

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **25 August 2016**

TRIAL CHAMBER III

Before: Judge Joyce Aluoch, Presiding Judge
Judge Geoffrey Henderson
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO**

Public Redacted Document

**Public redacted version of "Prosecution's Observations on the Victims and Witnesses Unit's Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial", 3 November 2010,
ICC-01/05-01/08-993-Conf**

Source: The Office of the Prosecutor

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

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Introduction

1. On 25 October 2010, the Victims and Witnesses Unit (“VWU”) filed its “Victims and Witnesses Unit’s Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial” (“VWU Protocol”).¹

2. The Office of the Prosecutor (“Prosecution”) submits its observations on the VWU Protocol. In general, the Prosecution believes the document reflects accurately the proper practices as they have developed over time between the VWU and the Prosecution in order to properly address the needs of the witnesses. Only limited comments are being made in order to further improve the proposed protocol. The Prosecution considers that an informal meeting with the VWU could help to dissipate any misunderstanding.

Request for confidentiality

3. The Prosecution requests that this submission, be received by Trial Chamber III (“Chamber”) as “Confidential” as it relates to confidential information that is not known to the public.

Areas requiring further clarification

1. Preparation phase²

4. The Prosecution notes that paragraph 5 of the VWU Protocol does not specify when the preparation phase commences with respect to witnesses already under the

¹ ICC-01/05-01/08-972, Victims and Witnesses Unit’s Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 22 October 2010.

² The number of the titles in this filing correspond to the relevant sections of the VWU Protocol.

care of the VWU. For these witnesses, the Prosecution proposes that the following text should be added at the end of paragraph 5 of the VWU Protocol *i.e.*; “[REDACTED]”.

5. Regarding paragraph 7 of the VWU Protocol, the Prosecution points out that the last sentence concerning the extraordinary cases in which the Registrar may provide an allowance for lost earnings. The Prosecution submits that [REDACTED].

6. With regard to paragraph 9, the Prosecution also notes that it does not specify to whom the witnesses in the International Criminal Court Protection Programme (“ICCPP”) will be handed back to. With respect to [REDACTED], the Prosecution submits that [REDACTED].

1.1 Scheduling of witnesses

7. While the Prosecution agrees that any Witness Information Form referred to in paragraph 14 should be submitted to the extent possible no less than 35 days before the witness is scheduled to arrive at the location of the testimony, it submits that this deadline should be considered as a guideline, but not be strictly binding.³ This deadline should be interpreted with some flexibility so as to allow the parties and participants calling a witness as well as the Chamber to adjust to the circumstances of each witness and to avoid delays in the proceedings. Therefore, the Prosecution submits that the term “must” ought to be replaced with the phrase “should, to the extent possible”.

³ The current text of paragraph 14 suggests that this deadline is strict, which is expressed by the term “must”.

1.3 Travel to the location of testimony and accommodation

8. Paragraphs 25 and 26 of the VWU Protocol deal with the issues of joint travel and accommodation. Regarding witnesses coming from the same location, the VWU Protocol states that “taking into account the upcoming simultaneous trials, the VWU will have to reduce to the extent possible the number of witnesses travelling and accommodated separately. Therefore, the VWU recommends that witnesses travel and be accommodated jointly”⁴. While the Prosecution agrees in principle that, to the extent possible, witnesses may travel and be accommodated jointly, there are instances where this should be avoided in order to prevent any impact on the security/protective measures and the preservation of the integrity of the evidence.

9. [REDACTED].

10. The Prosecution submits that [REDACTED]⁵ [REDACTED].

11. The Prosecution additionally requests that the VWU ensure that that Witnesses 38, 42, 47, 169, 178, 209 and 213, for whom it had requested special and protective measures do not travel and be accommodated together with any other witness. The special measures requested for these witnesses include voice and face distortion and the assignment of pseudonym during their testimony.⁶ The VWU supported these measures.⁷ Implementation of these measures would be frustrated if these witnesses travel with, or, are housed jointly with other witnesses.

⁴ ICC-01/05-01/08-972-Anx. See Footnote 7.

⁵ [REDACTED].

⁶ ICC-01/05-01/08-800-Conf-Exp-Corr, Corrigendum to Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial, 6 July 2010, at para 57.

⁷ ICC-01/05-01/08-884-Conf-Exp, Victims and Witnesses Unit’s observations on the Corrigendum to Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial, 15 September 2010, at paras 5-9, 13, 14 and 18.

12. In supporting the Prosecution's request for special measures for witnesses in this case, the VWU recommended that; "[REDACTED]".⁸ [REDACTED].

13. The Prosecution concurs with the VWU regarding the joint travel and accommodation for four vulnerable witnesses prior to their testimony. These are Witnesses 23, 80, 81 and 82. [REDACTED].⁹ The Prosecution is in agreement with the VWU assessment that [REDACTED].¹⁰ [REDACTED] would be artificial as Trial Chamber I determined in the *Lubanga* case.

14. Trial Chamber I dealt with a similar issue, concerning father and son, who appeared as witnesses in that case. In its decision, it determined that; "We've reflected on the matter and our view is that in order to reflect the practical realities of the situation where there is a father and a son who have already been with each other and travelling together, it would be artificial if at this stage we were to say they should be separated."¹¹ Given the similarity in the circumstances of the two cases, the Prosecution recommends this Chamber to adopt the practice developed by Trial Chamber I in the *Lubanga* case.

15. The Prosecution further notes that the joint accommodation of witnesses at the place of testimony may have an impact on the testimony of these witnesses once anyone of them commences giving his/her evidence. This is particularly the case where there is an element of overlap between the evidence of such witnesses.¹² It is reasonable to infer that there may be conversations between them.

⁸ ICC-01/05-01/08-974-Conf-Exp, Victims and Witnesses Unit's additional observations on protective measures for vulnerable witnesses, 25 October 2010, at para 9.

⁹ [REDACTED].

¹⁰ ICC-01/05-01/08-972-Anx, at para. 25.

¹¹ ICC-01/04-01/06-T-265-Red-ENG, 18 March 2010.

¹² The evidence of Witnesses 23, 80, 81 and 82 overlap on a number of issues.

16. To maintain the physical and psychological well being of the separated witness, the Prosecution proposes the following measures;

- a) [REDACTED];
- b) [REDACTED];
- c) [REDACTED];
- d) [REDACTED]; and
- e) [REDACTED].

2.1.1 Commencement of the familiarization process

17. The Prosecution further refers to paragraph 35 of the VWU Protocol which requires that all meetings between the entity calling the witness and the witnesses, including expert witnesses, will be conducted within the premises of the VWU. The Prosecution submits that it is neither necessary nor practical for the meetings with the experts to take place within the VWU premises.¹³ Accordingly, the Prosecution proposes that the text “including expert witnesses” be deleted from paragraph 35.

2.3. Protective measures

18. With regard to protective measures, the Prosecution clarifies that the measures referred to in this section are limited to in-court protective measures pursuant to Rule 87 as opposed to other protective measures taken by the Prosecution or the VWU. The Prosecution proposes that the title to this section as well as the text in paragraphs 51 to 53 should be changed from protective measures to “In-Court protective measures” to reflect the nature of the measures referred to in those paragraphs.

¹³ In the *Lubanga* case, Trial Chamber I rule that “Accordingly, discussions between the parties and their experts may take place at any stage prior to calling the witness” (ICC-01/04-01/06-T-104-ENG, p. 29, lines 10-11).

2.4. Witnesses falling under the scope of Rule 74 of the Rules of Procedure and Evidence (“Rules”).

19. Paragraph 60 of the VWU Protocol states that; “VWU staff informs the witness that a meeting or a consultation by phone with the duty counsel will take place. If the witness does not want to consult with the latter, this decision is brought to the attention of the Chamber.” The Prosecution takes no issue with this paragraph. However, if the witness does not wish to consult with Duty Counsel regarding Rule 74 of the Rules issues, then the VWU should bring this not only to the attention of the Chamber, but also the party calling the witness.

2.6 Reading and provision of statement

20. Paragraph 83 of the VWU Protocol provides guidance to the parties calling witnesses on information that they should provide to the witnesses to read during familiarisation. The Prosecution submits that this paragraph should be deleted in its entirety from the Protocol since it is not the VWU’s mandate to influence a party’s choice of the information they would like their witnesses to read prior to testimony. Neither is it in the interest of the fairness of the proceedings to limit the time that a witness is given to read any prior statements or related documents.

2.6.2 Reading of the statement

21. The Prosecution is also concerned with paragraph 95 of the VWU Protocol which states that; “The Chamber may allow witnesses to refer to documents in order to refresh their memory only insofar as: a) the documents in question contain the personal recollections of the witness and b) copies of the document have been made available to the opposing party, who may rely on the parts referred to by the witness during cross-examination. For the purpose of refreshing the witness’ memory, it is

immaterial whether the documents are admissible as evidence or not. If a Chamber allows a witness to consult any documents in Court, such documents will be made available by the relevant Court staff members in the courtroom”. The Prosecution submits this text should be deleted from the Protocol. Issues discussed in the text are issues that need to be determined by the Chamber after hearing submissions from the parties. It is not for the VWU to propose such matters in the Protocol.

2.7 Day of testimony

22. Regarding paragraph 107 of the VWU Protocol, the Prosecution submits that it's the party calling the witness and not the VWU that decides whether or not to provide a statement to the witness. The VWU can provide its assessment and recommendation on the impact that this would have on the security and well being of the witness in the ICCPP. The VWU cannot overrule the party calling the witness where the latter has decided to provide or not to provide a statement to the witness. The Prosecution proposes that this paragraph should be amended accordingly to allow the party calling the witness to make the decision as opposed to the VWU.

3.2 Cooling down period

23. With regard to paragraph 115 of the VWU Protocol, the Prosecution stresses that during post testimony risk assessment, the content of the witness testimony should be taken into consideration. Moreover, [REDACTED]. The Prosecution proposes that the text of paragraph 115 should be amended accordingly to reflect this position

24. In paragraph 120 of the VWU Protocol, the VWU states that “Security concerns of sufficient gravity arising after testimony will be brought to the attention of the Trial Chamber. In this context, the VWU will also convey to the Chamber any

influence that the situation could have on witnesses who have not yet testified and on any procedural protective measures the Trial Chamber may consider granting to them.” The Prosecution has no issue with this paragraph. It requests that the information referred to in this paragraph must not only be provided to the Chamber but also to the party calling the witness.

Conclusion

25. In light of the foregoing, the Prosecution invites the VWU and the Chamber to consider its proposals in order to ensure that the witness familiarisation exercise proceed efficiently and fairly.



Fatou Bensouda, Prosecutor

Dated this 25th Day of August 2016
At The Hague, The Netherlands