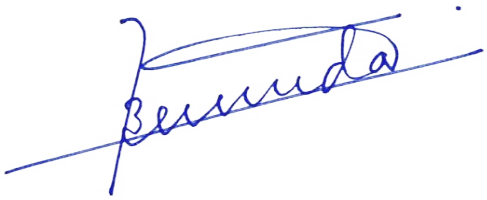
interest of maintaining consistency with other situations and cases—and the case-law emanating from them—where two separate protocols have been adopted.[131] Keeping to two protocols as in other cases also means that any evolution in practices in different cases can be more easily followed. Such consistency is reflected in the Chambers Practice Manual, which foresees that "[f]or cases governing dual status witnesses, a protocol governing such witnesses may also be appropriate",[132] and also envisages that a Chamber should order the parties and participants to comply with a confidentiality protocol and put it in the record of the case, annexing one to the manual.[133]

115. To the extent that the Chamber is minded to merge the two in the Confidentiality Protocol, the provisions of the Protocol on dual status witnesses should be faithfully and comprehensively reproduced therein, to ensure none of these issues are left unregulated.

116. Finally, as noted in the Joint Filing, in light of the participants' disagreement, the parties agreed to withdraw the proposal to expand section III of the Confidentiality Protocol ('Use of Confidential documents and information in investigations') to include information related to victims, defined as "a person who has been granted the right to participate in these proceedings in accordance with article 68(3) of the Statute and is not otherwise being called as a witness by either the parties or participants, and whose identity as a participating victim has been communicated to the parties."[134] Out of an abundance of caution, the Prosecution indicates that this proposed definition—part of proposed amendments which are no longer sought—was put forward without prejudice to the Prosecution's position as set out in its

[131] *E.g.: Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-339 and ICC-02/04-01/15-339-Anx, and ICC-02/04-01/15-504 and ICC-02/04-01/15-504-Anx2; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-412 and ICC-01/04-02/06-412-AnxA, and ICC-01/04-02/06-464 and ICC-01/04-02/06-430-Anxl.
[132] Chambers Practice Manual, para. 79.
[133] Chambers Practice Manual, para. 103-104. *See also* Annex.
[134] Prosecution and Defence Joint Filing, p. 3-4.

previous filing regarding the victim application process,[135] and did not constitute an agreement to or acquiescence with the Defence proposal that the Registry transmit all victim applications to the Prosecution.[136]



Fatou Bensouda
Prosecutor

Dated this 28th day of February 2020

At The Hague, The Netherlands.

[135] ICC-01/12-01/18-573, para. 2 and 3, citing ICC-01/12-01/18-563-Anx-Red2, para. 11-12.
[136] *See* ICC-01/12-01/18-574, para. 3, 15-21.