Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/05-01/08**
Date: **18 November 2010**

TRIAL CHAMBER III

Before: **Judge Sylvia Steiner, Presiding Judge**
Judge Joyce Aluoch
Judge Kuniko Ozaki

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

Public - URGENT

Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence
Mr Nkwebe Liriss
Mr Aimé Kilolo Musamba

Legal Representatives of the Victims
Ms Marie-Edith Douzima Lawson
Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit
Ms Maria Luisa Martinod Jacome

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("*Bemba* case"), hereby renders the following Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial:

I. Background and Submissions

1. On 22 October 2010, the Victims and Witness Unit ("VWU") filed the "Victims and Witness Unit's Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony at trial",[1] with accompanying annex containing a consolidated document of the procedure for witness familiarization ("Unified Protocol"). According to the VWU, the Unified Protocol reflects the relevant jurisprudence of the Court as well as the various substantive achievements made over the years through experience, being currently applied before Trial Chamber I and Trial Chamber II. The VWU requests the Chamber's authorisation to apply the Unified Protocol for the purposes of the trial in the *Bemba* case before Trial Chamber III.

2. On 28 October 2010, the Chamber issued an order pursuant to Regulation 34 of the Regulations of the Court instructing that any observations on the VWU Unified Protocol must be filed by 3 November 2010.[2]

3. On 3 November 2010, the Office of the Public Counsel for Victims ("OPCV"), acting as the legal representative of victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09,

[1] Victims and Witness Unit's Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony at trial, 22 October 2010, ICC-01/05-01/08-972 and public Annex, ICC-01/05-01/08-972-Anx.
[2] Email communication from the Legal Adviser to the Trial Division of 28 October 2010 at 16.32.

a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09, filed its observations.[3] The OPCV generally agrees with the Unified Protocol and suggests that it should be endorsed by all Chambers of the Court. Notwithstanding its basic agreement, the OPCV submitted some general and specific observations in order to ensure that the interests of victims will be appropriately addressed in the Unified Protocol.

4. On 3 November 2010, the defence filed its observations ("defence observations"),[4] in which no objections to the terms of the Unified Protocol were raised, although the defence suggests that it should apply only during the prosecution's presentation of evidence. The defence maintains it reserves the right to revisit the terms of the Unified Protocol, and make additional submissions on its application prior to the commencement of the defence's presentation of evidence. The defence further makes some observations on the issues of scheduling of witnesses, joint housing of prosecution witnesses and on provision of materials to witnesses.

5. The Office of the Prosecutor ("prosecution") filed its observations on 3 November 2010 ("prosecution observations").[5] In general, the prosecution agrees that the Unified Protocol accurately reflects the practices as they have developed over time in order to properly address the needs of the witnesses. The prosecution

[3] Legal Representative's Observations on the Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony at trial, 3 November 2010, ICC-01/05-01/08-991. Following the "Notification of designation of common legal representatives" filed by the Registry on 16 November 2010 (ICC-01/05-01/08-1012 and annexes), the OPCV no longer represents these victims.
[4] Defence Observations on the VWU Unified Protocol on Practices for Witnesses Giving Testimony at Trial, 3 November 2010, ICC-01/05-01/08-992.
[5] 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.

further makes limited comments in order to improve the proposed Unified Protocol.

6. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Chamber in making its determination has considered Article 43(6) and Article 68 of the Statute, Rule 16(1)(c), Rule 16(2), Rule 17, Rule 18(b) and (c), Rule 86, Rule 87, Rule 88 and Rule 134 of the Rules of Procedure and Evidence ("Rules"), Regulation 24 *bis* and Regulation 41 of the Regulations of the Court and Regulations 79 to 96 of the Regulations of the Registry.

II. Analysis and Conclusions

Unified Protocol

7. The Chamber notes that the parties and participants generally agree with the terms of the Unified Protocol. In view of this, and after having analysed the aforementioned protocol in detail against each suggested modification or improvement made by the parties and participants, the Chamber considers that the Unified Protocol should be adopted for the purposes of the trial before Trial Chamber III, with appropriate amendments as are addressed below.

8. The Unified Protocol shall only apply to victims appearing before the Court for the purpose of giving oral testimony. Paragraph 4 of the Unified Protocol shall therefore be amended to reflect that familiarisation will not be provided to all victims appearing before the Court but only to "victims appearing before the Court to testify". For the same reason, the Chamber orders the VWU to modify the second sentence of paragraph 54 of the Unified Protocol replacing the words "are participating" with "otherwise testifying".

9. Regarding the defence's submission that it "reserves the right to revisit the terms of this protocol, and make additional submissions on its application prior to the commencement of the Defence case,"[6] the Chamber recalls that, according to Rule 134(1) of the Rules, objections or observations concerning the conduct of the proceedings shall be raised by the parties at the commencement of the trial and may not be raised or made again on a subsequent occasion during the trial proceedings, without leave of the Trial Chamber. Therefore, the Chamber finds that the Unified Protocol shall apply equally to prosecution and defence witnesses, as well as victims appearing before the Court to testify and any other witnesses called to give testimony before the Chamber.

Preparation Phase

10. In relation to the prosecution's request to better specify the commencement of the preparation phase for witnesses already under the care of the VWU,[7] the Chamber simply reminds the parties of the need to liaise, communicate and cooperate with the VWU, especially in relation to the travel arrangements for witnesses that require special care and attention.

11. As regards the extraordinary cases in which the Registrar may provide witnesses with an allowance for loss of earnings, the Chamber is of the view that whilst the criteria used to determine the granting of such an allowance is a matter for the Registrar, the party calling the witness should nonetheless be notified that such an allowance is to be granted. Therefore, the last sentence of paragraph 7 of the Unified Protocol shall be amended to include the obligation of the Registrar to inform the relevant party of the fact that an allowance for loss of earnings is to be granted.

[6] ICC-01/05-01/08-992, paragraph 4.
[7] ICC-01/05-01/08-993-Conf, paragraph 4.

12. The prosecution notes that, in paragraph 9 of the Unified Protocol, there is no mention of the treatment to be given to witnesses in the International Criminal Court Protection Program ("ICCPP") once they have returned to their place of residence.[8] As a preliminary matter, the Chamber regrets the unfortunate use by the VWU and the prosecution of the terms "handed back" and "retained" when referring to witnesses, and accordingly instructs the VWU to re-draft the paragraph in a manner that conveys the necessary respect for witnesses who appear before the Court. In relation to the concern expressed by the prosecution, the Chamber once again reminds the parties of the need to liaise, communicate and cooperate with the VWU, particularly in relation to the arrangements related to witnesses that require special care and attention.

Scheduling of witnesses

13. The Chamber agrees with the concern of the prosecution that the deadline given to submit the form referred to in paragraph 14 of the Unified Protocol should allow some flexibility.[9] Paragraph 14 of the Unified Protocol shall therefore be amended to replace the word "must" with the words "needs to".

14. In relation to the proposals made by the defence in paragraphs 5 to 7 of the defence observations, it would seem that the defence's suggestions are not directly referring to the process of witness familiarisation, but rather to issues related to the conduct of proceedings. This issue will be dealt with separately by the Chamber.

Travel to the location of the testimony and accommodation

15. In relation to the concerns expressed by the prosecution regarding the travel and accommodation of vulnerable witnesses,[10] the Chamber considers that enough

[8] ICC-01/05-01/08-993-Conf, paragraph 6.
[9] ICC-01/05-01/08-993-Conf, paragraph 7.
[10] ICC-01/05-01/08-993-Conf, paragraphs 8 to 14.

flexibility is provided in the Unified Protocol[11] for the party calling the witness to request directly the VWU to make separate travel and accommodation arrangements, depending on the specific circumstances and to the extent possible. In this respect the Chamber endorses the approach taken by Trial Chamber I to the extent that "fact-sensitive decisions should be made, bearing in mind particularly the personal circumstances of each witness and the areas of evidence they will be addressing [...] although measures that would facilitate separation should be considered and implemented if feasible, this is a multifaceted issue which should be approached with care and sensitivity."[12] Therefore, the Chamber does not deem it necessary to modify the Unified Protocol in relation to this issue.

Commencement of the familiarisation process

16. The Chamber agrees with the prosecution and the OPCV that there is no reason for the meetings with expert witnesses to take place only within the premises of the VWU.[13] Instead, the Chamber concurs with the view of Trial Chamber I, as regards the disadvantages of discussions prior to giving evidence not applying to expert witnesses.[14] Therefore, paragraph 35 of the Unified Protocol shall be modified by changing the word "including" to "excluding" in the first line.

Separation of witnesses at the accommodation

17. The Chamber agrees with the defence and the prosecution that a distinction should be made, to the extent possible, between witnesses depending on whether they have completed their testimony, are in the process of testifying, or have concluded their testimony.[15] Therefore, in cases in which the accounts of

[11] See ICC-01/05-01/08-972-Anx, paragraph 25 and footnote 7.
[12] Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga* case"), Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, 23 May 2008, ICC-01/04-01/06-1351, paragraph 31.
[13] ICC-01/05-01/08-993-Conf, paragraph 17; ICC-01/05-01/08-991, paragraph 13.
[14] Transcript of hearing on 16 January 2009, ICC-01/04-01/06-T-104-ENG, page 29, lines 3 to 11. Judge Kuniko Ozaki will address this issue in her partly dissenting Opinion.
[15] ICC-01/05-01/08-993-Conf, paragraphs 15 to 16 ; ICC-01/05-01/08-992, paragraph 9.

witnesses overlap or there is a risk of evidence being tainted by contact during and after testimony, the VWU, in consultation with the party calling the witness shall, to the extent possible, take the following measures: (i) once a witness commences giving evidence, he or she should be separated from other witnesses; (ii) the VWU shall arrange supervised social contact between the witness who has testified and the remaining witnesses at least for a few hours each day; (iii) the VWU shall warn the witnesses that they should not discuss their evidence with each other; (iv) the VWU shall, as far as possible, jointly accommodate the witnesses who have finished giving evidence; and, (v) in the event that the witnesses breach these conditions imposed by the Chamber, the matter should be brought to the Chamber's attention for review. Paragraph 37 of the Unified Protocol should be amended accordingly to include the abovementioned amendments.

Assessment of vulnerable witnesses for special measures

18. In cases special measures are recommended following the assessment of vulnerable witnesses conducted by the VWU, and in order for them to be able to be implemented in a timely manner, the recommended measures sent by the VWU to the Court Management Section shall also be provided to the parties and participants. Paragraph 45 of the Unified Protocol shall be amended accordingly.

Protective measures

19. With regard to the clarification suggested by the prosecution in relation to the protective measures referred to in paragraph 51 of the Unified Protocol,[16] the Chamber agrees with the prosecution and orders the VWU to modify paragraph 51 to refer to protective measures pursuant Rule 87 and Rule 88 of the Rules.

Self incrimination of witnesses pursuant to Rule 74 of the Rules

[16] ICC-01/05-01/08-993-Conf, paragraph 18.

20. The Chamber agrees with the prosecution that in case witnesses do not wish to consult with duty counsel, such a decision should be brought to the attention of the Chamber and the party calling the witness.[17] Therefore, paragraph 60 of the Unified Protocol shall be amended accordingly.

Reading and provision of statements

21. In the view of the Chamber, witnesses should be allowed to read, look at and/or listen to tape recordings of their interviews, and to any previous statements and documents generated or provided by them. Paragraph 81 of the Unified Protocol shall therefore be amended to replace the word "any" with "all". Similarly, paragraph 82 of the Unified Protocol needs to be amended to clarify that the VWU should provide the following documents to a witness to refresh their memory: (i) a copy of all the statements the witness has previously given. The term statement includes any signed statement and recorded interview (audio, video or both); and, (ii) any document or information generated or provided by the witness when giving any of his/her previous statements.

22. The Chamber agrees with the defence that a proper record should be kept of all material provided to a witness prior to his/her testimony.[18] The Chamber also agrees with the defence that such a record should be sent to the parties and participants by email, in advance of the hearing in which the witness will testify.[19] The Chamber therefore orders the VWU to modify the Unified Protocol to include such amendments.

23. In the view of the Chamber, the witnesses should have sufficient time to enable them to read, look at or listen to their previous statements, documents and/or information generated or provided by them at the time any previous statement was given. The Chamber also agrees with the prosecution that it is not the

[17] ICC-01/05-01/08-993-Conf, paragraph 19.
[18] ICC-01/05-01/08-992, paragraph 12.
[19] ICC-01/05-01/08-992, paragraph 12.

VWU's role to influence a party's choice of the information to be provided to witnesses, as the rules for the information that should be provided have been clearly stated by the Chamber in paragraph 22 above. Therefore, the Chamber orders the VWU to delete paragraphs 83 and 84 of the Unified Protocol.

24. The Chamber agrees with the prosecution that it is for the Chamber to decide which documents may be used in Court by witnesses to refresh their memory.[20] Paragraph 95 of the Unified Protocol shall be amended accordingly and be rephrased in the following way: "95. The witness will be reminded that none of the material the witness has re-read can be brought into Court. If it becomes necessary for reference to be made to one or more of the statements or related materials, then, subject to the Chamber's decision, copies can be made available during the witness's testimony."

25. The Majority agrees with the defence that, in relation to paragraph 96 of the Unified Protocol, the involvement of the entity calling the witness to testify at trial is inconsistent with the general scheme of the protocol and any assistance to witnesses should first come from the VWU.[21] Paragraph 96 of the Unified Protocol shall therefore be amended by changing the words "the entity calling the witness may request authorisation from the Chamber to assist" to "the VWU shall assist".

Day of the testimony

26. The Chamber considers that, on the one hand, the Unified Protocol should not purport to impose obligations on the Presiding Judge; on the other hand, the Chamber acknowledges that it can be very stressful for a witness to be warned personally by the Presiding Judge at the beginning of their testimony about the consequences of false testimony. Therefore, paragraph 101 of the Unified

[20] ICC-01/05-01/08-993-Conf, paragraph 20.
[21] ICC-01/05-01/08-992, paragraph 15.

Protocol shall be amended replacing the last sentence that states "The Judge informs the witness that it is an offence under the Statute to give false testimony" with "Before the testimony, in accordance with Rule 66(3) of the Rules of Procedure and Evidence, the VWU shall inform the witness of the offence defined in article 70, paragraph 1 (a) of the Statute."

27. The Chamber also considers that the Unified Protocol should not be used as an instrument for the VWU to avoid discharging its obligations in relation to the information that it should be giving to witnesses. Paragraph 102 of the Unified Protocol shall therefore be amended to replace the phrase: "The witness will remain under oath", with the following: "The VWU shall inform the witness that he or she will remain under oath".

Providing witnesses with copies of statements after testimony

28. The Chamber is of the view that in order to protect witnesses and third parties not directly involved in the proceedings, and in order to preserve the integrity of ongoing investigations, as a general rule, witnesses shall not be given copies of their statements, nor allowed to keep copies of their statement(s). In this respect, the Chamber concurs with Trial Chamber I insofar as the Statute or the Rules do not contemplate any established "right" for the witnesses to be given or to keep copies of their statement(s) and any decision in that respect will need to be made on a case-by case basis, taking into account the particular circumstances of each witness.[22] Consequently, the Chamber orders the VWU: (i) to replace paragraph 104 of the Unified Protocol in its entirety with the following: "In case a witness requests to retain a copy of his or her statement or any related material, the VWU shall inform the Chamber which will decide on a case-by-case basis."; (ii) to delete from the Unified Protocol, paragraphs 105, 106, 107, 108, 109 and 110.

[22] See similar approach in the *Lubanga* case, ICC-01/04-01/06-1352, paragraph 34.

Cooling down period

29. The Chamber agrees with the prosecution that any issue related to security concerns of sufficient gravity arising after the testimony of a witness should be brought not only to the attention to the Chamber, but also to the attention of the party calling the witness.[23] Paragraph 120 of the Unified Protocol shall therefore be modified accordingly.

Witness feedback program

30. The Chamber is of the view that the participation of witnesses in the feedback program organized by the VWU should not be mandatory but rather should be at the witnesses' discretion. Consequently, paragraph 122 of the Unified Protocol shall be modified to replace the words "are required" with "will be invited".

Witness' preparation and proofing by the parties

31. On 26 November 2009, the defence filed its «Observations de la Défense relatives à la jurisprudence de l'Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense», and a subsequent «Corrigendum Observations de la Défense relatives à la jurisprudence de l'Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense»[24] ("defence filing dated 26 November 2009"), in which, amongst other issues, the defence requested the Chamber's authorisation to contact witnesses immediately prior to trial in order to prepare them for their testimony.

32. In the recent defence observations on the proposed Unified Protocol the defence specifically states that it "does not object to the terms of the Unified Protocol,"

[23] ICC-01/05-01/08-993-Conf, paragraph 24.
[24] Observations de la Défense relatives à la jurisprudence de l'Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense, 26 novembre 2009 (notified on 27 November 2010), and Corrigendum Observations de la Défense relatives à la jurisprudence de l'Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense, 26 novembre 2009 (notified on 27 November 2010), ICC-01/05-01/08-620-Corr.

without requesting or raising again any issue concerning the conduct of the proceedings or the mode of contacting or preparing witnesses, other then the comment already referred to in paragraph 9 of this Decision.

33. As previously mentioned in the present Decision, the Chamber finds that the Unified Protocol is applicable for all witnesses in the case and throughout the course of the proceedings, which includes the defence witnesses to be called at a later stage of the proceedings.

34. The Majority of the Chamber[25] recalls that the issue of the parties' preparation of witnesses for trial has already been addressed, unanimously, by the other Chambers of the Court, by way of explicit decisions on the issue[26] or implicitly, by adopting Unified Protocols for witnesses' familiarisation in which no provisions for witnesses' preparation by the parties, or proofing, are adopted.[27] In view of the present Unified Protocol, the Chamber, by Majority, sees no compelling reasons to depart from the uncontroversial jurisprudence of the Court and maintains the view that no proofing or preparation of witnesses for trial by the parties shall be allowed.

35. In view of the abovementioned, the Majority finds that the issue raised by the defence in its filing dated 26 November 2009, relating to the contact and preparation of witnesses for trial, which was not reiterated in its observations on the Unified Protocol, may be considered as having been withdrawn by the defence, and it is therefore rejected *in limine*.

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[25] Judge Kuniko Ozaki will file a partially dissenting Opinion.
[26] See *Lubanga* case, Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679; Trial Chamber I, Decision regarding the Practices used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049.
[27] Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo*, Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134, paragraph 18.

For the foregoing reasons, the Chamber

INSTRUCTS the VWU to apply the Unified Protocol for the purposes of the trial, after having made the amendments ordered in the present Decision; and to file the amended version of the Protocol as soon as available;

REJECTS *in limine*, by Majority, the part of the defence filing dated 26 November 2009 that relates to contact and preparation of witnesses for trial.

The partly dissenting Opinion of Judge Kuniko Ozaki will follow in due course.

Done in both English and French, the English version being authoritative.

Judge Sylvia Steiner

Judge Joyce Aluoch

Judge Kuniko Ozaki

Dated this 18 November 2010

At The Hague, The Netherlands

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/05-01/08**
Date: **24 November 2010**

TRIAL CHAMBER III

Before: **Judge Sylvia Steiner, Presiding Judge**
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
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Public - URGENT

Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence
Mr Nkwebe Liriss
Mr Aimé Kilolo Musamba

Legal Representatives of the Victims
Ms Marie Edith Douzima-Lawson
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Other

I. Introduction

1. This Partly Dissenting Opinion is in response to paragraphs 25 and 31 to 35 of the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial ("Decision"),[1] which refers to the involvement of the entity calling the witness to testify at trial in the preparation and familiarisation of witnesses and rejects, *in limine*, the defence's request to prepare its witnesses for trial, contained in the "Observations of the defence regarding the jurisprudence of Trial Chamber I on procedural issues", filed on 26 November 2009 ("defence Observations").[2]

2. The dissent will address the reasons underlying my disagreement with the Majority over their dismissal of the defence's arguments and explain the reasons why I am opposed to the summary prohibition of the practice of "witness proofing" for the purpose of the proceedings taking place before this Chamber.

II. The Prohibition on "Witness Proofing"

[1] Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016.
[2] Observation de la Défense relatives à la jurisprudence de l'Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense, 26 November 2009, ICC-01/05-01/08-620; Corringendum [*sic*] Observations de la Défense relatives à la jurisprudence de l'Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense, 26 November 2009, ICC-01/05-01/08-620-Corr.

3. The Majority decided that by consenting to the Unified Protocol on familiarisation, the defence implicitly withdrew its submissions on witness proofing contained in the defence Observations,[3] and thus declined to address the defence's arguments on this issue. The Majority then stated that it did not find any "compelling reasons to depart from the uncontroversial jurisprudence of the Court" and that it was of the view that no proofing or preparation of witnesses prior to trial is allowed before the ICC.[4]

4. With due respect for my Colleagues, I cannot agree that the defence's approval of the Unified Protocol automatically implies a withdrawal of their previous arguments, because although closely linked, the processes known as "witness familiarisation" and "witness proofing" remain two distinct procedures with different purposes, as recognised by the jurisprudence of this Court. Therefore, I am of the view that the defence's arguments contained in the Observations should have been addressed by the Chamber.[5]

5. In the Observations, the defence argues in favour of a distinction between the proofing of prosecution and defence witnesses. It argues that while the prohibition on proofing by the prosecution should be maintained, a number of factors militate in favour of allowing this practice for defence witnesses.[6] With regard to the

[3] ICC-01/05-01/08-1016, paragraph 35.
[4] ICC-01/05-01/08-1016, paragraph 34.
[5] This being said, for the purposes of the present Opinion, the defence argument to the effect that the accused himself should be allowed to meet with witnesses prior to their testimony, contained in paragraph 30 of the defence Observations will not be addressed.
[6] ICC-01/05-01/08-620-Corr, paragraphs 5 to 25.

merits of the practice, the defence asserts that although for some witnesses the defence may be able to rely solely on the work of its investigators, for most witnesses, counsel would not properly fulfil their duty if they did not meet these witnesses prior to their testimony.[7] Moreover, the defence suggests that it would be unreasonable to expect the defence to call a witness without making sure that he/she will provide relevant and probative evidence.[8]

6. In its response to the defence Observations, the prosecution objects to the argument that a distinction should be made between the rights of the defence and prosecution with regard to witness proofing.[9] While the prosecution does not request the Chamber to depart from the previous decisions of the Court with regard to proofing, it argues that if such reconsideration were to be made, it should be done "on the same terms for both parties".[10]

7. In the Decision, the Majority explicitly endorses[11] the decisions of Pre-Trial Chamber I[12] and Trial Chamber I,[13] which imposed a prohibition on the practice of witness proofing by the prosecution in

[7] ICC-01/05-01/08-620-Corr, paragraph 26.
[8] ICC-01/05-01/08-620-Corr, paragraph 27.
[9] Prosecution's Response to Defence's "Observation de la Défense relatives à la jurisprudence de l'Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense", 21 December 2009, ICC-01/05-01/08-661, paragraph 24.
[10] ICC-01/05-01/08-661, paragraph 34 ii).
[11] ICC-01/05-01/08-1016, paragraph 34.
[12] Decision on the practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679.
[13] Decision regarding the Practices Used to prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01-06-1049. I note, that although both Decisions prohibited witness proofing, there are significant differences in the reasoning as well as in the conclusions of these two Decisions. In this dissenting Opinion, I will mainly address the issues raised by the latter Decision which, in my view, is more relevant to the case of Mr Bemba.

proceedings before these Chambers. With due regard, I cannot concur with this position nor agree to the endorsement, without further analysis, of these previous decisions. I consider that any ruling on witness proofing should be made after a careful review of the circumstances prevailing in each case before the Court. Contrary to the defence's assertion, I am also of the opinion that, although the prosecution did not *per se* request to be allowed to proof its witnesses and therefore did not submit any substantive arguments in this regard, both the prosecution and the defence, in the proceedings in this case, should have been allowed, under specific conditions, to have a pre-trial meeting with witnesses to be called by them, in order to prepare their in-court testimony.

8. I fully support, however, Trial Chamber I's position with regard to witness familiarisation,[14] including its finding on the inclusion in the familiarisation process of the authorisation to provide witnesses with their previous statements,[15] which is a notable departure from Pre-Trial Chamber I's decision.[16] As a result of this, and of the same authorisation in the Majority Decision, my dissent to the Decision is limited to the witness proofing issue.

a. Legal basis

[14] ICC-01/04-01-06-1049, paragraphs 29 to 34.
[15] ICC-01/04-01/06-1049, paragraph 50.
[16] ICC-01/04-01/06-679, paragraphs 18 to 27.

9. I agree with both Pre-Trial Chamber I and Trial Chamber I that the Rome Statute ("Statute") is silent on the issue of witness proofing.[17] I would however, base my argument on Article 64(2) and (3)(a), to be read in accordance with Article 21(1)(a), rather than with Article 21(1)(c), on which the abovementioned decisions base their conclusions. Article 64(2) and (3)(a) read:

> 2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regards for the protection of victims and witnesses.
> 3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
> (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings; [...]

10. The purpose of Article 64 of the Statute is to give judges flexibility in the approaches they can adopt for the good management of a trial. Its formulation makes it clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters such as witness proofing, and that silence on a particular procedural issue does not necessarily imply that it is forbidden. On the contrary, the drafters of the Statute have intended to give judges a broad discretion in admitting or prohibiting certain procedures, in order to facilitate fair and expeditious trials, with full respect for the rights of the accused and due regards for the protection of victims and witnesses.

[17] ICC-01/04-01/06-679, paragraphs 11 and 28; ICC-01/04-01-06-1049, paragraph 36.

11. It is useful to compare the practice followed by the *ad hoc* Tribunals in this regard; while, their respective statutes do not expressly refer to witness proofing, in ruling on the matter chambers have referred to Rule 89(B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and of the International Criminal Tribunal for Rwanda ("ICTR"). For example, the ICTR Appeals Chamber stated:

> The Tribunal's Statute and Rules do not directly address the issue of witness proofing. In the absence of express provisions, Rule 89(B) of the Rules generally confers discretion on the Trial Chamber to apply "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law." It is evident from the jurisprudence of the *ad hoc* Tribunals that, as Trial Chambers have exercised this discretion, a practice of witness proofing has developed and has been accepted in various cases.[18]

12. While noting that the *ad hoc* Tribunals' jurisprudence is not in any way binding upon this Court, I am of the opinion that the drafters of the ICC Statute intended the judges of the Court to benefit from the same procedural flexibility as enjoyed by the ICTY and ICTR, demonstrated by the language of Article 64 of the Statute. Therefore, I believe that this provision is the proper legal basis to provide the Court with the necessary adaptability to create a system of its own.

b. Definition

[18] ICTR, *Prosecutor v. Karemera et al., Case No. ICTR-98-44-AR73.8*, Appeal Chamber, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, paragraph 8.

13. Having referred to the legal basis, I will now turn to the merits of the practice of "witness proofing", and on the issue of whether it may facilitate the fair and expeditious conduct of the proceedings, while ensuring the rights of the accused and with due regards to the protection of victims and witnesses.

14. In seeking to define the term "witness proofing" a review of the practice, jurisprudence and literature on the issue highlights the lack of a universal definition for this expression and a lack of agreement over the precise extent of the practice. In a considerable number of jurisdictions with adversarial systems of law and where in-court oral testimony of witnesses plays a central role in the evaluation of the evidence, some form of pre-trial discussion on the substance of the testimony to be given by a witness is either allowed or encouraged between the witness and the party calling the witness.[19] In addition to asking the witness to read his or her prior statement to refresh his or her memory, such discussion usually includes asking whether the statement is accurate and complete, and going through the evidence of the witness, including relevant exhibits.[20]

[19] Prosecution's submissions regarding the subjects that require early determination: procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing, 12 September 2007, 01/04-01/06-952, paragraph 24; ICC-01/04-01/06-1049, paragraph 40. See also, Australia: "New South Wales Barrister's Rules", April 2001, Rules 43 and 44; Canada (Ontario): "Crown Policy Manual – Witness", 21 March 2005; Law Society of Upper Canada, Rules of Professional Conduct, Rules 4.03 and 4.04, 1 November 2000; England and Wales: "The Crown Prosecution Service – Pre-Trial Witness interviews, Guidance for Prosecutors"; The Rt Hon The Lord Goldsmith QC, "Pre-Trial Witnesses Interviews by Prosecutors Report", December 2004; United States: US' Restatement of Law Governing Lawyers, paragraph 116, adopted in 2000; Nigeria: "Legal Practitioners Act – Rules of Professional Conduct in the Legal Profession", Chapter 207, Rule 20; New Zealand: "Rules of conduct and client care for lawyers", point 13.10, 2008; Japan: " Rules of Criminal Procedure" (Rules of the Supreme Court No. 32 of 1948 Article 191-3).

[20] England and Wales, "The Crown Prosecution Service – Pre-Trial Witness interviews, Guidance for Prosecutors", points 7.19 to 7.25.

However, elements such as the timing of the meeting, the way in which the meeting is conducted, who should be allowed to conduct the interview, the types of questions/discussion allowed (or prohibited), the manner in which information obtained as a result of the discussions should be disclosed, and the safeguards in place to ensure the proper conduct of the interview, vary from one jurisdiction to another.[21] If there is anything common to most of these jurisdictions, it is the prohibition on "witness coaching" or on otherwise contaminating/tainting evidence, influencing (with or without an intent to do so) the content of the testimony, manipulating the evidence or encouraging the witness to obscure or distort the truth.[22]

15. The issue of the definition of witness proofing was also raised before the *ad hoc* Tribunals. The ICTY, in the *Haradinaj* case, defined it as

> a meeting held between a party to the proceedings and a witness, usually shortly before the witness is to testify in court, the purpose of which is to prepare and familiarize the witness with courtroom procedures and to review the witness's evidence.[23]

The *ad hoc* Tribunals also stated that proofing should not constitute a rehearsal, practice or coaching of a witness[24] and that it should not be seen as permission to train or tamper with a witness so as to

[21] In this regard, the United States Restatement of Law Governing Lawyers, paragraph 116 (2000), is the less restrictive system in comparison with other jurisdictions.
[22] Contrary to the practice in other jurisdictions, the position adopted by the United States Restatement of the Law Governing Lawyers, paragraphs 116 and 120(1)(a) expressly allow the witness preparation to include rehearsal of testimony.
[23] ICTY, *Prosecutor v. Haradinaj et al.*, *Case No. IT-04-84-T*, Trial Chamber I, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, 23 May 2007, paragraph 8.
[24] ICTY, *Prosecutor v. Milutinovic et al.*, *Case No IT-05-87-T*, Trial Chamber, Decision on Ojdanic Motion to Prohibit Witness Proofing, 12 December 2006, paragraph 16.

mould the case against the accused or so as to manipulate the evidence.[25]

16. Finally, as regards the definition given in the *Lubanga* case, Trial Chamber I substituted the expression "witness proofing" with "the practice of substantive preparation of a witness for their in-court testimony."[26]

17. For the purposes of the present Opinion, witness proofing refers to a meeting between a witness and the party calling the witness for the purpose of substantive preparation of the witness's testimony. It effectively consists of confirming with the witness as to whether his/her statement is accurate and complete, presuming that the witness already has been given the opportunity to review his/her statement during the familiarisation process, and going through the evidence and relevant exhibits. It may also include a question and answer session, but should not be a rehearsal of the questioning that is to take place during the in-court session. "Rehearsing", "practicing", "coaching" or any intentional or unintentional contamination of the evidence is therefore not included in the definition.

c. Merits of witness proofing

[25] ICTR, *Prosecutor v. Karemera et al, Case No ICTR-98-44-T*, Trial Chamber, Decision on Defence Motion to Prohibit Witness Proofing, 15 December 2006, paragraphs 11, 12 and 15.
[26] ICC-01/04-01/06-1049, paragraph 28.

18. With regard to the merits of the practice of witness proofing, I limit myself to analysing three specific aspects, namely, (i) the impact of proofing on the general presentation of the evidence at trial; (ii) the relationship with the prosecution's disclosure obligations; and, (iii) the benefits of proofing for the protection and well-being of witnesses.

(i) General presentation of the evidence at trial

19. The practice of witness proofing may be useful in the presentation of evidence in proceedings before this Chamber, for several reasons:

20. The procedural framework of the Court is different and more hybrid in nature than those of the *ad hoc* Tribunals. However, it does not mean that each and every rule of procedure before this Court must be in a perfect compromise between different domestic legal systems. Regarding the specific rules on the presentation of evidence through witnesses at the trial stage, ICC proceedings are closer to the adversarial legal system than to the inquisitorial system. One of the most relevant features, for the purposes of the present Opinion, is the principle of primacy of oral evidence, which is enshrined in Article 69(2) of the Statute. Most witnesses are called by one of the parties, although the Chamber has the authority to request any evidence it considers necessary for the determination of the truth.[27] Therefore, the in-court evidence is primarily constituted with the

[27] See Article 69(3) of the Statute.

questioning by the parties, participants and the Chamber, of witnesses called by the parties, pursuant to Rule 140 (2) of the Rules. Although this does not mean that parties have any property in the witnesses they have called, such a system, in my opinion, is different from the practice of many civil law jurisdictions, where witnesses have been thoroughly questioned by a judge (*juge d'instruction*) mandated to instruct the case, and where statements produced by such examination are automatically included in the case file, as highly probative evidence at the trial stage, thus logically rendering witness proofing by the parties unnecessary and irrelevant.[28]

21. Before this Chamber, the manner in which the evidence is presented through the testimony of witnesses is of the utmost importance. It would undoubtedly be helpful to its truth-finding function to improve the quality of the presentation of evidence by receiving clear, relevant, structured, focussed and efficient testimonies from proofed witnesses. Witnesses who will testify before this Chamber come from places far away from The Hague and are not necessarily familiar with the "Western" way of questioning or with court-systems in general. Also, they give evidence on events which occurred a number of years ago (witnesses will testify on events which occurred in 2002-2003, therefore over seven years ago), and their statements were also given months, or even a few years ago. Sometimes those statements were taken before the confirmation of

[28] Similarly, I am not convinced by the reasoning of Trial Chamber I, which argues that the innovative provisions of the Court's procedural framework which impose a duty on the prosecution to investigate both exculpatory and incriminatory evidence as well as permit greater intervention by the Bench and allow victims to participate, have the effect of rendering witness proofing inappropriate, thus justifying the total ban of witness proofing before the Court (see ICC-01/04-01/06-1049, paragraph 45).

charges, by investigators without legal training or without precise directions regarding specific crime-related evidence to be collected, resulting in statements which lack the degree of specificity required to prove that the crimes charged were committed. Without proofing, there is an increased likelihood that the evidence given by the witness will be incomplete, confused and ill-structured.

22. Moreover, the case before this Chamber is complicated, and involves witnesses who will give evidence on both the alleged crimes as well as on the mode of liability, and will necessitate the review of a large number of complicated and detailed exhibits, which may include various types of documents, audio-video records, different kinds of communications from governments or other entities, maps, and pictures. In tackling a case of such magnitude and complexity, I do not believe it is practical and reasonable to prohibit any pre-trial meeting between the parties and their witnesses. Indeed, under these circumstances, witness proofing could be considered as a "genuine attempt to clarify a witness' evidence",[29] and to ensure the smooth conduct of the proceedings by enabling a more accurate, complete, methodical and efficient presentation of the evidence.

(ii) Consequences on the prosecution's disclosure obligations

23. It is likely that during proofing, new information (of either an incriminatory or an exculpatory nature) will be revealed to the

[29] ICTY, *Prosecutor v. Milutinovic et al., Case No IT-05-87-T*, Trial Chamber, Decision on Ojdanic Motion to Prohibit Witness Proofing, 12 December 2006, paragraph 16.

prosecution which was not part of the witness' prior statement and therefore not previously disclosed to the defence. An advantage of proofing in this regard is that this new information may then be disclosed to the defence, in advance of the witness' testimony, pursuant to the relevant provisions of the Statute. Indeed, it is obvious that, if a witness has knowledge of additional relevant facts, such new information will inevitably come to light when the witness gives evidence in court. In this scenario, precious time might be wasted, as a consequence of taking the defence not having prior knowledge of the information thereby creating the need for potential adjournments.[30] At the same time, however, admission of such additional evidence, where incriminatory in nature, should be strictly limited and subject to the control of the Chamber so that the proofing process is not abused, and used as a *de facto* delayed investigation.

(iii) Protection and well-being of witnesses

24. An additional benefit of proofing is related to the confidence it can provide to witnesses, especially in respect of vulnerable witnesses. The familiarisation process evidently plays a central role in this regard. However, it is one thing to have the trial processes explained and opportunity to observe the physical setting of the courtroom, and quite another to realise in advance what is expected from a

[30] See, for example, ICTR, *Prosecutor v. Karemera et al., Case* No. *ICTR-98-44-T*, Trial Chamber III, Decision on Defence Motion to Prohibit Witness Proofing, 15 December 2006, paragraph 9, which stated that: "Both this Tribunal and the ICTY have consistently allowed the practice of pre-testimony interviews of witnesses for the better administration of justice, in the particular context of their proceedings, and to reduce any element of surprise to the Defence."

witness and their likely reactions when testifying in the courtroom. In my opinion, the opportunity for a witness to tell his/her story to the party calling him/her prior to giving evidence in Court may prove comforting, or at least, serve as a very beneficial, substantive preparation for what will occur in Court. It goes without saying that a case-by case assessment of the merits and drawbacks of this practice for each vulnerable witness would have to be made by the VWU, before proofing takes place.

d. Safeguards

25. I agree with Trial Chamber I's warning that proofing "could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony",[31] although I do not agree that such a risk inevitably necessitates a total ban on the pre-trial meeting between the parties and the witnesses they are calling before this Chamber. There certainly is a grey area between what is acceptable, permissible proofing on one hand and prohibited contamination of evidence on the other. It is only after carefully balancing the merits and drawbacks of proofing and implementing various safeguards that many jurisdictions allow or even encourage witness proofing.[32] I believe that, in order to facilitate a fair and expeditious trial, with full respect for the rights of the accused and due regard for the protection of victims and witnesses, this Chamber would have considerably benefited from witness proofing,

[31] ICC-01/04-01/06-1049, paragraph 51.
[32] See above, paragraph 14.

considering the scale, complexity, geographical and temporal scope of the case and cultural and linguistic remoteness from the Court as well as the particular vulnerability of the witnesses. Potential risks associated to witness proofing could have been avoided had the Chamber imposed appropriate safeguards to counter them.[33]

26. The first and most obvious safeguard would be to create clear guidelines providing a definition and detailed guidance on the practice of proofing, including a list of recommended, acceptable, and prohibited conduct, together with a strict code of conduct applicable to all counsel. If necessary, the Code of Professional Conduct for counsel ("Code")[34] which applies to "defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses...",[35] could also be amended so as to adequately reflect this.

27. Other safeguards could include video-audio recording of the proofing session, presence of a third party such as a representative from the VWU or the VPRS, fixing a cut-off date for witness proofing, and specific training of lawyers for the purpose of proofing. The prosecution could also be encouraged to organise a

[33] I should also touch upon the issue of spontaneity, though as a side-note. Although it is ideal to have purely spontaneous in-court testimony, the parties calling a witness for the purposes of the proceedings before the Court are the last of a very long chain of "questioners". Prior to being called before the Court, most witnesses have been interrogated by NGOs, relief agencies, governments, or investigators, etc, which may have the effect of contaminating their testimony. I am not persuaded that lawyers, when and if bound by proper guidelines and codes of conduct, are more "contaminating" than investigators. Therefore, in my opinion, the Chamber should seek a realistic solution to ensure that the need to preserve the spontaneity of the evidence is balanced with the many advantages of proofing, as mentioned above .

[34] Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, adopted on 2 December 2005.

[35] Code, Article 3.

proofing session before the witness arrives in The Hague, in order to minimise the risk of influencing the evidence and to avoid late disclosure in case any new facts emerged from the proofing session. It would also be possible for the Chamber to designate a lawyer from the prosecution, other than the trial lawyer examining the witness in court, in order to conduct proofing if there is an apparent risk of contamination of the evidence, but where proofing is nonetheless considered preferable.[36]

28. This list of suggested safeguards is not meant to be exhaustive, and should be carefully constructed after consultation with parties, participants and relevant sections and units of the Registry, in order to minimise the risks, while preserving the advantages that the practice of witness proofing can offer.

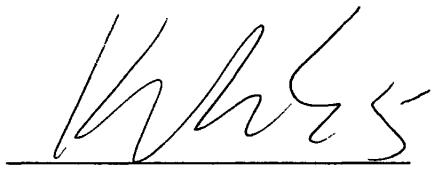
IV. Conclusion

29. For the aforementioned reasons, pursuant to Article 64 (2) and (3) of the Statute, I would have addressed the defence's request and requested the parties and participants to file further submissions on the issue of witness proofing, including observations on possible safeguards against any misuse or abuse of the practice. In my opinion, the Chamber should have only then made its own

[36] While one of the elements which make the proofing issue complicated in some national jurisdictions is an institutional separation of prosecution and investigations, and also separation of the role of barrister and solicitor, there are no such difficulties in this Court.

assessment on the issue, based on the specific circumstances of the *Bemba* case.

Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki

Dated this 24 November 2010

At The Hague, The Netherlands