Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/14-01/18**
Date: **14 April 2020**

TRIAL CHAMBER V

Before: **Judge Bertram Schmitt, Presiding Judge**
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD NGAÏSSONA*

Public
with Public Annexes A and B

Prosecution's Submission of Proposed Directions for the Conduct of Proceedings and Proposed Protocol on Witness Familiarisation

Source: **Office of the Prosecutor**

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

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I. INTRODUCTION

1. The Office of the Prosecutor ("Prosecution") submits for Trial Chamber V's ("Chamber") consideration i) proposed Directions for the Conduct of Proceedings; and ii) a proposed Protocol on Witness Familiarisation, set out at Annexes A and B, respectively.

2. The Prosecution further favours the Chamber's adoption of the following existing protocols and procedures implemented by Pre-Trial Chamber II ("Pre-Trial Chamber") for the duration of trial, comprising:

a. the E-Court Protocol;[1]

b. the Redactions Protocol; [2]

c. the Protocol on the Handling of Confidential Information and Contacts with Witnesses;[3] and

d. the Victim Application Procedure (together, "Four Existing Protocols and Procedures").[4]

II. PROCEDURAL HISTORY

3. On 11 December 2019, the Pre-Trial Chamber issued its decision on the confirmation of charges, committing Alfred Yekatom and Patrice-Edouard Ngaïssona to trial.[5]

[1] ICC-01/14-01/18-64-Anx.
[2] ICC-01/14-01/18-64-Red, paras. 23-32.
[3] ICC-01/14-01/18-156; ICC-01/14-01/18-156-AnxA.
[4] ICC-01/14-01/18-141.
[5] ICC-01/14-01/18-403-Conf.

4. On 16 March 2020, the Presidency constituted the Chamber and transmitted to it the full record of the proceedings.[6]

5. On 19 March 2020, the Chamber scheduled the first status conference for 21 April 2020, ordering the parties to provide written submissions by 8 April 2020 ("Order").[7] The Chamber further informed the Parties of its intention "to issue directions on a variety of matters pursuant to Article 64(8)(b) of the Statute in due course", and that it "may take into account the submissions of the parties on these matters".[8] The Chamber also confirmed that the Four Existing Protocols and Procedures would remain in place, unless otherwise indicated.[9]

III. SUBMISSIONS

A. Directions for the Conduct of Proceedings

6. The proposed Directions for the Conduct of Proceedings ("Directions") govern the presentation of evidence and other related matters as contemplated in the Chambers Practice Manual.[10] As noted, they are set out at Annex A.

7. With a view to creating one comprehensive document governing proceedings, the proposed Directions further include provisions on witness preparation and on dual status witnesses previously detailed in discrete dedicated protocols. Part V of the Directions which covers "Witness Preparation", is based on the Witness Preparation Protocol most recently adopted by Trial Chamber X in the *Al Hassan* case.[11] Likewise, Part IX on "Dual Status Witnesses" covers the same substantive

[6] ICC-01/14-01/18-451.
[7] ICC-01/14-01/18-459. The Chamber subsequently deferred the first status conference to an undetermined date due to the current COVID-10 pandemic: ICC-01/14-01/18-464.
[8] Order, para. 7.
[9] Order, para. 8.
[10] *See* Chambers Practice Manual, para. 83.
[11] *See* ICC-01/12-01/18-666-Anx.

ground as the Dual Status Witness Protocol also recently adopted in *Al Hassan*.[12] In both cases, modifications have been made to promote clarity, accuracy and consistency.

8. Most provisions of the proposed Directions reflect accepted practice and therefore, do not require elaboration. However, the issue of witness preparation, and the choice of the evidentiary regime to be applied ("submission" or "admission"), are less consistent in the Court's practice. The Prosecution therefore elaborates its position with respect to these two matters.

a. Proposed witness preparation

9. The Prosecution proposes that witness preparation be authorised in the trial proceedings within the parameters set out in Part V of the Directions, for the stated purposes of i) assisting the witness "to help ensure that the witness gives relevant, accurate and structured testimony; and to help ensure the well-being of the witness; ii) [f]or the Calling Party to assess and clarify the witness's evidence in order to facilitate the focused, efficient and effective questioning of the witness during the proceedings; and iii) [i]mportantly, for the Calling Party meaningfully to exercise its statutory right to effectively prepare and present its case."[13]

10. As Trial Chamber VI stated in the *Ntaganda* case, "any decision on witness preparation should be made after a careful review of the circumstances prevailing in each case at the court."[14] It is submitted that the circumstances of this case are such that witness preparation would support witnesses to give their testimony in the best possible conditions, would contribute to the fair and expeditious conduct of trial proceedings, and would do both within the present budgetary and potentially logistical constraints of the institution.

[12] *See* ICC-01/12-01/18-674-Anx1.
[13] *See* Annex A, para. 11.
[14] ICC-01/04-02/06-652, para. 17. *See also* ICC-01/12-01/18-666, para. 10.

11. *Firstly*, preparation sessions would help witnesses to be more comfortable and confident when giving their testimony. All witnesses will be called to testify about events that occurred at least six years prior, and – in most cases – about which they gave their statements to investigators many years ago. For most witnesses, it will be their first exposure to the judicial process, let alone in a foreign courtroom. Attendance at preparation sessions with lawyers from the Calling Party will give witnesses the best possible opportunity to review their statements and to understand on which topics they will be examined.

12. While the familiarisation process conducted by the Victims and Witnesses Unit ("VWU") may allow witnesses to review their statements,[15] it lacks a certain dimension found in the practice of witness preparation, particularly as concerns vulnerable witnesses. For instance, when adopting its Witness Preparation Protocol in March of this year, Trial Chamber X in *Al Hassan* noted:

> "*While VWU can provide neutral sensitization, it is particularly helpful that the witness has a chance to meet and interact with the person who will actually be questioning him or her in the courtroom. These sessions are especially important for vulnerable witnesses who will already be dealing with difficult challenges in presenting evidence. […] Preparatory sessions in which vulnerable witnesses will have more time to meet with counsel may reassure them and contribute to their well-being, particularly during and after their testimony.*"[16]

13. *Secondly*, witness preparation will enhance the fairness and efficiency of proceedings, and recognise the Parties' right to prepare and present their cases in a manner best suited to establishing the truth.[17] By allowing witnesses to refresh their

[15] As explained in the Registry Submissions in View of the upcoming Status Conference, this occurred in *Ongwen* and *Gbagbo/Blé Goudé* where, in the absence of a Witness Preparation Protocol, the VWU conducted the process of statement reading with the witnesses (ICC-01/14-01/18-470, para. 13).
[16] ICC-01/12-01/18-666, para. 13.
[17] *See* ICC-01/09-01/11-524, paras. 31-36, in particular para. 34: "In order to elicit focused and structured testimony and to ensure that all probative evidence is presented, it is also important that counsel, particularly

memories and by giving them the opportunity to clarify any issues, witness preparation would lead to "more efficient and focused witness examination", and ultimately to testimony that is structured and clear.[18] Further, as emphasised by Trial Chamber X, "witness preparation is particularly well-suited for the introduction of previously recorded testimonies under Rule 68(3) of the Rules", as it allows witnesses to confirm the truth of their written statement and to identify any corrections required ahead of their testimony.[19] Witness preparation is therefore vital to the effective use of rule 68(3) as a means of facilitating the efficient and expeditious conduct of proceedings.

14. *Thirdly*, the current budgetary constraints under which the Prosecution is operating means that pre-testimony sessions in the field between witnesses and the lawyers who will examine them may not be feasible in this case, as they were, for example, in the *Ongwen* case. Further, the specific effects of the current COVID-19 pandemic on the proceedings are not yet known. The pandemic may render meetings in the field not only unfeasible as a matter or resources, but also of logistics.

15. *Fourthly,* in the manner that it has been regulated by Chambers of this Court, witness preparation can have no detrimental effect on the integrity of the proceedings. It is important to stress that witness preparation, as accepted by some Chambers of this Court, can be distinguished from the practice of "witness proofing", as admitted in other jurisdictions, in the sense that it is not a rehearsal or, in the words of Judge Fulford, a "dry run" of the evidence.[20] It is a much more

counsel of the calling party, are well prepared and fully acquainted with each witness's evidence." *See also* ICC-01/04-02/06-652, para. 18, in which Trial Chamber VI stated that in the circumstances of the *Ntaganda* case, "… witness preparation will enable the calling party to engage with the witness in order to define *the most effective way to discover the truth during trial*." (emphasis added)

[18] ICC-01/12-01/18-666, para. 15.

[19] ICC-01/12-01/18-666, para. 16.

[20] *See* ICC-01/04-01/06-T-58-ENG, p. 59, l. 1 *and following*. *See also* the definition of "witness preparation" adopted by Trial Chamber V in *Ruto/Sang* (ICC-01/09-01/11-524, para. 4): "… a meeting between a witness and the party calling that witness, taking place shortly before the witness's testimony, for the purpose of discussing matters relating to the witness's testimony."

limited process, aimed at facilitating the focused and efficient testimony of a witness, while simultaneously promoting his or her well-being.

16. Finally, witness preparation does not prejudice the rights of the Accused, due to the safeguards contained in the procedure proposed. The proposed Directions emphasise that witness preparation shall not be conducted for the purpose of seeking new evidence, although witnesses may volunteer new, relevant information.[21] They further provide that lawyers for the Calling Party must not seek to influence the substance of the witness's testimony during preparation sessions, whether directly or indirectly.[22] All interactions between the witness and lawyers for the Calling Party are video-recorded and subject to disclosure to the non-Calling Parties upon a substantiated request.[23] These safeguards are sufficient to ensure the fairness and integrity of the proceedings for the Parties and Participants.

b. Choice of evidentiary regime: "submission" or "admission"

17. As the Appeals Chamber has held, the Trial Chamber has discretion on how to deal with evidence submitted at trial:

a. The Trial Chamber may defer its assessment of the relevance, probative value and potential prejudice of the evidence until its article 74 judgment, when determining the weight to be given to the evidence ("Submission Regime"); or

b. The Trial Chamber may make a formal ruling on the admissibility of the evidence when it is submitted, based on its consideration of the

[21] *See* Annex A, para. 12.
[22] *See* Annex A, para. 27.
[23] *See* Annex A, paras. 21-22.

relevance, probative value and potential prejudice of the evidence ("Admission Regime").[24]

18. Noting the divergence of various Trial Chambers, both regimes are clearly foreseen in the regulatory framework. The Prosecution thus takes no specific position on which should be adopted in this case. However, the clear election of the applicable regime at the outset of these proceedings to provide certainty to the Parties and Participants is key. To this end, the proposed Directions contain two alternative options, marked in grey highlighted text. "[Option 1: …]" denotes provisions applicable to a Submission Regime, and "[Option 2: …]" denotes those applicable to an Admission Regime. The Prosecution also notes that the Trial Chamber may properly inject elements of one model into the other, for instance by including in a "Submission" Regime early determinations on admissibility, not only where an exclusionary rule applies, but also in relation to hotly contested items of evidence which have a particularly high probative importance in the case, in order to provide clarity to the parties and participants.

i) Submission Regime

19. Trial Chambers in the *Bemba, et al*,[25] *Gbagbo/Blé Goudé*,[26] and *Ongwen*[27] cases have adopted the Submission Regime. Under this regime, the Chamber does not make individualised rulings on the admissibility of evidence. Instead, it assesses the relevance, probative value and potential prejudice of the evidence "submitted and discussed" together with its weight in its article 74 judgment, and provided it meets any specific conditions under the Statute or Rules of Procedure and Evidence ("Rules"). The Trial Chamber need not refer to each item of evidence submitted by

[24] ICC-01/05-01/08-1386, para. 37.
[25] ICC-01/05-01/13-1285, para. 9.
[26] ICC-02/11-01/15-405, paras. 12-15.
[27] ICC-02/04-01/15-497, para. 25.

the Parties. Article 74(5) only requires "a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions".

20. The Appeals Chamber has upheld the application of the Submission Regime under article 69(4), noting that articles 64(9)(a) and 69(4) "accord the Trial Chamber discretion when admitting evidence at trial."[28] In doing so, it emphasised that "irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings – when evidence is submitted, during the trial, or at the end of the trial."[29]

21. Trial Chamber VII in *Bemba, et al* considered that the "proceedings will be conducted more efficiently if the Chamber defers its assessment of the admissibility of evidence until deliberating its judgment pursuant to article 74(2) of the Statute."[30]

22. In the *Gbagbo/Blé Goudé* case Trial Chamber I's decision to adopt the Submission Regime was based on three factors: (1) it is only at the end of trial, once the submission of the evidence will have been completed, that the Chamber will be in the best position to meaningfully assess each item of evidence as submitted throughout the course of the proceedings; (2) deferring the Chamber's determination of all the issues concerning a given piece of evidence to the time of judgment will prevent multiple determinations on the same item of evidence made at different stages of the trial; and (3) deferring the Chamber's determination to the time of judgment will also ensure that all evidence submitted will be subjected to uniform treatment.[31]

[28] ICC-01/05-01/08-1386, para. 37.
[29] ICC-01/05-01/08-1386, para. 37.
[30] ICC-01/05-01/13-1285, para. 9.
[31] ICC-02/11-01/15-405, paras. 12-15.

23. The Single Judge in *Ongwen* explained that this regime has been adopted in recent cases as -

> *"(i) the Chamber is able to assess more accurately the relevance and probative value of a given item of evidence after having received all of the evidence being presented at trial; (ii) a significant amount of time is saved by not having to assess an item's relevance and probative value at the point of submission and again at the end of the proceedings; (iii) there is no reason for the Chamber to make admissibility assessments in order to screen itself from considering materials inappropriately and (iv) there is no reason to assume that professional judges would consider irrelevant or unduly prejudicial material, noting in particular that the requirement of a reasoned judgment enables the participants to verify precisely how the Chamber evaluated the evidence."*[32]

24. Should the Chamber elect to apply a Submission Regime, it is urged do so in accordance with the proposed Directions, denoted as "[Option 1: …]", and delete the text denoted as "[Option 2: …]".

ii) Admission Regime

25. Under the Admission Regime, the Trial Chamber issues decisions admitting or denying admission to items of evidence when the Parties submit them at trial. The Trial Chamber must then give a reasoned decision on an item by item basis pursuant to rule 64(2) of the Rules.[33]

26. As stated in Judge Henderson's separate opinion in the *Bemba, et al* Appeals Judgment, the advantages of the Admission Regime are three-fold: (1) potentially unreliable evidence is immediately screened out, preventing the Parties and Legal Representatives from relying on them, and preventing the trial proceedings from

[32] ICC-02/04-01/15-497, para. 25.
[33] ICC-02/04-01/15-497, para. 59.

being inundated by large amounts of irrelevant, unauthentic, non-probative (e.g. anonymous hearsay) or otherwise prejudicial evidence; (2) the Parties and Legal Representatives are provided notice as to the purpose for which the evidence has been entered into the case record, that is, what the tendering party aims to prove by it (possibly in conjunction with other evidence); and (3) the Chamber is able to receive all necessary information to make a fully informed evaluation of the exhibit's evidentiary weight.[34]

27. Should the Chamber wish to adopt an Admission Regime, it is requested to accept the text of the proposed Directions denoted as "[Option 2: …]", and delete the text denoted as "[Option 1: …]".

B. Protocol on Witness Familiarisation

28. Consistently with the practice of previous Trial Chambers and with the guidance provided by the Chambers Practice Manual,[35] the Prosecution proposes a Protocol on Witness Familiarisation. As noted, this is set out at Annex B, and is based on a version recently adopted by Trial Chamber X.[36] In turn, that version was based on one used in the *Ntaganda* case.[37] The amendments marked in the document distinguish the version proposed in this case from that filed onto the record by the Registry before Trial Chamber X.[38]

29. Minimal substantive amendments are indicated at paragraphs 5, 24, 39, 41 and 58, and outlined below. The remaining marked amendments are non-substantive

[34] ICC-01/05-01/13-2275-Anx, paras. 42, 44; *see further*, paras. 38-55 (for a fuller analysis of the relevant issues).
[35] *See* Chambers Practice Manual, para. 78: "*The Trial Chamber should consider adopting a familiarisation protocol governing the period of time shortly before a witness commences his/her testimony.*"
[36] *See* ICC-01/12-01/18-705-AnxI.
[37] *See* ICC-01/12-01/18-666, paras. 54-58 (adopting with modifications the Protocol found at ICC-01/04-02/06-656-AnxA).
[38] *See* ICC-01/12-01/18-705 and ICC-01/12-01/18-705-AnxI.

and intended simply to add clarity to the existing provisions, including in the consistent use of terms to describe the Court's various actors.[39]

a. Location of introductory meeting between the VWU and the witness (paragraph 5)

30. The Prosecution proposes to remove the specification that the handover meeting – whereby the calling entity facilitates an introductory meeting between the VWU and the witness – occur in the field. To this end, the words "This phase takes place in the field, whereby…" should be deleted in paragraph 5. In light of the present budgetary and potentially logistical constraints under which the institution is operating, this amendment recognises that the physical presence of the calling entity at the handover meeting may not be feasible.

b. Joint travel and accommodation of witnesses

31. The Prosecution proposes additional safeguards at paragraphs 24, 39 and 41 to avoid the potential for contamination of evidence, and to ensure that witnesses' comfort, as well as the confidential nature of their interaction with the Court, are not compromised.

i) Deletion of qualifier "Wherever possible" (paragraphs 24 and 39)

32. The qualifier "Wherever possible" at the beginning of paragraphs 24 and 39 should be deleted so that joint travel and accommodation is not the default arrangement, but rather an exceptional arrangement that may be appropriate in given circumstances (such as, where witnesses are family members or otherwise living together).

[39] For example, the term "calling Party" refers to the Prosecution or the Defence in the context of calling a witness, while the wider term "calling entity" also encompasses the Legal Representatives in that context.

33. The Prosecution notes that Trial Chamber X in the *Al Hassan* proceedings rejected the necessity of the same amendment, finding that footnote 3 in paragraph 24 of the protocol[40] made it "sufficiently clear that this procedure is to be used only where it is consistent with the relevant witnesses' security and where, notably they have already had repeated contacts."[41] However, this exception – expressly provided for the minority of witnesses who are in the Court's protection programme ("ICCPP") – does not clarify the *exceptional* nature of joint travel and accommodation applicable to all witnesses. Instead, it exempts a particular class of witnesses (those in the ICCPP) from what is otherwise framed as a presumption of joint travel and accommodation, to be inferred from the wording "Wherever possible".

ii) Addition of general exception for ICCPP participants (paragraph 39)

34. Notably, paragraph 39 – on joint accommodation – contains no equivalent to footnote 3 on joint travel. The provision in its current form therefore creates a presumption for joint accommodation without the stated exception for ICCPP participants in to be found in paragraph 24 on joint travel. The Prosecution thus proposes the addition of a footnote with the same wording as footnote 3 be added to paragraph 39. This will ensure a uniform approach for ICCPP participants regarding both travel and accommodation (*see* proposed additional footnote 12).

35. Alternatively, given that participation in the ICCPP is already included as a factor for consideration under paragraphs 24 and 39, uniformity may also be achieved by simply deleting footnote 3. Especially if the qualifier "Wherever possible" is deleted from both paragraphs, it should already be sufficiently clear that an ICCPP participant would only travel and be accommodated with other witnesses in exceptional cases.

[40] Identical to footnote 3 (but shifted to marked up footnote 4) as proposed in this case: "As a general rule, this [joint travel] will not apply to witnesses who participate in the Court's protection programme and who do not live together."
[41] ICC-01/12-01/18-666, para. 55.

iii) Addition of "profile of the witness" as a factor for consideration (paragraphs 24, 39 and 41)

36. In addition to the current factors listed for consideration in paragraphs 24 and 39 (ICCPP participation, the preservation of confidentiality, and the potential for contamination), the factor of "profile of the witness" should be added. As elaborated in the related footnotes 5 and 13, this addition aims to avoid a situation where witnesses who have been victimised, or are otherwise vulnerable, come into contact with witnesses belonging to or associated with perpetrator groups.

37. To this same end, an addition should also be made to paragraph 41 specifying that any social contact facilitated by the VWU between witnesses at the place of accommodation should be subject to the restriction on contact between victims of crime and witnesses belonging to or associated with perpetrator groups (*see* proposed additional footnote 15).

c. Allocation of legal advisers (paragraph 58)

38. The Prosecution proposes a safeguard to ensure that any legal adviser allocated by the Counsel Support Section ("CSS") for the purpose of rule 74 is not professionally conflicted out of providing advice to the witness. Paragraph 58 should thus be amended to reflect that the lawyer identified by the CSS must be not only qualified but must also be "able (*i.e.* not conflicted)" to do so.

C. Existing Protocols and Procedures

39. Consistently with the approach foreseen in the Chambers Practice Manual,[42] the Chamber should adopt the Four Existing Protocols and Procedures implemented by the Pre-Trial Chamber for the duration of the trial.

40. While these protocols and procedures continue to apply "unless otherwise indicated" by virtue of the Chamber's statement to that effect,[43] formal adoption by the Chamber would provide additional certainty to the Parties and Participants in the discharge of their obligations.

41. Finally, the Chamber may wish to consider the necessity of adopting a Protocol on Vulnerable Witnesses. As stated in the Chambers Practice Manual, "[g]iven the now largely standardised and somewhat operational nature of this protocol, the Registry may be able to act in accordance with this protocol without it being formally adopted by a Trial Chamber."[44] This was also the view of Trial Chamber X in the *Al Hassan* proceedings, which after receiving observations from the Registry determined that there was no need to adopt a separate protocol and authorised the VWU to continue using the protocol developed in other cases.[45]

IV. CONCLUSION

42. For the above reasons, the Prosecution requests the Chamber to adopt: i) its proposed Directions for the Conduct of Proceedings, as contained in Annex A, electing either a Submission Regime or an Admission Regime; and ii) its proposed Protocol on Witness Familiarisation, as contained in Annex B.

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[42] *See* Chambers Practice Manual, para. 77: "*In general, protocols or procedures which have been adopted by the Pre-Trial Chamber and apply to various stages of proceedings, such as on redactions or the handling of confidential information, will continue to apply.*"
[43] Order, para. 8.
[44] Chambers Practice Manual, para. 80.
[45] ICC-01/12-01/18-562, para. 5.

43. The Prosecution further requests the Chamber to adopt the Four Existing Protocols and Procedures for the duration of the trial.

Fatou Bensouda, Prosecutor

Dated this 14th day of April 2020
At The Hague, The Netherlands