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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schimtt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

***v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO***

Public

Joint Defence Submissions on witness preparation

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Introduction

1. “[A] any ruling on witness proofing should be made after a careful review of the circumstances prevailing in each case before the Court”.¹

2. In light of the particular circumstances of this Article 70 case, the Defence teams of Narcisse Arido, Jean-Jacques Mangenda Kabongo, Fidel Babala, Aimé Kilolo and Jean-Pierre Bemba Gombo oppose the general practice of ‘witness preparation’ meetings between witnesses and the calling party immediately prior to the witnesses’ testimony.

3. Witness preparation is to be understood as the calling party (i) allowing a witness to read his or her statement(s) and refresh his or her memory in respect of the evidence to be given at trial; (ii) relying on the statement(s) to put questions to the witness which are intended to be asked at trial and in the order they are to be asked; and (iii) inquiring of the witness about possible additional information of an inculpatory or exculpatory nature.²

4. The rationale for applying a general practice of witness preparation does not apply to witnesses who have been recently interviewed by the Prosecution, especially given the small number of witnesses to be called. The interests of a fair, impartial and expeditious trial would be better served by determining the need for ‘witness preparation’ meetings on a case-by-case basis, taking into consideration the rights of the accused under Article 67(1) of the Statute.

5. Specific authorisation from the Trial Chamber should, accordingly, be required prior to any such witness preparation meetings. The request should be *inter partes*.

¹ ICC-01/05-01/08-1039, para. 7.

² ICC-01/04-01/06-679, para. 17.

6. The modalities of any safeguards implemented with this practice must also be tailored to the exigencies of the situation, and respect the fundamental differences between the roles and obligations of the Prosecution and the Defence.

Submissions

1. The rationale for implementing a general practice of witness preparation does not apply to this case, at least in respect of Prosecution witnesses

7. The *ad hoc* Tribunals have justified the employment of ‘witness preparation’ by referring to the time-lag between the date on which witnesses might have been initially interviewed at the date of the witness’s testimony (which at *ad hocs* could be several years), and the changing scope and focus of investigations which often spanned multiple defendants, cases, and regions.³

8. In contrast, the current proceedings concern Article 70 allegations, regarding conduct that allegedly took place within the last three years.

9. The Prosecution’s investigations were focussed from their inception on specific allegations and specific suspects,⁴ and as a result, witnesses were questioned extensively in relation to issues that concern both the current charges and the current defendants.

³ *Prosecutor v. Limaj*, ‘Decision on Defence Motion on Prosecution Practice on ‘Proofing’ Witnesses’, 10 December 2004: “Interviews by investigators were also conducted a long time ago” (p.2), the issue of translation from a different language (p. 3), the changing focus of investigations (p.2); the stress of recollecting events, which occurred a long time ago (p.3); *Prosecutor v. Karemera et al.*, Decision On Defence Motions To Prohibit Witness Proofing’, 15 December 2006, para. 17 (upheld on appeal: *Prosecutor v. Karemera et al.*, ‘Decision on Interlocutory Appeal Regarding Witness Proofing’, 11 May 2007).

⁴ ICC-01/05-44-Conf-Red2, paras. 3, 12, 15; ICC-01/05-51-Conf, paras. 2-4; 14; ICC-01/05-58-Conf-AnxA, paras. 2-4, 23, 29, 32; ICC-01/05-60-Conf-Red2, paras. 3, 25; ICC-01/05-01/08-2548, paras. 3, 10, 13, 21-24.

10. Since the Prosecution's documentary evidence in this case pertains largely to evidence extracted from the Main case, it was also in a position to go through relevant documents with witnesses at the time that they were interviewed.

11. Most of the witnesses who are likely to be called for the Prosecution have already testified before the Court, and are aware of its practices and procedures.

12. The majority of the charges against the Accused are based on the alleged difference between what these witnesses said while under oath in the Main Case, and what they later said to the Prosecution. In light of these contradictions, the interests of justice would be better served by these witnesses appearing "unprepared" before the Trial Chamber, and have their evidence presented and tested in Court. Any time-saving benefit of proofing is balanced by the fact that the scope of the charges in the present case is more limited than in Article 5 cases.

13. An equality of arms issue would arise if the Prosecution were permitted to employ witness preparation in the Article 70 case in connection with such witnesses, whilst relying on evidence obtained under a different procedural regime. This is particularly the case given that the Defence request to proof witnesses in the Main Case was never adjudicated on its merits.⁵

14. The instigation of a general practice of 'witness preparation' as concerns Prosecution witnesses would be inconsistent with the Prosecutor's duty, under Article 54(1), to establish the truth, in an expeditious manner. This duty requires the Prosecutor to ensure that all relevant information is brought to the attention of the Defence and the Chamber, even if the information in question undermines the Prosecution's charges.

⁵ ICC-01/05-01/08-1039, paras. 3-4.

15. In accordance with Article 67(2), anything which affects the credibility of Prosecution evidence can be considered to be exculpatory.⁶ This includes any inconsistencies in a witness's previous statements or a witness's lack of certainty about certain events. A general practice of preparation could frustrate witness spontaneity, and deprive the Chamber and the Defence of information that a more 'groomed' witness might not otherwise volunteer.⁷

16. A general practice of witness preparation could also frustrate the Prosecutor's statutory duty to act with due diligence, to inform the defence promptly of the nature and cause of the charges, and to ensure that its actions do not compromise the right of the Defence to have adequate time and preparation to respond to the Prosecution case.

17. Concretely, in the absence of exceptional circumstances beyond the Prosecution's control, there is no reason why the Prosecution would not be able to meet with its witnesses, and question them thoroughly in relation to the nature and scope of their proposed testimony, *in situ*, and prior to the commencement of the trial.

18. Moreover, if key questions are only put to a witness when they are in The Hague, the Defence would not be in a position to verify or investigate this information prior to the witness's testimony. Although the Defence could, in theory, request an adjournment, any such adjournments would be incompatible with the right of the defendants to an expeditious trial, and Mr. Bemba's right not to be detained for an unreasonable length of time as concerns charges, which involve a

⁶ Article 67(2) obliges the Prosecution to "as soon as practicable, disclose to the defence evidence in the Prosecution's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence."

⁷ "According to a source from the Court, if 'proofing' had been permitted, issues which arose in relation to the first witness in Lubanga may not have been brought to the attention of the Chamber and the parties"; 'Witnesses before the International Criminal Court', IBA Report, July 2013, p.24.

maximum penalty of five years. It would also be contrary to the best interests of the witness, as the witness would either be compelled to prolong their stay at the seat of the Court, or endure multiple trips to The Hague.

19. Even if new evidence or documents were to emerge in relation to a witness, this does not in justify a general practice of witness preparation as concerns Prosecution witnesses. Unless such matters are exculpatory, the Prosecution would have no right to raise such matters at trial if the new material had not been disclosed previously during the pre-trial phase.

2. The need for witness preparation should be determined on a case by case basis, taking into consideration the different positions of the Prosecution and the Defence.

20. Whereas it is unnecessary and inefficient to implement a general practice of witness preparation, the Trial Chamber should nonetheless consider and authorise witness preparation on a case-by-case basis, where necessary to ensure that the 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”.⁸

21. This is consistent with the practice of Trial Chamber I, in which – notwithstanding the general prohibition on witness proofing/preparation – parties were permitted to meet with witnesses if there was a particular justification for doing so. For example, the Trial Chamber granted a Defence request to meet a witness in The Hague in order to go through documents, which had only recently been disclosed by the Prosecution.⁹ Similarly, the Defence were permitted to meet with a witness, who had brought documents with him to the Court, as part of the Defence investigation into new issues.¹⁰

⁸ Article 64(2).

⁹ ICC-01/04-01/06-T-239-Red-ENG, p.1, line 12 – p.7 line 14.

¹⁰ ICC-01/04-01/06-T-284-Red-ENG, p.23, line 6 – p.24, line 14.

22. In the *Katanga & Ngudjolo* case, Trial Chamber II granted a Defence request to meet with a witness prior to his testimony so that the Defence could assess, in light of a recently disclosed document, whether to call the witness.¹¹

23. The very nature of a case-by-case assessment militates against setting out the criteria which would govern the Chamber's assessment, in an exhaustive manner at this stage of the proceedings. These will be addressed by the parties in their filings before the Trial Chamber.

24. The above decisions nonetheless reflect the fact that any regime for witness preparation must respect the rights of the Defence (including the right to adequate time and facilities and the privilege against self-incrimination), and must take into consideration the more limited ability of the Defence to conduct extensive *in situ* investigations.

25. The latter aspect is of crucial importance in this case. Whereas the Prosecution have been investigating this case for several years (and has received contingency funds and regular budget funds to enable it to do so),¹² the Defence teams have been allocated no investigations budget, or funding for a professional investigator.

26. For the majority of potential witnesses, Defence counsel would not be discharging their duties properly if they did not meet and interview the witness directly, before the witness testifies.¹³ However, in the absence of funding for a Co-

¹¹ ICC-01/04-01/07-T-251-ENG, p.36, line 1 – p.40, line 7.

¹² ICC-ASP/13/10, paras. 198, 206, 227, 235, 255.

¹³ See *Prosecutor v. Brdjanin & Talić*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 36, where the Trial Chamber held that, in relation to a prosecution motion concerning the late disclosure of a witness's identity, that: "The Appeals Chamber has placed a firm obligation upon 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

Counsel, when the trial commences, Defence counsel do not have the means to attend hearings, whilst also travelling on mission to interview potential Defence witnesses that have been identified.

27. Furthermore, it would be unreasonable for the Trial Chamber to expect Defence counsel to call a witness without having had the chance to personally meet and confirm that the witness is in a position to provide relevant and probative evidence. The ICTY Appeals Chamber in the *Krstić* case recognised that it would not be reasonable for the Defence to expect a witness to testify “‘cold’ in court without first knowing what he will say. That would be contrary to the duty owed by counsel to their client to act skilfully and with loyalty.”¹⁴ Similarly, Defence counsel in this case would be failing in their duty to act with a high level of competence¹⁵ if they failed to meet directly with potential Defence witnesses.

28. Whereas such circumstances will not be the rule, the Trial Chamber’s duty to ensure that the trial adheres to the minimum guarantees set forth in Article 67, requires that the Trial Chamber should permit the Defence to conduct a preparation session with a witness in The Hague, if the Defence did not have adequate time and resources to do so previously.

29. In sum, the following factors would be relevant to any decision as to whether to authorise a preparation meeting:

- i. The Prosecution’s duty to act in a diligent manner, and to ensure that thorough investigations are conducted at the earliest juncture rather than on the eve of witness’s testimony;

witnesses to be done by counsel who is to appear for the accused at trial. That 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. Many more than one person may well need to be spoken to before appropriate information becomes available.”

¹⁴ *Prosecutor v Krstić*, Appeals Chamber, Decision on Application for Subpoenas, 1 July 2003, para. 8.

¹⁵ Article 7, Code of Professional Conduct for Counsel.

- ii. The defendant's privilege against self-incrimination, and the corollary right of the Defence to make an informed decision as to whether to advance a case, through the testimony of a particular witness;
- iii. Resource and security issues, which might have impeded the ability of the calling party to conduct interviews *in situ*;
- iv. Any disclosure delays or violations, which have impeded the ability of the calling party to question the witness in relation to relevant issues during its investigation; and
- v. The procedural regime which applied if and when the witness previously testified before the ICC.

3. The Trial Chamber should not adopt a fixed protocol concerning the modalities of preparation

30. The Defence position is that the modalities of witness preparation should be determined on a case-by-case basis, and that as such, the Prosecution's proposed protocol (hereinafter the "Prosecution Protocol") should not be adopted. The modalities of any such meetings must be tailored to the particular circumstances of the witnesses, and the particular rights and obligations of the calling party.

31. Apart from the fact that the Defence objects to the promulgation of a fixed protocol on witness preparation at this juncture, the Defence also requests the Trial Chamber to refrain from relying on specific principles set out in the Prosecution Protocol, which will be identified below, in any future determinations.

Specific Principles in the Prosecution Protocol, which should not be followed

32. The Prosecution Protocol attempts, erroneously, to modify the different rights and obligations of the Prosecution and the Defence under the ICC legal framework. In particular, the Protocol:

- i. Imposes additional and unfounded disclosure obligations on the Defence; and
- ii. Fails to distinguish between the different legal regime which applies to exculpatory information as compared to incriminating information.

The Prosecution Protocol imposes additional and unwarranted disclosure obligations on the Defence

33. The inclusion of an obligation for both the Prosecution and the Defence to record and disclose any new information volunteered by the witness¹⁶ modifies the existing disclosure obligations of the Defence, and subverts the intention of the drafters to impose different disclosure obligations between the Prosecution and the Defence.¹⁷

34. The Prosecution must compile an accurate and complete record concerning each interview with witnesses, in particular, as concerns persons falling under Article 55(2),¹⁸ and disclose any such records to the Defence (apart from specific information that might be exempted from disclosure).¹⁹ In contrast, the Defence has no obligation to make a formal record of each and every meeting with a witness, and has the option to either disclose statements or summaries, which correspond to the proposed testimony of its witnesses.²⁰

¹⁶ Prosecution Protocol, para. 2.

¹⁷ ICC-01/04-01/06-T-254-Red-ENG, p.68, lines 3-10.

¹⁸ Rule 112.

¹⁹ ICC-01/04-01/07-1364, paras. 16-17; ICC-01/04-01/07-1553, para. 35; ICC-01/04-01/06-T-171-ENG, p.48, lines 15-25; ICC-01/05-01/08-750-Red, para. 36. See also *Prosecutor v. Sesay et al*, 'Decision on Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TFI-141', 26 October 2005, paras. 44-45.

²⁰ ICC-01/04-01/07-2388, para. 60; ICC-01/04-01/06-2192-Red, paras. 58-59; ICC-01/04-01/06-2433, para. 47; ICC-01/04-01/06-2192-Red; ICC-01/05-01/08-2141, para. 27.

35. What this means in practice is that if, during the course of a preparation meeting, a Prosecution witness proffers new information or evidence to the Prosecution, the Prosecution would have an obligation to record such information and disclose it to the Defence.²¹ This obligation exists independently of any protocols or case law concerning witness preparation.

36. In contrast, if a Defence witness proffers information to the Defence which the Defence does not intend to lead in evidence, the Defence has no obligation to record or disclose such information to the Prosecution, as Defence disclosure obligations under Rule 78 of the RPE are limited to items it intends to use at trial.²²

37. Similarly, the requirement that witness preparation can only take place “after witness statements have been taken and disclosed to the opposing party”²³ ignores the fact that the Defence are under no such obligation to compile or disclose such statements.

38. It is notable that in the United Kingdom, which employs a similar system to that proposed by the Prosecution Protocol, the specific obligation to record interviews and disclose new information only applies to interviews between the Crown Prosecution services and the witness,²⁴ and not to interviews between Defence solicitors and their witnesses.²⁵

²¹ The Prosecution’s disclosure obligation under Rule 76 is not limited to formal statements prepared under rule 111: ICC-02/05-03/09-295, paras. 23, 27.

²² ICC-01/04-01/06-2192-Red, fn.88; *see also* ICC-01/04-01/07-2388, para. 48.

²³ Prosecution Protocol, para. 8.

²⁴ ‘The Crown Prosecution Service - Pre-trial witness interviews: Code of Practice’, http://www.cps.gov.uk/victims_witnesses/resources/interviews.html#a08.

²⁵ A solicitor may not coach a Defence witness, but is not otherwise subject to more detailed obligations imposed on the Crown Prosecution Services: *see* Article 20, Code Of Practice For The Conduct Of Criminal Proceedings By The Prosecution And The Defence, <http://www.lawsociety.org.sg/portals/0/NewsMedia/pdf/FINAL%20Code%20of%20Practice%20for%20the%20Conduct%20of%20Criminal%20Proceedings.pdf>.

The Prosecution Protocol fails to distinguish between the legal regime which applies to exculpatory information as compared to incriminating information

39. In setting out a right to conduct follow up inquiries in relation to new information, irrespective as to whether it is incriminating or exculpatory in nature,²⁶ the Prosecution has failed to address or respect the strict time limits and duty of diligence which applies to the investigation and disclosure of incriminating information.

40. Whereas the Prosecution has an ongoing right and duty to investigate exculpatory information, the same does not apply to incriminating information.

41. To the contrary, the Rome Statute framework specifies that the Prosecution must complete the disclosure of incriminating statements and evidence prior to the commencement of the trial.²⁷ This include an obligation to compile and disclose an exhaustive witness statement corresponding to the witness's proposed testimony,²⁸ which in turn, requires the Prosecution to discuss all relevant matters with a witness at least several months prior to the commencement of the trial, and not on the *eve* of the witness's testimony.

²⁶ ICC-01/05-01/13-856, paras. 11-12.

²⁷ Article 64(3)(c) requires the Trial Chamber to ensure that the Prosecution effects "disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial". The Appeals Chamber has also underscored that "the Statute and the Rules of Procedure and Evidence provide that disclosure by the Prosecutor should, in principle, take place prior to the commencement of trial. Pursuant to article 61 (3) of the Statute and rules 121 (3) and (5) of the Rules of Procedure and Evidence, the Prosecutor must disclose all of the evidence intended for use at the confirmation hearing prior to that hearing. After the confirmation hearing, pursuant to article 64 (3) (c) of the Statute, the Trial Chamber shall "provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial". The Statute, Rules of Procedure and Evidence and Regulations of the Court also emphasise the duty of the Chamber to ensure that the Prosecutor discloses, prior to the commencement of trial, any evidence not previously disclosed during the pre-trial phase of the case." ICC-01/04-01/07-2288, para. 43.

²⁸ ICC-01/04-01/07-1364, paras. 16-17; ICC-01/04-01/07-1553, para. 35; ICC-01/04-01/06-T-171-ENG, p.48, lines 15-25.

42. A right to conduct further inquiries with Prosecution witnesses in relation to incriminating issues would also be contrary to:

- i. The right of the Defence to be informed promptly of the nature and cause of the charges (which includes the underlying evidence); and
- ii. The right of the Defence to adequate time and disclosure to prepare its cases as concerns the testimony of Prosecution witnesses.

43. Accordingly, far from prohibiting further investigations, any decision from the Trial Chamber granting the Prosecution the permission to prepare certain witnesses should impose a duty on the Prosecution to continue its investigations on exculpatory matters (even during witness preparation sessions). It should, at the same time, prohibit both further investigations and inquiries in relation to incriminating issues.

44. Should the Trial Chamber decide to implement both a general practice of witness preparation and a fixed protocol concerning the modalities of such preparation, the Defence respectfully requests to make further observations on the contents of any such Protocol, before its adoption.



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Dated this 13th day of April, 2015

The Hague, The Netherlands