

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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
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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 Protocol¹¹ 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 than 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 Chamber²⁵ 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 issue²⁶ 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*.

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.

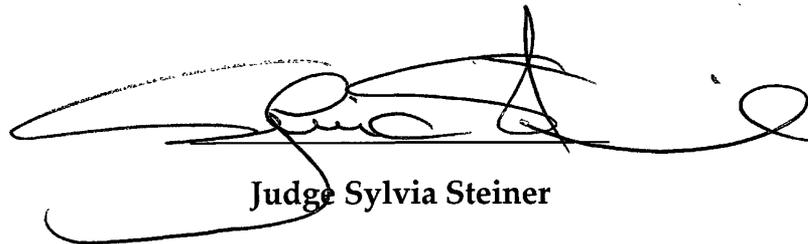
For the foregoing reasons, the Chamber

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