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**TRIAL CHAMBER IV**

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

**SITUATION IN DARFUR, THE SUDAN**

**IN THE CASE OF**

***THE PROSECUTOR v.***

***ABDALLAH BANDA ABAKAER NOURAIN***

**Public with Public Annex A**

**Prosecution motion regarding witness preparation**

**Source:** 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**

Ms. Fatou Bensouda, Prosecutor

Mr. James Stewart, Deputy Prosecutor

Mr. Julian Nicholls, Senior Trial Lawyer

**Counsel for the Defence**

Mr. Karim A.A. Khan, QC

**Legal Representatives of the Victims**

Ms. Hélène Cissé

Mr. Jens Dieckmann

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented**

**Applicants(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr. Herman von Hebel

**Deputy Registrar**

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

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Section**

**Other**

## Introduction

1. The Prosecution hereby requests a ruling on the permissible scope of witness preparation in this case.
2. In its 6 June 2011 “Decision on the re-interviews of six witnesses by the prosecution” (“2011 Decision”), the Chamber stated that:

... 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.<sup>1</sup>

3. Since the 2011 Decision was issued, witness preparation has been authorised in two cases – *Ruto & Sang* and *Kenyatta*.<sup>2</sup> The rulings in those cases are consistent with the 2011 Decision in that they prohibit rehearsing testimony or training witnesses to answer specific questions. Subject to this restriction, the Kenya decisions contain a detailed explanation on the scope of permissible witness contact and preparation prior to testimony. The Kenya rulings permit “judicious witness preparation aimed at clarifying a witness’s evidence”,<sup>3</sup> while at the same time maintaining the prohibition on rehearsing testimony, which this Chamber adopted in its 2011 Decision.
4. The Prosecution requests this Chamber to issue guidelines that: (i) maintain the 2011 Decision’s prohibition on rehearsing testimony, while at the same time (ii) permit witness preparation aimed at augmenting the Court’s truth-finding function and the efficiency of the proceedings, as authorised in the Kenya cases. Stated differently, the Prosecution asks the Chamber to clarify that the parties are permitted to conduct witness preparation that does *not* constitute a “rehearsal of the witness’s evidence”.<sup>4</sup> Such a ruling will ensure

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<sup>1</sup> ICC-02/05-03/09-158, para. 15.

<sup>2</sup> ICC-01/09-01/11-524; ICC-01/09-02/11-588.

<sup>3</sup> ICC-01/09-01/11-524, para. 50; ICC-01/09-02/11-588, para. 52.

<sup>4</sup> ICC-02/05-03/09-158, para. 15.

consistency across the Court's current trials and will produce significant benefits, including:

- Assisting the Court in the truth-finding process by helping to ensure that all probative evidence is presented at trial;
- Assisting witnesses in providing (and assist counsel in eliciting) clear, focused and structured testimony, which will facilitate a fair and expeditious trial; and
- Contributing to the well-being of witnesses, including by helping reduce their stress and anxiety about testifying, and by ensuring that they understand the unique features of this case.

5. Such a ruling is particularly appropriate in the *Banda* case:

- *First*, proper witness preparation will assist witnesses to recall events that took place almost seven years ago. The passage of time can make recollection more difficult, particularly where witnesses are asked to testify about traumatic events. Proper witness preparation will help address this challenge by providing witnesses with an adequate opportunity to re-engage with their evidence immediately before testimony. This will assist in the process of recollection and better enable witnesses to provide their account accurately on the stand. Such an approach furthers both the Court's truth-finding function and its Article 68(1) duty to safeguard the well-being of witnesses.
- *Second*, witnesses require a full explanation of the unique features of this case if they are to provide clear and concise evidence to the Chamber. Because of the agreed facts in this case, the parties will tailor their presentations of evidence in line with the stipulations. Counsel may limit questions on topics that do not relate to the contested issues, which may surprise witnesses, who may reasonably expect that they will have an opportunity to tell the Court their entire account. If

witnesses do not understand the scope of this trial before they take the stand, there is an increased possibility that they may stray onto irrelevant topics, causing unnecessary delay. It may also lead to confusion or dissatisfaction from witnesses who do not understand why the parties are not interested in hearing evidence that appears to the witness to be relevant.

6. The experience in *Ruto & Sang* – the one trial in which witness preparation has been conducted at this Court – demonstrates that proper preparation assists in the presentation of evidence and witness well-being, while at the same time ensuring that the proceedings are fair to all parties. The Prosecution submits that this Chamber should authorise the same approach in this case.

### Submissions

- I. Consistent with the 2011 Decision, the Chamber should follow the procedure authorised in the Kenya cases, which has proved effective in practice.
7. Consistent with the 2011 Decision, the Prosecution submits that the Chamber should follow the procedure authorised in the *Ruto & Sang*<sup>5</sup> and *Kenyatta*<sup>6</sup> cases (“Proposed Procedure”). In those cases, Trial Chamber V set out the Proposed Procedure in a detailed annex, a copy of which is appended to this application as Annex A.
8. Under the Proposed Procedure, counsel for the calling party will: *first*, explain the purpose of the preparation session and reiterate the witness’ obligation to tell the truth; *second*, provide the witness with an opportunity to review his or her prior statements; and *third*, provide the witness with an opportunity to confirm whether his or her prior statements are accurate and to explain any changes as necessary.<sup>7</sup>

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<sup>5</sup> ICC-01/09-01/11-524-Anx.

<sup>6</sup> ICC-01/09-02/11-588-Anx.

<sup>7</sup> ICC-01/09-01/11-524-Anx, paras. 15-18; ICC-01/09-02/11-588-Anx, paras. 15-18.

9. Counsel may also: (i) review with the witness his or her prior statement(s) and question the witness on any inconsistencies in those statements;<sup>8</sup> (ii) explain, in general terms, the topics the calling party intends to cover in examination-in-chief, as well as the topics on which the witness may be questioned during cross-examination;<sup>9</sup> (iii) show the witness potential exhibits and ask him or her to comment on them for the purpose of determining the utility of using the exhibits in court;<sup>10</sup> (iv) explain the role of the various participants in the courtroom;<sup>11</sup> and (v) subject to certain restrictions,<sup>12</sup> answer any questions the witness may have, including about what to expect in court.<sup>13</sup>
10. Consistent with this Chamber's prohibition on the "rehearsal" of testimony, the Proposed Procedure prohibits counsel from "undertak[ing] to train the witness or practice the questions and answers expected during the witness's in-court testimony so that the witness memorises those questions and answers".<sup>14</sup> The Proposed Procedure also prohibits counsel from: (i) "[s]eek[ing] to influence the substance of the witness' answers";<sup>15</sup> and (ii) "[i]nform[ing] the witness of the evidence of other witnesses".<sup>16</sup>
11. The Proposed Procedure has worked well in practice. In the *Ruto & Sang* case, witness preparation has enabled questioning counsel to: (i) explain courtroom procedures to help the witness feel comfortable in court; (ii) address any security concerns the witness may have in connection with testifying, including explaining the in-court protective measures the Trial Chamber may choose to authorise, which helps put witnesses at ease to the greatest extent possible prior to testimony; (iii) explain appropriate courtroom behavior,

<sup>8</sup> ICC-01/09-01/11-524-Anx, para. 19; ICC-01/09-02/11-588-Anx, para. 19.

<sup>9</sup> ICC-01/09-01/11-524-Anx, paras. 20-21; ICC-01/09-02/11-588-Anx, paras. 20-21. This includes explaining to the witness that "he or she may not be questioned in court on matters upon which investigators previously questioned the witness" - see ICC-01/09-01/11-524-Anx, para. 22; ICC-01/09-02/11-588-Anx, para. 22.

<sup>10</sup> ICC-01/09-01/11-524-Anx, para. 23; ICC-01/09-02/11-588-Anx, para. 23.

<sup>11</sup> ICC-01/09-01/11-524-Anx, para. 24; ICC-01/09-02/11-588-Anx, para. 24.

<sup>12</sup> ICC-01/09-01/11-524-Anx, paras. 27-29; ICC-01/09-02/11-588-Anx, paras. 27-29.

<sup>13</sup> ICC-01/09-01/11-524-Anx, para. 26; ICC-01/09-02/11-588-Anx, para. 26.

<sup>14</sup> ICC-01/09-01/11-524-Anx, para. 28; ICC-01/09-02/11-588-Anx, para. 28.

<sup>15</sup> ICC-01/09-01/11-524-Anx, para. 27; ICC-01/09-02/11-588-Anx, para. 27.

<sup>16</sup> ICC-01/09-01/11-524-Anx, para. 29; ICC-01/09-02/11-588-Anx, para. 29.

including the obligation to tell the truth, the importance of speaking slowly and clearly, and making allowances for translation, thus facilitating the smooth running of witness testimony; (iv) clarify unclear or inconsistent prior statement(s) so that the witness' testimony can be presented to the Chamber in the clearest and most accurate way possible; and (v) assess the witness' capacity to comprehend questions, follow written material, identify potential exhibits and deliver a coherent account of their evidence, and adapt in-court questioning accordingly.

12. While the Defence in *Ruto & Sang* has sought disclosure of recordings of Prosecution witness preparation sessions, Trial Chamber V(A) has rejected the requests on each occasion, ruling that there was "no concrete and credible basis " to support the requests.<sup>17</sup>

## II. There is a proper legal basis to authorise witness preparation.

13. Article 64 provides the Chamber with the legal basis to authorise witness preparation. It "is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims".<sup>18</sup> In particular sub-articles 64(2), 64(3)(a), 64(6)(f) and 64(8)(b) provide the Chamber with broad discretion to adopt procedures that may "facilitate the fair and expeditious conduct of the proceedings", including the questioning of witnesses and the presentation of evidence.<sup>19</sup>
14. While Article 64 provides the Chamber with ample legal basis to authorise witness preparation, further support can be derived from *ad hoc* and hybrid tribunals' jurisprudence, as foreseen in Article 21. Witness preparation "is either allowed or encouraged at the *ad hoc* tribunals [ICTR, ICTY and Special

<sup>17</sup> ICC-01/09-01/11-T-77-CONF-ENG, pp. 1-3; *see also* ICC-01/09-01/11-T-85-CONF-ENG, pp. 31-32. While redacted versions of these transcripts have not yet been issued, the Chamber's decisions were rendered in public. The Prosecution therefore considers it permissible to quote the transcripts in this document, particularly given that the Accused's counsel has access to confidential transcripts in the *Ruto & Sang* case.

<sup>18</sup> ICC-01/09-01/11-524, para. 27.

<sup>19</sup> *See* ICC-01/05-01/08-1039, paras. 9-10; *see also* Rule 140 and Regulation 43 of the Regulations of the Court.

Court for Sierra Leone] and in various national jurisdictions where the principle of the primacy of orality is followed and where trials [...] rely on the examination of live witnesses through questioning by the parties.”<sup>20</sup>

III. The 2011 Decision does not address whether the type of witness preparation authorised in the Kenya cases is permissible in this case.

15. Other than the prohibition on “rehears[ing]” witness testimony contained in the 2011 Decision, no guidance has been issued to the parties in this case regarding the permissible scope of witness contact or preparation prior to testimony. No protocol governing the procedure for witness familiarisation has been adopted, as has been the case for other cases at this Court.<sup>21</sup>

16. While the 2011 Decision makes clear that the rehearsal of testimony is impermissible, it does not address whether parties may undertake witness preparation that does *not* constitute a “rehearsal”. It is this open issue that the Prosecution asks the Chamber to address before trial. In the Prosecution’s view, a ruling that provides the parties with certainty regarding the rules applicable in this case will further the fair and expeditious nature of the proceedings by reducing the chances of litigation on the issue arising during trial.

17. To be clear, the Prosecution is not asking the Chamber to depart from the 2011 Decision’s prohibition on rehearsing witness testimony. The Prosecution agrees with that prohibition and does not wish to rehearse witness testimony.

<sup>20</sup> See ICC-01/09-01/11-524, para. 35 and the authorities cited in footnote 54. See also ICTY, *Prosecutor v. Limaj, et al.*, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, 10 December 2004; ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006; ICTR, *Prosecutor v. Karemera, et al.*, Case No. ICTR-98-44-T, Decision on Defence Motions to Prohibit Witness Proofing, 15 December 2006; ICTR, *Prosecutor v. Karemera, et al.*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007; SCSL, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005; ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, 23 May 2007.

<sup>21</sup> Such protocols have been adopted in other cases before this Court. See, e.g., ICC-01/05-01/08-1016, p. 15; ICC-01/05-01/08-1081-Anx; ICC-01/09-02/11-727-Anx; ICC-01/09-01/11-704-Anx; ICC-02/11-01/11-93-Anx1.



Rather, the Prosecution is asking the Chamber to adopt a complementary regime that maintains the prohibition on rehearsing testimony, while at the same time permitting counsel to undertake witness preparation aimed at augmenting the Court's truth-finding function and the efficiency of proceedings. Such a ruling will ensure consistency between the Court's current trials and will produce substantial benefits in this case, as discussed below.

IV. Witness preparation has substantial benefits.

a. Proper preparation assists witnesses to provide clear and focused testimony.

18. As noted by Trial Chamber V, "permitting witnesses to re-engage with the facts underlying their testimony aids the process of human recollection, better enables witnesses to tell their stories accurately on the stand and can assist in ensuring that the testimony of a witness is structured and clear".<sup>22</sup> Similarly, the ICTY has recognised that witness preparation "is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial."<sup>23</sup>

19. Relevant, accurate and complete witness testimony facilitates a fair, effective and expeditious trial. The need for clear and focused testimony is significant at this Court, where the importance of oral evidence is enshrined in Article 69(2). In this case, live witness testimony is likely to constitute a significant part of the evidence presented to the Chamber. It is therefore important that the testimony is structured, clear and concise. As noted by Trial Chamber V, "[a] witness who testifies in an incomplete, confused and ill-

<sup>22</sup> ICC-01/09-01/11-524, para. 32; ICC-01/09-02/11-588, para. 36.

<sup>23</sup> *Prosecutor v. Limaj, et al.*, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, 10 December 2004, p. 2.

structured way because of lack of preparation is of limited assistance to the Chamber's truth-finding function".<sup>24</sup>

20. One example of the benefits of witness preparation is the use of exhibits. A witness "shown a document for the first time on the stand may be caught off guard, without adequate time to consider whether he knows of the document and what relevant information, if any, he can provide about it".<sup>25</sup> This potential problem can be mitigated by showing witnesses potential exhibits during witness preparation, which enables counsel to determine which exhibits the witness can speak to and which (s)he cannot.<sup>26</sup> As Trial Chamber V held, "showing witnesses potential exhibits ahead of time will assist in the efficient conduct of proceedings and will help to ensure that witnesses are in a position to give the Chamber the most complete version of their evidence".<sup>27</sup>

b. Witness preparation furthers the Court's truth-finding function and increases efficiency.

21. Witness preparation furthers the Court's truth-finding function because it helps ensure that witnesses "are in a position to give the Chamber the most complete version of their evidence".<sup>28</sup> New information may surface during witness preparation that was not revealed by the witness in previous interviews and was previously unknown to either party. Learning such information before testimony enables the calling party to assess the impact of the new information on the witness' evidence as a whole, and to disclose new information to the non-calling party before the witness takes the stand,

<sup>24</sup> ICC-01/09-01/11-524, para. 31; ICC-01/09-02/11-588, para. 35.

<sup>25</sup> ICC-01/09-01/11-524, para. 33; ICC-01/09-02/11-588, para. 37.

<sup>26</sup> Consider, for example, a witness who is to testify about the location where crimes were committed. Showing the witness potential demonstratives ahead of time enables questioning counsel to determine whether the witness is capable of commenting on maps or sketches of the locations, or whether a computer reconstruction is necessary. Absent such preparation, counsel may need to try several exhibits in court before finding one, with which the witness can cope. Such trial and error inevitably slow the trial and may cause unnecessary embarrassment to the witness.

<sup>27</sup> ICC-01/09-01/11-524, para. 33; ICC-01/09-02/11-588, para. 37.

<sup>28</sup> See ICC-01/09-01/11-524, para. 33; ICC-01/09-02/11-588, para. 37.

thereby reducing the possibility of either party being blindsided by unexpected issues that arise for the first time during testimony.

22. Efficient trials require efficient witness examinations, and a lawyer who recently met with a witness will be better positioned to question the witness in court efficiently.<sup>29</sup> Witness preparation meetings provide “a last opportunity for the calling party to determine the most effective way to question its witnesses and which topics will elicit the most relevant and probative evidence during in-court examination”.<sup>30</sup> It enables counsel to determine which topics will elicit relevant and probative testimony, and which may cause the witness to stray into irrelevant areas that need not occupy the Court’s time; counsel can then structure their in-court examination accordingly. Hence, the Proposed Procedure will increase efficiency by enabling parties to streamline their witness examinations and tailor them to the contested issues, while at the same time reducing the possibility of the parties being surprised by unexpected issues that arise for the first time during in-court testimony.<sup>31</sup>

c. Witness preparation contributes to the well-being of witnesses.

23. Trial Chamber V correctly observed that witness preparation “enhances the protection and well-being of witnesses, including by helping to reduce their stress and anxiety about testifying”.<sup>32</sup> Most witnesses have never testified in court and are unfamiliar with courtroom questioning. Most are accustomed to sharing information as lay people normally do, by telling a story or engaging in informal conversation for which they do not ordinarily prepare in advance, whereas a witness needs to be able to break down information into small

<sup>29</sup> See ICC-01/09-01/11-524, para. 34; ICC-01/09-02/11-588, para. 38.

<sup>30</sup> ICC-01/09-01/11-524, para. 34; ICC-01/09-02/11-588, para. 38.

<sup>31</sup> See ICC-01/05-01/08-1039, para. 23; ICTY, *Prosecutor v. Limaj, et al.*, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, 10 December 2004, p. 2; ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006, para. 20.

<sup>32</sup> ICC-01/09-01/11-524, para. 37; ICC-01/09-02/11-588, para. 41.

pieces and to respond directly to questions posed. As Trial Chamber V observed:

[Witnesses'] concerns may also result from anxiety about giving evidence in what may feel like a foreign and even hostile environment, a lack of confidence in their ability to communicate and articulate their experiences, and/or apprehension over the unfamiliar experience of being challenged during cross-examination. Witness preparation can help to ensure that witnesses fully understand what to expect during their time in court and that they are able to communicate any concerns to the calling party, including case-specific questions which the VWU would be unable to address. Particularly with regard to vulnerable witnesses, such prior preparation may help to reduce the psychological burdens of testimony, since those witnesses may face unique difficulties when being questioned repeatedly about traumatic events.<sup>33</sup>

24. This consideration is pertinent in the *Banda* case. Many witnesses have no experience testifying in court. Several of the victim witnesses suffered serious trauma during the events in question: Witness P-0416 was shot in the back at close range by an attacker standing over him, before which he saw a comrade shot next to him.<sup>34</sup> A rocket-propelled grenade exploded next to Witness P-0446, injuring him and knocking him unconscious.<sup>35</sup> Witness P-0486 saw a round of heavy calibre ammunition cut through a person near him and was then attacked.<sup>36</sup> When he regained consciousness, he saw the attackers shoot and kill another person.<sup>37</sup>

25. Against this backdrop, the Prosecution agrees with Trial Chamber V's finding that witness preparation "may help to increase witnesses' confidence and may reduce their reluctance to reveal sensitive information on the stand".<sup>38</sup>

<sup>33</sup> ICC-01/09-01/11-524, para. 37; ICC-01/09-02/11-588, para. 41.

<sup>34</sup> DAR-OTP-0165-0381 at 0390, para. 40.

<sup>35</sup> DAR-OTP-0169-0808 at 0820, para. 104.

<sup>36</sup> DAR-OTP-0181-0204 at 0223-0224, paras. 114-115.

<sup>37</sup> DAR-OTP-0181-0204 at 0224, para. 116.

<sup>38</sup> ICC-01/09-01/11-524, para. 37; ICC-01/09-02/11-588, para. 41. While Trial Chamber V made the above finding in the context of "the specific situation in Kenya", the same considerations apply with equal force to the witnesses in the *Banda* case. Indeed, Judge Eboe-Osuji, sitting as a member of Trial Chamber V, did not concur as to the reference to the "specific situation in Kenya" in that case (see ICC-01/09-02/11-588, para. 41), which suggests that he views the witness welfare benefits of witness preparation as applicable to all cases.

V. The Proposed Procedure mitigates any perceived risks of witness preparation.

26. The Prosecution agrees with Trial Chamber V that witness preparation, properly conducted, is not likely “to result in substantive alterations to a witness’s testimony at trial”.<sup>39</sup>
27. *First*, adopting comprehensive guidelines will prevent counsel from straying into inappropriate territory during witness preparation sessions.<sup>40</sup> Trial Chamber V adopted such guidelines in the Kenya cases,<sup>41</sup> as has the ICTY,<sup>42</sup> and there is nothing to prevent this Chamber from doing so.
28. *Second*, the 2011 Decision’s prohibition on “rehearsing” testimony prevents counsel from engaging in activity during witness preparation that “may negatively affect the reliability of the evidence adduced at trial”, which in any event can be “adequately addressed by appropriate safeguards”.<sup>43</sup> In this regard, the Prosecution emphasises that the Proposed Procedure is complementary to the 2011 Decision.
29. *Third*, “cross-examination, and questioning by the Chamber, concerning the extent of a witness’s preparation can provide an important check against improper conduct”.<sup>44</sup> With an assurance that improper conduct will be revealed during in-court questioning, counsel will not risk impeaching the credibility of the witness, and their own professional reputation, by using preparation sessions to improperly coach or influence testimony.
30. *Fourth*, the applicable codes of conduct require lawyers to undertake witness preparation honestly and fairly. The Code of Conduct for the Office of the Prosecutor requires Prosecution staff to, among others, “uphold the highest

<sup>39</sup> ICC-01/09-01/11-524, para. 39.

<sup>40</sup> See ICC-01/09-01/11-524, para. 46; ICC-01/09-02/11-588, para. 49.

<sup>41</sup> ICC-01/09-01/11-524-Anx; ICC-01/09-02/11-588-Anx.

<sup>42</sup> *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Annex to Prosecution’s Written Submissions in Response Opposing Verbatim Recording of “Proofing” Sessions with Witnesses, 28 March 2007.

<sup>43</sup> ICC-01/09-01/11-524, para. 44; ICC-01/09-02/11-588, para. 47.

<sup>44</sup> ICC-01/09-01/11-524, para. 45; ICC-01/09-02/11-588, para. 48.

standards of integrity and relevant standards on confidentiality, fairness, honesty and truthfulness” and to “ensure that proceedings are conducted in a fair manner”.<sup>45</sup> The Code of Professional Conduct for counsel requires Defence counsel to “take all necessary steps to ensure that his or her actions. . . are not prejudicial to the ongoing proceedings” and to “maintain the integrity of evidence” at all times.<sup>46</sup>

31. *Fifth*, the Proposed Procedure requires the prompt disclosure of any disclosable information obtained during witness preparation sessions, which mitigates any inconvenience to the non-calling party.<sup>47</sup> While the disclosure of additional information shortly before a witness testifies may place certain burdens on the parties, the Chamber will be able to regulate the in-court use of new information obtained before testimony to ensure that the fairness of proceedings is preserved.<sup>48</sup> And in any event, “such pre-testimony disclosure is preferable to requiring the opposing party to react to new evidence only when the witness is on the stand”.<sup>49</sup>

VI. Witness preparation is particularly appropriate in light of the specific features of the *Banda* case.

- a. Proper witness preparation is necessary given the length of time since the events at issue and the parties’ limited ability to maintain contact with its witnesses during the pre-trial phase.

32. The events relevant to the *Banda* case took place almost seven years ago. The deployment of AMIS in the region (and the consequent deployment of several Prosecution witnesses) took place even earlier. Witnesses will be asked to testify about the activities of the combatant groups in the lead up to the

<sup>45</sup> Code of Conduct for the Office of the Prosecutor, paras.20(c) and 51(b); *see also* paras. 25-30, 49, 52-54.

<sup>46</sup> Code of Professional Conduct for counsel, Articles 24(1) and 25(1); *see also* Article 29.

<sup>47</sup> ICC-01/09-01/11-524-Anx, para. 30 (“Where the calling party obtains information during a preparation session that is subject to disclosure, it shall disclose that information to the non-calling party as soon as practicable, and in any event before the witness begins his or her examination-in-chief.”)

<sup>48</sup> ICC-01/09-01/11-524, para. 42; ICC-01/09-02/11-588, para. 46.

<sup>49</sup> ICC-01/09-01/11-524, para. 42; ICC-01/09-02/11-588, para. 46.

29 September 2007 attack on MGS Haskanita, which will require recollection of events well before the attack. In addition, several witnesses provided their initial statements to the Prosecution over five years ago.<sup>50</sup> Since then, many witnesses have had little, if any, opportunity to engage with the substance of their testimony. It is to be expected that the events of 2007 will no longer be at the forefront of their minds. It is particularly important in this context that every effort is made to ensure that witnesses are in a position to provide the Court with their best recollection of what happened. Proper witness preparation serves this end because it enables witnesses to re-engage with their evidence in a meaningful manner prior to taking the stand, thus bringing the relevant events to the forefront of their minds and better equipping them to provide clear, accurate, testimony in court.<sup>51</sup>

33. In the Prosecution's view, this goal cannot be achieved through the VWU-led "witness familiarisation" process employed in the *Lubanga*, *Katanga* and *Bemba* trials. While the familiarisation process may provide the witness with a sense of what the courtroom looks like and the roles of the participants, it does little to prepare a witness for the substance of his or her testimony. With the best will in the world, VWU staff cannot be expected to answer questions the witness may have, such as what to expect questions on and whether certain issues are relevant to the case. Whatever benefits the VWU familiarisation process may have, it is not as effective in preparing witnesses to give clear, concise and accurate testimony as preparation meetings with the counsel who will question them in court. As Trial Chamber V correctly observed:

Limiting pre-testimony contact between counsel and witnesses to the ten minute "courtesy meeting" provided for in the Familiarisation Protocol does not best serve

<sup>50</sup> For example, Witness P-0307 was interviewed in mid-2008. Witnesses P-0326, P-0416, P-0417 and P-0420 were interviewed in early 2009.

<sup>51</sup> See ICC-01/09-01/11-524, para. 36 (noting that "there is an increased likelihood that witnesses will give testimony that is incomplete, confused or ill-structured" asked to testify about events that took place many years ago); ICC-01/09-02/11-588, para. 40.

the Chamber's Article 68(1) duty to take appropriate measures to protect the well-being and dignity of witnesses.<sup>52</sup>

34. As explained above, witness preparation meetings also increase witness well-being because they enable counsel to develop a rapport with the witness. That is the time when witnesses need to be able to ask questions to the lawyer tasked with eliciting private and traumatic information from them in court. In the context of the *Banda* case, it is particularly important for counsel to have an adequate opportunity to engage with witnesses immediately prior to their testimony and to assure them about the process, their place in it, and the measures taken to ensure their security. Permitting counsel to undertake witness preparation is thus consistent with the Court's duty under Article 68(1) to take measures to ensure the well-being of witnesses.

b. Proper preparation will ensure that witnesses are aware of the unique features of the *Banda* case.

35. Witnesses benefit when the process of testifying and the topics to be covered are fully explained before they take the stand. This is particularly true in this case because the parties have stipulated to many of the key facts underlying the charges and have narrowed the disputed issues in the case to three.<sup>53</sup> The Chamber has ruled that "the trial will proceed only on the basis of the contested issues",<sup>54</sup> which means that the trial will be narrower in scope.

36. It is important for this feature to be explained to witnesses before trial. Unless counsel are given a chance to explain the focused nature of the trial, witnesses may reasonably expect to be given an opportunity to tell the Court everything they know about the attack on MGS Haskanita. If they are not, witnesses may end up feeling confused or frustrated with the process. Witness preparation will allow questioning counsel to focus the witnesses on the contested issues,

<sup>52</sup> ICC-01/09-01/11-524, para. 37; ICC-01/09-02/11-588, para. 41.

<sup>53</sup> See ICC-02/05-03/09-148, para. 3.

<sup>54</sup> ICC-02/05-03/09-227, para. 46. This ruling is subject to the Chamber's "discretion to request additional evidence and/or submissions on the alleged facts if required in the interests of justice". *Id.*, para. 24.



and to enable witnesses to provide the Court with the most helpful evidence on those issues. It will also help witnesses understand why they may not be questioned about issues that the witness considers relevant, but are peripheral to the contested issues. Such preparation will further the interests of witness welfare under Article 68(1) and increase counsel's ability to keep witnesses focused on the contested issues while on the stand.

### **Conclusion**

37. The Proposed Procedure addresses the complexities and challenges in cases before this Court and the particular circumstances of the *Banda* case. Permitting proper witness preparation – while at the same time maintaining the 2011 Decision's prohibition on "rehears[ing]" testimony – will further the Court's truth-finding function by increasing the chances that the Chamber will hear all probative evidence that a witness has to offer. It will also result in more efficient witness examinations that are fairer to the parties and the witnesses.

38. In light of the foregoing, the Prosecution respectfully requests that the Chamber authorise the parties to carry out witness preparation in accordance with the Proposed Procedure.




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**Fatou Bensouda**  
**Prosecutor**

Dated this 28<sup>th</sup> day of March 2014

At The Hague, The Netherlands