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TRIAL CHAMBER IV

Before:

**Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernández de Gurmendi**

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

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

**Sources: Defence Team of Abdallah Banda Abakaer Nourain
 Defence Team of Saleh Mohammed Jerbo Jamus**

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

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I. Introduction

1. Pursuant to leave granted by the Trial Chamber in its Decision on the defence request for leave to reply,¹ the Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") respectfully submit this Reply to the Prosecution's Response to the Defence's Oral Application of 19 April 2011² ("Response"), filed 4 May 2011. The Defence submit that the Prosecution erred in limiting the definition of witness proofing to the rehearsal of the witness's imminent upcoming testimony and incompletely presented the jurisprudence on re-interviewing witnesses and on investigation post-confirmation.
2. For the reasons set out below, the Defence respectfully request that, if the Trial Chamber permit the Prosecution to conduct the proposed re-interviews, the Chamber consider the imposition of safeguards. The Defence submit that safeguards are necessary in order to reduce the risk that re-interviews in the context of the present proceedings trespass into inappropriate areas of witness proofing and/or evidence checking.
3. For the reasons detailed in this Reply and advanced at the Status Conference on 19 April 2011,³ the Defence request firstly, that the Prosecution be required to seek the authorisation of the Trial Chamber before carrying out a re-interview, that such authorisation should only be granted by the Trial Chamber if a new issue has arisen in the proceedings or there is an issue which could not reasonably have been addressed or anticipated by due investigative diligence at the first interview. Secondly, the Defence propose that in the event that such authorisation is granted, suggested safeguards (such as video and audio recording and the presence of the Defence) be imposed in order to preserve the integrity of the process.

¹ ICC-02/05-03/09-147.

² ICC-02/05-03/09-140.

³ ICC-02/05-03/09-T-10-ENG.

II. Background

4. At the Status Conference held on 19 April 2011, the Defence expressed the concern that the re-interviews of six witnesses planned by the Prosecution might raise difficulties similar to those underlying the prohibition against witness proofing⁴ at the International Criminal Court.⁵ Therefore, the Defence requested that the Trial Chamber decide whether such re-interviews should be allowed at all, and if they were allowed, what measures ought to be put in place to guard against various difficulties arising so as to best preserve the integrity of the re-interview process (“Oral Application”).⁶ During the Status Conference, the Prosecution had the opportunity to respond to the Oral Application.⁷ On 21 April 2011, the Trial Chamber ordered the Prosecution to file a written response to the Oral Application, including its observations on potential safeguards.⁸

5. On 4 May 2011, the Prosecution submitted their Response, in which the Prosecution state that re-interviews serve the purpose of asking new questions or clarifying matters and gaining more precision.⁹ The Prosecution equate proofing to “a rehearsal of the witness’s imminent upcoming testimony.”¹⁰ It is the Prosecution’s submission that its proposed re-interviews are part of its on-going investigation and are carried out to establish the truth.¹¹ Furthermore, the Prosecution argue that their right to a fair trial comprises the right to undertake re-interviews,¹² including for the purpose of filling gaps in

⁴ See ICC-01/04-01/06-679.

⁵ In particular, Defence Counsel noted the principle set out in Trial Chamber I’s 23 May 2008 Decision in the *Lubanga* case (ICC-01/04-01/06-1351) that discrepancies in a witness’s prior statements “should be ventilated in court” as the “Chamber is more likely to identify the truth if the witness explains any reservations about the[ir] written account during their oral testimony [...]” ICC-02/05-03/09-T-10-ENG CT WT 19-04-2011, page 12, lines 18 to page 13, line 13.

⁶ ICC-02/05-03/09-T-10-ENG, page 14, lines 5-9.

⁷ *Ibid.*, page 14, line 17 to page 15, line 7.

⁸ ICC-02/05-03/09-137.

⁹ ICC-02/05-03/09-140, para. 4.

¹⁰ *Ibid.*, para. 5.

¹¹ *Ibid.*, paras. 5 and 6.

¹² *Ibid.*, para. 8.

Prosecution's evidence identified at the confirmation stage.¹³ Additionally, the Prosecution note that other Trial Chambers have allowed the parties to carry out re-interviews.¹⁴

6. On 10 May 2011, the Defence submitted its Application for Leave to Reply to Prosecution's Response to the Defence's Oral Application of 19 April 2011 in which it identified three issues to be addressed if leave to reply was granted.¹⁵ On 12 May 2011, the Trial Chamber granted leave to reply in relation to the three issues identified.¹⁶

III. Defence Submissions

7. In accordance with the Chamber's decision granting leave to reply, this Reply addresses the following issues:
 - (a) The definition and scope of witness proofing as defined by the Court's jurisprudence.¹⁷
 - (b) The circumstances under which re-interviews have taken place in other cases before the Court.¹⁸
 - (c) The Prosecution's right to continue investigations post-confirmation.¹⁹

Issue 1: Definition and Scope of Witness Proofing and the Defence's Concern

8. The essence of the Defence's underlying concern regarding the planned re-interviews emanates from the particular facts and circumstances of this case. The Defence is compelled to make this observation since the Prosecution's Response is predicated on a misstatement of the Defence's position. Contrary to the Prosecution's assertion, the Defence do not assume that the re-interviews of witnesses whose evidence was previously introduced amount to

¹³ *Ibid*, para. 9.

¹⁴ *Ibid*, para. 8.

¹⁵ ICC-02/05-03/09-144, para. 8.

¹⁶ ICC-02/05-03/09-147.

¹⁷ ICC-02/05-03/09-144, para. 8(c).

¹⁸ *Ibid*, para. 8(b).

¹⁹ *Ibid*, para. 8(a).

witness proofing.²⁰ For the reasons set out below, re-interviews have the very real potential of becoming witness proofing and/or evidence checking in the specific and unique circumstances of this case.

9. First, the Defence have been extraordinarily candid in their discussions with the Prosecution with regard to Defence case and this has led to a subsequent narrowing of the contested issues and significant agreement as to facts.²¹ In this process, certain details of Defence strategy and case theory have been disclosed which would not ordinarily be divulged to the Prosecution. Second, the Prosecution's evidence on the alleged attack on MGS Haskanita has been tested twice in the context of the confirmation hearings in the *Abu Garda*²² and the *Banda and Jerbo*²³ cases, respectively. A third concern arises from the time which has elapsed since the first interviews. As the original interviews took place between 2008 and 2010,²⁴ the question which arises is why there is a need now to clarify aspects of these witnesses' statements.
10. The Defence submits that the confirmation of charges hearing is a juncture in the criminal process of the ICC after which the legal landscape changes in significant respects. This is especially so when Defence counsel have tested the evidence in related hearings, or made certain concessions and the Pre-Trial Chamber have ruled on various aspects of the Prosecution's case, including issues relating to witnesses. At this stage the Defence should have a realistic expectation that the Prosecution's evidence has crystallised and is not going to be subject to further change save in respect of completely new issues or other exceptional circumstances. Certainly, on the basis of the good administration of justice, work "to clarify matters and gain more precision", as the

²⁰ ICC-02/05-03/09-140, para. 4.

²¹ Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons, 16 May 2011.

²² ICC-02/05-02/09-243-Red.

²³ ICC-02/05-03/09-121-Conf.

²⁴ The witnesses were interviewed on the following dates : Witness 304 on 24 to 27 September 2008; Witness 305 on 8 to 9 August 2008; Witness 441 on 9 to 14 October 2009; Witness 466 on 2 to 4 December 2009 and 15 to 19 March 2010; Witness 307 on 10 to 12 August 2008; Witness 312 on 19 to 23 September 2008.

Prosecution expressly intend to,²⁵ and fill gaps identified at confirmation²⁶ should not normally be undertaken post-confirmation, at least in relation to witnesses already known and interviewed prior to confirmation. Accordingly, it is in this context that the Defence submit that the Prosecution's proposed re-interviews give rise to a very real risk that they may amount to *de facto* evidence checking (or stray into this territory), and/or fall within the definition of witness proofing.

11. Any doubt that the type of questioning envisaged by the Prosecution constitutes evidence checking is removed by the Prosecution's own admission that the proposed re-interviews aim at "clarify[ing] certain aspects of the previous statements."²⁷ In a *Lubanga* decision "evidence checking" is defined as a procedure of "establishing whether or not the witness maintains the original account or whether he or she considers that changes to the written account need to be made."²⁸ The *Lubanga* Trial Chamber held that any discrepancies should emerge in court. The Trial Chamber "is more likely to identify the truth" if those discrepancies appear in court for the first time.²⁹ Concerns regarding the truth seeking function of the Trial Chamber underlie the prohibition against witness proofing. The type of questioning proposed by the Prosecution, therefore, falls within the prohibition of evidence checking and witness proofing.

12. In an attempt to allay concerns that re-interviews may become witness proofing, the Prosecution erroneously narrow the definition of witness proofing and submit that the "rehearsal of the witness's imminent upcoming testimony" constitutes witness proofing.³⁰ However, as is clear from a detailed consideration of this Court's case law, proofing is not simply the rehearsal of

²⁵ ICC-02/05-03/09-140, para. 4.

²⁶ *Ibid.*, para. 9.

²⁷ *Ibid.*, para. 6.

²⁸ ICC-01/04-01/06-1351, para. 38.

²⁹ *Ibid.*

³⁰ ICC-02/05-03/09-140, para. 5.

testimony nor does it only occur at the stage just prior to the witness taking the stand.

13. In support of its limited definition of proofing, the Prosecution rely on a decision in *Lubanga*.³¹ This decision, however, prohibits witness proofing “as characterised by the prosecution” in that case.³² Of key importance is the fact that in that case the Prosecution sought leave to carry out witness proofing which would include “addressing any areas within the witness statement that may be addressed in court”.³³ Furthermore, the Prosecution assured the Trial Chamber, that the type of questioning proposed would not constitute a rehearsal of the questions which would be asked in court.³⁴ Nevertheless, the Trial Chamber held that addressing “topics to be dealt with in court” may lead to “a distortion of the truth”.³⁵ According to the Trial Chamber, “[t]he 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.”³⁶ The Chamber’s reasoning shows that the underlying concerns regarding witness proofing are not limited to the rehearsal of testimony.

14. In addition, nothing in the *Lubanga* decision cited by the Prosecution suggests that the underlying concerns regarding witness proofing are limited to the familiarisation stage. Indeed, in an oral decision in the same case, the Trial Chamber confirmed that meetings with witnesses *prior to* the familiarisation stage are conditional on avoiding witness proofing: “Under normal circumstances, a party is entitled to meet with potential witnesses in the absence of the other party, prior to the commencement of the familiarisation

³¹ *Ibid.*, para. 5.

³² ICC-01/04-01/06-1049, para. 57. See paras. 48-49 for the Prosecution’s proposed witness proofing activities and the Trial Chamber’s views thereon.

³³ *Ibid.*, para. 48 citing to ICC-01/04-01/06-T-58-ENG, pp. 54.

³⁴ ICC-01/04-01/06-T-58-ENG, page 57, lines 23 - 25, page 55, line 1 and page 59, lines 4 - 15.

³⁵ ICC-01/04-01/06-1049, para. 51.

³⁶ *Ibid.*, para. 52.

process, provided the interview does not constitute witness proofing.”³⁷ This clearly demonstrates that proofing may occur before the familiarisation stage.

Issue 2: Re-interviews of Witnesses

15. As is evident from the following analysis of the jurisprudence, the circumstances in which re-interviews by the Prosecution have been conducted in other cases before this Court support the Defence submission that the issue of re-interviews is not straight forward and may require Court supervision and the imposition of safeguards.³⁸

16. The Prosecution submit that “[a]ll trial chambers thus far have allowed the parties to interview or re-interview witnesses before trial”.³⁹ However, the Prosecution neglects to mention the important contextual factors which triggered the re-interviews, the fact that in several cases court authorisation for the re-interview was required and that in some instances safeguards were imposed by the court.

17. The Prosecution cite to an oral ruling in *Lubanga*⁴⁰ in support of the proposition that “a pre-trial interview of a witness is not the same as a rehearsal of the witness’ imminent upcoming testimony.”⁴¹ Indeed, the Trial Chamber in that case held that the Prosecution was not at fault in contacting its witness since the witness had not yet arrived in The Hague. However, the re-interview in question appears not to have been a substantive re-interview, but rather concerned the witness’ security and possible protective measures.⁴² In any event, it is certainly not authority for the proposition quoted and it is not comparable to the re-interviews that the Prosecution intends to carry out

³⁷ ICC-01/04-01/06-T-295-ENG ET WT, page 5, lines 14 - 17.

³⁸ ICC-02/05-03/09-T-10-ENG, page 12, lines 1 to 3 and page 13, lines 3 to 8.

³⁹ ICC-02/05-03/09-140, para. 8.

⁴⁰ ICC-01/04-01/06-T-113-Red-ENG.

⁴¹ ICC-02/05-03/09-140, para. 5.

⁴² ICC-01/04-01/06-T-113-Red-ENG, pp. 20-21.

in this case which aim to clarify certain aspects of the witnesses' statements and explore new lines of enquiry.

18. Further, the Prosecution cite to the *Katanga and Ngudjolo* case in which, according to the Prosecution, "witness 28 was re-interviewed after the confirmation of charges in that case."⁴³ While the Defence would dispute that under the circumstances of that case the re-interview was appropriate, the Defence note that the Prosecution argued that the re-interview was necessary to address "new elements"⁴⁴ and when ruling on the issue, the Trial Chamber granted the re-interviews on this basis. The Trial Chamber noted that neither Defence team objected to the re-interview.⁴⁵ Moreover, the Trial Chamber ordered that the interview be recorded and that the recording be disclosed along with a written statement.⁴⁶

19. The Prosecution also cite to a decision in *Bemba*.⁴⁷ In that case,⁴⁸ the Prosecution had already conducted the re-interview and sought to disclose the re-interview past the disclosure deadline. The parties did not deal with the issue of the re-interview, and the Trial Chamber's decision accordingly only deals with the issue of disclosure. Prosecution reliance on this case is, therefore, also misplaced.

20. Finally, the Prosecution state that the defence in the *Lubanga* and *Katanga* cases have carried out re-interviews "presumably [...] to address gaps in the defence theory as well as to exploit gaps in the Prosecution's case."⁴⁹ However, none of the referenced authorities in the Response support the position that the Defence conducted re-interviews as described by the Prosecution. The cited jurisprudence rather shows that the Prosecution sought

⁴³ ICC-02/05-03/09-140 04-05-2011, fn. 13.

⁴⁴ ICC-01/04-01/07-2406-Red2, para. 12.

⁴⁵ ICC-01/04-01/07-T-200-Red-ENG, page 4, lines 2-4.

⁴⁶ ICC-01/04-01/07-T-200-Red-ENG at page 4, lines 21-24.

⁴⁷ ICC-02/05-03/09-140, fn. 13.

⁴⁸ ICC-01/05-01/08-767-Conf-Exp.

⁴⁹ ICC-02/05-03/09-140, para. 8.

leave to re-interview from the Trial Chamber, and that only new matters were to be covered.

21. None of the citations to the *Lubanga* case relate to re-interviews by the Defence. The court transcript of 5 May 2010 concerns a re-interview conducted by the Prosecution and not the Defence.⁵⁰ As to the *Lubanga* court transcript of 17 September 2009,⁵¹ it is clear that this witness was originally a Prosecution witness, and the matter at issue was not a re-interview but simply whether the witness consented to being contacted by the Defence.⁵² Finally, the *Lubanga* court transcript of 31 March 2010, also cited in the Response,⁵³ concerns the same witness and includes submissions by the parties concerning the nature of the pre-trial interview of the witness by the Prosecution and whether the Defence may be present.⁵⁴ The Defence also note that the Prosecution fail to provide any citation to *Katanga*.

22. A consideration of the jurisprudence regarding re-interviews demonstrates that the Prosecution has sought the Chamber's authorisation before conducting a re-interview.⁵⁵ Moreover, in cases where re-interviews were conducted, safeguards were imposed. In addition to the *Katanga* case discussed in paragraph 18 above, in *Lubanga*, the Trial Chamber imposed strict conditions on the re-interview of two intermediaries by the Prosecution during trial. A Defence representative was allowed to be present and an audio or video recording of the interview was to be disclosed to the Defence immediately after the interview.⁵⁶ In sum, the cases relied upon by the

⁵⁰ "With respect to Witness 297, the Chamber may recall that the Prosecution had asked for an interview with 297 because the matters that were going to be covered were matters that had not been hitherto covered in the previous two statements." ICC-01/04-01/06-T-280-RED-ENG WT at p. 11, lines 6-15.

⁵¹ The 17 September 2009 transcript is ICC-01/04-01/06-T-210-ENG CT WT (rev.dec.2143) cited in ICC-02/05-03/09-140, fn. 14.

⁵² ICC-01/04-01/06-T-210-ENG CT WT (rev.dec.2143), page 35, lines 20-25 and page 36.

⁵³ ICC-02/05-03/09-140, fn. 14.

⁵⁴ ICC-01/04-01/06-T-274-Red-ENG, pages 2-4.

⁵⁵ ICC-01/04-01/06-T-295-ENG, page 2, line 22 to page 3, line 2.

⁵⁶ ICC-01/04-01/06-T-295-ENG, page 6, lines 7-13.

Prosecution in the Response regarding re-interviews in other cases does not support their assertions and supports the relief requested by the Defence.

23. In addition to the foregoing, the Prosecution objection to the Defence's focus on re-interviews by the Prosecution of witnesses relied on at the confirmation hearing is flawed.⁵⁷ The objection ignores the Defence's underlying concern regarding re-interviews becoming witness proofing and/or evidence checking. Further, the Defence focus stems from: first, the fundamentally different roles and functions of the Prosecutor and the Defence in proceedings before this Court; and second, the uniquely different facts and circumstances of this case and the impact such facts and circumstances have on the position of the Defence in this case.

24. The case against the accused is brought at the instance of the Prosecutor. He decides that a case is brought, when it is brought and knows what evidence has and may be obtained. The Defence does not have this luxury and is, therefore, not in the same position. As the Prosecution acknowledges, "it has the exclusive duty to prove [the] guilt [of the accused] beyond a reasonable doubt and to investigate all relevant evidence".⁵⁸ The Prosecution is also tasked with establishing the truth.⁵⁹ However, these duties must be conducted at all times in accordance with the accused's fair trial rights including ensuring that the accused are fully and timeously informed of the case they are to meet and that the evidence which is to be used against them has not been improperly obtained. By contrast, the Defence role and function is to rigorously test the Prosecution evidence, advance the client's case and to play its part in ensuring the trial is conducted fairly and in accordance with the rights of the accused. It is on this basis that interviews and re-interviews are conducted by the Defence and also why the Defence must continue to

⁵⁷ ICC-02/05-03/09-140, para. 5, fn.9.

⁵⁸ *Ibid*, para. 8.

⁵⁹ Rome Statute, Article 54(1)(a).

investigate and strengthen its case post-confirmation. One way this difference is evidenced by is the different disclosure obligations imposed to the Prosecution and the Defence pursuant to the Statute.

25. In view of these differing roles, and where, as here, there is a real risk that the serious concerns stated above may materialise, Court oversight and safeguards are required. As highlighted above, the further risk factor in this case, stemming from the parties' very detailed discussions on agreed facts and contested issues lends further weight to the concern that re-interviews are being undertaken in light of the information provided by the Defence during this process. Thus, the above detailed safeguards are required to protect the integrity of the evidence gathering and truth seeking process.

26. Crucially, the request for a ruling on whether the Prosecution be allowed to re-interview at this stage, and if so the requirement for safeguards, does not run contrary to any known jurisprudence of the Court. While the Defence may well have recourse to re-interviewing, the authorities cited by the Prosecution to demonstrate that the same regime applies are, as discussed above, not correct. In fact, Defence re-interviews of four witnesses who were at that time prisoners in DRC was not made subject to any safeguards. The Trial Chamber ordered the Registry's involvement to ensure that the interviews were substantive rather than to supervise Defence conduct.⁶⁰ This is in contrast to Prosecution re-interviews which have involved the imposition of safeguards to address witness proofing/evidence checking concerns.

Issue 3: Continuation of the Prosecution's Investigation after Confirmation

27. In its submission on the right to continue its investigation after the decision on confirmation of the charges, the Prosecution refer to an Appeals Chamber's

⁶⁰ ICC-01/04-01/07-2755, paras. 11-14.

ruling in *Lubanga*.⁶¹ The Defence note that the Appeals Chamber, while holding that the Prosecution must be allowed to continue to investigate after the confirmation of charges,⁶² also observed that “it would be desirable for the investigation to be complete by the time of the confirmation hearing [...]”.⁶³ The Appeals Chamber also found that “in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence [...]”, in particular in circumstances where “more compelling evidence” becomes available.⁶⁴

28. The *Lubanga* Appeals Chamber decision thus supports the position that the Prosecution’s investigations should be reasonably complete by the time of the confirmation hearing. The Defence submit that at the present stage of the *Banda and Jerbo* proceedings the Prosecution should have completed its investigation on issues which, through the exercise of reasonable diligence, are foreseeable before the confirmation stage. The Defence acknowledge that the Prosecution may, however, continue its investigation regarding new issues arising out of the proceedings or in relation to issues or evidence which due to exceptional circumstances were not previously available.

29. The Prosecution state that the purpose of the re-interviews is *inter alia* “to clarify certain aspects of their statements [...]”.⁶⁵ The Prosecution conducted and directed the interviews culminating in the production of the witness statements, which it now seeks to clarify. It has also been in possession of these statements for a considerable period of time. In these circumstances, the Defence submit that the reasonable diligence standard is not satisfied where no attempt was made to address the lack of clarity of a witness statement during the initial interview and no explanation for such failure is provided.

⁶¹ *Ibid*, para. 7.

⁶² ICC-01/04-01/06-568, paras. 52 – 53.

⁶³ ICC-01/04-01/06-568, para. 54.

⁶⁴ ICC-01/04-01/06-568, para. 54.

⁶⁵ ICC-02/05-03/09-140, para. 6.

IV. Relief Requested

30. In the circumstances of the present case detailed in paragraph 9 above there is a real risk that re-interviews may not be part of new/further investigation, but as indicated by the Prosecution in their Response⁶⁶ amount to proofing and/or evidence checking. Specifically, the re-interviews may be triggered by the advantage which the Prosecution has gained via discussions with the Defence and the facts and arguments that have been presented at two confirmation hearings. Accordingly, the Defence submit that the locus of fairness between the Prosecutions's right to investigate and the fair trial rights of Mr. Banda and Mr. Jerbo means that safeguards are required. The Defence respectfully request the Trial Chamber to rule on whether such Prosecution re-interviews post-confirmation are permitted at all. In the event that they are permitted in principle, the Defence request the Trial Chamber to rule that the Prosecution seek authorisation before carrying out re-interviews. The Defence submit that the Trial Chamber limit the scope of such re-interviews to new issues and impose safeguards such as the presence of the Defence and video or audio recording of the re-interviews followed by full and immediate disclosure.

31. The Defence submits that that the jurisprudence of the Court cited in the Oral Application⁶⁷ and further referenced in this Reply supports the imposition of such safeguards. Furthermore, due to the case specific nature of the Defence's concerns, the Defence submit that the relief requested may be limited to this case.

⁶⁶ See para. 4 above and related footnotes.

⁶⁷ ICC-02/05-03/09-140, paras. 4, 6 and 9.

Respectfully Submitted,



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Dated this 16th Day of May 2011

At Nairobi, Kenya