

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/12-01/18

Date: 13 February 2020

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
Judge Tomoko Akane
Judge Kimberly Prost

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD

Public

Defence Submissions on Witness Preparation

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
Mahmoud

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart

Counsel for the Defence

Melinda Taylor
Marie-Hélène Proulx
Sarah Bafadhel

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

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

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. When Trial Chamber VI adopted its protocol concerning witness preparation in the *Ntaganda* case, the Chamber gave “due regard to the parties agreement to use witness preparation”.¹ In contrast, the Defence for Mr. Al Hassan objects to the application of the *Ntaganda* protocol, in particular, as concerns the provisions governing witness ‘preparation’. The preparation aspects of the Protocol are ill-suited to the particular matrix of this case and would engender prejudicial consequences for both the impartial determination of the truth, and the specific rights of the Defence.
2. The rationale for witness ‘preparation’ – as employed at the *ad hoc* Tribunals – does not apply to the present case: the charges in this case are recent, most witnesses have been interviewed recently and after the scope of the case was known, and key insider witnesses were interviewed on multiple occasions. The use of preparation in connection with particular individuals in this case is likely to result in re-traumatisation, and to impede the determination of the truth. The International Criminal Court (ICC) also has several procedural features, which do not exist in jurisdictions that employ witness preparation/proofing. The mélange of these features with witness preparation will override or dilute key fair trial protections, and thus undermine the accused’s right to a fair, impartial and expeditious trial.
3. Witness preparation is likely to give rise to severe delays in the proceedings and additional costs, due to the lengthy periods during which individuals are kept in The Hague prior to their testimony. Accordingly, even if witness preparation is permissible in principle, its use should be restricted to situations where it is both necessary and appropriate to prepare the witness in The Hague.
4. In the alternative, the *Ntaganda* Protocol should be amended to ensure that it complies fully with the respective rights and obligations of the parties. Specifically:
 - a. Pursuant to Rule 76, the Prosecution should disclose the videos and summaries of its preparation sessions to the Defence;
 - b. The procedures for the Defence should be harmonised with Defence disclosure obligations, and the defendant’s rights under Article 67(1) of the Statute (including the privilege against self-incrimination); and

¹ [ICC-01/04-02/06-652](#), para. 16.

- c. Witnesses should not be given access to their statements either before or after the preparation session. There is, conversely, no general legal basis to require the Defence to disclose videos of meetings with Defence witnesses.
5. Finally, the witness contact protocol will also need to be harmonised with the content of the preparation protocol that is finally adopted. The adoption of witness preparation in this case will also affect the modalities of victim participation as concerns the role of the Legal Representatives of Victims, and the modalities for advising witnesses on Rule 74 issues. The Defence will address these matters in more detail in its submissions concerning the conduct of proceedings.

II. Submissions

A. IT WOULD NOT BE APPROPRIATE OR EFFICIENT TO ADOPT WITNESS PREPARATION IN THIS CASE

6. As a first point, it should be acknowledged that witness preparation is simply witness proofing by another name. As remarked by the International Bar Association:²

While the judges in the Kenya cases clearly define ‘witness preparation’, oddly they do not explain the term ‘witness proofing’, giving the impression that the two practises are different. However, it appears to be a matter of semantics since the term ‘witness proofing’ was employed and rejected in the *Lubanga*, *Katanga Ngudjolo* and *Bemba* cases, and has been long been coined to refer to a practice common in many national criminal justice systems and at the ad hoc tribunals where lawyers for either party are permitted to meet and re-interview their witnesses before they take the stand. While it appears as though a new term is being used to describe a novel procedure, in reality preparation appears to be precisely the same as proofing.

7. The Statute neither permits, nor prohibits witness preparation or proofing. That being said, the Chamber’s judicial discretion as concerns trial procedures must be tailored to the specific legal framework of the ICC, and further ensure that the procedures in question are compatible with the right to a fair, impartial and speedy trial, as conducted within this particular framework. Accordingly, the mere fact that other international tribunals or courts have employed various forms of witness preparation is not a satisfactory response to the question as whether these forms are appropriate at

² IBA Report, ‘Witnesses before the International Criminal Court’, July 2013, pp. 21-22 (footnotes omitted).

this Court, and more importantly, in this case. To the contrary, there are extremely cogent legal and practical grounds for distinguishing *ad hoc* precedents in favour of the weight of ICC practice thus far.³ These include the following:

(i) *The reasons relied upon to justify witness proofing at the ad hocs do not apply to this case*

8. Although witness proofing has been applied at the *ad hoc* Tribunals, its application has not been without controversy or challenge. Although the respective Chambers ultimately dismissed such challenges, it is notable that they did so by reference to the following specific features concerning proceedings before the *ad hoc* Tribunals:

- a. The time lag between when the statements were taken (some in 1995) and the time when the witness appeared in court, which could amount to a 10-year time lag for some witnesses;⁴
- b. In line with this time lag, many statements were taken several years before the indictments were confirmed (and in some cases, before the Prosecution had even determined that the accused was a potential suspect). This meant that the witness would arrive at the Court expecting to testify on certain matters, which were in fact irrelevant to the proceedings at hand. In such cases, the purpose and content of proofing was directed towards ensuring that the defendant (and not just the Prosecution) was well-placed to anticipate the witness's responses to the specific issues that would be put to the witness during questioning;⁵ and
- c. Errors in the manner in which statements were translated and transcribed, which were caused by the fact that statements of B/C/S speaking witnesses were transcribed and signed in English, rather than the language understood by the witness. It was, consequently, a common occurrence for witnesses to subsequently deny the accuracy of these statements when confronted with a

³ See [ICC-02/04-01/15-504](#), para. 7, noting that most ICC Chambers have not allowed witness preparation.

⁴ *Prosecutor v. Limaj et al.*, Decision on Defence Motion on Prosecution Practice of "Proofing" Witness, 10 December 2004, p. 2, cited the following factors: "Interviews by investigators were also conducted a long time ago", (at page 2), the issue of translation from a different language (at page 3), and the stress of recollecting events, which occurred a long time ago.

⁵ See *Prosecutor v. Sikirica et al.*, [Transcript of 8 February 2001](#), p. 446.

B/C/S interpretation of the statement in court, or B/C/S translation during the Rule 92 *bis* process.⁶

9. These factors are irrelevant to the present case. There has not been a significant time lag between the date of witness interviews, and the confirmation of charges in this case. The Prosecution has had sufficient opportunity to conduct focused interviews with its witnesses as concerns the issues that will be put to them, during their testimony. Articles 55 and 56 interviews are also recorded, which provides a reliable means for the Prosecution to verify the original intent of the witness, irrespective of any transcription or translation errors. It would also be expected that the Prosecution would generally record its interviews with witnesses. Unless the witnesses are provided with copies of their prior statements in their native language, witness preparation (which will be conducted through interpretation) is also unlikely to eliminate errors in translation: to the contrary, there is a risk that further errors may be generated.
10. The practice of the *ad hoc* Tribunals also demonstrates that witness proofing can lead to delays or prejudice. There appear to have been several examples, where the Prosecution disclosed entirely new allegations against the defendant, after obtaining this information from proofing sessions.⁷ It was then necessary to translate these new allegations, and delay the testimony, in order to ensure the defendant's right to adequate notice and time for preparation.⁸ The delays would also be likely to be far greater if the new allegations triggered a request from the Defence to interview the witness, in advance of his or her testimony. It was also possible that the evidence

⁶ See [Transcript of 18 May 2001](#), *Prosecutor v. Brdjanin and Talic*, in particular at page 281.

⁷ [Manual on International Criminal Defence ADC-ICTY Developed Practices](#), p. 102; ICTY [Manual on Developed Practices](#), p. 83 (para. 22).

⁸ See *Prosecutor v. Vidoje Blagojevic & Dragan Jokic*, Case No. IT-02-60-T, [Decision on Prosecution's Unopposed Motion for Two Day Continuance for the Testimony of Momir Nikolic](#) (TC), 16 September 2003:

FINDING that there was more than sufficient time for the Prosecution to complete all interviews and final proofing sessions with Mr. Nikolić and to inform the Defence of any new information arising out of such proofing sessions in advance of him being called to testify,

CONSIDERING that the Prosecution has only disclosed the final notes from its last proofing sessions to the Defence on 16 September 2003, one day before Mr. Nikolic is to testify, and that this information needs to be translated into B/C/S for Defence review,

CONSIDERING that the Defence should not be adversely affected due to the late conclusion of Prosecution proofing sessions and the late disclosure of new information from such sessions,

CONSIDERING therefore that it is in the interests of justice to give the Defence additional time to prepare for the testimony of Momir Nikolić,

REMINING the Prosecution that all such proofing sessions of witnesses – particularly witnesses whom it expects to testify at length – should be completed in sufficient time to allow the Defence to consider any new information gathered through such sessions (...).

would be excluded, in order to prevent further prejudice to the Defence.⁹ Allegations of potential impropriety also exhausted court-time, as the Defence (as was their entitlement) routinely questioned witnesses as to whether the Prosecution had crossed the line as concerns the manner in which the witnesses were prepared.¹⁰

11. The following statements of Judge Bonomy reflect the tangible prejudice and problems, which are generated through the Prosecution's routine recourse to preparation/proofing, in *lieu* of focused and timely investigations:¹¹

"I've said it before, I'll say it again it seems to me a crazy system this proofing days before a witness is supposed to give evidence when there has been a lengthy pre-trial phase in the case. I cannot, still cannot understand why the Prosecution don't have lawyers go over statements with witnesses much earlier so that the final statements are available well before the witness is due to testify. I can see that this will be an ongoing problem in the trial as long as that practice persists."

[...]

"But you see, I ask again the question: Why are these witnesses being proofed at this stage? It seems utterly ridiculous to me to wait until they're at the door of the court before a lawyer sits down with them and addresses their evidence; that a lawyer with an understanding of the case as a whole. Because all that's going to happen is we're going to limp from witness to witness, unsure of what that witness's evidence is going to be until they come to court. Now that's not—that's not a good enough way to present an international case which is constantly in the public limelight [...] What's the problem about lawyers going to Kosovo and actually investigating the case properly in the pre-trial phase at the latest? What's the problem there? Is it not cheaper for a lawyer to go there than to bring witnesses and all their accompanying personnel to The Hague?"

[...]

"There's going to come a time when pressure will be such— that's the pressure of the clock will be such—that we won't be able to allow this sort of thing. We'll have to do something which we find distasteful, which is take an otherwise unrealistic approach to a witness's evidence and exclude things in

⁹ See for example, *Prosecutor v. Rwamakuba*, [Decision on the Defence Motion Regarding Will-Say Statements](#), 14 July 2005, Case No. ICTR-98-44C-T, para. 6: "*While the will-say statement only supplements or elaborates on information previously disclosed to the Defence, the Chamber shares the Defence's view that it may eventually bring new elements on which the Defence was not put on notice. Although it is not acceptable for the Prosecution to mould its case against the Accused in the course of the trial, it must be admitted that a Witness may recall and add details to his or her prior statements. In this situation, several remedies are possible such as providing additional time to the Defence for its preparation or, where appropriate, the exclusion of the evidence.*"

¹⁰ *Prosecutor v. Karemera*, [Decision on Defence Motions to Prohibit Witness Proofing](#), 15 December 2006, para. 22.

¹¹ [Manual on International Criminal Defence ADC-ICTY Developed Practices](#), p. 102, citing to *Prosecutor v. Milutinović et al.*, T. 1435 (10 August 2006); T: 2674-2675 (31 August 2006); T: 5791 (2 November 2006).

fairness because time will not allow us the luxury of re-call or delay of cross-examination. So we urge you again to think about how you are carrying out these proofing exercises and how much time or notice you're giving the Defence as a result of doing so at the very last minute

12. Accordingly, while proofing was considered by the *ad hocs* to be a suitable 'stop gap' to address the particular logistical difficulties they faced (stemming from the fact that, over the space of a decade or more, they were trying multiple cases concerning the same facts), it is also clear that this was a 'least worst' solution, rather than a best practice, which should be adopted at a permanent international criminal court. Rather, it would have been more consistent with the right to fair and proceedings for the Prosecution to have conducted focused interviews in advance of the trial, and to have concluded these interviews, in advance of the deadline for the disclosure of incriminating evidence.¹² Since the Prosecution in this case has already indicated that it intends to contact its witnesses in order to liaise with them on issues of protection and disclosure, there is no reason why it cannot conduct any follow-up inquiries (if any are required) at the same time. There are, therefore, no logistical impediments that would dictate the adoption of a least-worst solution, rather than a best practice.

(ii) *Domestic systems, where such forms of preparation are employed are also inapposite*

13. The issue of 'proofing'/'preparation' is not a common law *versus* civil law issue: the concept itself only has limited application within certain common law jurisdictions,¹³ where it is employed in a legal environment that differs radically from that of the ICC. Of key importance, within a North American setting, the parties have far greater latitude as concerns the manner in which they can interact with, and prepare witnesses. In contrast, the ICC has affirmed that such practices are not only inapplicable, but contrary to the administration of justice.¹⁴

14. Domestic systems, where such forms of preparation are employed are also inapposite. These systems do not have the phenomena of actively participating dual victim-

¹² This would be consistent with Judge Ozaki's position that "*in order to minimise the risk of influencing the evidence and to avoid late disclosure in case any new facts emerged from the proofing session*", it would be preferable for proofing to be completed before the witness travels to The Hague: [ICC-01/05-01/08-1039](#), para. 27. See also *Prosecutor v. Ojdanic*, '[Decision on Ojdanic Motion to Prohibit Witness Proofing](#)', 12 December 2006, para. 23: "with respect to the timing of witness proofing, the Chamber once again, strongly reiterates its request that the Prosecution conduct proofing sessions at the earliest possible date. Ideally, proofing should be conducted at the pre-trial stage of the case".

¹³ [ICC-01/04-01/06-679](#), paras. 36-37.

¹⁴ [ICC-01/05-01/13-2275-Red](#), paras. 724, 728.

witnesses, and the Prosecution in those jurisdictions are not vested with duties that are directly comparable to Article 54(1) of the Statute.¹⁵ The context of witness testimony at the ICC also differs radically from that of domestic jurisdictions. Whereas proofing in Canada or the United States can be organised and implemented at short notice, ICC witnesses are located on a different continent, and significant logistical issues are likely to arise in relation to scheduling their transfers, within, and from a country that is experiencing a high level of insecurity.

(iii) *Witness preparation would be prejudicial in light of the particular features of this case*

Witness vulnerability

15. Witness vulnerability militates against, rather than for witness preparation. The more vulnerable the witness, the more important it is that preparation is conducted by a section of the court, which is neutral,¹⁶ and with whom the witness can pose questions and concerns in an unfettered manner.
16. In line with the principle that witnesses are not the property of either party, it is also essential that witnesses are prepared in an environment, which affirms their role in assisting the Chamber to establish the truth; it is not to fulfil an obligation to a particular party. Nonetheless, if intense and potentially extensive preparation sessions are held immediately before their testimony, it is natural that witnesses will feel implicit pressure to adhere to prior statements or to otherwise respond, in the manner expected, to Prosecution questions. This risk is particularly high in relation to witnesses, who are unfamiliar with legal proceedings or concepts, or who originate from a country/legal system in which the Prosecutor has a quasi-judicial status, and the Defence have a far more restrictive role. Even if preparation is conducted in good faith, it is very difficult to question a witness, without signaling, through body language or tone, a particular reaction to the manner in which the witness responds. The risk is further elevated in relation to interviews conducted in different languages,

¹⁵ Although referring to the *ad hocs*, the following conclusion of Trial Chamber I also underlines the difference between the ICC, and certain common law jurisdictions: “The ICC Statute has, through important advances, created a procedural framework which differs markedly from the ad hoc tribunals, such as, for example, in the requirement in the Statute that the prosecution should investigate exculpatory as well as incriminatory evidence, for which the Statute and Rules of the ad hoc tribunals do not provide”: [ICC-01/04-01/06-1049](#), para. 45.

¹⁶ [ICC-02/04-01/15-504](#), para. 15: “As to the Prosecution’s concerns as to witness vulnerability in this case, the Chamber is entirely confident that the VWU can sufficiently address the needs and cultural sensitivities of all witnesses during the period just before their testimony”.

as the witness is more likely to focus on the body language of the interviewer. As cautioned by the UK Court of Appeal:¹⁷

Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events.

17. After reviewing the practice of witness proofing in the United States, Sergey Vasiliev concludes, in a similar vein, that:¹⁸

Substantive discussions of evidence prior to in-court testimony are likely to result in unintended modifications to the original recall because adversary parties do not interview witnesses in detached ways; their questioning will in most cases tend to be subtly suggestive even if it is not meant to be such and therefore have a potential to undermine the genuine search for the truth. The suggestions inherent in the lawyer's unfortunate choice of words, facial expressions and non-verbal language in reaction to the witness's answers may lead an unsure or impressionable witness to substantially alter her evidence. Witnesses are viewed and often view themselves as performers for the respective party in the first place rather than conveyors of the truth. They may be strongly inclined to internalize a lawyer's additions to their original memory images as proper and truthful recollections. Worse still, a witness whose initial account has been modified will likely remain unaware of this fact and be convinced that she testifies from her own knowledge. Any damage to the truth brought about by non-deliberate distortions of the witness recollections will probably be irrevocable, given that subtle modifications of memory images are utterly difficult if not impossible to establish during cross-examination

18. Proofing also gives the Prosecution an inherent advantage by facilitating the ability of the witness to comprehend and respond to Prosecution questions (and agreed terminology) but not the Defence. Accordingly, if the objective is to ensure that witnesses are familiar with the terminology employed in Court, then this objective would be better served if a neutral service, such as the Victims and Witnesses Section (VWS), were to perform this role. And, in order to facilitate the work of the VWS, the parties could provide the Section with a list of terminology or a short précis of the procedure which is likely to arise in connection with their respective roles. This would be consistent with the mechanism envisaged by Trial Chamber I, whereby the

¹⁷ *R v Momodou* [2005] EWCA Cnm 177, para. 61.

¹⁸ S. Vasiliev, '[From liberal extremity to safe mainstream? The comparative controversies of witness preparation in the United States](#)', *International Commentary on Evidence*, 9(2), 5 (2011), pp. 53-54.

VWS would consult with the parties to ensure that the familiarisation sessions are tailored to the particular circumstances and needs of the witness in question.¹⁹

19. The Prosecution has claimed in earlier cases that some witnesses have expressed discomfort when testifying without preparation. But, as noted by Trial Chamber IX,²⁰ it is empirically impossible to ascertain whether the same witnesses would have felt less discomfort if there *had been* witness preparation. Indeed, unless the witnesses in question have testified before a Court with witness preparation, there is no objective basis on which they can make such a comparison. It is also impossible to ascertain whether the discomfort was caused by a lack of preparation, of a reluctance to testify truthfully under oath. It is notable that in the *Lubanga* case, when the first witness revised his testimony under oath, there was some suggestion that this was triggered by discomfort caused by a lack of witness preparation.²¹ The ultimate Trial Judgment found otherwise.²² Indeed, if one were to accept the argument that the witness only testified in that manner because he had not been prepared, then this give rise to more concern about the impact of witness preparation on truthful testimony than its absence.
20. Witness preparation sessions are also likely to extend the witness's stay in The Hague.²³ And if anything, prolonging the length of the witness's separation from his or her normal family and community context is likely to make testifying more, rather than less stressful for the witness in question.
21. For particularly vulnerable witnesses, it is also potentially harmful and re-traumatising to require the witness to recount particular events on multiple occasions.²⁴ The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict thus cautions that:²⁵

Victims/witnesses may have to repeatedly tell their story on numerous occasions, for different purposes, to different people. In some cases this might

¹⁹ [ICC-01/04-01/06-1049](#), paras. 33-34.

²⁰ [ICC-02/04-01/15-504](#), para. 8.

²¹ K. Glassborow, '[Lawyers Divided Over ICC Witness Preparation](#)', International Justice Monitor, 2 March 2009.

²² Judgment, [ICC-01/04-01/06-2842](#), paras. 430-441.

²³ See Registry observations set out in [ICC-01/04-01/06-1049](#), para. 27.

²⁴ '[Supporting Vulnerable Witnesses in the Giving of Evidence: Guidelines for Giving Best Evidence](#)', (South Australia Attorney-General's Department): "Requiring vulnerable witnesses to recount their story multiple times is harmful and should be kept to a strict minimum", p. 2.

²⁵ S. Ribeiro, D van der Straten Ponthoz, [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#), March 2017, 2nd edition, p. 93.

lead to re-traumatisation. Being asked questions, however sensitively, can be experienced by the victim/witness like an interrogation.

22. In line with the paramount notion of ‘do no harm’, the desire to streamline and focus witness testimony should not trump the Court’s duty to protect victim-witnesses from unnecessary exposure to re-traumatisation. And, while it might be helpful for key terms, processes and procedures to be explained to the witness in a non-threatening environment, this role can be performed by the VWS, with the assistance of the calling party or parties. The familiarisation aspects of the Protocol (which includes the possibility of meeting the witness before his or her testimony, and thanking him or her afterwards), also supplies a human dimension, which facilitates in-court testimony, and post-testimony recovery.

The risk of ongoing investigations or a fundamental case mutation

23. In previous cases, the Prosecution has averred that one of the purposes of witness preparation is to review exhibits with the witness.²⁶ This objective is problematic. If the exhibits have been reviewed during initial statements, then any further ‘review’ is either otiose, or tantamount to a rehearsal.
24. If the exhibits have not been shown to the witness previously, then eliciting evidence on new elements constitutes a new investigation, and one, which is being conducted during the height of trial publicity, and after the deadline for full disclosure. This objective cannot be reconciled with the overarching emphasis that the Court has placed on the timely conclusion of Prosecution investigations.
25. The Prosecution is supposed to be trial ready at the end of the confirmation stage. When the Prosecution files its list of witnesses and exhibits for trial, it is supposed to know its case, and to have determined, which exhibits are relevant to each witness. Further deviations and new incriminating elements undermine the very purpose of advance disclosure and render it impossible for the Defence to prepare effectively for trial. Accordingly, if the Prosecution is of the view that additional exhibits need to be put to a witness, the time to do so would be before the disclosure cut-off, and not on the very eve of the witness’s testimony.
26. The ICC Statute and Rules also place a particularly rigorous duty on the Chamber to make appropriate orders to ensure that disclosure is completed *in advance* of the

²⁶ [ICC-01/04-02/06-444](#), para. 4 (*Ntaganda*).

trial.²⁷ The trial procedures for familiarising witnesses should further this objective, rather than creating a back door for the Prosecution to launch last minutes investigations and tardy disclosures.

27. Of further concern, unlike domestic cases, ICC cases are the subject of intense media scrutiny – particularly amongst victim communities in the situation country. This publicity can produce adverse consequences as concerns the reliability of witness memory, in particular, as concerns issues of identification, locations, or dates. The inevitable spread of information concerning the Prosecution case on these points could render it difficult (even subjectively) to identify a response which has been implicitly learned from the media, as compared to that which emanates from his or her knowledge and experiences. This risk is heightened at the stage where preparation/proofing comes into play: during such sessions, the focus is entirely on Mr. Al Hassan’s responsibility and that of the Islamic Police (i.e. the witness knows the target of the case, and what the Prosecution case seeks to establish) whereas during pre-trial interviews, the focus of questions is likely to be more open-ended, and less impacted by the publicity of trial proceedings.²⁸

The security situation in Mali

28. The security situation Mali has loomed large as an issue of serious consideration as concerns the manner in which this trial will be conducted.²⁹ It is quite clear from the most recent Registry report that it will be exceedingly difficult to conduct investigations, and completely impossible to do so at short notice.³⁰ For this reason, clear cut-off points for disclosure, in advance of the commencement of the trial, play

²⁷ ICC-01/12-01/18-546, paras. 6, 8- 9; See also [ICC-01/04-01/06-1019](#), paras. 19-21.

²⁸ See S. Vasiliev (ibid.), p. 55: “As confirmed by cognitive psychology research, human memory is highly malleable and fallible; original recollections tend to fade with time and are replaced by fresh impressions and overlapping post-event knowledge. A witness’s confidence levels may change according to whether posterior information about the same facts received from other sources confirms or conflicts with the witness’s original recollection. It is true that post-event discussions are hardly avoidable since by the time the witness is brought into a preparation session she will most likely have discussed her perceptions and experiences within her social circle and with the police. However, the suggestive questioning by a lawyer is all the more apt to reshape the witness recollection because the lawyer will unavoidably speak from a position of knowledge when refreshing the witness’s memory and confronting the witness with alternative accounts. It may ‘cause a witness to remember something he or she claims on the stand to have seen’ whilst it is uncertain ‘whether the witness is really remembering something or whether the power of suggestion is taking effect’. In the worst case scenario, this may result in a totally false recollection”

²⁹ ICC-01/12-01/18-548, para. 23.

³⁰ ICC-01/12-01/18-571-Conf; For some areas, it is necessary to submit a mission request at least 4 weeks in advance, even if the person conducting the investigation is based in Mali.

a crucial role in ensuring that the Defence is placed in a position to investigate the case against Mr. Al Hassan.

29. This rationale will be vitiated if the Prosecution is afforded an opportunity to continue its investigations, by interviewing its witnesses (again), on the very eve of their testimony. This will result in the disclosure of additional information (of a potentially incriminating type), at the very point where the Defence will lack any ability to conduct investigative measures in order to prepare its cross-examination. This, in turn, will either generate significant delays (caused by the need to suspend cross-examination), or undermine key fair trial rights, including the right to confront Prosecution witnesses.
30. In the Kenya cases, the respective Chambers suggested that the opposing party could explore and rectify possible issues of prejudice that might arise from the proofing sessions, through cross-examination.³¹ Cross-examination cannot, however, operate as an effective safeguard as concerns potential improper influence or forms of proofing, in circumstances where the Defence lacks the time and means to prepare effectively for cross-examination. Indeed, the Kenya cases are clearly distinguishable from the present proceedings. In the Kenya cases, the Defence teams had a significant physical presence in Kenya (including the defendants themselves), enjoyed excellent forms of cooperation from national authorities, and there were no security obstructions to investigations, whereas the opposite holds true in this case.

B. IN THE EVENT THAT THE CHAMBER ADOPTS WITNESS PREPARATION, FURTHER SAFEGUARDS ARE REQUIRED TO ENSURE THE RIGHT TO FAIR, IMPARTIAL AND EXPEDITIOUS PROCEEDINGS

- (i) *Preparation should only be allowed on a case by case basis, and should not be employed in relation to certain categories of witnesses*

31. Even if the Trial Chamber determines that witness preparation is not prohibited for the purposes of this case, that determination should not translate to a blanket check to conduct witness preparation routinely for each witness. Rather, preparation should be employed in a focused and proportionate manner, and it should only be conducted at the seat of the Court when absolutely necessary;³² conversely, it would be

³¹ [ICC-01/09-02/11-588](#), para. 48.

³² ICTY [Manual on Developed Practices](#), p. 83 (para. 22): “Needless delays due to witnesses being unavailable or their intended areas of testimony altering can be avoided by conducting proofing sessions sufficiently in

unnecessary, and inappropriate to conduct witness preparation with individuals, who have been extensively interviewed in the recent past, since to do so, would border on rehearsal.

32. For reasons which will be developed in a forthcoming application concerning detained witnesses (including former detainees), it would also be highly problematic to employ this technique with individuals who have been interrogated in a coercive manner, or a coercive environment.
33. Witness preparation is also not appropriate in relation to individuals with dual status, who are contemporaneously represented by the LRV, or witness suspects, who might be assisted throughout their testimony by Rule 74 advisors. The presence or involvement of multiple participants within preparation sessions (i.e. the Prosecution and the LRV) would lead to an *ex parte* trial within a trial, and a gross inequality of arms.³³ Indeed, given that the LRV may also pose questions to witnesses, it would be highly unfair if they were to be given a privileged seat in relation to the questions that the Prosecution will put to these witnesses, and the witnesses' responses. But, tasking the Prosecution with the exclusive right and the duty to prepare dual-victim witnesses would also rob the ICC of one of its unique features – the objective of giving victim-witnesses more independence from the Prosecution.
34. The very existence of such issues stems from the fact that witness preparation/proofing is not employed in legal systems with active forms of victim participation in criminal proceedings.³⁴ Indeed, in such systems, the notion of testifying as an objective witness of the truth is generally incompatible with active participation as an interested civil party.³⁵ Although ICC Chambers have allowed for

advance of the witness' appearance in court. Where a witness has testified in a number of cases, further "familiarization" may be unnecessary, particularly where the witness is to testify about similar crime base evidence. However, significant delays in the trial process can result from substantive changes to a witness statement during the proofing process. Complaints may be made by other parties due to lack of proper notice which must be provided where a modification has occurred'.

³³ The Defence notes, for example, that although Trial Chamber II emphasised the importance of allowing LRV to participate in familiarisation sessions of dual victim-witnesses, the Chamber attempted the explicit caveat that such sessions would be governed by the familiarisation protocol (which excluded all forms of preparation): [ICC-01/04-01/07-1788-tENG](#), para. 80.

³⁴ [ICC-01/04-01/06-1049](#), para. 45: "the Statute seemingly permits greater intervention by the Bench, as well as introducing the unique element of victim participation. Therefore, the Statute moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth. Thus, the procedure of preparation of witnesses before trial is not easily transferable into the system of law created by the ICC Statute and Rule".

³⁵ See [ICC-01/04-01/07-1788-tENG](#), para. 88: "mindful of the fact that, in those legal systems which attribute an active role to victims in criminal proceedings, such victims are usually not authorised to testify under oath."

participating victims to testify as witnesses, they have nonetheless underscored the importance of erecting objecting and transparent safeguards to ensure that this dual role does not impact adversely on the fairness and integrity of the Court's truth-finding processes.³⁶

35. When proofing is thrown into the mix, the potential for unfairness and prejudice is further heightened. Accordingly, in order to ensure that the bastardisation of common law and civil law concepts does not eliminate the safeguards that exist in these respective systems, either:

- Witness preparation should not be extended to dual-victim witnesses (only the familiarisation aspects of the protocol should be retained), or suspect-witnesses; or
- Victim-witnesses/suspect-witnesses, who are 'prepared' by the Prosecution, should not be entitled to retain copies of their statements, or to have any discussions with the LRV/Rule 74 advisers during or after the preparation sessions. Since the Prosecution should not raise new issues with witnesses, it must be assumed that suspect-witnesses will have had an adequate opportunity to seek legal advice, in advance of the preparation session.

(ii) *The Protocol should be amended to specify that recordings of such sessions are subject to the general principles of disclosure*

36. The *Ntaganda* protocol presages that the parties must video record the 'preparation session', and this recording may be transmitted to the Chamber for review, in case the opposing party raises allegations of impropriety.³⁷ This 'safeguard' is inadequate in the case of the Prosecution, and inappropriate in the case of the Defence.

37. As concerns the position of the Prosecution, if the Prosecutor discusses information concerning the charges against Mr. Al Hassan with a witness, then all records (including audio or video recordings) of these discussions are automatically disclosable to the Defence. This stems from the Appeals Chamber's determinations that: *firstly*, the Prosecution's disclosure obligation under Rule 76 is "broad and requires the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded";³⁸ and *secondly*, it would be erroneous to exclude from

³⁶ [ICC-01/04-01/07-1788-tENG](#), para. 90; [ICC-01/04-01/06-1119](#), para. 134.

³⁷ [ICC-01/04-02/06-652-Anx](#), para. 13.

³⁸ [ICC-02/05-03/09-295](#), para. 23.

disclosure, “other records of statements such as audio- or video-records prepared pursuant to rule 112”.³⁹ In the same judgment, the Appeals Chamber further explained that:⁴⁰

A complete audio- or video-record of the questioning of a person will provide the fullest and most accurate account of the questioned person's statements. Any additional written record could, at most, only duplicate the statements contained in this audio- or video-record and would most likely contain less information.

38. It follows, therefore, that while the disclosure of proofing notes might expedite and focus preparation, these notes do not exempt the Prosecution from its duty to disclose the recordings themselves. Any other position would risk diverting a significant amount of time and resources into unnecessary litigation as concerns the threshold for obtaining access to information that is substantively no different from other Rule 76 disclosures, and which would, in any case, be material to the preparation of the Defence. Apart from, and in addition to the issues raised above, this litigation would prolong the proceedings, and eliminate any desired efficiencies from witness preparation.
39. Given that disclosure is the rule, there is also no basis not to disclose the videos to the Defence. There is no prosecutorial counterpart to the privilege against self-incrimination; the Prosecution enjoys no privilege as concerns interactions with witnesses, particularly as concerns issues related to the charges and their testimony.⁴¹ Thus, although the Trial Chamber has broad discretion to craft appropriate procedures for trial, this discretion must be exercised in a manner, which is consonant with the Prosecution’s Rule 76 disclosure obligations.⁴²

³⁹ [ICC-02/05-03/09-295](#), para. 23.

⁴⁰ [ICC-02/05-03/09-295](#), para. 27.

⁴¹ *Niyitegeka*, ICTR-96-14-A, [Appeal Judgment](#), 9 July 2004, paras. 33-34 (“[a] question once put to a witness is not an internal note anymore; it does not fall within the ambit and thereby under the protection of Rule 70(A) of the Rules.”).

⁴² [ICC-02/05-03/09-295](#), paras. 28-29: “Accordingly, the Appeals Chamber concludes that, with respect to persons questioned in accordance with rule 112, the Trial Chamber erred by: (1) effectively excluding from the scope of the Prosecutor’s disclosure obligations under rule 76 the audio- or video-records of questioning and transcripts thereof and (2) requiring the Prosecutor, as a matter of law, to create written and signed records of the statements of witnesses in lieu of these audio- or video-records and transcripts. (...) The Appeals Chamber generally agrees with Messrs Banda and Jerbo that the resolution of such practical difficulties is, in principle, a matter falling within the Trial Chamber’s “discretionary trial management powers”. However, as set out above, the Impugned Decision fundamentally was not based on the Trial Chamber’s discretionary trial management powers. Rather, it was premised on an erroneous interpretation of the law.”

40. Conversely, Defence disclosure obligations are limited,⁴³ and do not extend to the audio or video recordings of interviews with Defence witnesses.⁴⁴ The Defence cannot present evidence it knows to be false, nor can it cherry pick from witness testimony to such an extent that it would mislead the Chamber or distort the truth. The Defence is, however, under no obligation to lead information that is irrelevant or incriminating, nor can it be compelled to call evidence against its own client.⁴⁵ It would, therefore, be highly problematic for the Trial Chamber to review the recordings in case the Prosecution raises claims of potential impropriety. Specifically, even if the Chamber determines that the claim is unfounded, the Chamber's possible exposure to incriminating information would violate the defendant's privilege against self-incrimination, since the Defence would have been forced to disclose incriminating information to the Chamber even if it had no intention to lead or tender this evidence. Although this issue was flagged by the International Bar Association,⁴⁶ the existing Protocols have yet to recognise or remedy the problem, or to otherwise distinguish between the different roles and responsibilities of the parties.
41. The need to distinguish between the respective obligations of the Prosecution and the Defence also stems from the demarcation between the rules applicable to the Prosecution as compared to the Defence, at the domestic level, and at the *ad hoc* Tribunals. For example, in Canada, the Crown Prosecution Services are obliged to maintain a complete record, and disclose information emanating from witness preparation interviews,⁴⁷ but there is no reciprocal obligation on the Defence to do so. And crucially, although some ICTY Chambers have required the Prosecution to record discrete proofing sessions with particular witnesses, this obligation has not been placed on the Defence. It was also confirmed in the *Stanisic* case, that due to the incongruent roles and obligations of the Prosecution and the Defence, the obligation

⁴³ See [ICC-01/04-02/06-1818](#), para. 18, in which the "Chamber noted that 'the disclosure obligations of the Prosecution and Defence differ significantly under the statutory framework'. As previously emphasised by Trial Chamber II, the difference in disclosure obligations applicable to the parties reflects the particular roles the parties have at trial, and the fact that the Prosecution bears the burden of proof and has to investigate both incriminating and exonerating circumstances pursuant to Article 54(1)(a) of the Statute, while the role of the Defence is 'largely reactive to the Prosecution's presentation of evidence'".

⁴⁴ [ICC-01/05-01/13-907](#).

⁴⁵ See *Prosecutor v. Mucic et al.*, [Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample](#), 19 January 1998, paras. 45-60.

⁴⁶ See 'Witnesses before the International Criminal Court', IBA Report, 5 July 2013, p. 23.

⁴⁷ Section 3.17, Part II of [Public Prosecution Services of Canada Deskbook](#)

to disclose interview notes, which applies to the Prosecution, did not apply to the Defence.⁴⁸

42. It is therefore necessary to amend the *Ntaganda* Protocol to ensure that it complies fully with the defendant's rights under Article 67(1) of the Statute, and recognises the different roles of the Prosecution and the Defence – it would indeed be quite perverse to insert a purely common law notion into ICC procedures, without taking into consideration the difference that exists between the parties in those jurisdictions. This can be achieved by either deleting the recording requirement for the Defence, or specifying *firstly*, that if the Prosecution raises any issues of impropriety, then the Trial Chamber may refer the issue to a Judge of the Pre-Trial Chamber to determine whether to review the recording in question,⁴⁹ and *secondly*, that in the event that the Pre-Trial Judge detects improprieties, the report of the Pre-Trial Judge shall first be transmitted to the Defence, who will be afforded an opportunity to be heard as concerns whether the report should be transmitted to the Trial Chamber, and what redactions or measures might be required to prevent undue prejudice to the Defence, and the impartiality of the proceedings.

(iii) *The process of asking the witness to affirm to the party calling them whether their previous statement is accurate, can be unhelpful, and may risk distorting the testimonial process*

43. It is not appropriate for the Prosecution to assume, or appear to assume the mantle of the Judges in advance of the trial: any confirmation of truth and accuracy should therefore be done under oath before the Judges, independently of the Prosecutor. Indeed, it is objectively intimidating to require witnesses to confirm such issues before the party that is responsible for bringing them to The Hague. Since the ICC Prosecution is also tasked with investigating Article 70 offences, there is also a risk that witnesses might fear (erroneously) that a failure or refusal to affirm the accuracy

⁴⁸ *Prosecutor v. Stanasic & Simatovic*, [‘Decision on Prosecution Urgent Motion Related to Non-Compliance of Stanasic Defence with Rule 65 ter \(G\) and Rule 67 of the Rules’](#), 12 October 2011, para. 30: “Under the Rules the Defence does not have corresponding disclosure obligations to those of the Prosecution. Taking this into consideration, the Chamber finds that interpreting Rules 67 (A) (ii) and 66 (A) (ii) in a similar manner would be inconsistent with the general asymmetry of the parties’ disclosure obligations. Accordingly, the Chamber finds that the Defence does not have an obligation to disclose to the Prosecution interview or other notes of its prospective witnesses. In the absence of such a disclosure obligation, the Chamber does not consider it necessary to address the Stanasic Defence’s argument regarding the scope of disclosure protections offered by Rules 70 (A) and 97.”

⁴⁹ This would be consistent with Article 64(4) of the Statute.

of prior statements could expose them to possible consequences under Article 70. The risk that stems from such a practice is further magnified in the case of cooperating witnesses, who are already predisposed towards affirming the Prosecution's narrative.⁵⁰

44. In line with the principle of orality established by Article 69(2) of the Statute,⁵¹ it is also important for witnesses to appreciate the importance of speaking the truth under oath, and to further accept that this might involve deviating from prior statements or preparation sessions, in order to do so. Since witnesses are unlikely to have been questioned by the Defence prior to their testimony, it would be highly inappropriate to use language or procedures that might have the effect of 'crystallising' a particular version of the witness's account, prior to their appearance in Court. The *Ntaganda* Protocol should therefore be amended to delete this wording, and to use more neutral terminology as concerns the possibility for witnesses to make corrections to prior statements, either in such sessions, or during questioning in Court.

(iv) *Witnesses should not be allowed to retain copies of their statements during, or after the preparation sessions*

45. Whereas witness preparation OR allowing witnesses to review their statements may, in themselves, be appropriate, the combination of the two practices can amount to a form of 'rehearsal', which borders on, or enters the territory of witness coaching. Thus, in the *Majinsiki* case, the Supreme Court of Western Australia cautioned that

⁵⁰ B. Cohen, '[Whose Line Is It Anyway?](#)': Reducing Witness Coaching By Prosecutors', Legislation And Public Policy [Vol. 18:985] at 1001-1002:

"In addition to any inherent tendency toward suggestibility a standard witness may possess, cooperating witnesses possess a unique motive to obtain leniency in relation to their own offenses. The danger stems from the fact that cooperating witnesses are aware that they will not obtain leniency if they are unable to provide the prosecutor with information that benefits the prosecution in proving its case. This knowledge incentivizes cooperating witnesses to provide prosecutors with information they believe the prosecutors wish to hear. In addition to possessing incentives to fabricate testimony in pursuit of leniency, cooperating witnesses have the ability to do so without exposure. Often, cooperators will lie about small details of a case that are "not readily discoverable or easily disproved" and go undetected. Furthermore, prosecutors tend to believe slight lies if they are able to verify the other testimony given by the cooperating witness. Cooperators may learn of favorable, but false, information from outside sources such as the media or their attorneys before conversations with the prosecution even take place. They may also receive information for fabrications from prosecutors themselves during pretrial interviews, either verbally or non-verbally, through the prosecutors' intentional or inadvertent witness coaching. Examples of prosecutorial conduct that may inadvertently lead to a cooperator's ability to falsely alter his testimony include: unintentionally asking a leading question, conveying approval or dissatisfaction when the cooperator answers a question, and disclosing a fact that was unknown to the cooperator. As studies indicate that the testimony of these witnesses play a significant role in wrongful convictions, particular attention must be paid to the techniques that prosecutors use to prepare cooperating witnesses to testify".

⁵¹ [ICC-01/05-01/08-1386](#), para. 3.

while it was generally proper to give witnesses an opportunity to view statements, that had been taken contemporaneously with the incident, in advance of their testimony,⁵²

Questioning of a witness moves beyond ‘proofing’ to impermissible ‘coaching’ when the witness’ true recollection of events is supplanted by another version suggested by the interviewer or other party, **whether by repetitive reading of a statement to the point where their testimony is mere regurgitation** or by otherwise influencing the witness: *HKSAR v Tse Tat Fung*; *R v Momodou*.

46. This concern is further reflected in the approach adopted in the *Lubanga* case. Trial Chamber I determined that, in the absence of witness preparation, it was appropriate to provide witnesses with copies of their statements, to review, identify inaccuracies, and refresh their recollection.⁵³ The Chamber nonetheless cautioned that if, after reviewing their statements, the witnesses were to discuss their contents with the Prosecution, “this could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony”.⁵⁴ The combination of allowing the witness to review his or her statements, and witness preparation was thus deemed to be problematic.
47. Even if this Chamber were to depart from Trial Chamber I’s approach to witness preparation, this would not diminish the probative weight of Trial Chamber I’s concerns regarding the combined effects of witness preparation and providing statements to witnesses. The most appropriate solution would therefore be to amend the Protocol to specify that witnesses may not access their prior statements during, or after the conclusion of any preparation sessions. If, after this point, witnesses consider it necessary to refresh their memories, then the procedure for witness refreshing should be followed.⁵⁵ For example, if during a preparation session, the witness asks to consult a prior statement to refresh his or her memory, then the record disclosed to the Defence must reflect firstly, the witness’s request to review prior statements on a certain issue, and secondly, the specific portions viewed by the witness.

⁵² [Majinski v Western Australian \[2013\] WASCA 10](#) paras. 30, 32.

⁵³ [ICC-01/04-01/06-1049](#), para. 50.

⁵⁴ [ICC-01/04-01/06-1049](#), para. 51.

⁵⁵ See *Prosecutor v. Katanga and Ngudjolo*, ‘Directions for the conduct of the proceedings and testimony in accordance with rule 140’, 20 November 2009; [ICC-01/04-01/07-1665-Corr](#); para. 109-111 (V. Documentary Evidence / D. Use of documents by the witness to refresh memory); *Prosecutor v. Hadzihasanovic et al.*, [Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness](#), 2 April 2004, IT-01-47-AR73.2.

III. Conclusion

48. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Trial Chamber to:

- a. prohibit witness preparation in this case; or, in the alternative,
- b. restrict its application, and impose the safeguards requested in Section B above.



Melinda Taylor
Lead Counsel for Mr. Al Hassan



Marie-Hélène Proulx
Associate Counsel for Mr. Al Hassan



Sarah Bafadhel
Associate Counsel for Mr. Al Hassan

Dated this 13th Day of February 2020
At The Hague, The Netherlands