

**Cour
Pénale
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**International
Criminal
Court**



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No.: **ICC-02/04-01/15**

Date: **17 June 2016**

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 Document

Victims' joint observations on protocols to be adopted for trial

Source: Office of Public Counsel for Victims

Legal Representatives of Victims

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

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I. INTRODUCTION

1. On 23 May 2016, the Legal Officer of Trial Chamber IX (the “Chamber”) instructed all participants – by way of e-mail - to file submissions, if any, on different protocols to be adopted for trial by 17 June 2016.¹

2. On 13 June 2016, the Victims and Witnesses Unit (the “VWU”) sent to all participants, by way of e-mail, amended versions of the protocols mentioned in the “Registry Submissions on the Order Scheduling the First Status Conference and Other Matters” (No. ICC-02/04-01/15-440) (the “Registry Submissions”) that it intends to file by the above mentioned deadline.² According to the VWU, *“some minor terminology amendments needed to be made to the existing protocols in order to reflect the recent restructuring of VWU and the Registry. Some additional technical amendments were made in order to adjust the protocols to the present case”*.³

3. In accordance with the instructions of the Chamber, the Common Legal Representative and the Legal Representatives of Victims (together referred to as “Counsel representing victims”)⁴ jointly submit their observations on the protocols to be adopted for trial.

¹ See the email from Legal Officer of Trial Chamber IX, sent on 23 May 2016 at 18:17.

² See the email from Legal Officer of the Victims and Witnesses Unit, sent on 13 June 2016 at 17:27.

³ *Idem*.

⁴ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; and the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 24 December 2015, pp. 20-22.

I. SUBMISSIONS

A. On the e-court Protocol and the Protocol for handling confidential information and contacting witnesses of other participants

4. Preliminarily, Counsel representing victims inform the Chamber that they have no observations on the e-court protocol⁵ and on the protocol for handling confidential information and contacting witnesses of other participants⁶, as already adopted at the pre-trial stage of the case.

B. On the Protocol on dual status individuals

5. In relation to dual status individuals, Counsel representing victims favour the adoption of the recently approved protocols in the *Ntaganda*⁷ and *Gbagbo & Blé Goudé* cases.⁸ These versions reflect the efforts of various Pre-Trial and Trial Chambers to create a uniform practice on the matter and have proved to be workable Court-wide. They also take into account the specificity of individuals enjoying dual status of participating victims and witnesses.

⁵ See Annex 1 to the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-203-Anx 1, 27 February 2015.

⁶ See the “Order concerning the modalities for the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-339-Anx 1, 11 November 2015.

⁷ See the “Decision adopting the Protocol on dual status witnesses and the Protocol on vulnerable witnesses” (Trial Chamber VI), No. ICC-01/04-02/06-464 and, 18 February 2015 and the “Victims and Witnesses Unit’s submission of the proposed mechanisms for exchange of information on individuals enjoying dual status pursuant to Order n° ICC-01/04-02/06-416”, No. ICC-01/04-02/06-430, with ICC-01/04-02/06-430-Anx1, 23 January 2015.

⁸ See the “Decision adopting mechanisms for exchange of information on individuals enjoying dual status”, with one public annex (Trial Chamber I), No. ICC-02/11-01/15-199 and ICC-02/11-01/15-199-Anx, 31 August 2015.

C. On the Protocol on vulnerable witnesses

6. In relation to vulnerable witnesses, Counsel representing victims favour the adoption of the recently approved protocols in the *Ntaganda*⁹ and *Gbagbo & Blé Goudé* cases.¹⁰

7. Counsel have no objections to the amendments suggested by the VWU as proposed in the e-mail circulated on 13 June 2016. However, Counsel wish to underline that the recommendation for special measures for dual status individual should be provided to the concerned legal representative in order for her or him to be fully aware of the needs of his or her client. This approach is in line with the recent practice adopted in the *Ntaganda* and *Gbagbo & Blé Goudé* case.

D. On the Familiarisation Protocol and on the Witness Preparation Protocol

8. As mentioned in the Registry Submissions¹¹ and in the subsequent e-mail sent by the VWU to all participants¹², two different amended versions of familiarisation protocols have recently been adopted in the *Ntaganda* case and in the *Gbagbo & Blé Goudé* case. The former includes the practice of witness preparation while the latter excludes said practice.

⁹ See the “Decision adopting the Protocol on dual status witnesses and the Protocol on vulnerable witnesses, *supra* note 7 and the “Victims and Witnesses Unit’s submission of the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses pursuant to Order n° ICC-01/04-02/06-416”, No. ICC-01/04-02/06-445, with ICC-01/04-02/06-445-Anx1, 5 February 2015.

¹⁰ See the “Decision on witness preparation and familiarisation (Trial Chamber I), No. ICC-02/11-01/15-355; 2 December 2015 and the “Decision on Protocol on vulnerable witnesses” (Trial Chamber I), No. ICC-02/11-01/15-357, 4 December 2015, and the “Victims and Witnesses Unit’s Submission of the ‘Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony’ and the ‘Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses’”, No. ICC-02/11-02/11-110, with ICC-02/11-02/11-110-Anx2, 30 July 2014.

¹¹ See the “Registry Submissions on the Order Scheduling the First Status Conference and Other Matters”, No. ICC-02/04-01/15-440, 18 May 2016, para. 12.

¹² See *supra* paragraph 2.

9. The practice of “witness preparation” or “witness proofing” 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 Rome Statute.¹³ Nevertheless, this practice is prevalent in common law legal systems and has been accepted before other international tribunals and before this Court. Furthermore, trial chambers have a broad discretion pursuant to article 64(2) and (3)(a) of the Rome Statute to adopt adequate procedures to ensure that the trial is fair and expeditious, including in relation to witnesses appearing before the Court.

10. In some recent ongoing cases, Trial Chambers¹⁴ have agreed to authorise witness preparation invoking the singularity and complexity of the given case¹⁵, including the lapse of time since the occurrence of the alleged facts and the large number of potential exhibits¹⁶. These facts are clearly relevant for the present case.

11. In addition, Counsel highlight the need to protect the well-being and safety of witnesses in the present case, some of whom will be among their clients. As Trial Chamber V noted in the *Ruto & Sang* and in the *Kenyatta* cases, much of a witness’ apprehension about testifying may result from “[...] anxiety about giving evidence in what may feel like a foreign and even hostile environment, a lack of confidence in their ability to communicate and articulate their experiences, and/or apprehension over the unfamiliar experience of being challenged during cross-examination.”¹⁷ In the particular circumstances of the present case it is likely that a number of witnesses will be highly

¹³ See the “Decision on the Practices of Witness Familiarisation and Witness Proofing” (Trial Chamber I), No. ICC-01/04-01/06-679, 8 November 2006, paras. 11 and 42; the “Decision on Witness Preparation” (Trial Chamber V), No. ICC-01/09-01/11-524, 2 January 2013, para. 26 and the “Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial” (Trial Chamber I) No. ICC-01/04-01/06-1049, 30 November 2007, para. 36.

¹⁴ The reference is to the proceedings in the *Ruto and Sang* case and in the *Ntaganda* case.

¹⁵ See the “Decision on witness preparation” (Trial Chamber V), No. ICC-01/09-02/11-588, 2 January 2013, para. 41.

¹⁶ See the “Decision on witness preparation” (Trial Chamber VI), No. ICC-01/04-02/06-652, 16 June 2015, para. 18 and the “Decision on Witness Preparation” (Trial Chamber V), No. ICC-01/09-01/11-524, 2 January 2013, para. 33.

¹⁷ See the “Decision on witness preparation” (Trial Chamber V), ICC-01/09-01/11-524, 2 January 2013, para. 37 and the “Decision on witness preparation” (Trial Chamber V), No. ICC-01/09-02/11-588, 2 January 2013, para. 41.

vulnerable persons, having been abducted to become child soldiers or having been forced to be LRA “wives” at an early age. Witness preparation is particularly important for such witnesses, and may reduce the psychological burden which testifying places on them.¹⁸ While the VWU’s familiarisation process is of undoubted value in this respect, it is not intended to, and nor can it, substitute a discussion with counsel from the calling party.

12. Any potential risks which are considered inherent in the process of witness preparation can be adequately mitigated by the use of safeguards¹⁹, including the possibility for the non-calling party to question the witness, the provisions of the codes of professional conduct imposed by the Court and national systems, as well as any rules specific to the witness preparation process which the Chamber may deem it appropriate to impose in the present case.

13. Therefore, Counsel representing victims submit that the Chamber should consider adopting a Witness Preparation Protocol.

14. Should the Chamber decide to adopt this approach, one protocol including preparation and familiarization practices could be adopted, following the *Ntaganda* model including the amendments suggested by the VWU as proposed in the e-mail circulated on 13 June 2016.

¹⁸ *Idem*.

¹⁹ See the “Decision on witness preparation” (Trial Chamber V), ICC-01/09-01/11-524, 2 January 2013, paras 43-49 and the “Decision on witness preparation” (Trial Chamber V), No. ICC-01/09-02/11-588, 2 January 2013, paras 47-51.

Respectfully submitted.



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Joseph A Manoba



Francisco Cox

Dated this 17th Day of June 2016

At The Hague, The Netherlands, at Kampala, Uganda and at Santiago, Chile