

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: 23 May 2008

**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

**SITUATION**  
***IN THE DEMOCRATIC REPUBLIC OF THE CONGO THE CASE OF***  
***THE PROSECUTOR***  
***v. THOMAS LUBANGA DYILO***

**Public Document**

**Decision regarding the Protocol on the practices to be used to prepare witnesses  
for trial**

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

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**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
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**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Mr Simo Vaatainen

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**TRIAL CHAMBER I** (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following decision on the issue of the protocol on the practices used to prepare witnesses for trial (“Protocol”):

## **I. Procedural history**

1. During the Status Conference of 10 January 2008, the Victims and Witnesses Unit (“VWU”) agreed to provide the Chamber with a Protocol on the practices to be used to prepare and familiarise witnesses for giving evidence,<sup>1</sup> which the VWU filed on 1 February 2008.<sup>2</sup> The Office of the Prosecutor (“prosecution”)<sup>3</sup> and the defence<sup>4</sup> responded on 25 February 2008. The issue was then considered during a Status Conference on 12 and 13 March 2008.<sup>5</sup> On 31 January 2008 the VWU filed the “Victims and Witnesses Unit recommendations on psycho-social in-court assistance”<sup>6</sup> which has not been the subject of any dispute.<sup>7</sup> In the filing it requested certain guidance from the Chamber.<sup>8</sup> Whilst certain of the written and oral submissions were made on a confidential basis, the references made thereto contained in this decision do not disclose any material which, in the view of the Chamber, should be kept confidential.

<sup>1</sup> Transcript of hearing on 10 January 2008, ICC-01/04-01/06-T-69-ENG, page 15, lines 10-25.

<sup>2</sup> Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 31 January 2008, ICC-01/04-01/06-1150-Conf.

<sup>3</sup> Prosecution’s Observations on the Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at Trial, 25 February 2008, ICC-01/04-01/06-1189-Conf.

<sup>4</sup> Observations de la défense sur le “Victims and Witnesses Unit Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial”, 25 February 2008, ICC-01/04-01/06-1188-Conf.

<sup>5</sup> Transcript of hearing on 12 March 2008, ICC-01/04-01/06-T-78-CONF-ENG and transcript of hearing on 13 March 2008, ICC-01/04-01/06-T-79-ENG.

<sup>6</sup> 31 January 2008, ICC-01/04-01/06-1149.

<sup>7</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 54, lines 17-21.

<sup>8</sup> Victims and Witnesses Unit recommendations on psycho-social in-court assistance, 31 January 2008, ICC-01/04-01/06-1149, paragraph 15.

## II. Submissions

### *Submissions of the Registrar*

2. The Protocol sets out the VWU's approach throughout the trial<sup>9</sup> to the preparation and handling of witnesses in the field,<sup>10</sup> at the location selected for them to give their evidence,<sup>11</sup> during their testimony<sup>12</sup> and post-trial.<sup>13</sup> However, the VWU acknowledged that these general provisions can be adjusted according to the needs of individual witnesses.<sup>14</sup>
  
3. The Protocol currently provides that witnesses who participate in the Court's protection programme and who do not live together, will travel<sup>15</sup> and live separately.<sup>16</sup> All other witnesses may travel together and may stay at the same location.<sup>17</sup> In oral submissions, relying on the practices of other international criminal tribunals, the Registry contended that for reasons of logistics and efficiency, witnesses called by a party should travel together unless there are specific reasons for separating them. This would enable the VWU to provide a sufficient level of psychological care and assistance, as well as accommodating the difficulties of limited resources and finance.<sup>18</sup> However, the VWU acknowledged that specific circumstances may necessitate their separation.<sup>19</sup>
  
4. The Protocol establishes that the VWU is to remind witnesses on a regular basis not to discuss their evidence and the reasons for this requirement and the

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<sup>9</sup> *Ibid*, paragraph 3.

<sup>10</sup> *Ibid*, paragraph 6.

<sup>11</sup> *Ibid*, paragraphs 15-40.

<sup>12</sup> *Ibid*, paragraphs 41-42.

<sup>13</sup> *Ibid*, paragraphs 43-44.

<sup>14</sup> *Ibid*, paragraph 3.

<sup>15</sup> *Ibid*, paragraph 14.

<sup>16</sup> *Ibid*, paragraph 17.

<sup>17</sup> *Ibid*, paragraphs 14 and 17.

<sup>18</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 14, lines 7-10.

<sup>19</sup> *Ibid*, page 9, lines 3-4.

possible consequences of any breach will be explained to them.<sup>20</sup> The VWU noted, however, that it will not be able to prevent discussions from taking place.<sup>21</sup>

5. Consistent with the Trial Chamber's "Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial",<sup>22</sup> the Protocol provides that witnesses will be allowed to meet the advocates who are to examine them in court,<sup>23</sup> under the supervision of the staff of the VWU.<sup>24</sup> Once the familiarisation process has commenced, the VWU will not facilitate any further contact between the witness and the party calling him or her until their testimony is complete.<sup>25</sup>
  
6. The Protocol sets out that the VWU shall make available a copy of a witness's previous statements for memory refreshing purposes.<sup>26</sup> To facilitate this process, the party calling the witness shall provide the VWU with the witness's statements in the language in which they were originally given, ensuring, however, that they can be easily understood by the witness.<sup>27</sup> The Registry added in oral submissions that the copies of the statements must be as close as possible to their original form.<sup>28</sup> For this system to be effective, when the statements are originally compiled (before the witness is asked to sign), he or she should be provided with a copy translated into his or her native language. This safeguard, it is submitted, would ensure the witness is aware of, and understands, the contents<sup>29</sup> and it would help reduce the risk of errors.<sup>30</sup> As a result, the Registry

<sup>20</sup> Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 1 February 2008, ICC-01/04-01/06-1150-Conf, paragraphs 14 and 18.

<sup>21</sup> *Ibid*, paragraph 18.

<sup>22</sup> *Ibid*, paragraph 24, referring to "Decision regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007", ICC-01/04-01/06-1049.

<sup>23</sup> *Ibid*, paragraph 24, referring to "Decision regarding the practices used to prepare and familiarise witnesses for giving testimony at trial", 30 November 2007, ICC-01/04-01/06-1049, paragraph 53(f).

<sup>24</sup> *Ibid*, paragraph 25.

<sup>25</sup> *Ibid*, paragraph 26, referring to "Decision regarding the practices used to prepare and familiarise witnesses for giving testimony at trial", 30 November 2007, ICC-01/04-01/06-1049, paragraph 56.

<sup>26</sup> *Ibid*, paragraph 35, referring to "Decision regarding the practices used to prepare and familiarise witnesses for giving testimony at trial", 30 November 2007, ICC-01/04-01/06-1049, paragraph 55.

<sup>27</sup> *Ibid*, paragraph 37.

<sup>28</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 17, lines 1-4.

<sup>29</sup> *Ibid*, page 20, lines 3-5.

submitted that any translations of the statements should be prepared by the party or participant when the statements are originally compiled and not at a later stage by the Registry.<sup>31</sup> The Registry refuted the suggestion that if this exercise is undertaken by the prosecution, the translations may lack objectivity.<sup>32</sup> The Registry submitted that if the accuracy of the translation is challenged, it is able – if requested – to review the translation and to provide an official version.<sup>33</sup> The Registry argued this exercise would be compatible with its status as a neutral organ of the Court.<sup>34</sup>

7. The Protocol provides that whilst VWU staff will be available before, during and after the memory-refreshing procedure,<sup>35</sup> they will be unable to familiarise themselves with the content of the statement. As a result, they cannot ensure that the witness has understood the material<sup>36</sup> and, it was submitted, it would be inappropriate for the representative to attempt to answer any legal or factual questions that may arise.<sup>37</sup> The Protocol will facilitate any necessary contact between the witnesses and their legal representatives while the former are housed at the location where they are to give evidence, but this will only occur via the VWU.<sup>38</sup>
  
8. Finally, the VWU, in drafting the Protocol, has identified a number of issues on which guidance is sought, including the procedure to be followed if a witness suggests that a written statement is inaccurate, whether or when a witness's statement should be returned to the party calling him or her, whether witnesses are entitled to take documents into the courtroom and whether it is permissible

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<sup>30</sup> *Ibid*, page 19, lines 22-23.

<sup>31</sup> *Ibid*, page 20, lines 17-19.

<sup>32</sup> *Ibid*, page 25, lines 19-21.

<sup>33</sup> *Ibid*, page 25, lines 9-10 and page 26, lines 3-6.

<sup>34</sup> *Ibid*, page 26, lines 3-10.

<sup>35</sup> Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 1 February 2008, ICC-01/04-01/06-1150-Conf, paragraph 38.

<sup>36</sup> *Ibid*, paragraph 39.

<sup>37</sup> *Ibid*, paragraph 40

<sup>38</sup> *Ibid*, paragraph 45.

for a witness's legal representative to be present during the witness familiarisation process.<sup>39</sup>

9. The Registry suggested in its oral submissions that it will not monitor or interfere if a witness and their legal representative speak while the former reads his or her statements, and it proposes not to report any discussions back to the Chamber.<sup>40</sup>
10. The Registry suggested that for reasons of protection witnesses should not be allowed to keep a copy of their statements although they could be held by their legal representatives.<sup>41</sup>
11. The VWU accepted at the Status Conference that the Protocol should address the need for security measures for the period following the testimony of the witness,<sup>42</sup> and accordingly submitted an addendum to the Protocol setting out those measures.<sup>43</sup>
12. Additionally, the VWU provided a discrete and detailed document setting out the practices for courtroom familiarisation,<sup>44</sup> a draft 'Request for provision of VWU services for victims/witness appearance before the Court and their accompanying persons',<sup>45</sup> the DVD film 'Being a witness at the ICC'<sup>46</sup> and the brochures 'Travel to The Hague'<sup>47</sup> and 'Being a Witness at the International

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<sup>39</sup> *Ibid*, paragraph 46.

<sup>40</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 30, lines 13-16.

<sup>41</sup> *Ibid*, page 30, line 24 to page 31, lines 5.

<sup>42</sup> *Ibid*, page 54 lines 13-14.

<sup>43</sup> Addendum to the Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 19 March 2008, ICC-01/04-01/06-1232-Conf.

<sup>44</sup> Annexed to "Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial", 1 February 2008, ICC-01/04-01/06-1150-Conf-Anx1.

<sup>45</sup> Annexed to "Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial", 1 February 2008, ICC-01/04-01/06-1150-Conf-Anx2.

<sup>46</sup> Annexed to "Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial", 1 February 2008, ICC-01/04-01/06-1150-Conf-Anx3.

<sup>47</sup> Annexed to "Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial", 1 February 2008, ICC-01/04-01/06-1150-Conf-Anx4.1.

Criminal Court in The Hague'.<sup>48</sup> It noted that the familiarisation film may not comply fully with the decisions of 30 November 2007 (see above paragraph 5) and 29 January 2008,<sup>49</sup> having been made at an earlier date.<sup>50</sup>

### *Prosecution submissions*

13. The prosecution, in its written submissions of 25 February 2008, submitted that all witnesses should be accommodated and should travel separately, and that the VWU ought to separate those whose evidence overlaps. Absent this step, it was contended the evidence may be contaminated, the protective measures frustrated and any pre-existing animosities exacerbated.<sup>51</sup> The prosecution suggested that 'indirect contamination' may occur if witnesses become aware of the identity of others who are to give evidence, and for this reason it submitted that all of the trial witnesses should be housed separately.<sup>52</sup> However, in its oral submissions the prosecution conceded that witnesses whose testimonies are geographically or temporally distinct may travel together.<sup>53</sup>

14. The prosecution submitted that the value of refreshing the memories of witnesses would be diminished if the VWU made no effort "to ascertain the content of the [...] statement" or "to ensure that the witness apprehends all of the [...] material".<sup>54</sup> In the circumstances, the prosecution seeks the implementation of a procedure to address the possibility that, having read

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<sup>48</sup> Annexed to "Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial", 1 February 2008, ICC-01/04-01/06-1150-Conf-Anx4.2.

<sup>49</sup> Decision on various issues related to witnesses' testimony during trial, ICC-01/04-01/06-1140.

<sup>50</sup> Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 1 February 2008, ICC-01/04-01/06-1150-Conf, paragraph 47.

<sup>51</sup> Prosecution's observations on the Victims and Witnesses Unit Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 25 February 2008, ICC-01/04-01/06-1189-Conf, paragraphs 6-10.

<sup>52</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 11, lines 18-22.

<sup>53</sup> *Ibid*, page 10, lines 10-13.

<sup>54</sup> Prosecution's observations on the Victims and Witnesses Unit Protocol on the practices used to Prepare and familiarise witnesses for giving testimony at trial, 25 February 2008, ICC-01/04-01/06-1189-Conf, paragraph 12, citing paragraph 39 of the Protocol.



their statements, witnesses may “wish to clarify, change, delete or add to (them)” and that, additionally, the party calling the witness should be notified of any genuine concerns that the VWU may entertain as to the witness’s integrity and well-being. To ensure that witnesses understand their prior statements, and to facilitate requests to modify them, the prosecution submitted that the VWU should be briefed by the party calling the witness on the most important areas of the latter’s statements. This would enable the VWU to identify any possible changes in areas of fundamental importance and to report them to the party calling the witness. The prosecution suggested the VWU should provide a comprehensive report of this familiarisation process to the relevant party which, in turn, could notify the Trial Chamber (if this latter step was considered necessary).<sup>55</sup>

15. Addressing the issue of where responsibility lies for providing translations of the statements of witnesses into their native languages, the prosecution highlighted that the originals are usually recorded in French or English.<sup>56</sup> It was the prosecution’s contention that the Registry bears the responsibility for translating the statements into the native language of the witnesses for the purpose of refreshing their memories, prior to giving evidence. The prosecution argued this procedure ensures that it is not involved in the witness familiarisation process, thereby guaranteeing its impartiality.<sup>57</sup> The prosecution contested the suggestion that witnesses regularly experience difficulties with the translations of their statements and suggested this is a rare occurrence.<sup>58</sup> The prosecution resisted the proposal that at the time the evidence is first recorded, it should furnish the witnesses with copies of their statements in their native languages, to enable them to read and agree the contents prior to adding their signature.<sup>59</sup> It submitted this procedure would contravene the Chamber’s decision on

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<sup>55</sup> *Ibid*, paragraphs 13-16.

<sup>56</sup> *Ibid*, paragraph 17.

<sup>57</sup> *Ibid*, paragraph 18

<sup>58</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 22, lines 6-9.

<sup>59</sup> ICC-01/04-01/06-T-79-ENG, page 2, lines 1-5.

familiarisation<sup>60</sup> because the prosecution would have reviewed the statement before trial and this may lead to difficulties if a discrepancy arose as a result of the translation.<sup>61</sup> However, the prosecution accepted the observation of the Presiding Judge that if statements were recorded at the outset in English or French and the witness's native language, this would not constitute witness familiarisation. The prosecution, whilst acknowledging that there was nothing inherently problematic with a witness providing two statements, suggested it may expose him or her to questioning on the basis of alleged inconsistencies between the statements.<sup>62</sup>

16. Notwithstanding these matters, the prosecution acknowledged that if interviews with witnesses are taped in future and if translations are provided at the time the statements are compiled, this problem will disappear.<sup>63</sup> The prosecution accepted that taping is the preferable course to be followed in the future<sup>64</sup> because it will provide certainty as to what a witness said, thereby avoiding the disputes that may arise when there are two contradictory statements.<sup>65</sup> Indeed the prosecution noted that three of the fourteen interviews of witnesses referred to above were conducted under Article 55(2) of the Statute.<sup>66</sup>

17. The prosecution argued that witnesses should not be permitted to keep their statements or take documents into the courtroom, because these steps may undermine and contaminate evidence, cause security breaches and contravene the indication from the Chamber that oral evidence should be spontaneous.<sup>67</sup> However, the prosecution acknowledged during the Status Conference that

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<sup>60</sup> Decision regarding the practices used to prepare and familiarise witnesses for giving testimony at trial, 30 November 2007, ICC-01/04-01/06-1049.

<sup>61</sup> ICC-01/04-01/06-T-79-ENG, page 2, lines 6-12.

<sup>62</sup> *Ibid*, page 3 lines 1-19.

<sup>63</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 22, lines 15-17 and page 27, lines 8-17.

<sup>64</sup> ICC-01/04-01/06-T-79-ENG, page 3, lines 8-10.

<sup>65</sup> *Ibid*, page 4, line 23 to page 5, line 2.

<sup>66</sup> *Ibid*, page 4, lines 14-16.

<sup>67</sup> Prosecution's observations on the Victims and Witnesses Unit Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 25 February 2008, ICC-01/04-01/06-1189-Conf, paragraphs 20 and 21

witnesses have a right to copies of transcripts of their interviews which, it was submitted, should be given to their counsel.<sup>68</sup> Although the prosecution sought to retain an element of discretion in this regard, it did not advance significant objections to providing copies of the statements to the legal representatives of the witnesses.<sup>69</sup> The prosecution submitted witnesses may remain at risk even if they are interviewed at a safe location outside the Democratic Republic of the Congo ("DRC"), particularly when they keep copies of their statements.<sup>70</sup>

18. The prosecution in oral submissions doubted the practicality of the Registry's contention that the latter will be able to review a translation of a witness statement when its accuracy is challenged because the translations will not usually be used in the courtroom.<sup>71</sup>

19. Relying on a suggested general obligation of disclosure, the prosecution submitted that the VWU should furnish the party calling a witness with any notes or other documents the latter has made. The prosecution argued that legal representatives should be permitted to be present during the process when the witnesses review their statements, and suggested this would be consistent with the procedure previously outlined by the Trial Chamber. The prosecution wishes to be informed about the policy of the VWU for those witnesses who are unable to return home due to safety concerns, by identifying, *inter alia*, the available measures and where responsibility for their implementation lies. The prosecution argued that the VWU should notify the party calling the witness as to its assessment of any risks if they are returning to the DRC following their evidence. Finally, the prosecution submitted that the party who called a witness should be permitted to contact the witness once their evidence is complete.<sup>72</sup>

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<sup>68</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 32, lines 10-12.

<sup>69</sup> *Ibid*, page 33, lines 15-18.

<sup>70</sup> *Ibid*, page 32, lines 23-25.

<sup>71</sup> *Ibid*, page 28, lines 6-10.

<sup>72</sup> Prosecution's observations on the Victims and Witnesses Unit Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 25 February 2008, ICC-01/04-01/06-1189-Conf, paragraphs 22-25

*Defence submissions*

20. The defence, in its confidential written submissions of 25 February 2008, submitted that each witness – protected and unprotected – should be accommodated separately<sup>73</sup> in order to ensure their protection and to prevent discussions between them about their testimony. It argued it is insufficient merely to advise witnesses not to discuss matters related to the trial.<sup>74</sup> Whilst the defence acknowledged in oral submissions that financial constraints are an issue, it submitted they do not obviate the need to prevent witness contamination.<sup>75</sup> The defence reminded the Bench that given the relatively small number of witnesses in this case, separating witnesses would not create an undue financial burden.<sup>76</sup>

21. Whilst the defence accepted that witnesses may read their statements to refresh their memories, it contended that the VWU should not communicate with the witnesses or the parties calling them regarding their statements or this process.<sup>77</sup> Moreover, it argued that statements provided to witnesses for this purpose should be those translated by the Registry (as a neutral organ of the court) rather than by one of the parties.<sup>78</sup> It submitted that witnesses ought not to be permitted to retain the original or copies of statements as this could jeopardise the spontaneity of their oral testimony. Although the defence did not dispute that the legal representatives of the witnesses can be present during the familiarisation process, it submitted they should not intervene or be provided with copies of the statements.<sup>79</sup> In support of this latter contention, it argued, first, that the Rome Statute framework did not create

<sup>73</sup> Observations de la défense sur le “Victims and Witnesses Unit Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial”, ICC-01/04-01/06-1188-Conf, paragraph 6.

<sup>74</sup> *Ibid*, paragraphs 6- 8

<sup>75</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 12, lines 10-14.

<sup>76</sup> *Ibid*, page 13, lines 6-7.

<sup>77</sup> Observations de la défense sur le “Victims and Witnesses Unit Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial”, ICC-01/04-01/06-1188-Conf, paragraphs 9 and 13.

<sup>78</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 27, lines 3-6.

<sup>79</sup> Observations de la défense sur le “Victims and Witnesses Unit Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial”, ICC-01/04-01/06-1188-Conf, paragraphs 14 and 18.

such an entitlement<sup>80</sup> and, second, it would not advance the fairness of the trial or the good administration of justice.<sup>81</sup> indeed, it was submitted that it might undermine the accuracy of the testimony.<sup>82</sup> It was submitted that an unrepresented witness should not be placed in a worse position than those who have the benefit of legal representation.<sup>83</sup>

22. The defence submitted that witnesses should not bring documents into the courtroom, since it is for the parties and not the witnesses to tender evidence and, furthermore, if witnesses are able personally to introduce documentary evidence during the trial, this may undermine the accused's right to full advance disclosure.<sup>84</sup> Finally, the defence submitted that witnesses should be told that they can only give evidence about matters which are within their personal knowledge (as opposed to hearsay).<sup>85</sup>

*Submissions of the legal representative of victims a/0001/06 to a/0003/06*

23. The legal representative of victims a/0001/06 to a/0003/06 contended in oral submissions that on the issue of separating witnesses, the Chamber should be guided by the experience and the requests of the individual witnesses.<sup>86</sup>
24. On behalf of those victims, it was averred that the legal representatives should have access to the witness statements, as documents that are central to the victim's interests. It was argued that this is consistent with the Chamber's ruling of 18 January 2008. The legal representative resisted the prosecution's submission that the latter has discretion to decide whether the statements should

<sup>80</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 34, lines 22-23.

<sup>81</sup> *Ibid*, lines 24-25

<sup>82</sup> *Ibid*, page 35, lines 14-16.

<sup>83</sup> *Ibid*, page 29, lines 15-16

<sup>84</sup> Observations de la défense sur le "Victims and Witnesses Unit Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial", ICC-01/04-01/06-1188-Conf, paragraphs 16.

<sup>85</sup> *Ibid*, paragraphs 16 and 22

<sup>86</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 13, lines 17-21.

be disclosed to the legal representatives.<sup>87</sup> Whilst it was acknowledged there may be security concerns, it was suggested these would be met by a requirement that the legal representatives should treat the statements as confidential.<sup>88</sup> However, the legal representative accepted the observation of the Presiding Judge<sup>89</sup> that it was impossible to regulate privileged discussions between counsel and client to ensure that the statements are not discussed.<sup>90</sup> The legal representative averred that concerns that statements may be lost or inappropriately divulged by legal representatives were misplaced, given the provisions of the code of conduct. Counsel resisted the suggestion that allowing legal representatives (but not witnesses) access to statements unfairly favoured those with legal representation, on the basis that individuals who have retained counsel *ipso facto* ordinarily have more rights than those without and that all witnesses – including those who do not apply to participate as victims – have the right to instruct a lawyer.<sup>91</sup>

*Submissions of legal representative of victim a/0105/06*

25. In oral submissions the legal representative of victim a/0105/06 contended that witnesses should be kept separate, whether or not they are protected.<sup>92</sup>

26. The legal representative of victim a/0105/06 suggested that providing legal representatives with their clients' statements was an essential step in enabling them to fulfil their role as counsel.<sup>93</sup> Similarly the legal representative disputed the defence contention that providing representatives with statements was neither useful nor prudent, on the basis that they may assist, particularly during the latter parts of the trial and including on issues connected with reparations.<sup>94</sup>

Whilst the representative acknowledged that this issue was not covered by the

<sup>87</sup> *Ibid*, page 36, lines 12-23.

<sup>88</sup> *Ibid*, page 36, line 24 to page 37, line 2.

<sup>89</sup> *Ibid*, page 37, lines 21-22

<sup>90</sup> *Ibid*, page 39, lines 5-6.

<sup>91</sup> *Ibid*, page 37, line 10 to page 38, line 25.

<sup>92</sup> *Ibid*, page 13, lines 22-24.

<sup>93</sup> *Ibid*, page 53, lines 13-14.

<sup>94</sup> *Ibid*, page 52, lines 1-25 and page 53, lines 1-5.

Rome Statute framework, she relied on the decision of the Chamber of 18 January 2008<sup>95</sup> which confirmed the right of victims to access to prosecution documents relating to their personal interests.

*Submissions of the Office for Public Counsel for Victims*

27. Citing paragraph 111 of the decision of the Chamber of 18 January 2008, the OPCV contended that witnesses with the status of victims have the right to access any document in the possession of the prosecution relevant to their interests and including their witness statements.<sup>96</sup>

### III. Analysis and conclusions

#### **The Decision of 30 November 2007**

28. In its decision of 30 November 2007 entitled "Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial",<sup>97</sup> the Chamber established the following approach that is to be applied to the witness-familiarisation process:

- a. The VWU is under the obligation to remind witnesses of their duty to tell the truth and to implement any protective measures which may be necessary;
- b. The VWU is to provide each witness with a copy of his or her witness statements; and

<sup>95</sup> Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119.

<sup>96</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 39, lines 19-25 and page 40, lines 1-6.

<sup>97</sup> Decision Regarding the practices used to prepare and familiarise witnesses for giving testimony at trial, 30 November 2007, ICC-01/04-01/06-1049.

- c. The party calling the witness is not to hold discussions with the latter about the topics that are to be dealt with in court during their evidence or the exhibits which may be produced.<sup>98</sup>

29. Additionally, the Chamber set out the following:

“[. ], the Trial Chamber is of the opinion that the preparation of witness testimony by parties prior to trial may diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness. The spontaneous nature of testimony can be of paramount importance to the Court’s ability to find the truth, and the Trial Chamber is not willing to lose such an important element in the proceedings.”<sup>99</sup>

30. Against the background of, and by way of necessary extension to, that established approach, the Chamber has reached the following conclusions on the various issues summarised above.

#### **Travel and accommodation**

31. The Trial Chamber is unpersuaded that all the witnesses to be called during the trial need to travel to court and to be accommodated separately. Instead, appropriate, fact-sensitive decisions should be made, bearing in mind particularly the personal circumstances of each witness and the areas of evidence they will be addressing. For instance, it would be without real purpose to separate – at this late stage – witnesses who are currently, or in the recent past have been, in regular contact with each other. Furthermore, with witnesses who have not been in contact with each other, often there would be little point in taking steps to keep them apart if their evidence does not materially overlap as regards the events they will address in court. Even with witnesses where there is a risk that they may speak with each other about events in ways that could influence their respective accounts, the broad picture needs to be considered before a decision is taken. Whilst it may be preferable to keep witnesses in this latter category apart, finance, logistics, available accommodation and protective

<sup>98</sup> *Ibid*, paragraphs 49-51.

<sup>99</sup> *Ibid*, paragraph 52.



measures, along with the well-being of the witnesses may collectively or individually tend towards a conclusion in favour of keeping them together as regards travel or accommodation, or both. Accordingly, although measures that would facilitate separation should be considered and implemented if feasible, this is a multifaceted issue which should be approached with care and sensitivity.

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).
  
33. If a party considers that witnesses with overlapping accounts should be kept apart, they have an obligation to inform the VWU as to which witnesses fall into this category. The presumption will be that the VWU is to implement this separation unless it can show the party or, in case of dispute, the Chamber good reason as to why it is either unnecessary or impractical.

#### **Providing witnesses with copies of statements**

34. It is likely that a number of the witnesses in this case will also participate as victims. In all probability this group will have the benefit of legal representation, and in most – if not all – instances it will be appropriate for their advisers to be supplied with copies of their witness statements and any related materials, which as a result will be available to the witnesses they represent. It would be unfair on those witnesses who are without representatives to deny them, as a matter of course, a similar opportunity of gaining access to this documentation. However, the argument is well-founded that some witnesses could be put significantly at risk if they retain their statements because if this material is seen by a third party, it clearly establishes a level of cooperation with the ICC generally, and with the prosecution in particular. Since there is no established “right” to be given or to keep copies of this documentation within the Rome Statute framework, once

again fact-sensitive decisions will need to be made, which take into account the circumstances of each witness. If there are grounds for concluding, because of an individual's vulnerability (particularly if the witness is unrepresented), that supplying copies would place him or her in danger, they should be withheld. In these circumstances, steps should be taken to allow the witness the opportunity to look at, but not retain copies of, the statement(s) and any relevant documents if a request is made. On the other hand, if their personal circumstances are such that no identifiable danger exists (e.g. with witnesses living in areas of stability within the DRC or abroad) then, on request, copies should be provided. In these circumstances, the witness should be given an explanation of the need to protect themselves by ensuring that the written materials remain private. Where a witness does not have legal representation, a copy of his or her statement should be provided by the relevant party by way of the VWU.

35. The witnesses should not bring any of this material into court; if it becomes necessary for reference to be made to one or more of the statements or related material, then (subject to objection) copies can be made available during the witness's testimony.

#### **Providing a copy of each statement in the first language of the witness**

36. As a matter of general practice, the arguments are wholly persuasive that the statements of witnesses should be compiled by way of recorded interviews, which are contemporaneously reduced into statement form in one of the working languages of the court **and** in the first language of the witness (or if this is impractical, a language he or she can easily understand) if the witness's native language, or one they readily comprehend, is not French or English. This will ensure that there is no doubt as to what the witness said at the time, and it will reveal whether he or she agrees with the way the account has been set out in the statement. Any divergence in content between the statements as recorded in the two languages can be resolved by listening to the tape of the interview. Given the

translation will occur at the time the statement is recorded, it will be wholly unrelated to the “witness familiarisation” process. Since the prosecution is responsible for taking statements from the witnesses, it should bear responsibility for providing copies of them, where relevant, in both languages. Although the prosecution indicated that it intends only to record certain selected interviews<sup>100</sup> no justification for this approach was advanced. The Chamber is unable to detect any proper basis for this suggestion given the ease with which conversations can now be recorded on small digital, handheld devices.

37. Addressing the immediate problem, the trial is to begin in a few weeks and translations of the statements are needed for those witnesses who do not readily understand the statements which they signed (this seemingly relates to 14 witnesses).<sup>101</sup> In order to ensure that the trial is not adjourned because of delays in providing translations, the prosecution and the registry should cooperate to ensure that this task is completed in advance of the trial (since both organs of the court have translation services available to them). Bearing in mind the importance of securing an efficient and timely trial, it is to be hoped that budgetary disagreements will not impede this work. Ultimately, however, responsibility rests with the prosecution to ensure that its witnesses are able to refresh their memories from statements they are able to understand: it is the party introducing this evidence and, ultimately, it must take this necessary step to ensure that the witnesses are properly equipped to assist the Chamber on this issue.

#### **The “witness-familiarisation process”**

38. The purpose of allowing a witness to reread his or her statements is to help to “refresh” potentially fallible memories. This is not an “evidence-checking” procedure, namely establishing whether or not the witness maintains the original

<sup>100</sup> ICC-01/04-01/06-T-78-CONF-ENG, page 27, lines 14-17.

<sup>101</sup> *Ibid*, page 23, line 3.

account or whether he or she considers that changes to the written account need to be made. Any discrepancies of that kind should be ventilated in court rather than being discussed and recorded shortly before the witness gives evidence. The Chamber is more likely to identify the truth if the witness explains any reservations about the written account during their oral testimony, rather than by having his or her concerns interpreted and recorded by a representative of the VWU. Therefore, the submissions of the VWU are apposite to the extent that it suggests it should not be under any duty to monitor or record anything that is said by the witnesses during this familiarisation process, unless something exceptional occurs.

39. Although representatives of the parties or participants may be present during the familiarisation process, including when the written records are read, they will be unable to speak with the witness about the evidence, and as a result they will only be permitted to watch the procedure. Similarly, if the witness is also a participating victim who is represented, with the witness's consent, the representative can be present during this process.

40. Unless something exceptional occurs, the VWU is not under an obligation to provide a report on the statement-reading process to the parties and the Chamber. If a witness indicates to a representative of the VWU that they wish to say something about the content of their statement(s), they should simply be told that the representative is not allowed to speak with the witness about the evidence in the case, save to say that any concerns about what they have read (or other issues) should be explained to the court when their evidence in court begins. The VWU is not under any duty, unless something exceptional comes to their attention, to provide the parties or the Court with the originals or copies of any notes made by the witness during this process.

41. The suggestion by the defence that the VWU should inform the witnesses that they should not give hearsay evidence is inappropriate: exclusion of hearsay evidence is not expressly provided for in the Statute and the matter has not been the subject to a ruling by the Chamber.
42. Once the witness's evidence in court is completed, the prohibition on discussions between the party introducing the evidence and the witness is lifted, unless the Chamber directs otherwise. Where witnesses are in the protection programme, the VWU should, sufficiently in advance of the end of the witness's evidence, give details to the party who called him or her of any future protective measures. The VWU should ensure that adequate time is allowed to enable suggested deficiencies in the VWU's proposals to be raised with, and resolved by, the Chamber.
43. The Protocol on the practices used to prepare and familiarise witnesses and, if it is reasonably practicable, the Registry's familiarisation film should be altered to reflect the Chamber's decisions of 30 November 2007, 29 January 2008 and the present decision.
44. On the subject of how an "in-court" assistant can communicate with the Chamber,<sup>102</sup> for urgent matters the assistant should simply raise his or her hand in order to gain the Chamber's attention. Otherwise, any issue requiring the attention of the Chamber can be raised with the court staff during an adjournment.

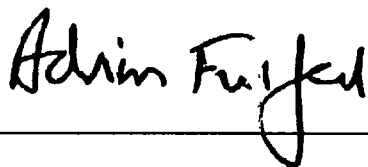
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<sup>102</sup> Victims and Witnesses Unit recommendations on psycho-social in-court assistance, 1 February 2008, ICC-01/04-01/06-1149, paragraphs 15 and 18.


45. Accordingly, the Chamber issues the following orders:

- a. The VWU is directed to facilitate the travel and accommodation of witnesses to be called during the trial in accordance with the directions given in paragraphs 31 – 33 of the present decision.
- b. The parties are directed to provide witnesses with copies of their statements as set out in paragraphs 34 and 35 of the present decision.
- c. The prosecution, in cooperation with the Registry, is directed to ensure that its witnesses are provided with a copy of their statements in a language they understand as set out in paragraphs 36 and 37 of the present decision.
- d. The VWU is directed to facilitate the witness familiarisation process as set out in paragraphs 38 to 44 of the present decision.

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



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge René Blattmann**

Dated this 23 May 2008

At The Hague, The Netherlands