

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/05-01/13
Date: **15 September 2015**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU
and NARCISSE ARIDO

Public with public Annex

Decision on Witness Preparation and 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

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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 VII (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 43(6) and 64(2) of the Rome Statute (the ‘Statute’), and Rules 16(2) and 17(2) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on Witness Preparation and Familiarisation’.

I. Procedural history

1. On 23 February 2015, the Chamber issued an order seeking submissions from the parties on potential agenda items for the first status conference.¹
2. On 19 March 2015, the Office of the Prosecutor (the ‘Prosecution’) filed the ‘Prosecution’s Proposed Protocol on Witness Preparation’ (the ‘Prosecution Proposed Protocol’).²
3. On 20 March 2015, the Prosecution and the Registry filed their observations in preparation for the first status conference.³
4. On 13 April 2015, the defence teams of all the accused (the ‘Defence’) filed the ‘Joint Defence Submissions on witness preparation’,⁴ and the ‘Joint Defence Submissions on Witness Contact and Familiarisation’.⁵

¹ [Order seeking submissions in advance of first status conference](#), ICC-01/05-01/13-824.

² [ICC-01/05-01/13-856](#) with [Public Annex A](#) and [Public Annex B](#).

³ Prosecution’s Observations on the Agenda of the First Status Conference, 20 March 2015, ICC-01/05-01/13-859-Conf, with Public Annexes [A](#), [B](#) and [D](#) and Confidential Annex C; a public redacted version is also available, [ICC-01/05-01/13-859-Red](#); [Registry submission to the Chamber regarding trial preparation](#), 20 March 2015, ICC-01/05-01/13-860.

⁴ [ICC-01/05-01/13-897](#).

⁵ [ICC-01/05-01/13-898](#), with [Public Annex A](#) and [Public Annex B](#).

II. Submissions

A. Prosecution

5. The Prosecution suggests that the Chamber follow the example of the protocols adopted by Trial Chamber V in the cases of *The Prosecutor v. Ruto and Sang* and *The Prosecutor v. Kenyatta* (the 'Kenya Protocols'), albeit with amendments.⁶
6. First, as regards the management of new information volunteered by a witness, the Prosecution proposes that the calling party be able to follow up on any new evidence volunteered by the witness.⁷ The Prosecution suggests that the new evidence be treated as 'new information' resulting from the review and clarification of the evidence of a witness, as stated in the Kenya Protocols.⁸
7. Second, in relation to the persons conducting the preparation session, the Prosecution submits that the parties should have more flexibility in order to manage circumstances where one of the lawyers is unavailable or where the assistance of a psychologist is required.⁹
8. Third, for the purpose of showing potential exhibits to the witness, the Prosecution considers that the Kenya Protocols needlessly constrain the parties, by providing that exhibits may be shown to the witness only 'for the purpose of determining the utility of using the exhibits in court.'¹⁰ The Prosecution proposes the deletion of that requirement.
9. Fourth, when informing the witness of evidence obtained from other witnesses, the Prosecution considers that the parties should be allowed to refer to evidence

⁶ [ICC-01/05-01/13-856](#), para. 1.

⁷ [ICC-01/05-01/13-856](#), para. 11.

⁸ [ICC-01/05-01/13-856](#), para. 12.

⁹ [ICC-01/05-01/13-856](#), para. 14.

¹⁰ [ICC-01/05-01/13-856](#), para. 16.

which may have been obtained from other witnesses during the course of witness preparation, but without revealing its source.¹¹

10. The Prosecution also proposes changes as regards the prohibition on the calling party from influencing factual events that the witness did not perceive,¹² and clarifying language concerning the questioning of witnesses in court.¹³

11. With regard to the location of the preparation session, the Prosecution submits that, in principle, witness preparation should be conducted at the seat of the Court or at the place of testimony, as long as due regard is given to the confidentiality of information and the security of the witness.¹⁴ It submits that in addition to the location, duration and attendees, the time of a preparation session should also be recorded.¹⁵

12. With regard to witness familiarisation, the Prosecution states that it does not oppose the adoption of the latest version of the protocol submitted by the Victims and Witnesses Unit (the 'VWU') in the cases of *The Prosecutor v. Bosco Ntaganda* (the 'Ntaganda case') and *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* (the 'Gbagbo and Blé Goudé case'), albeit with some exceptions.¹⁶ The Prosecution believes that references to victims, legal representatives and participants should be removed, since they are not applicable in this case.¹⁷ It also proposes clarifying the language related to contact with witnesses.¹⁸ Finally, the Prosecution recommends redrafting the provision on the location of meetings for the sake of clarity.¹⁹

¹¹ [ICC-01/05-01/13-856](#), para. 18.

¹² [ICC-01/05-01/13-856](#), para. 22.

¹³ [ICC-01/05-01/13-856](#), para. 23.

¹⁴ [ICC-01/05-01/13-856](#), para. 24.

¹⁵ [ICC-01/05-01/13-856](#), para. 25.

¹⁶ [ICC-01/05-01/13-859-Red.](#)

¹⁷ [ICC-01/05-01/13-859-Red.](#), para. 16.

¹⁸ [ICC-01/05-01/13-859-Red.](#), para. 16; see also, [Annex A](#) and [Annex B](#), paras 29 and 32.

¹⁹ [ICC-01/05-01/13-859-Red.](#), para. 16; see also, [Annex A](#) and [Annex B](#), para. 35.

B. Defence

13. The Defence opposes the general practice of ‘witness preparation’ meetings between witnesses and the calling party immediately prior to the testimony of witnesses.²⁰
14. The Defence contends that the rationale for implementing a general practice of witness preparation does not apply to this case, in respect of Prosecution witnesses. It submits that the Prosecution has recently interviewed the small number of witnesses in this case.²¹ Moreover, the Defence contends that most of the witnesses have already testified before the Court, and are mindful of its procedures.²²
15. The Defence submits that the need for witness preparation should be determined on a case-by-case basis,²³ and argues that consequently the Chamber should not adopt the Prosecution Proposed Protocol.²⁴
16. The Defence also requests the Chamber to abstain from relying on ‘specific principles’ set out in the Prosecution Proposed Protocol, which it is submitted impose additional and unsupported disclosure obligations on the Defence.²⁵
17. The Defence further contends that the Prosecution fails to distinguish between the different legal regimes that apply to exculpatory and incriminatory information.²⁶
18. As regards witness familiarisation, the Defence opposes the suggestion of the Prosecution on the limitation of contact with witnesses.²⁷ In relation to the

²⁰ [ICC-01/05-01/13-897](#), para. 2.

²¹ [ICC-01/05-01/13-897](#), para. 4; page 4.

²² [ICC-01/05-01/13-897](#), para. 11.

²³ [ICC-01/05-01/13-897](#), page 7, paras 20-21.

²⁴ [ICC-01/05-01/13-897](#), page 10 and para. 30.

²⁵ [ICC-01/05-01/13-897](#), para. 33.

²⁶ [ICC-01/05-01/13-897](#), paras 32, 39 and 42.

²⁷ [ICC-01/05-01/13-898](#), paras 57-58.

location of the meetings with witnesses, the Defence has added that parties should try to reach an agreement concerning the location and modalities of the interview in case the calling party does not have the time or resources to attend an interview *in situ*.²⁸

C. Registry

19. The Registry submits that the VWU is ‘generally required’ to carry out a witness familiarisation procedure and recommends the adoption of a familiarisation protocol, as adopted in the *Gbagbo and Blé Goudé* case.²⁹

III. Analysis

A. Witness Preparation

20. The practice of ‘witness preparation’³⁰ or ‘witness proofing’³¹ is not provided for explicitly in the Court’s statutory framework and cannot be considered a general principle of law within the meaning of Article 21(1)(c) of the Statute.³² Nevertheless, this practice is prevalent in common law legal systems and has been accepted before other international tribunals³³ and before this Court. Furthermore, trial chambers have a broad discretion pursuant to Article 64(2) and (3)(a) of the Statute to adopt adequate procedures to ensure that the trial is fair and expeditious, including in relation to witnesses appearing before the Court.

²⁸ [ICC-01/05-01/13-898](#), para. 63.

²⁹ [ICC-01/05-01/13-860](#), paras 1-2.

³⁰ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (‘*Ruto and Sang*’), Trial Chamber V, [Decision on witness preparation](#), 2 January 2013, ICC-01/09-01/11-524, para. 4.

³¹ *The Prosecutor v Thomas Lubanga Dyilo* (‘*Lubanga*’), Trial Chamber I, [Decision on the Practices of Witness Familiarisation and Witness Proofing](#), 8 November 2006, ICC-01/04-01/06-679, paras 14-17.

³² *Lubanga*, [ICC-01/04-01/06-679](#), paras 11 and 42; *Ruto and Sang*, [ICC-01/09-01/11-524](#), para. 26; *Lubanga, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial*, 30 November 2007, ICC-01/04-01/06-1049, para. 36.

³³ See, International Tribunal for Rwanda (‘ICTR’), *The Prosecutor v Karemera et al*, ICTR-98-44-T, [Decision on Defence Motions to Prohibit Witness Proofing, Rule 73 of the Rules of Procedure and Evidence](#), 15 December 2006, paras 9-15; *The Prosecutor v Karemera et al*, ICTR-98-44-AR73.8, [Decision on Interlocutory Appeal Regarding Witness Proofing](#), 11 May 2007, paras 9-12.

21. However, the Chamber finds that, in this case, it is unnecessary and inappropriate to authorise witness preparation as defined in the Kenya Protocols. Its finding is based on the following considerations.

22. It is undeniable that witness preparation entails risks that could affect the spontaneity and reliability of the testimonies of witnesses and, in the particular circumstances of this case, those risks are not outweighed by the benefits of witness preparation.³⁴ Trial Chamber I in the *Lubanga* case stated that ‘whilst some aspects of a proofing session could potentially help the Court arrive at the truth in an efficient manner, many others may prove detrimental’.³⁵ In particular, that Trial Chamber noted that the preparation of witness testimony by the parties ‘could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony’.³⁶ It also determined that this practice could inhibit the entirety of the true extent of an account, and could ‘diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness’.³⁷ These concerns are shared by this Chamber.

23. In more recent ongoing cases, Trial Chambers³⁸ have agreed to authorise witness preparation invoking the singularity and complexity of the given case,³⁹ including the lapse of time since the occurrence of the alleged facts⁴⁰ and the large number of potential exhibits.⁴¹ Notwithstanding the basic concerns surrounding witness preparation as laid out in paragraph 22 above, the instant case is fundamentally concerned with allegations of improper interference with defence witnesses and false testimony. The Chamber considers that the

³⁴ *Ruto and Sang*, [ICC-01/09-01/11-524](#), paras 38-42.

³⁵ *Lubanga*, [ICC-01/04-01/06-1049](#), para. 47.

³⁶ *Lubanga*, [ICC-01/04-01/06-1049](#), para. 51.

³⁷ *Lubanga*, [ICC-01/04-01/06-1049](#), paras 51-52.

³⁸ *Ruto and Sang*, [ICC-01/09-01/11-524](#); *The Prosecutor v. Bosco Ntaganda* (‘*Ntaganda*’), Trial Chamber VI, [Decision on witness preparation](#), 16 June 2015, ICC-01/04-02/06-652.

³⁹ *The Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber V, [Decision on witness preparation](#), 2 January 2013, ICC-01/09-02/11-588, para. 41.

⁴⁰ *Ntaganda*, [ICC-01/04-02/06-652](#), para. 18.

⁴¹ *Ntaganda*, [ICC-01/04-02/06-652](#), para. 18; *Ruto and Sang*, [ICC-01/09-01/11-524](#), para. 33.

spontaneity of the witness testimony is of particular importance in these circumstances.

24. Moreover, in the present case, the witnesses whom the Prosecution has indicated that it plans to call have been interviewed by the latter in the last three years on matters which occurred during this same timeframe. In addition, a significant number of the witnesses have already testified before the Court in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ('Bemba'), and are therefore familiar with the Court's proceedings and the expected principal issues arising in their testimonies.

25. As regards any eventual inconsistent or additional evidence witnesses may provide during the course of their testimony, the Chamber considers that these are better tested in the courtroom before the Chamber, in order to preserve the principles of orality and immediacy that govern trial proceedings.

B. Witness familiarisation

26. Notwithstanding the above, the Chamber is of the view that it is appropriate, in order to enhance the expeditiousness of proceedings, for witnesses to refresh their memory and review their prior written statements, recordings and/or transcripts of interview, in anticipation of their in-court testimony. This is appropriately facilitated by the VWU, as a neutral unit within the Registry, mandated to protect the well-being of witnesses and assist their appearances before the Court, pursuant to Article 43(6) of the Statute and Rules 16(2) and 17(2) of the Rules.⁴²

27. Within the familiarisation process, the VWU shall facilitate a courtesy meeting between relevant counsel and the witness. Whilst no specific time-limit shall be imposed on such a meeting, they should not be lengthy in time. The essence is

⁴² *Lubanga*, [ICC-01/04-01/06-679](#), paras 24-27; *Lubanga*, [ICC-01/04-01/06-1049](#), para. 53.

that this courtesy meeting shall not touch upon the evidence to be given by the witness and shall be attended by an independent officer from the VWU.

28. Concerning submissions regarding the potential for contamination arising from the joint travel and accommodation of witnesses, this Chamber concurs with other Trial Chambers, in deciding that in devising 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’.⁴³ In view of its mandate and expertise, this decision shall be taken by the VWU, in consultation with the calling party, where necessary.

29. The Chamber has considered the parties’ submissions seeking some discrete modifications to the familiarisation process in the *Ntaganda* case and the *Gbagbo and Blé Goudé* case and has implemented additional changes where necessary.

30. Accordingly, the Chamber determines that the VWU shall facilitate the practice of witness familiarisation in accordance with the Protocol annexed hereto.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

REJECTS the Prosecution’s request to adopt a Witness Preparation Protocol;

DIRECTS the VWU to facilitate witness familiarisation in accordance with this decision and the Protocol annexed hereto.

⁴³ *Ntaganda*, Trial Chamber VI, [Decision on the protocol on witness familiarisation](#), 17 June 2015, ICC-01/04-02/06-656, para. 13 referring to *Lubanga*, 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; and *Bemba*, Trial Chamber III, [Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial](#), 18 November 2010, ICC-01/05-01/08-1016, para. 15.

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



Judge Bertram Schmitt, Presiding



Judge Marc Perrin de Brichambaut



Judge Raul Pangalangan

Dated 15 September 2015

At The Hague, The Netherlands