

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/04-02/06**

Date: **11 May 2017**

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Decision on further matters related to the presentation of evidence by the Defence

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 67-69 of the Rome Statute ('Statute'), Rules 78-79, 134 and 140 of the Rules of Procedure and Evidence ('Rules') and Regulation 43 of the Regulations of the Court ('Regulations'), issues the following 'Decision on further matters related to the presentation of evidence by the Defence'.

I. BACKGROUND

1. On 2 June 2015, the Chamber issued its 'Decision on the conduct of proceedings' ('Conduct of Proceedings Decision').¹
2. On 27 May 2016, the Chamber issued its 'Supplemental decision on matters related to the conduct of proceedings' ('Supplemental Conduct of Proceedings Decision'), wherein it supplemented, or amended, certain parts of the Conduct of Proceedings Decision, and provided further directions.²
3. On 19 October 2016, the Chamber issued the 'Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution',³ providing further directions related to the conduct of proceedings at that stage.
4. On 16 December 2016, in accordance with these directions, the defence team for Mr Ntaganda ('Defence') filed its 'Preliminary list of Defence Witnesses', on an *ex parte*, Chamber only, basis.⁴
5. On 30 January 2017, the Chamber issued directions and a schedule leading-up to the presentation of evidence by the Defence,⁵ in which it, *inter alia*, ordered

¹ ICC-01/04-02/06-619 and Annex.

² ICC-01/04-02/06-1342.

³ Order setting certain deadlines related to the presentation of evidence by the Prosecution, 19 October 2016, ICC-01/04-02/06-1588, para. 11. A corrigendum of the order was filed on 12 December 2016, ICC-01/04-02/06-1588-Corr and ICC-01/04-02/06-1588-Corr-Anx.

⁴ ICC-01/04-02/06-1690-Conf-Exp.

that by 31 March 2017, the Defence provide a further provisional list of witnesses, including estimates for the number of hours it intends to examine each witness, and statements or summaries of the anticipated testimonies, together with a confidential redacted version of the list.⁶ The Chamber further ordered that by 26 April 2017, the Defence: (i) provide the final list of witnesses together with accompanying estimates for length of examination and statements or summaries, and its final list of evidence ('Final List');⁷ (ii) indicate any intention to raise an alibi or grounds for excluding criminal liability in accordance with Rule 79 of the Rules; and (iii) disclose all remaining materials it intends to rely upon during the presentation of its evidence.⁸ In addition, the Chamber 'indicate[d] its intention that the presentation of evidence by the Defence should commence within one month following the final Defence disclosure deadline'.⁹

6. On 22 March 2017, the Chamber rejected a Defence request for extension of time to prepare for its presentation of evidence ('Decision on Request for Extension of Time').¹⁰ A Defence request for leave to appeal¹¹ the Decision on Request for Extension of Time was rejected on 13 April 2017.¹²
7. On 31 March 2017, the Defence filed its 'Further Provisional List of Defence Witnesses and Summaries' ('Further Provisional List'), including one version as *ex parte*, Chamber only, and one version as confidential, available to the

⁵ Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to preparations for the presentation of evidence by the Defence, ICC-01/04-02/06-1757 ('Chamber's Directions').

⁶ Chamber's Directions, ICC-01/04-02/06-1757, para. 10.

⁷ Chamber's Directions, ICC-01/04-02/06-1757, para. 11.

⁸ Chamber's Directions, ICC-01/04-02/06-1757, para. 14.

⁹ Chamber's Directions, ICC-01/04-02/06-1757, para. 16.

¹⁰ Decision on Defence request for extension of time to prepare for its presentation of evidence, ICC-01/04-02/06-1832 and confidential Annex.

¹¹ Request on behalf of Mr Ntaganda seeking leave to appeal 'Decision on Defence request for extension of time to prepare for its presentation of evidence', 27 March 2017, ICC-01/04-02/06-1836-Conf. A public redacted version was filed on 24 April 2017, ICC-01/04-02/06-1836-Red.

¹² Decision on Defence request for leave to appeal the 'Decision on Defence request for extension of time to prepare for its presentation of evidence', ICC-01/04-02/06-1860.

Chamber, Office of the Prosecutor ('Prosecution') and Legal Representatives of Victims ('LRVs').¹³

8. On 13 April 2017, further to a request from the Prosecution,¹⁴ and having heard oral submissions on the matter,¹⁵ the Chamber issued its 'Decision on Prosecution request related to the Defence "Further Provisional List of Witnesses and Summaries"' ('Directions on Summaries'),¹⁶ in which it, *inter alia*, provided further directions for the filing of the Final List. Specifically, the Chamber ordered that 'the summaries of anticipated testimony of Defence witnesses in the Final List should contain the key elements that each witness will address during his or her testimony, including, at a minimum: (i) a description, as exhaustive as possible, of the facts upon which the witness will testify, including any relevant information on their personal history and background, which is available to the Defence; and (ii) the relevance of the anticipated testimony of the witness to the case'.¹⁷
9. On 26 April 2017, the Defence filed its Final List,¹⁸ including a list of witnesses it intends to call ('List of Witnesses'),¹⁹ summaries of the anticipated evidence of the witnesses it intends to call ('Summaries'),²⁰ and a list of evidence ('List of Evidence').²¹

¹³ ICC-01/04-02/06-1843-Conf-Exp, *ex parte*, Chamber only. A confidential redacted version was filed on the same day, ICC-01/04-02/06-1843-Conf-Red. Three annexes were also filed, including *ex parte* Chamber only Annex A, and confidential Annexes B and C.

¹⁴ Prosecution's Urgent request for orders related to the Defence's Confidential redacted "Further Provisional List of Defence Witnesses and Summaries", ICC-01/04-02/06-1855-Conf. A courtesy copy was transmitted to the Chamber, parties and participants on 7 April 2017 at 17:46. A public redacted version was filed on 26 April 2017, ICC-01/04-02/06-1855-Red.

¹⁵ See Transcript of hearing on 12 April 2017, ICC-01/04-02/06-T-203-ENG ET.

¹⁶ ICC-01/04-02/06-1862.

¹⁷ Direction on Summaries, ICC-01/04-02/06-1862, para. 12 (footnotes omitted).

¹⁸ ICC-01/04-02/06-1881-Conf and confidential Annexes A and B and public Annex C. A courtesy copy of the document was submitted on 26 April 2017 and the document was notified on 28 April 2017. Corrected versions of the Final List and Annex C were filed on 2 May 2017, ICC-01/04-02/06-1881-Conf-Corr, ICC-01/04-02/06-1881-AnxC-Corr, and ICC-01/04-02/06-1881-Conf-Corr-Anx.

¹⁹ ICC-01/04-02/06-1881-Conf-AnxA.

²⁰ ICC-01/04-02/06-1881-Conf-AnxB.

²¹ ICC-01/04-02/06-1881-AnxC-Corr.

10. Also on 26 April 2017, the Defence circulated a 'Forthcoming Witness List' for the first evidentiary block.²²
11. On 28 April 2017, the Chamber rejected a Defence request for stay of proceedings.²³
12. On 4 May 2017, further to a request from the Prosecution,²⁴ a status conference was convened to discuss matters related to the Forthcoming Witness List, Final List and related disclosure ('4 May 2017 Status Conference').²⁵ In this context, the Prosecution sought a number of orders from the Chamber to ensure the Defence's compliance with its disclosure obligations, as set out in the Chamber's previous orders. According to the Prosecution, the Defence violated the Chamber's directions in relation to a number of matters concerning the upcoming Defence case. It submits that the Defence's lack of compliance hampers the Prosecution's ability to meaningfully prepare for the cross-examination of Defence witnesses, as well as the Chamber's ability to ensure the fair and expeditious conduct of proceedings and to determine the truth.²⁶ The Defence made submissions on issues impacting on its investigations and opposed the majority of the Prosecution's requests.
13. Also on 4 May 2017, after the conclusion of the 4 May 2017 Status Conference, the Chamber held a second status conference, on an *ex parte* basis with the Defence and the Victims and Witnesses Unit ('VWU'), in order to discuss certain issues concerning witnesses for the upcoming Defence case.²⁷

²² Email communication from the Defence on 26 April 2017, at 17:51.

²³ Decision on Defence request for stay of proceedings with prejudice to the Prosecution, ICC-01/04-02/06-1883. The Defence sought leave to appeal this decision on 4 May 2017: Request on behalf of Mr Ntaganda seeking leave to appeal 'Decision on Defence request for stay of proceedings with prejudice to the Prosecution', ICC-01/04-02/06-1888.

²⁴ Email communication from the Prosecution on 28 April 2017, at 13:51.

²⁵ Transcript of hearing on 4 May 2017, ICC-01/04-02-06-T-204-CONF-ENG-ET.

²⁶ Transcript of hearing on 4 May 2017, ICC-01/04-02-06-T-204- CONF-ENG-ET, pages 4-5.

²⁷ Transcript of hearing on 4 May 2017, ICC-01/04-02-06-T-205- CONF-ENG-ET.

14. On 10 May 2017, in line with the Chamber's direction,²⁸ the Defence submitted an 'Updated Forthcoming Witness List' for the first block.²⁹

II. SUBMISSIONS, ANALYSIS AND DIRECTIONS

15. Having considered the submissions and requests made at the 4 May 2017 Status Conference, and bearing in mind its responsibility to ensure that the trial is conducted in a fair and expeditious manner in accordance with Article 64(2) of the Statute, the Chamber provides the following further directions on certain matters related to the presentation of evidence by the Defence.

A. Summaries

(i) Submissions

16. The Prosecution submits that the Summaries do not comply with the regime set out by the Chamber in the Chamber's Directions and Directions on Summaries. Specifically, the Prosecution argues that the Summaries: (i) do not provide adequate notice of the anticipated evidence; (ii) are insufficient to allow a meaningful preparation for the Prosecution's cross-examination; and (iii) for the most part, lack basic biographical information, such as complete names, relevant nicknames or call signs, places or dates of birth, ethnicity, or relationships with other witnesses or with the accused.³⁰ The Prosecution further submits that two witnesses included in the Forthcoming Witness List were only identified to the Prosecution in the Final List that was filed on the same day, and that there is insufficient time to enable the Prosecution to meaningfully prepare for their scheduled testimonies. The Prosecution also notes that 'more than half' of the Summaries are of a provisional nature, which is incompatible with the Chamber's direction to provide final summaries by

²⁸ Email communication from the Chamber to the parties and participants on 9 May 2017, at 08:40.

²⁹ Email communication from the Defence on 10 May 2017, at 14:50.

³⁰ ICC-01/04-02/06-T-204-CONF-ENG-ET, pages 6-11.

26 April 2017, and that the Defence's proposal to provide complete summaries 30 days before the relevant witnesses' appearance³¹ is 'in contravention of the Chamber's clear direction'.³²

17. For these reasons, the Prosecution requests that (i) for any witnesses expected to testify in the first block, complete disclosure be ordered by Friday, 5 May 2017; and (ii) for all other witnesses, final and complete disclosure, be provided no later than Friday, 12 May 2017. In addition, the Prosecution requests that the two witnesses that were only identified in the Final List not be permitted to testify in the first block.³³
18. The Defence submits that the Summaries comply with the Chamber's instructions and that the Prosecution can make specific requests for specific witnesses directly to the Defence, or otherwise seize the Chamber with a request.³⁴ For the summaries qualified as 'provisional', the Defence submits that even these summaries are sufficient for the Prosecution's needs. The Defence also indicated that it would not supplement the Summaries further absent an order from the Chamber.³⁵

(ii) Analysis and Directions

Level of detail in Summaries

19. Concerning the level of detail provided in the Summaries, the Chamber notes that the parties and participants appear to disagree on the interpretation of the requirements set out in the Chamber's Directions and Directions on Summaries.

³¹ Referring to Final List, ICC-01/04-02/06-1881-Conf-Corr, para.11.

³² ICC-01/04-02/06-T-204-CONF-ENG-ET, pages 11-12.

³³ ICC-01/04-02/06-T-204-CONF-ENG ET, page 19. The Prosecution reiterated this request in an email communication to the Chamber on 5 May 2017, at 10:28.

³⁴ ICC-01/04-02/06-T-204-CONF-ENG ET, page 32.

³⁵ ICC-01/04-02/06-T-204-CONF-ENG ET, page 33.

As communicated following the 4 May 2017 Status Conference,³⁶ the Chamber directed the Prosecution to: (i) identify any specific information not currently contained in the Summaries that it considers necessary to meaningfully prepare for cross-examination; and (ii) request such information from the Defence in *inter partes* consultations, to be conducted in good faith with a view to reaching an agreement. In case no agreement can be reached, the Prosecution shall seize the Chamber with a written request setting out the information sought.

20. As further indicated in this communication, for the summaries relating to the witnesses currently scheduled to testify in the first evidentiary block, the Chamber considered that *inter partes* consultations were not appropriate at this stage given the impending start of the first block, and therefore decided that any request by the Prosecution for further and specific information should be submitted to the Chamber as soon as practicable, and in any event no later than by 12:00 on 8 May 2017.

'Provisional' Summaries

21. Concerning the summaries currently qualified as 'provisional', the Chamber notes the submissions of the Defence that it considers these summaries to be sufficient for the purposes of the Prosecution's preparation. However, the Chamber does not consider summaries of a provisional nature to be appropriate or sufficient in the context of the Defence's filing of its Final List. Accordingly, the Chamber finds the existence of provisional summaries to be inconsistent with the Chamber's Directions and Directions on Summaries, and orders the Defence to finalise these summaries as expeditiously as possible. Noting the multiplicity of issues raised by the Defence in relation to its preparations, including difficulties in meeting with and scheduling witnesses, the Chamber shall provide further directions in relation to the summaries of a

³⁶ Email communication from the Chamber to the parties and participants on 4 May 2017, at 19:08.

provisional nature to promote the fair and expeditious conduct of the proceedings. Accordingly, and without prejudice to the procedure for requests for specific information as set out above, the Chamber decides that for the witnesses scheduled to testify during the second evidentiary block, all summaries shall be finalised and transmitted to the Chamber, Prosecution and LRVs by the filing deadline on **29 May 2017**. For the witnesses scheduled to testify during the third evidentiary block, all summaries shall be finalised and transmitted to the Chamber, Prosecution and LRVs by the filing deadline on **17 July 2017**.

Request that two of the witnesses on the Forthcoming Witness List be not permitted to testify during the first evidentiary block

22. In view of the directions set out above, and noting further that one of the specified witnesses is not included in the Updated Forthcoming Witness List, the Chamber does not consider that any separate ruling on these witnesses is required at this stage.

B. Contacts with proposed Defence witnesses

(i) Submissions

23. The Prosecution requests that the Chamber order the Defence to clarify whether it has met with all witnesses on its List of Witnesses and whether these witnesses were informed that they were on the list.³⁷ Further, noting that the Defence's List of Witnesses includes four former Prosecution intermediaries, in relation to whom the Prosecution has security concerns, the Prosecution further requests that the 'Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party or Participant and Witnesses of the

³⁷ ICC-01/04-02/06-T-204-CONF-ENG ET, pages 19-20.

Opposing Party or a Participant' ('Contacts Protocol')³⁸ be amended so as not to apply to these individuals, so the Prosecution may contact them as necessary.³⁹

24. The Defence confirms that it has not yet contacted these individuals, but opposes the Prosecution's request for the Contacts Protocol not to apply to these individuals. It further requests the assistance of the Chamber to ensure that the Defence will be able to contact these four individuals without interference from the Prosecution and without any impediment because the information expected to be obtained from these individuals is necessary for the Chamber to determine the truth.⁴⁰

(ii) Analysis and Directions

25. As previously recalled,⁴¹ Section VI of the Contacts Protocol 'governs the conditions under which the investigating party or participant is authorised to contact witnesses of the opposing party or a participant', and this section applies only to a 'witness' as defined in the Contacts Protocol.⁴² 'Witness' is defined therein as 'a person whom a party or participant intends to call to testify or whose statement the party or participant intends to rely upon, provided that such intention has been conveyed to the non-calling party or participant by means that establish a clear intention on behalf of the calling party or participant to rely upon the individual as a witness'.⁴³

26. In the present case, despite the Defence's submission that it has not yet contacted the four relevant individuals, the Chamber notes that these

³⁸ Decision on the adoption of a 'Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant', 12 December 2014, ICC-01/04-02/06-412, with public Annex A.

³⁹ ICC-01/04-02/06-T-204-CONF-ENG ET, pages 12-13.

⁴⁰ ICC-01/04-02/06-T-204-CONF-ENG ET, page 34.

⁴¹ Decision on the Defence request regarding the application of certain protocols, 4 April 2017, ICC-01/04-02/06-1849, para. 10.

⁴² Contacts Protocol, ICC-01/04-02/06-412-AnxA, paras 31-32.

⁴³ Contacts Protocol, ICC-01/04-02/06-412-AnxA, para. 3(f). This is erroneously referred to as paragraph 1(f) at paragraph 32 of the Contacts Protocol.

individuals are listed in the List of Witnesses, which shows, as specified in the Contacts Protocol, 'a clear intention on behalf of the calling party or participant to rely upon the individual as a witness'. Accordingly, in the circumstances, the Chamber finds no obstacle to the application of the Contacts Protocol to these individuals. Regarding the security concerns raised by the Prosecution, the Chamber reminds the Defence of its duty specified in paragraph 1 of the Contacts Protocol to 'take all measures necessary to ensure the protection and the safety of witnesses, victims, and other individuals at risk, as well as the integrity of its investigations'. In addition, the Chamber directs the Prosecution to communicate any specific security concerns it may have in relation to these individuals to the VWU. As for the Defence's request for assistance from the Chamber,⁴⁴ the Chamber is of the view that, at this stage, requests of this nature should be addressed directly to the VWU in accordance with the regime set out in the Contacts Protocol.

27. The Chamber does, however, note with concern that there may be individuals on the List of Witnesses that the Defence has not yet met with. Accordingly, the Chamber orders the Defence to provide the Chamber, on an *ex parte* basis and by no later than **14 August 2017**, with a list indicating which persons appearing on its Witnesses List it has not yet had the opportunity to contact.

C. Length of the presentation of evidence by the Defence and expert witnesses

(i) Submissions

28. In its Final List, the Defence indicates that it intends to call 111 fact witnesses, and that the total time for the examination of these witnesses amounts to

⁴⁴ ICC-01/04-02/06-T-204-CONF-ENG ET, page 34.

381.5 hours.⁴⁵ In addition, the Defence submits that it intends to rely on the testimony of four expert witnesses, two of whom remain to be identified, and that it 'expect[s] to be in a position to submit its final list of Expert witnesses along with their *curriculum vitae* and description of the evidence to be adduced by 15 June 2017'.⁴⁶

29. The Prosecution requests that the Chamber review the Defence's List of Witnesses and instruct the Defence to reduce its list by capping the presentation of its evidence to the hours allotted to the Prosecution and the Legal representative of the victims of the attacks.⁴⁷ It further argues that the Defence's proposed course of action in relation to expert witnesses does not comply with the Chamber's Directions, and that the Defence should be ordered to file well-founded applications under Regulation 35 of the Regulations to call any witnesses that are not currently named on its list.⁴⁸
30. With regard to expert witnesses, the Defence responds that, on 15 June 2017, it will provide notice of its proposed expert witnesses, which can be ruled upon by the Chamber, and that it will then undertake to call these witnesses later in time.⁴⁹ It opposes the Prosecution's request to file a request under Regulation 35 of the Regulations for that purpose.⁵⁰

⁴⁵ Defence Final List, ICC-01/04-02/06-1881-Conf-Corr, paras 10-11. The Chamber notes that according to the time estimates provided in confidential Annex B to the Defence Final List, the total number of hours amounts to 380.4 hours.

⁴⁶ Defence Final List, ICC-01/04-02/06-1881-Conf-Corr, paras 13-16.

⁴⁷ ICC-01/04-02/06-T-204-CONF-ENG ET, pages 14-15 and 20.

⁴⁸ ICC-01/04-02/06-T-204-CONF-ENG ET, pages 15-16.

⁴⁹ ICC-01/04-02/06-T-204-CONF-ENG ET, pages 34-35.

⁵⁰ ICC-01/04-02/06-T-204-CONF-ENG ET, pages 34-35.

(ii) Analysis and Directions*Length of Defence presentation of evidence*

31. Noting that the Defence does not bear the burden of proof and that it is for the Prosecution to prove its case beyond reasonable doubt,⁵¹ the Chamber considers that the time granted for the Defence to present its case should not, in principle, exceed the time used by the Prosecution and the LRVs to present their evidence.⁵² However, the Chamber also notes certain additional hours that had been anticipated in relation to certain Prosecution witnesses whose evidence was adduced in whole or in part in a manner other than through *viva voce* testimony,⁵³ and the hours that were used by the LRVs during the Prosecution case.⁵⁴ In this regard, it is appropriate to take these into account in allocating time to the Defence for its presentation of evidence. In light of the foregoing, the Chamber considers that, at this stage, in addition to the time used by the Prosecution and the LRV to present their evidence, a maximum of a further 30 additional hours may be given to the Defence if the Chamber considers it appropriate and necessary, and directs the Defence to review its List of Witnesses accordingly. This is without prejudice to any review by the Chamber of the list, or of the individual time estimates provided for the witnesses, if necessary, at appropriate stages of the proceedings, in accordance with the principles stated below.

⁵¹ Article 66(2) and (3) of the Rome Statute. See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the “Submissions on Defence Evidence”, 7 June 2012, ICC-01/05-01/08-2225 (‘Bemba decision on defence evidence’), para. 10. *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order determining the mode and order of examination for the witnesses called by the Defence teams (regulation 43 and 54 of the Regulations of the Court), 15 March 2011, ICC-01/04-01/07-2775-tENG, para.16.

⁵² According to the records provided by the Registry, the Prosecution used a total of approximately 259 hours for the examination-in-chief of its witnesses, and approximately 4.5 hours for its re-examination. The time used by the Legal representative of the victims of the attack to question three witnesses presented by him amounts to approximately 5 hours.

⁵³ The Chamber recalls that for 26 of the Prosecution witnesses prior recorded testimony was admitted pursuant to Rule 68(3) of the Rules, while the prior recorded testimony of seven Prosecution witnesses was admitted under Rule 68(2).

⁵⁴ The Chamber recalls that the LRVs used a total of approximately 6 hours for their questioning of the Prosecution witnesses.

32. The Chamber's preference is to refrain from interfering with the parties' presentation of evidence unless there is a compelling reason to do so. This said, the Chamber emphasises that the Defence is required to present its evidence in an efficient manner within the allotted time. In reviewing the Defence's Final List, and in order to ensure that the Defence will be in a position to present its case within the number of hours allocated by the Chamber, the Chamber strongly encourages the Defence to focus the proposed testimony on those topics of greatest relevance to the proceedings and on truly contentious issues, relating to the confirmed charges against the accused, in order to avoid the presentation of evidence that may be irrelevant to the Chamber's final determination of the case and to minimise cumulative evidence.⁵⁵ In this regard, the Chamber directs the Defence to consider the use of Rules 68(2)(b) or 68(3) in appropriate cases, and shall address this issue further below.⁵⁶ In addition, the Chamber reminds the parties that they may also submit proposals for agreed facts to the Chamber.
33. The Chamber further directs the Defence to first focus on the witnesses it considers to be of greatest importance to its case, for whom it does not foresee any major scheduling difficulties and whom it intends to call during the first three evidentiary blocks. This list is to be filed by **28 July 2017**, together with the relevant time estimates for examination-in-chief, reviewed, as necessary, in light of the principles set out above.

Expert witnesses

34. The Chamber notes the Defence submission that by 15 June 2017, it will provide notice of its proposed expert witnesses. Noting that a different procedure also

⁵⁵ For a similar approach in relation to the presentation of evidence by the Prosecution, see Supplemental Conduct of Proceedings Decision, ICC-01/04-02/06-1342, para. 15; see similarly *Bemba* decision on defence evidence, ICC-01/05-01/08-2225, paras 12-13.

⁵⁶ See also Conduct of Proceedings Decision, ICC-01/04-02/06-619, paras 41 and 55 and Supplemental Conduct of Proceedings Decision, ICC-01/04-02/06-1342, para. 15.

applied to the Prosecution expert witnesses and that no summaries were provided when the Prosecution filed its final list of witnesses, the Chamber finds this deadline appropriate in the circumstances, and will rule on any related requests at the relevant time. Therefore, notice of any proposed expert witnesses is required to be provided by **15 June 2017**, and accompanying expert reports to be transmitted to the Chamber, Prosecution and participants as soon as possible thereafter, and in any event not less than **45 days** before the proposed expert testifies.

D. Use of Rule 68 of the Rules

35. In its Final List, the Defence submits that should it intend to adduce any evidence pursuant to, *inter alia*, Rule 68, notice will be provided in accordance with the Supplemental Decision on Conduct of Proceedings.⁵⁷ The Prosecution submits that the Defence has not disclosed any statements that could be used via Rule 68, and the Summaries as currently set out would be ‘wholly insufficient’ to replace live testimony on any of the matters that these witnesses are likely to testify about.⁵⁸
36. The Chamber recalls that according to the Conduct of Proceedings Decision, any application seeking the introduction of previously recorded testimony of a witness present before the Chamber, in accordance with Rule 68(3) of the Rules, shall be filed at the earliest opportunity, but no later than four weeks before the relevant witness is scheduled to testify, and should be reflected, where relevant, in the Forthcoming Witnesses List.⁵⁹ The Chamber further recalls that according to the Supplemental Conduct of Proceedings Decision, any objections shall be raised by way of written filing within 10 days of notification of the application.⁶⁰
- The Chamber finds no reason warranting a departure from the regime

⁵⁷ Final List, ICC-01/04-02/06-1881-Conf-Corr, para. 12.

⁵⁸ ICC-01/04-02/06-T-204-CONF-ENG ET, page 17.

⁵⁹ Conduct of Proceedings Decision, ICC-01/04-02/06-619, para. 41.

⁶⁰ Supplemental Conduct of Proceedings Decision, ICC-01/04-02/06-1342, para.18.

previously set out by it, and therefore finds that it shall continue to apply to the Defence presentation of evidence.

37. The Chamber also encourages the Defence to make any applications for use of Rule 68(2)(b) or (c) of the Rules as expeditiously as possible. As with the Prosecution presentation of evidence, the Chamber may impose a final deadline for such Defence applications at a later stage.

E. Notice of intention to raise an alibi defence or other grounds for excluding criminal responsibility

38. The Prosecution submits that while the Final List is silent on the issue of alibi defences, the summary for one of the proposed witnesses relates to the absence of the accused from a specific location during a specific timeframe. The Prosecution argues that this issue therefore requires immediate clarification from the Defence.⁶¹
39. The Defence submits that the Prosecution's understanding of alibi is contrary to that of the Defence, arguing that the absence of the accused at a certain place does not warrant provision of notice as anticipated by Rule 79 of the Rules.⁶²
40. In the Chamber's Directions, the Defence was required to indicate, by 26 April 2017, 'any intention to raise an alibi or grounds for excluding criminal liability in accordance with Rule 79 of the Rules.'⁶³ On the basis of the submissions made by the Prosecution, which refer to an unspecified summary and information that the Chamber has not been directed to, the Chamber is not in a position to rule on the matter and therefore rejects the Prosecution's request for clarification.

⁶¹ ICC-01/04-02/06-T-204-CONF-ENG ET, pages 17-19.

⁶² ICC-01/04-02/06-T-204-CONF-ENG ET, pages 35-36.

⁶³ Chamber's Directions, ICC-01/04-02/06-1757, para.11.

F. Incomplete disclosure of items on the List of Evidence

41. The Prosecution submits that certain items on the List of Evidence have not yet been disclosed or lack complete metadata.⁶⁴ The Prosecution therefore requests that the Chamber order immediate disclosure of the missing items and immediate correction and addition of the requisite eCourt metadata.⁶⁵
42. Noting the apparently limited number of undisclosed items, as well as the difficulties mentioned by the Defence in their Final List⁶⁶ and during the 4 May 2017 Status Conference⁶⁷ with respect to the issues faced in obtaining certain exhibits, and given the Defence's commitment to disclose the relevant items as soon as possible,⁶⁸ the Chamber does not consider that a further order is required at this stage. Concerning the Prosecution's submissions on incomplete metadata, the Chamber reminds the Defence of its obligation to comply with the regulations set out in the 'Unified Technical protocol [...] for the provision of evidence, witness and victims information in the e-court protocol'.⁶⁹

G. LRV requests to question a witness

43. The LRVs submit that the information provided in the Summaries does not allow the LRVs to determine whether the testimony of the relevant witnesses will affect the personal interests of the victims they represent, and indicate that this may affect their questioning of Defence witnesses, warranting a departure from the relevant procedure outlined in the Conduct of Proceedings Decision.
44. According to the Conduct of Proceedings Decision, '[s]hould a Legal Representative wish to put questions to a witness called by the Prosecution or

⁶⁴ ICC-01/04-02/06-T-204-CONF-ENG ET, page 19.

⁶⁵ ICC-01/04-02/06-T-204-CONF-ENG ET, page 19.

⁶⁶ Final List, ICC-01/04-02/06-1881-Conf-Corr, paras 17-30.

⁶⁷ ICC-01/04-02/06-T-204-CONF-ENG ET, pages 28-30.

⁶⁸ Final List, ICC-01/04-02/06-1881-Conf-Corr, paras 23, 26, and 30.

⁶⁹ Unified Technical protocol ("E-court Protocol") for the provision of evidence, witness and victims information in electronic form, ICC-01/04-02/06-47-Anx1.

Defence, he or she is to file a motivated request no later than four days before the beginning of the witness's examination-in-chief.⁷⁰ Noting that the scope of the LRVs' questioning may be more limited with respect to Defence witnesses as opposed to Prosecution witnesses, and noting the directions in relation to the Summaries outlined in this decision, the Chamber sees no reason to depart from this regime. However, in exceptional cases, should the examination-in-chief of the Defence witnesses reveal information affecting the personal interests of victims that could not have been reasonably anticipated on the basis of the relevant summary or disclosure, the LRVs may make an oral request to question the relevant witness.

H. Scheduling of witnesses

45. In line with its practice for the Forthcoming Witness List for the first block, the Defence is directed to continue to provide, four weeks prior to the start of a block, a list, setting out: (i) the witnesses it intends to call in the upcoming block, and the order in which it intends to call them; (ii) a final time estimate for each examination-in-chief; (iii) the dual status of the witnesses, if applicable; (iv) the language to be spoken; (v) whether Rule 68(3) is anticipated; and (vi) details of any in-court protective measures that will or have been sought.⁷¹ The Chamber further directs the Defence to identify at least two reserve witnesses for each evidentiary block who could be called upon to testify should the proceedings progress faster than anticipated or should any of the scheduled witnesses fail to testify for any reason.⁷²
46. As to the order of witnesses, the Chamber is of the view that in principle, the calling party is best placed to determine the order of appearance of its witnesses. The Chamber further recalls that it previously indicated that it will

⁷⁰ Conduct of Proceedings Decision, ICC-01/04-02/06-619, para. 64.

⁷¹ See also Conduct of Proceedings Decision, ICC-01/04-02/06-619, para.16.

⁷² See similarly Supplemental Conduct of Proceedings Decision, ICC-01/04-02/06-1342, para. 16.

remain attentive to any difficulties the Defence may face during the course of its presentation of evidence, and, where necessary, retain a flexible approach to facilitate the Defence's preparations, including by accommodating requests for changes in the order of witnesses.⁷³ However, as it did during the presentation of evidence by the Prosecution, the Chamber may take measures when it considers this appropriate to ensure the efficient presentation of evidence and the fairness and expeditiousness of the proceedings. Such measures may include instructing that the testimony of a specific witness be heard via video-link, if warranted for practical and/or logistical considerations.⁷⁴

47. In this respect, and noting the operational requirements and timeframes indicated by the VWU during the second status conference on 4 May 2017,⁷⁵ the Chamber considers it appropriate to emphasise its previous order to the Defence and the VWU to 'engage actively with each other as early as possible in order to ensure full clarity and cooperation regarding necessary procedures for the making of any witness referrals, for the purposes of, *inter alia*, protection assessments, necessary travel arrangements and for the smooth scheduling of witness testimony.'⁷⁶ In this respect, the Chamber specifically reminds the Defence to provide the VWU with the relevant documents that are required to facilitate the witnesses' appearance. Finally, the Chamber finds that, in cases where the VWU faces difficulties in obtaining the necessary travel documents in a timely manner, alternatives to live testimony at the seat of the Court should be considered by the VWU and the Defence.

⁷³ Decision on Request for Extension of Time, ICC-01/04-02/06-1832, para. 23.

⁷⁴ See Decision on Prosecution's request to hear P-0933's testimony via video-link, 16 March 2016, ICC-01/04-02/06-1213-Red, para. 6; Decision on Prosecution's request to hear P-0039's testimony by way of video-link, 12 October 2015, ICC-01/04-02/06-897-Red2, para. 12.

⁷⁵ Transcript of hearing on 4 May 2017, ICC-01/04-02-06-T-205-CONF-ENG ET.

⁷⁶ Chamber's Directions, ICC-01/04-02/06-1757, para. 12.

I. Schedule for the first two evidentiary blocks

48. The Chamber has considered the Defence's proposal to modify the dates of the first evidentiary block, as previously communicated via email.⁷⁷ However, due to scheduling difficulties, such a change cannot be accommodated. Therefore, the Chamber hereby confirms that the first two blocks of the Defence's presentation of evidence are scheduled for **29 May – 9 June 2017** and **27 June – 21 July 2017**, respectively. As for the first day of the Defence's presentation of evidence, the Chamber notes the Defence's request to make a further opening statement of up to 1.5 hours.⁷⁸ The Chamber considers that one hour⁷⁹ is reasonable for any further opening statement from the Defence and will allow the Defence to make its statement of approximately one hour before the presentation of its evidence on 29 May 2017.

J. Sitting hours

49. The Chamber intends to maintain the schedule of sitting for five hours per day and hereby provides notice that, unless otherwise ordered, the usual sitting hours for the Defence case shall be: 09:30-11:00; 11:30-13:00; and 14:30-16:30.

K. Conduct of proceedings and time limits

50. Finally, unless otherwise provided in the present decision or other decisions of the Chamber, the Chamber recalls that all previous directions and time limits set out in the Conduct of Proceedings Decision and Supplemental Conduct of Proceedings Decision shall continue to apply to the presentation of evidence by the Defence.

⁷⁷ Email communications from the Chamber on 28 April 2017, at 18:04 and 1 May 2017, at 15:28.

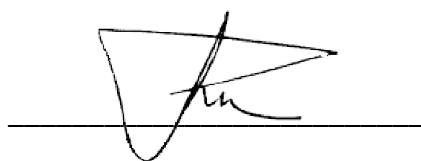
⁷⁸ ICC-01/04-02/06-T-204-CONF-ENG ET, page 37.

⁷⁹ The Chamber notes in this regard that in the context of the opening statements, the Defence has used three out of the four hours allocated for that purpose. See transcript of hearing on 3 September 2015, ICC-01/04-02/06-T-24-ENG ET.

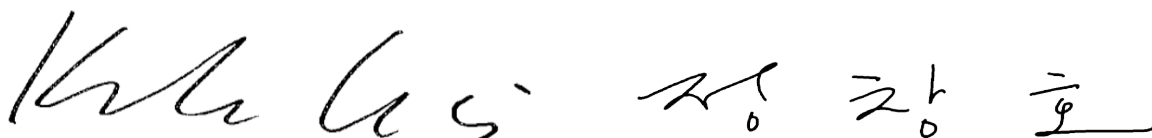
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS the parties, participants and Registry to proceed in accordance with the directions set out herein.

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

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

Two handwritten signatures in black ink, one on the left and one on the right, each written over a horizontal line. The left signature is 'Kuniko Ozaki' and the right signature is 'Chang-ho Chung'.

Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated 11 May 2017

At The Hague, The Netherlands