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**International
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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Geoffrey Henderson

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

**PUBLIC
with Public Annexes 1 and 2**

Prosecution motion regarding witness preparation

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 Office of the Prosecutor (“Prosecution”) seeks authorisation to conduct witness preparation in this case.
2. Trial Chamber V in the *Ruto & Sang* and *Kenyatta* cases¹ has permitted the calling party to prepare witnesses for testimony within prescribed limits. The legal instruments of the Court provide ample support for the implementation of a witness preparation procedure. Article 64 of the Rome Statute (“Statute”), rule 140 of the Rules of Procedure and Evidence (“Rules”) and regulation 43 of the Regulations of the Court (“Regulations”), provide the Trial Chamber with broad discretionary power to set procedures to facilitate fair and expeditious trials. Further, article 64(2) refers to the Trial Chamber’s duty to give due regard to the protection of victims and witnesses, and article 68(1) grants the Trial Chamber with the authority to take appropriate measures to protect the “safety, physical and psychological well-being, dignity and privacy of victims and witnesses”.
3. The Prosecution requests the Trial Chamber VI (“Chamber”) to issue guidelines permitting witness preparation consistent with those authorised by Trial Chamber V in the *Ruto & Sang* and *Kenyatta* cases.² The Prosecution’s proposed witness preparation protocol (“Proposed Protocol”) is based on the protocol adopted in the Kenya cases and is attached as Annex 1 to the present filing.
4. The Prosecution submits that implementing the Proposed Protocol will:
 - (i) further the Court’s truth-finding function by allowing witnesses to refresh their memory, review potential exhibits, and provide more focused, clear, complete, structured and relevant testimony;
 - (ii) contribute to fair and expeditious proceedings by enabling counsel to present more efficient and focused witness examinations having had

¹ ICC-01/09-01/11-524 and ICC-01/09-02/11-588.

² ICC-01/09-01/11-524 and ICC-01/09-02/11-588.

the opportunity to clarify witnesses' evidence with them in advance, confirm the accuracy and completeness of any prior statements and, if any disclosable information comes to light, disclose it to the opposing party prior to the witness testifying; and

- (iii) contribute to witness well-being by allowing witnesses to meet counsel prior to testifying, review and clarify their evidence with counsel, ask meaningful questions about what to expect with a view to reducing anxiety, and discuss any security concerns including as a result of interference or intimidation.

5. Trial Chamber V found that relevant, accurate and complete witness testimony facilitates a fair, effective and expeditious trial and assists in the search for truth.³ The Prosecution submits that permitting proper witness preparation, such as that set out in the Proposed Protocol, will both enhance the efficiency and fairness of the proceedings and significantly contribute to witness well-being.
6. The Defence advised the Prosecution that it does not oppose the practice of witness preparation by a calling party, but it raised two points of disagreement with the Proposed Protocol. Although the Defence declined to provide proposed language, its stated concerns relate to: (i) access to the video recording of the witness preparation session, and (ii) the need for greater specificity on the form and content of the disclosure following such sessions.

Procedural History

7. On 21 July 2014, the Chamber filed the "Order Scheduling a Status Conference and Setting a Provisional Agenda", in which the Parties, legal representatives for

³ ICC-01/09-01/11-524, para.31 and ICC-01/09-02/11-588, para. 35. *See also*: ICC-01/09-01/11-524 and ICC-01/09-02/11-588, para.55 (partly dissenting opinion of Judge Eboe-Osui).

victims and Registry were invited to make written submissions on the provisional agenda items by 14 August 2014.⁴

8. On 14 August 2014, the Registry filed its submissions on the provisional agenda.⁵ In it, the Registry recommended the adoption of a protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, citing the Familiarisation Protocol adopted in *Bemba* and the Amended Familiarisation Protocol adopted in the Kenya cases.⁶
9. On 14 October 2014, the Prosecution indicated that it intended to seek authorisation for the Parties to prepare witnesses in advance of testimony and that this would impact the scope of the familiarisation protocol.⁷ The Prosecution referred to this pending filing in oral submissions at the 2 December 2014 status conference.⁸

Prosecution's Submissions

I. The legal basis for authorising witness preparation

10. Although the Statute is silent on the issue of witness preparation, article 64 has been found to provide the Chamber with the legal basis to authorise witness preparation.⁹ The article "is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims".¹⁰ In particular sub-articles 64(2), 64(3)(a), 64(6)(f) and 64(8)(b) provide the Chamber with broad discretion to adopt procedures that

⁴ ICC-01/04-02/06-339, para.7.

⁵ ICC-01/04-02/06-350.

⁶ ICC-01/04-02/06-350, para.3. See: ICC-01/05-01/08-1081-Anx (*Bemba*) and ICC-01/09-01/11-704-Anx and ICC-01/09-02/11-727-Anx (Kenya cases).

⁷ ICC-01/04-02/06-385, para.35.

⁸ ICC-01/04-02/06-T-17-CONF-ENG, pp. 4 and 17.

⁹ ICC-01/09-01/11-524, paras.26-27 and ICC-01/09-02/11-588, paras.30-31.

¹⁰ ICC-01/09-01/11-524, para.27 and ICC-01/09-02/11-588, para.31. See also: ICC-01/05-01/08-1039, para.10 (partly dissenting opinion of Judge Ozaki).

may facilitate the fair and expeditious conduct of the proceedings, including the questioning of witnesses and the presentation of evidence.

11. Further, regulation 43 provides the Trial Chamber with the authority to determine the “mode and order of questioning witnesses” for the effective determination of the truth and the effective use of time.¹¹
12. In addition to this authority for setting procedures, the Chamber has a duty, pursuant to article 68(1), to take appropriate measures to protect the “safety, physical and psychological well-being” of victims and witnesses. In the Kenya cases, Trial Chamber V held that this duty was not best served by limiting the pre-testimony contact between counsel and witnesses.¹²
13. The Court’s legal instruments provide the Chamber with ample legal basis to authorise witness preparation; however, further support can be derived from *ad hoc* and hybrid tribunals’ jurisprudence, as foreseen in article 21. Witness preparation “is either allowed or encouraged at the *ad hoc* tribunals (ICTR, ICTY and Special Court for Sierra Leone) and in various national jurisdictions where the principle of the primacy of orality is followed and where trials [...] rely on the examination of live witnesses through questioning by the parties.”¹³

¹¹ Rule 140 states that the parties shall agree on the order and manner in which evidence shall be submitted to the Trial Chamber and where they can not, the Presiding Judge shall provide direction.

¹² ICC-01/09-01/11-524, para.37 and ICC-01/09-02/11-588, para.41.

¹³ ICC-01/09-01/11-524, para.35 and ICC-01/09-02/11-588, para.39 (and the authorities cited in footnotes 54 and 63, respectively). *See also*: ICC-01/09-01/11-524 and ICC-01/09-02/11-588, paras.20-36 (partly dissenting opinion of Judge Eboe-Osui). *See also*: **ICTY**: *Prosecutor v Limaj, et al.*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, 10 December 2004; *Prosecutor v Milutinović et al.*, IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006; and *Prosecutor v Haradinaj et al.*, IT-04-84-T, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, 23 May 2007. **ICTR**: *Prosecutor v Karemera, et al.*, ICTR-98-44-T, Decision on Defence Motions to Prohibit Witness Proofing, 15 December 2006; and *Prosecutor v Karemera, et al.*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007. **SCSL**: *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005.

II. Witness preparation has substantial benefits

(a) Furthers the Court's truth-finding function

14. Proper witness preparation will result in more accurate, focused and complete testimony, which will enhance the Chamber's ability to ascertain the truth.¹⁴ As articulated by Trial Chamber V, "[a] witness who testifies in an incomplete, confused and ill-structured way because of lack of preparation is of limited assistance to the Chamber's truth-finding function."¹⁵
15. Drawing upon the jurisprudence of the ICTY, Trial Chamber V found that "permitting witnesses to re-engage with the facts underlying their testimony aids the process of human recollection, better enables witnesses to tell their stories accurately on the stand and can assist in ensuring that the testimony of a witness is structured and clear".¹⁶
16. Witness preparation is a means of ensuring the entirety of a witness's probative evidence is adduced for the Chamber's consideration. One example is with the use of exhibits. A witness who is shown a document for the first time on the stand "may be caught off guard, without adequate time to consider whether he knows of the document and what relevant information, if any, he can provide about it".¹⁷ As articulated by Trial Chamber V, showing witnesses potential exhibits in advance of their testifying "will help to ensure that witnesses are in a position to give the Chamber the most complete version of their evidence".¹⁸

¹⁴ ICC-01/05-01/08-1039, para.21 (dissenting opinion of Judge Ozaki).

¹⁵ ICC-01/09-01/11-524, para.31 and ICC-01/09-02/11-588, para.35. See also: ICC-01/09-01/11-524 and ICC-01/09-02/11-588, para.12 (partly dissenting opinion of Judge Eboe-Osui).

¹⁶ ICC-01/09-01/11-524, para.32 and ICC-01/09-02/11-588, para.36, referring to *Prosecutor v Limaj, et al.*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, 10 December 2004, page 2: "the process of human recollection is likely to be assisted... by a detailed canvassing during the pre-trial proofing of the relevant recollection of a witness... In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial."

¹⁷ ICC-01/09-01/11-524, para.33 and ICC-01/09-02/11-588, para.37.

¹⁸ ICC-01/09-01/11-524, para.33 and ICC-01/09-02/11-588, para.37.

17. Further, in the decision in the *Kenyatta* proceedings, Trial Chamber V opined that it was far from clear whether prohibiting contact between witnesses and the calling party, thereby “requiring witnesses to take the stand “cold” best serves the Court’s truth-seeking mandate.”¹⁹
18. Similarly, new information may surface when a witness re-engages with their account of events and is asked focused and clarifying questions in preparation for testifying. Learning such information prior to the witness taking the stand enables the calling party to assess the impact of the new information on the witness’s evidence as a whole, and to disclose any relevant new information to the non-calling party in advance of the witness testifying.²⁰ In this way, counsel also avoids having to explore new information with a witness for the first time on the stand. Parties may be hesitant to freely explore new areas with witnesses in the course of their testimony for fear of wasting time or confusing the evidence thereby preventing the Chamber from receiving relevant and probative evidence.²¹
19. Article 30 of the Proposed Protocol mandates the provision of disclosable information obtained during a witness preparation session to the non-calling party. It is unnecessary to prescribe further the form of such disclosure or its content. Disclosable information obtained from a witness during the preparation sessions includes contradictions with the witness statement and new information or clarifications provided by the witness. The Prosecution’s practice in the *Ruto & Sang* case has been to disclose notes containing disclosable information following a witness preparation session.

¹⁹ ICC-01/09-02/11-588, para.43. *See also*: ICC-01/09-01/11-524 and ICC-01/09-02/11-588, paras.17-19 (partly dissenting opinion of Judge Eboe-Osuji).

²⁰ Article 30 of the Proposed Protocol is clear that the calling party shall disclose information obtained during a preparation session that is subject to disclosure as soon as practicable.

²¹ ICC-01/09-01/11-524, para.42 and ICC-01/09-02/11-588, para.46.

(b) Assists witnesses to provide clear and focused testimony

20. Trial Chamber V found that properly conducted witness preparation was likely to enhance the “efficiency, fairness and expeditiousness” of the trials in the two Kenya cases.²² Given the importance of oral evidence at this Court, enshrined in article 69(2), there is a significant need for clear and focused testimony.²³ In the present case, live witness testimony is likely to constitute a significant part of the evidence presented to the Chamber. It is therefore important that testimonies are structured, clear and concise.
21. In order to have efficient trials, it is necessary to have efficient witness examinations. To a large extent, this requires well-prepared counsel who are fully acquainted with a witness’s evidence.²⁴ Giving a witness the opportunity to review any prior statements assists the process of recollection and will enhance the witness’s ability to accurately give his or her account of events. Doing so in the presence of counsel provides the witness with the opportunity to clarify information in any prior statements and to confirm the accuracy of these statements. Should new information emerge during the preparation session, it can be disclosed to the opposing party in advance of the witness’s testimony.²⁵ Trial Chamber V opined that such pre-testimony disclosure was preferable to having the information emerge during in-court testimony, and found that it would also ensure the Chamber was not foreclosed from hearing the entirety of the witness’s evidence.²⁶
22. Witness preparation meetings provide “a last opportunity for the calling party to determine the most effective way to question its witnesses and which topics will

²² ICC-01/09-01/11-524, para.35 and ICC-01/09-02/11-588, para.39.

²³ ICC-01/09-01/11-524, para.31 and ICC-01/09-02/11-588, para.35. *See also*: ICC-01/05-01/08-1039, paras.20-21 (partly dissenting opinion of Judge Ozaki).

²⁴ ICC-01/09-01/11-524, para.34 and ICC-01/09-02/11-588, para.38.

²⁵ ICC-01/09-01/11-524, para.42 and ICC-01/09-02/11-588, para.46. *See also*: ICC-01/05-01/08-1039, para.14 (partly dissenting opinion of Judge Ozaki).

²⁶ ICC-01/09-01/11-524, para.42 and ICC-01/09-02/11-588, para.46. *See also*: ICC-01/05-01/08-1039, para.23 (partly dissenting opinion of Judge Ozaki).

elicit the most relevant and probative evidence during in-court examination”.²⁷ By knowing in advance what topics may cause a witness to stray into irrelevant areas that need not occupy the Court’s time, counsel can streamline in-court examinations and tailor them to the most relevant or contested issues. Similarly, by showing witnesses potential exhibits during witness preparation, counsel is better able to determine which exhibits the witness can speak to and which he or she cannot.²⁸ Finally, Trial Chamber V found that informing witnesses of likely topics of direct and cross-examination will presumably “help them focus on the relevant issues.”²⁹

(c) Contributes to the well-being of witnesses

23. Importantly, Trial Chamber V held that proper witness preparation “enhances the protection and well-being of witnesses, including by helping to reduce their stress and anxiety about testifying.”³⁰
24. Trial Chamber V found that limited pre-testimony contact between counsel and witnesses, such as that provided for in the Victims and Witnesses Unit (“VWU”) Familiarisation Protocol, does not best serve the Chamber’s duty to protect witnesses’ dignity and well-being, as set out in article 68(1). Moreover, it opined that enabling counsel to interact with witnesses on the substantive aspects of their evidence may increase witnesses’ confidence and reduce their reluctance to reveal sensitive evidence during their testimony. The role played by VWU in familiarising witness, while vital, is not a substitute for this interaction.³¹

²⁷ ICC-01/09-01/11-524, para.34 and ICC-01/09-02/11-588, para.38.

²⁸ For example, if a witness is to testify about the location where crimes were committed, showing the witness maps or sketches of locations ahead of time enables counsel to determine whether the witness is capable of commenting on them. Absent such preparation, counsel may need to try several exhibits in court before finding one to which the witness can speak, which is time consuming and may be unsettling or embarrassing for the witness.

²⁹ ICC-01/09-01/11-524, para.39 and ICC-01/09-02/11-588, para.44.

³⁰ ICC-01/09-01/11-524, para.37 and ICC-01/09-02/11-588, para.41. *See also*: ICC-01/09-01/11-524 and ICC-01/09-02/11-588, paras.8-10, (partly dissenting opinion of Judge Eboe-Osuji).

³¹ ICC-01/09-01/11-524, para.37 and ICC-01/09-02/11-588, para.41.

25. Most of the Prosecution's witnesses have never testified in court and are unfamiliar with this process.³² In-court testimony differs from how people typically share information in conversation. Witnesses are asked to break information into small pieces and respond to precise, probing questions often about highly sensitive issues or traumatic experiences. In this context, Trial Chamber V's finding that witness preparation "may help to increase witnesses' confidence and may reduce their reluctance to reveal sensitive information on the stand"³³ is germane.

26. The following excerpt from the decision of Trial Chamber V in the Kenya cases are also equally applicable to the present case:

[Witnesses'] concerns may also result from anxiety about giving evidence in what may feel like a foreign and even hostile environment, a lack of confidence in their ability to communicate and articulate their experiences, and/or apprehension over the unfamiliar experience of being challenged during cross-examination. Witness preparation can help to ensure that witnesses fully understand what to expect during their time in court and that they are able to communicate any concerns to the calling party, including case-specific questions which the VWU would be unable to address. Particularly with regard to vulnerable witnesses, such prior preparation may help to reduce the psychological burdens of testimony, since those witnesses may face unique difficulties when being questioned repeatedly about traumatic events.³⁴

27. The Prosecution endeavors to keep personal contact with witnesses, especially those living in affected communities, to a minimum in order to reduce the risk of their association with the Court. The principal protective measure for many witnesses (and their family members) is keeping their cooperation with the Prosecution (and the Court) confidential. As such, witnesses often only meet the lawyer who will question them in court when they present themselves to testify. Having a brief courtesy meeting with the witness at this point is insufficient for

³² ICC-01/09-01/11-524, para.36 and ICC-01/09-02/11-588, para.40. *See also*: ICC-01/09-01/11-524 and ICC-01/09-02/11-588, paras.8-10 (partly dissenting opinion of Judge Eboe-Osuji) and ICC-01/05-01/08-1039, para.21 (partly dissenting opinion of Judge Ozaki).

³³ ICC-01/09-01/11-524, para.37 and ICC-01/09-02/11-588, para.41.

³⁴ ICC-01/09-01/11-524, para.37 and ICC-01/09-02/11-588, para.41.

counsel to establish the rapport with the witness that is necessary to put them at ease and assist them in providing the most accurate and complete account of their experience.³⁵

28. Furthermore, it is important to have the opportunity immediately before a witness's testimony to discuss any particular safety or security concerns, including whether the witness has been interfered with since his or her last contact with the calling party, and take appropriate measures to address such concerns.

III. Any potential risks are mitigated by the Proposed Protocol and other safeguards

29. Potential risks associated with improper witness preparation such as "induc[ing] witnesses to modify their testimony,"³⁶ "reducing any helpful spontaneity,"³⁷ or these sessions becoming "an improper rehearsal of in-court testimony which may negatively affect the reliability of the evidence adduced at trial"³⁸ are all mitigated by the adoption of the Proposed Protocol in concert with other available safeguards.
30. First, the Proposed Protocol itself contains clear guidelines that mitigate improper witness preparation.³⁹ Based upon the protocol adopted in the Kenya cases,⁴⁰ the Proposed Protocol similarly provides a detailed list of permissible witness contact and preparation prior to testimony to permit "judicious witness preparation aimed at clarifying a witness's evidence and carried out with full respect for the rights of the accused."⁴¹

³⁵ ICC-01/09-01/11-524 and ICC-01/09-02/11-588, para.37 (partly dissenting opinion of Judge Eboe-Osuji).

³⁶ ICC-01/09-01/11-524, para.39 and ICC-01/09-02/11-588, para.44.

³⁷ ICC-01/09-02/11-588, para.43.

³⁸ ICC-01/09-01/11-524, para.44 and ICC-01/09-02/11-588, para.47.

³⁹ Proposed Protocol, articles 2, 3 and 4.

⁴⁰ ICC-01/09-01/11-524-Anx and ICC-01/09-02/11-588-Anx.

⁴¹ ICC-01/09-01/11-524, para.50 and ICC-01/09-02/11-588, para.52.

31. In particular, the Proposed Protocol requires counsel for the calling party to perform four key functions: (i) to reiterate the witness's obligation to tell the truth; (ii) to explain the purpose of the preparation session; (iii) to provide the witness with an opportunity to review his or her prior statements; and, (iv) to provide the witness with an opportunity to confirm whether his or her prior statements are accurate and to explain any changes as necessary.⁴²
32. Counsel for the calling party is permitted to perform a variety of other functions such as: asking the witness about inconsistencies in any prior statements;⁴³ explaining (in general terms) the topics the calling party intends to cover in examination-in-chief, as well as the topics on which the witness may be questioned during cross-examination;⁴⁴ asking the witness to comment upon potential exhibits for the purpose of determining the utility of using the exhibits in court;⁴⁵ informing the witness of appropriate behaviour, including the need to speak slowly and concisely;⁴⁶ and answering questions the witness may have, including about what to expect in court.⁴⁷
33. The Proposed Protocol also prohibits counsel from engaging in certain conduct including: seeking to influence the substance of the witness's answers;⁴⁸ training the witness or practicing the questions and answers expected during the

⁴² Proposed Protocol, articles 15-18 (which reflect ICC-01/09-01/11-524-Anx and ICC-01/09-02/11-588-Anx, articles 15-18).

⁴³ Proposed Protocol, article 19 (which reflects ICC-01/09-01/11-524-Anx and ICC-01/09-02/11-588-Anx, article 19).

⁴⁴ Proposed Protocol, articles 20-22 (which reflect ICC-01/09-01/11-524-Anx and ICC-01/09-02/11-588-Anx, articles 20-22).

⁴⁵ Proposed Protocol, article 23 (which reflects ICC-01/09-01/11-524-Anx and ICC-01/09-02/11-588-Anx, article 23).

⁴⁶ Proposed Protocol, article 25 (which reflects ICC-01/09-01/11-524-Anx and ICC-01/09-02/11-588-Anx, article 25).

⁴⁷ Proposed Protocol, article 26 (which reflects ICC-01/09-01/11-524-Anx and ICC-01/09-02/11-588-Anx, article 26).

⁴⁸ ICC-01/09-01/11-524-Anx, para.27 and ICC-01/09-02/11-588-Anx, para.27.

witness's testimony so that the witness memorises those questions and answers;⁴⁹ and informing the witness of the evidence of other witnesses.⁵⁰

34. Finally, the Proposed Protocol includes a requirement to video record the preparation sessions and maintain a log of the location, duration and attendees at these sessions.⁵¹ Where there is a concrete and credible basis for a request to access the video, such as an allegation of witness coaching or tampering, the Chamber can order disclosure of the video taped session.⁵² This provides a solid safeguard for witness preparation. It does not necessitate that the video be provided to the non-calling party in the absence of a well-founded request for access. The Chamber in the *Ruto & Sang* case held that if it was satisfied as to the basis of such a request, in its discretion it could consider whether to view the video recording prior to making any disclosure order, being mindful of protecting any privileged information revealed in the video recording.⁵³
35. The Chamber in the *Ruto & Sang* case further held that it had “no basis for assuming that either party will fail to adhere to the limitations” in the protocol.⁵⁴ For this reason, as well as the appropriate caution regarding privileged information in the video recording, the Prosecution submits that there should not be automatic disclosure of the video recording. A party must apply for access on a concrete and credible basis.
36. There are other available safeguards that act as a check against improper witness preparation. One of these additional safeguards is the use of cross-examination, as well as questioning by the Chamber, about the extent of a witness's preparation.⁵⁵ Knowing that any improper conduct will be revealed during in-

⁴⁹ ICC-01/09-01/11-524-Anx, para.28 and ICC-01/09-02/11-588-Anx, para.28.

⁵⁰ ICC-01/09-01/11-524-Anx, para.29 and ICC-01/09-02/11-588-Anx, para.29.

⁵¹ Proposed Protocol, articles 12 and 13 (which reflect ICC-01/09-01/11-524-Anx and ICC-01/09-02/11-588-Anx, articles 12 and 13).

⁵² ICC-01/09-01/11-524, para.47 and ICC-01/09-02/11-588, para.50.

⁵³ ICC-01/09-01/11-524, para.47.

⁵⁴ ICC-01/09-01/11-524, para.48.

⁵⁵ ICC-01/09-01/11-524, para.45 and ICC-01/09-02/11-588, para.48.

court questioning, counsel will not jeopardise the credibility of the witness (or their own professional reputation) by using preparation sessions to improperly coach or influence testimony.

37. Codes of conduct that require counsel to conduct witness preparation honestly and fairly are another available safeguard. The Code of Conduct for the Office of the Prosecutor requires Prosecution staff to, among others, “uphold the highest standards of integrity and relevant standards on confidentiality, fairness, honesty and truthfulness” and to “ensure that proceedings are conducted in a fair manner.”⁵⁶ The Code of Professional Conduct for counsel requires counsel (including Defence counsel) to “take all necessary steps to ensure that his or her actions or those of counsel’s assistants or staff are not prejudicial to the ongoing proceedings” and to “maintain the integrity of evidence” at all times.⁵⁷

IV. Witness preparation is particularly appropriate in this case

38. The events relevant to the proceedings against the Accused occurred 12-13 years ago. Many witnesses provided their initial (and sometimes only) statement to the Prosecution as early as 2005. Since then many witnesses have had little, if any, opportunity to engage with the substance of their evidence. It is to be expected that events from 2002 and 2003 will no longer be at the forefront of their minds.
39. In addition to the significant lapse of time, this case involves allegations of crimes with significant scale, complexity and scope. Overlaying this complexity is the cultural and linguistic remoteness of the Court processes, and the particular vulnerability of witnesses, including victims of intense violence and trauma, including gender based sexual crimes.

⁵⁶ Code of Conduct for the Office of the Prosecutor, paras.20(c) and 51(b), respectively. *See also:* paras.25-30, 49, 52-54.

⁵⁷ Code of Professional Conduct for counsel, articles 24(1) and 25(1), respectively. *See also:* article 29.

40. Proper witness preparation will enable witnesses to re-engage with their evidence in a more meaningful manner than by simply reading their prior statements alone. Having the opportunity to review these statements with counsel present allows witnesses to clarify their evidence, confirm the accuracy and completeness of their prior statement, disclose any new information that may be relevant and ask questions of counsel about what to expect. It also enables counsel to develop a vital rapport with witnesses to enhance their comfort and confidence, and to provide them assurances with respect to the overall process and the measures available to ensure their safety and well-being, as well as address any particular security concerns. All of these salutary aspects of witness preparation contribute to making the process of eliciting personal, sensitive and often harrowing information in court less traumatic and invasive.

Conclusion

41. Permitting proper witness preparation will further the Court's truth-finding function, allow for more efficient and focused witness examinations that are fairer to the Parties and the witnesses, and contribute to the well-being of witnesses.
42. The Prosecution requests that the Chamber authorise the Proposed Protocol to permit the Parties to engage in appropriate witness preparation in this case.



Fatou Bensouda,
Prosecutor

Dated this 5th day of February 2015
At The Hague, The Netherlands