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**TRIAL CHAMBER IX**

**Before:** **Judge Bertram Schmitt, Presiding Judge**
**Judge Péter Kovács**
**Judge Raul C. Pangalangan**

**SITUATION IN UGANDA**

**IN THE CASE OF**
***THE PROSECUTOR v. DOMINIC ONGWEN***

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

# Prosecution's request for authorisation to conduct witness preparation

**Source:** **The Office of the Prosecutor**

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## Introduction

1. The Prosecution requests the Trial Chamber to allow witness preparation in the *Ongwen* case. In an era where this Court emphasises effective and efficient proceedings,[1] witness preparation is both a best practice and a quintessential tool to aid and expedite trials at this Court. The *Ongwen* trial in particular, given its unique and complex nature, will benefit from this procedure. Allowing a limited and carefully regulated practice of witness preparation will assist the Chamber, the witnesses, the Parties and the participants. Not only does the practice of witness preparation (as defined in this submission and the draft protocol) facilitate the giving of truthful, relevant, accurate and focused testimony, thus enhancing the veracity of the proceedings, it will also enable the Court to best ensure the well-being and serenity of the witnesses it is mandated to protect. Moreover, witness preparation remains a critical aspect of a Party's right and ability to present its case in a meaningful, fair and expeditious manner.

2. Yet, the term "witness preparation" carries several meanings within different international and national judicial proceedings, including those at this Court. To assist the Chamber, in this submission the Prosecution defines the scope of the procedure proposed in this case, identifying five carefully balanced measures specially geared to the intricacies of an international criminal trial. Many of these measures may be redundant, even irrelevant, in some national trials. Yet, they are relevant, even essential, at this Court where language and cultural differences matter.

3. Witness preparation, consisting of the five suggested measures, is a highly circumscribed procedure to assist in the *process* of giving evidence. In particular, witness preparation allows the witness:

[1] *See e.g.*, Presentation of the Court's annual report to the Assembly of States Parties (ASP 14th session), ICC President's Statement, 18 November 2015, noting "the main priority" to enhance the effectiveness and efficiency of the institution and emphasising adopting best practices and revised working methods to expedite the criminal process. *See also* Special Plenary Meeting on the Efficiency and Effectiveness of Court Proceedings at the ASP's 14th session, where States Parties expressed their support for the Court's measures to identify best practices, streamline procedures and ensure greater harmonisation across Chambers and Divisions.

(i) to review his or her prior statements;

(ii) to confirm whether those prior statements are accurate and to explain any inaccuracies;

(iii) to be informed of the broad topics that may be covered in the in-court examination;

(iv) to view exhibits that the calling party intends to use and to familiarise himself or herself with them; and

(v) to ask questions on the process of testifying and what to expect in court.

4. These measures do not influence the substance of what a witness may wish to tell this Chamber. They do not hinder the testimony's spontaneity. Nor do they tarnish the essential bond between a witness and the Judges. The Prosecution respects the concerns expressed by several Trial Chambers towards witness preparation and other types of pre-testimony interaction between the calling party and a witness. The draft protocol annexed to this submission is a revised version of the protocol the Prosecution has previously presented in other cases. It addresses these concerns, and clarifies the limited and regulated nature of the witness preparation requested in this case. Indeed, the proposed witness preparation is not the same as the "witness proofing" procedure conducted in the UN *ad hoc* tribunals, which involved a review of the evidence. Nor is it even the witness preparation proposed, for instance, in the *Lubanga* trial, which envisaged a practice similar to the review of evidence.[2] Rather, the proposed witness preparation is a best practice that will enable the truth to be elicited in a fair, efficient and expedited manner.

5. In this submission the Prosecution will demonstrate:

a. the limited, albeit necessary, scope of each individual measure of witness preparation; and

[2] *Contra* ICC-01/04-01/06-1049, para. 51.

b. how each measure contributes to the fair and expeditious conduct of the *Ongwen* trial, in line with the best practices of witness preparation in other cases at this Court.

6. Although the trial will be most fully assisted by adopting the whole Protocol, the Chamber may also consider each individual measure separately if it prefers.

## Submissions

### A. The limited scope of witness preparation

7. Witness preparation and the VWS-led witness familiarisation complement each other and are carried out in parallel,[3] and may properly be viewed as elements of a single process of inducting the witness into the Court's judicial functioning. However, witness preparation proper cannot be delegated to the VWS. Witness familiarisation has the purpose of "facilitating the testimony of witnesses in the best possible circumstances",[4] including by "familiaris[ing] witnesses with the courtroom and the procedures which they will encounter".[5] Witness preparation, on the other hand, focuses on the *process of giving evidence*. It is intended to help ensure that witnesses give truthful, relevant, accurate and focused testimony while at the same time ensuring their well-being.

8. Witness preparation, as defined here, differs from the "witness proofing" practice used at the UN *ad hoc* Tribunals. According to the *Lubanga* Trial Chamber, the practice of witness proofing at the *ad hoc* tribunals had the effect of "preparing a witness in a *substantive* way for [the] testimony at trial".[6] Contrary to witness preparation, witness proofing consists of a "meeting […] between a party to the proceedings and a witness, before the witness is due to testify in Court, the purpose

[3] ICC-01/04-02/06-656-AnxA, para. 26.
[4] ICC-01/04-02/06-656-AnxA, para. 1.
[5] ICC-01/04-01/06-1049, paras. 28-29.
[6] ICC-01/04-01/06-1049, paras. 28, 35 (emphasis added).

of which is to re-examine the witness's evidence […]."[7] During such a meeting the party will "discuss […] the topics to be dealt with in court"[8] by asking the witness all the same questions that it will later ask during the witness's testimony.[9] The *Lubanga* Chamber prohibited this practice, largely due to its concern that such meeting "may come dangerously close to constituting a rehearsal of in-court testimony".[10] Similar concerns have been raised by other Chambers when rejecting witness proofing and other forms of interaction between a witness and the counsel of the calling party shortly before testimony.[11]

9. Witness preparation, as proposed in this submission and Annex A, does not impact on the substance of the witness's testimony in any way. In fact, the Prosecution merely requests that shortly before the witness's testimony commences, the lawyer who will question the witness pursuant to rule 140(2)(a) be allowed to meet with the witness at the place of testimony to undertake the following five discrete measures, which have been successfully tested in *Ntaganda* and *Ruto & Sang*.[12]

*(i) Provide the witness with an opportunity to review his or her prior statements*

10. This measure is uncontroversial. Even in cases where witness preparation has not been allowed, witnesses have been allowed to review their prior statements and any documents generated or provided by the witness as part of the VWS's familiarisation process to refresh their memory.[13] If the witness is expected to review extensive transcripts or lengthy documents, the reading material should be organised

[7] *Haradinaj et al* Decision, para. 8; ICC-01/04-01/06-952, para. 15; *see also* ICC-01/04-01/06-1049, para. 48.
[8] ICC-01/04-01/06-1049, para. 51 (emphasis added).
[9] *Karemera* Decision, paras. 5, 13-14; *Gacumbitsi AJ*, paras. 73-74: "It is not inappropriate *per se* for the parties to discuss the conduct of testimony and witness statements with their witnesses, unless they attempt to influence that content in ways that shade or distort the truth".
[10] ICC-01/04-01/06-1049, paras. 51-52.
[11] Chambers held that these forms of interaction impacted on the "genuine and undistorted" testimony of witnesses, that they have the potential of generating "new evidence", that they "may lead to conduct […] such as rehearsal, practice and coaching" or "could diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness": ICC-02/11-01/15-355, paras. 16-19; ICC-01/05-01/08-1016, para. 34; ICC-01/04-01/07-1134, para. 18.
[12] ICC-01/04-02/06-652-Anx, paras. 16-27; ICC-01/09-01/11-524-Anx, paras. 15-26.
[13] ICC-02/11-01/15-355-Anx, paras. 79-94, *especially* para. 85; ICC-01/04-01/06-1049, para. 55.

in a way to point the witness to the most relevant portions of the statements, which can be done only by the Party. However, counsel for the calling party will not be present during the review process. Where a witness is illiterate or does not speak the language in which the prior statements or documents are written, a qualified staff member of the Court should be present to facilitate the reading.

*(ii) Provide the witness with an opportunity to confirm whether his or her prior statements are accurate, to explain any inaccuracies or inconsistencies, and to make changes as necessary*

11. This measure ensures that the Parties, participants and the Chamber have a witness statement that accurately reflects the prior recorded testimony. Not only will such accuracy assist the other party to prepare its examination pursuant to rule 140(2)(b); it is also particularly relevant where the calling party will seek to submit that prior recorded testimony pursuant to rule 68(3) to replace or to shorten the questioning of the witness pursuant to rule 140(2)(a). An analogy to this measure can be drawn from declarations under rule 68(2)(b)(ii). Similarly to those declarations, the calling party will not seek to elicit "new information".[14] Instead, the calling party will communicate to the witness before the review process that he or she should identify which parts of the prior statements, if any, are inaccurate or inconsistent.[15] After reviewing the statements, during a meeting with counsel for the calling party, the witness may correct the relevant portions. The witness will then simply indicate which parts should be corrected and how, but there will not be any substantive discussion about the relevant topics. These corrections will be reflected in an updated statement which will be duly disclosed.

[14] Under rule 68(2)(b)(ii), accompanying declarations require a statement that "the contents of the prior testimony are true and correct to be best of [the witness's] knowledge" and must be made "reasonably close in time to when the prior recorded testimony is being submitted".

[15] A party will not "[take] a witness systematically through inconsistencies in their statements", but it will be left to the witness's own initiative to identify any inconsistencies: *contra*, ICC-02/11-01/15-355, para. 17. Because of the limited scope of this measure and the manner in which it is conducted, it will not strip the witness of any "helpful spontaneity" during the testimony.

*(iii) Identify the general topics that the calling party intends to cover during its questioning of the witness in Court and the topics on which, in the calling party's opinion, the witness may be questioned by the other party and participants.*

12. The calling party will simply identify the anticipated topics of questioning in broad terms to assist the witness to focus his or her mind prior to entering the courtroom. The calling party will not anticipate concrete questions that will be asked in court, explain the relevance of the anticipated topics to the party's case or engage in any substantive discussion with the witness about the anticipated topics. As such, the calling party will not influence the substance of the witness's testimony. Nor will the calling party coach or train the witness or practice questions and answers expected in the witness's testimony. The witness will not be permitted to comment on the substance of the proposed topics, nor rehearse testimony on these identified topics in any way. The calling party may, however, explain to the witness that he or she might not be questioned in court on all matters upon which investigators previously questioned the witness.

*(iv) Show the witness exhibits that the calling party plans to use in court when questioning the witness to enable the witness to familiarise himself or herself with the document, and ask the witness to comment on them to determine the utility of using the exhibits in court*

13. This measure is intended to establish if a particular exhibit falls within the witness's knowledge. If not, it will not be used when questioning the witness, thereby saving the Court's time. Likewise, witnesses can familiarise themselves with documents that they will be shown in court so that they are in a position to fully appreciate the scope and the context of the parties' questions about those documents. Finally, vulnerable witnesses can view material, such as videos, that may be expected to seriously affect their well-being and ability to immediately give relevant, accurate and focused evidence about them.

14. Witnesses will only be shown the documents and they will be asked to read them. The calling party will then inquire whether the witness recognises the documents and if they are able to comment on them. During this conversation, the calling party will not elicit new information or influence the witness's testimony about the documents.

*(v) Answer any questions the witness may have, including about what to expect in court*

15. Experience has shown that for many witnesses testifying before the Court causes stress and anxiety.[16] To allow the calling party's counsel to address the witness's concerns will assist in putting the witness at ease and building the witness's confidence in view of the upcoming testimony. Questions asked by witnesses typically focus on the process of giving evidence. However, this interaction is not intended to discuss or influence the substance of the witness's testimony, to elicit new evidence or to coach or train the witness. The VWS-led familiarisation process cannot fulfil this function on its own because it does not involve the counsel for the calling party. Although VWS protocols state that the "witnesses are provided with an opportunity to acquaint themselves with the people who may examine them in court",[17] these "courtesy meetings" organised by the VWS are typically limited to a very short introduction without the possibility for a witness to engage in any way with the examining counsel.[18] Moreover, the VWS's proposed Amended Protocol recognises the distinct difference between witness familiarisation and witness preparation, and that the latter, a separate process, is the calling party's responsibility. The VWS while prepared to give assistance cedes all control to the calling party to determine logistics in support of this best practice. [19]

[16] *See* Jackson, J.D., 601-624, pp. 614-615.
[17] ICC-02/11-01/15-355-Anx , para. 66.
[18] *See also* Jackson, J.D., 601-624, pp. 614-615.
[19] VWU's Amended Protocol on Familiarisation, paras. 27-29.

**B. Witness preparation is essential in the *Ongwen* case: the proposed measures will assist in determining the truth and enhancing fairness and expedition**

*(i) Witness preparation, through the five discrete measures, will assist the Ongwen case*

***a. General benefits***

16. Chambers of this Court have consistently stated that "the notion of fairness should be preserved to the benefit of all participants in the proceedings."[20] Witness preparation is a critical procedural feature, a best practice: its absence cuts across the intrinsic fairness of the proceedings, affecting the witnesses, the Chamber and the Parties.

17. First, witnesses who have testified without witness preparation at this Court have expressed their discomfort with the process.[21] Despite the VWS-led familiarisation process, *Lubanga* and *Katanga* witnesses said that they were anxious about giving evidence, felt under-confident in articulating their experiences and were apprehensive about cross-examination.[22] Although these witnesses felt a duty to testify, they were anxious about testifying. "I felt very intimidated," said one witness. "I felt naked, very exposed, vulnerable. I felt a very heavy responsibility having to take part in a process of justice." Another witness said: "I was fearful because it was my first time appearing in front of a court."[23] A nervous witness is not in the Court's interest; nor is testimony that lacks precision, is incomplete, confused, or rendered in an ill-structured or chaotic manner, even if these could also be seen as indicia of spontaneity.

18. Second, while the testimony of unprepared witnesses hinders the Chamber in its determination of the truth, testimony that follows careful witness preparation is not to be equated with witness interference. Counsel are professional: for instance,

[20] ICC-02/04-112, para. 27; ICC-02/04-01/05-90-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-135, para. 24.
[21] *Bearing Witness at the International Criminal Court*, p. 22, where a witness said "I should have been better prepared by the party that called me."
[22] *See* Jackson, J.D., p. 614.
[23] *Bearing Witness at the International Criminal Court*, p. 23.

the *Lubanga* Trial Chamber found that pre-testimony interactions between suitably qualified lawyers and witnesses was foreseen and appropriate, especially when those witnesses would find it "extremely difficult to understand and therefore to react appropriately[…]" in the more formal courtroom setting.[24] Not only are counsel bound by a strict code of conduct and ethics,[25] but in addition the witness preparation sessions are recorded, and the record preserved and disclosed to the opposing party.[26] Indeed, the experience of this Court in *CAR Article 70* has shown that witness interference occurs independently of witness preparation.[27]

19. Nor, without witness preparation, is the Chamber assisted in its mandate to expedite the proceedings. Not only will unfocused testimony extend beyond the allotted time, precious time is lost when witnesses are shown voluminous documents for the first time on the stand. The Chamber may need to intervene more frequently to assist the witness and bring order to his or her testimony. Counsel too may need to seek adjournments to adjust to unanticipated testimony.

20. Third, the Parties, and the Prosecution in particular, have a right to prepare and present their case in the manner it deems best suited to establish the truth.[28] The Chamber has a duty to exercise its trial management powers under article 64 to "ensure that the trial is conducted fairly both to the Prosecution and the accused."[29] As Judges of the Appeals Chamber have noted, "fairness also extends to […] the Prosecution",[30] which is entitled to submit evidence relevant to the case.[31] Indeed, one of counsel's roles in the ICC's hybrid legal system is to assist the witness in focussing his or her evidence and to ensure that the witness provides all relevant evidence that he or she has to give to the Chamber. An absence of witness

[24] ICC-01/04-01/06-T-110-Red3-ENG, p. 2 ln. 2- p. 3 ln. 20 (on rule 74 warnings).
[25] *E.g.*, Code of Professional Conduct for counsel; OTP Regulations; OTP Code of Conduct.
[26] Annex A, Section IV.
[27] *See also* ICC-02/11-01/15-355-AnxI, paras. 8-9.
[28] *See e.g.*, articles 54(1) and 69(3).
[29] ICC-02/11-01/15-313, para. 14.
[30] ICC-01/04-02/12-271-AnxA, paras. 5-6.
[31] *Ibid*., paras. 5-6.

preparation impedes a Party's ability to present its case and to assist the Chamber to determine the truth.

21. As shown above, the absence of witness preparation has an impact on the use of the Court's resources in general. Without it, a Party may be compelled to expend valuable resources (human and financial) by re-interviewing witnesses in the field. Re-interviewing in this manner may raise further protection concerns and cause witness fatigue. Likewise, the Judges' time is not conserved, nor is the Court's calendar effectively utilised, when witness testimony is unnecessarily prolonged. A contrary example is provided by the *Ruto & Sang* case, where witness preparation enabled the calling party to withdraw at least one witness after it determined, judging from the witness's demeanour during that session, that the witness's evidence was unreliable.[32] This saved the Court considerable time and resources.

***b. Specific measures***

22. The five specific measures in the annexed protocol will assist in conducting the *Ongwen* trial fairly and expeditiously.

23. ***Measure i*** *(allowing the witness to review prior statements)* ensures fairness and expedition. Indeed, even the *Lubanga* Trial Chamber, which disallowed "witness proofing", acknowledged that "[s]ome aspects of a proofing session could potentially help the Court arrive at the truth in an efficient manner […]."[33] In that Chamber's view, this was one such beneficial aspect.[34] In situations where original statements are given at least a year and often much longer before the trial, witnesses cannot be expected to remember events in their exact detail and the order in which they occurred, particularly when such events were traumatic. Not only is greater efficiency achieved by allowing a witness access to his or her prior statements pre-testimony, but where these are organised and prioritised in a logical sequence by the

[32] ICC-01/09-01/11-T-114-CONF-ENG (open session), p. 36 ln. 11-p. 37 ln. 12; p. 52 ln. 7-p. 55 ln. 11.
[33] ICC-01/04-01/06-1049, para. 47.
[34] *Ibid*., para. 50.

calling party, the process allows the witness greater clarity on those events.[35] The witnesses should not have to sift through swathes of disorganised material; the calling party is best placed to organise the materials in a manner to make the review process most effective.[36]

24. ***Measure ii*** *(witness confirming the accuracy of prior statements or explaining inaccuracies or inconsistencies)* assists the fair and expeditious conduct of proceedings. Any human attempt to record every conceivable and relevant detail in a prior statement will almost always be riddled with error. As witnesses themselves have admitted, they can make mistakes. Likewise, the process of generating statements carries with it an inherent possibility of misunderstanding the information conveyed. Not only can witnesses be illiterate, Parties must use interpreters to speak to them. The statement is then drafted in English, which is then read back to the witness, *via* the interpreter, in Acholi. If a witness should indicate an error at that time, and if this should occur during the VWS-led familiarisation process, there would be no mechanism to remedy such errors. Finally, VWS is not privy to the details of the case and of the witness's evidence, and therefore is not suited to truly assist the witness in relation to any corrections or amendments that the witness may wish to make.

25. An opportunity to correct errors not only ensures an accurate statement, it is fair. Witnesses carry the burden of testifying about serious crimes, of which they are often the victims. The Court should, at the very least, ease this process for them and help them feel better prepared to testify. Moreover, this correction process is fair to the other party who is more likely to have an accurate statement prior to the commencement of the witness's testimony.

26. A better prepared witness in turn expedites the process in court, helping to conserve valuable court time for the actual testimony, eliminating peripheral, tangential and irrelevant corrections. For instance, in *Ntaganda,* a witness preparation

[35] *Ibid*., para. 50.
[36] *See* para. 10.

session assisted to clarify information in a prior witness statement that "we ate wild taro and not yam." These details—what the witness ate—were wholly irrelevant to the testimony and to the case. Yet, without the witness preparation session, valuable court time could have been lost going over these details and making corrections in court.

27. *Measure ii* also enhances the potential effectiveness of rule 68(3) as a procedural vehicle to expedite the trial. For example, generally, the use of witness preparation sessions in *Ntaganda* has enabled the calling party to (a) make necessary corrections on the witness's statement during the preparation session, the statement is then disclosed; (b) tender the statement and lead the witness through the corrections; and (c) conduct a short supplementary examination pursuant to rule 140(2)(a). Without the opportunity to ensure an accurate statement prior to testimony, the use of rule 68(3) as a time saving measure would have been blunted, since the process of verifying whether the witness stands by the statement as it is, or considers that corrections should be made, will necessarily have to be conducted in court.

28. ***Measure iii*** (*identifying the broad topics to be covered in questioning)* also assists the fair and expeditious conduct of proceedings. It is fair: witnesses cannot be expected to guess which matters within their knowledge may be relevant to the Court, especially with the language and cultural differences. Accordingly, it is only fair that they are given an opportunity to focus their mind on which, of all of these matters, the Court will expect to hear about. *Measure iii* assists because it serves to exclude irrelevant topics. Therefore, in *Ntaganda*, as explained, even though a witness provided additional information that "[they] ate wild taro in the bush and not yam", witness preparation assisted in identifying this apparently worrying discrepancy as not being one of the subjects that the testimony would cover. In contrast, in *Gbagbo,* without the benefit of witness preparation, a witness confessed that he was not at ease because, in his view, the questions only focused "on the *Galaxie Patriotique*", and

he was being asked only about facts that concerned "them". The Presiding Judge needed to intervene to explain to the witness that "[he was not there] to challenge the questions."[37] The witness later launched into what the Presiding Judge termed an "emotional speech".

29. *Measure iii* further assists because it identifies sensitive and traumatic topics beforehand for the witness. Again, in *Ntaganda*, a witness preparation session helped facilitate a witness's willingness to look at photographs of a massacre scene depicting his wife as one of the victims. This interaction outside the courtroom was crucial to enable the witness to understand, and to come to terms with in advance of his testimony, the painful necessity that reliving painful memories, through the photographs, would be necessary during his testimony.[38]

30. ***Measure iv*** *(showing potential exhibits)* also enhances fairness and expedition. As with *Measure i*, it allows the witness to become familiar with voluminous material outside of the spotlight of the courtroom. It also ensures that no courtroom time is wasted by showing to the witness documents the witness has nothing to say about, which is particularly relevant for documents that have been obtained after the witness was interviewed by the Prosecution. Indeed, in relation to such documents, and without witness preparation, the Prosecution is forced to choose between the risk of wasting valuable courtroom time or assuming the significant expense of re-interviewing the witness once the new documents are obtained. Moreover, the *Ntaganda* Trial Chamber, having recently reviewed the impact of witness preparation in that case, has affirmed the utility of showing potential exhibits to a witness during preparation, regardless of whether or not the witness had seen them previously, to ascertain if he could usefully comment on them.[39]

31. Not only does *Measure iv* reduce delay during testimony, it spares witnesses embarrassment. For instance, an *Ntaganda* witness who was illiterate was able to

[37] ICC-02/11-01/15-T-25-Red, p. 81 ln. 4-p. 83, ln. 3.
[38] ICC-01/04-02/06-T-44-Red, p. 49 ln. 9-p. 52 ln. 2.
[39] ICC-01/04-02/06-1342, paras. 10-11.

indicate during a witness preparation session whether or not he could read a map. Likewise, when the use of technology in court could have seemed overwhelming, witnesses were allowed to become familiar with the 360° panorama presentation of a location before testimony. Counsel were also able to limit the photographs shown during testimony to those which a witness could best comment on, and deselect others. In contrast, witnesses have found it difficult to recognise video footage in court when it "took place a very long time ago",[40] if they had had no opportunity to view them pre-testimony.

32. *Measure iv* is especially significant for vulnerable witnesses. Indeed, the *Gbagbo* Chamber has allowed vulnerable witnesses to be shown documents and materials that may cause them trauma in advance of their testimony.[41] Such witnesses are then mentally prepared to view these materials in open court, notwithstanding their traumatic content, and to testify about them.

33. ***Measure v*** *(answering a witness's questions)* ensures fairness and expedition. For example, in an *Ntaganda* witness preparation session, a witness was able to ask the examining lawyer about the available in-court protection measures. This allowed the witness to understand that the court proceedings would be broadcast publicly in the witness's home country, and accordingly to request necessary protective measures.[42] Further, having extra contact time allows the calling party's counsel to develop a relationship of trust with the witness, giving them the confidence to tell their story efficiently in the courtroom.

*(ii) The Ongwen case is both unique and complex*

34. Adopting a witness preparation protocol is critical to the *Ongwen* case. Although the VWS is appropriately tasked with making witnesses aware of the courtroom dynamics in a more generic way, its responsibilities do not touch upon

[40] ICC-02/11-01/15-T-22-Red, p. 12 ln. 19 – p. 14 ln. 9.
[41] ICC-02/11-01/15-T-12-Red-ENG, p. 84 ln. 11-p. 86 ln. 18.
[42] ICC-01/04-02/06-913-Red2, paras. 2, 10, noting that the Prosecution only learned that the witness seeks these measures during witness preparation.

the actual process of giving testimony, as it affects an individual witness. It is this gap that witness preparation in the *Ongwen* case will fill.

35. First, this case is unique: much of the evidence in this case emerges directly from Uganda. Being the first case at trial in the Uganda situation, this Court is still unfamiliar with the intricacies of the Ugandan context. The majority of the Prosecution witnesses lack a shared language in common with this Court. Many speak Acholi, and a smaller number speak Lango and Ateso. Only seven witnesses, as presently designated, will testify in English. Significantly, a number of the Prosecution's witnesses are illiterate.[43] Not only must these witnesses travel to a new country and continent, but everything from the climate to food to local customs in The Hague may be unsettling.[44] And as several Judges of this Court have stated, unlike domestic proceedings where arguably the witness, counsel and the Judges share the same culture and language, the experience of testifying in an international criminal trial is unique.[45] Witness preparation sessions would allow the witnesses to be at ease and despite these cultural differences, practise effective communication with the Judges and the lawyers who are to question them.[46]

36. Without witness preparation, this basic need to communicate effectively would be further impeded when witnesses, such as the ones in this case, are unfamiliar with the system of questioning by both the calling and the non-calling parties.[47] Most of the Prosecution witnesses have never left Uganda or been inside a courtroom, let alone have any familiarity with this Court's processes. This unfamiliarity with the legal process and setting will compound the potential trauma involved in testifying about events that occurred over a decade ago. In this situation, witness preparation sessions would enhance the witness's comfort in testifying before the Court when they have never done so.

[43] P-0227, P-0085, P-0130, P-0045, P-0070, P-0101, and P-0024.
[44] *Bearing Witness at the International Criminal Court*, p. 14.
[45] ICC-01/04-02/06-652, para. 18; ICC-01/09-01/11-524, para. 36; ICC-01/09-02/11-588, para. 40; ICC-02/11-01/15-355-AnxI, para. 13.
[46] *Ibid*.
[47] ICC-01/09-01/11-524, para. 36; ICC-01/09-02/11-588, para. 40.

37. There is a crucial distinction between this case and the *CAR Article* 70 case, where witness preparation was disallowed. The *Ongwen* witnesses are wholly unfamiliar with "the Court's proceedings and the expected principal issues arising in their testimonies";[48] the *CAR Article 70* witnesses, having already testified before the Court in the *Bemba* Main Case, were not,[49] and for this reason they were far less likely to benefit from witness preparation.

38. Second, the *Ongwen* case is complex: its scale is comparable to other trials at this Court where witness preparation has been found to be appropriate and necessary.[50] It involves large numbers of witnesses and exhibits, complex charges and the passage of significant time between the disputed conduct and the trial date. Indeed, Dominic Ongwen's alleged acts and conduct date back 14 years, and span over three years (July 2002 until December 2005). The Prosecution alleges six separate categories of crime and 70 counts.[51]

39. Approximately 65 to 70 witnesses will provide live testimony for the Prosecution.[52] The examination by the calling party is itself expected to last about 400 hours. Many of these witnesses made their substantive statements over a decade ago.[53] These witnesses will not only have to testify about events that occurred a long time ago, but these will also be events about which they may not have thought for a long time. Over 1000 items are anticipated as potential exhibits. Some of this material was not in the Prosecution's possession at the time witness statements were taken. Without witness preparation, critical court time will be lost when witnesses require time in court to familiarise themselves with documents before questioning can proceed. Further, witnesses may have no knowledge of certain material. Time is likely to be lost in first determining with the witnesses if that is the case. Not only is

[48] ICC-01/05-01/13-1252, para. 24.
[49] *Ibid.*
[50] ICC-01/04-02/06-652, para. 18; ICC-01/09-01/11-524, para. 33; ICC-01/09-02/11-588, para. 37; ICC-02/11-01/15-355, para. 18; ICC-02/11-01/15-355-AnxI, paras. 15-16.
[51] *See generally* ICC-02/04-01/15-422-Red.
[52] ICC-02/04-01/15-438, paras. 11, 16 and 23.
[53] *E.g.* P-0018, P-0024, P-0045, P-0048, P-0067, P-0070, P-0085, P-0138, P-0145 and P-0146.

such a process onerous and time-consuming, it may also be overwhelming for the witnesses.

40. Moreover, this case is marked by the vulnerability of its witnesses. Many of these witnesses are insiders: victims of the Lord's Resistance Army (LRA). Almost all these witnesses were abducted as children and young adults. Of the approximately 63 witnesses currently anticipated to give live evidence,[54] only 10 were neither abducted by the LRA nor victims of an IDP attack by the LRA.[55] All others suffered trauma within the LRA and/or were present during the LRA attacks. These witnesses still carry the physical and mental scars of their exploitation; testifying will lay bare these wounds. P-0199, P-0351, P-0352, P-0366, and P0374 are all (indirect) victims of sexual and gender-based violence in Sinia. P-0097, P-0252, P-0264, P-0275, P-0314, and P-0330 are former child soldiers, aged between 9 and 15 years during the events. All these witnesses will be asked to describe their experience and prolonged violent trauma in detail. In these circumstances, witness preparation is a warranted pre-testimony measure, under article 68(1), "to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." Witness preparation, by providing the reassurance of familiarity with the process of giving evidence and counsel leading the sensitive evidence, would facilitate such testimony in open court.[56] It would also therefore constitute a special measure under rule 88(1).

41. As shown above, not only is the *Ongwen* case uniquely suited for witness preparation; the five measures, highly circumscribed, and regulated, will assist its conduct. For all these reasons, the Prosecution requests the Chamber to authorise *Measures i-v*, as a best practice, to enhance the fairness and expedition of the *Ongwen* trial.

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[54] *See* ICC-02/04-01/15-467-Conf-AnxA.

[55] *See e.g.*, army/local officials and expert witnesses: P-0003, P-0059, P-0125, P-0189, P-0337, P-0339, P-0355, P-0359, P-0403, P-country expert (number not yet assigned).

[56] Article 68(1); rule 86, requiring a Chamber to take into account "the needs of all victims and witnesses in accordance with article 68, in particular, children […] and victims of sexual and gender violence"; ICC-01/09-01/11-524, para. 37; ICC-01/09-02/11-588, para. 41; ICC-01/04-02/06-652, para. 17; ICC-01/05-01/08-1039, para. 24; ICC-02/11-01/15-355-AnxI, para. 14.

## Relief Sought and Conclusion

42. The Prosecution requests the Chamber to authorise witness preparation in the *Ongwen* trial and adopt the annexed protocol. Witness preparation, through the five discrete and carefully balanced and regulated measures, is a best practice that enhances the fairness, efficiency and effectiveness of this trial.

**Fatou Bensouda**
**Prosecutor**

Dated this 17th day of June 2016
At The Hague, The Netherlands