

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/05-03/09

Date: 4 May 2011

**TRIAL CHAMBER IV**

**Before:** Judge Joyce Aluoch, Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Silvia Fernandez de Gurmendi

**SITUATION IN THE DARFUR, SUDAN**

**IN THE CASE OF *THE PROSECUTOR***

***v.***

***ABDALLAH BANDA ABAKAER NOURAIN***

***&***

***SALEH MOHAMMED JERBO JAMUS***

**Public Document**

**Prosecution's Response to the Defence's Oral Application of 19 April 2011**

**Sources:** Office of the Prosecutor

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

**The Office of the Prosecutor**

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## I. Background

1. During the status conference held on 19 April 2011, the defence of Messrs Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") made an oral application ("Oral Application") requesting the Trial Chamber to decide (i) whether the Prosecution can conduct re-interviews prior to trial of witnesses that it relied upon at the confirmation stage and (ii) if so, what safeguards, if any, should be put in place by the Chamber.<sup>1</sup> The Defence also raised concerns that such re-interviews could amount to "*proofing*" of these witness.<sup>2</sup>

2. On 21 April 2011, Trial Chamber IV ("Trial Chamber") ordered the Prosecution to file a response to the Oral Application, including its observations on potential "safeguards" that could be instituted during any re-interviews.<sup>3</sup>

## II. Prosecution's Submissions

3. During the Status Conference on 19 April 2011, the Defence referred<sup>4</sup> to Trial Chamber I's "Decision regarding the Protocol on the practices to be used to prepare witnesses for trial", rendered in the *Lubanga* case on 23 May 2008<sup>5</sup> in arguing that the proposed re-interviews by the Prosecution are impermissible. As the Defence stated, "when, for example, does a witness re-interview become [witness] proofing"?<sup>6</sup>

4. The Defence's concerns are not well-taken. The Defence assumes that prosecutorial re-interview of a witness whose evidence was previously introduced is presumptively proofing. Witness proofing, however, does not depend on whether the witness previously was interviewed, whether the witness's evidence was offered at the confirmation proceeding, or indeed whether the witness is a prosecution or a defence witness. It is solely a matter of manner of the re-interview. Thus, a party

<sup>1</sup> ICC-02/05-03/09-T-10-ENG CT WT 19-04-2011, page 14, lines 5-9.

<sup>2</sup> ICC-02/05-03/09-T-10-ENG CT WT 19-04-2011 page 12, lines 3-4.

<sup>3</sup> ICC-02/05-03/09-137.

<sup>4</sup> ICC-02/05-03/09-T-10-ENG CT WT 19-04-2011 page 12, lines 10-11. The Defence quoted paragraph 38 of the Decision.

<sup>5</sup> ICC-01/04-01/06-1351.

<sup>6</sup> See fn. 2, *supra*.

that re-interviews a witness whose evidence was not relied on at confirmation or interviews a new witness for the first time would still be engaging in proofing if that interview were to be a rehearsal of the upcoming trial examination. On the other hand, a party who re-interviews a witness to ask new questions or to clarify matters and gain more precision, without rehearsing the upcoming trial examination, would not have engaged in proofing.

5. In other words, a pre-trial interview of a witness is not the same as a rehearsal of the witness's imminent upcoming testimony.<sup>7</sup> The latter constitutes witness proofing, and it was prohibited because of the concerns that it would deprive the Chamber of spontaneity and could constitute coaching.<sup>8</sup> Post-confirmation witness interviews, on the other hand, are not prohibited because they are recognized as being an entirely different matter. They do not occur immediately before the witness testifies, are part of the parties' necessary preparation for trial,<sup>9</sup> and more particularly constitute part of the Prosecution's investigative activities.

6. Article 54 of the Rome Statute obligates the Prosecution to conduct a thorough investigation "in order to establish the truth". Interviews to clarify certain aspects of their statements or to explore new lines of enquiry with them that may not have been envisaged at the initial interview is one of the means by which the Prosecution can ensure that its investigation is thorough and its presentation of the evidence at trial is accurate and complete.

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<sup>7</sup> See the Trial Chamber I's oral decision Friday, 30 January 2009 concerning the point in time at which contact with a witness may fall foul of its Decision on "witness proofing": ICC-01/04-01/06-T-113-Red-ENG at page 22, lines 1-10.

<sup>8</sup> ICC-01/04-01/06-1049, para 51.

<sup>9</sup> The Prosecution notes that the Defence objection was only to the Prosecution's re-interviews of witnesses who were relied on at the confirmation proceeding, but there is no principled reason to focus only on the Prosecution and only on "re-interviews" of witnesses who were relied upon at the confirmation stage. Instead, the rule should apply equally to the Defence (as does the witness proofing rule, which the Trial Chamber couched in very general terms See ICC-01/04-01/06-1049, para 57) and should apply regardless of whether the witness was relied on at the confirmation hearing or was subject to a prior witness interview.

7. The Prosecution's obligation to establish the truth is not, as the Appeals Chamber emphasised in *Lubanga*,<sup>10</sup> "limited to the time before the confirmation hearing". Rather, "the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth."<sup>11</sup> Re-interviewing witnesses before the trial is thus a proper continuation of those investigative activities.

8. Accordingly, the Prosecution submits that it is also part of the Prosecution's right to a fair trial to re-interview its witnesses after the confirmation of the charges, since it has the exclusive duty to prove guilt beyond a reasonable doubt and to investigate all relevant evidence regardless whether it is incriminating or potentially exonerating.<sup>12</sup> All trial chambers thus far have allowed the parties to interview or re-interview witnesses before trial, regardless whether those witnesses were relied on at the confirmation stage.<sup>13</sup> The Prosecution notes, moreover, that the practice of interviewing witnesses is not limited to the Prosecution. The Defence in both *Lubanga* and *Katanga* have done precisely the same thing with respect to defence witnesses,<sup>14</sup> and presumably have done so to address gaps in the defence theory as well as to exploit gaps in the Prosecution's case.

9. The Prosecution also disagrees that it is "unfair" for the Prosecution to be able to clarify matters with its witnesses after the Defence identified at confirmation the gaps it perceived in the Prosecution's evidence. To the contrary, it fundamentally disserves the goal of the trial, which is to discover the truth, to bar the Prosecution

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<sup>10</sup> ICC-01/04-01/06-568.

<sup>11</sup> Ibid at para. 53.

<sup>12</sup> Ibid at para. 54.

<sup>13</sup> For example, in *Katanga and Ngudjolo*, witness 28 was re-interviewed after the confirmation of charges in that case. Mention of this was made in ICC-01/04-01/07-2406-Red2. See further: ICC-01/04-01/07-T-200-Red-ENG CT, p. 1, line 15 to p. 4, line 21, 11 October 2010. Re-interviews post confirmation of charges have also taken place in the *Bemba* case. Mention of this was made in ICC-01/05-01/08-767-Red2 at paras 2, 7 and 10.

<sup>14</sup> For example, in *Lubanga*, witness 297, who was originally interviewed by the Prosecution, was consequently interviewed by the Defence. Reference to prior interviews by both parties is made in ICC-01/04-01/06-T-280 - Red-ENG WT, page 11, at lines 6-15. Specific reference to witness being interviewed by the Defence is mentioned in ICC-01/04-01/06-T-210-ENG CT WT (rev.dec.2143), page 35 lines 20-25 and page 36, as well as in ICC-01/04-01/06-T-274-T-Red-ENG WT, pages 2-4.

from investigating those gaps – to either determine if there is exculpatory evidence or to fill them with evidence of the Accused’s guilt – in order to make the most accurate presentation possible. It is also unfair to the Prosecution that the Defence may strengthen its case after confirmation, based on the evidence and arguments offered by the Prosecution, but the Prosecution is forbidden to attempt to meet its burden of proving guilt beyond reasonable doubt by taking the same steps on its behalf.

10. The Prosecution also does not consider that there is need for the Chamber to institute particular “safeguards” during either party’s pre-trial interviews or re-interviews of witnesses. Counsel for each party are aware of their ethical and legal obligations. Moreover, the witnesses will provide witness statements that will be available to the other party. And the witnesses may be cross-examined on the processes under which those statements have been obtained, and if the process amounted to a rehearsal of testimony, the Chamber may take that into account in evaluating credibility.

### **III. Conclusion**

11. Accordingly, the Prosecution requests the Chamber to dismiss the Defence’s Oral Application.



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Luis Moreno-Ocampo  
Prosecutor

Dated this 4<sup>th</sup> day of May 2011  
At The Hague, The Netherlands