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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA**

Public Document

**Victims' Response to the "Prosecution Motion Regarding the Scope of Witness
Preparation"**

Source: Victims' Legal Representative

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

Court to:

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I. INTRODUCTION

1. The “Prosecution Motion Regarding the Scope of Witness Preparation”¹ was filed on 13 August 2012, seeking permission from the Chamber for the “modification of the witness familiarisation protocol² that has been adopted in other cases at th[e] Court”³ so as to “allow the party calling a witness to talk to the witness in advance of testimony,”⁴ in order that the witness may be prepared for his/ her in-court testimony.
2. The Motion argues that modification of the familiarisation regime is within the Chamber’s discretion⁵ and is warranted for reasons that it: (i) takes into account and is best suited to the acute witness management challenges that characterise the Kenya cases⁶; (ii) will contribute to the expeditiousness of the proceedings⁷; (iii) will further the Court’s truth-finding function⁸; and (iv) will create a fairer system for witnesses⁹.
3. Pursuant to Regulations 24(2) and 34(b) of the Regulations of the Court, the participating victims hereby file their response to the Motion.
4. The victims support the proposed modification of the witness familiarisation protocol, as advanced in the Motion, except those aspects that relate to the preparation of a witness in anticipation of cross-examination. The victims are of

¹ “Prosecution Motion Regarding the Scope of Witness Preparation” (hereafter “Motion”), ICC-01/09-02/11-462, 13 August 2012.

² *Prosecutor v. Laurent Gbagbo*, Victims and Witnesses’ Unit “Unified Protocol on practices used to prepare and familiarise witnesses for giving testimony” (hereafter “Unified Protocol”), ICC-02/11-01/11-93-Anx1 which is, in substance, the same as protocols adopted in *Prosecutor v. Bemba*, ICC-01/05-01/08-1081-Anx, and by Pre-Trial Chamber II in *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-259-Anx, and in *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-260-Anx.

³ Motion, para. 1.

⁴ Motion, paras 1, 5.

⁵ Motion, paras 9-10.

⁶ Motion, paras 2, 16-21.

⁷ Motion, paras 2, 23-26.

⁸ Motion, paras 2, 27-29.

⁹ Motion, para. 2.

the view that the benefits of the proposed modifications,¹⁰ combined with certain safeguards identified in the Motion, outweigh the risks of witness coaching. Modification of the witness familiarisation protocol would thus be proper, in the particular circumstances of this case.

5. In supporting the relief sought through the Motion, the victims are mindful that safeguards whose implementation would mitigate any perceived risks of witness coaching have been identified and proposed in the Motion. More specifically, cross-examination and questioning by the Chamber provide effective means to deter and expose any misuse of witness preparation by the calling party.¹¹ The guidelines which are conveyed in Annex A to the Motion¹² are clear and sufficient, in the victims' view, for purposes of "providing... guidance on the practice of proofing, including a list of recommended, acceptable and prohibited conduct..."¹³

II. SUBMISSIONS

A. Past Practices Versus the Particular Circumstances of this Case

6. The victims are in accord with the averments in the Motion that it is well-within the discretion of the Chamber to modify the witness familiarisation regime,¹⁴ and that the Chamber has the power and obligation, by law, to depart from the approach adopted by other Chambers on this procedural matter.¹⁵

¹⁰ Motion, para. 5.

¹¹ Motion, paras 30-32.

¹² "Annex A: Prosecution's Motion Regarding the Scope of Witness Preparation", ICC-01/09-02/11-462-Anx, 13 August 2012.

¹³ Motion, para. 31, quoting *Prosecutor v. Bemba*, "Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" (hereafter, "Partly Dissenting Opinion"), ICC-01/05-01/08-1039, 24 November 2010, para. 26.

¹⁴ Motion, paras 9-10. See also Partly Dissenting Opinion, paras. 9-12.

¹⁵ Motion, para. 10.

7. Pre-Trial Chamber I,¹⁶ Trial Chambers I¹⁷ and II,¹⁸ and Trial Chamber III¹⁹ - the latter by Majority - have all excluded the practice of witness proofing and limited contact between the calling party and the witness at the location of the testimony to a so-called “courtesy meeting” of ten minutes, whose purpose is for the “witnesses to acquaint themselves with the people who may examine them in court.”²⁰ The main reason behind this prohibition has been the risk that witness preparation might result in a rehearsal of in-court testimony.²¹ Indeed, the Majority of the Chamber in *Bemba* saw “no compelling reasons to depart from the uncontroversial jurisprudence of the Court.”²²
8. While the Chambers have thus far approached the prevailing practice of witness proofing as if it were binding precedent, the victims believe that it should be addressed with an awareness that it is subject to a spectrum of possible interpretations. Indeed, and as Judge Ozaki rightly pointed out in her Partly Dissenting Opinion in *Bemba*, “[t]here certainly is a grey area between what is acceptable, permissible proofing on one hand and prohibited contamination of evidence on the other.”²³
9. The victims share the view expressed by Judge Ozaki in *Bemba* that “any ruling on witness proofing should be made after a careful review of the circumstances prevailing in each case before the Court.”²⁴ The necessary premise of any such ruling is the acknowledgment that the practice of witness proofing is a flexible

¹⁶ *Prosecutor v. Lubanga*, “Decision on the Practices of Witness Familiarisation and Witness Proofing”, ICC-01/04-01/06-679, 8 November 2006.

¹⁷ *Prosecutor v. Lubanga*, “Decision regarding the Practices used to Prepare and Familiarise Witnesses for giving Testimony at Trial”, ICC-01/04-01/06-1049, 30 November 2007.

¹⁸ *Prosecution v. Katanga and Ngudjolo*, “Decision on a Number of procedural issues raised by the Registry”, ICC-01/04-01/07-1134, 14 May 2009.

¹⁹ *Prosecutor v. Bemba*, “Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial”, ICC-01/05-01/08-1016, 18 November 2010.

²⁰ Unified Protocol, para. 69.

²¹ ICC-01/04-01/06-1049, para. 51.

²² ICC-01/05-01/08-1016, para. 34.

²³ Partly Dissenting Opinion, para. 25.

²⁴ Partly Dissenting Opinion, para. 7.

matter which a Chamber, pursuant to Articles 64(2) and (3)(a), has the power and obligation to adapt to the particular circumstances of each case.

10. The particular circumstances of this case vis-à-vis the security situation in Kenya has been recognized in the decisions of Pre-Trial Chamber II²⁵ and constitutes a material challenge to witness management, with one consequence being the limiting of personal contact between the Prosecution and witnesses to a minimum, in order not to jeopardize the protection and well-being of the witnesses.²⁶
11. The 12 July Decision rejected the Government of Kenya's second request for cooperation²⁷ because on the basis of updated reports on the security situation in Kenya submitted by the Prosecution²⁸ and the Victims and Witnesses Unit ("VWU") on 2 July 2012,²⁹ "there remain security concerns with regard to the disclosure of confidential information relating to the witnesses"³⁰ and "a number of incidents [had occurred] according to which witnesses had either been subject to threats or actually suffered certain harm."³¹
12. The victims submit that this Chamber should remain cognisant of the observations made by Pre-Trial Chamber II, in respect of the distinctive circumstances that characterise the Kenya situation and in which the parties and participants to these cases operate. In the victims' view, the security situation in

²⁵ *Situation in the Republic of Kenya*, "Decision on the Second Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence", ICC-01/09-97, 12 July 2012 ("12 July Decision").

²⁶ Motion, paras 16-21.

²⁷ *Situation in the Republic of Kenya*, "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194", ICC-01/09-79 and its annexes, 2 July 2012.

²⁸ *Situation in the Republic of Kenya*, "Prosecution's Submission regarding the provision of Confidential Information to the Government of Kenya", ICC-01/09-95-Conf-Exp and its annexes, 2 July 2012.

²⁹ *Situation in the Republic of Kenya*, "Victims and Witnesses Unit's Updated report pursuant to the Order ICC-01/09-91-Conf-Exp of 15 June 2012", ICC-01/09-94-Conf-Exp and its annex.

³⁰ 12 July Decision, para. 21.

³¹ 12 July Decision, para. 21. The victims have not had access to the Prosecution's and VWU's reports, however, the Pre-Trial Chamber comprehensively summarised their contents in its 12 July Decision. The account of the security situation in Kenya provided by the Pre-Trial Chamber is consistent with, what victim- participants have consistently conveyed to the Legal Representative and his field staff.

Kenya constitutes a compelling factual basis for a departure by this Chamber from witness familiarisation practices which were adopted in previous cases. Indeed, and drawing from Judge Ozaki's Partly Dissenting Opinion in *Bemba*, "in order to facilitate a fair and expeditious trial, with full respect of the rights of the accused and due regard for the protection of victims and witnesses, this Chamber [would] considerably benefit from witness proofing,"³² considering, *inter alia*, the witness management challenges in the Kenya cases.

13. Modification of the prevailing witness preparation regime through witness proofing, as argued for in the Motion, would compensate for shortcomings with result from lack of sufficient contact between the calling party and its witnesses, owing to the security situation on the ground in Kenya.

B. Expeditious, Efficient, and Fair Proceedings

14. The primary interests of participating victims in relation to the practices used to prepare and familiarise witnesses are twofold: victims are interested (i) as victims participating in the proceedings and (ii) as individuals who could testify at trial (i.e., as potential dual status witnesses).
15. It is well-established in the jurisprudence of the Court that one of the core interests of those granted the procedural status of "victims" in the proceedings is the determination of the truth which, is itself, key to the realization of the victims' right to justice: "[t]he victims' central interest in the search for the truth can only be satisfied if (i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty; and (ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can

³² Partly Dissenting Opinion, para. 25.

continue.”³³ For these objectives to be achieved, it is essential that the judges are put in a position to exercise their truth-finding function in the best possible way.

16. As part of their right to justice, participating victims also have a vested interest in expeditiously and efficiently conducted proceedings. Indeed, the victims in this case have been waiting for justice to be done for almost five years now and, regrettably, some of them will never be able to witness the realization of their right to justice, given their untimely demise.³⁴ With such considerations in mind, the efficiency and expeditiousness of the proceedings are vital to ensure that the victims’ right to justice is not rendered an empty and formal entitlement.
17. As proposed in the Motion, witness proofing would contribute to the Chamber’s discharge of its obligations (i) to ensure expeditious proceedings,³⁵ (ii) to establish the truth, and (iii) to ensure the protection and well-being of witnesses.³⁶ It also would facilitate a fair trial, with full respect of the rights of the accused, as was acknowledged by Judge Ozaki in *Bemba*.³⁷

C. Cross-Examination

18. While the victims generally support the proposed modification to the witness preparation protocol being sought by the Prosecution, the victim disagree with the component of the Motion that advocates for the discussion of likely topics of cross-examination between the calling party and the prospective witness during proofing sessions.³⁸

³³ Pre-Trial Chamber 1 (Single Judge), “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case,” ICC-01/04-01/07-474, paras. 34-36.

³⁴ See, “Notification to the Chamber and Request for Re-Notification by 5 December,” ICC-01/09-02/11-362, 31 October 2011, para. 5; “Observations in Relation to the Current Number of Participating Victims,” ICC-01/09-02/11-369, 24 November 2011, paras. 7, 9.

³⁵ Articles 64(2) and (3)(a) of the Statute.

³⁶ Articles 64(2) and 68(1) of the Statute.

³⁷ Partly Dissenting Opinion, para. 25.

³⁸ Motion, para. 5.

19. In the victims' view, it is one thing to facilitate expeditious, efficient and fair proceedings through proofing sessions (including the elicitation of the full scope of information that a witness possesses), but quite another thing to implant in the minds' eye of a prospective witness, possible topics or questions that could be put to them during cross-examination. Unlike information which a witness retains and is intimately familiar with, due often to their first-hand knowledge, information about possible topics of cross-examination would come from the lawyer proofing the witness which makes it have added significance, even where it is based on facts and circumstances already familiar to the witness. The prospects of witnesses spending the lead-up time to their testimony rehearsing what they might say in response to a suggested topic of cross-examination is not difficult to contemplate. The laudable safeguards which are advanced in the Motion would not, in the victim's view, suffice to attenuate the potential dangers associated with proofing that is focused on cross-examination.

20. The victim's opposition to witness proofing that foreshadows topics or questions on cross-examination does not extend to the calling party advising a witness of the purposes behind cross-examination, the fact that use of leading questions could be permitted by the Chamber, or the fact that the witness should listen well to the questions and that he or she could request the cross-examiner to repeat a question they do not understand. These would all be legitimate issues for discussion during proofing sessions, in the victims' view.

D. Safeguards

21. The victims agree with the Prosecution that cross-examination of proofed witnesses, questioning by the Chamber, as well as comprehensive guidelines that clearly define the permissible scope of witness preparation constitute effective means of mitigating any perceived risks of witness coaching during witness

proofing sessions.³⁹ Additional safeguards are also to be found in Article 70 of the Statute which includes “corruptly influencing a witness [...] tampering with or interfering with the collection of evidence”⁴⁰ amongst offences against the administration of justice that fall within the competence of the Court.

22. Furthermore, several provisions of the Code of Professional Conduct for Counsel⁴¹ caution counsel against engaging in practices that could constitute witness coaching. For example, (i) Article 24(3) provides that “[c]ounsel shall not mislead or knowingly deceive the Court;” (ii) Article 29(1) states that “[c]ounsel shall refrain from intimidating, harassing or humiliating witnesses or victims or from subjecting them to disproportionate or unnecessary pressure within or outside the courtroom;” and (iii) Article 31(a) provides that “Counsel commits misconduct when he or she: [v]iolates or attempts to violate any provisions of this Code, the Statute, the Rules of Procedure and Evidence and the Regulations of the Court or of the Registry in force imposing a substantial ethical or professional duty on him or her.” Although the Code does not explicitly apply to Prosecution counsel,⁴² its provisions of what constitutes impermissible conduct as far as witness proofing is concerned would be instructive, even as relates to the conduct of Prosecution counsel in that context.
23. Judge Ozaki, in her Partly Dissenting Opinion in *Bemba*, mentioned the presence of a third party during witness proofing, such as a representative from the VWU or VPRS, as one possible safeguard against witness coaching.⁴³ While the victims agree that, in theory, this could be a beneficial safeguard against witness coaching, in practice, however, it would possibly consume much of the limited resources of those sections of the Court as it would require a member of the VWU or VPRS to be present at all proofing sessions. Moreover, and in the

³⁹ Motion, paras 30-32. See also Partly Dissenting Opinion, para 26.

⁴⁰ Article 70(c) of the Statute.

⁴¹ Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, adopted on 2 December 2005 (the “Code”).

⁴² See, Article 1 of the Code.

⁴³ Partly Dissenting Opinion, para. 27.

victims' view, cross-examination by the non-calling party remains the strongest and most effective means to prevent and expose witness coaching.

III. CONCLUSION AND RELIEF SOUGHT

24. The victims support the Motion and the guidelines on witness preparation⁴⁴ proposed by the Prosecution. However, the victims submit that the following changes should be made to the proposed guidelines: (i) *timing*: the preparation session should be completed at least *36 hours* before the witness' testimony is due to commence, in order to ensure that disclosure obligations to the non-calling party can be effectuated at least 24 hours before the witness commences testifying; (ii) *staffing*: in cases in which a victim decides to cooperate with one of the parties to the point of testifying as a witness, the Legal Representative should be available in the vicinity of the proofing room to be consulted by the victim, if needed; and (iii) *permissible conduct*: explanation of the topics on which the witness can expect to be questioned during cross-examination should be excluded from the list of permissible conduct during proofing sessions.

25. Additionally, the victims propose that the guidelines be revised to clearly state that the protocol on witness preparation and the modified proofing regime are triggered and come into operation, at the moment when the witness arrives at the location (city or town) where they are to give testimony or, if pursuant to Regulation 45 of the Regulations of the Registry the testimony is to be given via video-link, when the witness arrives at the location (city or town) from which the video-link is to be undertaken. Furthermore, the victims propose that the guidelines contain the predicted length of the witness preparation session, to be supplied by the calling party to the VWU, when submitting the Witness Information Form.

⁴⁴ ICC-01/09-02/11-462-Anx.

26. In conclusion, the victims respectfully request that the Chamber grant the Motion and embrace the suggested modifications to the proposed guidelines which have been advanced herein, including the proscription of proofing in anticipation of cross-examination.

Respectfully submitted,



Morris Anyah

Victims' Legal Representative

Dated this 3rd day of September, 2012

At The Hague, The Netherlands.