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No.: **ICC-02/05-03/09**
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TRIAL CHAMBER IV

Before: **Judge Joyce Aluoch, Presiding Judge**
Judge Silvia Fernández de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*
v.
ABDALLAH BANDA ABAKAER NOURAIN

Public

Public redacted version of the "Defence response to 'Prosecution motion regarding witness preparation'"

Sources: **Defence Team of Abdallah Banda Abakaer Nourain**

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I. Introduction

1. Only one out of the four cases which has reached the evidentiary phase of trial proceedings has permitted witness preparation.[1] The departure in the *Ruto & Sang* case from the practice in the other trials at this Court can be explained primarily by the alleged security issues facing witnesses in that case and the Prosecution's related argument that it had not had sufficient opportunity to meet with witnesses outside The Hague prior to trial.[2]

2. The peculiar facts and circumstances of the *Kenya I* case are not faced by the Prosecution in this case. Rather, the current concern is the fact that the Prosecution has embarked on a series of re-interviews with its core trial witnesses with some being re-interviewed for a third or fourth time.[3] Therefore, a witness preparation session would in some cases be the fourth or fifth substantive meeting with the Prosecution.

3. The plain fact is that all the components of witness preparation proposed in the *Prosecution motion regarding witness preparation* ("Motion")[4] could and should fairly be done by the Prosecution during the investigative phase or by the Victims and Witnesses Unit ("VWU") during the process of witness familiarisation.[5] This approach would ensure the fair trial rights of Mr. Banda, avoid the risks inherent in witness preparation and preserve "*the spontaneous*

[1] See *Prosecutor v. Ruto and Sang*, Decision on witness preparation, ICC-01/09-01/11-524, 2 January 2013 ("***Kenya* Witness Preparation Decision**") which permitted "witness preparation" (as such term is defined at paragraph 4 of the decision) in that case. Witness preparation was not permitted in the trial phase of the *Lubanga*, *Katanga and Ngudjolo*, or the *Bemba* cases. See *Prosecutor v. Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049 ("***Lubanga* Witness Proofing Decision**"); *Prosecutor v. Katanga and Ngudjolo*, Decision on a number of procedural issues raised by the Registry, ICC-01/04-01/07-1134, 14 May 2009; *Prosecutor v. Bemba*, Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, ICC-01/05-01/08-1016, 18 November 2010.
[2] *Kenya* Witness Preparation Decision, paras. 9, 10, 37.
[3] P-0355 was interviewed for the third time on 16 September 2013 and his statement disclosed to the Defence on 10 December 2013. P-0419 was interviewed for the third time between 12-14 March 2014 and his statement disclosed on 18 March 2014. P-0446 was interviewed for the third and fourth times between 23-25 March 2014 and 4-6 April 2014 and his statements disclosed on 2 April and 11 April 2014 respectively.
[4] ICC-02/05-03/09-574, 28 March 2014.
[5] The Defence adopts the definition of "witness familiarisation" used in the Kenya Witness Preparation Decision. See para. 4.

nature of testimony [which] can be of paramount importance to the Court's ability to find the truth".[6]

4. The defence for Mr. Abdallah Banda Abakaer Nourain ("Defence") respectfully submits that the Motion should, therefore, be dismissed.

II. Submissions

Witness preparation is not merited for the Prosecution case in the Banda trial

5. The Defence submits that there is nothing faced by the Prosecution in this case which would merit a departure from the practice adopted by Trial Chambers in the majority of the trials at this Court on the issue of witness preparation. In this case, the Prosecution makes no assertion that its witnesses are being interfered with and, thus, require extra care or that it is has any difficulty in meeting with them prior to arrival in The Hague.[7] In fact, and as stated above, the Prosecution is clearly able to meet with its witnesses with a series of re-interviews having already been embarked upon in recent months with core trial witnesses.[8] In addition, to the Defence's knowledge, [REDACTED].[9]

6. In fact, the distinguishing feature of the Prosecution case is the calibre and professionalism of all its witnesses.[10] Such individuals are clearly capable of providing clear and focused testimony with minimal direction by an experienced trial counsel and without any necessity for in-depth witness preparation.[11] This assertion is bolstered by the fact that the charges concern one event on one day. Similarly, it is to be expected that a basic explanation provided by VWU that

[6] *Lubanga* Witness Proofing Decision, para. 52.
[7] *Kenya* Witness Preparation Decision, paras. 9, 10, 37.
[8] See *supra*, fn 3.
[9] The Prosecution's current list of trial witnesses is provided in ICC-02/05-03/09-189-AnxA. [REDACTED]
[10] [REDACTED]
[11] Motion, paras. 4, 18, 19.

testimony will be limited to the three contested issues will be easily understood and appreciated by these individuals.[12]

7. From a review of the Prosecution's submissions, of concern is the fact that sufficient acknowledgement is not given to the experience and education level of its own witnesses. First, it is disingenuous to say that "*[m]ost witnesses have never testified in court and are unfamiliar with courtroom questioning.*"[13] The Defence understands that at least five of the witnesses (a third of the Prosecution's current witness list) have previously given evidence about the attack to one or more boards of inquiry, a process which, according to the items disclosed by the Prosecution, involved the questioning of witnesses by an investigating body.[14] Additionally, three witnesses have also testified at the *Abu Garda* confirmation proceedings,[15] [REDACTED]. Thus, taking into account any overlaps, seven witnesses – effectively half of the witness list – have very relevant experience which has already prepared them for testimony before the Court. Second, while the Defence does not underestimate the fact that testifying before the Chamber will not be an easy experience and that some of the witnesses will have to recall distressing events,[16] it is clear that the following description of the trial witnesses in *Ruto & Sang*, which the Prosecution refers to in paragraph 23 of the Motion, does not apply in this case:

> *…[The witnesses'] concerns may also result from anxiety about giving evidence in what may feel like a foreign and even hostile environment, a lack of confidence in their ability to communicate and articulate their experiences, and/or apprehension over the unfamiliar experience of being challenged during cross-examination.*[17]

[12] Motion, paras. 5.
[13] Motion, para. 23. See also para. 24: "Many witnesses have no experience testifying in court."
[14] The witnesses are P-0417, P-0419, P-0446, P-0486 and P-0487.
[15] P-0416, P-0446 and P-0445 all testified *viva voce* during the *Abu Garda* confirmation proceedings.
[16] Motion, para. 24.
[17] *Kenya* Witness Preparation Decision, para. 37.

8. In any event, the Defence submits that, given its specialised mandate,[18] the VWU is the appropriate body to handle the well-being of witnesses, including managing any stress and/or anxiety about testifying, and not the Prosecution. This approach was expressly endorsed by Trial Chamber I.[19]

Witness preparation is not universally accepted at this Court; witness familiarisation is preferred

9. The Prosecution assertion that witness preparation will assist the Trial Chamber in the truth-finding process[20] is not uncontroversial and it bears recalling that the practice of witness preparation at this Court is the exception and witness familiarisation is the rule.[21]

10. The Defence submits that Trial Chamber I's findings accurately reflect the purported link between witness preparation and the truth:

> *…with regard to any discussion on the topics to be dealt with in court or any exhibits which may be shown to a witness in court, the Trial Chamber is not convinced that either greater efficiency or the establishment of the truth will be achieved by these measures. Rather, it is the opinion of the Chamber that this could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony…A rehearsed witness may not provide the entirety or the true extent of his memory or knowledge of a subject, and the Trial Chamber would wish to hear the totality of an individual's recollection.*[22]

11. Notwithstanding the imposition of safeguards, it is difficult to appreciate how "*explain[ing], in general terms, the topics the calling party intends to cover in examination-in-chief, as well as the topics on which the witness may be questioned during cross-examination*" plus "*show[ing] the witness potential exhibits and ask[ing] him or her to comment on them*" can be viewed as anything other than a rehearsal

[18] Rome Statute, Article 43(6): "The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence" (emphasis added).
[19] *Lubanga* Witness Proofing Decision, para. 33.
[20] Motion, paras. 4, 21
[21] See text accompanying footnote 1 above.
[22] *Lubanga* Witness Proofing Decision, para. 51 (emphasis added).

for testimony with each stage being clearly mapped out by a topic marker and an indication being given of the exhibits the witness can expect to face.[23]

12. The Defence also notes that Trial Chamber I emphasised the connection between "*the spontaneous nature of testimony*" and "*the Court's ability to find the truth*", a vital connection which will be diminished, or even lost, by the practice of witness preparation.[24] This is particularly so in the area of cross-examination. The plain fact is that it is unlikely that many witnesses will be familiar with courtroom technique and so be able to predict with any certainty or accuracy how cross-examination might be approached. By having an experienced counsel provide advance notice of areas of possible cross-examination, vital spontaneity will be lost. For the avoidance of doubt, the Defence is not advocating that witnesses should be subject to unfair surprise or ambush. Instead, as noted by Trial Chamber I, "*[t]he pro-active role of judges under the Statute and Rules will help to ensure that witnesses are "re-victimised" by their testimony*"[25] and the proper and respectful conduct of proceedings.

13. The Prosecution's concern regarding a witness' ability to recall events almost seven years ago[26] can be dealt with adequately by providing each witness with his statement or statements for review prior to testimony, a procedure normally

[23] Motion, para. 9(ii) and (iii). The International Bar Association, in its in-depth July 2013 report *Witnesses before the International Criminal Court* (available at: http://www.google.nl/url?sa=t&rct=j&q=international%20bar%20association%20icc%20victims&source=web&cd=1&cad=rja&uact=8&ved=0CCkQFjAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3D9c4f533d-1927-421b-8c12-d41768ffc11f&ei=LoRVU7C4Eq_a0QW2lIHoDw&usg=AFQjCNE6FY2qydmbP3p4iVesgwFRXbevaQ&sig2=dJpdMbuATfnZ-7G8iBzO6A&bvm=bv.65058239,d.d2k), commented as follows with respect to Trial Chamber V(A) and (B)'s witness preparation decisions: "While the judges in the Kenya cases clearly define 'witness preparation', oddly they do not explain the term 'witness proofing', giving the impression that the two practises are different. However, it appears to be a matter of semantics since the term 'witness proofing' was employed and rejected in the *Lubanga*, *Katanga Ngudjolo* and *Bemba* cases, and has been long been coined to refer to a practice common in many national criminal justice systems and at the ad hoc tribunals where lawyers for either party are permitted to meet and re-interview their witnesses before they take the stand. While it appears as though a new term is being used to describe a novel procedure, in reality preparation appears to be precisely the same as proofing." (pgs. 21-22) (internal citations omitted)
[24] *Lubanga* Witness Proofing Decision, para. 52.
[25] *Lubanga* Witness Proofing Decision, para. 52.
[26] Motion, paras. 5

handled by the VWU during witness familiarisation.[27] In fact, the Defence submits that the components proposed by the Prosecution at paragraph 9(i) (reviewing statements), (iv) (explaining the role of the various participants in the courtroom) and (v) (answer witness questions) can all be dealt with properly and professionally by the VWU and, indeed, have been so in all cases without complaint save in *Ruto & Sang* where witness preparation was used instead.[28]

Witness preparation is prejudicial to Mr. Banda's fair trial rights

14. Not only is witness preparation unnecessary, but it also risks prejudicing Mr. Banda's fair trial rights. For the following four reasons, the Defence submits that the balance of fairness dictates that it should not be permitted.

15. *First,* witness preparation risks undermining Mr. Banda's right to timely disclosure and adequate time for the preparation of his defence.[29] If witness preparation is to be permitted up to the last 24 hours before a witness takes the stand, it will likely result in the disclosure of new information. As the Chamber is well aware, the Defence's ability to react to such information is severely constrained in this case.[30] The Defence is unable to have recourse to on-the-ground capabilities to mitigate the effects of any unanticipated late disclosure. As argued below, the focus should, thus, be on ensuring thorough investigations are conducted suitably in advance of trial, although, as noted in the *Kenyatta* case, this is not a licence for continuing post-confirmation investigations without sufficient cause.[31]

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[27] *Lubanga* Witness Proofing Decision, para. 55.
[28] *Kenya* Witness Preparation Decision, para. 23 citing to the Registry's submissions, ICC-01/09-01/11-455, para. 21 ("The VWU submits that witnesses have generally given positive feedback as regards the current witness familiarisation process and felt that they were well-prepared and knew what to expect in the courtroom").
[29] Rome Statute, Article 67(1)(b); Rules of Procedure and Evidence, Rules 76(1).
[30] See previous submissions at: Defence request for a temporary stay of proceedings, ICC-02/05-03/09-274, 6 January 2012; Confidential Redacted Version of "Defence Submissions on the Possible Date for the Commencement of the Trial" filed on 19 November 2012, ICC-02/05-03/09-422-Conf-Red, paras. 26-29.
[31] *Prosecutor v. Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, ICC-01/09-02/11-728, 26 April 2013, para. 120.

16. *Second*, there is no reason why the activities such as ensuring statements are accurate, clearing up discrepancies between statements (where more than one) and choosing relevant exhibits to use with a witness cannot be done during the course of investigations.[32] In fact, such activities should, as a matter of good practice, be done at an early stage, not least to respect the above referenced fair trial rights. The Defence submits that witness preparation is, in one sense, simply improperly delayed investigations. Bearing in mind that the charges were confirmed in this case some 3 years ago[33] and the Prosecution declared itself trial ready in November 2012,[34] there is clearly no excuse for such delay.

17. While there can never be a full-proof method to prevent unexpected issues arising during the course of testimony, the conduct of thorough early investigations is one way to mitigate the risk.[35] Plus, where surprises do emerge either in witness preparation or on the stand, these situations will still mean that the Defence must be given adequate time to prepare and a possible adjournment. Therefore, weighing in the balance the other risks and disadvantages posed by witness preparation, the practice should not be adopted in this case as it offers no clear advantages to the trial process save to assist the Prosecution to continue to perfect its case.

18. *Third,* the Defence submits that permitting the Prosecution an opportunity to meet with and effectively conduct a further interview with witnesses would be particularly prejudicial in the context of this case where several key Prosecution witnesses have recently been re-interviewed to deal with inconsistencies and gaps in their statements.[36] Witness preparation would amount to a "second bite

[32] Motion, paras. 9, 10, 20.
[33] Corrigendum of the "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Conf-Corr, 8 March 2011.
[34] Prosecution's Submissions on the Possible Date for Commencement of the Trial, 19 November 2012, ICC-02/05-03/09-421-Red.
[35] Motion, para. 21.
[36] See text at footnote 3 above. Also note the acknowledgement of the Prosecution's Senior Trial Attorney regarding why P-0419 and P-0446 were re-interviewed: "We re-interviewed these two witnesses because when I

of the cherry" or, more accurately in respect of some witnesses, even a fourth or fifth bite.

19. *Fourth,* the Defence submits that there is merit in the concerns raised by Trial Chamber I that it is not "*practically achievable*" to "*limit any pre-trial rehearsal during a 'proofing session'*".[37] Thus, it is preferable that the activities which the Prosecution proposes to undertake during witness preparation are done at a much earlier stage and not on the eve of testimony. Time provides a powerful safeguard to ensure that: (i) the meeting with the witness is sufficiently removed, temporally and geographically, so that it cannot amount to a rehearsal of evidence; and (ii) the effects of any inadvertent coaching will have worn off or been forgotten by the time of testimony.

20. Notwithstanding the foregoing, the Defence submits that if witness preparation is *generally* prohibited in this case such a ruling would not preclude the Prosecution from applying to the Trial Chamber to conduct witness preparation in exceptional circumstances and on a case-by-case basis.

A more flexible regime should apply during the Defence case

21. The Trial Chamber is well aware of the difficulties faced by the Defence in conducting investigations in this case. Accordingly, the Defence submits that the issue of witness preparation of defence witnesses should be revisited after the close of the Prosecution case.

III. Classification

22. This filing is submitted confidentially because it refers to confidential information pertaining to Prosecution witnesses. A redacted version will be filed in due course.

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came here, read through their statements and looked at them, there were clear inconsistencies that were diametrically opposed, there were areas that were not clear and that's why they were re-interviewed to clear those up." (ICC-02/05-03/09-T-24-ENG ET, p. 9, line 24 to p. 10, line 2.)

[37] *Lubanga* Witness Proofing Decision, para. 51.

IV. Relief Requested

23. For the reasons set out above, the Defence respectfully requests the Trial Chamber to dismiss the Motion.

Respectfully Submitted,

Mr. Karim A. A. Khan QC
Lead Counsel
for Abdallah Banda Abakaer Nourain

Dated this 24th day of April 2014

At The Hague, Netherlands