

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 22 July 2016

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Peter Kovacs
Judge Raul C. Pangalangan

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public, with two annexes

Decision on Protocols to be Adopted at Trial

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Others

Trial Chamber IX ('Chamber') of the International Criminal Court ('Court') issues the following 'Decision on Protocols to be Adopted at Trial', in the case of *The Prosecutor v. Dominic Ongwen*, pursuant to Article 64(2) and 3(a) of the Rome Statute and Rule 140 of the Rules of Procedure and Evidence.

I. Procedural history

1. On 23 May 2016, the Chamber announced it would issue any necessary protocols before the start of the trial and request observations from the parties if necessary.¹ Following a request from the Office of the Prosecutor ('Prosecution') to make submissions on the protocols, the Chamber indicated that it would entertain such submissions by 17 June 2016.²
2. On this date, the Prosecution,³ defence for Mr Ongwen ('Defence'),⁴ Registry⁵ and Legal Representatives for Victims and Office of Public Counsel for Victims⁶ (collectively, 'LRVs') filed their protocols submissions.

II. Protocols to be adopted at trial

3. The Chamber recalls its past determination that the protocols adopted by the Pre-Trial Chamber continue to have effect, namely the e-court protocol and the protocol on handling confidential information and contacting witnesses of

¹ Transcript of Hearing, ICC-02/04-01/15-T-25-ENG, page 5 lines 9-13.

² Email from Trial Chamber IX Communications to the participants and Registry, 23 May 2016 at 18:17 (also indicating that no responses to these submissions would be considered without leave of the Chamber).

³ Prosecution's request for authorisation to conduct witness preparation, ICC-02/04-01/15-472 (with two annexes) ('Prosecution Witness Preparation Submissions'); Prosecution submissions on witness familiarisation and vulnerable witness protocols, ICC-02/04-01/15-480 ('Prosecution Vulnerable Witness Protocol Submissions').

⁴ Defence Observations on a Protocol on Witness Familiarisation and Preparation, ICC-02/04-01/15-473 ('Defence Submissions').

⁵ Registry's Submissions on the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses, ICC-02/04-01/15-478 (with annex) ('Registry Vulnerable Witness Protocol Submissions'); Registry's Submissions on the Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, ICC-02/04-01/15-479 (with two annexes) ('Registry Witness Familiarisation Protocol Submissions').

⁶ Victims' joint observations on protocols to be adopted for trial, ICC-02/04-01/15-477 ('LRV Submissions').

other participants.⁷ The present decision will address four further proposed protocols: (i) a witness preparation protocol; (ii) a witness familiarisation protocol; (iii) a vulnerable witness protocol and (iv) a dual status witness protocol.

A. Witness preparation protocol

4. In a request supported by the LRVs⁸ and opposed by the Defence,⁹ the Prosecution requests that the Chamber adopt a witness preparation protocol. The Prosecution argues generally that witnesses who testified without witness preparation at this Court have expressed discomfort with the process, testimony following such preparation cannot be equated with witness interference and ‘the Parties, and the Prosecution in particular, have a right to prepare and present their case in the manner it deems [sic] best suited to establish the truth’.¹⁰
5. The Prosecution also makes several case specific arguments in favour of witness preparation, relying on the elapsed time since the alleged crimes occurred, the complexity of this case and the well-being of vulnerable witnesses.¹¹
6. The Prosecution defines the ‘witness preparation’ it wants to conduct with reference to five suggested measures which allow the witness: (i) to review his/her prior statements; (ii) to confirm whether those prior statements are accurate and to explain any inaccuracies; (iii) to be informed of the broad topics that may be covered in the in-court examination; (iv) to view exhibits that the

⁷ Order Scheduling First Status Conference and Other Matters, ICC-02/04-01/15-432, para. 4, *referencing* Annex 1 to the Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 27 February 2015, ICC-02/04-01/15-203-Anx1 (e-court protocol) *and* Order concerning the modalities for the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, 11 November 2015, ICC-02/04-01/15-339 (with annex).

⁸ LRV Submissions, ICC-02/04-01/15-477, paras 8-14.

⁹ Defence Submissions, ICC-02/04-01/15-473, paras 1-23.

¹⁰ Prosecution Witness Preparation Submissions, ICC-02/04-01/15-472, paras 17-20.

¹¹ Prosecution Witness Preparation Submissions, ICC-02/04-01/15-472, paras 1, 23, 34-40.

calling party intends to use and to familiarise himself/herself with them; and (v) to ask questions on the process of testifying and what to expect in court.¹²

The Prosecution describes this as a ‘highly circumscribed procedure’ solely focused on the ‘process of giving evidence’, distinguishing its request from preparing a witness in a substantive way for testimony at trial.¹³

7. Trial chambers have a broad discretion pursuant to Article 64(2) and (3)(a) of the Statute to adopt adequate procedures to ensure that the trial is fair and expeditious - some trial chambers have permitted witness preparation;¹⁴ most have not.¹⁵ The Chamber understands ‘witness preparation’ to refer to 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.¹⁶ This is to be contrasted from ‘witness familiarisation’, which describes the support provided by the Victims and Witnesses Unit (‘VWU’) to witnesses shortly before the witness’s testimony.¹⁷
8. The Chamber is not persuaded by the Prosecution’s general arguments in favour of witness preparation. The examples cited of witnesses expressing discomfort about testifying in past cases without witness preparation¹⁸ do not necessarily support the view that these persons would have experienced

¹² Prosecution Witness Preparation Submissions, ICC-02/04-01/15-472, paras 10-15, 23-33.

¹³ Prosecution Witness Preparation Submissions, ICC-02/04-01/15-472, paras 3, 7-8.

¹⁴ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on witness preparation, 16 June 2015, ICC-01/04-02/06-652 (with annex); Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524 (with annex and partly dissenting opinion; notified 3 January 2013).

¹⁵ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Witness Preparation and Familiarisation, 15 September 2015, ICC-01/05-01/13-1252; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on witness preparation and familiarisation, 2 December 2015, ICC-02/11-01/15-355 (with annex and dissenting opinion); Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016 (with partly dissenting opinion at ICC-01/05-01/08-1039); Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 2 December 2007, ICC-01/04-01/06-1049, para. 57. See also Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134, para. 18 (implicitly rejecting witness preparation as well).

¹⁶ ICC-01/09-01/11-524, para. 4.

¹⁷ ICC-01/09-01/11-524, para. 4.

¹⁸ Prosecution Witness Preparation Submissions, ICC-02/04-01/15-472, para. 17.

significantly less discomfort with preparation. Even if this were verifiable for the persons referenced, witness well-being cannot be the trial's sole, overriding consideration – witnesses may feel less discomfort if cross-examination were prohibited, for example, but doing so would infringe the fundamental rights of the accused.¹⁹ It is also entirely speculative to extrapolate from this that *all* witnesses do not prefer a familiarisation procedure exclusively through the VWU. The Chamber notes in this regard that the VWU is not an interested party, but is part of the Registry - a neutral organ of the Court – and created to provide appropriate assistance to all witnesses.²⁰

9. Although it is correct that witness preparation as set out by the Prosecution is not the same as witness interference within the meaning of something like Article 70(1)(c) of the Statute, the Prosecution understates witness preparation's potentially distortive effects. As set out by Trial Chamber VII, with reference to the jurisprudence from *Lubanga*:

Trial Chamber I in the *Lubanga* case stated that 'whilst some aspects of a proofing session could potentially help the Court arrive at the truth in an efficient manner, many others may prove detrimental'. In particular, that Trial Chamber noted that the preparation of witness testimony by the parties 'could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony'. It also determined that this practice could inhibit the entirety of the true extent of an account, and could 'diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness'. These concerns are shared by this Chamber.²¹

10. This Chamber shares these same concerns. Witness preparation has an inherent risk of approaching a rehearsal of the witness's testimony. This risk is caused by the calling party who, irrespective of his/her intentions, can unwittingly transmit expectations to the witness. No matter how narrowly tailored the Prosecution frames the practice, witness preparation still involves extended meetings with adversarial parties imminently before testimony is given. This inherent risk could certainly be addressed by a witness preparation regime

¹⁹ See generally Article 68(1) of the Statute, which discusses the Court's obligation to protect witness well-being

²⁰ Article 43(6) of the Statute.

²¹ ICC-01/05-01/13-1252, para. 22.

with ample safeguards and heavily circumscribed roles for the parties. However, the Chamber considers that the resulting regime would need to be so limited in character that it would reduce the calling party's role to little more than what the VWU can do in the witness familiarisation process. Given its impartial role in the proceedings, the Chamber considers that the VWU is better placed to conduct this kind of limited familiarisation procedure.

11. As to the alleged right to prepare and present evidence in the manner the parties deem best suited to establish the truth,²² the Prosecution suggests that witness preparation must be permitted in order to respect this 'right'. The Chamber emphasises that the Statute confers it with broad discretion in managing evidence presentation. Additionally, the judges have their own duty to establish the truth,²³ and this Chamber decides that this is best pursued by not having witness preparation. The Prosecution's position is also contradicted by the other party in this case. The Defence do not assert any sort of right to witness preparation, but rather insist that the practice 'will disproportionately prejudice the rights of the Accused when weighed against any other goal it could be said to serve'.²⁴
12. The Prosecution's case-specific arguments likewise fail to persuade. There is clearly a long gap in time between the witnesses' testimonies in this case and the alleged crimes. However, the Prosecution has interviewed many of its witnesses more recently, which presumably assisted their memory recall to some degree. The witnesses are also entitled to review their prior statements shortly before testifying, irrespective of whether witness preparation is adopted.

²² Prosecution Witness Preparation Submissions, ICC-02/04-01/15-472, para. 20.

²³ Article 69(3) of the Statute.

²⁴ Defence Submissions, ICC-02/04-01/15-473, para. 2.

13. Beyond these limited measures, the Chamber considers that witness recollection in this case should be tested during the hearing in order to preserve the principle of immediacy. Extended pre-testimony discussions with the parties about the topics of a witness's upcoming testimony diminish spontaneity and thus reduce the benefit of the immediate impression. Inconsistencies and additional information from those who appear to testify are better aired in the courtroom, so all concerned have an opportunity to examine the testimony immediately. Certain witnesses may be naturally expected to not remember or even mistakenly remember certain ancillary aspects of more distant events.²⁵ Witness preparation interferes with the natural reactions to such questions, and the Chamber considers that it is better able to evaluate witness testimony without witness preparation.
14. The alleged complexity of this case also does not justify witness preparation. Even when there are many charged incidents, other witnesses and exhibits, witnesses still testify only to the extent of their personal knowledge. Moreover, the Chamber has already emphasised that the number of charges in this case does not predominantly reflect its magnitude²⁶ and, as correctly pointed out by the Defence, other cases of comparable complexity have also prohibited witness preparation.²⁷
15. As to the Prosecution's concerns as to witness vulnerability in this case, the Chamber is entirely confident that the VWU can sufficiently address the needs and cultural sensitivities of all witnesses during the period just before their testimony. The Chamber also emphasises its own independent obligations to

²⁵ See generally Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, para. 230.

²⁶ ICC-02/04-01/15-T-25-ENG, page 4 line 18 to page 5 line 2.

²⁷ Defence Submissions, ICC-02/04-01/15-473, para. 17 (with reference to *Bemba et al.* and *Gbagbo and Blé Goudé*).

witnesses in this case, and can order special measures to protect their well-being without making witness preparation a general rule.²⁸

16. To conclude, the Chamber considers that the five measures identified by the Prosecution as the core of a witness preparation framework do not justify a witness preparation protocol in this case. In a witness familiarisation process conducted by VWU without a witness preparation component, as adopted by this Chamber below, witnesses are perfectly capable of: (i) reviewing prior statements;²⁹ (ii) confirming their accuracy or explaining any inaccuracies when testifying³⁰ and (iii) asking questions on the process of testifying and what to expect in court.³¹ As discussed above, and beyond review of a witness's prior statements, the Chamber also considers that explaining the broad topics of the examination³² or showing exhibits imminently in advance of testifying³³ unduly distorts the spontaneity of the testimony.
17. For these reasons, the Chamber rejects the Prosecution's request for a witness preparation protocol in this case.

B. Witness familiarisation protocol

18. The Registry indicates that there are two versions of the witness familiarisation protocol in use, depending on whether Chambers allow for witness preparation or not. Given the Chamber's decision on witness preparation above, this section will focus exclusively on the non-preparation version of the witness familiarisation protocol. Such a protocol has been presented by the Registry³⁴ and is based on the familiarisation protocol adopted in the *Gbagbo and Blé Goudé* and *Bemba et al.* cases ('Proposed Familiarisation Protocol'). The

²⁸ Article 68(1) of the Statute and Rule 88 of the Rules.

²⁹ Measure 1 as argued by the Prosecution.

³⁰ Measure 2 as argued by the Prosecution.

³¹ Measure 5 as argued by the Prosecution.

³² Measure 3 as argued by the Prosecution.

³³ Measure 4 as argued by the Prosecution.

³⁴ Annex 2 of the Registry Witness Familiarisation Protocol Submissions, ICC-02/04-01/15-479-Anx2.

Prosecution and LRVs did not comment on this version of the familiarisation protocol, while the Defence proposed minor amendments to it.³⁵

19. The Chamber is generally satisfied with the terms of the Proposed Familiarisation Protocol, and does not consider the Defence modifications to be necessary.
20. The first Defence modification proposed is to remove paragraph 36(ii)-(iii) of the Proposed Familiarisation Protocol,³⁶ which provides:

In cases in which the accounts of 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: [...] (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.³⁷

21. The Chamber appreciates the Defence concerns of the potential risks of such ‘social contact’ and the logistical issue of needing Acholi interpreters to monitor such meetings.³⁸ However, some witnesses covered by this provision, such as family members with similar accounts, have a reasonable and understandable interest in having supervised social contact on the terms specified in the Proposed Familiarisation Protocol. It would unduly infringe witnesses’ well-being to prohibit such contacts as a matter of course.
22. The second Defence modification proposed is to amend the Proposed Familiarisation Protocol to explicitly allow for LRVs representing dual status witnesses to sit in on courtesy meetings if the witness so desires.³⁹ The Chamber will discuss the protocol specific to dual status witnesses later in this

³⁵ Defence Submissions, ICC-02/04-01/15-473, paras 24-27.

³⁶ Defence Submissions, ICC-02/04-01/15-473, paras 24-26.

³⁷ Annex 2 of the Registry Witness Familiarisation Protocol Submissions, ICC-02/04-01/15-479-Anx2, para. 36.

³⁸ Defence Submissions, ICC-02/04-01/15-473, paras 24-26.

³⁹ Defence Submissions, ICC-02/04-01/15-473, para. 27.

decision, but it considers that the Proposed Familiarisation Protocol is sufficiently broad to allow for the possibility contemplated by the Defence.

23. As such, the Chamber adopts the Proposed Familiarisation Protocol, subject to a few minor amendments mostly reflecting items addressed during the *Bemba et al.* case. These amendments can be described as follows:

- (i) The legal adviser for purposes of Rule 74 of the Rules is generally expected to be physically present with the witness during his/her testimony.⁴⁰
- (ii) These legal advisers must be in a position to confirm that the meaning of self-incrimination, the content of Rule 74 and, in accordance with Rule 66(3) of the Rules, the offence defined in Article 70(1)(a) of the Statute have been explained to the witness.⁴¹
- (iii) Absent exigent circumstances, this legal adviser must request Rule 74 assurances in formal filings as soon as possible in order for the Chamber to have sufficient time to decide on the merits before testimony commences.⁴²
- (iv) The witness familiarisation process may start prior to the witness arriving at the location of testimony, so long as the VWU communicates to the parties and participants when the familiarisation process starts with sufficient advance notice.⁴³
- (v) With regard to reading prior statements and/or transcripts by the witness as part of the familiarisation, the calling party must give at least three days notice to the non-calling party of which documentation will

⁴⁰ Amendment to paragraph 55 of the Proposed Familiarisation Protocol.

⁴¹ Amendment to paragraph 60 of the Proposed Familiarisation Protocol.

⁴² Amendment to paragraph 60 of the Proposed Familiarisation Protocol.

⁴³ Amendment to paragraph 27 of the Proposed Familiarisation Protocol.

be provided to the witness. This provides a window in which to make any objections before documents are provided.⁴⁴

24. The Chamber therefore adopts the amended witness familiarisation protocol contained in Annex 1 of the present decision. The participants must apply the terms of this protocol in good faith and while mindful of the reasons why the Chamber prohibits witness preparation in this case.

C. Vulnerable witness protocol

25. The Registry recommends adopting a protocol for vulnerable witnesses in the present case ('Vulnerable Witness Protocol'),⁴⁵ the terms of which it describes as the 'uniform practice' of the Court.⁴⁶ The Prosecution indicates it is in general agreement with the contents of the proposed Vulnerable Witness Protocol, but requests that it be modified to allow the calling party to independently share concerns about measures proposed by the VWU when these measures differ from those deemed appropriate by the calling party.⁴⁷
26. The Vulnerable Witness Protocol describes the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses. The protocol sets out: (i) how the VWU assesses and supports vulnerable witnesses; (ii) the parties' role in relation to vulnerable witnesses⁴⁸ and (iii) the kinds of special measures which could be recommended under Rule 88 of the Rules.
27. The Chamber notes the high likelihood in this case that vulnerable witnesses may be called to testify. The Chamber also considers the terms of the Vulnerable Witness Protocol to be generally sensible.

⁴⁴ Amendment to paragraph 81 of the Proposed Familiarisation Protocol.

⁴⁵ Annex 1 to the Registry Vulnerable Witness Protocol Submissions, ICC-02/04-01/15-478-Anx1.

⁴⁶ Registry Vulnerable Witness Protocol Submissions, ICC-02/04-01/15-478, para. 5.

⁴⁷ Prosecution Vulnerable Witness Protocol Submissions, ICC-02/04-01/15-480, paras 5-9.

⁴⁸ Annex 1 to the Registry Vulnerable Witness Protocol Submissions, ICC-02/04-01/15-478-Anx1, paras 7, 9.

28. However, the Chamber fails to see why it is necessary for it to adopt such a protocol. Most of the Vulnerable Witness Protocol regulates the VWU's internal process for assessing and supporting vulnerable witnesses. It is for the VWU itself to decide such procedures – the Chamber does not need to adopt a protocol in order for the VWU to assess vulnerable witnesses in the manner it sees fit. Further, the familiarisation protocol adopted by the Chamber already governs many aspects of the Vulnerable Witness Protocol, including all those involving the VWU's interactions with the parties.⁴⁹ The Chamber also does not need to adopt a catalogue of potential special measures in order for these measures to be requested. Likewise, the parties may request Rule 88 special measures which diverge from the measures recommended by the VWU, whether this possibility is codified in a protocol or not.
29. For these reasons, the Chamber declines to adopt the Vulnerable Witness Protocol.

D. Dual status witness protocol

30. The LRVs favour the adoption of a dual status witness protocol of the kind adopted in recent cases.⁵⁰ The parties took no position on this particular protocol.
31. Dual status witnesses are persons represented by the LRVs who are also called as witnesses in the case. The Chamber is satisfied that special considerations apply to such witnesses and that something like a protocol is required to regulate the exchange of information regarding them. The Chamber therefore adopts the terms of the most recent iteration of the dual status witness

⁴⁹ As examples, *compare*: (i) paragraph 7 of the Vulnerable Witness Protocol *with* paragraph 19 of the Proposed Familiarisation Protocol; paragraph 9 of the Vulnerable Witness Protocol *with* paragraphs 20 and 52 of the Proposed Familiarisation Protocol and (iii) paragraph 17 of the Vulnerable Witness Protocol *with* paragraphs 41-46 of the Proposed Familiarisation Protocol.

⁵⁰ LRV Submissions, ICC-02/04-01/15-477, para. 5.

protocol⁵¹ in this case. To the extent that this protocol overlaps with any other protocol adopted in this case, the parties are to act in accordance with the obligations set out in each of them.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Prosecution's request for a witness preparation protocol;

ADOPTS a witness familiarisation protocol as contained in Annex 1 of the present decision;

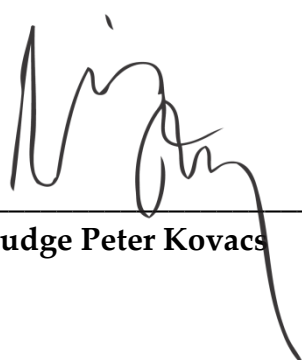
DECLINES to adopt the Vulnerable Witness Protocol; and

ADOPTS a dual status witness protocol as contained in Annex 2 of the present decision.

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



Judge Bertram Schmitt, Presiding Judge



Judge Peter Kovacs



Judge Raul C. Pangalangan

Dated 22 July 2016

At The Hague, The Netherlands

⁵¹ Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex to Decision adopting mechanisms for exchange of information on individuals enjoying dual status, 1 September 2015, ICC-02/11-01/15-199-Anx.