

Cour
Pénale
Internationale



International
Criminal
Court

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Date: 12 September 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
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

Registrar's Observations pursuant to regulation 24*bis* of the Regulations of the
Court on the "Prosecution Motion Regarding the Scope of Witness Preparation"
(ICC-01/09-02/11-462)

Source: Registrar

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

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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Victims and Witnesses Unit
Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

The Registrar of the International Criminal Court (the “Court”);

NOTING the “Decision on the Practices of Witness Familiarisation and Witness Proofing” issued by Pre-Trial Chamber I on 8 November 2006;¹

NOTING the “Prosecution's Submission in Anticipation of a Status Conference” dated 29 March 2007;²

NOTING the “Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial” issued by Trial Chamber I on 30 November 2007;³

NOTING the “Victims and Witnesses Unit's amended version of the “Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial” submitted on 22 October 2010” filed by the Registrar before Trial Chamber III on 7 December 2010 (the “Unified familiarisation Protocol”);⁴

NOTING the “Victims and Witnesses Unit’s Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony” submitted by the Registrar before Pre-Trial Chamber II on 12 August 2011;⁵

NOTING the “Victims and Witnesses Unit’s Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony” submitted by the Registrar before Pre-Trial Chamber II on 22 August 2011;⁶

¹ ICC-01/04-01/06-679.

² ICC-01/04-01/06-853.

³ ICC-01/04-01/06-1049.

⁴ ICC-01/05-01/08-1081.

⁵ ICC-01/09-01/11-259.

⁶ ICC-01/09-02/11-260.

NOTING the “Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses” submitted by the Registrar before Pre-Trial Chamber II on 29 August 2011 (the “Vulnerability Protocol”);⁷

NOTING the “Victims and Witnesses Unit's Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial and Protocol on the on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses” submitted by the Registrar before Pre-Trial Chamber I on 16 April 2012;⁸

NOTING the “Prosecution Motion Regarding the Scope of Witness Preparation” submitted by the Office of the Prosecutor on 13 August 2012 (the “Prosecutions’ Motion”);⁹

NOTING the “Defence Response to “Prosecution Motion Regarding the Scope of Witness Preparation”” submitted by Defence for Mr. Kenyatta and Defence of Mr. Muthaura on 3 September 2012;¹⁰

NOTING the “Victims’ Response to the “Prosecution Motion Regarding the Scope of Witness Preparation”” submitted by the Victims’ Legal Representative on 3 September 2012;¹¹

NOTING that on 6 September 2012 Trial Chamber V (the “Chamber”), upon Registry’s request, agreed to receive the observations of the Registrar in regards to the “Prosecution Motion Regarding the Scope of Witness Preparation” in both Kenya

⁷ ICC-01/09-01/11-303-Conf-Exp-Anx.

⁸ ICC-02/11-01/11-93.

⁹ ICC-01/09-02/11-462.

¹⁰ ICC-01/09-02/11-475-Red.

¹¹ ICC-01/09-02/11-476.

cases (ICC-01/09-02/11-462+AnxA and ICC-01/09-01/11-446+AnxA) pursuant to Regulation 24*bis* of the Regulations of the Court on 12 September 2012;¹²

NOTING articles 43(6) and 68(1) and (4) of the Rome Statute, rules 16 to 19, 86 to 88 of the Rules of Procedure and Evidence, regulation 24*bis* and 41 of the Regulations of the Court and regulations 79 to 96 of the Regulations of the Registry;

CONSIDERING that should the Chamber decide to accept the submission of the Prosecution to conduct witness proofing, such decision will have a direct impact on the way the witnesses are prepared to testify before the Court and that the Registrar considers therefore necessary to provide the Chamber with her submission on that issue in accordance with regulation 24*bis* of the Regulations of the Registry;

CONSIDERING that over the years the Victims and Witnesses Unit (the “VWU”) of the Registry has developed a Unified Familiarisation Protocol which has been successively accepted by all Pre-Trial and Trial Chambers of the Court¹³ and has proven to have a beneficial impact on witnesses and victims appearing before the Court;

CONSIDERING that the Unit also developed a Vulnerability Protocol¹⁴ which, in combination with the said Unified Familiarisation Protocol, has allowed the Unit to refine the manner in which vulnerable witnesses and victims are taken care of while appearing before the Court;

CONSIDERING that with this experience the VWU has consolidated an operational expertise in the area of victims and witnesses appearance before the Court;

¹² Email sent from the Chamber to the Victims and Witnesses Unit.

¹³ Please see ICC-01/05-01/08-1081, ICC-01/09-01/11-259 and ICC-02/11-01/11-93.

¹⁴ Please see ICC-01/05-01/08-974-Anx2, ICC-02/11-01/11-93-Anx2 and ICC-01/09-01/11-303-Conf-Exp-Anx.

CONSIDERING that the Registry wishes to highlight the beneficial aspects of this practice in general and, in particular, the way such process could be combined with witness proofing should the Chamber grant the Prosecution's Motion;

RESPECTFULLY SUBMITS the Registrar's Observations pursuant to regulation 24*bis* of the Regulations of the Court on the "Prosecution Motion Regarding the Scope of Witness Preparation" (ICC-01/09-02/11-462):

I. Preliminary remark: Current practice of the VWU in relation to witnesses and victims' appearance before the Court

1. The assistance the VWU has been providing so far to victims and witnesses prior to and in the course of their testimony or appearance before the Court is based on its mandate as stipulated by the relevant provisions of the legal texts applicable before the Court and detailed further in relevant decisions of the Chambers of the Court.
2. In particular, the relevant legal provisions foresee an involvement of the Unit in the preparation of witnesses. Thus, Rule 17 of the Rules of Procedure and Evidence (the "RPE") defines the mandate of the VWU in assisting the victims and the witnesses when they are called to testify before the Court and implies that the VWU participates in the witnesses and victims preparation to testimony or appearance.
3. Furthermore, the specific role of the VWU in relation to vulnerable witnesses and victims is also envisaged in rule 88 of the RPE which stipulates the mandate of the VWU in advising the Chambers on special measures that the latter can grant to vulnerable witnesses and victims.
4. Finally, regulation 79 of the Regulations of the Registry insists on the utmost importance to prepare witnesses for the experience of testifying and on the role of the Registry in that respect by stating that "pursuant to article 43, paragraph 6, and rules 16, 17 and 18, the Registrar shall develop and, to the extent possible,

implement policies and procedures to enable witnesses to testify in safety, so that the experience of testifying does not result in further harm, suffering or trauma for the witnesses”.

5. The applicable legal texts also specify the manner the VWU shall exercise its mandate and emphasize the need for the Unit to provide its services in a neutral and impartial manner. Hence, rule 18 of the RPE states that the Unit shall recognize “the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, including, where necessary, by maintaining an appropriate separation of the services provided to the prosecution and defence witnesses, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers”.
6. In addition to these legal provisions the VWU has built a set of guidelines on how the familiarisation process should be conducted in accordance with the applicable case law of the Chambers of the Court, which also considered the neutrality of the Registry and of the VWU as an asset for conducting the preparation of witnesses and victims appearing before the judges.
7. In that regard, it has to be noted that in 2006 Pre-Trial Chamber I in the case of *the Prosecutor v. Thomas Lubanga Dyilo* rejected the request of the Prosecution to conduct witness proofing and instead ordered the VWU to assist with witness preparation, as “the organ of the Court competent to carry out the practice of witness familiarisation [...]” “according to article 43(6) of the Statute and Rules 16 and 17 of the Rules”¹⁵. The Chamber underlined the benefit of the neutrality of the VWU by stating that “this would avoid from the outset any risk that witnesses may be confronted with one-sided interpretations of the Statute and the Rules and would make moot any allegation that the practice of “witness familiarisation” might be used to influence the testimony of the witnesses in some way”¹⁶.

¹⁵ ICC-01/04-01/06-679, para.24.

¹⁶ ICC-01/04-01/06-679, para.27.

8. The same approach was taken by Trial Chamber I in the case of *the Prosecutor v. Thomas Lubanga Dyilo* when the issue of witness proofing was again raised by the Prosecution¹⁷. The Chamber decided to prohibit witness proofing as witness familiarisation allows “spontaneity during the giving of evidence”¹⁸.
9. Other Chambers of the Court shared this view and adopted the same practice. Consequently, the VWU conducted witness familiarisation in the cases of *the Prosecutor v. Bahar Idriss Abu Garda*, *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *the Prosecutor v. Jean-Pierre Bemba Gombo* and in the preliminary phase of the cases *the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and *the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*.
10. During the years of witness preparation the VWU developed a series of practices and procedures reflecting relevant jurisprudence and instructions of the different Chambers. They are consolidated in details in the Unified Familiarisation Protocol filed for the first time in the *Bemba case* and then, without any change, in the *Gbagbo case* and in the preliminary phase of the two cases in the Kenyan situation.¹⁹ The protocol outlines the process of witness preparation that serves the best interests of witnesses and provides for sustainable working solutions for all entities involved.
11. Additionally, the VWU developed practices aiming at addressing the specific issue of assessment and care of vulnerable witnesses and victims. These practices are formalised in a Vulnerability Protocol which has also been filed in several cases before the Court.²⁰ The Vulnerability Protocol allows specialised psychological assessments and care as well as tailored recommendations (*inter alia* on special measures as per rule 88 of the RPE) to the Chamber aimed at protecting the vulnerable witnesses and victims against re-traumatisation and at facilitating the proceedings.

¹⁷ ICC-01/04-01/06-853; see also ICC-01/04-01/06-T-58-ENG, pp. 54-77.

¹⁸ ICC-01/04-01/06-1049, para. 52.

¹⁹ Please see ICC-01/05-01/08-1081, ICC-01/09-01/11-259, ICC-01/09-02/11-260 and ICC-02/11-01/11-93.

²⁰ Please see ICC-01/05-01/08-974-Anx2, ICC-02/11-01/11-93-Anx2 and ICC-01/09-01/11-303-Conf-Exp-Anx.

II. Recommendations of the VWU in relation to the Prosecution's motion

12. Without taking any position on the value of witness proofing, the Registry would like to highlight the positive aspects of the Familiarisation process which the Registry proposes to preserve.
13. Should the Chamber decide to grant the Prosecution's Motion, it is the view of the Registry that both processes (proofing on the one side and familiarisation on the other side) could be followed in parallel. The Registry notes in that regard that the implementation of such concurrent preparation could be achieved by slightly modifying VWU's current Familiarisation practice²¹ and would allow the proofing of witnesses to take place while maintaining the beneficial impact of the familiarisation process.

a. The Unit's expertise and its positive impact on the protection and support to witnesses and victims appearing before the Court

- **Specialised and experienced staffing allowing immediate and focused reaction to witnesses and victims concerns**
14. As *per* article 43(6) of the Rome Statute and rule 19 of the RPE the VWU is equipped with the relevant expertise in witness protection and security, logistics administration, psychology in criminal proceedings, vulnerable witnesses, trauma, including trauma related to crimes of sexual violence, and health care.
 15. Whilst preparing and assisting witnesses and victims for and during testimony the VWU staff is also monitoring any potential issues the witnesses or victims may encounter in relation to security, health or psychological well-being. Their professional background and experience in dealing with witnesses over the

²¹ In particular, it is related to the part of the Unified Familiarisation Protocol related to the restriction of contacts between the calling party and its witnesses (ICC-01/09-01/11-462).

years enables VWU staff members to identify such issues and prevent escalation.

16. VWU staff specialised in protection and psychosocial care is also available as *per* the Unit's mandate to address any concerns the parties, participants or judges may raise in that regard. Having at its disposal staff specialised in the relevant areas of witnesses and victims' management the VWU is able to deal with such issues in a centralised and consistent manner.
17. Therefore, the Registry would suggest, if the Chamber grants the Prosecution's motion, that any concerns related to protection or psychosocial care, should they be raised during the proofing phase, be immediately reported to the VWU in order for the Unit to take appropriate actions.

- **Efficiency of the familiarisation process and of the Vulnerability Protocol with regards to witnesses and victims preparation and welfare**

18. In the view of the Registry, the way VWU conducts the familiarisation process and provides special care to vulnerable witnesses and victims allows them to feel empowered and more confident when appearing before the Court.
19. The familiarisation process aims at acquainting witnesses and victims with the unfamiliar court environment and with the questioning process conducted by different parties, participants and judges. They are informed as well of the need to break down the information into small pieces. The way questioning by the opposing party is performed and the fact that it is a normal part of the proceedings which should not to be taken personally is also explained to the witnesses. During courtroom briefings witnesses are given the chance to practice these aspects in neutral role-plays, adapted to their assessed level of understanding.²² Finally, according to the current practice witnesses are entitled to read their previous statements in order to refresh their memory and not to be surprised when the content of these documents is used during the hearing.

²² It is the view of the Registry that this practice addresses the Prosecution's concerns described in para. 24 of the Prosecution's Motion (ICC-01/09-01/11-446).

20. The VWU also developed a Vulnerability Protocol based on its practice regarding the protection and support of vulnerable witnesses and victims. In accordance with the practice of the VWU and with this Protocol, the familiarisation of vulnerable witnesses and victims is adapted to their special needs. These witnesses and victims are thoroughly informed and prepared for testimony and especially for the phase of questioning by the opposing party by exploring the potentially negative feelings the process of testifying and facing adversarial questions might have on them, this process is conducted in a neutral way and without going into the content of their evidence.
21. The current procedures have proven to be highly useful tools to protect from further harm witnesses and victims in general and vulnerable ones in particular. The feedback collected from witnesses and victims after their appearance before the Court is usually positive. The witnesses generally express their satisfaction of having been given the opportunity to tell their story and to contribute to justice being done. With regard to the familiarisation procedure itself, the witnesses' general perception is that they were well-prepared and at ease in the courtroom because they knew what to expect. With regard to vulnerable witnesses and victims, it is worth mentioning that so far all of the witnesses and victims pertaining to this category have managed to complete their testimony successfully and without significant delays or extended breaks.

2. The benefits of the Unit's neutrality for the witnesses and victims' well-being and for the facilitation of their testimony and appearance

22. The current practice of the VWU with regard to familiarisation of witnesses and victims and, in particular, of vulnerable ones is founded on the principle of neutrality.
23. In its preparation of witnesses the VWU makes it clear that the Unit focuses only on their well-being and has no interest in the content of their testimony. This neutral and independent position of the VWU, whose sole interest is to

assist and protect witnesses and to facilitate testimony, permits the establishment of a relationship of trust with them.

24. This is of particular importance when it comes to the assistance provided to vulnerable witnesses for whom the VWU Psychologist establishes the level of vulnerability through clinical assessments in order to identify and advise the Chamber on necessary special measures in accordance with rule 88 and to monitor the mental health condition of such witnesses throughout the testimony.
25. The fact that the VWU Psychologist is not associated with any of the parties and distantiate him/herself from the evidence provided, makes it possible to establish a relationship of trust in which witnesses feel freer to express their views and concerns about how they experience the testimony and how they feel in the witness box. It allows the VWU Psychologist to provide, if required, updated assessments to the Chamber during the testimony based on the feedback of the witness and on observations during the familiarization process and in court.
26. Such feedback to the Chamber regarding a vulnerable witness' state of mind and capacity to testify can only be neutral and objective if it is conducted independently from the influence of the parties and by a staff member who will be able to inform the Chamber should the witness be unable to testify or should there be a risk for his/her mental health associated to the appearance before the Court.
27. In addition, recommendations for special measures often include a guidance regarding the manner of questioning, such as limitations regarding the type of questions that can be asked. Furthermore, when the questioning by the opposing party is experienced by the witness as insulting, degrading or destabilising, the Vulnerability Protocol allows the Psychologist to raise concerns with the Chamber and/or to explore, during the course of testimony, in a neutral and impartial way, the negative feelings the witness or victim experiences, the way to minimize potentially disturbing effects and to facilitate the continuation of

the process. Such recommendations can only be elaborated independently from the parties.

28. Therefore, any assessment or intervention relating to the witness' well-being should entirely remain the responsibility of the VWU and a strict separation between proofing and addressing well-being is of utmost importance in order to avoid any confusion for the witness and to allow the VWU to perform its duties independently.

III. Conclusion

29. As in its Motion the Prosecution is clearly limiting its involvement to the proofing of witnesses and as the general aim of the familiarisation process is not to prepare the witnesses on the content of their evidence but to make them feel comfortable during their testimony, the Registry believes that even if such process is implemented, it would be possible and preferable to conduct it in parallel witness familiarisation in order to allow the VWU to continue providing its assistance in the most effective way.
30. The Registry also suggests that the Vulnerability Protocol and the specific mandate of the VWU with regard to vulnerable witnesses and victims be accepted by the Chamber.
31. Additionally, the VWU will remain available to provide its advice to the parties, participants and to the Chamber on the best manner to implement such process in accordance with the best interest of the witnesses.
32. In that respect, the Registry would like, already at this stage, and in addition to the above-mentioned Recommendations to draw the attention of the Chamber to some specific aspects of the Prosecution's proposal which may require the assistance of the VWU.
- First of all the Registry respectfully suggests that the meetings between the calling party and protected witnesses (participants of the Court protection

program as well as individuals benefiting from other protective measures, including in-court protective measures) be conducted on the premises of the Unit in order to avoid any inadvertent exposure of the witnesses. This does not imply that VWU should attend the meetings.

- Additionally, should the witness proofing be conducted in The Hague, sufficient time, would need to be allocated between final proofing sessions and the start of the testimony in order to give the witness a chance to prepare mentally for his or her appearance and to avoid confusion. This time is also important to avoid that witnesses get the feeling that they are facing an exam or performance for which they have to rehearse until the last moment in order to succeed. This pause should also help to make witnesses feel confident and comfortable about their capacity to testify successfully by relying on their own memory and capacity to tell the truth.
- The Registry suggests that the scheduling of the proofing meetings is done carefully in advance in order for the VWU to take the necessary logistical steps
- Finally, the Registry observes that efficiency requires that proofing sessions, should they be authorized, shall not impact on the overall duration of the witness' stay at headquarters.



Silvana Arbia, Registrar

Dated this 12 September 2012

At The Hague, The Netherlands