

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/14-01/21

Date: 2 September 2022

TRIAL CHAMBER VI

Before:

**Judge Miatta Maria Samba, Presiding Judge
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godínez**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public

Decision on the Adoption of Two Witness-Related Protocols

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

The Office of the Prosecutor

Mr Karim A. A. Khan
Ms Holo Makwaia

Counsel for the Defence

Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Ms Sarah Pellet

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

TRIAL CHAMBER VI of the International Criminal Court, in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to articles 64, 67 and 68 of the Rome Statute (the ‘Statute’) and rules 16-19 of the Rules of Procedure and Evidence (the ‘Rules’) issues this ‘Decision on the Adoption of Two Witness-Related Protocols’.

I. PROCEDURAL HISTORY

1. On 9 August 2022, the Registry proposed two protocols for adoption in this case.¹
2. On 22 August, the Defence submitted observations on the two protocols (the ‘Defence Observations’).²
3. Neither the Office of the Prosecutor³ nor the Office of Public Counsel for Victims⁴ made submissions.

II. ANALYSIS

4. The Chamber has taken note of the ‘Protocol on the practices to be used to familiarise witnesses for giving testimony at trial’ (the ‘Familiarisation Protocol’)⁵ and of the ‘Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses’ (the ‘Vulnerable Witnesses Protocol’).⁶ These are two standardised protocols that have been adopted in a number of cases before the Court.⁷

¹ Registry’s Submissions of the Protocol on the practices to be used to familiarise witnesses for giving testimony at trial and of the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses, ICC-01/14-01/21-446.

² Observations de la Défense sur les « Registry’s Submissions of the Protocol on the practices to be used to familiarise witnesses for giving testimony at trial and of the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses » (ICC-01/14-01/21-446), ICC-01/14-01/21-459.

³ Email from Prosecution of 22 August 2022 at 17:29.

⁴ Email from the OPCV of 22 August 2022 at 15:46.

⁵ ICC-01/14-01/21-446-AnxI.

⁶ ICC-01/14-01/21-446-AnxII.

⁷ Most recently: Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Registry’s Submission of the Protocol on the practices to be used to familiarise witnesses for giving testimony at trial and of the Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses. 9 May 2022, ICC-02/05-01/20-688 (with two annexes);

5. The Chamber has also considered the concerns expressed by the Defence in relation to these protocols. However, for the reasons set out below, it does not view them as standing in the way of adopting the two protocols.

A. Familiarisation Protocol

1. Joint travel of witnesses

6. The Chamber agrees that the risk of contamination of evidence of witnesses traveling together should be minimised as much as possible. However, the Chamber notes that the Familiarisation Protocol specifically states that this factor is being considered by the VWU when determining whether or not witnesses should travel together.⁸ The Chamber understands that it is the calling party's responsibility to alert the VWU about possible concerns of 'contamination' and that the Registry will do its utmost to make travel arrangements in light of this information.

7. The Chamber also notes that the issue of joint travel only seems to arise in relation to the first four witnesses who are currently scheduled to testify at the start of the trial.⁹ If the Defence has any specific concerns in relation to any of these witnesses, it is free to communicate this to the VWU. However, the Chamber sees no need to amend the wording of the Familiarisation Protocol in this regard and stresses that the ultimate decision of whether certain witnesses can travel together can only be made by the VWU and will depend on a multitude of factors.

2. Contact with witnesses during testimony

8. The Defence argues that the Familiarisation Protocol should be amended to prohibit the Legal Representative of dual status witnesses from being in contact with such witnesses when they give testimony.¹⁰ As noted by the Defence, the Familiarisation Protocol makes it abundantly clear that Legal Representatives may not meet with dual status victims in order to discuss their evidence, topics or exhibits to be

Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohammed Ag Mahmoud*, Registry's Submissions on the Protocol on the practices to be used to familiarise witnesses for giving testimony at trial pursuant to "Decision on witness preparation and familiarisation" (ICC-01/12-01/18-666), 31 March 2020, ICC-01/12-01/18-705 (with two annexes).

⁸ Familiarisation Protocol, para. 24.

⁹ Proposed Order of Appearance, 10 June 2022, ICC-01/14-01/21-354-Conf-AnxB.

¹⁰ Defence Observations, paras 18-21.

dealt with in court, or any other matter that could influence their testimony. In practice, there will therefore normally be no reason for the Legal Representative to meet with dual status witnesses during the time they are giving evidence before the Chamber. Nevertheless, the Chamber considers that there may be legitimate reasons why the Legal Representative and dual status witnesses may need to communicate during this time. For example, the Legal Representative may need to receive instructions from their client on urgent procedural matters or the client may wish the Legal Representative to assist him or her in a dispute with the Registry. Accordingly, the Chamber does not see a need for a blanket prohibition of any contact between the Legal Representative and dual status witnesses during their testimony.

3. *Showing of courtroom and explanation of the proceedings*

9. In relation to the procedure for familiarising witnesses with the courtroom and explaining the proceedings before the Court, the Defence asks to be allowed to be present during this process also when the witness testifies remotely. The Chamber understands that this is already the case, in that the parties and participants are invited to be present inside the courtroom when the witness is shown the courtroom via video link technology. There is thus no need for the Chamber to intervene on this matter.

10. As regards the Defence's request to be provided in advance with the text of the presentation of the Registry,¹¹ the Chamber sees no justification for this. The Registry must be presumed to present the courtroom proceedings in a clear and neutral manner. The parties are free to attend the presentation and can always bring serious concerns to the Chamber's attention. However, it is not for the Defence to 'pre-approve' the Registry's presentation.

4. *Witnesses on standby*

11. The Chamber has taken note of the Registry's recommendation to limit the number of standby witnesses to one and to avoid requiring witnesses to be on standby at the location of testimony.¹² The Chamber understands and endorses these recommendations, but emphasises the need to maximise the use of available courtroom time and to avoid unnecessary gaps in the scheduled hearings. The Chamber therefore

¹¹ Defence Observations, para. 25

¹² Familiarisation Protocol, paras 14-13.

orders the Registry to work closely with the calling parties and the witnesses to make such arrangements so as to ensure that, if one witness suddenly becomes unavailable or completes his/her testimony earlier than expected, there is always another witness ready to step in at short notice. To avoid prejudice to the non-calling party, it is crucial that there is constant and clear communication between the parties and the Registry regarding the witness schedule.

B. Vulnerable Witnesses Protocol

1. Vulnerability assessment

12. In relation to the Vulnerable Witnesses Protocol, the Defence asks to be provided with the questions that are asked of witnesses during the vulnerability assessment.¹³ The Chamber sees no merit in this request. The vulnerability assessment is conducted by highly trained and experienced professionals, who are expected to follow a scientifically validated methodology. The Chamber also has full confidence that the VWU experts are careful not to influence the witnesses in terms of the substance of their testimony. The Chamber therefore does not see any added value in the Defence commenting on such matters.

13. The Defence further asks to be provided with the report on the vulnerability assessment as well as with ‘medical information’ about the witnesses in order to allow the Defence to adjust its examination.¹⁴ Although the Chamber appreciates the Defence’s concern, the Chamber does not deem it necessary or appropriate for the Defence to be provided with specific medical or psychological information about the witnesses. If the vulnerability assessment reports contain information that is relevant to the parties, the Chamber will communicate this.

2. Assistance during testimony

14. The Defence claims that the psychologists who assist vulnerable witnesses during hearings have a significant impact on how witnesses respond to questions.¹⁵ However,

¹³ Defence Observations, para. 27.

¹⁴ Defence Observations, paras 28-29.

¹⁵ Defence Observations, para. 31.

the Chamber notes that the Defence makes no effort to substantiate this allegation and thus the Chamber will not entertain it further.

FOR THESE REASONS, THE CHAMBER HEREBY

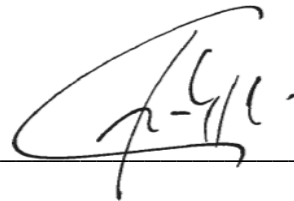
ADOPTS the Familiarisation Protocol and of the Vulnerable Witnesses Protocol.



Judge Miatta Maria Samba
Presiding Judge



Judge María del Socorro Flores Liera



Judge Sergio Gerardo Ugalde Godínez

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

Dated 2 September 2022

At The Hague, The Netherlands