

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06

Date: 17 June 2015

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public with two public annexes

Decision on the protocol on witness familiarisation

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon

Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 43(6), 64(2) and (3)(a) and 68(1) and (4) of the Rome Statute ('Statute') and Rules 16-18 and 134 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on the protocol on witness familiarisation'.

I. PROCEDURAL HISTORY

1. On 18 December 2014, the Chamber issued an order setting deadlines for the filing of submissions on outstanding protocols ('Order').¹ Therein, the Chamber directed, *inter alia*, (i) the Registry to 'submit draft Protocols into the record [...] by 22 December 2014' as a basis for further submissions, and (ii) the parties and participants to 'file, by 6 February 2015, their submissions on the draft [f]amiliarisation [p]rotocol, as filed by the Registry'.²
2. On 22 December 2014, pursuant to the Order, the Registry submitted into the record, *inter alia*, a copy of the familiarisation protocol³ as filed in the *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta* ('Draft Protocol').
3. On 6 February 2015, the Office of the Prosecutor ('Prosecution'), the defence team for Mr Ntaganda ('Defence') and the Legal Representatives of Victims ('LRVs') filed joint submissions on the familiarisation protocol to be adopted in this case ('Joint Submissions'), as well as a draft protocol.⁴

¹ Order setting deadlines for the filing of submissions on outstanding protocols, ICC-01/04-02/06-416.

² Order, ICC-01/04-02/06-416, page 6.

³ Annex 2 to Victims and Witnesses Unit's submission pursuant to Order n° ICC-01/04-02/06-416, ICC-01/04-02/06-419-Anx2.

⁴ Joint submissions of the Prosecution, Defence and Legal Representatives of Victims on the proposed Familiarisation Protocol, ICC-01/04-02/06-448, with annex (ICC-01/04-02/06-448-Anx1).

4. On that same day, the Victims and Witnesses Unit ('VWU') filed its observations ('VWU Submissions').⁵

II. SUBMISSIONS

5. The parties, participants and VWU agree on all aspects of the proposed 'Protocol on the practices to be used to familiarise witnesses for giving testimony' ('Familiarisation Protocol'), with the exception of two paragraphs⁶ relating to travel and accommodation arrangements for witnesses.⁷
6. In the Joint Submissions, it is stated that the Prosecution proposed ('Prosecution's Proposal') – and Defence and LRVs agreed – to amend paragraphs 24 and 39 of the Familiarisation Protocol in order to provide that witnesses are to travel and be accommodated separately, save in exceptional circumstances following discussion between all the parties and participants and with the prior approval of the Chamber.⁸
7. While the Prosecution, Defence and LRVs 'acknowledged the potential benefits of joint travel and accommodation for certain witnesses, and were sympathetic to the financial and logistical considerations of VWU', they are concerned about the risk of 'contamination' that could result from joint travel and accommodation of witnesses in this case.⁹
8. The Defence submits that the Prosecution's Proposal has four advantages, namely: (i) it provides a mechanism to enhance the well-being and protection

⁵ 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, ICC-01/04-02/06-451. *See also*, Annex 1 to 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, ICC-01/04-02/06-451-Anx1.

⁶ In the Joint Submissions (*see* ICC-01/04-02/06-448, para. 6) these are referred to as paragraphs 24 and 39; in the VWU Submissions they are referred to as paragraphs 24 and 40 (*see* ICC-01/04-02/06-451, paras 6-8) (as the proposal contained in the VWU Submissions breaks the previous paragraph 24 into two paragraphs). For the purposes of this decision they will be referred to as paragraphs 24 and 39, reflecting the numbering of the Draft Protocol without the proposals of any of the parties, participants or of the VWU.

⁷ Joint Submissions, ICC-01/04-02/06-448, paras 4-6; VWU Submissions, ICC-01/04-02/06-451, paras 1-2.

⁸ Joint Submissions, ICC-01/04-02/06-448, paras 12-13 and 15.

⁹ Joint Submissions, ICC-01/04-02/06-448, para. 14.

of witnesses; (ii) it offers protection against 'witness influence, interference or tampering'; (iii) it provides a transparent mechanism involving all parties and participants; and (iv) it reduces the need for extensive cross-examination on the issue of possible witness influence, interference or tampering.¹⁰

9. The VWU disagrees with the Prosecution's Proposal, as it submits that the current practice already provides sufficient safeguards in respect of the concerns raised.¹¹ The VWU states that it does not arrange for the travel and accommodation of witnesses jointly where this would prejudice their protective measures, their anonymity, or where their 'testimony may become contaminated'.¹² The VWU also notes that witnesses are regularly reminded not to discuss their impending testimony,¹³ and that the presence of VWU staff provides an additional safeguard against 'interference or influence among the witnesses'.¹⁴ The VWU therefore states that, in practice, witnesses who travel and are accommodated together are 'either part of the same family or already live together, and know themselves and are already aware of their respective status as witnesses before the Court'.¹⁵ As such, the VWU submits that separate travel and accommodation would result in unnecessary hardship to the witnesses without impacting on the prevention of witness contamination.¹⁶ In addition, the VWU submits that joint travel and accommodation promotes witness well-being, particularly for vulnerable witnesses, and presents undeniable logistical advantages and is consistent with the efficient use of the Court's resources.¹⁷ Moreover, the VWU recalls that witnesses will always be separated from each other when they start testifying before the Court.¹⁸

¹⁰ Joint Submissions, ICC-01/04-02/06-448, para. 16.

¹¹ VWU Submissions, ICC-01/04-02/06-451, para. 13.

¹² VWU Submissions, ICC-01/04-02/06-451, paras 3 and 10.

¹³ VWU Submissions, ICC-01/04-02/06-451, paras 5 and 13.

¹⁴ VWU Submissions, ICC-01/04-02/06-451, para. 13.

¹⁵ VWU Submissions, ICC-01/04-02/06-451, para. 11.

¹⁶ VWU Submissions, ICC-01/04-02/06-451, para. 11.

¹⁷ VWU Submissions, ICC-01/04-02/06-451, para. 12.

¹⁸ VWU Submissions, ICC-01/04-02/06-451, paras 5, 11 and 13.

10. The VWU contends that the Prosecution's Proposal would be 'too restrictive' and prevents 'case-by-case analysis'.¹⁹ However, taking account of the issues raised by the parties and participants,²⁰ the VWU proposes amending the Familiarisation Protocol to specify that: (i) travel and accommodation arrangements of witnesses be discussed between the VWU and the calling party as a standard practice at the beginning of the trial and in the course of witnesses' appearances;²¹ and (ii) only in the event of disagreement, after discussion between the calling party and the Chamber, should the issue be raised before the Chamber.²² As an additional safeguard, the VWU suggests that the Familiarisation Protocol expressly state that joint travel and accommodation would only be offered to those witnesses who are not participating in the Court's Protection Programme and who are already aware of their respective interaction with the Court.²³

III. ANALYSIS

11. The Chamber notes its duty, pursuant to Article 64(2) of the Statute, to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Pursuant to Article 68(1) of the Statute, the Chamber is also required to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'.

12. The Chamber is mindful of the concerns of the VWU in relation to the well-being of witnesses, as well as to the efficient use of its financial and logistical resources. Moreover, the Chamber notes the specific mandate and

¹⁹ VWU Submissions, ICC-01/04-02/06-451, para. 12.

²⁰ VWU Submissions, ICC-01/04-02/06-451, paras 15-16.

²¹ VWU Submissions, ICC-01/04-02/06-451, para. 16.

²² VWU Submissions, ICC-01/04-02/06-451, para. 18.

²³ VWU Submissions, ICC-01/04-02/06-451, para. 17.

expertise of the VWU relating to witnesses.²⁴ The Chamber therefore considers that, as a general principle, the VWU should be granted a certain level of discretion in carrying out its duties.

13. The Chamber has also taken note of the issues raised in the Joint Submissions, specifically in regard to potential 'contamination' of the witnesses' evidence and to the preservation of the integrity of the proceedings. However, the Chamber is not persuaded that such concerns necessitate the measures outlined in the Prosecution's Proposal. The Chamber endorses the view of Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo* that, in determining the appropriate travel and accommodation arrangements for witnesses, 'fact-sensitive decisions should be made, bearing in mind particularly the personal circumstances of each witness and the areas of evidence they will be addressing'.²⁵ The Chamber considers that this is best accomplished through communication between the parties and VWU, in a manner which enables particular concerns to be raised in any individual case.

14. The Chamber nonetheless considers that, in respect of the accommodation of witnesses, it is appropriate to draw a distinction between witnesses who have yet to testify, those who are in the process of testifying and those who have completed their testimony.²⁶ In this regard, the Chamber notes in particular that the Familiarisation Protocol already provides that where there is overlap in witness accounts, or a 'risk of evidence being tainted' by contact, the VWU

²⁴ See e.g. Article 43(6) of the Statute and Rules 17-19 of the Rules; see also *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' of Pre-Trial Chamber I, 26 November 2008, ICC-01/04-01/07-776 OA 7.

²⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, 23 May 2008, ICC-01/04-01/06-1351, para. 31. See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016 ('Bemba Decision of 18 November 2010'), para. 15.

²⁶ *Bemba Decision of 18 November 2010*, ICC-01/05-01/08-1016, para. 17.

shall, in consultation with the calling party and to the extent possible, arrange for the separation of witnesses once they have commenced their testimony.²⁷

15. Further, the Chamber considers that it should only be seised of matters relating to the travel or accommodation of witnesses in the event that the parties, participants and Registry are unable to agree in particular instances.

16. Accordingly, the Chamber finds that paragraphs 24 and 39 of the Familiarisation Protocol shall read as follows:

24. Wherever possible²⁸ the VWU may, in consultation with the calling party and Legal Representative (where applicable), arrange for witnesses to travel jointly to the seat of the Court. In determining whether or not witnesses should travel jointly, regard shall be had, in particular, to whether the witness is participating in the Court's protection programme, whether joint travel might compromise confidentiality in respect of the witness's interaction with the Court and the risk of 'contamination' of the witness's evidence. In the event of irreconcilable disagreement between the calling party and the VWU the Chamber shall be seised of the matter in a timely manner.

...

39. Wherever possible, the VWU may, in consultation with the calling party and Legal Representative (where applicable), arrange for witnesses to be accommodated jointly at the location of testimony. In determining whether or not witnesses should be accommodated jointly, regard shall be had, in particular, to whether the witness is participating in the Court's protection programme, whether joint accommodation might compromise confidentiality in respect of the witness's interaction with the Court and the risk of 'contamination' of the witness's evidence. In the event of irreconcilable disagreement between the calling party and the VWU the Chamber shall be seised of the matter in a timely manner.

17. Finally, the Chamber notes that, other than making a small number of amendments to the Draft Protocol to reflect its application to this case, the Chamber has confined itself to considering the points of dispute. Annex A to

²⁷ See Joint Submissions, ICC-01/04-02/06-448-Anx1, para. 41; VWU Submissions, ICC-01/04-02/06-451-Anx1, para. 43.

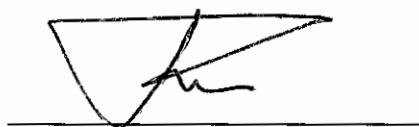
²⁸ As a general rule, this will not apply to witness who participate in the Court's protection programme and who do not live together, unless the Protection Officer takes a decision to the contrary.

this decision contains the Familiarisation Protocol in the form to be applied in this case; Annex B to this decision contains a version showing, in tracked changes for ease of reference, all changes made to the Draft Protocol filed by the Registry on 22 December 2014.

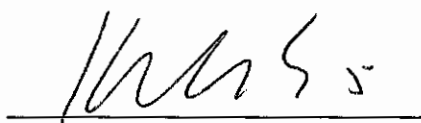
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS that the Familiarisation Protocol contained at Annex A to this decision shall apply in this case.

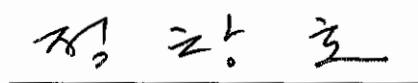
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 17 June 2015

At The Hague, The Netherlands