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TRIAL CHAMBER V

Before: **Judge Kuniko Ozaki, Presiding Judge**
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 Document
with Public Annex A

Prosecution Motion Regarding the Scope of Witness Preparation

Source: **The Office of the Prosecutor**

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

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Introduction

1. The Prosecution seeks a modification of the witness familiarization protocol that has been adopted in other cases at this Court. The process in those cases permitted a very brief courtesy meeting between counsel and witness, but barred factual discussions and placed the task of witness familiarization on the Victim and Witnesses Unit ("VWU").[1] The proposed modification would allow the party calling a witness to talk to the witness in advance of testimony, with safeguards to avoid coaching or otherwise improperly influencing the witness.

2. The modification is warranted for two reasons. *First*, the Kenya cases present acute witness management challenges that require a different approach to witness familiarization. *Second*, the proposed modification will (i) expedite court proceedings by enabling counsel to prepare and present more streamlined witness examinations; (ii) further the Court's truth-finding function by helping ensure that the entirety of a witness' evidence is elicited at trial; and (iii) create a fairer system for witnesses by giving them an opportunity to clarify their evidence, ask meaningful questions about what to expect during testimony, and develop a rapport with questioning counsel.[2]

The witness preparation regime used in other cases

3. The Pre-Trial Chamber did not address pre-testimony interaction between a party and its witnesses in this case. It has, however, been considered by other Trial Chambers of the Court. In *Lubanga*, Trial Chamber I prohibited the parties from undertaking "substantive preparation of witnesses for

[1] *See* Victims and Witnesses' Unit Unified Protocol used to prepare and familiarise witnesses for giving testimony and Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses, 16 April 2012, ICC-02/11-01/11-93-Anx1, para 73.
[2] For ease of reference, the Prosecution is concurrently filing a "Compendium of Authorities", containing all non-ICC sources cited in this motion.

trial", largely due to its concern that such preparation "may come dangerously close to constituting a rehearsal of in-court testimony"[3] and endorsed a protocol outlining the modalities of witness preparation in line with that principle.[4] In *Katanga and Ngudjolo*, Trial Chamber II did not rule on the question of witness preparation directly,[5] but implicitly endorsed the approach taken by Trial Chamber I.[6] In *Bemba*, a majority of Trial Chamber III held "that no proofing or preparation of witnesses for trial by the parties shall be allowed".[7] Judge Ozaki dissented.[8]

4. Noting that the Court's legal framework provides Judges with "broad discretion" to rule on "purely procedural issues", such as witness preparation,[9] Judge Ozaki advanced several reasons why a departure from Trial Chamber I's approach warranted careful consideration:

    - It would further the Chamber's truth-finding function by ensuring that witnesses give "clear, relevant, structured, focused and efficient testimonies" in Court;[10]

[3] Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049 ("Lubanga Decision"), paras 35-52; 57. Pre-Trial Chamber I also prohibited the Prosecution from undertaking substantive witness preparation at the pre-trial stage. *See* Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, paras 18-24; disposition.
[4] Victims and Witnesses Unit protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 31 January 2008, ICC-01/04-01/06-1150-Conf. The VWU Protocol has been amended several times, the most recent version in the *Gbagbo* case on 16 April 2012, see n. 3 supra.
[5] Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134, para 18 (referring to Lubanga and stating that "[a] priori, the Chamber has no comments on the matter . . .").
[6] *See, e.g.*, ICC-01/04-01/07-T-110-Red-ENG WT, 2 March 2010, page 8, line 14 to page 9, line 9. The Single Judge previously endorsed the prohibition on witness preparation in *Lubanga*. *See* ICC-01/04-01/07-T12-ENG ET WT, 14 December 2007, page 6, lines 1-9.
[7] Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016, para 43.
[8] 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, ICC-01/05-01/08-1039 ("Dissenting Opinion").
[9] ICC-01/05-01/08-1039, paras 9-10.
[10] ICC-01/05-01/08-1039, para 21.

- It would help witnesses adjust to the unfamiliar process of testifying in a foreign court, and to recall events that may have occurred years earlier;[11]
- It would enable potential exhibits to be discussed with witnesses, which would "enable[e] a more accurate, complete, methodical and efficient presentation of the evidence";[12]
- It would save court time by ensuring that the Defence is provided with any disclosable information that comes to light during witness preparation, as opposed to hearing it for the first time in court;[13]
- It would increase witness "confidence [. . .] especially in respect of vulnerable witnesses".[14]

The modification proposed by the Prosecution

5. The Prosecution proposes that the witness familiarization regime applied in other cases be modified to enable the party calling a witness to meet with the witness in The Hague, before he or she is due to give evidence, to:

- Re-iterate the witness' obligation to tell the truth;
- Review the topics to be covered in examination and the likely topics of cross-examination;
- Review, with the witness, his/her prior statements;
- Confirm whether the statements are accurate, clarify additional points, and document additions or retractions the witness may deem appropriate;
- Show potential exhibits to the witness for his/her comment;

[11] ICC-01/05-01/08-1039, para 21; *see also* para 25.
[12] ICC-01/05-01/08-1039, para 22.
[13] ICC-01/05-01/08-1039, para 23.
[14] ICC-01/05-01/08-1039, para 24.

- Answer questions the witness may have, including about what to expect in court.

6. In the Prosecution's view, all parties and participants should be subject to the same witness preparation rules.

7. The Prosecution will promptly disclose any new information obtained during witness preparation. Disclosure will take place as soon as practicable after the preparation session, and in any event, before the witness begins his or her examination-in-chief.[15]

8. As explained below, the proposed modification is consistent with the interest in preventing witness coaching or the rehearsal of testimony, and will bring about substantial efficiency gains.

Modifying the witness familiarization regime is well within the Chamber's discretion and is supported by the practice of other international courts

9. The approach to witness preparation taken by other Trial Chambers is not binding on this Chamber. The Appeals Chamber has not ruled on the issue and procedural matters governing the conduct of one trial ought not to be reflexively applied to another, without consideration of the particular characteristics of a given case.[16]

10. Articles 64(2), 64(3)(a), 64(6)(f) and 64(8)(b) of the Statute, as well as Rule 140 and Regulation 43, provide the Chamber with broad discretion to adopt procedures that may "facilitate the fair and expeditious conduct of proceedings", including the questioning of witnesses and the presentation

[15] The experience at the *ad hoc* tribunals demonstrates that even where supplementary information obtained during preparation sessions is disclosed the same day as the witness' testimony, adjournments are generally unnecessary or brief and tend not to disrupt the court schedule. *See, e.g.*, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, transcript of hearing on 10 March 2011, T. 13140-13141 and T. 13205.
[16] *See* Dissenting Opinion, para 29 (observing that the Trial Chamber III's decision regarding witness preparation should have been based "on the specific circumstances of the *Bemba* case").

of evidence.[17] When read with Article 68(1)'s requirement that the Chamber "take appropriate measures to protect the […] well-being […] of […] witnesses", these provide the Chamber with ample legal basis to depart from the approach of the other Trial Chambers. This is particularly true at this stage of the Court's development, where lessons can and should be drawn from the first cases, and practices adapted to enhance the Court's work going forward.

11. In contrast to the approach taken to date at this Court, the *ad hoc* tribunals affirmatively permit witness preparation on efficiency, fairness and witness welfare grounds. While this jurisprudence is in no way binding, it is instructive to consider the experience and practice of other courts that try similar cases.

12. At the ICTY, witness preparation was first expressly upheld in the *Limaj* case. Denying a defence motion to direct the prosecution to cease the practice,[18] the Chamber articulated the advantages of witness preparation:

> 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 . . . such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial. Very importantly, proofing enables differences in recollection, especially additional recollections, to be identified and notice of them to be given to the Defence, before the evidence is given, thereby reducing the prospect of the Defence being taken entirely by surprise.[19]

[17] ICC-01/05-01/08-1039, paras 9-10; *see also* R. Karemaker, B. D. Taylor III, and T. Pittman, 'Witness Proofing in International Criminal Tribunals: Response to Ambos, 21 Leiden Journal of International Law 911 (2008) ("Karemaker et al. Response"), page 918 ("The ICC's procedural regime vests extraordinary discretion in the trial chamber to determine which form trial proceedings will take"); Karemera Appeals Chamber Decision, para 3 (noting that under the ICTR's legal framework, the regulation of witness preparation "falls within the discretion of the Trial Chamber").
[18] *Prosecutor v. Limaj, et al.*, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice on "Proofing" Witnesses, 10 December 2004 ("Limaj Decision").
[19] Limaj Decision, page 2.

13. The Chamber in *Milutinović* took the same approach, denying a defence motion to prohibit witness preparation on the basis that:

> . . . discussions between a party and a potential witness regarding his/her evidence can, in fact, enhance the fairness and expeditiousness of the trial, provided that these discussions are a genuine attempt to clarify a witness' evidence.[20]

14. The ICTR takes a similar approach. In *Karemera*, the Trial Chamber denied a defence motion to prohibit witness preparation, holding that it is "a useful and permissible practice" that reflects the "specificities of the proceedings before the *ad hoc* Tribunals".[21] The Appeals Chamber affirmed, emphasizing that cross-examination provides the non-calling party with an effective means to test whether "witness preparation might have improperly influenced testimony".[22]

15. The Special Court for Sierra Leone also recognized the benefits of permitting meaningful witness preparation, holding in the *Sesay* case that:

> . . . proofing witnesses prior to their testimony in court is a legitimate practice that serves the interests of justice. This is especially so given the particular circumstances of many of the witnesses in this trial who are testifying about traumatic events in

[20] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006 ("Milutinović Decision"), para 16; *see also* para 20 (endorsing Limaj Decision); *see also 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, para 22 (rejecting defence request for audio-recording of prosecution witness preparation sessions, holding that it was sufficient for the prosecution to disclose "a supplementary statement signed by the witness that would set out any new, additional or different evidence gleaned from the witness during proofing").

[21] *Prosecutor v. Karemera, et al.*, Case No. IT-98-44-T, Decision on Defence Motion to Prohibit Witness Proofing, 15 December 2006, paras 10, 17; *see also* paras 9-20. The defence motion in Karemera was based upon the decision of the *Lubanga* Pre-Trial Chamber to prohibit witness preparation; an approach the Karemera Chamber rejected.

[22] *Prosecutor v. Karemera, et al.*, Case No. IT-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007 ("Karemera Appeals Decision"), para 13. The Appeals Chamber also relied in part on its judgment in *Gacumbitsi*, where it had implicitly endorsed the practice of preparing witnesses for testimony. *See ibid*., para 9 (citing *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, judgment, 7 July 2006, para 73 ("It is not inappropriate *per se* for the parties to discuss the conduct of testimony and witness statements with their witnesses, unless they attempt to influence that content in ways that shade or distort the truth")).

an environment that can be entirely foreign and intimidating for them.[23]

The proposed procedure is best suited to the needs of the witnesses and the specific circumstances of the Kenya cases

16. The witness familiarization process should account for the specific facts of the Kenya cases and the challenges faced by individuals who agree to testify as trial witnesses.

17. In both Kenya cases, multiple witnesses report being offered bribes not to cooperate with the Prosecution and/or threats if they do cooperate; there have also been efforts to expose the identities of protected witnesses. Many potential witnesses expressed a fear of being harmed or even killed if they cooperate with the Prosecution, and several declined to testify on this basis. Against this backdrop of witness interference and fear, it is particularly important for counsel to have an adequate opportunity to meet with witnesses prior to their testimony and to assure them about the process, their place in it, and the measures taken to ensure their security. It is also important to have the opportunity immediately before a witness' testimony to inquire as to whether the witness has been interfered with since his or her last contact with the calling party.

18. In addition, circumstances in previous cases allowed greater personal contact with the witnesses outside The Hague, before the testimony, than is practicable in the Kenya cases. The principal protective measure for many witnesses is the confidentiality of their co-operation with the Prosecution. To avoid exposing these individuals, the Prosecution cannot meet with them in their communities and must keep its contacts with them to a

[23] *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, para 33. The application underlying the decision was a motion to exclude a witness' trial testimony due to the prosecution's alleged destruction of notes from a proofing session; no objection was raised to proofing as such.

minimum. This renders it likely, in the Kenya cases, that the witnesses will have little interaction with the Prosecution after their initial interviews, and will first meet the lawyer who will question them in court only when the witnesses arrive here for testimony years later. A 10 minute courtesy meeting, with the remainder of the familiarization regime left to the VWU, is inadequate for counsel to establish the essential rapport.[24]

19. Nor is the VWU witness familiarization process the best way to meet the needs of the witnesses or the cases. While the VWU-driven familiarization 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/her testimony.[25] 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. The more information available to witnesses before their testimony, the more comfortable they are likely to be on the stand. This dynamic is particularly true of sexual violence victims and other vulnerable witnesses who are called upon to testify about intensely personal and traumatic events, and for whom prior preparation can help mitigate the re-traumatization caused by testimony.[26]

[24] Empirical research from the ICTY demonstrates that witnesses value preparation with counsel more than support and briefings from staff of Victims and Witnesses Units. *See* Eric Stover, The Witnesses: War Crimes and the Promise of Justice in The Hague, Human Rights Center, University of California, Berkley, May 2003 ("Stover"), page 83 ("While witnesses spoke highly of the support provided by the counseling staff of the Victims and Witnesses Section, their real need was to be engaged with their prosecutors"). Stover also addresses the importance of the relationship between witness and counsel, and the consequences of neglecting it. *See* Stover, page 147 ("If potential witnesses come to regard their treatment as too demeaning, and unfair or too remote or little concerned with their rights and interests, this neglect may hinder the future cooperation of the very people we are trying to serve").

[25] *See* Dissenting Opinion, para 24; Limaj Decision, page 3 (holding that "preparing a witness to cope adequately with the stress of [testifying in court] . . . are properly within the realm of proofing, and are not to be left to the different form of support provided by the Victims and Witnesses Section").

[26] Witness Proofing at the International Criminal Court, War Crimes Research Office, Washington College of Law (July 2009) ("Washington College of Law Report"), pages 38-39. Available at: http://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_on_Witness_Proofing_at_the_ICC_July2009.pdf.

20. The significance of the relationship between witness and counsel cannot be overstated. Witnesses at this Court often assume significant personal risks: of physical, psychological or economic retaliation from those who oppose the ICC process, of family pressures or accusations of treachery, or of ostracism. The period immediately prior to witnesses' in-court testimony is the moment at which witnesses most need reassurance regarding the process upon which they are embarking and the risks they may be taking. 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. The current system prevents the calling party from providing these assurances, often causing distress for the witness and sometimes leading the witness to feel abandoned by, and alienated from, the calling party.

21. Not only is there a concern about the absence of rapport, the inability to meet with the witnesses for security reasons means that there is no real opportunity for counsel to address the witnesses' particular fears. Given the prevalence of witness interference and intimidation in the cases, it is foreseeable that absent adequate preparation, witnesses will refuse to reveal on the stand those matters that, in their view, are likely to expose them to increased risk. This will prevent the Chamber from hearing relevant evidence and will undermine the truth-finding process of the trial. The chances of this happening can be reduced by permitting counsel to meet a witness immediately prior to testimony, so that the witness can raise any concerns he or she has regarding his/her security or testimony and counsel can take the appropriate measures to mitigate those concerns Enabling interaction will also provide increased "confidence . . . to witnesses, especially in respect of vulnerable witnesses",[27] and avoid witnesses taking

[27] Dissenting Opinion, para 24.

the stand "cold", with the attendant risks of re-traumatization.[28] In this respect, the proposed modification to the witness preparation regime used in other cases is consistent with the Chamber's Article 68(1) duty to "take appropriate measures to protect the . . . well-being [and] dignity" of witnesses.

The proposed modification will produce other substantial benefits in this case

22. Aside from the benefits to witnesses discussed above, the modification proposed by the Prosecution will produce two additional benefits. *First*, it will increase efficiency by enabling parties to streamline their witness examinations and tailor them to the salient issues, while at the same time reducing the possibility of the parties being blindsided by unexpected issues that arise for the first time during testimony. *Second*, it will further the Court's truth-finding function by helping ensure that the entirety of witnesses' probative evidence is presented at trial.

23. **Expeditious proceedings**. It is in the interests of all – and indeed in the interests of justice – for trials to be as efficient as possible. 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.[29] As one commentator observes, "even the nimblest of advocates are more effective with preparation".[30] At the most basic level, exploring with the witness the topics that will be covered during testimony permits counsel to determine which topics will elicit relevant and probative, or

[28] Washington College of Law Report, pages 30-31, 38-39.
[29] *See* Dissenting Opinion, para 21 ("…the manner in which evidence is presented through witnesses is of the utmost importance. It would undoubtedly be helpful to [the Chamber's] truth-finding function to improve the quality of the presentation of evidence by receiving clear, relevant, structured, focused and efficient testimonies from proofed witnesses"); Milutinović Decision, para 16.
[30] R. Karemaker, B. D. Taylor III, and T. Pittman, 'Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence', (2008) 21 Leiden Journal of International Law, 683 ("Karemaker et al"), page 695.

irrelevant and rambling, testimony; counsel can then structure the in-court examination accordingly.

24. More importantly, *witnesses* benefit when the process and the topics have been fully explained before they take the stand. Most witnesses have never testified in court, are unfamiliar with courtroom questioning and may also be illiterate or uneducated. 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 focus or prepare in advance, whereas a witness needs to be prepared to break down information into small pieces and to respond directly to questions posed. Witnesses also need to have cross-examination carefully explained to them – to understand that having their memories and accounts publicly challenged is a normal, important part of the court process.[31] Indeed, former ICTY Judge Patricia Wald opined that counsel:

> . . . would do well to prepare their witnesses more carefully for what they will encounter by way of cross examination. . . . Counsel should certainly acquaint the witness with prior statements on which he may be quizzed and even try to build the witness's emotional stamina so that he will not blow up or break down on the stand.[32]

25. Allowing witnesses to acclimatize to these unnatural processes before they testify increases the likelihood of their in-court testimony being efficient, structured and clear.[33] Similarly, showing a witness potential exhibits saves court time because it enables counsel to determine which exhibits the

[31] Empirical research demonstrates that witnesses value being informed before testimony about the challenges they can expect during cross-examination. *See* Stover, pages 81, 150-151.
[32] Patricia M. Wald, Dealing with Witnesses in War Crimes Trials, 5 Yale H.R. & Dev. L.J. 217, 232-233
[33] For example, court time can be saved if a witness is informed in advance why he or she will not be questioned on certain topics discussed with investigators (for instance, because they are outside the scope of the case). Thus informed, a witness is less likely to veer off on a tangent during testimony and raise matters which he or she considers important, but which are irrelevant from an evidentiary standpoint.

witness can speak to and which (s)he cannot.[34] Witnesses shown documents for the first time in court may be caught off guard, without adequate time to consider whether they know a document, what it contains, and what relevant information, if any, they can provide about it. Judge Ozaki explained that this can undermine the Court's truth-finding function;[35] it also deprives witnesses of a fair opportunity to tell their story.[36]

26. Finally, witness preparation permits differences in a witness' recollections, especially additional recollections, to be identified and disclosed before the witness takes the stand, "thereby reducing the prospect of the defence being taken entirely by surprise".[37] While the Prosecution accepts that disclosing additional information shortly before a witness testifies may place certain burdens on the parties, Judge Ozaki noted that 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.[38] And, in any event, it is clearly preferable, and less prejudicial, to give the opposing party advance notice rather than requiring it to react to new evidence only when the witness is testifying.

27. **Truth-finding**. Providing the parties with an opportunity to engage in witness preparation furthers the Court's truth-finding function because it helps ensure that the entirety of a witness' probative evidence is adduced

[34] Consider, for example, an illiterate 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 slows the trial and may cause unnecessary embarrassment to the witness.
[35] *See* Dissenting Opinion, paras 21-22.
[36] Even critics of witness preparation concede that Trial Chamber I "might have gone too far with its prohibition on discussions with witnesses concerning potential exhibits". Wayne Jordash, The Practice of 'Witness Proofing' in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice, 22 Leiden Journal of International Law 501 (2009) ("Jordash"), page 523.
[37] Limaj Decision, page 2; *see also* Dissenting Opinion, para 23 ("An advantage of proofing . . . is that this new information may then be disclosed to the defence, in advance of the witness' testimony"); Milutinović Decision, para 20; Karemera Decision, paras 9, 17.
[38] Dissenting Opinion, para 23.

for the Chamber's consideration. New information often surfaces during witness preparation that was previously unknown to either party.[39] This enables the calling party to question the witness about the newly-revealed information in court, so that the Chamber can consider it. Further, it ensures that the parties are provided with advance notice of the new information, enabling them to adequately prepare for the witness' in-court testimony. In contrast, the system employed in other cases – where counsel are required to explore new information with a witness for the first time on the stand – is inefficient and can prevent the Chamber from hearing relevant and probative testimony. In court, particularly in cases where the Chamber has regulated the number of hours for presentation of the party's case, counsel may be hesitant to begin exploring new areas with witnesses out of fear of wasting time or confusing the evidence. Or the Court may be reluctant to permit inquiries into new areas because of lack of prior notice to the other side. Before testimony, however, counsel will be freer to assess whether the witness has additional relevant information, and if anything is discovered, it can be disclosed to the other side, if required, before being presented to the Chamber during testimony.

28. By helping witnesses to re-engage with the facts underlying their testimony, witness preparation assists in the process of human recollection and better enables witnesses to tell their story accurately on the stand. This is particularly important in this case, where the events will have occurred more than five years before the trial, and the process of recalling and recounting the evidence in a public setting may be highly traumatic. As an ICTY witness explained, "I gave my statement. . . in 1994. But I didn't testify

[39] *See*, *e.g.*, Karemera Appeals Chamber Decision, para 12, n. 33 (noting appellant's assertion that the prosecution's witness preparation resulted in several instances of additional evidence being adduced); Karemaker et al., pages 694-95.

until 1998. So while I was on the witness stand I had to keep trying to remember what exactly I said four years earlier."[40]

29. While on-site pre-trial witness interviews are of course designed to elicit all probative information, there are myriad reasons why a witness may not reveal certain information during investigations, including, for example, initial caution, embarrassment or fear. By contrast, the prospect of imminent in-court testimony tends to focus witnesses' attention in a way that pre-trial contact cannot, no matter how well it is conducted.[41] By giving a witness an opportunity to clarify his or her statements before taking the stand or to address newly-discovered information that may have emerged during the trial itself, the calling party is provided with the information needed to elicit complete testimony in court, the opposing party is provided with advance notice so that it is not blindsided in court, and the Chamber is presented with all the probative evidence the witness is able to provide.

Safeguards can mitigate perceived risks

30. The proposed modification, along with safeguards, will address the concerns underlying the current prohibition on witness preparation in that it prevents the parties from coaching witnesses before they testify.[42] Further, easily implemented safeguards can mitigate any perceived risks arising out of the implementation of the modification sought. These safeguards include:

[40] Stover, page 76. *See also* Limaj Decision, page 2 (where the events in question took place many years ago, "[t]he 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").
[41] It also reflects the fact that initial witness interviews may have occurred before precise charges against the accused were determined, and the reality is that, in almost every trial, issues or facts arise, unforeseeable at the investigation stage, about which witnesses may be questioned in court. *See* Limaj Decision, page 2; Karemera Trial Chamber Decision, para 17; Milutinović Decision, para 20.
[42] *See* Kai Ambos, "Witness Proofing" before the International Criminal Court: A Reply to Karemaker, Taylor and Pittman, 21 Leiden Journal of International Law 911 (2008), pages 913-14; Jordash, pages 511-12; *but see* Karemaker et al. Response, pages 919-20.

31. **Comprehensive guidelines.** The risk that counsel may abuse witness preparation to coach or otherwise improperly influence a witness' testimony can be mitigated by adopting "clear guidelines providing a definition and detailed guidance on the practice of proofing, including a list of recommended, acceptable, and prohibited conduct . . .".[43] The ICTY established such guidelines for this purpose,[44] and there is nothing to stop the Chamber doing so here. The Prosecution proposes guidelines in annex A, attached. In the Prosecution's view, these or similar guidelines would prevent ambiguity on what constitutes acceptable conduct and would enable counsel to conduct preparation sessions accordingly.

32. **Cross-examination.** In-court questioning by the non-calling party is an additional important safeguard to prevent misuse of witness preparation. "Through careful cross-examination, a party can explore the impact of preparation on the witness's testimony and use this to call into question the witness's credibility".[45] Further, the *Chamber* can question a witness regarding his or her preparation,[46] and discount the evidence if it believes the witness was coached or improperly influenced during preparation. With an assurance that improper conduct will be revealed, counsel are unlikely to risk impeaching the credibility of the witness, and their own professional reputation, by using preparation sessions to improperly coach or influence testimony.

Conclusion and relief requested

[43] Dissenting Opinion, para 26.
[44] *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.
[45] *See* Karemera Appeals Chamber Decision, para 13); Karemaker et al., pages 695-96; Washington College of Law Report, page 35.
[46] Rule 140(2)(c); *see also* Karemaker et al. Response, page 922; Washington College of Law Report, page 35.

33. Particularly at this early stage of the Court's development, it is open to the Chamber to employ new approaches to increase the fairness and efficiency of proceedings. Modifying the current approach to witness preparation presents a straightforward route for such gains. The modification proposed here is fairer to the parties and to witnesses; it will result in more efficient witness examinations; it reflects the factual, cultural and investigative complexities of the Kenya cases; and, most importantly, it will further the Chamber's truth-finding function by increasing the chances that the Chamber will hear all probative evidence that a witness has to offer. With the safeguards discussed above, the benefits of a modified witness preparation regime far outweigh any perceived risks. For these reasons, the Prosecution respectfully requests that the Chamber permit the modification described above in paragraph 5 for the purpose of the Kenya cases.

Fatou Bensouda,
Prosecutor

Dated this 13th day of August, 2012
At The Hague, The Netherlands