

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 6 February 2015

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 one Public Annex**

**Victims and Witnesses Unit's submission on the Protocol on the practices to be
used to familiarise witnesses for giving testimony pursuant to
Order n° ICC-01/04-02/06-416**

Source: Registry

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

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Victims and Witnesses Unit

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Other

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

NOTING the “Registry submission pursuant to Order Scheduling a Status Conference and Setting a provisional Agenda” filed on 14 August 2014;¹

NOTING the “Order setting deadlines for the filing of submissions on outstanding protocols” issued by Trial Chamber VI (the “Chamber”) on 18 December 2014;²

NOTING the “Victims and Witnesses Unit’s submission pursuant to Order n° ICC-01/04-02/06-416” filed on 22 December 2014 (the “Submission”);³

NOTING articles 43(6) and 68(1) and (4) of the Rome Statute, rules 16 to 19, 86 and 87 of the Rules of Procedure and Evidence, regulation 23*bis* of the Regulations of the Court and regulations 79 to 96 of the Regulations of the Registry;

CONSIDERING that the Chamber directed “the Prosecution, the Defence, the LRVs and the VWU to file by 6 February 2015 their submissions on the draft Familiarisation Protocol as filed by the Registry or, in the alternative, the parties to file any request for witness preparation no later than 6 February 2015, along with a proposed witness preparation protocol, as well as the appropriate protocol on familiarisation”;

CONSIDERING that in its submission the Registry filed the “Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial” as filed in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*⁴ and the “Protocol on the practices used to familiarise witnesses for giving testimony applicable in the case *The*

¹ ICC-01/04-02/06-350.

² ICC-01/04-02/06-416.

³ ICC-01/04-02/06-419.

⁴ ICC-01/04-02/06-419-Anx1.

Prosecutor v. William Samoei Ruto and Joshua Arap Sang (ICC-01/09-01/11) and the case of *The Prosecutor v. Uhuru Muigai Kenyatta* (ICC-01/09-02/11)"⁵;

CONSIDERING that as the parties informed all the participants that they intend to file a request to prepare witnesses, the version of the familiarisation protocol filed in the Kenya case was used as a basis for discussion;

CONSIDERING that the parties, the participants and the Victims and Witnesses Unit (the "VWU" or the "Unit") met on 21 January 2015 to discuss the amendments that could be made to the text and agreed on the amendments to paragraphs 21 and 61 to 67 but could not reach any agreement on amendments to paragraphs 24, 25, 40 and 41;

RESPECTFULLY SUBMITS the "Victims and Witnesses Unit's submission on the Protocol on the practices to be used to familiarise witnesses for giving testimony pursuant to Order n° ICC-01/04-02/06-416" and the VWU's proposed version of the familiarisation protocol as annex 1 to the present submission:

1. The parties, the participants and the VWU agreed on the amendments of paragraph 21 and of paragraphs 61 to 67. Paragraph 21 was amended in order to include that the VWU will, in addition to the Chamber, also raise with the calling parties and the legal representative when applicable, any specific concerns regarding the integrity and well-being of a witness especially in relation to those who may be traumatised or vulnerable. Paragraphs 61 to 67 were amended in order to reflect the new practice of the Registry regarding the legal assistance that is provided under rule 74 of the Rules of Procedure and Evidence. The term of duty counsel is replaced by legal adviser, the reference to the list of counsel and external counsel is removed as well as the paragraph related to the costs and allowance.

⁵ ICC-01/04-02/06-419-Anx2.

2. The point of disagreement between the parties and the VWU is related to the joint travel of witnesses while they are travelling to the seat of the Court and their joint accommodation at the location of testimony.

I. Dispositions of the current familiarisation protocol

3. The practice foreseen in the protocol filed in the Bemba case and which also applies to Kenya 1 case is that witnesses are travelling and are accommodated jointly, whenever possible. This principle does not apply when the witnesses participate in the Court's Protection Programme or are otherwise protected or when the witnesses do not know each other and are not aware of each other status as witnesses before the Court. As such, this practice ensures that the anonymity of the witnesses is preserved.
4. The Protocol stipulates that this practise has been recognised by the VWU to be beneficial for the well-being of witnesses who feel less anxious to travel with other witnesses they already know and who experience less isolation and boredom when accommodated with people from the same cultural background.
5. The text also foresees that the Unit always reminds witnesses with regularity that they must not discuss their impending evidence with each other and of their role in preserving evidence and in avoiding unnecessary disclosure. This message is conveyed to the witnesses by the VWU throughout the familiarisation procedure.

II. The points of disagreement with the parties

6. In a meeting held on 21 January 2015 to discuss the familiarisation protocol, the Office of the Prosecutor has proposed that the current paragraphs 24 and 40 be amended to read as follows:
7. Paragraph 24: *"The VWU shall arrange for witnesses to travel separately at the location of testimony. In exceptional circumstances and after prior notice to the parties and the participant, and approval of the Chamber, witnesses may travel jointly if, in*

the VWU's assessment, their particular vulnerable situation so requires. VWU shall communicate the reasons for its recommendation in its notice to the parties, participants and Chamber".

8. Paragraph 40: *"The VWU shall arrange for witnesses to be accommodated separately at the location of testimony. In exceptional circumstances and after prior notice to the parties and the participant, and approval of the Chamber, witnesses may be accommodated jointly if, in the VWU's assessment, their particular vulnerable situation so requires. VWU shall communicate the reasons for its recommendation in its notice to the parties, participants and Chamber".*
9. The Defence concurs with the proposed amendment and is of the view that the proposal of the Prosecution will put in place a practical mechanism to maximise the well-being and protection of witnesses during their interaction with the Court and offer the best protection against witness tampering, interference of influence⁶.

III. Comments of the VWU

10. The Unit is of the view that the current practice of joint travel and joint accommodation *whenever this is possible* [emphasize added] should not be presented as an exception, subject to the approval of the Chamber. Based on its assessment, experience and regular consultation with the parties, the VWU does not in any case ever travel or accommodate jointly witnesses whose testimony may become contaminated and whose anonymity regarding their interaction with the Court would be compromised. The Unit also never travels and accommodates jointly witnesses when it would be prejudicial to the protective measures granted to the witnesses.
11. In practice, witnesses who travel together and are jointly accommodated are either part of the same family or already live together, know themselves and are already aware of their respective status as witnesses before the Court. This information is collected during the VWU's interaction with the witnesses or is

⁶ E-mail sent to the VWU on 29 January 2015 at 16h14.

communicated by the parties to the VWU. It would therefore not appear valuable to separate witnesses who have always been in contact or even live together just for their travels to the seat of the Court and not to further accommodate them together in the place of their testimony. Preventing witnesses who know each other and can meet at any time before or after their travel to the Court from travelling together would have no impact on the prevention of witness contamination, as such contamination, if it was to occur, could take place at any time outside their period of travel. This measure would thus only cause additional stress and hardship to the witnesses, without any benefit for the interests of justice. Quite the opposite, increasing hardship for witnesses is likely to impact adversely on the witness' capacity to appear, which would not be in the interests of justice. The Unit would like to remind that in any case, witnesses will always be separated from each other when they will start testifying before the Court.

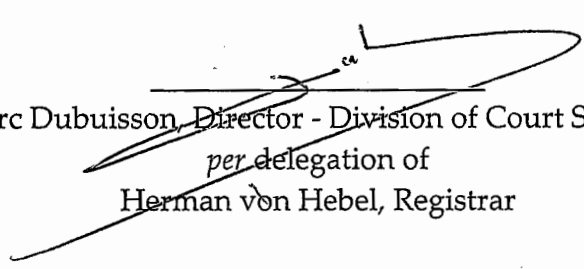
12. In addition, the Unit considers that although joint travel and accommodation is particularly beneficial for vulnerable witnesses, it can be beneficial to all witnesses as it increases a general sense of well-being. While this joint accommodation or travel presents undeniable logistical advantage and is consistent with the efficient use of the Court's resources allocated by the Assembly of States Parties, it also serves one of the main goals of the VWU as it increases the well-being of witnesses in order to facilitate testimony. The proposition of the parties to limit the joint travel and accommodation to vulnerable witnesses would be too restrictive and would prevent a case by case analysis of the VWU.
13. The Unit is of the view that the current practice of the VWU together with the appropriate safeguards applied by the Unit, such as the presence of a VWU staff and the reminder to witnesses that they should not discuss their evidence, does not as such pose any additional risk of witness tampering or create any interference or influence among the witnesses that would be prejudicial to the fair conduct of the proceedings.

14. Therefore the Unit does not see any reasons to deviate from this practice. The Unit is of the view that the need to for witnesses to be separated during travel and accommodated separately at the location of the testimony should be subject of ongoing preparatory discussion and should only be addressed to the Chamber in case of contention between the calling party and the VWU.

IV. The VWU's proposed amendments

15. The VWU paid attention to the arguments put forward by the parties during the meeting and their concerns to avoid joint travel and accommodation of witnesses in order to get the best protection against witness tampering, influence or interference.
16. Therefore and in view to reach a consensus on this matter, the Unit has proposed to amend the existing paragraphs in order to better address the views of the parties and to give them further guarantees and assurances that their concerns will be fully considered by the VWU. The amended version of paragraphs 24 and 40 now stipulates that the calling party is always consulted and that a discussion is taking place at the beginning of the trial and in the course of witnesses' appearance. The calling party will then have an opportunity to address its specific concerns to the VWU regarding a potential contamination of the witnesses testimonies and to bring to the Unit's attention any information that the Unit may not be aware of that would prevent a joint travel and accommodation.
17. In addition, the amended text makes it clear that only witnesses who are not participating in the Court Protection Programme and who are aware of their respective interaction with the Court may be offered to travel or be accommodated jointly.

18. Lastly, in order to reflect the parties' wish that the Chamber is involved and ultimately decides on this issue, the VWU has also amended the text to foresee that in case where no agreement can be reached with the calling party, the Chamber is seized of the matter. The VWU is of the view that this issue should first be discussed with the calling party and that the Chamber should only be consulted in case of unsolvable disagreement.



Marc Dubuisson, Director - Division of Court Services
per delegation of
Herman von Hebel, Registrar

Dated this 6 February 2015

At The Hague, the Netherlands