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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

PUBLIC

Public redacted version of “Prosecution’s response to the *Victims and Witnesses Unit’s submissions in relation to the implementation of the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial* (ICC-02/11-01/15-355-Anx) (ICC-02/11-01/15-375)”, 11 January 2016

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

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Introduction

1. The Victims and Witnesses Unit (“VWU”) seeks to deviate from the “Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial” (“Unified Protocol”),¹ by conducting “in-court protection measures and vulnerability assessments”,² together with the read-back of the prior statement(s) of witnesses, in the field.³
2. The Prosecution’s position is that, as a general rule, *the whole of* the familiarisation process - as described in section 2 of the Unified Protocol - should appropriately take place at the seat of the Court, in The Netherlands (or at any other location of the relevant witness’s testimony). However, the Prosecution does not, in principle, oppose the carrying out of assessments related to in-court protection measures and vulnerability in the field, provided that such assessments are conducted in-person, with full respect accorded to the Court’s obligation under article 68(1) to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.
3. In addition, in *exceptional circumstances*, other parts of the familiarisation process – including the statement reading - may appropriately take place in the field, with the agreement of the calling party. Any disagreements between the VWU and the calling party as to the appropriate location for familiarisation should be raised with, and resolved by the Trial Chamber. For the avoidance of any doubt, the Prosecution opposes, for reasons of witness well-being, security and confidentiality, the VWU’s request to conduct, as a general rule, statement reading in the field.

Confidentiality

4. The Prosecution files this submission as Confidential since it refers in paragraphs 14 to 16 to operational security matters that should not be shared with the public.

¹ ICC-02/11-01/15-355-Anx (“Unified Protocol”).

² ICC-02/11-01/15-375 (“23 December 2015 Request”), para. 1.

³ 23 December 2015 Request, para. 2.

Submissions

In-court protection measures and vulnerability assessments of witnesses

5. In its 23 December 2015 Request, the VWU seeks to carry out in-court protection measures and vulnerability assessments of witnesses in the field.⁴ The Prosecution does not oppose this proposal. However, all aspects of such assessments must be conducted during in-person meetings with the witnesses concerned.
6. The requirements in relation to the assessment – at the location of testimony - of vulnerable witnesses for special measures are set out under section 2.2 of the Unified Protocol. Requirements in relation to in-court protective measures and special measures are set out in section 2.3 of the Unified Protocol. Vulnerability assessments at the location of testimony are also addressed in the Trial Chamber's Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses.⁵ The Prosecution notes that there has been no corresponding request made to amend the Vulnerable Witnesses Protocol, even though the 23 December 2015 Request relates also to the implementation of section III of this Protocol.
7. Further, it has come to the Prosecution's knowledge that vulnerability assessments - by the VWU Psychologist - are sometimes carried out via video-link. Although the Prosecution understands the advantages of this approach in terms of reducing costs and logistical issues (such as time constraints and available resources), this practice should nevertheless be discouraged.
8. In-court protection measures and vulnerability assessments should be conducted in-person, either in the field or at the location of the witness's testimony.
9. In particular, a face-to-face meeting between a vulnerable witness and VWU Psychologist – whether conducted in the field or at the location of the witness's

⁴ 23 December 2015 Request, para. 1.

⁵ ICC-02/11-02/11-110-Anx2 ("Vulnerable Witnesses Protocol"), paras. 9-15. *See also* ICC-02/11-01/15-357.

testimony - is appropriate and necessary because overwhelmingly in the best interests of the witness, for the reasons stated below.

10. Vulnerability assessments entail a process of gathering in-depth information on the vulnerability of an individual, to ensure that appropriate measures are taken, or put in place, in order to facilitate their testimony at trial, without causing re-traumatisation. Therefore, the very focus of the enquiry demands a process designed to enhance the witness experience and should be as unthreatening as possible. During the assessment, the most sensitive and potentially re-traumatising aspects of the witness's psyche are brought up. Therefore, such assessments must be done with great care and sensitivity. Establishing a trusting and therapeutic relationship with the vulnerable witnesses will be difficult, if not impossible, when interacting with this witness remotely.
11. The vulnerability assessment involves not only eliciting information from the witness, but - of equal importance - the observations made by the expert. The body language of the witness is of particular significance and cannot be noted by the expert through video-link. Other signals that are apparent in a face-to-face meeting will also be difficult to perceive remotely, which may carry a risk of missing important information about the well-being of the witness. In addition, it is also difficult to intervene if a witness has an emotional breakdown during a video-link assessment.
12. Video-link can also create a particularly daunting and intimidating barrier for witnesses who are not accustomed to modern communications technology. Moreover, there can be technical interferences such as difficulties with the connection, synchronicity of image or sound distortion. Eye-contact can also be more difficult to make or maintain at a comfortable-enough level for the witness *via* video-link. In addition, the lack of in-person contact can pose particular difficulties where there is also a need for interpretation.
13. Finally, the VWU does not offer reasons why it seeks to conduct assessments - including the assessment of vulnerable witnesses under section 2.2 of the Unified Protocol - in the field. It may be that this part of the Request is guided - or

impelled - by financial constraints upon the work of the VWU. The Prosecution merely observes, in this regard, that the availability, or lack of, financial resources - whilst concerning - does not provide a sufficient, or any, reason to justify encroachment upon the protections afforded to witnesses under article 68(1) - a fundamental obligation related to its core function - in particular where vulnerable witnesses are concerned.

Reading witness statements

14. [REDACTED].⁶ [REDACTED].

15. [REDACTED].

16. [REDACTED].⁷ [REDACTED].

17. Finally, the Prosecution notes, first, that conducting the read-back of statements in the field also deviates from section 2.5 of the Unified Protocol, which states that “[a]s a general rule, the VWU will conduct the courtroom familiarisation prior to the reading of the statement”.⁸

18. Proceeding in the order currently set out in the Unified Protocol has the advantage of further focusing the witness on his/her upcoming testimony before proceeding with the read-back of the statement(s). Witnesses are more likely to have fresh recall when the read-back takes place in The Hague. In addition, in the field, witnesses will also be contending with work, family and other personal issues, and may be less focused on the task at hand. Read-back should always take place very close to the date of the testimony for optimal results, and a field mission may take place several weeks before the witness testifies; witnesses are less focussed, and perhaps feel less concentrated, when they are still far away from testifying. In addition, a witness may suffer distress – as foreseen by paragraphs 86 and 87 of the Unified Protocol – in the course of reading his/her statement, in some circumstances requiring additional support – for example, of

⁶ [REDACTED].

⁷ [REDACTED].

⁸ Unified Protocol, para. 61.

the VWU Psychologist. Carrying out read-backs in the field will, presumably, mean that less support is available in the event that a witness experiences a breakdown or other emotional difficulties in the course of reading back his/her statement.

19. Second, the Prosecution notes that one of the main purposes of the familiarisation process - which exists to ensure the Court fulfils its duties pursuant to article 68 of the Statute - is not only to provide witnesses with the opportunity to familiarise themselves with the Court, but also to adapt to a new environment. This takes time and cannot be done from a distance. It is important that witnesses, particularly those who have never previously travelled outside of Côte d'Ivoire, are provided with adequate time to psychologically and physically adjust to this new environment. For the avoidance of any doubt, it is the Prosecution's position that the read-back of witness statements in the field should be entirely excluded in the case of crime base victim-witnesses. These witnesses are often vulnerable, and, in this case, may have been the subject of sexual and gender-based crimes. However, the Prosecution accepts that – otherwise – in very specific and limited circumstances, there may be exceptions to the general rule – witness statement reading may, exceptionally, be carried out in the field. This will depend, in particular, on the profile of the witness and the length of his/her statement(s). Furthermore, such read-backs in the field should only take place following consultation with and the agreement of the calling party. Any disagreements between the VWU and the calling party as to the appropriate location for this, and any aspect of witness familiarisation should appropriately be raised with, and resolved by the Trial Chamber.

Conclusion

20. For the foregoing reasons, the Prosecution submits that the Trial Chamber should order the VWU to conduct in-court protection measures and vulnerability assessments of witnesses in person if conducted in the field. It should further

reject the VWU's request to conduct the read-back of witness's prior statements in the field, barring exceptional circumstances.



Fatou Bensouda, Prosecutor

Dated this 11th day of January 2016

At The Hague, The Netherlands