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No.: ICC-01/05-01/08
Date: 3 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

**Legal Representative's Observations on the
Unified Protocol on the practices used to prepare and familiarise witnesses for
giving testimony at trial**

Source: Office of Public Counsel for Victims, as 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,
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

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

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I. Procedural Background

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

2. On 28 October 2010, Trial Chamber III (the “Chamber”) issued an order pursuant to regulation 34 of the Regulations of the Court instructing the parties and participants to file any observations on such Protocol by 3 November 2010².

3. Following the instruction of the Chamber, the Principal Counsel of the OPCV, acting as 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, 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 (the “Legal Representative”)³, respectfully submits her observations on the Unified Protocol.

II. General observations on the Unified Protocol

4. Before addressing specific observations, the Legal Representative wishes to express her general agreement to the Unified Protocol submitted by the VWU and to

¹ See the “Victims and Witnesses Unit’s Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial”, No. ICC-01/05-01/08-972, 22 October 2010 (the “Unified Protocol”).

² See the order conveyed through the email sent by the Legal Adviser on 28 October 2010 at 4.32 pm.

³ See the “Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants”, No. ICC-01/08-01/05-699, 22 February 2010; see also the “Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”, No. ICC-01/05-01/08-807 and No. ICC-01/05-01/08-807-Conf-Exp-AnxA, 30 June 2010.

the suggestion to have this Protocol endorsed by all the Chambers of the Court⁴. In this regard, the Legal Representative wishes to submit some general and specific observations in order to ensure that the interests of victims will be appropriately foreseen in the Unified Protocol and, when appearing before the Court, taken into account.

5. As a preliminary matter, the Legal Representative notes from the reading of paragraph 4 of the Unified Protocol that the latter is to be applied “*to all victims and witnesses appearing before the Court*”. However, the Unified Protocol does not reflect in its current version the fact that it is designed for victims appearing before the Court as much as for witnesses⁵. Consequently, the Legal Representative would suggest that such clarification be made in the Unified Protocol in order to avoid any ambiguity in the future and to ensure, as suggested by the VWU, a consistency in the practice of familiarisation of both victims appearing before the Court and witnesses.

6. In this regard, the Legal Representative refers to victims who may appear before the Chamber in their own capacity as foreseen under rule 93 of the Rules of Procedure and Evidence, rather than those enjoying the dual status of victim-witness. The Legal Representative underlines that the Chamber may indeed wish to receive the views and concerns of victims in person at any stage of the proceedings, as already pointed out by the Chamber in its Decision on participation of victims at trial⁶. In the said decision the Chamber notably refers to Trial Chamber I’s reasoning according to which “[the] *Trial Chamber rejects the submission of the defence that victims appearing before the Court in person should be treated automatically as witnesses*”⁷.

⁴ See the Unified Protocol, *supra* footnote 1, par. 4.

⁵ *Idem*, paras. 21 to 24 for instance. The Legal Representative notes that the Unified Protocol does not refer in a consistent manner to both victims and witnesses when victims, being dual status victim/witnesses of victims appearing before a Chamber will have the same or at least similar needs.

⁶ See the “Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings” (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010, paras. 101 and 102. The Chamber also refers in this Decision (par. 52) to the Trial Chamber I’s “Decision on victims’ participation”, No. ICC-01/04-01/06-1119, 18 January 2008, paras. 132-133.

⁷ *Idem*, par. 52.

Accordingly, the Legal Representative submits that the Unified Protocol should reflect the possibility for victims to appear in person before the Court and the fact that said Protocol should apply to them *mutatis mutandis*⁸.

II. Specific observations on the Unified Protocol

7. The specific observations of the Legal Representative follow the structure of the order of the issues as presented in the Unified Protocol.

8. The Legal Representative first wishes to highlight the need for consistency in the wording endorsed by the Unified Protocol. In this regard, she notes that the words “entity-ies” and “party-ies” presenting or calling a witness⁹ or calling party¹⁰ or parties *tout court*¹¹ are used throughout the Protocol. In order to reflect the possibility recognised by the Chamber to have any participant in the proceedings (including legal representatives of victims and the Chamber itself), call a witness to testify during the course of the trial, the Legal Representative suggests to uniformly using the word *entities* throughout the Unified Protocol.

9. Regarding the ICC film and brochures referred to in paragraph 12, the Legal Representative underscores that these tools, if and when made available to victims appearing in person, should be tailored to fit their needs. Indeed, in the Legal Representative’s knowledge, said tools are at present focussed only on witnesses, therefore not providing a clear distinction between witnesses and persons appearing before the Court in their capacity as victims.

10. In particular and with relation to the “Witness Information Form” mentioned at paragraphs 10 and 13, the Legal Representative notes that a similar “Victim

⁸ Should the Chamber accept this approach and so require the Legal Representative is in a position to suggest the appropriate necessary amendments to the Unified Protocol.

⁹ See *supra* footnote 1, paragraph 20 for instance.

¹⁰ *Idem*, paragraph 53 for instance.

¹¹ *Ibidem*, paragraph 20 for instance.

Information Form” should be conceived for victims who will appear before a Chamber. In this regard, the Legal Representative notes that this will also be in line with the e-court Protocol which foresees the provision of relevant information related to victims who might appear in the proceedings¹².

11. In relation to paragraph 20, the Legal Representative remarks that if the person concerned enjoys the dual status of victim and witness, his or her lawyer has to be informed of any concern in relation to his or her security and well-being and that counsel should be included in any consultations in the said matter. Indeed, the Legal Representative recalls the principle pursuant to which counsel of the person concerned should be consulted for any question arising in relation to his/her client prior to any decision taken by the VWU¹³.

12. In relation to paragraph 33, the Legal Representative notes that adequate time should be included in the VWU schedule so that a person enjoying the dual status of victim and witness could spend time with his or her counsel. The practice in both the *Lubanga* and *Katanga and Chui* cases has indeed shown the importance for dual status individuals to have regular contact with their counsel during the critical period of their testimony. The Legal Representative further emphasises that it would be more appropriate to rephrase said paragraph in order to reflect the meaning intended in footnote 16 of the Unified Protocol, by referring to the “legal representatives of individuals enjoying the dual status of victims/witnesses” instead of to the “legal representatives of witnesses”.

13. In relation to paragraph 35, the Legal Representative fails to understand the reason why meetings with expert witnesses should take place only within the premises of the VWU. This approach will restrain the possibility for parties and

¹² See the “Annex 1: Registration of the eCourt Protocol in the Record of the Case”, No. ICC-01/05-01/08-971-Anx1, 25 October 2010, paras. 29 and 30.

¹³ See the “Decision on certain practicalities regarding individuals who have the dual status of witness and victim” (Trial Chamber I), No. ICC-01/04-01/06-1379, 5 June 2010.

participants to see the expert prior to his or her testimony due to the fact that meetings would only be arranged following the availability of the VWU staff. Since it is recognised by the current practice of the Chambers that limitation of contact does not apply to this category of witnesses, the arrangement proposed by the VWU seems unnecessary. However, the Legal Representative recognises the VWU's role in relation to witnesses and victims appearing before the Court, as well as the fact that normally VWU will organise activities for them during their stay, and therefore suggests that VWU should be kept informed of any meetings the parties or participants might have with experts for coordination purposes.

14. In relation to paragraphs 54 to 62, which address witnesses who fall under the scope of rule 74 of the Rules of Procedure and Evidence, the Legal Representative would first like to underline that discussion between a witness and his/her counsel about such issue is not as automatic and systematic as the VWU seems to suggest in the Unified Protocol. The practice established so far provides that it is incumbent on the party or participant *calling* the witness to testify to inform the Chamber and the VWU whether said witness may be making self-incriminating statements during his/her testimony. Therefore, the wording in paragraph 54 should be in line with the wording in paragraph 55. Moreover, in relation to paragraph 54, the Legal Representative submits that 'victims' appearing in that capacity only and not as witnesses do not fall within the scope of rule 74 of the Rules of Procedure and Evidence. Consequently, it is submitted that the second sentence of the said paragraph should be deleted. Moreover, as a matter of principle, the Legal Representative submits that despite the current practice of the Chambers of the Court, rule 74 provides that "[t]he Chamber shall notify a witness of the provisions of this rule before his or her testimony". Finally, and if the current practice of the Chambers is maintained, the Legal Representative submits that, in relation to the "relevant material" to be provided to the counsel notifying the witness of the provisions of rule 74 of the Rules of Procedure and Evidence (if different from his/her legal

representative), this material should be determined by the Chamber and should in any case be confined only to the statements of the concerned witness.

15. In relation to the period after testimony¹⁴, the Legal Representative notes that the VWU has foreseen a “thank you” meeting between the entity calling the witness and the latter. The Legal Representative would also like to draw the attention of the Chamber to the necessity of safeguarding a time during which the Legal Representative of a dual status victim/witness will be able to meet with his/her client after his or her testimony in order to discuss matters related to the participation in the proceedings.

16. Finally, the Legal Representative suggests that the possibility for modifying certain arrangements concerning victims appearing before the Chamber and witnesses, such as is the case when they might benefit from travelling together to the seat of the Court, should also be permitted to be raised by the entity calling the witness and/or the legal representative, in the case of dual status individuals, for the Chamber to rule upon, and not be solely limited to the Protection Officer’s discretion, as is currently indicated in paragraph 24, footnote 6 of the Unified Protocol.

¹⁴ See *supra* note 1, paras. 111-113.

FOR THE ABOVE-MENTIONED REASONS, 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, 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 respectfully requests the Chamber to consider the above-mentioned observations and to order the amendments herein suggested to the Unified Protocol.

A handwritten signature in black ink, reading 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 3 November 2010

At The Hague, The Netherlands