



Original: English

No. ICC-01/14-01/18

Date: 8 October 2020

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

**Public
with public Annexes 1-5
Decision on Protocols at Trial**

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Kweku Vanderpuye

Counsel for the Alfred Yekatom

Mylène Dimitri
Thomas Hannis

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

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

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Article 64(2) and 3(a) of the Rome Statute (the ‘Statute’) issues this ‘Decision on Protocols at Trial’.

I. Procedural history and submissions

1. On 19 March 2020, the Chamber issued its order convening a first status conference (the ‘Status Conference’) and confirming that the following protocols and procedures adopted by Pre-Trial Chamber II (the ‘PTC II’) would remain in place, unless otherwise indicated (the ‘Order’):¹ (i) the E-Court Protocol;² (ii) the Redaction Protocol;³ (iii) the Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant;⁴ and (iv) the Victim application procedure.⁵
2. On 8 April 2020, as directed in the Order,⁶ the Office of the Prosecutor (the ‘Prosecution’),⁷ the Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of Victims of Other Crimes (jointly, the ‘CLR’),⁸ and the Registry⁹ filed their respective submissions on the agenda items for the Status Conference. On the same day, the Yekatom Defence and the

¹ Order Scheduling First Status Conference, ICC-01/14-01/18-459, para. 8.

² Annex to the Decision on Disclosure and Related Matters, 23 January 2019, ICC-01/14-01/18-64-Anx.

³ Decision on Disclosure and Related Matters, 23 January 2019, ICC-01/14-01/18-64-Conf, paras 24-32 (public redacted version notified the same day, ICC-01/14-01/18-64-Red). *See further* Second Decision on Disclosure and Related Matters, 4 April 2019, ICC-01/14-01/18-163 (notified on 5 April 2019).

⁴ Annex A to the Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses, 22 March 2019, ICC-01/14-01/18-156-AnxA. For ease of reference, the terms of this protocol have been provided in Annex 5 to the present decision.

⁵ Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 5 March 2019, ICC-01/14-01/18-141.

⁶ Order Scheduling First Status Conference, ICC-01/14-01/18-459, paras 3, 4, 7.

⁷ Prosecution’s Observations on the Agenda of the First Status Conference, ICC-01/14-01/18-474-Conf (second public redacted version notified on 11 June 2020, ICC-01/14-01/18-474-Red2).

⁸ Common Legal Representatives’ joint submissions on the matters identified in the “Order Scheduling First Status Conference”, ICC-01/14-01/18-471 (the ‘CLR Submission on the Status Conference’).

⁹ Registry Submissions in View of the Upcoming Status Conference, ICC-01/14-01/18-470 (with confidential *ex parte* Annex I, only available to the Prosecution and the Registry; confidential *ex parte* Annexes II and III, only available to the Registry) (confidential redacted version of Annex II notified on 17 April 2020; confidential redacted version of Annex III notified on 8 April 2020; public redacted version of Annex III notified on 22 May 2020) (the ‘Registry Submission on the Status Conference’).

Ngaïssona Defence (jointly, the ‘Defence’) filed their submissions (the ‘Yekatom Defence Submission on the Status Conference’ and the ‘Ngaïssona Defence Submission on the Status Conference’, respectively).¹⁰ The Prosecution responded to these submissions.¹¹

3. On 14 April 2020, the Prosecution filed submissions on the conduct of proceedings, wherein it also made specific submissions regarding witness preparation (the ‘Submissions on the Conduct of Proceedings’).¹² Additionally, it annexed two proposals, one on the directions for the conduct of the proceedings (the ‘Proposed Directions on the Conduct of Proceedings’)¹³ and another on witness familiarisation.¹⁴
4. On 14 and 15 May 2020, following an extension of the deadline for responses,¹⁵ the Registry,¹⁶ the CLRV,¹⁷ the Ngaïssona Defence¹⁸ and the Yekatom

¹⁰ Yekatom Defence Submissions for First Status Conference, ICC-01/14-01/18-472 (with one confidential annex); Defence Submissions pursuant to Trial Chamber V’s “Order Scheduling First Status Conference” (ICC-01/14-01/18-459), ICC-01/14-01/18-473-Conf (with confidential *ex parte* Annex 1, only available to the Ngaïssona Defence and the Registry) (public redacted version notified on 5 June 2020, ICC-01/14-01/18-473-Red).

¹¹ Prosecution’s Response to “Yekatom Defence Submissions for First Status Conference” (ICC-01/14-01/18-472), 20 April 2020, ICC-01/14-01/18-486; Prosecution’s Response to the Ngaïssona “Defence Submissions pursuant to Trial Chamber V’s “Order Scheduling First Status Conference” (ICC-01/14-01/18-473-Conf), ICC-01/14-01/18-488-Conf (public redacted version notified the next day, ICC-01/14-01/18-488-Red) (the ‘Prosecution Response to the Ngaïssona Defence Submission on the Status Conference’).

¹² Prosecution’s Submission of Proposed Directions for the Conduct of Proceedings and Proposed Protocol on Witness Familiarisation, ICC-01/14-01/18-476 (with public Annexes A and B, ICC-01/14-01/18-476-AnxA and ICC-01/14-01/18-476-AnxB, respectively), paras 9-16.

¹³ Annex A to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476-AnxA.

¹⁴ Annex B to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476-AnxB. *See also* Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 28-38.

¹⁵ Decision on the Ngaïssona Defence Requests Related to the Prosecution Submissions on the Conduct of Proceedings, 23 April 2020, ICC-01/14-01/18-491. The Single Judge rejected the request to dismiss the Submissions on the Conduct of Proceedings but granted an extension of the response deadline. The parties and participants were ordered to file their responses within 21 days of notification of the decision. On 16 April 2020, the Ngaïssona Defence had filed a request seeking that the Submissions on the Conduct of Proceedings be dismissed *in limine* or, alternatively, that the response deadlines thereto be extended. *See* Defence request for dismissal, *in limine*, of the “Prosecution’s Submission of Proposed Directions for the Conduct of Proceedings and Proposed Protocol on Witness Familiarisation”, ICC-01/14-01/18-476, or, in the alternative, Request for Extension of time pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/14-01/18-479, paras 1, 7; *see also* Prosecution’s Response to Ngaïssona Defence’s Request for *In Limine* Dismissal of the Prosecution’s Submission ICC-01/04-01/18-476 and Alternative Request for Extension of Time (ICC-01/14-01/18-479), 17 April 2020, ICC-01/14-01/18-483.

¹⁶ Registry’s Submissions pursuant to regulation 24*bis* of the Regulations of the Court and in relation to the “Decision on Ngaïssona Defence Requests Related to the Prosecution Submissions on the Conduct of the Proceedings” [ICC-01/14-01/18-491], 14 May 2020, ICC-01/14-01/18-516-Conf (public

Defence¹⁹ submitted their respective responses to the Submissions on the Conduct of Proceedings.

5. On 9 July 2020, during the Status Conference, the Yekatom Defence made oral submissions concerning amendments to the Redaction Protocol.²⁰ Following directions by the Presiding Judge,²¹ the Yekatom Defence subsequently filed its submissions in writing (the ‘Additional Submission’)²² to which the Prosecution responded on 24 July 2020.²³
6. On 26 August 2020, the Chamber issued its ‘Initial Directions on the Conduct of the Proceedings’.²⁴
7. On 31 August 2020, the Prosecution filed their provisional list of witnesses, with a summary of the witnesses’ anticipated testimony (the ‘Provisional Witness List’).²⁵

II. Analysis

8. The present decision will address the proposed protocols on (i) witness preparation, (ii) witness familiarisation, (iii) dual status witnesses, and (iv) vulnerable witnesses, as well as requested amendments to (v) the Redaction Protocol and (vi) the E-Court Protocol.

redacted version notified the same day, ICC-01/14-01/18-516-Red) (the ‘Registry Response to the Submissions on the Conduct of Proceedings’).

¹⁷ Réponse conjointe des Représentants Légaux Communs des Victimes à la « Prosecution’s Submission of Proposed Directions for the Conduct of Proceedings and Proposed Protocol on Witness Familiarisation » (ICC-01/14-01/18-476) et ses annexes, 15 May 2020, ICC-01/14-01/18-520 (the ‘CLRv Response to the Submissions on Conduct of Proceedings’).

¹⁸ Defence response to the “Prosecution’s Submission of Proposed Directions for the Conduct of Proceedings and Proposed Protocol on Witness Familiarisation”, ICC-01/14-01/18-476, 15 May 2020, ICC-01/14-01/18-521-Conf (public redacted version notified the same day, ICC-01/14-01/18-521-Red) (with two public annexes) (the ‘Ngaïssona Defence Response to the Submissions on the Conduct of Proceedings’).

¹⁹ Yekatom Defence Submission on the Conduct of the Trial, 15 May 2020, ICC-01/14-01/18-519 (the ‘Yekatom Defence Response to the Submissions on the Conduct of Proceedings’).

²⁰ See transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 61, line 25 to p. 62, line 8.

²¹ See transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 62 lines 16-17.

²² Additional Submissions on Redaction Protocol, 14 July 2020, ICC-01/14-01/18-587-Conf (public redacted version notified the next day, ICC-01/14-01/18-587-Red).

²³ Prosecution’s Response to Yekatom Defence “Additional Submissions on Redaction Protocol, (ICC-01/14-01/18-587-Conf)”, ICC-01/14-01/18-600-Conf (the ‘Prosecution Response to the Additional Submission’).

²⁴ ICC-01/14-01/18-631.

²⁵ Notification of the Provisional List of Prosecution Witnesses with a Summary of their Anticipated Testimony, ICC-01/14-01/18-642-Conf (with one confidential annex).

A. Witness Preparation Protocol

9. The Chamber understands ‘witness preparation’ as the regulation of a meeting between a witness and the entity calling the witness (the ‘Calling Party’) for the purpose of discussing matters relating to the witness’s upcoming testimony. The purported purpose of this meeting is to facilitate the focused, efficient and effective questioning during the proceedings (the ‘Witness Preparation Protocol’ and ‘Witness Preparation’, respectively).

1. Submissions of the parties and participants

10. The Prosecution requests that the Chamber adopt a Witness Preparation Protocol in the present case, similar to the one adopted by Trial Chamber X in *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (the ‘*Al Hassan* Witness Preparation Protocol’ and the ‘*Al Hassan* case’, respectively).²⁶ The Prosecution included the suggested terms of its Witness Preparation Protocol in its Proposed Directions on the Conduct of Proceedings.²⁷
11. The Prosecution submits that in the specific circumstances of this case, Witness Preparation would firstly help witnesses to be more comfortable and confident when giving their testimony, especially as they gave their statements many years ago and are testifying in a foreign courtroom for the first time.²⁸ The Prosecution argues that this would, *inter alia*, (i) assist the witnesses in giving ‘relevant, accurate and structured testimony’ and help ensure their well-being; (ii) assist the Calling Party in assessing and clarifying the witness’s evidence thereby facilitating a ‘focused, efficient and effective questioning’ during the proceedings; and (iii) enable the Calling Party to meaningfully exercise its statutory right to ‘effectively prepare and present its case’.²⁹

²⁶ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 7, 9-16 *referring to* Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on outstanding protocols, 24 January 2020, ICC-01/12-01/18-562 (the ‘*Al Hassan* Decision on Protocols’), para. 4; Decision on witness preparation and familiarisation, 17 March 2020, ICC-01/12-01/18-666 (the ‘*Al Hassan* Decision on Witness Preparation’).

²⁷ See Proposed Directions on the Conduct of Proceedings, ICC-01/14-01/18-476-AnxA, paras 11-29.

²⁸ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 11.

²⁹ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 9, 11-13.

12. The Prosecution further submits that, given the circumstances of the case, its present budgetary constraints and the logistical limitations resulting from the Coronavirus Pandemic, pre-testimony sessions in the field between witnesses and the lawyers who will examine them may not be feasible.³⁰ It argues that Witness Preparation would allow witnesses to give their testimony in the best possible conditions while contributing to the fair and expeditious conduct of trial.³¹ It adds that Witness Preparation can have ‘no detrimental effect’ on the integrity of the proceedings as it is distinguishable from and more limited than the practice of witness proofing.³² Lastly, the Prosecution submits that the procedural safeguards included within the proposed terms of its Witness Preparation Protocol ensure respect for the rights of the accused as well as the fairness and integrity of the proceedings.³³
13. The Yekatom Defence³⁴ and the Ngaïssona Defence³⁵ oppose Witness Preparation and have instead expressed a preference for the protocol on witness familiarisation adopted in *The Prosecutor v. Dominic Ongwen* (the ‘Ongwen Witness Familiarisation Protocol’ and the ‘Ongwen case’, respectively), where Witness Preparation was not allowed.³⁶
14. The Yekatom Defence submits that Witness Preparation does not advance witness well-being and that assistance to witnesses prior to the hearing should be provided by the VWU.³⁷ Additionally, it points to a ‘legitimate concern that witness preparation could lead to a distortion of the truth’.³⁸ It adds that the

³⁰ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 14.

³¹ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 9, 14.

³² Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 15.

³³ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 16.

³⁴ Yekatom Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-519, paras 17-21.

³⁵ Ngaïssona Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-521-Red, paras 3-12.

³⁶ Trial Chamber IX, Annex 1 to the Decision on Protocols to be Adopted at Trial, 22 July 2016, ICC-02/04-01/15-504-Anx1.

³⁷ Yekatom Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-519, para. 20.

³⁸ Yekatom Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-519, para. 18.

possibility of new information arising from Witness Preparation sessions could be prejudicial to the Defence and interfere with the rights of the accused.³⁹

15. The Ngaïssona Defence ‘strongly opposes’ Witness Preparation, arguing that none of the factors raised by the Prosecution in support outweigh the inherent risks of this procedure, namely the risk of witness coaching.⁴⁰ It submits that chambers only exceptionally allowed such procedure after consideration of case-specific factors.⁴¹ As for the Prosecution’s case specific arguments, the Ngaïssona Defence submits that they do not shift the balance in favour of Witness Preparation.⁴²
16. The CLRV consider witness familiarisation to be favourable in the particular circumstances of the present case, and have referred to the *Ongwen* Witness Familiarisation Protocol with approval.⁴³

2. *The Chamber’s determination*

17. The Chamber recalls that pursuant to Article 64(2) and 3(a) of the Statute, trial chambers have broad discretion in adopting procedures to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.⁴⁴ In exercising this discretion, some trial chambers have allowed Witness Preparation, whereas most have not.⁴⁵ In deciding whether or not Witness

³⁹ Yekatom Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-519, para. 19.

⁴⁰ Ngaïssona Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-521-Red, paras 3-4.

⁴¹ Ngaïssona Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-521-Red, paras 5-6.

⁴² Ngaïssona Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-521-Red, paras 9-13.

⁴³ CLRV Submission on the Status Conference, ICC-01/14-01/18-471, paras 47-49.

⁴⁴ See also Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Protocols to be Adopted at Trial, 22 July 2016, ICC-02/04-01/15-504 (the ‘*Ongwen* Decision’), para. 7; *Al Hassan* Decision on Witness Preparation, ICC-01/12-01/18-666, paras 9-10; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on witness preparation, 16 June 2015, ICC-01/04-02/06-652 (the ‘*Ntaganda* Decision’), paras 13-14, referring to 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, para. 27.

⁴⁵ See *Ongwen* Decision ICC-02/04-01/15-504, para. 7 referring, *inter alia*, to 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; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on

Preparation should be allowed, the Chamber will also assess the specific circumstances in this case.⁴⁶

18. The Chamber's provides below an assessment of factors and specific circumstances guiding its discretion.
19. First, as regards the well-being of the witnesses and the quality of their testimony,⁴⁷ the Chamber does not consider that Witness Preparation is essential in order for witnesses to have access to or benefit from the support services of the Court. The Chamber recalls that the VWU, as a neutral entity of the Registry, is charged with ensuring the well-being of victims and witnesses and providing support services to witnesses. The Chamber is confident that the VWU is capable of tailoring these services to suit the specific needs and cultural sensitivities of vulnerable witnesses, as the case may be.⁴⁸
20. Further, as part of the practices used to prepare and familiarise witnesses for giving testimony at trial (the 'Witness Familiarisation'), the VWU also assists witnesses in reviewing their prior statements shortly before testifying, thereby assisting them to understand which topics will be discussed, and will generally prepare them on what to expect during the judicial process. The Chamber considers that this fully addresses the Prosecution's concerns in this regard.
21. In the Chamber's view, Witness Preparation has an inherent risk of rehearsing and distorting witnesses' evidence.⁴⁹ Such risk exists regardless of any intention of the Calling Party to do so. The Calling Party might indirectly convey its expectations about the witness's evidence to the witness and thereby

witness preparation and familiarisation, 2 December 2015, ICC-02/11-01/15-355 (with one annex, ICC-02/11-01/15-355-Anx; and a dissenting opinion) (the '*Gbagbo and Blé Goudé* Decision'); 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 a partly dissenting opinion); 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 (with one annex, ICC-01/05-01/13-1252-Anx) (the '*Bemba et al.* Decision on Witness Preparation and Familiarisation').

⁴⁶ See also *Al Hassan* Decision on Witness Preparation, ICC-01/12-01/18-666, para. 10; *Ntaganda* Decision, ICC-01/04-02/06-652, para. 17.

⁴⁷ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 9, 11-13.

⁴⁸ See also *Ongwen* Decision, ICC-02/04-01/15-504, para. 8.

⁴⁹ See also *Ongwen* Decision, ICC-02/04-01/15-504, paras 9-10; *Bemba et al.* Decision on Witness Preparation and Familiarisation, ICC-01/05-01/13-1252, para. 22.

inadvertently contaminate the witness's recollection of the events as they occurred. While this inherent risk could potentially be addressed by imposing ample safeguards, the Chamber considers that such safeguards would need to exceed those proposed by the Prosecution. This would consequently lead to a very limited role and number of tasks of the Calling Party, which can, in the Chamber's view, be done by the VWU as part of Witness Familiarisation.

22. Moreover, the Chamber considers that the VWU – as the specialised unit and an impartial entity – is better placed than the Calling Party to (i) assess the particular needs and vulnerability of a witness; and (ii) assist the witness in reviewing their statement without risking inadvertent transmission of the Calling Party's expectations about the testimony to the witness. Therefore, the Chamber is not convinced that potential needs of vulnerable witnesses in the present case warrant the adoption of Witness Preparation.
23. Second, as regards the fairness and integrity of the proceedings,⁵⁰ the Chamber considers that a witness's recollection of the events should be first tested during the hearing in order to preserve the principle of immediacy.⁵¹ In this respect, the Chamber also finds it preferable that any additional information from a witness, who has been afforded an opportunity to review their statement, is first presented in court rather than only in the presence of the Calling Party. This permits all the participants in the courtroom to react to and examine a witness's testimony immediately and on an equal footing. This is also valid for the introduction of witness testimonies pursuant to Rule 68(3) of the Rules of Procedure and Evidence (the 'Rules').
24. Further, it is possible that witnesses do not recall information provided by them in their statement or provide different information during their testimony. When that happens, the witness's natural reaction to such inconsistencies would also be significant in examining and evaluating their overall testimony. Therefore, the Chamber considers that Witness Familiarisation adequately enables a witness to reflect on their memory of the events as well as their statement, while

⁵⁰ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 13, 15.

⁵¹ See also *Ongwen* Decision, ICC-02/04-01/15-504, para. 13.

still maintaining spontaneity of their responses when examined before the Chamber.

25. Third, the Chamber notes that the parties do not agree on allowing Witness Preparation in the present case. The Prosecution argues that Witness Preparation would enable the Calling Party to meaningfully exercise its ‘statutory right to effectively prepare and present its case’ in a manner best suited to establish the truth.⁵² Yet, the Prosecution does not point to the legal basis of the aforementioned statutory right. The Chamber also notes that neither one of the Defence teams is in favour of adopting Witness Preparation.⁵³ Be that as it may, the Chamber does not consider that Witness Preparation is necessary for a Calling Party to effectively prepare and present its case. Even without adopting Witness Preparation, witnesses are able to review their statements before testifying (within the framework of Witness Familiarisation), which adequately ensures the quality of their testimony.
26. The Chamber further emphasises that it has broad discretion in managing evidence presentation and a duty to establish the truth, pursuant to Article 69(3) of the Statute.⁵⁴ In light of the inherent risks identified above,⁵⁵ the Chamber considers that its statutory duties are best fulfilled by not adopting Witness Preparation in this case.
27. Finally, the Chamber turns to the case-specific circumstances presented by the Prosecution in support of Witness Preparation, namely (i) the Prosecution’s present budgetary and logistical constraints, including the impact of the Coronavirus Pandemic on the proceedings;⁵⁶ and (ii) the passage of time between the investigation and the trial.⁵⁷

⁵² Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 9, 13, *referring to* Proposed Directions on the Conduct of Proceedings, ICC-01/14-01/18-476-AnxA, para. 11.

⁵³ Yekatom Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-519, paras 17-21; Ngaïssona Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-521-Red, paras 3-12.

⁵⁴ *See also Ongwen* Decision, ICC-02/04-01/15-504, para. 11.

⁵⁵ *See above* paragraph 21.

⁵⁶ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 10, 14.

⁵⁷ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 11.

28. The Prosecution's budgetary constraints cannot override the Chamber's appreciation of the fairness and integrity of the proceedings as set out above. The Chamber is mindful of the potential impact of the Coronavirus Pandemic on the trial proceedings. However, the Chamber does not consider that the absence of 'pre-testimony sessions in the field' – which is invoked by the Prosecution as a consequence of the budgetary constraints and to justify the need for Witness Preparation⁵⁸ – presents a risk to the fairness and integrity of the proceedings. Accordingly, the Chamber does not consider this as a factor weighing in its present assessment.
29. Furthermore, the passage of a certain amount of time between the commission of crimes and trial proceedings is intrinsic to all cases before the Court, and in fact, has not been particularly long in this case compared to others. This is however not *per se* a factor warranting the adoption of Witness Preparation. In this regard, the Chamber notes that several other chambers, despite a significant passage of time, have also not adopted Witness Preparation.⁵⁹ In any event, the Chamber recalls again that witnesses are entitled to review their statements with the support of the VWU before testifying, irrespective of whether Witness Preparation is adopted. Moreover, the Chamber considers itself capable to assess the witness's testimony with due appreciation of the lapse of time between the commission of crimes and their testimony.
30. In conclusion, having regard to the Chamber's obligations pursuant to Articles 64, 68(1) and 69(3) of the Statute and considering the parties' submissions and the circumstances of the case, the Chamber rejects the Prosecution's request to allow Witness Preparation and to adopt a Witness Preparation Protocol in the present case.

⁵⁸ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 14.

⁵⁹ See above n. 45. In *Ongwen*, the period between the alleged crimes (2004) to the start of trial (December 2016) was approximately 12 years. In *Lubanga*, the period between the commission of crimes (2002-2003) to the start of trial (26 January 2009) was approximately six - seven years. In *Bemba*, the period between the alleged commission of crimes (2002-2003) to the start of trial (November 2010) was approximately seven - eight years. In *Gbagbo and Blé Goudé*, the period between the alleged commission of crimes (2010-2011) to start of trial (January 2016) was approximately five - six years.

B. Witness Familiarisation Protocol

31. The Chamber understands this protocol to regulate practices used to prepare and familiarise witnesses for giving testimony at trial (the ‘Witness Familiarisation Protocol’).

1. Submissions of the parties and participants

32. The Registry indicates that two types of witness familiarisation protocols are currently in use at the Court. The difference between these two types is based on whether a chamber decides to adopt Witness Preparation. The Registry recommends adopting the latest version of either type of protocol, namely the *Ongwen* Witness Familiarisation Protocol or the *Al Hassan* Witness Familiarisation Protocol.⁶⁰ In line with their position on Witness Preparation, the Defence and the CLRV have expressed a preference for the *Ongwen* Witness Familiarisation Protocol.⁶¹
33. The Prosecution proposes the adoption of the *Al Hassan* Witness Familiarisation Protocol⁶² with certain amendments.⁶³ These relate to matters concerning (i) meetings between the VWU and the witness in the field in the presence of the Calling Party;⁶⁴ (ii) the procedure of joint travel and accommodation of witnesses;⁶⁵ and (iii) professional obligations of the legal advisor allocated by the Counsel Support Section for the purposes of Rule 74 of the Rules.⁶⁶

⁶⁰ Registry Submission on the Status Conference, ICC-01/14-01/18-470, para .15.

⁶¹ Yekatom Defence Response to the Submissions on the Conduct of Proceedings, 15 May 2020, ICC-01/14-01/18-519, para. 22; Ngaïssona Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-521-Red, paras 48-49; CLRV Submission on the Status Conference, ICC-01/14-01/18-471, paras 48-50.

⁶² Annex I to the 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), ICC-01/12-01/18-705-AnxI.

⁶³ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 28-38. *See also* Annex B to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476-AnxB.

⁶⁴ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 30.

⁶⁵ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 31-37. The Yekatom Defence agrees with the Prosecution on this point; *see* Yekatom Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-519, para. 22.

⁶⁶ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 38.

2. *The Chamber's determination*

34. Given the Chamber's position on Witness Preparation set out above,⁶⁷ the Chamber has limited its assessment to protocols adopted in cases not allowing witness preparation. Having reviewed these protocols,⁶⁸ and noting the submissions of the Registry, the parties and the participants, the Chamber is satisfied with the terms of the *Ongwen* Witness Familiarisation Protocol.
35. Nonetheless, the Chamber notes that the terms requested by the Prosecution to be amended in the *Al Hassan* Witness Familiarisation Protocol⁶⁹ are also contained in the *Ongwen* Witness Familiarisation Protocol.⁷⁰ Therefore, these requested amendments are pertinent to the relevant portions of the *Ongwen* Witness Familiarisation Protocol and will be addressed in the following.
36. First, the Prosecution submits that, in light of the budgetary and logistical constraints under which it is operating, the physical presence of the Calling Party at the introductory meeting between the VWU and the witness in the field may not be feasible.⁷¹ In this respect, the Prosecution proposes to remove from paragraph 5 of the *Al Hassan* Witness Familiarisation Protocol the phrase 'This phase takes place in the field, whereby', which also appears in paragraph 5 of the *Ongwen* Witness Familiarisation Protocol.
37. The Chamber considers that while the meeting between the VWU and the witness may continue to take place or be facilitated in the field, it does not appear necessary that the Calling Party be physically present. Therefore, should the Prosecution elect to facilitate such meetings remotely, the Chamber

⁶⁷ See above paragraphs 17-30.

⁶⁸ *Ongwen* Witness Familiarisation Protocol, ICC-02/04-01/15-504-Anx1; Annex to the *Bemba et al.* Decision on Witness Preparation and Familiarisation, ICC-01/05-01/13-1252-Anx; Annex to the *Gbagbo and Blé Goudé* Decision, ICC-02/11-01/15-355-Anx; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Annex: Victims and Witnesses Unit's amended version of the "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" submitted on 22 October 2010, 7 December 2010, ICC-01/05-01/08-1081-Anx; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, 24 May 2008, ICC-01/04-01/06-1351. See also Victims and Witnesses Unit report on practices used to prepare and familiarise witnesses for giving testimony at trial, 31 December 2008, ICC-01/04-01/06-1578.

⁶⁹ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 28-38.

⁷⁰ Cf. *Al Hassan* Witness Familiarisation Protocol, ICC-01/12-01/18-705-AnxI, paras 5, 24, 39, 41, 58; *Ongwen* Witness Familiarisation Protocol, ICC-02/04-01/15-504-Anx1, paras 5, 24, 35, 36, 54.

⁷¹ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 30.

considers this to be possible within the existing framework of the *Ongwen* Witness Familiarisation Protocol. Considering the submission of the Registry on the challenges in the identification of victims and witnesses,⁷² the Chamber stresses that, should it not be physically present during such meeting, the Calling Party is to ensure that the VWU is able to establish the identity of the witness with absolute certainty. In order to achieve this, the Chamber encourages the Calling Party and the VWU to determine and agree on the required modalities on a case-by-case basis.

38. Second, the Prosecution requests amendments in the terms of paragraphs 24, 39 and 41 of the *Al Hassan* Witness Familiarisation Protocol, which correspond to paragraphs 24, 35 and 36 of the *Ongwen* Familiarisation Protocol and concern the procedure of joint travel and accommodation of witnesses.⁷³ These relate to (i) the deletion of ‘wherever possible’ in paragraphs 24 and 39 so that joint travel and accommodation are not the default arrangement;⁷⁴ (ii) the addition of a general exception for individuals under the Court’s protection programme for joint accommodation, in order to ensure a uniform approach regarding both joint travel and accommodation;⁷⁵ and (iii) the addition of ‘profile of the witness’ as a factor for consideration in paragraphs 24, 39, and 41 which aims to avoid that witnesses who have been victimised, or are otherwise vulnerable, come into contact with witnesses belonging to or associated with perpetrator groups.⁷⁶
39. Having regard to the submissions by the Yekatom Defence and the Registry,⁷⁷ the Chamber finds that the terms of the *Ongwen* Witness Familiarisation Protocol do sufficiently address the Prosecution’s concerns. The Chamber recalls that the VWU assesses the vulnerabilities of a witness based on the

⁷² Registry Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-516-Red, paras 11-20.

⁷³ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 31-37. The Yekatom Defence agrees with the Prosecution on this point; see Yekatom Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-519, para. 22.

⁷⁴ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 32-33.

⁷⁵ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 34-35.

⁷⁶ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, paras 36-37.

⁷⁷ Yekatom Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-519, paras 17-21; Registry Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-516-Red, paras 21-29.

information provided by the Calling Party on a case-by-case basis, and takes into account their particular needs when providing for the logistical and operational travel arrangements, including accommodation.⁷⁸ Further, the Chamber considers that the VWU is already obliged to take into account several factors in assessing joint travel and accommodation, in particular whether they might compromise confidentiality in respect of the witness' interaction with the Court and 'the risk of "contamination" of the witness' evidence', as well as whether the witness is participating in the Court's protection programme.⁷⁹ The Chamber notes the Registry's submission that the current practice reflects these requirements and considerations.⁸⁰

40. The Chamber also considers that it is sufficiently clear that the procedure for joint travel and accommodation is to be used only where it is consistent with the security of the concerned victim or witness.⁸¹ Further, the Chamber recalls that should a Calling Party disagree with the arrangements made by the VWU, it remains open to it to first seek an internal solution with the VWU and then approach the Chamber as and when necessary.⁸²
41. Third, the Prosecution proposes an amendment aimed at safeguarding that any legal advisor allocated by the Counsel Support Section for the purposes of Rule 74 of the Rules is not 'professionally conflicted out of providing advice to the witness'.⁸³ In particular, the Prosecution requests the addition of 'able (*i.e.* not conflicted)' in paragraph 58 of the *Al Hassan* Witness Familiarisation Protocol, which corresponds to paragraph 54 of the *Ongwen* Witness Familiarisation Protocol.⁸⁴
42. The Chamber reads the phrase 'independent legal advice from a qualified lawyer' in paragraph 54 of the *Ongwen* Witness Familiarisation Protocol as already including this understanding (*i.e.* that the concerned lawyer should not

⁷⁸ *Ongwen* Witness Familiarisation Protocol, ICC-02/04-01/15-504-Anx1, paras 20, 23-24, 35.

⁷⁹ *Ongwen* Witness Familiarisation Protocol, ICC-02/04-01/15-504-Anx1, paras 24, 35.

⁸⁰ Registry Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-516-Red, paras 21-23, 26-27.

⁸¹ See also *Al Hassan* Decision on Witness Preparation, ICC-01/12-01/18-666, para. 55.

⁸² *Ongwen* Witness Familiarisation Protocol, ICC-02/04-01/15-504-Anx1, paras 24, 35.

⁸³ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 38.

⁸⁴ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 38.

have a conflict in representing the interests of the witness). The Chamber also recalls that interactions between the lawyer and the witness in question are governed by the Code of Professional Conduct for counsel that makes it incumbent on the lawyer to ‘exercise all care to ensure that no conflict of interest arises’.⁸⁵ Therefore, in the Chamber’s view, introducing additional language in the *Ongwen* Witness Familiarisation Protocol reflecting the same principle is not necessary.

43. For these reasons, the Chamber adopts the *Ongwen* Witness Familiarisation Protocol for this case without any amendments. For ease of reference, the terms of this protocol are provided in Annex 1.

C. Dual Status Witness Protocol

44. This protocol regulates the exchange of information in respect of dual status witnesses, that is, individuals called to testify as witnesses in a case who are also victims represented by the CLRV (the ‘Dual Status Witness Protocol’ and the ‘Dual Status Witnesses’, respectively). Having regard to this status, the Chamber is satisfied that special considerations apply to this category of witnesses.

1. Submissions of the parties and participants

45. The Registry brings to the attention of the Chamber the Dual Status Witness Protocol in the *Al Hassan* case (the ‘*Al Hassan* Dual Status Witness Protocol’).⁸⁶ The Prosecution proposes its own protocol, which it has included in its Proposed Directions on the Conduct of Proceedings, and submits that it covers the ‘same substantive ground’ as the *Al Hassan* Dual Status Witness Protocol, with some modifications ‘made to promote clarity, accuracy and consistency’ (the ‘Proposed Dual Status Witness Protocol’).⁸⁷ The CLRV request the adoption of a Dual Status Witness Protocol, as approved in other

⁸⁵ See Article 16(1) of the Code of Professional Conduct for counsel; *see also* Articles 12-13, 16(2)-(3).

⁸⁶ Registry Submission on the Status Conference, ICC-01/14-01/18-470, para. 17, *referring to* Annex I to the Decision on the ‘Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant’, the ‘Dual Status Witness Protocol’, and related matters, 19 March 2020, ICC-01/12-01/18-674-Anx1.

⁸⁷ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 7; Proposed Directions on the Conduct of Proceedings, ICC-01/14-01/18-476-AnxA, paras 107-122.

cases and in accordance with the Chambers Practice Manual recommendation;⁸⁸ and specifically request the adoption of the protocol in the *Ongwen* case (the ‘*Ongwen* Dual Status Witness Protocol’).⁸⁹

46. Additionally, the CLRV respond to the Proposed Dual Status Witness Protocol and request amendments to it on the following issues: (i) contact between parties and Dual Status Witnesses without notice to their legal representatives in certain situations;⁹⁰ (ii) contact between legal representatives and Dual Status Witnesses who are in the Court’s protection programme;⁹¹ (iii) presence of legal representatives during medical examination of the witness;⁹² (iv) access to documents concerning the victims;⁹³ (v) conduct of interviews with a Dual Status Witness without the presence of their legal representative;⁹⁴ and (vi) consent by minor Dual Status Witnesses.⁹⁵

2. *The Chamber’s determination*

47. Noting that Dual Status Witnesses may testify in the present case and that special considerations apply to such witnesses, the Chamber considers it necessary to adopt a Dual Status Witness Protocol to regulate the exchange of information regarding them.⁹⁶
48. The Chamber recalls that the CLRV specifically request the adoption of the *Ongwen* Dual Status Witness Protocol,⁹⁷ but also respond to the Proposed Dual Status Witness Protocol.⁹⁸ The Chamber further notes that the terms of the

⁸⁸ CLRV Submission on the Status Conference, ICC-01/14-01/18-471, paras 43-44.

⁸⁹ CLRV Submission on the Status Conference, ICC-01/14-01/18-471, para. 46, *referring to* Annex 2 to the *Ongwen* Decision, ICC-02/04-01/15-504-Anx2.

⁹⁰ CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, para. 43.

⁹¹ CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, para. 45.

⁹² CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, para. 47. This provision corresponds to paragraph 8(b) of the *Ongwen* Dual Status Witness Protocol, ICC-02/04-01/15-504-Anx2.

⁹³ CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, paras 48-55.

⁹⁴ CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, paras 56-59.

⁹⁵ CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, para. 60.

⁹⁶ *See also* *Ongwen* Decision ICC-02/04-01/15-504, para. 31.

⁹⁷ CLRV Submission on the Status Conference, ICC-01/14-01/18-471, para. 46, *referring to* Annex 2 to the *Ongwen* Decision, ICC-02/04-01/15-504-Anx2.

⁹⁸ *See* CLRV Response to Prosecution Submission on Conduct of Proceedings, ICC-01/14-01/18-520, paras 42-60.

Ongwen Dual Status Witness Protocol and the *Al Hassan* Dual Status Witness Protocol are identical, with two exceptions.⁹⁹

49. In light of the submissions received and noting that various Chambers have adopted Dual Status Witness Protocols and therefore templates already exist, the Chamber considers it appropriate to adopt one of the existing protocols to the extent that it is applicable to the present case. Consequently, it will adopt the *Ongwen* Dual Status Witness Protocol and make its assessment on this basis, rather than on the basis of Proposed Dual Status Witness Protocol. To the extent that there may be overlap between the two, the Chamber will assess whether or not any further amendments to the *Ongwen* Dual Status Witness Protocol are needed in light of the response received from the CLRV on the Proposed Dual Status Witness Protocol.
50. First, the CLRV submit that paragraph 111 in the Proposed Directions on the Conduct of Proceedings,¹⁰⁰ which permits parties to contact Dual Status Witnesses without notice to their legal representatives in situations of urgency, does not contain a mechanism to verify whether or not the purported situation of urgency exists in reality.¹⁰¹ The Chamber considers that the terms of paragraph 5(d) of the *Ongwen* Dual Status Witness Protocol are adequate to address the CLRV's concerns. The parties and the participants may bring a challenge before the Chamber if and when the concerned party does not fulfil the preconditions to invoke this provision, namely the need to urgently preserve or collect evidence and whether and, to what extent, a situation is exceptional.
51. Second, the CLRV submit that provisions concerning the contact between legal representatives and a Dual Status Witness in the Court's protection programme

⁹⁹ See Decision on the 'Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant', the 'Dual Status Witness Protocol', and related matters, 19 March 2020, ICC-01/12-01/18-674 (with two public annexes) (the '*Al Hassan* Decision on Dual Status Witnesses'), paras 21-22 (emphasis added). The exceptions concern paragraph 9(d) concerning interview of a Dual Status Witness by a party in the absence of their legal representative, and (ii) a correction in paragraph 8(b), namely that the 'presence of the legal representatives must *not* obstruct a proper interview'.

¹⁰⁰ This provision corresponds to paragraph 5(d) of the *Ongwen* Dual Status Witness Protocol, ICC-02/04-01/15-504-Anx2.

¹⁰¹ CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, para. 43.

violate the witness's right to contact his or her legal representative freely.¹⁰² The Chamber notes that paragraph 6(a) of the *Ongwen* Dual Status Witness Protocol grants the legal representatives the right to contact their respective clients, including if they are in the Court's protection programme, and therefore this concern does not arise. In that respect, the Chamber further agrees with Trial Chamber X that the 'relationship between a client and his or her counsel inherently implies that a client must be able to freely contact his or her legal representative and *vice versa*'.¹⁰³ Given the information and security risks surrounding witnesses who are in the Court's protection programme, the Chamber considers it reasonable that such contact is facilitated by the VWU.

52. Third, the CLRV request the deletion of the provision: 'The presence of Legal Representative must not in any way obstruct a proper medical examination' in paragraph 118 of the Proposed Directions on the Conduct of Proceedings.¹⁰⁴ This provision corresponds to paragraph 8(b) of the *Ongwen* Dual Status Witness Protocol. The CLRV submit that this wording is unnecessary and duplicative, as this is an obligation for *all* participants under the Code of Professional Conduct for counsel; yet the terms only propose it in respect of the legal representatives of victims.¹⁰⁵
53. As regards the potential duplication with the Code of Professional Conduct for counsel, the Chamber considers this overlap to be limited to maintaining a professional and respectful behaviour towards their client and the Court.¹⁰⁶ Further the Chamber emphasises that the terms of the provision in question specifically concerns medical examinations of Dual Status Witnesses, a scenario not covered in the Code of Professional Conduct for counsel. Furthermore, the provision permits the Dual Status Witness, as well as other parties, to approach the Chamber in cases of violation. Complaints against violation of the Code of Professional Conduct for counsel on the other hand are made to the Registry and

¹⁰² CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, para. 45.

¹⁰³ *Al Hassan* Decision on Dual Status Witnesses, ICC-01/12-01/18-674, para. 19.

¹⁰⁴ CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, para. 47.

¹⁰⁵ CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, para. 46.

¹⁰⁶ See Code of Professional Conduct for counsel, Articles 7-9.

only in ‘exceptional cases’ to the Chamber.¹⁰⁷ For these reasons, the Chamber retains paragraph 8(b) of the *Ongwen* Dual Status Witness Protocol and sees no need for any amendments.

54. Nonetheless, the Chamber considers it appropriate to correct the typographical error in paragraph 8(b) of the *Ongwen* Dual Status Witness Protocol, namely that the ‘presence of the legal representatives must *not* in any way obstruct a proper medical examination’.¹⁰⁸
55. Fourth, in respect of paragraph 115 in the Proposed Directions on the Conduct of Proceedings, the CLRV argue that they should have access to documents concerning their clients (including transcripts and recordings made during interviews between the witness and the party), as well as documents that do not directly concern their clients but have been prepared with their assistance or participation.¹⁰⁹ The Chamber notes that this provision provides the legal representative with access *only* to the witness’s ‘prior statement(s) taken by the Calling Party’; access to further materials relating to the Dual Status Witness may be only provided upon a detailed and reasoned request to the Calling Party.¹¹⁰ Paragraph 7(a) of the *Ongwen* Dual Status Witness Protocol, however, grants the legal representative the right to receive a copy of ‘the statement, transcript or recording made during the interview with the Calling Party’.
56. Therefore, the Chamber sees no reason to deviate from the *Ongwen* Dual Status Witness Protocol in this regard. Further, the Chamber recalls that statements by the witness may include statements prepared with their assistance and participation so long as their contents are a result of the witness being questioned about his or her knowledge of the case and have been ‘accepted or adopted’ by the witness as true, accurate, and as his or her own.¹¹¹

¹⁰⁷ See Code of Professional Conduct for counsel, Articles 34, 39(8).

¹⁰⁸ See also *Al Hassan* Decision on Dual Status Witnesses, ICC-01/12-01/18-674, para. 22.

¹⁰⁹ CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, paras 48-55.

¹¹⁰ Proposed Directions on the Conduct of Proceedings, ICC-01/14-01/18-476-AnxA, para. 116.

¹¹¹ See Decision on the Yekatom Defence Motion for Disclosure of Draft Witness Statements, 1 June 2020, ICC-01/14-01/18-539, paras 18-19.

57. Fifth, the CLRV respond to paragraph 120 of the Proposed Directions on the Conduct of Proceedings, regulating situations whereby a party may seek the Chamber's authorisation to conduct an interview with a Dual Status Witness without the presence of their legal representative.¹¹² The Chamber notes that, except for the first sentence of paragraph 120, the remaining portion of this paragraph is not contained in any of the clauses of paragraph 9 of the *Ongwen* Dual Status Witness Protocol and therefore the need to address the CLRV's concerns does not arise. To the extent that the CLRV submit that the first sentence of paragraph 120 (also contained in paragraph 9(b) of the *Ongwen* Dual Status Witness Protocol) is duplicative of the counsel's obligations under the Code of Professional Conduct for counsel, the Chamber reiterates its aforementioned finding.¹¹³
58. Lastly, the Chamber turns to the CLRV submission concerning paragraph 121 of the Proposed Directions on the Conduct of Proceedings, which reads: 'Where a dual status witness is a minor, the Calling Party shall – with such minor's consent – provide their Legal Representative with information on their legal guardianship and/or family situation'.¹¹⁴ The Chamber finds the CLRV's position on this point unclear and, as a result, is unable to assess whether and to what extent it applies to the terms of the *Ongwen* Dual Status Witness Protocol. The Chamber nonetheless clarifies that a minor Dual Status Witness may consent to provide their legal representative with information concerning their family or legal guardian. In this respect, the Chamber considers that paragraph 10(a) of the *Ongwen* Dual Status Witness Protocol does not need amending.
59. In light of the aforementioned, the Chamber adopts the *Ongwen* Dual Status Witness Protocol as contained in ICC-02/04-01/15-504-Anx2, with the correction of the typographical error in paragraph 8(b) namely that the 'presence of the legal representatives must *not* in any way obstruct a proper medical

¹¹² CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, paras 56-59.

¹¹³ See above paragraph 53.

¹¹⁴ CLRV Response to the Submissions on Conduct of Proceedings, ICC-01/14-01/18-520, para. 60.

examination'. For ease of reference, the updated terms of this protocol are provided in Annex 2.

60. To the extent that this protocol overlaps with other protocols adopted, the parties and participants are instructed to act in accordance with the obligations set out in each of them. None of the protocols that may apply to Dual Status Witnesses prevails over the other.

D. Vulnerability Protocol

61. The Chamber understands that vulnerability protocols aim to regulate the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses at the Court (the 'Vulnerability Protocol'). The Chamber notes that such protocols are meant to regulate how the VWU assesses and supports vulnerable witnesses, sets out the parties' role in relation to vulnerable witnesses and elaborates on the kinds of special measures that may be requested pursuant to Rule 88 of the Rules.

1. Submissions of the parties and participants

62. The VWU recommends maintaining the 'uniform practice' of adopting the 'Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses', which has also been adopted in other cases at the Court.¹¹⁵ The VWU additionally suggests 'minor terminology amendments'.¹¹⁶ The Prosecution recalls that, according to the Chambers Practice Manual and, as also noted in the *Al Hassan* case, a chamber need not formally adopt this protocol for the Registry to be able to act in accordance with it.¹¹⁷

2. The Chamber's determination

63. The Chamber notes at the outset that there is currently no uniform practice, as suggested by the VWU, since not every Chamber has adopted a Vulnerability Protocol. The Chamber further considers that the Vulnerability Protocol need

¹¹⁵ Registry Submission on the Status Conference, ICC-01/14-01/18-470, para. 16.

¹¹⁶ Registry Submission on the Status Conference, ICC-01/14-01/18-470, para. 16.

¹¹⁷ Submissions on the Conduct of Proceedings, ICC-01/14-01/18-476, para. 41, *referring to, inter alia*, *Al Hassan* Decision on Protocols, ICC-01/12-01/18-562, para. 5.

not be adopted in order for the VWU to exercise its obligations under the legal framework of the Court.¹¹⁸ It is the VWU's prerogative to decide how to best assess vulnerable witnesses in a particular case. Further, even if adopted, the Chamber considers that the parties may request special measures different from those provided for in the Vulnerability Protocol. Therefore, the measures needed to be implemented by the VWU for the benefit of vulnerable witnesses would not be limited to those provided in the Vulnerability Protocol.

64. Lastly, insofar as the Vulnerability Protocol is intended to govern the VWU's interactions with the parties, the Chamber finds that directions in this regard are provided for in the Witness Familiarisation Protocol, adopted by the Chamber hereinabove. Therefore, the Chamber sees no need to adopt a Vulnerability Protocol in the present case.¹¹⁹

E. Redaction Protocol

65. The Chamber recalls that the Redaction Protocol put in place by PTC II remains in effect.¹²⁰ In addition to the procedure for redactions, it sets out, *inter alia*, the following categories of standard redactions pursuant to Rule 81(4) of the Rules:

Category 'B.1': Recent contact information of witnesses, insofar as necessary to protect the safety of the witness;

Category 'B.2': Identifying and contact information of family members of witnesses, insofar as necessary to protect their safety; and

Category 'B.3': Identifying and contact information of 'other persons at risk as a result of the activities of the Court' ('innocent third parties'), insofar as necessary to protect their safety. [...]

Category 'B.5': Other redactions under rule 81(4) of the Rules.

1. Submissions of the parties and participants

66. The Yekatom Defence seeks amendments in relation to standard redaction categories B.1, B.2 and B.3. It argues that these amendments aim to capture the

¹¹⁸ See also *Ongwen* Decision, ICC-02/04-01/15-504, para. 28.

¹¹⁹ See also *Ongwen* Decision, ICC-02/04-01/15-504, paras 26-29.

¹²⁰ Order, ICC-01/14-01/18-459, para. 8.

main principles set out in the Court's case law and are intended to avoid further litigation.¹²¹

67. In relation to category B.1, the Yekatom Defence argues that the Prosecution is misusing this category to redact telephone numbers being used by the witness at the time of the events.¹²² This prevents it from comparing this information against the 'call data records disclosed and/or referred to in the [Document Containing the Charges], [...] that may contradict the witness'.¹²³ In relation to category B.2, the Yekatom Defence submits that the Prosecution is using this category to redact identifying information of 'virtually every family member mentioned by the witness', including those who were eye witnesses or whose identity was relevant to the evidence of the witness.¹²⁴ In relation to category B.3, it submits that the Prosecution has used this category to also redact the 'names of individuals who have substantive connection to the events'.¹²⁵
68. The Yekatom Defence further points to a decision in the *Al Hassan* case on disclosure wherein the Single Judge of Trial Chamber X clarified the scope of B.2 and B.3 categories.¹²⁶ In its subsequent filing on this issue, the Yekatom Defence provides examples of what it considers are redactions made by the Prosecution contrary to the established jurisprudence.¹²⁷
69. The Prosecution responds that these amendments are 'not warranted', 'unnecessary' and 'duplicative' of the existing safeguards and the Prosecution's disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules.¹²⁸ The Prosecution submits that it has 'adapted its process of disclosure review and applied redactions under the established protocol' according to the

¹²¹ Yekatom Defence Submissions on the Status Conference, ICC-01/14-01/18-472, paras 67-78. *See* paras 75-77 for details on the specific amendments proposed on categories B.1, B.2 and B.3.

¹²² Yekatom Defence Submissions on the Status Conference, ICC-01/14-01/18-472, para. 70.

¹²³ Yekatom Defence Submissions on the Status Conference, ICC-01/14-01/18-472, para. 70.

¹²⁴ Yekatom Defence Submissions on the Status Conference, ICC-01/14-01/18-472, para. 69.

¹²⁵ Yekatom Defence Submissions on the Status Conference, ICC-01/14-01/18-472, para. 71.

¹²⁶ Yekatom Defence Submissions on the Status Conference, ICC-01/14-01/18-472, para. 71, *referring to* Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546 (the '*Al Hassan* Decision'), para. 22, n. 19.

¹²⁷ Additional Submissions, 14 July 2020, ICC-01/14-01/18-587-Red, paras 4, 6.

¹²⁸ Prosecution's Response to "Yekatom Defence Submissions for First Status Conference", ICC-01/14-01/18-486, paras 16-17. *See also* Prosecution Response to the Additional Submissions, ICC-01/14-01/18-600-Conf, paras 3-4.

case law and practice of this Court and that any amendments at this stage would create inefficiency and cause potential delays.¹²⁹ It recalls that it is open to *inter partes* consultations and requests the Chamber to reject the Yekatom Defence's request.¹³⁰ It further submits that an appropriate mechanism to dispute redactions already exists and has been successfully used by the parties to date.¹³¹

70. The CLRV raise concerns regarding the procedure for lifting redactions in application forms of victims and related material, in particular, those relating to identifying and contact information of intermediaries and information related to kinship and third parties.¹³² The CLRV request that the legal representatives (i) be consulted on any request for lifting redactions that may impact on previous rulings granting them in application forms and related material of participating victims; and (ii) be afforded an opportunity to challenge the lifting of redactions before the Chamber.¹³³

2. *The Chamber's determination*

71. The Chamber is of the view that the redaction of identifying information of a witness's family member is only permitted under the Redaction Protocol when the identity is of no relevance to a known issue in the case.¹³⁴ The Chamber further agrees with Trial Chamber X that

identifying information of individuals, family members or not, who were physically present at the scene of an alleged crime or individuals who have in any other way acquired or established knowledge of the events or circumstances part of a witness's narrative cannot be redacted pursuant to these two categories [B.2 and B.3] as no standard justification applies.¹³⁵

¹²⁹ Prosecution's Response to "Yekatom Defence Submissions for First Status Conference", ICC-01/14-01/18-486, para. 18; Prosecution Response to the Additional Submissions, ICC-01/14-01/18-600-Conf, para. 6.

¹³⁰ Prosecution's Response to "Yekatom Defence Submissions for First Status Conference", ICC-01/14-01/18-486, para. 19, p. 9.

¹³¹ Prosecution Response to the Additional Submissions, ICC-01/14-01/18-600-Conf, paras 7-8.

¹³² CLRV Submission on the Status Conference, ICC-01/14-01/18-471, para. 42.

¹³³ CLRV Submission on the Status Conference, ICC-01/14-01/18-471, para. 42.

¹³⁴ See also Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on the Protocol establishing a redaction regime, 12 December 2014, ICC-01/04-02/06-411, para. 36; *Al Hassan* Decision, ICC-01/12-01/18-546, para. 22.

¹³⁵ *Al Hassan* Decision, ICC-01/12-01/18-546, para. 22, n. 19.

72. The Chamber considers that this clarification applies to its determination of the scope of standard categories B.2 and B.3 in the present case. The Chamber further considers that the same principle applies to categories B.1 and B.5. The Chamber is of the view that this clarification provides sufficient guidance for the parties and therefore sees no need to adopt the Yekatom Defence's proposed amendments. Accordingly, the Chamber rejects the Yekatom Defence's request to amend the Redaction Protocol.
73. An assessment of whether or not information is relevant to a known issue in the case is an assessment that the disclosing party is expected to make, on a case-by-case basis, in good faith. The disclosing party carries the burden of justifying each redaction. The Chamber recalls and emphasises the disclosing party's ongoing obligations to review the redactions applied to ensure that they remain justified. The disclosing party is obliged to ensure that the standard redactions have been carried out in line with the Chamber's findings in the present decision, keeping the aforementioned clarification in mind.
74. The Chamber now turns to the CLRV's requests concerning the Redaction Protocol. In respect of their request to be consulted in advance of lifting redactions in application forms of victims and related material, the Chamber recalls the procedure set out by PTC II in respect of Dual Status Witnesses. The Chamber considers that this procedure remains largely applicable at this stage of the proceedings.
75. Notably, PTC II held that 'the Chamber's authorisation for the non-disclosure of information granted in relation to evidence provided by an individual in his/her capacity as witness extends, where applicable, to his/her victim application form'.¹³⁶ PTC II instructed the Prosecution to apply the necessary redactions to the material concerning Dual Status Witnesses in consultation with the legal representatives, following the redaction regime adopted by it.¹³⁷ It further directed the Prosecution to ensure that the redactions applied to the victim

¹³⁶ Decision on Motion for Disclosure of Witnesses with Dual Status, 13 September 2019, ICC-01/14-01/18-339 (the 'Decision on Disclosure of Dual Status Witnesses'), para. 11(iii).

¹³⁷ Decision on Disclosure of Dual Status Witnesses, ICC-01/14-01/18-339, para. 11(iii).

application forms are consistent with the ones applied to the witness statements disclosed to the Defence.¹³⁸

76. In setting out this procedure, PTC II considered that the Prosecution should receive unredacted versions of the victim application forms, finding that the Prosecution is best placed to ensure that the same information is redacted in both the victim application form and the evidence provided by the witness.¹³⁹ PTC II further instructed the Prosecution to liaise with the legal representatives before applying redactions.¹⁴⁰ For the same reasons, the Chamber also finds it appropriate for the CLRV to be consulted in advance of lifting redactions in victim application forms and related material.
77. Further, the Chamber directs the Prosecution and the CLRV to resolve any disagreements resulting from this exercise between them, to the extent possible. In case of dispute, they may approach the Chamber. The Chamber clarifies that the burden remains on the participant arguing to maintain the redactions to justify them.
78. While the Chamber has added these additional directions to the Redaction Protocol, it does not consider that any other amendments need to be made. The Chamber instructs the Prosecution, as a matter of priority, to review its redactions under categories B.1, B.2, B.3 and B.5. The Chamber further reminds the Prosecution of its general obligation to periodically review all standard redactions and to lift them where a justification no longer exists. Additionally, the Prosecution is directed to conduct a specific targeted review of redactions in the material related to a specific witness in advance of the witness's appearance at trial, particularly taking into consideration the evidence adduced till that time.
79. Lastly, noting that the evidence disclosure regime adopted only allows for limited and circumscribed exceptions to the principle of full disclosure, the Chamber no longer requires access to the evidence disclosed in its unredacted form and, therefore, finds it appropriate, at this stage, to depart from

¹³⁸ Decision on Disclosure of Dual Status Witnesses, ICC-01/14-01/18-339, para. 11(iii).

¹³⁹ Decision on Disclosure of Dual Status Witnesses, ICC-01/14-01/18-339, para. 12.

¹⁴⁰ Decision on Disclosure of Dual Status Witnesses, ICC-01/14-01/18-339, para. 12.

paragraph 32 of the Redaction Protocol as adopted by PTC II. For ease of reference during the present stage of the proceedings, the updated terms of this protocol together with the directions provided in the present decision are provided in Annex 3.

80. Additionally, the Chamber considers it appropriate to reclassify filing ICC-01/14-01/18-600-Conf as public. This document was filed confidentially in response to a motion that is now available in public redacted form and its author, the Prosecution, does not object to its reclassification as public.¹⁴¹ Accordingly, the Chamber finds that the reason for its current classification no longer exists.

F. E-Court Protocol

81. The Chamber clarifies that the E-Court Protocol is meant to address the Registry's implementation of an electronic system pursuant to Regulation 26 of the Regulations of the Court (the 'Regulations').¹⁴² It sets the standards for the parties and participants to prepare and provide evidence electronically during the proceedings to the Registry, which then uploads all data into the electronic system.¹⁴³

1. Submissions of the parties and participants

82. The Ngaïssona Defence submits that the Chamber should order the Prosecution to make *inter partes* disclosure 'via a ringtail link'.¹⁴⁴ It also submits that this is necessary as its 'administrative privileges are not the same on e-Court',¹⁴⁵ and that it would like to 'fully benefit from the search and analysis tools available only on Ringtail'.¹⁴⁶ The Prosecution submits that the procedure under the E-Court Protocol is set up to ensure that disclosure takes place in line with the

¹⁴¹ See Prosecution Response to the Additional Submission, ICC-01/14-01/18-600-Conf, para. 2.

¹⁴² E-Court Protocol, ICC-01/14-01/18-64-Anx, paras 1-2.

¹⁴³ E-Court Protocol, ICC-01/14-01/18-64-Anx, paras 2, 4-6.

¹⁴⁴ Ngaïssona Defence Submission on the Status Conference, ICC-01/14-01/18-473-Red, para. 25 *referring, inter alia*, to Ngaïssona Defence Observations on Disclosure and Related Matters (ICC-01/14-01/18-64-Conf), 11 March 2019, ICC-01/14-01/18-143-Conf (public redacted version notified on 28 March 2019); Ngaïssona Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-521-Red, para. 50.

¹⁴⁵ Ngaïssona Defence Submissions on the Status Conference, ICC-01/14-01/18-473-Red, para. 25.

¹⁴⁶ Ngaïssona Defence Response to the Submissions on the Conduct of Proceedings, ICC-01/14-01/18-521-Red, para. 50.

requirements of Article 61(3) of the Statute and Rule 121(2)(b) of the Rules and, for this reason, the practice has been applied consistently in all cases.¹⁴⁷

2. *The Chamber's determination*

83. The Chamber recalls that Ringtail is a tool for electronic management of evidence during the proceeding. Under the current system at the Court, there are several versions of Ringtail used in parallel, namely 'OTP Ringtail', 'Defence Ringtail' and a 'Registry Ringtail'. Only the latter is referred to as 'E-Court' within the meaning of Regulation 26(3) of the Regulations and Regulation 10(4) of the Regulations of the Registry, and contains the authoritative versions of evidence submitted by the parties and participants. Since the versions of Ringtail used by the participants are separate and independent of each other, it is not possible for *inter partes* disclosure to take place by exchanging Ringtail links or changing access rights to the material in the respective Ringtail.
84. Having regard to this, the Chamber rejects the Ngaïssona Defence's requests concerning the E-Court Protocol. Nevertheless, the Chamber instructs the Ngaïssona Defence to liaise with the Registry in respect of any assistance that may be needed in respect of its concerns. For ease of reference, the terms of this protocol are provided in Annex 4.

¹⁴⁷ Prosecution Response to the Ngaïssona Defence Submissions on the Status Conference, ICC-01/14-01/18-488-Red, paras 28-29.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Prosecution's request to allow Witness Preparation and to adopt a Witness Preparation Protocol;

ADOPTS the Witness Familiarisation Protocol as contained in Annex 1;

ADOPTS the Dual Status Witness Protocol as contained in Annex 2.

DECLINES to adopt a Vulnerability Protocol;

DIRECTS the Prosecution to review all redactions, in particular those applied under categories B.1, B.2, B.3 and B.5 according to paragraphs 71-78 of the present decision;



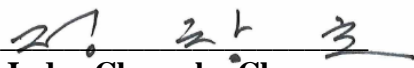
REJECTS the Yekatom Defence's request to amend the Redaction Protocol;

AMENDS the Redaction Protocol as set out in Annex 3;

REJECTS the Ngaïssona Defence's requests regarding the E-Court Protocol; and

ORDERS the Registry to reclassify the Prosecution Response to the Additional Submission, ICC-01/14-01/18-600-Conf, as public.

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

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
---	--	--

Dated 8 October 2020
At The Hague, The Netherlands