

**Cour  
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**International  
Criminal  
Court**

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No.: ICC-01/05-01/13

Date: 19 March 2015

**TRIAL CHAMBER VII**

**Before:** Judge Olga Herrera Carbuccion  
Judge Chile Eboe-Osuji  
Judge Bertram Schmitt

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

**IN THE CASE OF**

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO  
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU  
AND NARCISSE ARIDO***

**Public Document  
with  
Public Annexes A and B**

**Prosecution's Proposed Protocol on Witness Preparation**

**Source:** The Office of the Prosecutor

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

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## I. Introduction

1. The Office of the Prosecutor (“Prosecution”) seeks authorisation to conduct witness preparation in this case, pursuant to articles 64(2), 64(3)(a), 64(6)(f) and 64(8)(b) 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”).

2. In order to streamline the witness preparation process, the Prosecution proposes the implementation of the annexed witness preparation protocol (“Proposed Protocol”). The Proposed Protocol is based on the *Ruto & Sang* and *Kenyatta* protocols<sup>1</sup> adopted by Trial Chamber V (“Established Witness Preparation Protocols”). As detailed below, the Proposed Protocol modifies the Established Witness Preparation Protocols mainly in relation to the following matters: (a) managing new information volunteered by a witness;<sup>2</sup> (b) the persons conducting the preparations session;<sup>3</sup> (c) the purpose of showing potential exhibits to the witness;<sup>4</sup> and (d) informing the witness of evidence obtained from other witnesses.<sup>5</sup> In addition, the Prosecution has clarified<sup>6</sup> and aligned<sup>7</sup> other provisions for a more efficient application of the Proposed Protocol.

3. The decisions adopting these protocols set out in detail the reasoning behind, and the justifications for the witness preparation sought to be applied in this case. These are incorporated by reference herein.<sup>8</sup>

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<sup>1</sup> ICC-01/09-01/11-524-Anx; ICC-01/09-02/11-588-Anx.

<sup>2</sup> Proposed Protocol, para.2.

<sup>3</sup> Proposed Protocol, para.6.

<sup>4</sup> Proposed Protocol, para.21.

<sup>5</sup> Proposed Protocol, para.27.

<sup>6</sup> Provisions related to (i) attempting to influence factual events that the witness did not perceive (see Proposed Protocol, para.3); (ii) explaining what the witness might be questioned about in court (Proposed Protocol, para.20).

<sup>7</sup> Provisions related to the location (see Proposed Protocol, para.7) and log (see Proposed Protocol, para.11) of the preparation session.

<sup>8</sup> ICC-01/09-01/11-524; ICC-01/09-02/11-588.

4. The adoption and implementation of the Proposed Protocol would streamline the presentation of evidence, allowing the trial process to focus on the salient aspects of the witnesses' testimony essential to the fair adjudication of the case. Additionally, it would promote uniformity in the Court's trial practice by building on the Established Witness Preparation Protocols.

## II. Submissions

5. The Proposed Protocol outlines (i) the purpose of witness preparation;<sup>9</sup> (ii) the responsibilities of a party conducting a witness preparation session;<sup>10</sup> (iii) the location and timing of the session;<sup>11</sup> (iv) the required record keeping;<sup>12</sup> (v) the permissible and prohibited conduct of the calling party;<sup>13</sup> and (vi) the disclosure duties.<sup>14</sup>

6. Trial Chamber V has found that properly conducted witness preparation is likely to enhance "efficiency, fairness and expeditiousness".<sup>15</sup> It further articulated that "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."<sup>16</sup> Considering that this is the first case before the Court prosecuting article 70 crimes, the Prosecution believes that it is particularly important that witnesses are fully apprised of the factual and the legal issues.

7. Similarly, a streamlined witness preparation enhances the protection and well-being of witnesses, in accordance with article 68(1) of the Statute. It contributes to the reduction of stress and anxiety for witnesses before testifying, familiarises them with

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<sup>9</sup> Proposed Protocol, paras.1-4.

<sup>10</sup> Proposed Protocol, paras.5-6.

<sup>11</sup> Proposed Protocol, paras.7-9.

<sup>12</sup> Proposed Protocol, paras.10-12.

<sup>13</sup> Proposed Protocol, paras.13-27.

<sup>14</sup> Proposed Protocol, para.28.

<sup>15</sup> ICC-01/09-01/11-524, para.35; ICC-01/09-02/11-588, para.39.

<sup>16</sup> ICC-01/09-01/11-524, para.31; ICC-01/09-02/11-588, para.35.

what to expect during their time in court, and provides them an opportunity to communicate their concerns to the party.<sup>17</sup>

8. The Proposed Protocol is not prejudicial to the Accused's rights. It contains appropriate safeguards and addresses attendant concerns regarding coaching, training and practising, in accordance with those adopted by Trial Chamber V in the Kenya cases. It (a) lays out clear guidelines establishing permissible and prohibited conduct of the calling party;<sup>18</sup> (b) requires that counsel act in accordance with professional standards and in good faith at all times and prohibits the intentional interference with a witness' evidence;<sup>19</sup> and (c) requires the video recording of the preparation session.<sup>20</sup> These safeguards, as well as the provision of a meaningful opportunity for the parties to cross-examine witnesses at trial, provide an important and sufficient check against any improper conduct.<sup>21</sup>

9. As noted, the Proposed Protocol modifies the Established Witness Preparation Protocols mainly in relation to: (a) managing new information volunteered by a witness;<sup>22</sup> (b) the persons conducting the preparations session;<sup>23</sup> (c) the purpose of showing potential exhibits to the witness;<sup>24</sup> and (d) informing the witness of evidence obtained from other witnesses.<sup>25</sup> Further modifications have been made to clarify and align the provisions concerning: (i) attempting to influence factual events that the witness did not perceive;<sup>26</sup> (ii) explaining what the witness might be questioned about in court;<sup>27</sup> and (iii) the location<sup>28</sup> and log<sup>29</sup> of the preparation session.

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<sup>17</sup> ICC-01/09-01/11-524, para.37; ICC-01/09-02/11-588, para.41.

<sup>18</sup> Proposed Protocol, paras.13-27.

<sup>19</sup> Proposed Protocol, paras.3-4.

<sup>20</sup> Proposed Protocol, para.10.

<sup>21</sup> ICC-01/09-01/11-524, para.45; ICC-01/09-02/11-588, para.48.

<sup>22</sup> Proposed Protocol, para.2.

<sup>23</sup> Proposed Protocol, para.6.

<sup>24</sup> Proposed Protocol, para.21.

<sup>25</sup> Proposed Protocol, para.27.

<sup>26</sup> Proposed Protocol, para.3.

<sup>27</sup> Proposed Protocol, para.20.

<sup>28</sup> Proposed Protocol, para.7.

<sup>29</sup> Proposed Protocol, para.11.

10. For ease of reference, the Proposed Protocol is attached to this filing in track-changes at Annex A. A clean version thereof is attached at Annex B.

#### **A. New information volunteered by the witness**

11. The Established Witness Preparation Protocols prohibit conducting witness preparation for the purpose of “seeking new evidence or continuing the calling party’s investigation”.<sup>30</sup> However, they do not foresee the situation where a witness, during the preparation session, volunteers new information. Indeed, this is not an uncommon scenario. Accordingly, the Prosecution proposes that the calling party may follow-up on such information.<sup>31</sup> The ability to follow-up would allow the calling party to better assess, before the witness testifies, the relevance of the information to the case, investigation, or its impact on the witness’ evidence as a whole. It is further in full agreement with the Prosecution’s duties under article 54(1) of the Statute and will help ensure that the Chamber is not foreclosed from the possibility of hearing the entirety of a witness’s relevant evidence in its search for the truth.

12. The Prosecution proposes that newly volunteered information be treated in the same manner as that prescribed under the Established Witness Preparation Protocols regarding “new information”<sup>32</sup> resulting from the review and clarification of a witness’ evidence. As such, it would be disclosed to the non-calling party in advance of the witness’ testimony.<sup>33</sup> Trial Chamber V has effectively endorsed this approach, determining in the context of clarifications obtained from witnesses that “it is preferable to requiring the opposing party to react to new evidence only when the

<sup>30</sup> ICC-01/09-01/11-524-Anx, para.2; ICC-01/09-02/11-588-Anx, para.2.

<sup>31</sup> Proposed Protocol, para.2.

<sup>32</sup> ICC-01/09-01/11-524-Anx, para.30; ICC-01/09-02/11-588-Anx, para.30 ; ICC-01/09-01/11-524, para.42; ICC-01/09-02/11-588, para.46.

<sup>33</sup> Proposed Protocol, paras.2 and 28.

witness is on the stand”.<sup>34</sup> Further, the Prosecution suggests that the information be made available to Victims and Witnesses Unit if it is related to witness security.<sup>35</sup> This measure may enhance the well-being of the witness.

13. The Proposed Protocol is not prejudicial to, or inconsistent with, the rights of the Defence. To the contrary, allowing the follow-up of newly volunteered relevant information may benefit the disposition of contested matters between the parties. The use of such information is subject to the Chamber’s control in its management of the proceedings. Thus, the Proposed Protocol promotes the truth-seeking function of the Court without attenuating the parties’ procedural rights. Further, the attendant disclosure requirement promotes trial efficiency by limiting the necessity for the parties, particularly the Defence, to have to explore new information with a witness for the first time while they are on the stand.<sup>36</sup>

## **B. Persons conducting the preparation session**

14. The Established Witness Preparation Protocols provide for the preparation of a witness to be conducted by a lawyer of the calling party “who will question the witness in court”<sup>37</sup> and accompanied by “one other lawyer of the calling party’s team”.<sup>38</sup> The Prosecution considers that the parties should have more flexibility in this area to be able to manage unusual circumstances: for instance, the unavailability of a particular lawyer; or, depending on the situation or evidence of a particular witness, the calling party may consider the assistance of an investigator or psychologist more appropriate than that another lawyer.

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<sup>34</sup> ICC-01/09-01/11-524, para.42; ICC-01/09-02/11-588, para.46.

<sup>35</sup> Proposed Protocol, para. 2.

<sup>36</sup> ICC-01/09-01/11-524, para.42; ICC-01/09-02/11-588, para.46.

<sup>37</sup> ICC-01/09-01/11-524-Anx, para.6; ICC-01/09-02/11-588-Anx, para.6.

<sup>38</sup> ICC-01/09-01/11-524-Anx, para.7; ICC-01/09-02/11-588-Anx, para.7.

15. This is not prejudicial to, or inconsistent with, the rights of the Defence, as any member of the Prosecution would be bound by the guidelines set in the Proposed Protocol and therefore prohibited from engaging in improper conduct during the preparation sessions. Given the safeguards in place and the right of cross-examination, the Proposed Protocol more than satisfies the procedural framework of the Statute.

### **C. The purpose of showing potential exhibits to the witness**

16. The Established Witness Preparation Protocols provide that the calling party may show witnesses exhibits and ask for their comment on them “for the purpose of determining the utility of using the exhibits in court.”<sup>39</sup> The Prosecution considers that this may unnecessarily constrain the parties. The purpose of an exhibit may also be, for instance, to determine the credibility of a witness when clarifying his or her previous statements. The Prosecution proposes to delete the qualification “for the purpose of determining the utility of using the exhibits in court” from this paragraph.<sup>40</sup>

17. This modification is not prejudicial to, or inconsistent with, the rights of the Defence. Rather, it is in line with the Established Witness Preparation Protocols, which nevertheless prohibit the calling party from using the preparation process to “seek[ ] new evidence or continu[e] the calling party’s investigation”.<sup>41</sup>

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<sup>39</sup> ICC-01/09-01/11-524-Anx, para.23; ICC-01/09-02/11-588-Anx, para.23.

<sup>40</sup> Proposed Protocol, para.21.

<sup>41</sup> Proposed Protocol, para.2; See also ICC-01/09-01/11-524-Anx, para.2; ICC-01/09-02/11-588-Anx, para.2.

#### **D. Informing the witness of evidence obtained from other witnesses**

18. The Established Witness Preparation Protocols do not allow the calling party to “inform the witness of the evidence of other witnesses”.<sup>42</sup> As currently worded, whether the provision proscribes providing the source of the information as opposed to its nature may be read as ambiguous. The Prosecution takes the position that the parties should be allowed to refer to evidence which may have been obtained from other witnesses during the course of witness preparation, but without revealing its source, for instance, when asking clarifying questions.<sup>43</sup> This will eliminate any potential suggestiveness as may attach to one source *versus* another.

19. This modification is not prejudicial to, or inconsistent with, the rights of the Defence, as the Proposed Protocol is in line with routine investigative practices as well as the practice of many Chambers during the questioning of witnesses in court.

#### **E. Clarification and alignment of certain provisions**

20. Further amendments have been made to clarify and align provisions in the Established Witness Preparation Protocols, explained in detail below.

21. These modifications are not prejudicial to, or inconsistent with, the rights of the Defence. To the contrary, they contribute to an efficient application of the Proposed Protocol and avoid litigation at a later stage, which may unnecessarily delay the course of the proceedings. Further, the alignments do not affect the substance of the provisions, but aim solely to make the Proposed Protocol more concise.

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<sup>42</sup> ICC-01/09-01/11-524-Anx, para.29; ICC-01/09-02/11-588-Anx, para.29.

<sup>43</sup> Proposed Protocol, para.27.

(i) *Attempting to influence factual events that the witness did not perceive*

22. The Established Witness Preparation Protocols prohibit the calling party from attempting to influence factual events that the witness did not perceive.<sup>44</sup> As formulated, there is ambiguity as to whether the term “perceive” encompasses “hearsay”. In the event that this is not the case, advising the witness that hearsay testimony is permissible,<sup>45</sup> could nevertheless fall within the scope of prohibited conduct. Therefore, the Prosecution proposes that this clause be replaced by the following phrase: “attempting to improperly influence the testimony of a witness, directly or indirectly, is prohibited”<sup>46</sup>, which also better aligns with paragraph 26 of the Proposed Protocol.

(ii) *Explaining what the witness might be questioned about in court*

23. The Established Witness Preparation Protocols provide that the calling party may explain to the witness that “he or she *may not* be questioned in court on matters upon which investigators previously questioned the witness (emphasis added).”<sup>47</sup> This may be incorrectly interpreted to mean that the parties are not allowed to question the witness in court on matters already raised with him or her by an investigator (construing “may” in its permissive sense). To avoid such confusion, the Prosecution proposes that the operative language be clarified such that the witness is informed that: “he or she *might not* be questioned in court on *all* matters upon which investigators previously questioned the witness (emphasis added).”<sup>48</sup>

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<sup>44</sup> ICC-01/09-01/11-524-Anx, para.3; ICC-01/09-02/11-588-Anx, para.3.

<sup>45</sup> ICC-01/04-01/06-1399, para.28; ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Decision on Prosecution’s Appeal on Admissibility of Evidence, 16 February 1999, para.15.

<sup>46</sup> Proposed Protocol, para.3.

<sup>47</sup> ICC-01/09-01/11-524-Anx, para.22; ICC-01/09-02/11-588-Anx, para.22.

<sup>48</sup> Proposed Protocol, para.20.

(iii) *Location of the preparation session*

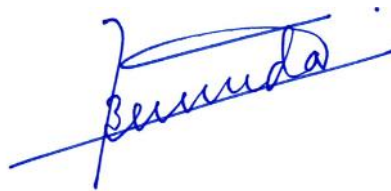
24. The Prosecution has amended the language of the Established Witness Preparation Protocols from “witness preparation may be conducted at the seat of the Court or at the place of testimony, if elsewhere, or any other place,”<sup>49</sup> to, “In principle, witness preparation should be conducted at the seat of the Court or at the place of testimony”<sup>50</sup> as long as due regard is given to the confidentiality of information and the security of the witness.<sup>51</sup>

(iv) *The log of the preparation session*

25. Finally, the Established Witness Preparation Protocols instruct the calling party to record the location, duration, and attendees at the preparation session, in the log of the preparation session.<sup>52</sup> The Prosecution considers it necessary and appropriate that the calling party also record the time of the preparation session.<sup>53</sup>

### III. Relief Requested

26. The Prosecution requests that the Chamber invite the observations of the Defence, and adopt the Proposed Protocol, attached at Annex B.




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**Fatou Bensouda, Prosecutor**

Dated this 19<sup>th</sup> Day of March 2015  
At The Hague, The Netherlands

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<sup>49</sup> ICC-01/09-01/11-524-Anx, paras.8 and 9; ICC-01/09-02/11-588-Anx, paras.8 and 9.

<sup>50</sup> Proposed Protocol, para.7.

<sup>51</sup> Proposed Protocol, para.7.

<sup>52</sup> ICC-01/09-01/11-524-Anx, para.13; ICC-01/09-02/11-588-Anx, para.13.

<sup>53</sup> Proposed Protocol, para.11.