

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/14-01/18

Date: 14 May 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
THE PROSECUTOR *v.* ALFRED YEKATOM AND PATRICE-EDOUARD
NGAÏSSONA**

Public

Public Redacted Version of the “Registry’s Submissions pursuant to regulation 24bis of the Regulations of the Court and in relation to the “Decision on Ngaïssona Defence Requests Related to the Prosecution Submissions on the Conduct of the Proceedings”[ICC-01/14-01/18-491]”

Source: Registry

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

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I. Introduction

1. Pursuant to the regulation 24*bis* of the Regulations of the Court (“RoC”), and in line with the “Decision on Ngaïssona Defence Requests Related to the Prosecution Submissions on the Conduct of the Proceedings”¹ (“Decision”) issued by Trial Chamber V (“Chamber”) on 23 April 2020, the Victims and Witnesses Unit (“VWU”) submits its views to the Chamber on the proposed amendments submitted by the Office of the Prosecutor (“Prosecution”) in the “Prosecution’s Submission of Proposed Directions for the Conduct of the Proceedings and Proposed Protocol on Witness Familiarisation”².

II. Classification

2. In accordance with regulation 23 *bis* (1) of the RoC, the present submissions are classified confidential as they contain confidential working procedures. A public redacted version of the present submissions is filed simultaneously.

III. Background

3. On 14 April 2020, the Prosecution filed the “Prosecution’s Submission of Proposed Directions for the Conduct of the Proceedings and Proposed Protocol on Witness Familiarisation” (“Prosecution Submissions”) whereby it proposes *inter alia* (i) Directions for the Conduct of Proceedings (“Prosecution’s Proposed Directions”), and (ii) Amendments to the Protocol on the practices to be used to familiarise witnesses for giving testimony at trial (“Familiarisation Protocol”) as filed by the Registry on 31 March 2020 before Trial Chamber X in the record of the *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (“Al Hassan Case”).³

¹ Trial Chamber V, “Decision on Ngaïssona Defence Requests Related to the Prosecution Submissions on the Conduct of the Proceedings”, 23 April 2020, ICC-01/14-01/18-491, para. 12.

² Office of the Prosecutor, “Prosecution’s Submission of Proposed Directions for the Conduct of the Proceedings and Proposed Protocol on Witness Familiarisation” 14 April 2020, ICC-01/14-01/18-476.

³ Registry, Registry’s Submissions on the Protocol on the practices to be used to familiarise witnesses for giving testimony at trial pursuant to “Decision on witness preparation and familiarisation” (ICC-01/12-01/18-666) “, 31 March 2020, ICC-01/12-01/18-705-AnxI.

4. On 16 April 2020, the Defence of Patrice Edouard-Ngaïssona filed a request seeking that the Prosecution Submissions be rejected in *limine* and, in the alternative, requesting an extension of time to file its response to the Prosecution Submissions, 21 days after issuance of the Chamber's decision on its request.⁴
5. On 23 April 2020, the Chamber issued the Decision, ordering the parties and participants to file responses to the Prosecution Submissions 21 days after the notification of the Decision.

IV. Submissions

6. The Registry, specifically the VWU, wishes to present its view on the Prosecution Submissions and to provide information that may be of use to the Chamber, mainly on matters pertaining to its mandate and internal working procedures.

A. Prosecution's Proposed Directions of the Conduct of the Proceedings

7. Paragraphs 108 and 109 of the Prosecution's Proposed Directions read as follows:

108. In these or any other circumstances, as soon as the Parties or Legal Representatives become aware of a witness's dual status, they shall communicate this to each other, to the other Parties, and to the VPRS.

109. The Parties or Legal Representatives shall also communicate this to the VWU where they seek the dual status witness's inclusion in the ICCPP. Likewise, the VWU shall ask witnesses during assessment interviews whether they have applied for participation and/or reparation.

8. In order to fulfil its mandate in protecting the security and well-being of victims and witnesses in an efficient manner, the VWU needs to be informed of the 'dual status' witnesses as soon as the calling/referring party or

⁴ Defence of Patrice Edouard- Ngaïssona, "Defence request for dismissal, in *limine*, of the "Prosecution's Submission of Proposed Directions for the Conduct of Proceedings and Proposed Protocol on Witness Familiarisation", ICC-01/14-01/18-476, or, in the alternative, Request for Extension of time pursuant to Regulation 35(2) of the Regulations of the Court", 16 April 2020, ICC-01/14-01/18-479.

participant is aware of the status. Whether the witness will be referred to the VWU for inclusion in the Court's Protection Programme (or any other purpose) should not be the determining factor and therefore the notification of the VWU should occur at the earliest possible opportunity.

9. This procedure is also in line with the "Mechanism for exchange of information on individuals enjoying dual status ("Dual Status Witness Protocol")", which was initially filed in the case of the *Prosecutor v. Bosco Ntaganda* and later on in different cases before the Court⁵, which reads:

b) The parties and participants should communicate to the VWU and to the VPRS the fact of the dual status of an individual *as soon as they become aware of it*. [emphasis added]

10. Therefore, VWU advises the modification of paragraph 108 of the Prosecution's Proposed Directions as follows:

108. In these or any other circumstances, as soon as the Parties or Legal Representatives become aware of a witness's dual status, they shall communicate this to each other, to the other Parties, to the VWU and to the VPRS.

B. Proposed amendments to the Familiarisation Protocol

i. On the removal of the phrase "This phase takes place in the field..."

11. In its submissions, the Prosecution proposes the removal of the above-mentioned phrase based on the present budgetary and potentially logistical constraints and therefore physical presence at the handover meeting may not be feasible.⁶
12. While the VWU acknowledges the constraints raised by the Prosecution, it wishes to emphasise the fundamental need of the VWU, for the proper conduct of the proceedings, to have absolute certainty on the identity of the witnesses that each calling party refers or presents to it.
13. Identification of victims and witnesses living in a conflict and post-conflict area can indeed be operationally challenging as they may not always have any

⁵ See for example: Trial Chamber X, "Decision on the 'Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant', the 'Dual Status Witness Protocol', and related matters", 19 March 2020, ICC-01/12-01/18-674-Anx1. See also: ICC-01/04-02/06-464, ICC-02/11-01/15-199, ICC-02/04-01/15-504.

⁶ Prosecution Submissions, para.30.

valid identification documents. This renders physical introduction of victims and witnesses in the field by the referring party/participant as one of the most crucial processes in minimising the risk of the VWU mistakenly identifying victims and witnesses.

14. The VWU needs to avoid any mistake in the identification of a witness before bringing him/her to present *viva voce* evidence in the courtroom. The VWU notes that such mistake is more likely to occur where the witness was never introduced physically to the VWU by the calling party. Where no physical introduction takes place, the VWU has to rely on photo identifications provided to it by the calling parties/participants which could be of poor quality. Mindful of these challenges, the VWU needs to ensure that all efforts are made to minimise the risk of a mistaken identity.
15. [REDACTED].
16. [REDACTED].
17. In some instances, where the physical handover by the calling party for the purpose of the trial is not feasible, the VWU may need to proceed differently. However, from the VWU's viewpoint, this exception should only be applicable under the following circumstances:
 - i) the VWU [REDACTED], or
 - ii) the referring/calling party can provide the VWU with [REDACTED] or;
 - iii) [REDACTED], where the victim or witness has sufficient and valid identification document and has been previously introduced to the VWU either physically or through a secure video/audio-conference method.
18. In any event, the VWU and the referring/calling party would need to be in close contact and agree on the best feasible approach on a case by case basis, considering each other's constraints at the relevant stage.
19. Therefore, the VWU advises that, as a matter of principle, the phrase referred in paragraph 5 of the Familiarisation Protocol (i.e. "This phase takes place in the field...") be maintained. Any deviation from this principle can be

determined by and agreed between the VWU and the calling party within the framework of the above condition, on a case by case basis and at an appropriate stage.

20. Should the Chamber consider it necessary, this possibility to deviate from the principle can be reflected in paragraph 5 of the Familiarisation Protocol. For that purpose, the VWU suggests the following additional phrase:

This phase takes place in the field, where circumstances allow, whereby, the entity calling the witness facilitates an introductory meeting between the VWU and the witness, informing the witness that the VWU will henceforth be responsible for the necessary arrangements to facilitate the witness' travel for the purpose of giving testimony.

ii. **On the removal of the phrase “Whenever possible...”**

21. As previously submitted in *The Prosecutor v. Bosco Ntaganda* case⁷, the VWU is of the view that the practice of joint travel and accommodation, whenever this is possible, should not be presented as an exception nor does it have an “exceptional nature” as suggested by the Prosecution.⁸
22. It is a preferable practice to organize joint travel and accommodation of the witnesses as it has been proven to increase the general sense of well-being of these witnesses, which is particularly relevant for specific vulnerable witnesses upon the VWU's assessment.
23. Certainly, this practice is implemented where there is no risk that the testimony may be contaminated and on a case by case basis with the appropriate safeguards put in place by the VWU. For example, the VWU only organizes joint travel and accommodation for witnesses who are aware of each other's interaction with the Court, who are part of the same family or who live together, preserving the anonymity of the witnesses, and never does

⁷ Registry, “Victims and Witnesses Unit's submission on the Protocol on the practices to be used to familiarise witnesses for giving testimony pursuant to Order n° ICC-01/04-02/06-416”, 6 February 2015, ICC-01/04-02/06-451.

⁸ Prosecution Submissions, para. 33.

so for witnesses who participate in the Court's Protection Programme or are otherwise protected.

24. Additionally, the Prosecution has made similar suggestions before Trial Chamber X in the Al Hassan Case. Trial Chamber X already found that it is already sufficiently clear that this procedure is to be used only where it is consistent with the relevant witnesses' security and where notably they have had repeated contacts, hence no additional risks arises.⁹ Trial Chamber X found that similar amendments sought by the Prosecution (i.e. removing the phrase "Whenever possible...") was not necessary and decided not to modify the language of paragraph 24 and 39 of the Familiarisation Protocol.¹⁰
25. Accordingly, the VWU submits that the phrase "wherever possible" be maintained as it is in line with the VWU's view and practice which has been observed consistently throughout different cases before the Court.

iii. **On the addition of the "profile of the witness" as a factor for consideration in paragraphs 24, 39 and 41 of the Familiarisation Protocol**

26. In relation to the additional safeguards of the "profile of the witness" as proposed by the Prosecution¹¹, the VWU informs the Chamber that, in the spirit of reducing the contamination of testimony, this has always been the internal practice and is particularly observed in relation to vulnerable witnesses requiring special care.
27. The VWU always takes into consideration the specific profile of each victim and witness and would organize their joint travel and accommodation where appropriate, only upon consultation with the calling party. Therefore, the calling party is given the opportunity to address any specific concerns or to

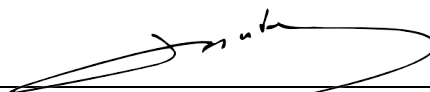
⁹ Trial Chamber X, "Decision on witness preparation and familiarisation", 17 March 2020, ICC-01/12-01/18-666, para.55.

¹⁰ Ibid.

¹¹ Prosecution Submissions, para, 36-37.

provide any information that the VWU may not be aware of that would prevent the joint travel or accommodation.

28. The Court as a whole, thus including the VWU, is responsible for the psychological well-being, dignity and privacy of victims and witnesses. Particularly for those who are under its care or are at an increased risk of psychological harm through the process of testimony, the VWU takes the appropriate measures to reduce the risk of traumatising from their interaction with the Court, including preventing these vulnerable witnesses to come into contact with witnesses who may re-traumatise them.
29. As this is already an established practice by the VWU, it submits that this proposed addition by the Prosecution is not necessary.



Marc Dubuisson, Director Division of Judicial Services
on behalf of Peter Lewis, Registrar

Dated this 14 May 2020

At The Hague, the Netherlands