

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-02/06

Date: 16 June 2015

**TRIAL CHAMBER VI**

**Before:** Judge Robert Fremr, Presiding Judge  
Judge Kuniko Ozaki  
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Public with one public annex**

**Decision on witness preparation**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Ms Nicole Samson

**Counsel for Bosco Ntaganda**

Mr Stéphane Bourgon  
Mr Luc Boutin

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Trial Chamber VI** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 68(1) of the Rome Statute ('Statute'), Rule 68(3) of the Rules of Procedure and Evidence ('Rules'), and Regulation 43 of the Regulations of the Court ('Regulations'), issues the following 'Decision on witness preparation'.

### **I. Procedural history**

1. On 2 December 2014, during a status conference, the Office of the Prosecutor ('Prosecution')<sup>1</sup> and the defence team for Mr Ntaganda ('Defence')<sup>2</sup> expressed their intention to consult on a possible joint protocol on witness preparation.
2. On 18 December 2014, the Chamber directed the parties to file any request for witness preparation no later than 6 February 2015, along with a proposed witness preparation protocol.<sup>3</sup>
3. On 5 February 2015, the Prosecution sought authorisation to conduct witness preparation ('Prosecution Request'), appending a proposed witness preparation protocol ('Proposed Protocol').<sup>4</sup>
4. On 27 February 2015, the Defence filed its response to the Prosecution Request ('Defence Response').<sup>5</sup> It stated that it does not oppose the proposed practice of witness preparation by a calling party. However, it indicated that it takes issue with three 'key aspects' of the Proposed Protocol.<sup>6</sup>

<sup>1</sup> Transcript of hearing on 2 December 2014, ICC-01/04-02/06-T-17-CONF-ENG, page 4, lines 4-8.

<sup>2</sup> ICC-01/04-02/06-T-17-CONF-ENG, page 18, lines 7-16.

<sup>3</sup> Order setting deadlines for the filing of submissions on outstanding protocols, 18 December 2014, ICC-01/04-02/06-416, p. 6.

<sup>4</sup> Prosecution motion regarding witness preparation, 5 February 2015, ICC-01/04-02/06-444 with Annexes 1-2.

<sup>5</sup> Response on Behalf of Mr Ntaganda to "Prosecution motion regarding witness preparation", 27 February 2015, ICC-01/04-02/06-484.

<sup>6</sup> Defence Response, ICC-01/04-02/06-484, para. 1.

5. On 2 March 2015, the Prosecution sought leave to reply to the Defence Response.<sup>7</sup> The following day, the Chamber granted the Prosecution's request and directed the Prosecution to file its reply no later than 16 March 2015.<sup>8</sup>
6. On 16 March 2015, the Prosecution filed its reply to the Defence Response ('Reply').<sup>9</sup>

## II. Submissions and analysis

### A. Whether witness preparation should be authorised

#### *Prosecution's submissions*

7. The Prosecution submits that the Court's legal framework, notably Articles 64 and 68 of the Statute and Regulation 43 of the Regulations provide a sufficient legal basis to authorise witness preparation.<sup>10</sup> According to the Prosecution further support can be derived from the jurisprudence of other international tribunals as well as national jurisprudence, 'as foreseen in Article 21 [of the Statute]'.<sup>11</sup>
8. According to the Prosecution, witness preparation would generate substantial benefits, as it would: (i) further the Court's truth-finding function; (ii) assist witnesses to provide clear and focused testimony; and (iii) contribute to the well-being of witnesses.<sup>12</sup>
9. The Prosecution submits in particular that witness preparation will 'result in more accurate, focused and complete testimony which will enhance the

<sup>7</sup> Prosecution request to file a reply to the "Response on Behalf of Mr Ntaganda to 'Prosecution motion regarding witness preparation'", 2 March 2015, ICC-01/04-02/06-485.

<sup>8</sup> Order requesting additional submissions on witness preparation, 3 March 2015, ICC-01/04-02/06-494.

<sup>9</sup> Prosecution reply to "Response on Behalf of Mr Ntaganda to Prosecution motion regarding witness preparation", 16 March 2015, ICC-01/04-02/06-515.

<sup>10</sup> Prosecution Request, ICC-01/04-02/06-444, paras 10-12.

<sup>11</sup> Prosecution Request, ICC-01/04-02/06-444, para. 13.

<sup>12</sup> Prosecution Request, ICC-01/04-02/06-444, paras 4 and 14-28.

Chamber's ability to ascertain the truth'.<sup>13</sup> It also suggests that the said process will enable witnesses to give an accurate account of the witnessed facts, and to present them in a complete, clear and structured manner, thereby assisting the Court in the discharge of its truth-finding process.<sup>14</sup> Moreover, the Prosecution avers that witness preparation allows for relevant new information obtained from a witness during the preparation sessions to be disclosed to the non-calling party, thereby preventing that new information is explored for the first time on the stand.<sup>15</sup> The Prosecution further avers that proper witness preparation enhances the protection and well-being of witnesses.<sup>16</sup>

10. According to the Prosecution, any potential risks including 'inducing witnesses to modify their testimony', 'reducing any helpful spontaneity', or 'sessions becoming an improper rehearsal of in-court testimony', are mitigated by the measures specified in the Proposed Protocol and other safeguards, such as cross-examination and the fact that all counsel are bound by a code of conduct.<sup>17</sup>

11. Lastly, the Prosecution submits that in the present case witness preparation is particularly appropriate because of the significant lapse of time since the relevant events occurred (i.e., twelve to thirteen years ago) and the length of time that has elapsed since many witnesses gave their initial statement to the Prosecution.<sup>18</sup>

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<sup>13</sup> Prosecution Request, ICC-01/04-02/06-444, para. 14.

<sup>14</sup> Prosecution Request, ICC-01/04-02/06-444, para. 15.

<sup>15</sup> Prosecution Request, ICC-01/04-02/06-444, paras 18 and 21.

<sup>16</sup> Prosecution Request, ICC-01/04-02/06-444, para. 23.

<sup>17</sup> Prosecution Request, ICC-01/04-02/06-444, para. 29-35.

<sup>18</sup> Prosecution Request, ICC-01/04-02/06-444, paras 38-39.

*Defence's submissions*

12. The Defence does not oppose witness preparation being conducted by the calling party, but raised concern with respect to three aspects of the Proposed Protocol.<sup>19</sup> It asks the Proposed Protocol to be adopted with three modifications (discussed further below).<sup>20</sup>

*Analysis and decision*

13. At the outset, the Chamber notes that the Court's statutory framework does not specifically address witness preparation. However, pursuant to Article 64 of the Statute, the Chamber shall ensure that the trial is fair and expeditious. To achieve this, the Chamber is to confer with the parties in order to adopt such procedures as are necessary to facilitate this goal.<sup>21</sup>

14. Trial Chamber V observed in this regard that

Article 64 of the Statute grants the Chamber flexibility in managing the trial. Its formulation makes clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters such as witness preparation, and that silence on a particular procedural issue does not necessarily imply that it is forbidden. Article 64 is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims.<sup>22</sup>

15. The Chamber observes that the concept of 'witness preparation' or 'witness proofing' is used in a number of domestic legal systems and has also

<sup>19</sup> Defence Response, ICC-01/04-02/06-484, para. 1

<sup>20</sup> Defence Response, ICC-01/04-02/06-484, para. 36.

<sup>21</sup> Article 64(2) and 64(3)(a) of the Statute,

<sup>22</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524 (*Ruto/Sang* Decision), para. 27 with further reference to *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 24 November 2010 ('*Bemba* Dissenting Opinion'), ICC-01/05-01/08-1039, para. 10; see also: *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on witness preparation ('*Muthaura/Kenyatta* Decision'), 2 January 2013, ICC-01/09-02/11-588, para. 31.

featured in the practice of international courts and tribunals. However, it has been received with varying degrees of acceptance at the Court. Trial Chamber I,<sup>23</sup> and Trial Chamber III, by Majority,<sup>24</sup> found that preparation of witness should not be allowed,<sup>25</sup> whilst Trial Chamber V concluded that it was ‘neither practical nor reasonable to prohibit pre-testimony meetings between parties and the witnesses they will call to testify at trial’.<sup>26</sup>

16. The Chamber concurs with Trial Chamber V that Article 64 provides a sufficient legal basis to allow the calling party to prepare witnesses, should the relevant party wish to do so. In this respect, the Chamber gives due regard to the parties agreement to use witness preparation in the present case.

17. The Chamber considers that witness preparation could, in principle, advance the fairness and expeditiousness of trial and at the same time help protect the well-being of witnesses.<sup>27</sup> However, any decision on witness preparation should be made after a careful review of the circumstances prevailing in each case at the Court.

18. In this regard, the Chamber observes that relevant, accurate and complete witness testimony facilitates a fair, effective and expeditious trial.<sup>28</sup> The Chamber considers that in light of the complexity of the present case, in particular the alleged events dating back to 2002 and 2003, as well as the

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<sup>23</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, para. 45, upholding an earlier decision by Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679.

<sup>24</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016 with 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, 24 November 2010, ICC-01/05-01/08-1039.

<sup>25</sup> Trial Chamber II did not explicitly pronounce on witness preparation, but no preparation took place in *The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui*.

<sup>26</sup> *Ruto/Sang* Decision, ICC-01/09-01/11-524, para. 50; *Muthaura/Kenyatta* Decision, ICC-01/09-02/11-588, para. 52.

<sup>27</sup> See Article 68(1) of the Statute.

<sup>28</sup> *Ruto/Sang* Decision, ICC-01/09-01/11-524, para. 31.

large number of potential exhibits, witness preparation will enable the calling party to engage with the witness in order to define the most effective way to discover the truth during trial.<sup>29</sup> It is also observed that the introduction of previously recorded testimonies in accordance with Rule 68(3) of the Rules may be facilitated through the witness preparation process, insofar as the witnesses have a further opportunity to confirm the truth of their written statement for the purposes of its admission into evidence, in lieu of examination-in-chief, thereby further contributing to the expeditiousness of the proceedings. Furthermore, as most witnesses come from different cultural backgrounds and appear for the first time in a courtroom some form of preparation, in addition to the familiarisation conducted by the Victim and Witnesses Unit, may assist these witnesses. The Chamber therefore considers it appropriate to authorise witness preparation within the defined parameters set out in the protocol adopted by way of this decision.

#### **B. Witness preparation protocol and issues raised by the Defence**

19. The Chamber has duly noted the suggested modalities for witness preparation as suggested in the Proposed Protocol, as well as the parties' positions set forth in their respective submissions. To the extent the parties are in agreement, the Chamber is ready to accept the draft protocol as submitted by the Prosecution.<sup>30</sup> The Chamber will now analyse the Defence's suggested modifications. The Defence takes issue with three aspects of the Proposed Protocol.<sup>31</sup> It argues that: (i) video-recording of witness preparation sessions should be limited to specific cases in which it has the potential 'to make a difference' ('First Issue'); (ii) provisions setting

<sup>29</sup> *Ruto/Sang* Decision, ICC-01/09-01/11-524, paras 31 and 34.

<sup>30</sup> The Chamber also notes that the agreed sections of the Proposed Protocol are consistent with the protocols as adopted by way of the *Ruto/Sang* Decision (ICC-01/09-01/11-524) and the *Muthaura/Kenyatta* Decision (ICC-01/09-02/11-588).

<sup>31</sup> Defence Response, ICC-01/04-02/06-484, para. 1.

out how the parties may gain access to and/or use the video recording should be included in the protocol ('Second Issue'); and (iii) the calling party should provide the non-calling party with a 'proofing note' ('Third Issue').

20. The Prosecution replied that the three modifications proposed by the Defence should be rejected.<sup>32</sup>

*First Issue*

21. The Defence does not agree that every single preparation session should be video-recorded. It contends that this would be neither necessary, nor practical,<sup>33</sup> and that the benefits of having a video-recording would be disproportionate to the logistical burden placed on the calling party.<sup>34</sup>

22. According to the Defence, video-recording can be limited to preparation sessions with witnesses who genuinely need it,<sup>35</sup> for example, in case of risk of self-incrimination by a witness pursuant to Article 55(2) of the Statute, or when a party has obtained information that the witness has engaged in illegal or inappropriate behaviour which it intends to raise during cross-examination.<sup>36</sup>

23. The Prosecution submits that the equipment required to video-record these sessions is minimal, easily transported and simple to use.<sup>37</sup> In addition, the Prosecution avers that video-recordings are a safeguard against improper conduct during preparation sessions, and that it is unlikely that concerns

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<sup>32</sup> Prosecution Reply, ICC-01/04-02/06-515, para. 10.

<sup>33</sup> Defence Response, ICC-01/04-02/06-484, para. 7.

<sup>34</sup> Defence Response, ICC-01/04-02/06-484, para. 8.

<sup>35</sup> Defence Response, ICC-01/04-02/06-484, para. 10.

<sup>36</sup> Defence Response, ICC-01/04-02/06-484, paras 11-12.

<sup>37</sup> Prosecution Reply, ICC-01/04-02/06-515, para. 12.

of improper interference occurring during the preparation sessions will be known to the calling party in advance.<sup>38</sup>

24. The Chamber recalls that Trial Chamber V put in place certain safeguards to mitigate the risk of witness preparation becoming improper rehearsal of in-court testimony, such as clear guidelines establishing permissible and prohibited conduct, and video-recording of preparation sessions.<sup>39</sup> The Chamber agrees that video-recording of witness preparation sessions is an important safeguard to prevent and disclose potential abuse by the calling party.<sup>40</sup> It can serve as an efficient tool to identify alleged acts of misconduct, as well as to resolve misunderstandings.<sup>41</sup>

25. Furthermore, the Chamber observes that the parties can be assisted by the Registry in relation to video-recording technology. The video-recording of preparation sessions therefore does not have any financial impact on Defence resources and any logistical impact is minimal. Moreover, the Chamber observes that any witness preparation will generally be done at the seat of the Court, at the premises of the VWU, although, when necessary, it could also be conducted at other locations with minimal logistical burden.

26. Additionally, the Chamber notes the Defence's proposal to only order the recording of specific sessions, for which there is a 'genuine need'.

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<sup>38</sup> Prosecution Reply, ICC-01/04-02/06-515, paras 13-15.

<sup>39</sup> *Ruto/Sang* Decision, ICC-01/09-01/11-524, paras 44-47 and *Muthaura/Kenyatta* Decision, ICC-01/09-02/11-588, paras 47-50.

<sup>40</sup> See *Ruto/Sang* Decision, ICC-01/09-01/11-524, para. 47.

<sup>41</sup> The Chamber notes that the low frequency and manner in which requests for disclosure of video-recordings were made and ruled upon in the proceedings in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, the only trial proceedings so far during which witness preparation has taken place, suggest that the requirement of video-recording provides an efficient safeguard that does not cause unnecessary delays as a result of protracted litigation. See, e.g., *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Transcript of hearing on 21 January 2014, ICC-01/09-01/11-T-77, page 1 line 25 to page 3, line 7, Transcript of hearing on 31 January 2014, ICC-01/09-01/11-T-85, page 31 line 24, to page 32, line 14, Transcript of hearing on 15 May 2014, ICC-01/09-01/11-T-114, page 52 line 9 to page 55, line 5 and Transcript of hearing on 16 May 2014, ICC-01/09-01/11-T-115, page 2 lines 6-15

However, the Chamber considers that such a need is difficult to assess beforehand and that limiting recording to specific sessions would defeat the purpose of the provision, namely to act as a general safeguard against improper conduct during preparation sessions.

27. Consequently, the Chamber considers that the advantage of video-recording all witness preparation sessions outweighs the limited logistical burden it creates. Article 12 of the Proposed Protocol shall therefore be retained in its current form.

#### *Second Issue*

28. The Defence submits that the Proposed Protocol lacks a 'well-known and transparent mechanism' for the parties to request access to and/or make use of the video-recordings of preparation sessions.<sup>42</sup> In its view, adding such a mechanism to the protocol would provide significant incentive to the parties to adhere to the Proposed Protocol and would make it easier to resolve disputes that may arise between the parties.<sup>43</sup>

29. The Defence agrees that any application for access to and/or use of the video recordings should be made on a concrete and credible basis and grounded on well-founded motives. Furthermore, because of the potentially privileged nature of some content of the preparation sessions, the Defence posits that any such application should be the object of a determination by the Chamber after the holding of a *voir-dire*.<sup>44</sup> The Defence therefore proposes the following provision:

A party wishing to gain access to and/or make use of the video recording of a witness preparation session shall apply to the Chamber, orally or in writing, setting out: (i) the reason why access to and/or use

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<sup>42</sup> Defence Response, ICC-01/04-02/06-484, paras 14-16.

<sup>43</sup> Defence Response, ICC-01/04-02/06-484, paras 16-17.

<sup>44</sup> Defence Response, ICC-01/04-02/06-484, paras 18-19.

of the video recording is necessary; and (ii) the information in its possession, evidentiary or other, demonstrating that access to and/or use of the video is warranted. The Chamber shall grant the application, if necessary following the holding of a *voir-dire*, if the party has shown genuine objective motives and the disclosure and/or use of the video recording will: (i) assist in either solving a dispute between the parties or proceeding swiftly with the testimony of the witness; and (ii) facilitate the search for the truth in the interests of justice.<sup>45</sup>

30. The Prosecution submits that the jurisprudence from the Kenya cases should suffice to appease the concerns raised. It views the Defence's proposal as being too prescriptive and interfering with the discretion of the Chamber.<sup>46</sup>

31. Should the Chamber wish to include a mechanism, as proposed by the Defence, the Prosecution submits that the wording used in the protocol should reflect the language used in the decisions on witness preparation in the Kenya cases.<sup>47</sup>

32. The Chamber observes that the general disclosure regime applies to witness preparation. As is further discussed below as part of the 'Third Issue', any information resulting from a preparation session for which disclosure obligations exist would therefore have to be disclosed in the regular manner. Although the video-recording of preparation sessions is intended as a safeguard, the Chamber considers that the need for disclosure of the video recordings themselves can also be assessed within the regular disclosure framework. With respect to witness preparation conducted by the Prosecution, the Chamber notes that since the scope of

<sup>45</sup> Defence Response, ICC-01/04-02/06-484, para. 20.

<sup>46</sup> Prosecution Reply, ICC-01/04-02/06-515, paras 17-19, referring to *Ruto/Sang* Decision, ICC-01/09-01/11-524, para. 47 and *Muthaura/Kenyatta* Decision, ICC-01/09-02/11-588, para. 50, in which Trial Chamber V held the following: 'Without prejudice to the relevant Articles and Rules applicable to disclosure, in the event of allegations of coaching of a witness or of any other improper interference with the evidence to be presented by a witness, the non-calling party may request the Chamber to order the disclosure of the video. The party making such a request shall satisfy the Chamber that there is a concrete and credible basis for the request. On being so satisfied as to the basis of the request, the Chamber, in its discretion, may consider whether to review the video recording prior to making any disclosure order, mindful of the need, among other things, to protect such privileged information as may be revealed in the video recording.'

<sup>47</sup> Prosecution Reply, ICC-01/04-02/06-515, paras 20-21.

witness preparation is limited, the content of a video-recording can be expected to be the largely equivalent to the content of the witness statements that would already have been disclosed to the Defence. So long as the Defence is informed of any deviation from the witness statements or additional information provided by the witness, the video-recordings themselves would thus not be subject to disclosure.<sup>48</sup> However, the Chamber can also assess whether further reasons exist that would make the video-recording disclosable, including, for example, the manner in which the preparation was conducted. Mindful of the Defence's concerns as to clarity and transparency, the Chamber considers it appropriate for the protocol to make specific reference to the procedure that has to be followed when the non-calling party wishes to access any video-recordings of preparation sessions. The following shall therefore be added to the protocol:

Should the non-calling party wish to gain access to the video-recording of a witness preparation session, it shall apply to the Chamber, orally or in writing, setting out: (i) the reason why access to the video-recording is necessary; and (ii) the information in its possession, evidentiary or other, demonstrating that access to the video is warranted. If the Chamber considers it necessary, it may review the recording itself, or order the disclosure of the recording.

### *Third Issue*

33. The Defence submits that the disclosure standard, described in Part VIII of the Proposed Protocol, is subjective, as there is no specific and objective guidance as to the content and scope of the information to be provided,

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<sup>48</sup> Compare *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, ICC-02/05-03/09-501, para. 40.

thereby lending itself to uncertainty, arbitrariness and disputes between the parties.<sup>49</sup>

34. The Defence further submits that transparency requires the provision to the non-calling party of all relevant information.<sup>50</sup> The Defence avers that information that may not be considered relevant by the calling party may, in fact, be material to the non-calling party's cross-examination.<sup>51</sup>

35. The Defence therefore proposes a process used in proceedings of the *ad hoc* tribunals, namely the use of 'proofing notes', which would contain: '(i) all information material to the preparation of the non-calling party's cross-examination; as well as (ii) all other information provided by the witness which is not privileged information'.<sup>52</sup> According to the Defence, this solution would achieve the objectives of the Proposed Protocol, provide an incentive for witnesses to tell the truth, foster good relationships and trust among the parties, and facilitate the work of the Chamber.<sup>53</sup> It further submits that proofing notes would assist the non-calling party when meeting with a witness of the calling-party.<sup>54</sup> The Defence proposes to add the following provision:

- a. Any changes or corrections made by the witness to his previous statements and the reasons advanced by the witness, if any, to justify the change or correction;
- b. Any clarification with regard to prior statements and the details of such clarification;
- c. Any new information obtained from the witness as well as that which is material to the preparation of the non-calling party's cross-examination or which is intended for use by the Prosecution as evidence at trial; and

<sup>49</sup> Defence Response, ICC-01/04-02/06-484, paras 21-22.

<sup>50</sup> Defence Response, ICC-01/04-02/06-484, para. 23.

<sup>51</sup> Defence Response, ICC-01/04-02/06-484, paras 24-25.

<sup>52</sup> Defence Response, ICC-01/04-02/06-484, para. 27.

<sup>53</sup> Defence Response, ICC-01/04-02/06-484, paras 28-30.

<sup>54</sup> Defence Response, ICC-01/04-02/06-484, para. 35.

d. A list of all documents – including prior statements provided by the witness – which have been shown to the witness and his comments thereon where applicable.<sup>55</sup>

36. The Prosecution submits the proposed addition is not necessary, as the Proposed Protocol already sufficiently articulates the requirement to disclose all information that the Defence refers to. In addition, it submits that the Defence fails to explain how the provision of proofing notes would facilitate meetings between the non-calling party and witnesses of the opposing party or participant. The Prosecution further avers that such meetings would normally occur prior to witness preparation sessions.<sup>56</sup>

37. The Chamber recalls that the regular disclosure regime applies to witness preparation. In this regard, it observes that Article 30 of the Proposed Protocol requires that information obtained ‘during a preparation session that is subject to disclosure’, is to be disclosed as soon as practicable. As witness preparation will generally be conducted shortly before a witness starts testifying,<sup>57</sup> the Chamber considers it useful for any disclosable material to be communicated to the non-calling party in a clear and accessible manner. The language set out below shall therefore be added to the provision currently addressing disclosure in the Proposed Protocol. As to sub d proposed by the Defence, the Chamber considers it appropriate for the non-calling party to be informed of the materials shown to the witness during preparation. However, any comments by the witness on such materials are already sufficiently captured in Article 30 (as included in the Proposed Protocol) and the additional language that will be added with respect to the provision of a proofing note.

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<sup>55</sup> Defence Response, ICC-01/04-02/06-484, para. 33.

<sup>56</sup> Prosecution Reply, ICC-01/04-02/06-515, para. 26.

<sup>57</sup> The Chamber notes that at this time the non-calling party will normally be conducting its cross-examination of a previous witness and/or preparing for the testimony of the upcoming witness.

38. The following provision shall therefore be added immediately after Article 30 (as included in the Proposed Protocol):

The calling party shall provide the non-calling party with a list of all materials that have been shown to the witness, and, if applicable, all of the information that is subject to the calling party's disclosure obligations, including:

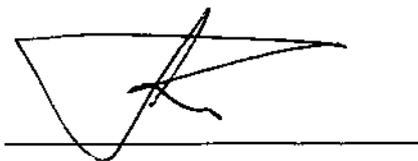
- any clarifications, changes or corrections made by the witness to his or her previous statements and the reasons advanced by the witness, if any, to justify the change or correction;
- any new information obtained from the witness.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**AUTHORISES** the preparation of witnesses in the present case; and

**ADOPTS** the witness preparation protocol in Annex A to this decision.

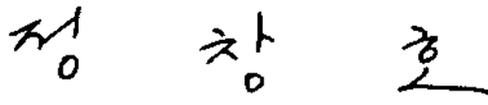
Done in both English and French, the English version being authoritative.



**Judge Robert Fremr, Presiding Judge**



**Judge Kuniko Ozaki**



**Judge Chang-ho Chung**

Dated 16 June 2015

At The Hague, The Netherlands