

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 June 2011

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN
AND SALEH MOHAMMED JERBO JAMUS***

Public

Decision on the re-interviews of six witnesses by the prosecution

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

Counsel for the Defence

Mr Karim A.A. Khan QC

Legal Representatives of Victims

Mr Brahim Koné

Ms Hélène Cissé

Mr Akin Akinbote

Mr Frank Adaka

Sir Geoffrey Nice QC & Mr Rodney
Dixon

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Others
Section**

Trial Chamber IV ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of the *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* ("Banda and Jerbo" case) issues the following Decision on the re-interviews of six witnesses by the prosecution.

I. Background and Submissions

1. During the status conference on 19 April 2011, the defence of Messrs Abdallah Banda Abaker Nourain and Saleh Mohammed Jerbo Jamus ("defence") made an oral application raising concerns about the intended re-interviews by the Office of the Prosecutor ("prosecution") of six witnesses.¹
2. On 21 April 2011 the Trial Chamber instructed the prosecution to file a response to the defence oral application, including its observations on potential "safeguards" as suggested by the defence that could be instituted during any possible re-interviews.²
3. The prosecution filed its response on 4 May 2011, requesting that the Chamber dismiss the defence oral application.³ In the course of its submissions, the prosecution disagrees with the defence suggestion that the proposed re-interviews of prosecution witnesses raise concerns about witness proofing.⁴ The prosecution submits that determining whether a given interview constitutes witness proofing does not depend on whether the witness was previously interviewed but instead on

¹ Transcript of hearing on 19 April 2011, ICC-02/05-03/09-T-10-ENG ET, page 11, line 25 to page 13, line 18; page 13, lines 22 – 24; page 14, lines 3 – 11; page 15, lines 11 - 15 ; and page 15, line 17 to page 17, line 1 and Prosecution's Response to the Trial Chamber's Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, 14 April 2011, ICC-02/05-03/09-131, paragraph 6.

² Order requesting the prosecution to file a response to the defence oral application of 19 April 2011, ICC-02/05-03/09-137.

³ Prosecution's Response to the Defence's Oral Application of 19 April 2011, 4 May 2011, ICC-02/05-03/09-140.

⁴ ICC-02/05-03/09-140, paragraphs 3 to 4.

the manner in which the interview is conducted.⁵ It is submitted that any interview held for the purpose of rehearsing the witness's upcoming trial testimony would constitute witness proofing.⁶ The prosecution distinguishes between interviews conducted for the purpose of witness proofing, which are prohibited, and any post-confirmation hearing interviews (which do not take place immediately before the witness testifies) that it may hold with witnesses as part of the investigative process.⁷

4. The prosecution observes that Article 54 of the Rome Statute ("Statute") obligates it to conduct a thorough investigation in order to establish the truth, and it submits that re-interviews of witnesses in order to "clarify certain aspects of their statements or to explore new lines of enquiry" assist with a thorough investigation and help to ensure that the prosecution's presentation of evidence at trial is accurate and complete.⁸
5. The prosecution relies on jurisprudence of the Appeals Chamber in the case of *The Prosecutor v. Thomas Lubanga* ("Lubanga case") setting out that "the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth".⁹ It is further submitted that all Trial Chambers of the Court have allowed the parties to re-interview witnesses before trial, regardless of whether the witnesses were relied on at the confirmation stage.¹⁰ According to the prosecution, no particular "safeguards" are necessary during

⁵ ICC-02/05-03/09-140, paragraph 4.

⁶ ICC-02/05-03/09-140, paragraphs 4 and 5.

⁷ ICC-02/05-03/09-140, paragraph 5.

⁸ ICC-02/05-03/09-140, paragraph 6.

⁹ ICC-02/05-03/09-140, paragraph 7, referring to the Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, paragraph 52.

¹⁰ The prosecution also submits that the defence in the *Lubanga* and *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* cases re-interviewed their own witnesses. ICC-02/05-03/09-140, paragraph 8.

either party's re-interviews of witnesses, as it is submitted that counsel for each party are aware of their ethical and legal obligations. It is suggested that the disclosure of witness statements to the opposing party and the possibility of cross-examination at trial concerning the processes under which the statements were obtained are sufficient.¹¹ The prosecution submits that if the interview process "amounted to a rehearsal of testimony, the Chamber may take that into account in evaluating credibility".¹²

6. On 11 May 2011, the Chamber granted leave to the defence to reply to the prosecution's response on three issues raised in the response.¹³
7. On 16 May 2011 the defence filed its "Reply to the Prosecution's Response to the Defence's Oral Application of 19 April 2011"¹⁴ arguing that the prosecution incompletely presented the Court's jurisprudence and requesting a ruling by the Chamber concerning whether post-confirmation hearing re-interviews by the prosecution of its witnesses are permitted under any circumstance.¹⁵ In the course of its submissions, the defence focuses on three issues, namely (i) the definition and scope of witness proofing as defined by the Court's jurisprudence; (ii) the circumstances in which re-interviews have occurred in other cases before the Court; and (iii) the prosecution's right to continue investigations following the confirmation hearing.¹⁶

¹¹ ICC-02/05-03/09-140, paragraph 10.

¹² ICC-02/05-03/09-140, paragraph 10.

¹³ Decision on the defence request for leave to reply, 12 May 2011, ICC-02/05-03/09-147. See also Defence Application for Leave to Reply to Prosecution's Response to the Defence's Oral Application of 19 April 2011, 10 May 2011, ICC-02/05-03/09-144, paragraphs 6 to 8.

¹⁴ ICC-02/05-03/09-149.

¹⁵ ICC-02/05-03/09-149.

¹⁶ ICC-02/05-03/09-149, paragraph 7.

8. In the first place, the defence states that it does not assume that the re-interviews of witnesses amount to witness proofing but submits that for several reasons, re-interviews “have the very real potential of becoming witness proofing and/or evidence checking” in the specific context of the present case.¹⁷ The suggested reasons include the joint agreement of facts and the disclosure to the prosecution of certain details of the defence case theory, the fact that the prosecution’s evidence was submitted and “tested” during the confirmation hearings in the case of the *Prosecutor v. Bahar Idriss Abu Garda* (“*Abu Garda* case”) and in the current case, and the fact that the initial interviews took place between 2008 and 2010.¹⁸

9. The defence submits that following the hearing on the confirmation of charges there should be a “realistic expectation” that the prosecution’s case will no longer be subject to change, save for “completely new issues or other exceptional circumstances that arise”.¹⁹ It is further submitted that the jurisprudence of the Appeals Chamber in the *Lubanga* case supports the position that the prosecution’s investigations should be “reasonably complete” by the time of the confirmation hearing.²⁰ The defence also relies on jurisprudence of Trial Chamber I in the *Lubanga* case to support its contention that insofar as the prosecution’s proposed re-interviews aim to clarify aspects of the witness’s previous statements, “[t]he type of questioning proposed by the Prosecution [...] falls within the prohibition of evidence checking and witness proofing.”²¹

10. The defence takes issue with what it describes as the prosecution’s limited definition of witness proofing as the “rehearsal of the witness’s imminent upcoming

¹⁷ ICC-02/05-03/09-149, paragraph 8.

¹⁸ ICC-02/05-03/09-149, paragraph 9.

¹⁹ ICC-02/05-03/09-149, paragraph 10.

²⁰ ICC-02/05-03/09-149, paragraph 28.

²¹ ICC-02/05-03/09-149, paragraph 11.

testimony”.²² The defence refers to jurisprudence from the *Lubanga* case to support its argument that witness proofing is not limited to the familiarisation stage.²³ The defence also challenges the prosecution’s reliance on situations in which prosecution re-interviews have been conducted in other cases before the Court.²⁴ The defence submits that the relevant jurisprudence on re-interviews is not straightforward, and emphasises that in several instances Trial Chambers have required prior authorisation for re-interviews and in some cases imposed safeguards.²⁵

11. The defence suggests that in the circumstances of this case, the prosecution should be required to seek the authorisation of the Trial Chamber before carrying out any re-interviews and that leave should only be granted “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.”²⁶ The defence additionally proposes that in the event that the prosecution is granted authorisation to conduct a re-interview, the Trial Chamber should limit the scope of the interview to new issues and impose safeguards such as video and audio recording, the presence of the defence, and full and immediate disclosure, in order to protect the integrity of the process.²⁷

²² ICC-02/05-03/09-149, paragraph 12, referring to ICC-02/05-03/09-140, paragraph 5.

²³ ICC-02/05-03/09-149, paragraphs 13 and 14, 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.

²⁴ ICC-02/05-03/09-149, paragraphs 15 to 22.

²⁵ ICC-02/05-03/09-149, paragraphs 15 to 16.

²⁶ ICC-02/05-03/09-149, paragraph 3.

²⁷ ICC-02/05-03/09-149, paragraphs 3 and 30.

II. Relevant Provisions

12. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 54 of the Statute

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:
 - (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
 - (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
 - (c) Fully respect the rights of persons arising under this Statute.

[...]

3. The Prosecutor may:
 - (a) Collect and examine evidence;
 - (b) Request the presence of and question persons being investigated, victims and witnesses.

Article 64(2) of the Statute

Functions and powers of the Trial Chamber

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

III. Analysis and Conclusions

13. The prosecution has conducted re-interviews of its own witnesses prior to their testimony at trial in all cases currently before the three Trial Chambers.²⁸ This practice as well as the judgment on 13 October 2006 of the Appeals Chamber acknowledges that the prosecution's investigation may continue after the confirmation of the charges.²⁹ As noted by the Appeals Chamber "ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing [...]. However [...] this is not a requirement of the Statute".³⁰ It would also be desirable, in the view of this Chamber, that post confirmation of charges investigations be completed as soon as possible.

14. Furthermore, the Chamber is of the view that the prosecution does not need to request the authorisation of the Chamber in order to conduct these re-interviews. This finding is in keeping with the judgment of the Appeals Chamber setting out that the Prosecutor does not need to seek permission from the Pre-Trial Chamber to continue his investigation after the confirmation of the charges.³¹ Similarly, the

²⁸ See for example Transcript of hearing on 31 March 2010, ICC-01/04-01/06-T-295-ENG ET, page 2, line 22 to page 6, line 13; Transcript of hearing on 11 October 2010, ICC-01/04-01/07-200-Red-ENG CT, page 1, line 15 to page 4, line 4; and Decision on the prosecution's second application for disclosure of additional evidence, 7 May 2010, ICC-01/05-01/08-767-Red2.

²⁹ Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, paragraph 53.

³⁰ ICC-01/04-01/06-568, paragraph 54.

³¹ ICC-01/04-01/06-568, paragraph 53. The relevant quotation reads as follows: "[...] Before the confirmation hearing, the Prosecutor may continue his investigation, amend or withdraw charges without the permission of the Pre-Trial Chamber. This flexibility of the Prosecutor is more limited after the confirmation of the charges with respect to the amendment, addition or withdrawal of charges: pursuant to article 61 (9) of the Statute the Prosecutor may amend the charges after their confirmation only with the permission of the Pre-Trial Chamber; in order to add additional charges or substitute charges with more serious charges, a new confirmation hearing must be held; withdrawal of charges after the commencement of the trial is only possible with the permission of the Trial Chamber. The fact that article 61 (9) of the Statute does not make reference to the investigation indicates that the Prosecutor's flexibility with respect to the investigation that is acknowledged by article 61 (4) of the Statute remains unaffected by the confirmation of the charges; the Prosecutor does not need to seek permission from the Pre-Trial Chamber to continue his investigation. [...]"

Chamber is of the view that, at this stage, the prosecution does not need to seek permission from the Trial Chamber.

15. In accordance with the consistent practice of the Trial Chambers, however, the parties are not authorised to “proof” witnesses prior to their in-Court testimony.³² Trial Chamber I has described “witness proofing” as the “rehearsal of in-court testimony” with a witness prior to his appearance before the Court.³³ It held 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.”³⁴ The Chamber finds no reason to deviate from this practice. Accordingly, the parties are prohibited from engaging in “witness proofing”, defined for the purposes of this trial as the rehearsal of the witness’s evidence in preparation for his or her testimony before the Court. In this regard, the essential consideration is not the stage in the proceedings at which the re-interview occurs but the content of the interview, namely whether it constitutes a rehearsal of the witness’s evidence.

16. Taking into account the fact that the evidence by the witnesses to be re-interviewed has already been tested by the defence during the proceedings before the Pre-Trial Chamber and in the *Abu Garda* case, the Chamber finds merit in the defence submission that certain safeguards should be imposed. The Chamber therefore instructs the prosecution to ensure that the re-interviews are audio and/or video recorded in order to guarantee that a permanent record is available to the defence and to the Chamber should an issue arise in relation to what occurred during the meetings.

³² ICC-01/04-01/06-1049; Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016, paragraph 34; Directions on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134, paragraph 18.

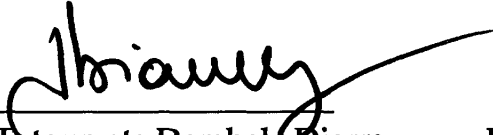
³³ ICC-01/04-01/06-1049, paragraph 51.

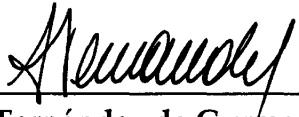
³⁴ ICC-01/04-01/06-1049, paragraph 52.

17. Following the six re-interviews, the prosecution is to effect full disclosure to the defence, subject to potential applications for redactions.³⁵

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



Judge Joyce Aluoch

Judge Fatoumata Dembele Diarra

Judge Fernández de Gurmendi

Dated this 6 June 2011

At The Hague, The Netherlands

³⁵ The prosecution has previously indicated that it anticipates that it will request redactions to the material generated as a result of its re-interviews of the six witnesses, Prosecution's Response to the Trial Chamber's Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, ICC-02/05-03/09-131, paragraph 16.