

## ANNEX

**Protocol on the practices to be used to familiarise witnesses for giving testimony applicable in the case *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11 ) and the case *The Prosecutor v. Uhuru Muigai Kenyatta* (ICC-01/09-02/11)**

1. The Victims and Witnesses Unit (the "VWU") will facilitate the testimony of witnesses in the best possible circumstances. For this purpose, the VWU intends to follow the protocol on the practices used to familiarise witnesses to give testimony before the Court as outlined below.
2. This protocol reflects the jurisprudence on familiarisation and its related procedures and also takes into account the practices and experiences concerning witnesses appearing before the Court at any stage of the proceedings. The protocol aims to outline the procedures that serve the best interests of witnesses and provide for sustainable working solutions for all entities involved.
3. Unless ordered otherwise, the VWU will apply the protocol to all witnesses called to testify before the Court in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*. However, the protocol could be adjusted according to the needs of witnesses who might not require such detailed attention and explanation. Adjustments will also be warranted if detained witnesses are called to testify.

## 1. Initial Familiarisation Phase

4. The initial phase commences when the entity calling introduces the witness to the VWU prior to the scheduled travel of the witness to the location of testimony.
5. This phase takes place in the field, whereby the entity calling the witness facilitates an introductory meeting between the VWU and the witness, informing the witness that the VWU will henceforth be responsible for the necessary arrangements to facilitate the witness' travel for the purpose of giving testimony.
6. During this period, the witness is in the care of the VWU in terms of the witness' safety, welfare, logistics and allowances, as specified by the Regulations of the Registry. This entails covering all costs related to the witness' travel, full board and accommodation, incidental and attendance allowances. In some extraordinary cases, the Registrar may provide for an allowance for lost earnings. Should this be the case, the Registrar will inform the relevant party of the granting of an allowance for loss of earnings.<sup>1</sup>
7. The initial period may be divided into two stages. During the first stage, the witness may be required to travel within the country of residence to, arrange for his/her passport, which will be facilitated by the VWU. This process may be lengthy in some areas where the Court operates and may require the witness to travel well in advance of his/her travel to the location of testimony. Upon conclusion of this first stage, the VWU arranges for the safe return of the witness to his/her residence and informs the entity calling the witness of the above. At this point in time, the witness is again in the care of the calling entity.

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<sup>1</sup> ICC-01/05-01/08-1016, para 11.

8. During the second stage, the witness will be required to travel to the location of testimony. The witness is in the care of the VWU from the moment he or she leaves his/her residence, and while he or she provides testimony before the Court, undergoes the "cooling down" period where necessary and returns safely to his/her residence. Henceforth, the entity calling the witness bears the responsibility to take care of the witness as outlined below.
9. The VWU will arrange for the witnesses to be present at the location of testimony. Careful planning is required to ensure sufficient time for all the necessary logistical and operational arrangements and to allow proceedings to run smoothly. The VWU relies on the entity calling the witness to communicate the necessary and recently updated information in a timely manner with the "Request for Provision of VWU Services for Victims/Witnesses Appearing before the Court and their Accompanying Persons" (the "Witness Information Form"/"WIF").
10. The VWU will only be able to arrange the witness' availability for testimony as long as the individual consents to appear as a witness. Should problems occur in that respect, the VWU will contact the entity calling the witness without delay.
11. Support services will commence in the field. The witnesses will be shown the film "Being a witness at the ICC". Additionally, the brochures "Travel to The Hague" and "Being a Witness at the International Criminal Court in The Hague" will be made available to the witnesses. The travel arrangements will be explained. A basic medical check-up will be conducted to ensure that the witness is fit to travel. If, based on the VWU's assessment, a witness requires an accompanying person to travel, in accordance with Regulation 91 of the Regulations of the Registry, such arrangements will be made. Furthermore, the witness special needs will be provided for, including,

for example, providing appropriate clothing. When witnesses are to travel with small children, appropriate arrangements will be made to accommodate their specific needs.

### **1.1. Scheduling of witnesses**

12. When an entity intends to call a witness to testify, it is required to submit the WIF to the VWU. In this request form, the parties are asked, inter alia, to identify the potential vulnerability of a witness and any need for protective measures in relation to his/her testimony and logistical arrangements. The entity calling the witness is invited to consult with the VWU about specific requirements that a witness may have.
13. In order to facilitate the logistical arrangements and to ensure the timely appearance of a witness, the WIF needs to<sup>2</sup> be submitted to the VWU not less than 35 days before the witness is scheduled to arrive at the location of testimony.
14. Notwithstanding the prerogative of the entity calling the witness to determine both the order and the scheduling of witnesses, the VWU strongly recommends avoiding unnecessary waiting times or last minute changes to the schedule of witness appearance for the benefit of the witness well-being. The VWU emphasizes the fact that the practice of standby witnesses is not only extremely resource-intensive but can also significantly impact on a witness' well-being due to the unpredictable waiting times and the constant pressure of being ready to give testimony.

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<sup>2</sup> ICC-01/05-01/08-1016, para.13.

15. For this reason, the VWU strongly recommends to have one stand-by witness only ready to testify by the time the preceding witness is scheduled to finish giving testimony.
16. In addition, the VWU strongly recommends avoiding a system whereby witnesses are required to be on standby at the location of testimony during the testimony of the preceding witness. Instead, the VWU recommends that those witnesses who have already undergone the familiarisation process and who are fully equipped for their testimony be permitted to stay in their accommodation or engage in other social activities while they wait to give their testimony.
17. For protection reasons, it will be important to limit the time spent away from the witness' location of residence to the extent possible. Moreover, travelling and awaiting scheduled testimony can be a very stressful experience for a witness. Keeping the psychological and physical well-being of witnesses in mind and demonstrating respect for their efforts to testify before the Court, the VWU stresses the need for detailed planning and careful scheduling of the witnesses' appearances before the Court.
18. Subject to approval by the Chamber, it is possible for victims to testify. In this case, the application to do so is made by the Legal Representative of the victim. Should the application be granted, the Legal Representative of the victim must contact the VWU in order to make all necessary arrangements and discuss any possible security concerns.<sup>3</sup>

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<sup>3</sup> ICC-01/04-01/07-1665-Corr, para. 29.

## 1.2 Early needs and vulnerability assessment

19. The parties are under an obligation to identify, protect and respect the wellbeing and dignity of witnesses.<sup>4</sup> Parties should, therefore, alert the VWU as early as practicable if they intend to call a vulnerable witness<sup>5</sup> or if they identify the need for procedural protective and/or special measures. The same applies if the entity calling the witness envisages the need for a witness to be accompanied by a Support Assistant, pursuant to Regulation 91 of the Regulations of the Registry. The parties are invited to consult with the VWU on this matter to allow for appropriate arrangements for the testimony of the witness. The entity calling the witness should make use of the WIF to indicate that assistance is needed for the arrangements for the witness for giving testimony and to share relevant information about the vulnerable witness.
20. Based on the information provided by the entity calling the witness or where the VWU identifies the vulnerability of a witness, appropriate actions to support and/or protect witnesses will be assessed on a case-by-case basis. Following the preparatory assessment, the VWU, in consultation with the entity calling the witness, determines appropriate measures to fully equip the vulnerable witness for his/her testimony.

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<sup>4</sup> ICC-01/04-01/06-1140, para. 36. See also article 68(1) of the Rome Statute.

<sup>5</sup> For the purposes of this protocol witnesses are considered to be vulnerable if they face an increased risk to suffer psychological harm through the process of testifying, and/or to experience psychosocial or physical difficulties which affect their ability to testify. The vulnerability of a witness can be determined by different factors: factors related to the person: age (children or elderly), personality, disability (including cognitive impairments), mental illness or psychosocial problems (such as trauma-related problems and/or lack of social support); factors related to the nature of the crime: in particular victims of sexual or gender-based violence, children that are victims of violence, and victims of torture or other crimes involving excessive violence; factors related to particular circumstances, such as significantly increased stress or anxiety due to relocation/resettlement or fear of retaliation, adaptation difficulties related to cultural differences or other factors.

21. The VWU will also raise with the Chamber on an ex parte basis, at an early stage, any specific concerns regarding the integrity and well-being of a witness, especially in relation to those who may be traumatised or vulnerable.<sup>6</sup>
22. If applicable at this stage, the entity calling the witness should inform the VWU about protective measures granted by the Chamber pursuant to rules 87 and 88 of the Rules of Procedure and Evidence.<sup>7</sup>

### **1.3 Travel to the location of testimony**

23. Upon receipt of the WIF from the entity calling the witness, the VWU will make travel arrangements for the witness. These arrangements will include, but are not limited to, making local and international travel arrangements, organising passports, visas, and accommodation, and providing travel escorts when necessary. The VWU will take into consideration the particular needs of the respective witness when providing for the different logistical and operational arrangements.
24. Wherever possible<sup>8</sup> the VWU will arrange for witnesses to travel jointly to the seat of the Court. This practice is beneficial for the well-being of the witnesses. Travelling to a location entirely different from the usual surroundings, in addition to any potential anxiety related to the forthcoming testimony, can lead to a significant increase of stress. Being isolated, and only being in contact with staff members of the Court, can increase a witness' stress level unnecessarily. Furthermore,

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<sup>6</sup> ICC-01/04-01/06-1140, para. 36.

<sup>7</sup> This is of particular importance as the VWU support staff will explain the practical implications of such measures to the witnesses in the course of the court room familiarisation.

<sup>8</sup> As a general rule, this will not apply to witness who participate in the Court's protection programme and who do not live together, unless the Protection Officer takes a decision to the contrary.

it allows the VWU to manage the logistical challenges imposed by escorting witnesses to the Court.<sup>9</sup>

25. All witnesses travelling together will be reminded with appropriate regularity that they must not discuss their impending evidence with each other or anyone else.<sup>10</sup> All witnesses are also reminded of their role in preserving their evidence and in avoiding any unnecessary exposure.

## **2. Pre-appearance Familiarisation**

### **2.1 Witness preparation and familiarisation**

26. Witness familiarisation by the VWU is to be carried out in parallel with the witness preparation<sup>11</sup> conducted by the calling party, in case the latter is conducted at the seat of the Court.<sup>12</sup>

27. Witness preparation is the responsibility of the calling party, who shall determine practical arrangements in co-ordination with the VWU.<sup>13</sup>

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<sup>9</sup> Taking into account the increasing occurrences of simultaneous trials and/or Confirmation of Charges hearings, the VWU will have to reduce to the extent possible the number of witnesses travelling and accommodated separately. Therefore, the VWU recommends that witnesses travel and be accommodated jointly. If the party requests the VWU to implement separate travel and accommodation, the VWU will carefully examine if "finance, logistics, available accommodation and protective measures along with the well-being of the witness may collectively or individually tend towards a conclusion in favor of keeping them together as regards travel or accommodation, or both", the Unit will inform the calling party accordingly and, in case of dispute, will seek the Chamber's authorization for the proposed procedure. See "Decision regarding the Protocol on the practices to be used to prepare witnesses", ICC-01/04-01/06-1351, para.31.

<sup>10</sup> ICC-01/04-01/06-1351, para.32: "The critical requirement is that if witnesses are housed or travel together, regardless of the extent to which their accounts overlap, they should be warned with appropriate regularity that they must not discuss their impending evidence with each other (or anyone else)".

<sup>11</sup> Witness preparation refers to "a meeting between a witness and the party calling that witness, taking place shortly before the witness's testimony, for the purpose of discussing matters relating to the witness's testimony" (ICC-01/09-01/11-524, para.4 and ICC-01/09-02/11-588, para. 4).

<sup>12</sup> ICC-01/09-01/11-524, para. 53 and ICC-01/09-02/11-588, para. 55.



28. VWU representatives are not required to be present during the witness preparation meetings.<sup>14</sup> However, if necessary, the VWU is available to assist the calling party with its witness preparation of vulnerable witnesses.<sup>15</sup>
29. The calling party shall endeavour to complete its witness preparations sessions as early as possible and in any event at least 24 hours before the witness's testimony is due to commence.<sup>16</sup>

## **2.2 Limitation of contact**

30. The VWU notes that non-substantive contact between the calling party and the witness in the 24 hours preceding the witness' testimony, while not prohibited, should be appropriate in the circumstances and guided by due regard to professional responsibility.<sup>17</sup>
31. From the time the witness begins to testify until the end of the witness' testimony, the calling party's contact with the witness is restricted to its examination in Court, unless otherwise authorised by the Chamber.<sup>18</sup>
32. Therefore, the VWU will not facilitate any further contact between the witness and the entity calling the witness from the time the witness starts to testify and until the witness has finished testimony. Should urgent matters arise that may have an impact on the witness' testimony,

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<sup>13</sup> ICC-01/09-01/11-524-Anx, para. 5 and ICC-01/09-02/11-588-Anx, para. 5

<sup>14</sup> “[..] the Chamber considers video recording to be a sufficient safeguard and finds that requiring the presence of a representative from the non-calling party or the VWU at the meeting is unwarranted at this stage” (ICC-01/09-01/11-524, para. 48 and ICC-01/09-02/11-588, para. 51).

<sup>15</sup> ICC-01/09-01/11-524-Anx, para. 5 and ICC-01/09-02/11-588-Anx, para. 5.

<sup>16</sup> ICC-01/09-01/11-676, para.3 and ICC-01/09-02/11-716, para.4.

<sup>17</sup> ICC-01/09-01/11-676, para.3 and ICC-01/09-02/11-716, para.4.

<sup>18</sup> ICC-01/09-01/11-676, para.3 and ICC-01/09-02/11-716, para.4.

the VWU will draw the matter to the attention of the entity calling the witness or to the attention of the Chamber, as appropriate.

33. The VWU notes that discussion between the parties and their experts may take place at any stage prior to calling the witness.<sup>19</sup>
34. The legal representatives of dual status witnesses, when not acting as calling party<sup>20</sup>, are entitled to speak with their clients during the whole duration of the witnesses' stay at the location of testimony<sup>21</sup>. However legal representatives should refrain from holding substantive discussions with witnesses about the topics that are to be dealt with in Court during their evidence or the exhibits which may be produced.<sup>22</sup> Instead, discussion with a witness about his/her testimony should only occur after the close of the evidence in the case.<sup>23</sup>
35. Counsels of witnesses are also entitled to speak to their clients during the whole duration of the witnesses' stay at the location of testimony. As the locations where witnesses are accommodated must remain confidential, contact with witnesses during their stay at the location of testimony will only be established through and facilitated by the VWU.

## **2.3 At the location of testimony**

### **2.3.1 Commencement of the familiarisation process**

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<sup>19</sup> ICC-01/04-01/06-T-104-ENG, page 29, lines 10-11.

<sup>20</sup> When a legal representative acts as a calling party, the regime described in paragraphs 30 to 32 applies.

<sup>21</sup> ICC-01/04-01/06-1379, para. 61. See also ICC-01/04-01/06- T-104-ENG, page 25, lines 18 to 19.

<sup>22</sup> ICC-01/04-01/06-T-104-ENG, page 25, lines 21-24.

<sup>23</sup> ICC-01/04-01/06-T-104-ENG, page 26, lines 7-8.

36. The starting point of the familiarisation process is when the witness arrives in the Netherlands<sup>24</sup> or at the location of testimony where different from the seat of the Court, prior to giving evidence.
37. The VWU informs the entity calling the witness when the witness is scheduled to arrive and if any major delays or disruptions occur.
38. Excluding witness preparation meetings<sup>25</sup>, all meetings with witnesses, excluding expert witnesses, and the entity calling the witness or legal representatives will be conducted within the premises of the VWU.<sup>26</sup> Practical arrangements for witness preparation shall be determined by the calling party in co-ordination with the VWU.<sup>27</sup>

### **2.3.2 Separation of witnesses at the accommodation**

39. Wherever possible, the VWU will arrange for witnesses to be accommodated jointly at the location of testimony. This practice benefits the well-being of the witnesses. Sharing the same accommodation will allow witnesses to stay together with individuals from the same cultural background and thus allow them to communicate in their own language about the more general experiences of travelling abroad. This interaction can foster moral support and prevent feelings of isolation and boredom. In addition, this joint accommodation also allows for joint social activities programme. Furthermore, it allows the VWU to more efficiently

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<sup>24</sup> In cases where testimony will be given by video-link in accordance with Regulation 45 of the Regulations of the Registry, the familiarisation process starts at the moment the witness arrives at the location of the video-link.

<sup>25</sup> ICC-01/09-01/11-524-Anx, para. 8 and 9, and ICC-01/09-02/11-588-Anx, para. 8 and 9.: "Witness preparation may be conducted at the seat of the Court or at the place of testimony, if elsewhere, or any other place. In determining where to conduct witness preparation, the calling party shall give due regard to the security of the witness."

<sup>26</sup> ICC-01/05-01/08-1016, para.16.

<sup>27</sup> ICC-01/09-01/11-524-Anx, para. 5 and ICC-01/09-02/11-588-Anx, para. 5.

handle logistical challenges imposed by providing 24/7 support services.

40. The VWU will, once again, remind witnesses with appropriate regularity that they must not discuss their impending evidence with each other or anyone else and will remind witnesses of their role in preserving their evidence and in avoiding any unnecessary exposure.<sup>28</sup>

41. In cases in which the accounts of witnesses overlap or there is a risk of evidence being tainted by contact during and after testimony, the VWU, in consultation with the party calling the witness shall, to the extent possible, take the following measures: (i) once a witness commences giving evidence, he or she should be separated from other witnesses; (ii), the VWU shall arrange supervised social contact between the witness who has testified and the remaining witnesses at least for a few hours each day; (iii) the VWU shall warn the witnesses that they should not discuss their evidence with each other; (iv) the VWU shall, as far as possible, jointly accommodate the witnesses who have finished giving evidence; and, (v) in the event that the witnesses breach these conditions imposed by the Chamber, the matter shall be brought to the Chamber's attention for review.<sup>29</sup>

42. Expert witnesses may also be jointly accommodated and will be reminded not to discuss the evidence they have given or will give.<sup>30</sup>

### **2.3.3 Support Services**

43. The VWU arranges for accommodation for the witness at the location of testimony. Furthermore, the VWU provides local transport between

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<sup>28</sup> The principles applicable to separate travel shall also apply to the determination of the need for separate accommodations (see Chapter 1.3. above, in particular footnotes 9 and 10).

<sup>29</sup> ICC-01/05-01/08-1016, para. 17.

<sup>30</sup> ICC-01/04-01/06-T-172-ENG, page 96, lines 20 to 25.

the accommodation and the Court or the site of video link testimony, where applicable. The witnesses are received by a Support Assistant of the VWU at the site of the accommodation. The Support Assistant provides a welcome briefing and orientation of the accommodation and its facilities, explaining to the witness, *inter alia*, the support services available, their day-to-day schedule to the extent known, and the allowances the witnesses receive and the expenses covered by the Court.

44. The VWU will have support services available 24 hours a day, seven days a week to witnesses during their stay at the location of testimony. During this time the VWU attends to the psycho-social and physical well-being and the practical needs of witnesses including any special needs vulnerable witnesses may have.
45. Those support services will include, but are not limited to, a welcome briefing, courtroom familiarisation, de-briefing after testimony and conducting an activity programme. The support staff will also attend to practical and medical needs of the witnesses.

#### **2.4 Assessment of vulnerable witnesses for special measures**

46. Upon arrival at the location of testimony, and subject to the witness' consent, the vulnerable witness is given a further assessment by the VWU Psychologist, which builds upon the preliminary vulnerability assessment as indicated in paragraph 1.2.
47. At the end of the assessment, the Psychologist discusses the relevant special measures with the witness and seeks his/her consent. The support and familiarisation process are then coordinated and, where applicable, adapted accordingly. This assessment is done following a clinical care model and on the basis of the assessment.

48. External specialists in clinical psychology are available to be consulted on short notice during the course of the proceedings, should the Psychologist be absent. In such a case, the Chamber is informed in a timely manner.
49. The assessment summary is sent to the Chamber on a confidential ex parte basis prior to testimony of the witness. It sets out the recommended special measures, as well as a summary of the evaluation that is relevant for testimony. The recommended measures (without the summary) are also sent to the Court Management Section (the "CMS") so that the measures, if granted, can be implemented in timely manner. The VWU will provide the same information to the parties and participants.<sup>31</sup>
50. The VWU's assessment does not address the credibility of the witness.
51. The witness is informed about the measures granted by the Chamber prior to testimony. The granted special measures are demonstrated to the witness during the (repeated) courtroom familiarisation.

#### **2.4.1 In-court reading assistance**

52. The VWU will also assess the need for a witness to be provided with reading assistance in the courtroom during his/her testimony. The assessment is based on the information about the literacy level provided by the party calling the witness, information about the level of education provided by the witness, and observations by the VWU Support Team of the capacity to read and write during the familiarisation process (for instance, during courtroom familiarisation). For vulnerable witnesses, literacy level may be determined from the

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<sup>31</sup> ICC-01/05-01/08-1016, para.18.

information provided and the observations made during the vulnerability assessment.

53. In case there is an indication that the witness has a limited literacy level, the capacity of the witness is explored further. It is often difficult to predict how witnesses with a limited literacy level will perform in the courtroom as they might be able to read during the familiarisation but may nevertheless feel uncomfortable doing so in public, in particular during their potentially stressful testimony in the courtroom. Therefore, the VWU does not address the question of whether a witness can or cannot read. Instead, the VWU asks for full reading assistance (for the oath and for reading names and texts) if the Unit assesses that the literacy level is too limited and/or if the witness clearly indicates that he/she does not feel comfortable reading out loud. Following this procedure avoids ambiguity and potentially embarrassing situations in the courtroom for the witness. In the exceptional case where it is assessed that a witness only needs assistance for a very particular task, the VWU will specify this in the assessment.

54. When the VWU assesses the need for reading assistance, it will inform the Chamber and the entity calling the witness as soon as possible<sup>32</sup>. It will also inform the Court Management Section's Associate Legal Officer/Courtroom Officer to ensure that proper arrangements are in place in the courtroom.

## **2.5 (In-Court) protective and Special measures as per rule 87 and rule 88 of the Rules of Procedure and Evidence**

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<sup>32</sup> As the calling party must "provide the witness with an opportunity to review his or her statements" as *per* the "Witness preparation protocol" (ICC-01/09-01/11-524-Anx and ICC-01/09-02/11-588-Anx), the calling party will be responsible to take the necessary measures to arrange for a reading assistance to be provided for the statement reading process.

55. The VWU informs each witness of the availability of in-court protective and special measures<sup>33</sup> when it meets the witness in the field to prepare the travel to the location of testimony.
56. In order to determine the necessity for in-court protective and special measures as early as possible, the VWU invites the entity calling the witness to indicate to the VWU any particular matter relating to the security, safety and vulnerability of witnesses.<sup>34</sup> To the extent possible, this information should be submitted to the VWU in the WIF.
57. Any request for in-court protective and special measures will promptly be brought to the attention of the Chamber by the calling party.<sup>35</sup> Upon consultation with the VWU, the entity calling the witness will, if applicable, file a motion to request protective measures to be granted by the Chamber. Should the entity calling the witness and the VWU not agree on the request for protective measures, the VWU will draw this matter to the attention of the Chamber pursuant to Regulation 41 of the Regulations of the Court, irrespective of the motion filed or not filed by the entity calling the witness.

## **2.6 Witnesses falling under the scope of Rule 74 of the Rules of Procedure and Evidence**

58. Where witnesses have dual status and have consequently been assigned legal representation, it lies within the responsibility of the legal representative to ensure that the witness is fully aware and informed about the consequences of potential self-incrimination and the content of Rule 74 of the Rules of Procedure and Evidence. Where

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<sup>33</sup> ICC-01/04-01/06-1140, para. 38 and ICC-01/04-01/06-1049, para. 53(e).

<sup>34</sup> ICC-01/04-01/06-1140, para. 36.

<sup>35</sup> ICC-01/04-01/06-1140, para. 38.



victims are otherwise testifying<sup>36</sup> in proceedings before the Court, it also lies within the responsibility of the legal representative to ensure that the victim is fully aware and informed about this issue.

59. For all other witnesses, it is the responsibility of the entity calling the witness to identify witnesses who may potentially incriminate themselves and to notify the VWU accordingly. Additionally, the entity calling the witness must inform such witnesses of their right to obtain legal advice. For witnesses who participate in the Court's protection programme ("ICCP"), the entity referring the witness provides this information with the application for protection referral. For witnesses who do not participate in the ICCPP, the entity calling the witness provides this information by submitting it to the VWU in the WIF. If the potential for self-incrimination is discovered after an initial WIF is submitted, the entity calling the witness must provide an updated WIF to the VWU. It is also the responsibility of the entity calling the witness to communicate this information to the relevant section of the Registry, currently being the Counsel Support Section ("CSS"). Once the Registry has been made aware that the witness may make self-incriminating statements during his / her testimony, it is the responsibility of the Registry to ensure that the witness is provided with independent legal advice from a qualified lawyer. It is preferable if the lawyer can speak directly to the witness in a language he/she understands.<sup>37</sup> Therefore, as soon as the dates of the witnesses' presence at the location of testimony are known, the VWU notifies the CSS, which appoints a duty counsel - based on specific requirements expressed, if any - to furnish "legal advice" to the witness(es) so concerned in accordance

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<sup>36</sup> "The Unified Protocol shall only apply to victims appearing before the Court for the purpose of giving oral testimony", ICC-01/05-01/08-1016, para.8.

<sup>37</sup> ICC-01/04-01/07-1665, para 53.

with Rule 74.10 of the Rules of Procedure and Evidence. The CSS ensures that a suitable duty counsel from the Court's List of Counsel eligible to practice in the proceedings before the Court is available to provide notification on the provisions of rule 74 of the Rules of Procedure and Evidence to all witnesses with the potential for self-incrimination in need of legal advice. The duty counsel need not be at any time physically present in The Hague or during the proceedings but, rather, can provide advice and assistance remotely. In order to maintain and respect the neutrality of the Registry staff, such advice can only be given by external counsel.

61. The duty counsel's fees, travel costs and daily subsistence allowance are covered by the Registry.
62. The duty counsel appointed by the Registry requires access to the relevant material to be in the position to advise the witness on the issue of self-incrimination. The CSS makes the necessary arrangements to ensure that the duty counsel reviews all relevant materials in connection with the case. The entity calling the witness will furnish the duty counsel with the relevant materials, such as witness statements and transcripts of interviews. At all times, due respect for confidentiality must be maintained.
63. The duty counsel is responsible for the safe keeping of the relevant material.
64. VWU staff informs the witness that a meeting or a consultation by phone with the duty counsel will take place. If the witness does not want to consult with the latter, this decision is brought to the attention of the Chamber and of the party calling the witness.<sup>38</sup>

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<sup>38</sup> ICC-01/05-01/08-1016, para.20.

65. The VWU facilitates the contact between the duty counsel and the witness in the course of the familiarisation process and, at the latest, on the day before the witness' testimony. The VWU is required to ensure that during the familiarisation process, the lawyer is given sufficient time along with the witness to give advice, so a minimum of an hour is set aside for this purpose. The consultation, either by phone or in person, takes place within the premises of the VWU, but the VWU will not participate in it.
66. It is the responsibility of the duty counsel to explain to the witness his/her mandate and to advise the witness that the meeting is restricted to issues relating to self-incrimination and that no other aspects of the testimony must be discussed. Should the witness require assurance under rule 74(3)(c) of the Rules of Procedure and Evidence, it will be the responsibility of the duty counsel to immediately inform the Chamber and Prosecution of this request, with reasons.

## **2.7 Courtroom familiarisation**

67. As a general rule, the VWU will conduct the courtroom familiarisation prior to the witness preparation meetings with the calling party.

### **2.7.1 Showing the VWU facilities**

68. The witness waiting rooms and other relevant VWU facilities are shown to the witness. As there might be a number of witnesses who are required to be separated at the VWU premises, witnesses are strictly required to stay inside the witness waiting rooms at all times. The Support Assistants explain, however, how to call for assistance and what to do if they need to leave the room.

69. All of the witness waiting rooms are equipped with an alarm system that enables the witness to contact a Support Assistant at any time.
70. In cases where a witness will require in-court assistance the in-court assistant will be present during the courtroom familiarisation, if possible.
71. The VWU staff confirms the language of the testimony with the witness. In case the information provided by the witness differs from the information in the WIF, the VWU brings this discrepancy to the attention of the entity calling the witness, the Chamber, the legal coordinator of the Registry, and Court Management Section's Associate Legal Officer/Courtroom Officer.

#### **2.7.2 Meeting with the persons who will examine the witness ("courtesy meeting")**

72. The witnesses are provided with an opportunity to acquaint themselves with the people who may examine them in court ("courtesy meeting").<sup>39</sup>The entity calling the witness, the non-calling party and the legal representatives, where applicable, must provide the VWU with the names of the persons who will examine the witness in Court. The VWU will require this information prior to the arrival of the witness to the location of testimony, thereby allowing the VWU to facilitate contacts in a timely manner.
73. Legal representatives assigned to a specific case will be reminded by the VWU of the possibility for such courtesy meetings between the witnesses and the persons who will examine them in court. The legal

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<sup>39</sup> ICC-01/04-01/06-1049, para. 53(f).

representatives, who have submitted to the Chamber a request to question the witness, must inform the VWU in a timely manner to allow the VWU to facilitate the meeting.

74. Based on this information provided by the parties and participants, and subject to the witness' consent, the VWU will notify all the people who have been listed to examine the witness in Court, including the legal representative of a witness, where applicable, on when the courtesy meeting is scheduled to take place.
75. Separate courtesy meetings for each entity will take place on the premises of the VWU, immediately before the courtroom familiarisation. The staff of the VWU shall attend the meeting.
76. In relation to the time allocated to the courtesy meetings, each party is allocated 10 minutes. If there is one legal representative team, it is allocated 10 minutes. If there are two legal representative teams, they attend the courtesy meeting at the same time for a maximum of 15 minutes. If there are more than two teams, then a maximum of 20 minutes is allocated to all. The VWU recommends joint courtesy meetings for the legal representatives because they are less burdensome for the witnesses.

### **2.7.3 Showing the courtroom and explaining the proceedings**

77. The Support Assistant will guide the witness to the courtroom. All individuals who have participated in the separate courtesy meetings may attend the courtroom familiarisation. The VWU notes that during this procedure, the various representatives are not allowed to speak about the evidence and, as a result, they are only allowed to watch the courtroom familiarisation passively to ensure that no interference

occurs.<sup>40</sup> VWU staff will remind the attending representatives of the parties and participants accordingly.

78. The witness will be introduced to the courtroom.<sup>41</sup> Where the Chamber has authorised the witness to testify from a remote witness room, either in headquarters or in the field, the witness will also be introduced to this room.

79. The technical devices will be explained to the witness. Where possible, the witness will practice using the equipment.

80. The Support Assistant will explain the proceedings before the Court, in particular the role of a witness and the process of examination.<sup>42</sup> This includes, where applicable, demonstrating to the witness the recommended and/or granted special and protective measures.

81. The Support Assistant will explain to the witness who he/she will see in the courtroom and who might directly address the witness.<sup>43</sup> The Support Assistant also point out where the respective person will sit.

82. The in-court familiarisation is repeated if it is assessed to be necessary for the benefit of the witness because the witness is vulnerable and/or has shown difficulties in understanding the proceedings. This repetition also presents the opportunity to provide or repeat the demonstration of the granted special and protective measures.

#### **2.7.4 Questionnaire**

83. After the in-court familiarisation, but prior to testimony, the VWU will conduct the first part of the "witness feedback programme".<sup>44</sup>

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<sup>40</sup> ICC-01/04-01/06-1351, para. 39.

<sup>41</sup> ICC-01/04-01/06-1049, para. 53(g).

<sup>42</sup> ICC-01/04-01/06-1049, para. 53(a) and (b).

<sup>43</sup> ICC-01/04-01/06-1049, para. 53(d).

## **2.8 Day of testimony**

84. On the day of testimony, the VWU will arrange for the appearance of the witness in Court.
85. If the mental state of the witness so requires, the witness can be monitored by the Psychologist, and any urgent concerns that arise will be communicated to the Chamber.
86. Before the examination of a witness commences, the Presiding Judge invites the witness to make the solemn declaration to tell the truth, in accordance with rule 66 of the Rules of Procedure and Evidence.
87. Support services will be available before, during and after testimony.

## **2.9 Providing witnesses with copies of statements after testimony**

88. In case a witness requests to retain a copy of his/her statement or any related material, the VWU shall inform the Chamber which will decide on a case-by-case basis.<sup>45</sup>

## **3. After testimony**

### **3.1 Immediately after testimony**

89. Once the witness' evidence in court is completed, the prohibition of contact, which started when the witness began testifying, between the party introducing the evidence and the witness is lifted, unless the Chamber directs otherwise. If a witness is in the ICCPP, the VWU will,

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<sup>44</sup> In order to capture both immediate as well as more long-term feedback of witnesses with regard to their court appearance and the services provided to them, the VWU implemented a "witness feedback programme", see for more details paragraphs 99 to 101.

<sup>45</sup> ICC-01/05-01/08-1016, para.28.

sufficiently in advance of the end of the witness' evidence, give details to the party who called him or her of any future protective measures. The VWU will ensure that adequate time is allowed to enable suggested deficiencies in the VWU's proposal to be raised with, and resolved by, the Chamber.<sup>46</sup>

90. After the witness has concluded giving testimony, the VWU strongly encourages and will facilitate, subject to the witness' consent, a "thank you" meeting between the witness and the entity calling the witness. This practice is a valuable and direct tool to recognise and express appreciation for the witness' cooperation with the Court in giving testimony.
91. The VWU will conduct a de-briefing and will arrange for the travel arrangements back to the witness' location of residence. The VWU will also use this opportunity to assess the immediate impact of the testimony with the post-testimony questionnaire.<sup>47</sup>

### **3.2 Cooling down period**

92. After the witness has concluded giving testimony, while at the location of the testimony, the witness receives a de-briefing and will go through a security questionnaire with VWU staff. A witness is also given an opportunity to contact his/her family, relatives and other trusted sources to find out any potential reactions to the testimony given by the witness that might have to be taken into consideration when planning the witness' return.
93. In the field, the VWU field staff conducts a risk assessment to determine whether the witness can return to his/her location of

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<sup>46</sup> ICC-01/04-01/06-1351, para. 42.

<sup>47</sup> See Chapter 3.3 for more details.



residence. The VWU also assesses whether further follow-up support measures are required.

94. Where appropriate, a witness may go through a cooling down period. The cooling down period may entail that witnesses remain in a safe holding area instead of returning immediately to their location of residence. While the VWU recognises the need to return a witness to the location of residence as soon as possible, ideally within ten calendar days of testimony, the witness' return will only be recommended if and when it is assessed to be sufficiently safe. The period of time spent at the holding area can be extended accordingly, subject to the witness' consent. Throughout the "cooling down period", VWU staff maintain regular contact with the witness to provide psycho-social support when necessary and address any issues that may arise from the witness' absence from his/her residence.
95. Should concerns about the security situation at the location of residence persist, the VWU will communicate this to the entity that called the witness and will provide its advice on suitable protective measures for the witness. If necessary, and in consultation with the entity that called the witness, the VWU will conduct an assessment procedure for participation in the ICCPP.
96. Should concerns about witness' psycho-social condition or necessity for follow-up support measures arise, the VWU will communicate it to the entity that called the witness.
97. Should concerns about the security of a witness arise after the witness has returned to the location of residence, the VWU invites the entity that called the witness to bring those concerns to the Unit's attention. The VWU will advise on the appropriate protection measures. If necessary, and in consultation with the entity that called the witness,

the VWU will conduct an assessment procedure for participation in the ICCPP.

98. Security concerns of sufficient gravity arising after testimony will be brought to the attention of the Chamber and the party calling the witness. In this context, the VWU will also convey to the Chamber and the party calling the witness any influence that the situation could have on witnesses who have not yet testified and on any procedural protective measures the Chamber may consider granting to them.<sup>48</sup>

### **3.3. Witness feedback program**

99. The VWU, with the assistance of the Berkeley-Tulane Initiative for Vulnerable Populations, has developed a comprehensive witness feedback program that aims to capture the experiences of ICC witnesses in a detailed, yet streamlined, manner.

100. Witnesses will be invited to complete detailed questionnaires before their testimony, shortly after testimony and six to twelve months after their return to their original location of residence. The questionnaire protocol follows a standardized and scientific approach to monitoring and evaluating the witnesses' experiences.

101. The witness feedback program is designed to provide information to the VWU that would allow the Unit to improve its provision of services to witnesses and to share outcomes and information with other relevant areas of the Court. The Unit intends to use this information for, inter alia, monitoring the familiarisation of witnesses and it will suggest changes to the Unit's practices and protocols, when appropriate.

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<sup>48</sup> See ICC-01/05-01/08-1016, para.29.