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**International
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Court**

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TRIAL CHAMBER IX

Before:

Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

PUBLIC

Defence Observations on a Protocol on Witness Familiarisation and Preparation

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence opposes the adoption of a protocol that enables witness preparation as exists, for example, in the *Ntaganda* case. Witness preparation has had a small place in the practice of the ICC, but it has been rejected by most of the Trial Chambers as inappropriate.¹ To accept otherwise, as stated by the Prosecution during the Confirmation of Charges Hearing, would go against the majority of the Court's decision, and be against the principle of legal certainty.²
2. In the present case, it will disproportionately prejudice the rights of the Accused when weighed against any other goal it could be said to serve, and thus should be rejected. The Defence requests Trial Chamber IX ('Trial Chamber') to adopt the approach of Trial Chamber I in the *Gbagbo and Blé Goudé* case which adopted the minimalist approach of witness familiarisation and preparation lead by the VWU.³

II. SUBMISSIONS

a) Witness preparation impacts upon trial fairness

3. Witness preparation has the potential to deny the Accused exculpatory information by reducing the spontaneity of witness interventions. The denial of exculpatory material goes to a fundamental fair trial right.

¹ See ICC-01/05-01/13-1252 (Bemba et al.), ICC-02/11-01/15-355 (Gbagbo and Blé Goudé), ICC-01/05-01/08-1016 (Bemba), ICC-01/04-01/07-1134, para. 18 (Katanga and Ngudjolo), ICC-01/04-01/06-1049, para. 57 (Lubanga), and ICC-02/05-03/09-158, para. 15 (stating, "In accordance with the consistent practice of the Trial Chambers, however, the parties are not authorised to "proof" witnesses prior to their in-Court testimony. Trial Chamber I has described "witness proofing" as the "rehearsal of in-court testimony" with a witness prior to his appearance before the Court.") (Banda and Jerbo).

² See ICC-02/04-01/15-T-23-Conf, pg. 45:14-24.

³ ICC-02/11-01/15-355.

4. The right of the Accused under Article 67(2) of the Statute ensures the provision of anything which affects the credibility of Prosecution evidence and can thus be considered to be exculpatory. Exculpatory evidence includes inconsistencies in a witness's previous statements or a witness's lack of certainty about a particular event.
5. Witness preparation can obscure this information coming to light and thus deny the Accused of exculpatory evidence and information in at least two major ways.
6. Firstly, witness preparation can enable witnesses – whether intentionally or not – to tidy up their memories of an event. This is a real risk in the present case. The events are now years in the past and occurred during the course of a conflict filled period in Ugandan history. Some witnesses whom the Prosecution aims to call have provided multiple statements and in these circumstances, when taken through a process like that adopted in the *Ntaganda case*, a witness may simply adopt what they previously said – regardless of its truth – or alternatively seek to rationalise away the inconsistencies to provide a more uniform and coherent account than actually occurred. This risk is heightened by the practice adopted in prior protocols of explaining to the witness the major themes that a party will raise.⁴
7. Secondly, and an extension of the first, witness preparation deprives the Trial Chamber of spontaneous reactions – whether to evidence or party questions. Showing a witness exhibits prior to testimony, as prior protocols have permitted,⁵ robs the Accused and the Trial Chamber of potentially important information. The lack of familiarity of a witness to a particular document can show that the witness was not in a position they claim or was not familiar with information that

⁴ ICC-01/04-02/06-652-Anx, paras 20-21.

⁵ *Ibid.*, para. 24.

their testimony suggests that they should otherwise know is significant. When this reaction is partitioned into a witness preparation phase and a testimony phase the, flow and importance of this can be lost – even if subsequently disclosed by the Prosecution.

8. Defence objections are neatly summed up by the Trial Chamber I majority's statement that:

[T]he principles of orality and immediacy that govern trial proceedings require that evidence is brought before the Chamber in a genuine and undistorted manner, leaving it for the Judges to assess any inconsistencies or additional evidence which are, in any case, better tested in the courtroom before the Chamber.⁶

9. The risk of attenuating this spontaneity is well illustrated by a recent incident in the *Bemba et al.* case. During the Prosecution case, witness P-267 spontaneously noted that he had some documents with him.⁷ These documents were sought by the Defence and permission to access them was granted.⁸ These documents proved to be very important for several Defence motions concerning disclosure and the legality of collected evidence.⁹ Had the witness been guided through preparation towards the themes that the Prosecution thought were important, it is plausible that the important information volunteered by the witness would have never have been brought to Court or come to light.

10. In sum, the Defence observes that witness preparation is not merely a procedural matter – it has the potential to impact upon substantive testimony. Though prior Prosecution submissions have argued that a protocol prohibits any improper

6 ICC-02/11-01/15-355, para. 16.

7 ICC-01/05-01/13-T-33-ENG ET, p. 22, lines 10-14.

8 *Ibid.*, p. 34, lines 8-14.

9 See *inter alia* ICC-01/05-01/13-1791-Corr-Red, paras 21-47.

influence as to the substantive testimony,¹⁰ it bares noting that lawyers argue over procedure precisely because it has to the potential to impact upon substantive matters.

b) Witness preparation overemphasises expediency at the expense of fairness

11. A central argument put forward in support of witness preparation is expediency¹¹ – this rationale should be rejected. Expeditionousness of trials is a responsibility of the Trial Chamber pursuant to Article 64(2) of the Statute, but the other responsibility contained in that phrase is *fairness* – not to mention the full protection of the rights of the Accused.
12. While expediency of trials may be a policy goal of the Prosecution and courts more generally, considerations of cost effectiveness cannot enter into a decision that has the potential to deny an Accused the right to a fair trial and possibly their liberty for a long period of time if convicted.
13. The only actual right in relation to expediency is to a trial without undue delay, which belongs solely to the Accused pursuant to Article 67(1)(c). As such, it is submitted that in the context of witness preparation, fairness to the Accused – as discussed above – trumps expediency arguments unless it can be shown that the expeditionousness problems risk unduly delaying trial and will not prejudice the rights of the Accused.

¹⁰ ICC-01/04-02/06-444, para. 33.

¹¹ See *inter alia* ICC-01/09-01/11-446, para. 23 ("Expeditious proceedings. It is in the interests of all – and indeed in the interests of justice – for trials to be as efficient as possible."); and ICC-01/04-02/06-444, para. 21 ("In order to have efficient trials, it is necessary to have efficient witness examinations.").

c) The features of the present case do not justify witness preparation

14. Prior Prosecution arguments have sought to justify witness preparation on the basis of the elapsed time since the basis of the allegations,¹² the complexity of the case,¹³ and witness well-being.¹⁴
15. As regards the elapsed time, the rationale for applying a general practice of witness preparation should not apply to witnesses who have been recently interviewed by the Prosecution since the witnesses will have been obliged to recall the alleged events and the Prosecution will have a good idea of their prospective testimony.
16. Though it is true that history of this case goes back to the early 2004, the Prosecution has recently and extensively questioned the witnesses in the present case. The witnesses have been able to engage with their prior experiences recently, and thus the Prosecution should by this stage know its case and whether its witnesses will provide the information that it expects.
17. Arguments concerning the complexity of the case are a smoke-screen. The events in the *Gbagbo and Blé Goudé case* are complex as well. Similarly, the *Bemba et al. case* might superficially be distinguishable as 'merely an Article 70 case'; however, that case had voluminous documentary evidence that reached into the *Bemba main case* and involved more Co-Accused than any other ICC case – having taken over three years to date, it cannot be claimed that it is not a complex case.

12 See *inter alia* ICC-01/04-02/06-444, para. 38 ("The events relevant to the proceedings against the Accused occurred 12-13 years ago. Many witnesses provided their initial (and sometimes only) statement to the Prosecution as early as 2005. Since then many witnesses have had little, if any, opportunity to engage with the substance of their evidence. It is to be expected that events from 2002 and 2003 will no longer be at the forefront of their minds.").

13 See *inter alia* ICC-01/04-02/06-444, para. 39 and ICC-01/09-01/11-446, para. 33.

14 See *inter alia* ICC-01/04-02/06-444, para. 4(iii) and paras 23-25; ICC-01/09-01/11-446, para. 21; and ICC-01/05-01/13-856, para. 7.

18. Prior Prosecution arguments have also emphasised witness well-being.¹⁵

However, these considerations are better addressed by the VWU than by this protocol. There is an abundance of mechanisms and supports throughout the court to anticipate the impact of traumatic evidence or to address witness anxiety. The Chamber retains discretion under Article 68 to protect witnesses.

19. If the Prosecution, Defence or VWU concludes that a particular witness has particular needs, the Trial Chamber can authorise measures tailored to the needs of that witness.

d) *A case-by-case approach will promote trial-fairness more than a general authorisation*

20. The interests of a fair, impartial and expeditious trial would be better served by determining the need for ‘witness preparation’ meetings on a case-by-case basis, while taking into consideration the rights of the Accused.

21. An example where this could be relevant relates to the comparatively limited investigation resources of the Defence in relation to the Prosecution. The right to prepare a defence pursuant to Article 67(1)(h) could be implicated where, for example, new information is disclosed during trial that the Defence was unable to discuss with a witness during investigations.

22. This is precisely what occurred before Trial Chamber I, where that Chamber permitted case-specific authorisations of measures like witness preparation to, for example, go through a document with a witness that had been disclosed *late and close to the date of testimony*.¹⁶

¹⁵ ICC-01/04-02/06-652, paras 23-28.

¹⁶ ICC-01/04-01/06-T-239-Red-ENG, p.1, line 12 – p.7 line 14.

23. A case-specific approach would respect the rights of the Defence, give flexibility to deal with issues related to vulnerable witnesses, and mitigate the prejudices to a fair trial described above.

e) Minor changes to the Protocol adopted in the Gbagbo and Blé Goudé case

24. The Defence makes note of paragraph 36 of the *Gbagbo and Blé Goudé protocol*.¹⁷ The Defence avers that (ii) and (iii) should be removed from the Protocol. It is the position of the Defence that non-expert witnesses who have testified should not have contact with non-expert witnesses who have not testified.

25. With respect, the proposed monitoring of the witnesses would put a serious strain on the fair and expeditious trial rights of Mr Ongwen. A majority of these witnesses speak Acholi, a language which the Registry has had some problems certifying interpreters.¹⁸ Because of logistical issues, a Prosecution interpreter was used during the Confirmation of Charges Hearing¹⁹ and a member of CSS²⁰ was used during the 23 May 2016 status conference.

26. The Defence does not question that LSS will have interpreters certified and prepared for the start of trial.²¹ The Defence worries that the issue addressed above will add an unnecessary strain on LSS and VWU to have an Acholi interpreter, or an interpreter for other languages, on-hand to monitor the witnesses' conversations. This could have the consequence of delaying the trial if

¹⁷ Amended Protocol emailed to the Parties and Participants on 13 June 2016 at 17h26 by a representative of VWU.

¹⁸ ICC-02/04-01/115-T-25-ENG, pg. 17:14-19.

¹⁹ Email from Benjamin Gumpert, QC to Pre-Trial Chamber II on 20 January 2016 at 13h09. The Defence highlights that Mr Gumpert contacted the Defence and did not object to the use of a Prosecution interpreter for the reasons stated within Mr Gumpert's email.

²⁰ Personal communication from CSS member to Defence. The Defence notes that it had no objection to the use of a member of CSS for the same reasons stated by Mr Gumpert in his 20 January 2016 email to Pre-Trial Chamber II.

²¹ See ICC-02/04-01/115-T-25-ENG, pg. 17:20-pg. 18:2.

an interpreter is caught between monitoring the witnesses and being prepared for his or duties in the interpretation booth.

27. Secondly, the Defence feels that during the Courtesy Meetings described in Section 2.5.2, paragraphs 66-70, of the *Gbagbo and Blé Goudé protocol*, if the person being called to testify is a dual status witness, or being called to testify by a Legal Representative for the Victims, the representing LRV should be allowed to sit with the witness during the Courtesy Meeting if the witness so desires, as this is consistent with the remainder of the protocol.

III. CONCLUSIONS

28. In light of the above, the Defence requests that:

- a. The Chamber adopt the “Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial” from the *Gbagbo and Blé Goudé case*, as amended by the VWU and emailed on 13 June 2016 to the Parties and Participants, with the minor changes recommended above and
- b. The Chamber rejects the Prosecution’s proposal on witness preparation, and instead adopt a case-by-case approach.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 17th day of June, 2016

At Kampala, Uganda