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(28022-28007)

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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding  
Judge Emile Short  
Judge G. Gustave Kam

Registrar: Mr. Adama Dieng

Date Filed: 13 November 2006

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS ARCHIVES  
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JOSEPH NZIRORERA'S MOTION TO  
PROHIBIT WITNESS PROOFING

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The Office of the Prosecutor:

Mr. Don Webster  
Ms. Allayne Frankson-Wallace  
Mr. Iain Morley  
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson  
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera  
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera respectfully moves for an order, with immediate effect, prohibiting the prosecution from “proofing” its witnesses before they testify.

2. This motion is inspired by the recent decision of the Pre-Trial Chamber of the International Criminal Court. On 8 November 2006, that Chamber, presided over by Judge Claude Jorda, the former President of the ICTY and ICTR Appeals Chamber, held that the practice of prosecution proofing its witnesses is not a widely accepted practice in international criminal law<sup>1</sup>, that it is in fact prohibited in many national jurisdictions<sup>2</sup> (i.e. Brazil, Spain, France, Belgium, Germany, Scotland, Ghana, England and Wales, and Australia), and that it is not an accepted practice in the Democratic Republic of Congo, where the crimes involved in the case took place<sup>3</sup>. It prohibited the prosecution at the International Criminal Court from proofing the witnesses to be called at the confirmation hearing, holding that the principle to be drawn from customary national practice was that witness proofing was prohibited.<sup>4</sup>

3. Mr. Nzirorera has attached a copy of the opinion of the International Criminal Court as Annex “A” to this motion.

4. The practice of witness proofing is not an accepted practice in Rwanda.

5. Mr. Nzirorera notes that the prosecution’s practice of proofing its witnesses in his case has created numerous problems of late disclosure and admission of evidence outside the scope of the indictment. He recalls the frequently stated admonition, by this Trial Chamber and other Chambers, that the prosecution is expected to know its case

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<sup>1</sup> *Prosecutor v Dyilo*, No. ICC-0/04-01/06, *Decision on the Practices of Witness Familiarisation and Witness Proofing* (8 November 2006) at para. 33

<sup>2</sup> *Prosecutor v Dyilo*, No. ICC-0/04-01/06, *Decision on the Practices of Witness Familiarisation and Witness Proofing* (8 November 2006) at para. 37

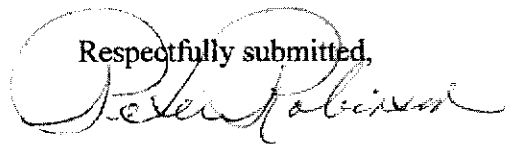
<sup>3</sup> *Prosecutor v Dyilo*, No. ICC-0/04-01/06, *Decision on the Practices of Witness Familiarisation and Witness Proofing* (8 November 2006) at para. 35

<sup>4</sup> *Prosecutor v Dyilo*, No. ICC-0/04-01/06, *Decision on the Practices of Witness Familiarisation and Witness Proofing* (8 November 2006) at para. 42

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before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused as the trial progresses.<sup>5</sup>

6. Since the International Criminal Court has now decreed that witness proofing has no place in international criminal law, Mr. Nzirorera respectfully requests that the Trial Chamber issue an order banning this practice in his case, with immediate effect.

Respectfully submitted,  
  
PETER ROBINSON  
Lead Counsel for Joseph Nzirorera

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<sup>5</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment* (20 October 2006); *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 26; *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 194; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-PT, *Decision on Defects in the Form of the Indictment* (26 May 2005) at para. 19; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 451; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 25; *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Judgement* (23 October 2001) at para 92; *Prosecutor v Kvočka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 30.

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## **ANNEX "A"**

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**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 8 November 2006

**PRE-TRIAL CHAMBER I**

**Before:** Judge Claude Jorda, Presiding Judge  
Judge Akua Kuenyehia  
Judge Sylvia Steiner

**Registrar:** Mr Bruno Cathala

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

**Public Document**

**Decision on the Practices of Witness Familiarisation and Witness Proofing**

**The Office of the Prosecutor**  
Mr Luis Moreno Ocampo  
Ms Fatou Bensouda  
Mr Ekkehard Withopf  
**Legal Representatives of the Victims**  
a/0001/06 to a/0003/06 and a/0105/06  
Mr Luc Walley  
Mr Franch Mulenda  
Ms Carine Bapita Buyangandu

**Counsel for the Defence**  
Mr Jean Flamme  
Ms Véronique Pandanzyla  
**Office of Public Counsel for the  
Defence**  
Ms Melinda Taylor

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**PRE-TRIAL CHAMBER I** of the International Criminal Court (“the Chamber” and “the Court” respectively), subsequent to the filing of the Prosecution and Defence Submissions in relation to the practice of witness proofing in relation to the only witness currently scheduled to testify at the confirmation hearing in the case of *The Prosecution vs Thomas Lubanga Dyilo*

**RENDERS THE FOLLOWING DECISION:**

## I. Procedural Background

1. At the status conference of 26 October 2006, the Prosecution, in addressing "a whole series of matters",<sup>1</sup> elaborated on the important issue of witness proofing by merely informing the Chamber that "the Prosecution has invited the witness for what is commonly referred to as 'proofing' for next week, and the Prosecution intends to have proofing sessions with that witness for a number of days next week."<sup>2</sup>
2. On 30 October 2006, the single judge issued the "Decision concerning the Prosecution Information on the Proofing of a Witness" ("the Decision"),<sup>3</sup> in which the Prosecution is requested:
  - i. to elaborate on the content of what the Prosecution means by the expression 'proofing of the witness' and the specific conditions under which the Prosecution wishes to carry out the proofing of the witness; and
  - ii. not to undertake any proofing session until the matter is ruled on by the Chamber.<sup>4</sup>
3. On 31 October 2006, the Prosecution filed the "Prosecution's Request for a Hearing on an Expedited Basis on the Proofing of a Witness",<sup>5</sup> in which the

<sup>1</sup> Transcript of the 26 October 2006 hearing , p. 11.

<sup>2</sup> Transcript of the 26 October 2006 hearing , p. 11.

<sup>3</sup> ICC-01/04-01/06- 630-Conf-Corr.

<sup>4</sup> ICC-01/04-01/06-Conf-Corr, pp. 3 and 4.

<sup>5</sup> ICC-01/04-01/06-632-Conf.

Prosecution "requests the Single Judge to convene a Court hearing on an expedited basis, preferably before the full Pre-Trial Chamber;"<sup>6</sup>

4. On 1 November 2006, the Prosecution filed the "Prosecution's Information on the Proofing of a Witness" ("the Prosecution Information"),<sup>7</sup> in which the Prosecution:

- (i) asserts that the practice of witness proofing is "a widely accepted practice in international criminal law"<sup>8</sup>;
- (ii) explains what the Prosecution means by the expression "proofing of a witness";<sup>9</sup>
- (iii) elaborates on the reasons why the practice of witness proofing "is beneficial to the testimony of a witness and thus to the Court's statutory duty to establish the truth;"<sup>10</sup>
- (iv) undertakes to comply with the principles provided for in article 705 of the Code of Conduct of the Bar Council of England and Wales;<sup>11</sup> and
- (v) requests the Chamber to allow the Prosecution to conduct proofing sessions with the witness within the scope and the limits detailed in paragraphs 16, 17 and 19 of the Prosecution Information.<sup>12</sup>

5. On 2 November 2006, the single judge issued the "Decision convening a hearing on Friday 3 November 2006", in which the single judge *inter alia*

<sup>6</sup> ICC-01/04-01/06-632-Conf., para. 10.

<sup>7</sup> ICC-01/04-01/06-638-Conf.

<sup>8</sup> ICC-01/04-01/06-638-Conf., para. 14.

<sup>9</sup> ICC-01/04-01/06-638-Conf., para. 16.

<sup>10</sup> ICC-01/04-01/06-638-Conf., para. 17.

<sup>11</sup> ICC-01/04-01/06-638-Conf., para. 19.

<sup>12</sup> ICC-01/04-01/06-638-Conf., para. 20.

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rejected the Prosecution's request for an urgent hearing on the issue of witness proofing.

6. On 3 November 2006, the Defence filed the "Response to Prosecution Information on Witness Proofing" ("the Defence Response"),<sup>13</sup> in which the Defence:

i. Requests the Chamber:

- a. to reject the request of the Prosecution to proof the witness prior to her testimony; and
- b. in the alternative, to order the Prosecutor to disclose records of any proofing session as a prior statement under Rule 76;<sup>14</sup>

- ii. Reserves its right to seek to interview the witness prior to any proofing session.<sup>15</sup>

## II. Brief Discussion of Article 21 of the Statute

7. At the outset, the Chamber recalls the Decision in which it expressly stated that the issue at stake, that is to say whether the practice of witness proofing is admissible under the applicable law of the Court and, if so, under which conditions, shall be settled in light of article 21 of the Rome Statute ("the Statute").<sup>16</sup>

8. According to article 21 (1) (a) of the Statute, the Chamber shall apply "in the first place, this Statute, Elements of Crimes and its Rules of Procedure

<sup>13</sup> ICC-01/04-01/06-653-Conf.

<sup>14</sup> ICC-01/04-01/06-653-Conf, paras. 32 and 33.

<sup>15</sup> ICC-01/04-01/06-653-Conf, para 33.

<sup>16</sup> ICC-01/04-01/06-Conf-Corr, p. 3.

and Evidence." As this Chamber has already stated,<sup>17</sup> in determining the contours of such a framework, the Chamber must look at the general principles of interpretation as set out in article 31 (1) of the Vienna Convention on the Law of Treaties, according to which "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".

9. Article 21 (1) (b) of the Statute provides that the Chamber shall apply "in the second place where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict". Moreover, failing that, the Chamber shall apply pursuant to article 21 (1) (c) of the Statute, "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and international recognized norms and standards."
  
10. Moreover, the Chamber recalls the general principle of interpretation set out in article 21 (3) of the Statute, according to which "the application and the interpretation of law pursuant to this article must be consistent with internationally recognized human rights". In this regard, the Chamber considers that prior to undertaking the analysis required by article 21 (3) of the Statute, the Chamber must find a provision, rule or principle that, under article 21 (1) (a) to (c) of the Statute, could be applicable to the issue at hand.

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<sup>17</sup> See for instance "the Decision on the Final System of Disclosure and the Establishment of a Timetable", issued by the single judge on 15 May 2006 (ICC-01/04-01/06-102), Annex I, para. 1.

**III. The two components of the practice of witness proofing in light of the definition of such practice in the Prosecution Information**

11. At the outset, the Chamber finds that the expression "proofing of a witness" cannot be found in the Rome Statute, the Rules of Procedure and Evidence ("the Rules") or the Regulations of the Court ("the Regulations").
12. The Chamber also observes that there are a number of expressions, including *inter alia* those of "preparation of a witness", "proofing of a witness", "training of a witness", "coaching of a witness" or "tampering with the evidence of a witness", which are used in different jurisdictions in connection with those practices followed to prepare a witness to give oral testimony before a court. Moreover, the meaning of such expressions and the delimitation of what is lawful (or at least what is required as professional good practice), what is contrary to the professional code of ethics, and what could even constitute a criminal offence, greatly differs from jurisdiction to jurisdiction.
13. For these reasons, before ruling on whether the practice of witness proofing is admissible in light of article 21 of the Statute, it is necessary to address what, according to the Prosecution, is the content of such a practice in the context of proceedings before the International Criminal Court. In this regard, the Chamber observes that the definition given in the Prosecution Information is two-fold insofar as it describes both the goals and the specific measures of the practice of witness proofing.
14. In the view of the Chamber, the goals and measures encompassed by the Prosecution definition of witness proofing can be divided in two groups. On the one hand, the Prosecution explains that the practice of witness

proofing “allows assisting the witness testifying with the full comprehension of the Court proceedings, its participants and their respective roles, freely and without fear”<sup>18</sup>. This goal is accomplished through the following measures which, according to the Prosecution, are part of the practice of witness proofing:

- i. “To provide the witness with an opportunity to acquaint him/herself with the Prosecution’s Trial Lawyer and other whom may examine the witness in Court;
- ii. To familiarise the witness with the Courtroom, the Participants to the Court proceedings and the Court proceedings;
- iii. To reassure the witness about his/her role in the Court proceedings;
- iv. To discuss matters that are related to the security and safety of the witness, in order to determine the necessity of applications for protective measures before the Court;
- v. To reinforce to the witness that he/she is under a strict legal obligation to tell the truth when testifying;
- vi. To explain the process of examination-in-chief, cross-examination and re-examination.”<sup>19</sup>

15. In the view of the Chamber, this first component of the definition of the practice of witness proofing advanced by the Prosecution aims at preparing the witness to give oral evidence before the Court in order to prevent being taken by surprise or being placed at a disadvantage due to ignorance of the Court’s proceedings. The Chamber observes that this first component consists basically of a series of arrangements to familiarise the witnesses with the layout of the Court, the sequence of events that is likely to take place when the witness is giving testimony, and the different responsibilities of the various participants at the hearing.

16. In the view of the Chamber, the second component of the definition of the practice of witness proofing advanced by the Prosecution aims at

<sup>18</sup> ICC-01/04-01/06-638-Conf, para. 17 (i).

<sup>19</sup> ICC-01/04-01/06-638-Conf, para. 16 (i) to (vi).

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achieving the following goals, as highlighted in the Prosecution Information:

- i. "Proofing" allows assisting the process of human recollection. Differences in recollection and additional recollections can be identified and addressed prior to the witness' testimony;
- ii. "Proofing", by comparing the statements made by a witness during the proofing with the content of an earlier statement of the witness, allows detecting deficiencies and differences in recollection of the witness. As a consequence, in addressing such deficiencies and differences prior to witness' testimony, "proofing" is likely to allow the witness to present the evidence in a more accurate, complete, structured and efficient manner;
- iii. "Proofing" allows the Prosecution to disclose to the Defence both additional information and/or evidence of incriminatory or exculpatory nature in sufficient time prior to the witness' testimony, thereby reducing the prospect of the Defence being taken by surprise during the witness testimony;"<sup>20</sup>

17. These goals are accomplished through three remaining measures which, according to the Prosecution, are also encompassed by the definition of the practice of witness proofing:

- i. To allow a witness to read his/her statement and refresh his/her memory in respect of the evidence he/she will give;
- ii. Relying on the witness' statement, the Prosecution's Trial Lawyer puts to the witness the questions he/she intends to ask the witness during the witness' testimony, and in the order as anticipated;
- iii. To inquire about possible additional information of both, potentially incriminatory and potentially exculpatory nature;"<sup>21</sup>

**IV. Admissibility of the first component of the practice of witness proofing as defined in the Prosecution Information in light of Article 21 of the Statute**

18. Regarding the first component of the definition of the practice of witness proofing advanced by the Prosecution, the Chamber observes that those arrangements referred to in paragraphs 16 (i) to (vi) and 17 (i) of the

<sup>20</sup> ICC-01/04-01/06-638-Conf, para. 117.

<sup>21</sup> ICC-01/04-01/06-638-Conf, para. 16 (vii), (viii) and (ix).

Prosecution Information are generally referred to as "witness preparation" for giving oral testimony or "witness familiarisation" with the Court proceedings as opposed to "witness proofing".

19. The rationale behind the practice of witness preparation or familiarisation has been thoroughly explained by the Court of Appeal in *R. v. Momodou* [2005] EWCA Crim 177 (England and Wales) as follows:

This principle does not preclude pre-trial arrangements to familiarise witnesses with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balance appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcome. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence [...]."<sup>22</sup>

20. In the view of the Chamber, there are several provisions of the Statute and Rules which, without being referred to as "witness preparation", "witness familiarisation" or "witness proofing", encompass the measures contained in paragraphs 16 (i) to (vi) of the Prosecution Information in order to assist the witness in the experience of giving oral evidence before the Court so as to prevent the witness from finding himself or herself in a disadvantageous position, or from being taken by surprise as a result of his or her ignorance of the process of giving oral testimony before the Court.

21. In this regard, the Chamber is particularly mindful of:

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<sup>22</sup> *R v. Momodou* [2005] EWCA Crim 177, para. 62.

- i. article 57 (3)(c) of the Statute, which imposes on the Chamber the duty to provide, where necessary, for the protection of victims and witnesses;
  - ii. article 68 (1) of the Statute which imposes upon the different organs of the Court within the scope of their competency, including the Chamber, the duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses;
  - iii. rules 87 and 88 of the Rules, which provide for a series of measures for the protection of the safety, physical and psychological well-being, dignity and privacy of the witnesses, including measures to facilitate their testimony;
22. Moreover, the Chamber observes that article 43 (6) of the Statute imposes upon the Registrar the duty to set up a Victims and Witnesses Unit (" the VWU") within the Registry, which in consultation with the Office of the Prosecution, shall provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses. Furthermore, rules 16 (2) and 17 (2) (b) of the Rules, when elaborating on the functions of the VWU, expressly state that, in accordance with the Statute and the Rules, and in consultation when appropriate with the Chamber, the Prosecution and the Defence, the said unit shall perform *inter alia* the following functions in relation to witnesses:
- i. Assisting witnesses when they are called to testify before the Court;<sup>23</sup>
  - ii. Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings;<sup>24</sup>

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<sup>23</sup> Rule 17 (2) (b) (ii) of the Rules.

- iii. Informing witnesses of their rights under the Statute and the Rules;<sup>25</sup>
  - iv. Advising witnesses where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;<sup>26</sup>
  - v. Assisting witnesses in obtaining medical, psychological and other appropriate assistance;<sup>27</sup> and
  - vi. Providing witnesses with adequate protective and security measures and formulating long-term and short-term plans for their protection;<sup>28</sup>
23. Hence, the Chamber considers that those measures included in paragraph 16 (i) to (vi) of the Prosecution Information are not only admissible in light of the above-mentioned provisions of the Statute and the Rules, but are mandatory according to such provisions. Moreover, it is the view of the Chamber that labelling this practice as "witness proofing" is not suitable for the content of this practice, and that the expression "witness familiarisation" is more appropriate in this context.
24. Moreover, the Chamber finds that, according to article 43 (6) of the Statute and Rules 16 and 17 of the Rules, the VWU, in consultation with the party that proposes the relevant witness, is the organ of the Court competent to carry out the practice of witness familiarisation from the moment the witness arrives at the seat of the Court to give oral testimony.
25. The Chamber considers that this approach, in addition to being supported by the literal interpretation of the relevant provisions of the Statute and the

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<sup>24</sup> Rule 17 (2) (b) (iii) of the Rules.

<sup>25</sup> Rule 16 (2) (a) of the Rules.

<sup>26</sup> Rule 17 (2) (b) (i) of the Rules.

<sup>27</sup> Rule 17 (2) (a) (iii) of the Rules.

<sup>28</sup> Rules 17 (2) (a) (i) of the Rules.

Rules, is also warranted by the systematic and teleological interpretation of such provisions.

26. From a systematic perspective, the attribution of the practice of witness familiarisation to the VWU is consistent with the principle that witnesses to a crime are the property neither of the Prosecution nor of the Defence and that they should therefore not be considered as witnesses of either party, but as witnesses of the Court. In this regard, the Chamber recalls that this principle underpins several decisions taken by the Chamber in the proceedings leading to the confirmation hearing in the present case.<sup>29</sup>

27. Finally, from a teleological perspective, the Chamber considers that this approach will contribute to the full achievement of the object and purpose of the above-mentioned provisions, which is to ensure that the practice of "witness familiarisation" provides a thorough and objective preparation of witnesses for giving oral evidence before the Court. In the view of the Chamber, this would avoid from the outset any risk that witnesses may be confronted with one-side interpretations of the Statute and the Rules<sup>30</sup> and would make moot any allegation that the practice of "witness familiarisation" might be used to influence the testimony of the witnesses in some way.

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<sup>29</sup> See, for instance, the system according to which the Prosecution and the Defence may contact, prior to the confirmation hearing, the witnesses on which the other party intends to rely at the hearing. This system was established in the "Decision on a General Framework concerning Protective Measures for Prosecution and Defence Witnesses", issued by the single judge on 19 September 2006 (ICC-01/04-01/06-447).

<sup>30</sup> For instance, the Chamber finds that rule 140 of the Rules does not use the expressions "examination-in-chief", "cross-examination" and "re-examination", which have a very technical and specific meaning in a number of national jurisdictions, and instead uses expressions such as "question the witness" or "examine the witness". Therefore, within the process of witness familiarisation, the VWU shall inform the witness of the process of its examination by the Prosecution and the Defence, as opposed to the process of "examination-in-chief", "cross-examination" and "re-examination" referred to by the Prosecution in paragraph 16 (vi) of the Prosecution Information.