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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

Public

**Joint Defence Response to Prosecution Motion
Regarding Scope of Witness Preparation**

Source: Defence for Mr. William Samoei Ruto
Defence for Mr. Joshua Arap Sang

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

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I. INTRODUCTION

1. On 13 August 2012, the prosecution filed a *Motion Regarding the Scope of Witness Preparation* (“Motion”),¹ in which it requests the Chamber to modify the witness familiarisation protocol that has been adopted in all other cases at the Court. The prosecution proposes modifications that would allow the parties, based either in the field or at the seat of the Court, to “prepare” witnesses for giving testimony, up to 24 hours before the witness’ testimony is to commence.² This is a significant departure from the current practice at the ICC and the defence for both Mr. Ruto and Mr. Sang oppose the application.
2. What has been described as ‘witness proofing’ is a contentious matter. One difficulty that arises is the meaning of the word ‘proofing’. In the United Kingdom the word ‘proofing’, used in a legal context, refers to the taking of a statement from a potential witness. The statement obtained is called ‘a proof of evidence’ or simply ‘a proof’. ‘Proofing’ is an inevitable and necessary component of preparation for a civil or criminal trial. Indeed, ICC prosecution pre-trial investigation and interviews with witnesses demonstrates the exercise of all the features listed by the prosecution in its annex to the current filing.
3. The word ‘proofing’ in the various discussions and decisions involving that word at the ICC has been assigned a more specific meaning. This is most clearly demonstrated in the submissions of the prosecution in the *Lubanga* case where the prosecution used the word ‘proofing’ to encompass a number of practices, several of them contentious. They concern, in the defence submission, the preparation of a witness’ testimony shortly before the witness provides that testimony to the Chamber and with a view to providing that testimony to the chamber. In the decision rendered by Trial Chamber I, the contentious practice was identified as being “the practice of substantive preparation of a witness for their in court testimony”³ and “a preparation session directly prior to giving testimony”.⁴ The

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-446, Prosecution Motion Regarding the Scope of Witness Preparation, 13 August 2012. See also, ICC-01/09-01/11-447, Prosecution’s Compendium of authorities in support of Prosecution Motion Regarding the Scope of Witness Preparation, 13 August 2012.

² Motion, Annex A (“**Proposed Guidelines on Witness Preparation**”), p. 1.

³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1049, Decision Regarding the Practices Used to Prepare and Familiarize Witnesses for Giving Testimony at Trial, 30 November 2007 (“**Lubanga (TC) Witness Proofing Decision**”), para. 28.

⁴ *Lubanga (TC) Witness Proofing Decision*, para. 36.

defence agrees that such a practice smacks of ‘rehearsing’ or ‘training’ a witness and strongly objects to such a practice. The Defence respectfully agrees with that Chamber’s analysis that such preparation is not a practice to be found in the ICC Rules of Procedure or Statute and is not supported by general principles of law. The defence respectfully welcomes the departure in the *Lubanga* case and subsequent cases from the practice at other international or hybrid criminal tribunals where, though widely endorsed, such practice remains highly contentious. There is a danger, as the *Lubanga* decision states, that such a practice can be capable of abuse.

4. Trial Chamber I sought to prevent such a practice. It did so by directing that, “Once the process of witness familiarisation has been commenced, any further meeting between a party and its witness outside court is prohibited”,⁵ and that while the witness may subsequently be shown his/her witness statement to refresh memory, “the practice of ‘witness proofing’ as characterized by the prosecution is prohibited”.⁶
5. At present the practice adopted by all the pre-trial and trial chambers who have considered and ruled on this issue is, essentially, that, once a witness has been brought to The Hague by the Victims and Witness Unit (“VWU”), the witness has limited contact with the party calling him or her. Such contact is restricted to a ‘courtesy’ meeting, where representatives of all the parties – including the party calling the witness - can meet the witness only to greet the witness and introduce themselves. No discussion of the witness’s evidence is permitted and such courtesy meetings typically take just a few minutes. Throughout the process the witness is in the company of, and assisted by, the VWU.
6. This forms part of the familiarisation process which is conducted by the VWU who bring particular skills to bear and are assisted by a team of psychologists and other specialists in this field. As stated in *Lubanga*,

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

⁵ *Lubanga* (TC) Witness Proofing Decision, para. 56.

⁶ *Lubanga* (TC) Witness Proofing Decision, para. 57.

therefore not be considered as witnesses of either party, but as witnesses of the Court.⁷

The witness is also given the opportunity to review his or her previous statements, and to make corrections to them if needed, again through the neutral agency of the VWU. The system has been the practice in several trials and the VWU, contrary to the suggestion made by the Prosecutor,⁸ has coped with its responsibility commendably.

7. Essentially, the prosecution, by its application, seeks to replace the present regime with one that permits the prosecution⁹ to have full and, it would appear, unsupervised and unrecorded meetings with its witness once he or she has arrived in The Hague to give his or her testimony. The Prosecutor proposes that, well after the established deadline for all disclosure to be made to the defence, she still be permitted, *inter alia*:

- to review with the witness the topics to be covered in examination and the likely topics of cross-examination;
- to review with the witness his or her prior statements to confirm whether the statements are accurate, clarify additional points and document additions or retractions the witness may deem appropriate
- to show potential exhibits to the witness for his/her comment; and
- to answer questions the witness may have, including about what to expect in court

Much, if not all of this exercise could and should, in the submission of the defence, be done in the course of investigation. Indeed, having regard to the material disclosed in this and other cases, the prosecution plainly does conduct such an exercise with its witnesses.¹⁰ It should be born in mind that the interviews with these witnesses, conducted by investigators often in the company of prosecution counsel, are very extensive and provide the prosecution with a full and sufficient

⁷ Lubanga (TC) Witness Proofing Decision, para. 34.

⁸ Motion, para. 19.

⁹ Any change in the current practice will, of course, apply to all parties.

¹⁰ See, *infra*, para. 20.

basis to extract the salient aspects of the evidence, refer to exhibits, and to revisit and challenge the account where necessary.

8. The Chamber will be aware that the current procedure has been discussed and employed by each of the Trial Chambers to date.¹¹ On each occasion, the Pre-Trial or Trial Chamber has carefully considered prosecution arguments almost identical to those raised by the prosecution in its current filing. While decisions on procedural issues by one Chamber are persuasive rather than binding on another Chamber, the prosecution, in the defence submission, has not provided a cogent argument for departing from the current settled and tried procedure. As the majority of the *Bemba* Trial Chamber determined, there are “no compelling reasons to depart from the uncontroversial jurisprudence of the Court”, maintaining that no proofing or preparation of witnesses for trial shall be allowed as part of the familiarisation process conducted by the VWU.¹² Nor has the prosecution sought leave to appeal or claimed that it has hitherto been disadvantaged in other cases by the application of the current rule.
9. The defence for Mr. Ruto and for Mr. Sang object to the proposed modifications for the same reasons as stated in the previous decisions; they are not statutorily grounded, are contrary to the rights of the accused to have adequate time to prepare for and challenge the case against him, and are not the most effective way of ascertaining the truth. The defence submits that the Trial Chamber should adopt the most recent version of the established Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony.¹³ The Unified Protocol allows parties to conduct investigations and to prepare witnesses to the fullest in the field, prior to the witness being taken into the care of the VWU and the Court. This approach provides ample opportunity for the parties to select witnesses whose evidence can be presented in court accurately and efficiently. At the same

¹¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarization and Witness Proofing, 8 November 2006; *Lubanga* (TC) Witness Proofing Decision; *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-110-Red-ENG, 2 March 2010, p. 8-9; *Prosecutor v. Bemba*, ICC-01/05-01/08-1016, Decision on the Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony at trial, 18 November 2010 (“*Bemba* Witness Preparation Decision”) and ICC-01/05-01/08-1039, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 24 November 2010 (“*Ozaki* Dissenting Opinion”); and most recently the *Gbagbo* Pre-Trial Chamber, ICC-02/11-01/11-93, 16 April 2012.

¹² *Bemba* Witness Preparation Decision, para. 34.

¹³ *Prosecutor v. Gbagbo*, ICC-02/11-01/11-93-Anx1, 16 April 2012 (“**Unified Protocol**”).

time it ensures timely disclosure to the defence of all relevant material, and it protects the investigatory and preparatory process from the possibility that a witness' evidence is contaminated during last minute proofing sessions, however inadvertently.

10. The process of witness proofing in the more general sense of the word, as part of the pre-trial investigations, contributes to the efficacy of the proceedings by allowing the parties to conduct witness examinations directed to the salient issues and may further the truth-finding function of the Court by ensuring that all probative evidence is heard. It forms part of the inevitable process of investigation, evidence gathering and the identification and review of witnesses. The objective of this 'general' proofing is to identify the relevant facts known to the witness, so that they may be presented during testimony in a concise, coherent and truthful manner. This may be achieved through informing the witness about the purpose of the trial and its procedure; taking a statement from a witness; providing the witness with the opportunity to review his/her prior statements to confirm whether they are accurate, and to make any clarifications, additions or retractions the witness may deem appropriate; to question the witness on inconsistencies in her/her prior statements and/or inconsistencies between the witness' prior statements and other available material; explain to the witness the topics that they may anticipate being questioned upon during examination; and to show the witness potential exhibits and ask him/her to comment on them for the purpose of determining the utility of using the exhibits in court.
11. During this process, no party should seek to coach a witness or to script his or her in-court performance. As cautioned by the *Lubanga* Trial Chamber, the parties must take the utmost care to ensure that the proofing process does not lead to a rehearsal of the evidence or lead to the distorting of the truth.¹⁴ Specifically, the parties should not: influence the substance of a witness' answers, either directly or indirectly; undertake a rehearsal of the questions and answers expected during the witness' in court testimony; explain why certain evidence would be helpful or unhelpful to the party's case; or inform the witness of testimony that other witnesses have provided at trial.

¹⁴ *Lubanga* (TC) Witness Proofing Decision, para. 51 (warning that proofing could "lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony").

12. The question therefore is not whether to prohibit or allow witness ‘proofing’, in the sense outlined above and which is necessary in order to gather and assess the witness’ viewpoint of events, but rather how to strike an appropriate balance between carefully eliciting all probative information from a witness while protecting the right of an accused to a fair trial.¹⁵
13. To this end, the defence submits that ‘proofing’ should primarily remain a pre-trial activity to be conducted during the investigations stage, as it is at present. It should not be done in tandem with, or instead of, the witness familiarization program conducted by VWU. Nor should it be done once the witness has been brought to the place of testimony and shortly before he or she provides evidence to the chamber. To do so blurs the line between investigation and proofing on the one hand and a rehearsal of the evidence on the other. This potentially prejudices the accused because it typically leads to the late disclosure of information and is more likely to produce contaminated testimony. On each occasion when the matter has been considered, the chamber has ultimately deemed the practice of substantive witness proofing or preparation at the seat of the Court and on the eve of a witness’ testimony, to be outside the statutory framework of the ICC.¹⁶
14. There is nothing so distinctive or unusual about the Situation in Kenya that should persuade the Chamber to depart from the approach of its colleagues.

II. SUBMISSIONS

Modifications are Contrary to the Rights of the Accused

¹⁵ See generally commentary by practitioner Wayne Jordash, p. 504 (article contained in the Prosecution’s Compendium of Authorities to the Motion, in Annex B at p. 234) (noting that because the *ad hoc* tribunals have unquestioningly accepted the value of proofing, they have “neglected to provide any meaningful guidance on an acceptable and uniform practice, leaving the parties to define its content and ethical parameters on a case-by-case basis, quite probably at the expense of fundamental fair trial guarantees”).

¹⁶ See, for example, *Lubanga* (TC) Witness Proofing Decision, para. 36 (“While Article 54(3)(b) allows the Prosecutor to question witnesses, nothing in the text supports the proposition that a preparation session directly prior to giving evidence is permitted.”).

15. Article 67(1)(b) of the Statute guarantees that the accused must have *adequate time* for the preparation of the defence;¹⁷ Rule 76(1) indicates that the prosecution shall provide the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses “*sufficiently in advance* to enable the adequate preparation of the defence” (emphasis added).
16. Article 67(1)(e) guarantees the right to examine or to have examined the witnesses against him.
17. These statutory safeguards must be read in a manner that gives full effect to the protection of an accused’s fair trial rights, namely sufficient advance notice of the prosecution’s case against him and adequate time to prepare to challenge that case (be it through cross-examination or during the defence case itself). These safeguards are severely undercut by the Prosecution’s proposed practice of substantively proofing and preparing witnesses for testimony up to the last 24 hours and as its case goes along, which often requires disclosure of new information.
18. The Prosecution acknowledges that new information may arise from these proofing sessions that would require disclosure to the Defence.¹⁸ In practical terms, and based on previous experience, this information is typically served on the Defence days, if not hours, prior to the beginning of the witness’ testimony. Such last minute disclosure, which the prosecution posits is better than ‘surprising’ the defence with new evidence for the first time in court,¹⁹ does not mitigate the need for an adjournment. In either scenario, the defence must be given adequate time to prepare.²⁰ In any event, as Judge Ozaki has pointed out, the proofing

¹⁷ The Trial Chamber has already confirmed that the right of the accused to have adequate time to prepare his defence is fundamental to the fairness of the trial. *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-440, Decision on the schedule leading up to trial, 9 July 2012 (“**Pre-Trial Schedule**”), para. 6.

¹⁸ Motion, para. 7 (stating that disclosure should take place as soon as practicable after the preparation session and in any event before the witness begins his examination in chief) and Annex, p. 3.

¹⁹ Motion, para. 26 (arguing that witness preparation permits differences in witness’ recollections and additional recollections to be identified and disclosed before the witness takes the stand as beneficial because it prevents the defence from being taken by surprise).

²⁰ Kai Ambos notes that the *ad hoc* tribunals have acknowledged the problem of late proofing and thus late disclosure. See Compendium of Authorities to Motion, Annex B, Ambos, p. 614, FN 112 (citing *Prosecutor v. Limaj et al*, IT-03-66-T, Decision on defence motion on prosecution practice of ‘proofing witnesses’, 10 December 2004, p. 3 and *Prosecutor v. Milutinovic et al*, IT-05-87-T, Decision on Ojdanic motion to prohibit witness proofing, 12 December 2006, para. 21).

process should not be abused such that it is used as a *de facto* delayed investigation.²¹

19. Indeed, this Chamber has already found that the Prosecution's case in full must be disclosed to the defence by the beginning of next year. This necessarily implies that the prosecution's investigations and any proofing of witnesses, which might produce additional, disclosable information, would be complete by this time.²² As the Chamber explained:

In order for the defence teams to be able to prepare adequately for trial, it is *essential for the prosecution to complete its disclosure obligations sufficiently in advance of trial*. The Chamber is of the view that *three months* between the full disclosure of the prosecution case and the commencement of trial will afford the defence sufficient time to carry out all necessary preparations.²³

The Trial Chamber consequently set the date for the final disclosure of material from the prosecution to the defence, as well as its list of witnesses and its list of evidence, as 9 January 2013 (three months before the start of trial in April 2013);²⁴ the prosecution must provide a provisional indication of the same to the Chamber as early as 16 October 2012.²⁵ In making such orders, the Chamber has demonstrated its appreciation for the need for the prosecution to finalize and disclose its case with a high degree of detail and certainty to the defence sufficiently in advance of trial. Only then can the Defence prepare adequately for its examination of prosecution witnesses and the defence case as a whole.

20. Consequently, all of the proofing that needs to be done can be done during the investigatory and pre-trial phase of the prosecution's preparations for its case.

²¹ Ozaki Dissenting Opinion, para. 23.

²² Wayne Jordash, p. 518 ("The suggestion that the prosecution is permitted to commence a trial against an accused without disclosing focused witness statements, and that this belated focus may be achieved through proofing, is evidence of an unhealthy acceptance of poor investigative processes and unsatisfactory disclosure practices ... [p]roofing has become the fail-safe mode. In the event that a party fails to fulfill its disclosure obligations, proofing provides the remedial safety valve, allowing the party to do what ought to have been done before. It is now practically impossible for a party to be found to be negligent or deleterious in the preparation of its case. If all else fails, there is always proofing or the lack of it to explain away the failure.").

²³ Pre-Trial Schedule, para. 7.

²⁴ Pre-Trial Schedule, para. 14. See also, para. 13 (By this date, the Prosecution must provide its witness list, which should include a bullet-pointed summary of the main facts on which each witness is expected to testify, an indication of the estimated length of time required for each witness and the total time for the presentation of the prosecution case, in hours. The prosecution is also to file its list of evidence to be relied on at trial.) and para. 15 (By this date, the prosecution must file its pre-trial brief explaining its case with reference to the evidence it intends to rely on at trial).

²⁵ Pre-Trial Schedule, para. 11.

Indeed, it appears that the prosecution, in interviews often conducted or attended by senior trial lawyers, even prior to the confirmation of charges hearing, undertook the type of proofing sessions that they now want permission to conduct immediately before a witness testifies. With the confirmation witnesses, investigators and counsel routinely compared prior inconsistent statements given by a witness;²⁶ confirmed whether the statements were accurate or required clarification, addition or retraction;²⁷ explained what to expect from the court process;²⁸ showed and discussed potential exhibits,²⁹ etc. Furthermore, the Chamber's recently adopted protocol on the use of confidential information during investigations presumes that when necessary, parties may show potential exhibits to a witness, in order to determine the witness' ability to speak to such a document.³⁰

21. In this vein, it is difficult to disagree with the findings of the *Limaj* Trial Chamber that stated:

The process of human recollection is likely to be assisted ... by a detailed canvassing during the *pre-trial* proofing of the relevant recollection of a witness ... In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence in the trial (emphasis added).³¹

It is true that proofing forms an integral part of a genuine investigative attempt to understand the full ambit of a witness' knowledge and which aspects of the case he

²⁶ See, for example, interview with Witness 8, KEN-OTP-0052-1007 at 1017 to 1025 (comparing two accounts to figure out who made a certain contribution); Witness 2, KEN-OTP-0053-0256 at 0270 to 0271 (there is a section entitled clarifications).

²⁷ Many of the prosecution's witnesses signed the following statement at the end of the interview: This Statement has been read over to me in the English and languages and is true to the best of my knowledge and recollection. I have given this Statement voluntarily and I am aware that it may be used in legal proceedings before the International Criminal Court and that I may be called to give evidence in public before the International Criminal Court. See, for example, Witness 2, KEN-OTP-0029-0131; Witness 4, KEN-OTP-0031-0085; and Witness 5, KEN-OTP-0037-0039).

²⁸ See, for example, Witness 8, KEN-OTP-0052-0003 at 0049 to 0051 (explaining to the witness his right to have a copy of the transcript, the process of disclosure to judges and parties, that fact that judges and the defence may ask questions etc).

²⁹ See, for example, Witness 8, KEN-OTP-0052-1079 at 1103 (Witness 8 is shown his own exhibit 1 in which he had listed attendees of a meeting and asked to list other attendees which he may have forgotten in an initial interview); Witness 8, KEN-OTP-0052-0402 at 0420 to 0426 (Witness 8 is shown a map where he marks in blue, places considered to be Kalenjin Land - it is later marked as exhibit 5); Witness 8, KEN-OTP-0052-0571 at 0577 to 0581 (Witness 8 is shown a map, KEN-OTP-0035-0081, on which he then marks tribal distributions in the rift valley. It then becomes exhibit 9).

³⁰ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-449-AnxA, Section 3.2 titled Limited Disclosure of Confidential Material, stating Parties and participants shall not disclose to the public any confidential material obtained in the course of the proceedings before the ICC, except to the extent it proves to be necessary and inevitable for their investigation and/ or preparation of the case.

³¹ *Prosecutor v. Limaj*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses, 10 December 2004 ("**Limaj Proofing Decision**"), para. 2 (emphasis added).

is able to speak to; yet it should never be an opportunity to interject new information or to suggest alternative versions of events which should be adopted. There is a built-in safeguard to proofing which occurs during investigations and at the pre-trial stage – it is removed enough in time and place from testimony that it cannot amount to a rehearsal of the evidence. Furthermore, the effects of any inadvertent coaching will have worn off or been forgotten by the time of testimony.

22. In this case, the prosecution claims that it is unable to conduct proper and thorough investigations sufficiently in advance of trial and in the field (and must thus discuss substantive issues with its witnesses immediately prior to giving testimony). In support of its argument, the prosecution makes generalized and unsubstantiated claims of witness interference and witness security concerns in the Kenya cases,³² to which the defence is not in a position to respond.
23. Yet the defence understands that many of the prosecution's witnesses have been already relocated outside of Kenya,³³ through funding provided to the ICC largely by the British government.³⁴ For those relocated witnesses, the alleged security concerns that may have prohibited the prosecution from meeting and interviewing them, have already been alleviated. Therefore, there are no special circumstances justifying delayed investigations with regard to relocated witnesses. For those witnesses remaining in Kenya, the defence is confident that the prosecution can rely on its counsel, investigators, intermediaries, and NGO connections, in

³² Motion, paras 17 and 18.

³³ After the confirmation hearing decision, O'Campo at a press conference on 24 January 2012, stated that he had no witnesses in Kenya at that time. See, at minute 7:29 of his speech, at <http://www.youtube.com/watch?v=0-WYkNYXvug&feature=relmfu>. Also, an August 2012 news story in the Star reports: "International Criminal Court witnesses against four Kenyans facing charges at The Hague have rejected a plan to move them to hideouts in African countries from Europe where they are currently under protection. Human rights groups have asked ICC prosecutor Fatou Bensouda to intervene and stop the Victims and Witnesses Protection Unit from proceeding with the proposal to relocate the witnesses ahead of the hearing of the cases [...]. Reports indicate that some of the witnesses have threatened not to testify before the ICC should they be forced to move to the African states, which are yet to be identified." See <http://www.the-star.co.ke/national/national/89365-icc-witnesses-protest-plan-to-relocate-hideout>. See also, another article in the Star, "Kenya: ICC Gives 14 Witnesses Lifetime Protection", dated 11 July 2011: "Fourteen witnesses who will testify before the International Criminal Court have been put on lifetime protection and will not return home to Kenya after the trials. The witnesses along with 56 members of their families have been allocated safe homes in European countries. Eight witnesses so far confirmed for lifetime protection are from Rift Valley while six are from Central Kenya. Six other witnesses including two from Nairobi and one from Western province are still considering their status." Available at: <http://allafrica.com/stories/201107120011.html>.

³⁴ ICC Press Release, ICC-CPI-20101126-PR601, ICC welcomes UK contribution for relocating at-risk persons in Kenya, dated 26 November 2011, available at: http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20%282010%29/icc%20welcomes%20uk%20contribution%20for%20relocating%20at_risk%20persons%20in%20kenya?lan=en-GB.

conjunction with the VWU, to ensure that investigations and witness proofing are done in a way that does not jeopardize their anonymity and/or security. For instance, in order to maintain confidentiality, it is a normal practice to ask the witnesses to come from their villages to a place where they are unknown in order to conduct the interviews; the witnesses can then be reimbursed for any expenses.

24. Consequently, one would expect that by the time the prosecution's list of witnesses, list of evidence, and pre-trial brief has been filed, and once full disclosure has been made to the defence, the witnesses to be called by the prosecution would be sufficiently vetted and prepared for testimony. As a judge at the ICTY queried, in response to continued problems caused by late proofing, "[w]hat's the problem about lawyers ... actually investigating the case properly in the pre-trial phase at the latest?"³⁵ Indeed, there is nothing in the Unified Protocol that regulates the conduct of investigations or that prevents the prosecution from ensuring that it achieves its stated goal of efficient truth-finding and truth-telling³⁶ well in advance of the witness' anticipated testimony.
25. Indeed, the prosecution has had adequate time to do everything listed in Annex A of the motion – it has been investigating the Situation in Kenya since March 2010.³⁷ All of these matters can be and have been done prior to the witness being taken into the care of the Court and the VWU, ie prior to his or her arrival at the place of testimony. In fact, ICC jurisprudence, which prohibits witness proofing only once the witness familiarisation process has commenced, provides a very generous cut off point for substantive contact between a witness and the party calling that witness.³⁸ To continue substantive proofing beyond this time frame is not only unnecessary, assuming that thorough investigations have been conducted well in advance, but it does not assist in the truth-seeking function of the Court.

³⁵ *Milutinovic* Trial Decision, para. 23 and FN 42, citing Transcript, 2 November 2006, para. 5791.

³⁶ Motion, paras 22 to 29.

³⁷ *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010.

³⁸ Unified Protocol, paras 27 and 28 ("Considering that once the process of witness familiarization has commenced, any further meeting between the entity calling the witness and witnesses outside of Court is prohibited, it is essential that the commencement of the familiarisation process can be clearly delineated. The starting point of the familiarisation process is when the witness arrives in the Netherlands or at the location of testimony where different from the seat of the Court, prior to giving evidence.").

Modifications are Not the Most Effective Way of Ascertaining the Truth

26. It is not controversial that the greatest of care must be taken by all parties to ensure that the proofing process does not lead to a rehearsal of the evidence or lead to the distorting of the truth.³⁹ Yet the modifications proposed by the Prosecution, including that of substantive proofing of witnesses once at the seat of the Court and up to 24 hours prior to giving testimony, are not the most effective way of ascertaining and preserving the truth. Pursuant to Article 54(1)(a), the Prosecutor is under an obligation to conduct her investigations in such a way so as to “establish the truth”. In doing so, she may “collect and examine evidence” (Article 54(3)(a)). The defence submits that the Prosecutor’s duty to collect and examine evidence must be strictly protected from the possibility that a witness’ evidence may become contaminated once the witness’ testimony is imminent.

27. The reality is that witnesses are suggestible; the parties must be aware of this throughout all phases of its investigation. Much has also been said about the pressure witnesses feel in connection with this process.⁴⁰ Witnesses are likely to be even more suggestible or to feel even more under pressure to “get it right” once they have been flown from their home country (or country of relocation) to a Court sitting in a foreign, intimidating, and highly public environment. In such circumstances, it is understandable that a witness will want to please the party that has called him to the Court.

28. It is at precisely such a moment that the risk of contamination is the greatest. The inadvertent modification of witness testimony as an outcome of proofing has long been a concern. One scholar has noted,

This risk may occur in scenarios of unintended influence exerted on a witness by well-meaning counsel and non-deliberate alteration of testimony by an ‘honest’ witness in the course of an interview. [...] the latter is a natural corollary of the notorious fallibility of human memory: a witness can be prodded into ‘recalling’ details she did not in fact perceive, by way of internalizing the information fed by counsel overtly or by innuendo.⁴¹

³⁹ The *Lubanga* Trial Chamber warned that proofing could “lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony”. ICC-01/04-01/06-1049, para. 51.

⁴⁰ The critical role of the VWU in alleviating this pressure and familiarizing the witness with what to expect while giving evidence cannot be under-estimated and should not be under-appreciated.

⁴¹ Sergey Vasiliev, “Proofing the Ban on ‘Witness Proofing’”, p. 247-8.

29. The witness should not be put in a situation wherein it becomes clear to him or her, which aspects of the evidence are most important or which are more likely to help or hurt the case. The witness should not be prepped in such a way that his or her testimony comes to include new details from and follows the contours of witnesses' testimonies preceding theirs. The defence submits that the closer to the time of testimony a witness is proofed, the more likely this type of contamination is to materialize.
30. Of course, the ultimate caution should be taken to ensure that the prosecution does not have an opportunity to attempt to bolster its case (what may be faltering due to poor pre-trial investigations or unreliable testimony proffered through the first few witnesses at trial) at this stage. In other words, the prosecution should not be able to use last-minute proofing sessions to "actively re-interview witnesses with the calculated aim of increasing the evidence against the accused and moulding their case according to their on-going assessment of the way in which their case has progressed".⁴² To do so in these circumstances might result in obtaining information that is tainted.
31. The best way for the Chamber to safeguard against such contamination is to require timely and complete disclosure during the pre-trial stage and for witnesses, once they reach The Hague, simply to refresh their recollection of previous statements and to participate in the familiarization program as conducted by VWU. Thus the present Unified Protocol adequately and appropriately addresses these concerns.

If Last-Minute Proofing is to be Allowed, Sufficient Safeguards Must be in Place

32. Witness proofing when a witness comes under the ambit of the VWU should only be allowed in exceptional circumstances and upon application to the Chamber, and with heightened safeguards.⁴³ These safeguards should go beyond code of

⁴² *Prosecutor v. Sesay et al*, SCSL-04-15-T, Defence Motion Requesting the Exclusion of Evidence arising from the Additional Information Provided by Witness TF1-168 and TF1-041, 23 February 2006, para. 14. See generally, Wayne Jordash, p. 509-510.

⁴³ For instance, in *Lubanga*, where the Trial Chamber granted the defence permission to discuss substantive issues with an upcoming defence witness because of late disclosure provided to the defence from the prosecution which was relevant to his testimony. See *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-239-Red-ENG, 2 February 2010, p. 1-7. See also, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1040, Decision on Prosecution's Request for

professional conduct guidelines and the possibility of cross-examination of the witness as to the matters discussed (the only two safeguards suggested by the prosecution⁴⁴). If the prosecution's modifications are accepted, last-minute proofing will be an unsupervised exercise. However the defence submits that if permission is granted for a last-minute proofing session, additional safeguards must be in place, as appropriate.⁴⁵ Safeguards may include the presence of a member of the Registry or a member of the defence, or audio/video taping the session followed by the provision of a transcript to the defence.⁴⁶

A More Flexible Regime should Apply to the Defence

33. The prosecution submits that all parties and participants should be subject to the same witness preparation rules.⁴⁷ Yet there are significant disparities between the institutional resources available to the prosecution and those available to the defence. Indeed, one commentator has acknowledged that extensive proofing conflicts with the equality of arms principle, in that while the defence may have resources to conduct pre-trial interviews, the practice is of much more use to the prosecution given its superior infrastructure and manpower.⁴⁸ The prosecution has the luxury of building its case over time, allowing prosecution counsel and investigators to conduct several interviews with witnesses over a prolonged period. Yet the Defence often has to react and prepare under serious time constraints. In any event, defence investigations are linked closely to the defence team's strategy, which may only emerge after hearing the entirety of the prosecution case and evidence which may emerge from defence witnesses. In such cases, it is not sufficient or appropriate for defence counsel, who may not be able to travel to the field from The Hague due to other ongoing commitments in the

the Preservation of Evidence, 21 November 2007 (the Chamber accepted as a matter of principle that if something emerges that reasonably requires further assistance from a witness, the prosecution should be able to take a further statement, but witness proofing is prohibited; in such instances, interviews must be recorded); *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-192-ENG, 16 June 2009 (where a witness testified that he gave a false statement to the prosecution previously, the Chamber ruled that the prosecution could have a non-Lubanga team member take a further statement from him).

⁴⁴ Motion, paras 30-32.

⁴⁵ Ozaki Dissent, paras 27 and 28.

⁴⁶ For instance, in *Lubanga*, where the Trial Chamber granted the prosecution permission to re-interview one of its intermediaries prior to his testimony before the Court. The Chamber ordered that the interview be recorded, whether or not one of the defence was present. See *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-295-ENG, 13 May 2010, p. 1-6. See also, *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-284-Red-ENG, 11 May 2010, p. 13-17.

⁴⁷ Motion, para. 6.

⁴⁸ Kai Ambos, "Witness Proofing" before the ICC: Neither legally admissible nor necessary, p. 614.

courtroom, to rely solely on the input of defence investigators as to whether or not call a certain witness to testify to a particular issue.⁴⁹

34. Consequently, the defence requests that the question of the timing of witness proofing in respect of its own witnesses be revisited after the close of the prosecution's case.

III. CONCLUSION

35. For the reasons given above, the defence for Mr. Ruto and for Mr. Sang request the Trial Chamber to dismiss the prosecution's motion and retain the current practice of the ICC with respect to witness proofing and witness familiarization.



David Hooper, QC
On behalf of William Samoei Ruto
Dated this 4th day of September 2012
In London



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 4th day of September 2012
In Nairobi

⁴⁹ See, for instance, *Prosecutor v. Brdanin and Talic*, Decision on Defence Motion by Prosecution for Protective Measures, 3 July 2000, para. 36 (where the Trial Chamber recalls that the Appeals chamber “has placed a firm obligation on those representing an accused person to make proper inquiries as to what evidence is available in that person’s defence. Some of the prosecution witnesses are likely to be of such importance that it will be necessary for at least the final stage of the investigation into those witnesses to be done by counsel who is to appear for the accused at trial. This is obvious to anyone with experience of criminal trials. The earlier stages can be conducted by the investigator(s) retained for the accused in the field”).