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Date: **24 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

**Prosecution response to Defence submissions regarding Protocol on Witness
Preparation (ICC-01/12-01/18-592)**

Source: Office of the Prosecutor

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The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart

Counsel for the Defence
Ms Melinda Taylor
Ms Marie-Hélène Proulx
Ms Sarah Bafadhel

Legal Representatives of the Victims
Mr Seydou Doumbia
Mr Mayombo Kassongo
Mr Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit
Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

Introduction

1. Witness preparation – a carefully regulated process as adopted in prior cases before the Court, has proven to be a best practice and an important tool in the Court’s truth-finding function, in contributing to the fairness and expeditiousness of the proceedings, and witness well-being.
2. In this case, witness preparation will not only assist in making the process expeditious, but will be extremely beneficial, especially for vulnerable victims. Testifying in this case has its own unique challenges: events in this case occurred in 2012 to 2013, almost 7 to 8 years ago, involve intense violence and trauma, and complex crimes. For many witnesses, it will be the first time that they appear to testify before a court, and certainly their first time testifying in a foreign country with a different linguistic, cultural and legal dimension, in the setting of an international criminal court. The interests of justice, a fair trial, and determination of the truth, are best served by ensuring witnesses are properly prepared before they testify.
3. The potential risks as described by the Defence in their submissions on the Protocol in the case of *Prosecutor v Ntaganda* (“Ntaganda Protocol”), either do not arise or are mitigated. Moreover, most of the challenges described by the Defence relate to the different system and context of ‘witness proofing’ that was practiced at the *ad hoc* Tribunals, which involved re-interviewing witnesses before they testified. The model of witness preparation based on the *Ntaganda* Protocol, which Trial Chamber X (“Chamber”) indicates it may adopt, is of a more limited scope and focusses instead on the process of testifying. The Defence amendments as proposed should be rejected: they are either unfounded, or unnecessary.

Procedural Background

4. On 24 January 2020, the Chamber issued its decision noting that it was in favour of allowing witness preparation and considered adopting a witness preparation protocol, such as the Ntaganda Protocol, as it “may facilitate the fair and expeditious conduct of the proceedings”.¹
5. As instructed by the Chamber,² the parties made submissions regarding the protocols on 13 February 2020. The Prosecution supported the use of witness preparation in this case,

¹ ICC-01/12-01/18-562, para.4.

² ICC-01/12-01/18-562, para.4.

suggesting a few amendments based on lessons learnt from the *Ntaganda* case. The Defence opposed the use of witness preparation, and submitted alternatively, that specific amendments should be made to the model of the *Ntaganda* Protocol being considered.³ On 16 February 2020, the Prosecution informed the Chamber, parties and participants that it would respond to the Defence's submissions regarding the protocol on witness preparation.⁴

Submissions

I. There is a legal basis for authorising witness preparation

6. The Defence states that “the Statute neither permits, nor prohibits witness preparation or proofing”.⁵ Although the Statute and Rules do not explicitly address the issue of witness preparation, the Chamber has the authority to permit the calling parties to prepare witnesses for testimony, within prescribed limits.

7. Both Trial Chamber V in *Prosecutor v Ruto & Sang* and *Prosecutor v Kenyatta*,⁶ and Trial Chamber VI in the *Ntaganda* case,⁷ permitted the calling party to prepare witnesses for testimony. Trial Chamber V⁸ and Trial Chamber VI⁹ considered that article 64 of the Statute provides a sufficient legal basis to allow the calling party to prepare witnesses, should they wish to do so. There is additional legal basis for this authority. Regulation 43 of the Regulations of the Court provides the Chamber with the authority to determine the “mode and order of questioning witnesses” for the effective determination of the truth and effective use of time.¹⁰ Under article 68(1), the Chamber must take appropriate measures to protect the “safety, physical and psychological well-being” of victims and witnesses. In the Kenya cases, Trial Chamber V held that this duty was not best served by limiting the pre-testimony contact between counsel and witnesses.¹¹

³ Prosecution submission on proposed amendments to Witness Familiarisation and Preparation Protocols, ICC-01/12-01/18-591; Defence Submissions on Witness Preparation, ICC-01/12-01/18-592 (“Defence Submissions”).

⁴ Email from Prosecution to Trial Chamber X, parties and participants on 16 February 2020 at 11:11am.

⁵ Defence Submissions, para.7. The Defence acknowledges that “the Statute neither permits, nor prohibits witness preparation or proofing”.

⁶ ICC-01/09-01/11-524; and ICC-01/09-02/11-588.

⁷ ICC-01/04-02/06-652; ICC-01/04-02/06-652-Anx.

⁸ ICC-01/09-01/11-524, para.26-27; ICC-01/09-02/11-588, para.30-31.

⁹ ICC-01/04-02/06-652, para.16.

¹⁰ Rule 140 states that the parties shall agree on the order and manner in which evidence shall be submitted to the Trial Chamber and where they cannot, the Presiding Judge shall provide direction.

¹¹ ICC-01/09-01/11-524, para.37 and ICC-01/09-02/11-588, para.41.

8. Further support can be derived from *ad hoc* and hybrid tribunals' jurisprudence, as foreseen in article 21. Witness preparation or witness proofing "is either allowed or encouraged at the *ad hoc* tribunals (ICTR, ICTY and Special Court for Sierra Leone) and in various national jurisdictions where the principle of the primacy of orality is followed and where trials [...] rely on the examination of live witnesses through questioning by the parties."¹² Contrary to what Defence states, witness preparation is not a tool used only in certain common law jurisdictions.¹³ For instance, in Japan, a primarily civil law system, parties can apply to prepare witnesses in advance of their testimony "by a method such as ascertaining the facts from the witness [...]."¹⁴

II. Issues described by the Defence do not arise because witness preparation is different to 'witness proofing'

9. Many of the potential challenges described by the Defence, arising before the *ad hoc* tribunals or domestic national courts,¹⁵ or perceived potential challenges before the ICC,¹⁶ relate to the system of witness proofing.

10. However, these issues do not arise as the *Ntaganda* Protocol reflects a different system of witness preparation. Contrary to what the Defence asserts, witness preparation is not "simply witness proofing by another name".¹⁷ The Defence refers to a definition of witness proofing, where "either party are permitted to meet and re-interview their witnesses before they take the stand."¹⁸ This is not the model of witness preparation as reflected in the *Ntaganda* Protocol. The proposed witness preparation is not the same as the "witness proofing" procedure conducted in the UN *ad hoc* tribunals, which involved a review of the

¹² ICC-01/09-01/11-524, para.35 and ICC-01/09-02/11-588, para.39 (and the authorities cited in footnotes 54 and 63, respectively). See also: ICC-01/09-01/11-524 and ICC-01/09-02/11-588, para.20-36 (partly dissenting opinion of Judge Eboe-Osuji). See also: **ICTY**: *Prosecutor v Limaj, et al.*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, 10 December 2004; *Prosecutor v Milutinović et al.*, IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006; and *Prosecutor v Haradinaj et al.*, IT-04-84-T, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, 23 May 2007. **ICTR**: *Prosecutor v Karemera, et al.*, ICTR-98-44-T, Decision on Defence Motions to Prohibit Witness Proofing, 15 December 2006; and *Prosecutor v Karemera, et al.*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007. **SCSL**: *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005.

¹³ Defence Submissions, para.13-14.

¹⁴ Rules of Criminal Procedure of 1 December 1948, Article 191-3. See, Japanese Ministry of Justice website, <http://www.japaneselawtranslation.go.jp/law/detail/?id=1979&vm=04&re=01>.

¹⁵ Defence Submissions, para.6-14.

¹⁶ Defence Submissions, para.15-22.

¹⁷ Defence Submissions, para.6.

¹⁸ Defence Submissions, para.6. Citing the International Bar Association. IBA, 'Witnesses before the International Criminal Court', July 2013, p.21-22.

evidence. Nor is it the same as the witness preparation proposed, for instance, in the *Lubanga* trial, which envisaged as well a practice similar to the review of evidence.¹⁹

11. Instead, witness preparation, as reflected in the *Ntaganda* Protocol, is a highly circumscribed procedure to assist in the *process* of giving evidence. In particular, witness preparation under the *Ntaganda* Protocol,²⁰ allows the witness, *inter alia*:

- (i) to review his or her prior statements;²¹
- (ii) to confirm whether those prior statements are accurate and to explain any changes necessary and inconsistencies;²²
- (iii) to be informed of the broad topics that may be covered in the in-court examination;²³
- (iv) to view exhibits that the calling party intends to use and to familiarise himself or herself with them;²⁴ and
- (v) to ask questions on the process of testifying and what to expect in court.²⁵

12. None of these measures constitute a re-interview of a witness. Indeed, the *Ntaganda* Protocol explicitly prohibits “seeking new evidence or continuing the calling party’s investigations”.²⁶ Further, contrary to the Defence’s assertions, these measures do not influence the substance of what a witness may wish to tell this Chamber. They do not hinder the testimony’s spontaneity. Nor do they tarnish the essential bond between a witness and the Judges.²⁷ The *Ntaganda* Protocol explicitly prohibits “[a]ny attempt to influence a witness to testify to factual events that the witness did not observe or perceive.[...] Coaching, training or practising are not allowed.”²⁸

13. According to the *Lubanga* Trial Chamber, the practice of witness proofing at the *ad hoc* tribunals had the effect of “preparing a witness in a *substantive* way for [the] testimony at

¹⁹ *Contra* ICC-01/04-01/06-1049, para. 51.

²⁰ ICC-01/04-02/06-652-Anx.

²¹ ICC-01/04-02/06-652-Anx, article 18.

²² ICC-01/04-02/06-652-Anx, article 19-20.

²³ ICC-01/04-02/06-652-Anx, article 21-22.

²⁴ ICC-01/04-02/06-652-Anx, article 24.

²⁵ ICC-01/04-02/06-652-Anx, article 23, 25-27.

²⁶ ICC-01/04-02/06-652-Anx, article 2.

²⁷ Defence Submissions, para.10-12, 15-18.

²⁸ ICC-01/04-02/06-652-Anx, article 3.

trial”.²⁹ In contrast to witness preparation, witness proofing consists of a “meeting [...] between a party to the proceedings and a witness, before the witness is due to testify in Court, the purpose of which is to re-examine the witness’s evidence [...]”.³⁰ During such a meeting the party will “discuss [...] the topics to be dealt with in court”³¹ by asking the witness all the same questions that it will later ask during the witness’s testimony.³² The *Lubanga* Chamber prohibited this practice, largely due to its concern that such meeting “may come dangerously close to constituting a rehearsal of in-court testimony”.³³ Similar concerns have been raised by other Chambers when rejecting witness proofing and other forms of interaction between a witness and the counsel of the calling party shortly before testimony.³⁴

III. Response to the Defence’s specific stated concerns under the Ntaganda Protocol

14. In contrast, witness preparation, as proposed in this case under the *Ntaganda* Protocol, does not impact on the substance of the witness’s testimony. In adopting the *Ntaganda* Protocol, shortly before the witness’s testimony commences, the lawyer who will question the witness would be allowed to meet with the witness at the place of testimony to undertake five discrete measures, which have been successfully tested in the cases of *Ntaganda* and *Prosecutor. v Ruto & Sang* (“*Ruto & Sang*”).³⁵

15. Below, the Prosecution explains each of the five key measures as adopted in the *Ntaganda* Protocol, and responds to the Defence’s stated concerns regarding each of the measures.

(i) Provide the witness with an opportunity to review his or her prior statements

16. The Defence does not appear to object to the process of a witness reviewing their prior statements before testimony. Even in cases where witness preparation has not been allowed, witnesses have been allowed to review their prior statements and any documents generated or

²⁹ ICC-01/04-01/06-1049, para. 28, 35 (emphasis added).

³⁰ *Haradinaj et al* Decision, para. 8; ICC-01/04-01/06-952, para. 15; *see also* ICC-01/04-01/06-1049, para. 48.

³¹ ICC-01/04-01/06-1049, para. 51 (emphasis added).

³² *Karemera* Decision, para. 5, 13-14; *Gacumbitsi AJ*, para. 73-74: “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”.

³³ ICC-01/04-01/06-1049, para. 51-52.

³⁴ Chambers held that these forms of interaction impacted on the “genuine and undistorted” testimony of witnesses, that they have the potential of generating “new evidence”, that they “may lead to conduct [...] such as rehearsal, practice and coaching” or “could diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness”: ICC-02/11-01/15-355, para. 16-19; ICC-01/05-01/08-1016, para. 34; ICC-01/04-01/07-1134, para. 18.

³⁵ ICC-01/04-02/06-652-Anx, para. 16-27; ICC-01/09-01/11-524-Anx, para. 15-26.

provided by the witness as part of the VWS's familiarisation process to refresh their memory.³⁶ Counsel for the calling party is not present during the reading process. Where a witness is illiterate or does not speak the language in which the prior statements or documents are written, a qualified interpreter who is a staff member of the Court is present to facilitate the reading.

17. Rather, the Defence objects to the provision of a witness's prior statement during witness preparation in the presence of Counsel, or after their witness preparation.³⁷ The *Ntaganda* Protocol does not enable witnesses to retain their witness statements after witness preparation, and the practice in the *Ntaganda* and *Ruto & Sang* cases is that witnesses do not retain them.³⁸

18. The Defence provides no valid basis for claiming that if a witness has recourse to their prior statements during witness preparation session, that this will "border on witness coaching":

- The authorities relied upon by the Defence are distinguishable: the Australian authority relates to individuals who effectively learnt their testimony by heart by repetitive reading so that their testimony was "mere regurgitation";³⁹
- As stated above, in the *Lubanga* case, Trial Chamber I was responding to a proposal for witnesses to be re-interviewed, which is *akin* to witness proofing, so that its comments must be understood in that context;⁴⁰
- The model under the *Ntaganda* Protocol is totally different. The witness is not re-interviewed and does not learn their prior statement by heart through repetitive reading. Instead, a witness refreshes their memory by reading their prior statement in the absence of Counsel, and is then given an opportunity in the presence of Counsel to clarify or correct any errors or inconsistencies. In that context, it is logical that they refer to their statement during witness preparation, as they need to indicate the passages that may need clarification or correction.

³⁶ ICC-02/11-01/15-355-Anx, para. 79-94, *especially* para. 85; ICC-01/04-01/06-1049, para. 55.

³⁷ Defence Submissions, para.45-47.

³⁸ Defence Submissions, para.45-47.

³⁹ Defence Submissions, para.45, fn. 52.

⁴⁰ Defence Submissions, para.46.

- (ii) *Provide the witness with an opportunity to confirm whether his or her prior statements are accurate, explain inaccuracies or inconsistencies, and make changes as necessary*

19. The Defence is not correct to state that this process usurps the role of the judges and undermines the principle of orality. Rather, the process is simply a means to determine if corrections or clarifications are needed in advance of testimony. Further, the Defence makes an unfounded claim that witnesses will affirm what they previously stated because of fear of consequences under article 70.⁴¹

20. On the contrary, the purpose of this measure is to give witnesses an opportunity to correct or clarify any errors or inconsistencies in their prior statements, and they are reminded of their obligation to tell the truth.⁴²

21. The measure ensures that the Parties, participants and the Chamber have a witness statement that accurately reflects the prior recorded testimony, and will be aware of any corrections that were needed before, rather than during, the witness's testimony. In particular, assuring that there is as accurate a statement as possible in advance of testimony: (a) assists the calling party to more efficiently prepare its examination-in-chief, including where it submits prior-recorded testimony under rule 68(3) to replace or shorten the questioning of a witness; (b) assists the other party to more efficiently prepare its cross-examination. Moreover, a better prepared witness expedites the process in court, helping to conserve valuable court time for the actual testimony, including by eliminating peripheral or irrelevant corrections.

22. This measure is analogous to declarations given by witnesses under rule 68(2)(b)(ii), where the calling party does not seek to elicit "new information".⁴³ Instead, the calling party asks the witness to identify which parts of the prior statements, if any, are inaccurate or inconsistent.⁴⁴ After reviewing the statements, during a meeting with counsel for the calling party, the witness may correct the relevant portions. However, there is no substantive

⁴¹ Defence Submissions, para.43-44.

⁴² ICC-01/04-02/06-652-Anx, article 16.

⁴³ Under rule 68(2)(b)(ii), accompanying declarations require a statement that "the contents of the prior testimony are true and correct to be best of [the witness's] knowledge" and must be made "reasonably close in time to when the prior recorded testimony is being submitted".

⁴⁴ A party will not "[take] a witness systematically through inconsistencies in their statements", but it will be left to the witness's own initiative to identify any inconsistencies: *contra*, ICC-02/11-01/15-355, para. 17. Because of the limited scope of this measure and the manner in which it is conducted, it will not strip the witness of any "helpful spontaneity" during the testimony.

discussion about the relevant topics. Corrections are reflected in the notes of the meeting and disclosed.

(iii) Identify the general topics that the calling party intends to cover during its questioning of the witness in Court and the topics on which, in the calling party's opinion, the witness may be questioned by the other party and participants.

23. The Defence implicitly opposes this measure, as it considers that it is for VWS and not for the calling party to undertake any witness familiarisation.

24. Any concerns are unfounded. The calling party simply identifies the anticipated topics of questioning in broad terms to assist the witness to focus his or her mind prior to entering the courtroom. The calling party will not anticipate concrete questions that will be asked in court, explain the relevance of the anticipated topics to the party's case or engage in any substantive discussion with the witness about the anticipated topics. As such, the calling party does not influence the substance of the witness's testimony. The calling party also does not coach or train the witness or practice questions and answers expected in the witness's testimony. The witness will not be permitted to comment on the substance of the proposed topics, nor rehearse testimony on these identified topics in any way. The calling party may, however, explain to the witness that he or she might not be questioned in court on all matters upon which investigators previously questioned the witness.

25. This measure assists witnesses to be properly prepared before testifying. It has been particularly beneficial where a witness is informed of sensitive and traumatic topics that may be broached in advance of testimony. For instance in *Ntaganda*, a witness preparation session helped facilitate a witness's willingness during testimony to look at photographs of a massacre scene depicting his wife as one of the victims.⁴⁵

(iv) Show the witness exhibits that the calling party plans to use in court when questioning the witness to enable the witness to familiarise himself or herself with the document, and ask the witness to comment on them to determine the utility of using the exhibits in court

26. Contrary to what the Defence alleges, this measure of showing exhibits to witnesses is not designed to circumvent any obligation to investigate pre-trial.⁴⁶ Indeed, the *Ntaganda* Protocol prohibits preparation "for the purpose of seeking new evidence or continuing the

⁴⁵ ICC-01/04-02/06-T-44-Red, p. 49 l. 9-p. 52 l. 2.

⁴⁶ Defence Submissions, para.23-27.

calling party's investigations'',⁴⁷ but allows showing a witness potential exhibits for the "purpose of determining the utility of using the exhibits in court".⁴⁸ This does not constitute seeking new evidence or continuing investigations. The calling party cannot ask substantive questions related to the exhibits; and can therefore not influence the witness's responses. In *Ntaganda*, Trial Chamber VI confirmed that a calling party has a right to show exhibits during witness preparation regardless of whether they have seen such materials previously or not, and that questioning is narrowly tailored to the purpose of ascertaining whether the witness can usefully comment on them during testimony.⁴⁹

27. This measure saves the Court's time, because if a particular exhibit falls out of the witness's knowledge, it will not be used when questioning the witness. Likewise, witnesses can familiarise themselves with exhibits that they will be shown in court so that they are better prepared to comment upon them. It is particularly useful with vulnerable witnesses, so that they are better mentally prepared to be shown material, such as images of deceased family members, rather than being shown them for the first time in the courtroom.

28. It is not always possible for a calling party to show an exhibit to a witness in advance of their witness preparation. For instance, the witness may not be the source of the item, or it may have been collected after their prior statement was taken. It is better for the security of a witness, less traumatic for them, more efficient and less expensive for the court, if a witness is asked about discrete exhibits during witness preparation, rather than to re-interview them on multiple occasions in the field.

(v) Answer any questions the witness may have, including about what to expect in court

29. The Defence's proposal of limiting a witness's preparation to the VWS-led familiarisation process only, instead of enabling a witness to undergo a more in-depth preparation through a calling party, is misguided and inadequate.⁵⁰

30. The VWS-led familiarisation process cannot fulfil the function of witness preparation on its own. Although VWS protocols state that the "witnesses are provided with an opportunity to acquaint themselves with the people who may examine them in court",⁵¹ these

⁴⁷ ICC-01/04-02/06-652-Anx, article 2.

⁴⁸ ICC-01/04-02/06-652-Anx, article 24.

⁴⁹ See ICC-01/04-01/02-06-1342, para.11.

⁵⁰ Defence Submissions, para.18.

⁵¹ ICC-02/11-01/15-355-Anx, para. 66.

“courtesy meetings” organised by the VWS are typically limited to a very short introduction without the possibility for a witness to engage in any way with the examining counsel.⁵² Experience has shown that for many witnesses testifying before the Court causes stress and anxiety.⁵³ To allow the calling party’s counsel to address the witness’s concerns will assist in putting the witness at ease and build the witness’s confidence in view of the upcoming testimony. Questions asked by witnesses typically focus on the process of giving evidence. However, this interaction is not intended to discuss or influence the substance of the witness’s testimony, to elicit new evidence or to coach or train the witness.

IV. Any potential risks are mitigated by the *Ntaganda* Protocol and other safeguards

31. Potential risks associated with improper witness preparation, as suggested by the Defence, such as inducing witnesses to modify their testimony, reducing any helpful spontaneity, or these sessions becoming an improper rehearsal of in-court testimony which may negatively affect the reliability of the evidence adduced at trial, are all mitigated by the adoption of the proposed Protocol in concert with other available safeguards.

32. First, the *Ntaganda* Protocol itself contains clear guidelines that mitigate improper witness preparation.⁵⁴ The *Ntaganda* Protocol provides a detailed list of permissible witness contact and preparation prior to testimony to permit “judicious witness preparation aimed at clarifying a witness’s evidence and carried out with full respect for the rights of the accused.”⁵⁵

33. In particular, the *Ntaganda* Protocol requires counsel for the calling party to perform four key functions: (i) to reiterate the witness’s obligation to tell the truth; (ii) to explain the purpose of the preparation session; (iii) to provide the witness with an opportunity to review his or her prior statements; and, (iv) to provide the witness with an opportunity to confirm whether his or her prior statements are accurate and to explain any changes as necessary.⁵⁶

34. Counsel for the calling party is permitted to perform a variety of other functions such as: asking the witness about inconsistencies in any prior statements;⁵⁷ explaining (in general

⁵² See also Jackson, J.D., 601-624, p. 614-615.

⁵³ See Jackson, J.D., 601-624, p. 614-615.

⁵⁴ *Ntaganda* Protocol, articles 2, 3, 4, 28-30.

⁵⁵ ICC-01/09-01/11-524, para.50 and ICC-01/09-02/11-588, para.52.

⁵⁶ *Ntaganda* Protocol, articles 16-19. See also ICC-01/09-01/11-524-Anx and ICC-01/09-02/11-588-Anx, articles 15-18.

⁵⁷ *Ntaganda* Protocol, article 29.

terms) the topics the calling party intends to cover in examination-in-chief, as well as the topics on which the witness may be questioned during cross-examination;⁵⁸ asking the witness to comment upon potential exhibits for the purpose of determining the utility of using the exhibits in court;⁵⁹ informing the witness of appropriate behaviour, including the need to speak slowly and concisely;⁶⁰ and answering questions the witness may have, including about what to expect in court.⁶¹

35. The *Ntaganda* Protocol prohibits counsel from engaging in certain conduct including: seeking to influence the substance of the witness's answers;⁶² training the witness or practicing the questions and answers expected during the witness's testimony so that the witness memorises those questions and answers;⁶³ and informing the witness of the evidence of other witnesses.⁶⁴

36. The *Ntaganda* Protocol includes a requirement to video record the preparation sessions and maintain a log of the location, duration and attendees at these sessions.⁶⁵ Where there is a concrete and credible basis for a request to access the video, such as an allegation of witness coaching or tampering, the Chamber can order disclosure of the video taped session.⁶⁶ This provides a solid safeguard for witness preparation. It does not necessitate that the video be provided to the non-calling party in the absence of a well-founded request for access. The Chamber in the *Ruto & Sang* case held that, if it was satisfied as to the basis of such a request, in its discretion it could consider whether to view the video recording prior to making any disclosure order, being mindful of protecting any privileged information revealed in the video recording.⁶⁷

37. The Chamber in the *Ruto & Sang* case further held that it had “no basis for assuming that either party will fail to adhere to the limitations” in the protocol.⁶⁸ For this reason, as well as the appropriate caution regarding privileged information in the video recording, the

⁵⁸ Ntaganda Protocol, articles 21-23.

⁵⁹ Ntaganda Protocol, article 24.

⁶⁰ Ntaganda Protocol, article 26.

⁶¹ Ntaganda Protocol, article 27.

⁶² Ntaganda Protocol, article 28.

⁶³ Ntaganda Protocol, article 29.

⁶⁴ Ntaganda Protocol, article 30.

⁶⁵ Ntaganda Protocol, articles 12 -15.

⁶⁶ Ntaganda Protocol, article 13.

⁶⁷ ICC-01/09-01/11-524, para.47.

⁶⁸ ICC-01/09-01/11-524, para.48.

Prosecution submits that there should not be automatic disclosure of the video recording. A party must apply for access on a concrete and credible basis.

38. There are other available safeguards that act as a check against improper witness preparation. One of these additional safeguards is the use of cross-examination, as well as questioning by the Chamber, about the extent of a witness's preparation.⁶⁹ Knowing that any improper conduct will be revealed during in-court questioning, counsel will not jeopardise the credibility of the witness (or their own professional reputation) by using preparation sessions to improperly coach or influence testimony.

39. Codes of conduct that require counsel to conduct witness preparation honestly and fairly are another available safeguard. The Code of Conduct for the Office of the Prosecutor requires Prosecution staff to, among others, "uphold the highest standards of integrity and relevant standards on confidentiality, fairness, honesty and truthfulness" and to "ensure that proceedings are conducted in a fair manner."⁷⁰ The Code of Professional Conduct for counsel requires counsel (including Defence counsel) to "take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings" and to "maintain the integrity of evidence" at all times.⁷¹

V. The Prosecution opposes the Defence's proposed amendments to the Protocol

40. The Defence proposes, in the alternative, that the *Ntaganda* Protocol be amended as follows. The Prosecution opposes each proposal in turn:

(i) *Recordings of witness preparation sessions do not constitute rule 76 interviews*

41. The Defence requests that the *Ntaganda* Protocol be amended to specify that recordings of witness preparation sessions are all subject to the general principles of disclosure.⁷²

42. Witness preparation does not constitute a rule 76 interview, as it not a re-interview of the witness. Where any disclosable evidence is elicited, articles 31 and 32 of the *Ntaganda* Protocol requires the disclosure of relevant information obtained during a witness preparation session to the non-calling party. Disclosable information obtained from a witness during the

⁶⁹ ICC-01/09-01/11-524, para.45 and ICC-01/09-02/11-588, para.48.

⁷⁰ Code of Conduct for the Office of the Prosecutor, para.20(c) and 51(b), respectively. *See also*: para.25-30, 49, 52-54.

⁷¹ Code of Professional Conduct for counsel, articles 24(1) and 25(1), respectively. *See also*: article 29.

⁷² Defence Submissions, para.36-42.

preparation sessions includes contradictions with the witness statement and new information or clarifications provided by the witness. The practice in the *Ruto & Sang* case and *Ntaganda* case has been to disclose notes containing disclosable information following a witness preparation session. It is unnecessary to prescribe further the form or content of such disclosure.

(ii) *Video recordings should not be automatically disclosed*

43. The Defence proposes that all video records of preparation sessions be automatically disclosed to the Defence.⁷³ This is unnecessary because the Protocol explicitly provides that the Chamber can oversee the process and order disclosure where required.⁷⁴ If video records must be provided in all instances, even where no justification is apparent, this will considerably delay the proceedings: a process of review and implementation of any necessary redactions would take place, for instance, if a witness discusses their security concerns and/or mentions their current location; it may also necessitate a delay in the cross-examination.

(iii) *Defence must also disclose notes and the log of their witness preparation sessions*

44. The Defence argues that only the Prosecution should be subject to disclosure obligations under the Protocol, and that it is not appropriate for the equivalent obligations to apply to the Defence.⁷⁵ This is untenable: the need to disclose records of the witness preparation of Defence witnesses does not arise because of any general disclosure obligations on the part of either party; nor, does it impinge on the rights of the Accused under article 67(1).⁷⁶ Instead, the need to disclose a record of a witness preparation session, no matter who the party or participant, is designed to ensure that: (a) there is no improper conduct; and (b) that there is appropriate disclosure of any relevant information before a witness testifies.

(iv) *Insiders and dual victim-status witnesses should not be excluded from preparation*

45. There is no valid basis for the Defence proposal that dual victim-witnesses and insider witnesses be excluded as categories of witnesses that undergo witness preparation.⁷⁷ As regards insider witnesses the Defence makes a spurious and unfounded argument that witness preparation “would border on rehearsal”.⁷⁸ Some of the concerns seem to arise from an

⁷³ Defence Submissions, para.36-39.

⁷⁴ ICC-01/04-02/06-652-Anx, article 13.

⁷⁵ Defence Submissions, para.40-42.

⁷⁶ Defence Submissions, para.40-42.

⁷⁷ Defence Submissions, para.31-35.

⁷⁸ Defence Submissions, para.31-34.

assumption that insiders would be re-interviewed under ‘witness proofing’. But as explained above, the system of witness preparation under the *Ntaganda* Protocol is entirely different. The Defence makes an equally unfounded, and unclear claim that the presence of rule 74 advisors of witness suspects in interviews leads to “an *ex parte* trial within a trial, and a gross inequality of arms”.⁷⁹ There is a summary provided of the session, so nothing is conducted on an *ex parte* basis. Additionally, contrary to what the Defence states, LRVs do not attend preparation sessions of the Prosecution.⁸⁰

VI. Witness preparation is appropriate and will be of substantial benefit

46. Contrary to the Defence’s assertions,⁸¹ allowing for witness preparation under the *Ntaganda* protocol in this case is appropriate and will be of substantial benefit. *Inter alia*, witness preparation will:

- (i) further the Court’s truth-finding function by allowing witnesses to refresh their memory, review potential exhibits, and provide more focused, clear, complete, structured and relevant testimony;
- (ii) contribute to fair and expeditious proceedings by enabling counsel to present more efficient and focused witness examinations having had the opportunity to clarify witnesses’ evidence with them in advance, confirm the accuracy and completeness of any prior statements and, if any disclosable information comes to light, disclose it to the opposing party prior to the witness testifying; and
- (iii) contribute to witness well-being by allowing witnesses to meet counsel prior to testifying, review and clarify their evidence with counsel, ask meaningful questions about what to expect with a view to reducing anxiety, and discuss any security concerns including as a result of interference or intimidation.

(a) Furthers the Court’s truth-finding function

47. Proper witness preparation results in more accurate, focused and complete testimony, which will enhance the Chamber’s ability to ascertain the truth.⁸²

⁷⁹ Defence Submissions, para.33.

⁸⁰ Defence Submissions, para.33-34.

⁸¹ Defence Submissions, para.6-30.

⁸² ICC-01/05-01/08-1039, para.21 (dissenting opinion of Judge Ozaki).

48. As Trial Chamber V opined:

(a) it is far from clear whether prohibiting contact between witnesses and the calling party, thereby “requiring witnesses to take the stand ‘cold’” best serves the Court’s truth-seeking mandate”;⁸³

(b) “[a] witness who testifies in an incomplete, confused and ill-structured way because of lack of preparation is of limited assistance to the Chamber’s truth-finding function;”⁸⁴

(c) “permitting witnesses to re-engage with the facts underlying their testimony aids the process of human recollection, better enables witnesses to tell their stories accurately on the stand and can assist in ensuring that the testimony of a witness is structured and clear”;⁸⁵ and,

(d) a witness only shown an exhibit for the first time on the stand “may be caught off guard, without adequate time to consider whether he knows of the document and what relevant information, if any, he can provide about it”.⁸⁶ Whilst, showing witnesses potential exhibits in advance of their testifying “will help to ensure that witnesses are in a position to give the Chamber the most complete version of their evidence”.⁸⁷

49. There are benefits for the Chamber’s truth-finding function if any new information raised by a witness when focusing on their testimony, is provided in advance of their testimony. Parties will be hesitant to freely explore new areas with witnesses in the course of their testimony for fear of wasting time or confusing the evidence thereby preventing the Chamber from receiving relevant and probative evidence.⁸⁸

50. The absence of witness preparation impedes a party’s ability to present its case and to assist the Chamber to determine the truth. The parties, including the Prosecution, have a right to prepare and present their case in the manner it deems best suited to establish the truth.⁸⁹

⁸³ ICC-01/09-02/11-588, para.43. *See also*: ICC-01/09-01/11-524 and ICC-01/09-02/11-588, para.17-19 (partly dissenting opinion of Judge Eboe-Osui).

⁸⁴ ICC-01/09-01/11-524, para.31 and ICC-01/09-02/11-588, para.35. *See also*: ICC-01/09-01/11-524 and ICC-01/09-02/11-588, para.12 (partly dissenting opinion of Judge Eboe-Osui).

⁸⁵ ICC-01/09-01/11-524, para.32 and ICC-01/09-02/11-588, para.36, referring to *Prosecutor v Limaj, et al.*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, 10 December 2004, page 2: “the process of human recollection is likely to be assisted... by a detailed canvassing during the pre-trial proofing of the relevant recollection of a witness... In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial.”

⁸⁶ ICC-01/09-01/11-524, para.33 and ICC-01/09-02/11-588, para.37.

⁸⁷ ICC-01/09-01/11-524, para.33 and ICC-01/09-02/11-588, para.37.

⁸⁸ ICC-01/09-01/11-524, para.42 and ICC-01/09-02/11-588, para.46.

⁸⁹ *See e.g.*, articles 54(1) and 69(3).

The Chamber has a duty to exercise its trial management powers under article 64 to “ensure that the trial is conducted fairly both to the Prosecution and the accused.”⁹⁰ As Judges of the Appeals Chamber have noted, “fairness also extends to [...] the Prosecution”,⁹¹ which is entitled to submit evidence relevant to the case.⁹² Indeed, one of counsel’s roles in the ICC’s hybrid legal system is to assist the witness in focussing his or her evidence and to ensure that the witness provides all relevant evidence that he or she has to give to the Chamber.

(b) Fair, efficient and expeditious proceedings

51. Similar to Trial Chamber X, Trial Chamber V⁹³ and Trial Chamber VI⁹⁴ found that properly conducted witness preparation is likely to enhance the fairness, efficiency, and expeditiousness of the trials. Trial Chamber VI considered that witness preparation assists, *inter alia*, because: (a) “relevant, accurate and complete witness testimony facilitates a fair, effective and expeditious trial;”⁹⁵ and (b) witness preparation enables the calling party to engage with the witness to define the most effective way to discover the truth during trial, also bearing in mind the complexity of the case and large number of exhibits.⁹⁶

52. The Chamber will not be assisted in its mandate to expedite the proceedings, if there is no system of witness preparation. Unfocused testimony can often extend beyond the allotted time, and precious time may be lost when witnesses are shown voluminous documents for the first time on the stand. The Chamber may need to intervene more frequently to assist the witness and bring order to his or her testimony. Counsel too may need to seek adjournments to adjust to unanticipated testimony. In the *Ruto & Sang* case, witness preparation enabled the calling party to withdraw at least one witness after it determined, judging from the witness’s demeanour during that session, that the witness’s evidence was unreliable.⁹⁷ This saved the Court considerable time and resources.

53. It is important that testimonies are structured, clear and concise, given the importance of oral evidence at this Court,⁹⁸ and the fact that live oral testimony is likely to constitute a

⁹⁰ ICC-02/11-01/15-313, para. 14.

⁹¹ ICC-01/04-02/12-271-AnxA, para. 5-6.

⁹² *Ibid.*, para. 5-6.

⁹³ ICC-01/09-01/11-524, para.35 and ICC-01/09-02/11-588, para.39.

⁹⁴ ICC-01/04-02/06-652, para.17-18.

⁹⁵ ICC-01/04-02/06-652, para.17-18.

⁹⁶ ICC-01/04-02/06-652, para.18.

⁹⁷ ICC-01/09-01/11-T-114-CONF-ENG (open session), p. 36 l. 11; p. 37 l. 12; p. 52, l. 7; p. 55, l. 11.

⁹⁸ ICC-01/09-01/11-524, para.31 and ICC-01/09-02/11-588, para.35. *See also*: ICC-01/05-01/08-1039, para.20-21 (partly dissenting opinion of Judge Ozaki).

significant part of the evidence presented to the Chamber in this case. Trial Chamber V found that informing witnesses of likely topics of direct and cross-examination will “help them focus on the relevant issues.”⁹⁹

54. Efficient trials require efficient witness examinations. To a large extent, this requires a well-prepared counsel who is fully acquainted with a witness’s evidence.¹⁰⁰ Witness preparation meetings provide “a last opportunity for the calling party to determine the most effective way to question its witnesses and which topics will elicit the most relevant and probative evidence during in-court examination”.¹⁰¹ By knowing in advance what topics may cause a witness to stray into irrelevant areas that need not occupy the Court’s time, counsel can streamline in-court examinations and tailor them to the most relevant or contested issues. Similarly, by showing witnesses potential exhibits during witness preparation, counsel is better able to determine which exhibits the witness can speak to and which he or she cannot.¹⁰²

55. It is also more fair and expeditious if any new information from a witness is disclosed in advance of their testimony.¹⁰³ Trial Chamber V opined that such pre-testimony disclosure was preferable to having the information emerge during in-court testimony, and found that it would also ensure the Chamber was not foreclosed from hearing the entirety of the witness’s evidence.¹⁰⁴

(c) Contributes to the well-being of witnesses

56. Contrary to what the Defence asserts, witness preparation does not increase the risk of re-traumatisation or improper influencing of vulnerable witnesses.¹⁰⁵ Trial Chamber V held that proper witness preparation “enhances the protection and well-being of witnesses,

⁹⁹ ICC-01/09-01/11-524, para.39 and ICC-01/09-02/11-588, para.44.

¹⁰⁰ ICC-01/09-01/11-524, para.34 and ICC-01/09-02/11-588, para.38.

¹⁰¹ ICC-01/09-01/11-524, para.34 and ICC-01/09-02/11-588, para.38.

¹⁰² For example, if a witness is to testify about the location where crimes were committed, showing the witness maps or sketches of locations ahead of time enables counsel to determine whether the witness is capable of commenting on them. Absent such preparation, counsel may need to try several exhibits in court before finding one to which the witness can speak, which is time consuming and may be unsettling or embarrassing for the witness.

¹⁰³ ICC-01/09-01/11-524, para.42 and ICC-01/09-02/11-588, para.46. *See also*: ICC-01/05-01/08-1039, para.14 (partly dissenting opinion of Judge Ozaki).

¹⁰⁴ ICC-01/09-01/11-524, para.42 and ICC-01/09-02/11-588, para.46. *See also*: ICC-01/05-01/08-1039, para.23 (partly dissenting opinion of Judge Ozaki).

¹⁰⁵ Defence Submissions, para.15-22.

including by helping to reduce their stress and anxiety about testifying.”¹⁰⁶ Trial Chamber VI considered that witness preparation could help protect the well-being of witnesses.¹⁰⁷ Trial Chamber VI observed that “as most witnesses come from different cultural backgrounds and appear for the first time in a courtroom, some form of preparation, in addition to the familiarisation conducted by the Victim and Witnesses Unit, may assist these witnesses”.¹⁰⁸ This reasoning is equally applicable to this case: where the witnesses come from different cultural and linguistic backgrounds and many appear for the first time in a courtroom – and certainly for the first time before an international criminal court.

57. In-court testimony differs from how people typically share information in conversation. Witnesses are asked to break information into small pieces and respond to precise, probing questions often about highly sensitive issues or traumatic experiences. In this context, Trial Chamber V’s finding that witness preparation “may help to increase witnesses’ confidence and may reduce their reluctance to reveal sensitive information on the stand”¹⁰⁹ is germane.

58. Indeed, witnesses who have testified without witness preparation at this Court have expressed their discomfort with the process.¹¹⁰ Despite the VWS-led familiarisation process, *Lubanga* and *Katanga* witnesses said that they were anxious about giving evidence, felt under-confident in articulating their experiences and were apprehensive about cross-examination.¹¹¹ Although these witnesses felt a duty to testify, they were anxious about testifying. “I felt very intimidated,” said one witness. “I felt naked, very exposed, vulnerable. I felt a very heavy responsibility having to take part in a process of justice.” Another witness said: “I was fearful because it was my first time appearing in front of a court.”¹¹² A nervous witness is not in the Court’s interest; nor is testimony that lacks precision, is incomplete, confused, or rendered in an ill-structured or chaotic manner, even if these could also be seen as indicia of spontaneity.

¹⁰⁶ ICC-01/09-01/11-524, para.37 and ICC-01/09-02/11-588, para.41. *See also*: ICC-01/09-01/11-524 and ICC-01/09-02/11-588, para.8-10, (partly dissenting opinion of Judge Eboe-Osuji).

¹⁰⁷ ICC-01/04-02/06-652, para.17.

¹⁰⁸ ICC-01/04-02/06-652, para.18. *See also* ICC-01/09-01/11-524, para.36 and ICC-01/09-02/11-588, para.40, para.8-10 (partly dissenting opinion of Judge Eboe-Osuji) and ICC-01/05-01/08-1039, para.21 (partly dissenting opinion of Judge Ozaki).

¹⁰⁹ ICC-01/09-01/11-524, para.37 and ICC-01/09-02/11-588, para.41.

¹¹⁰ *Bearing Witness at the International Criminal Court*, p. 22, where a witness said “I should have been better prepared by the party that called me.”

¹¹¹ *See* Jackson, J.D., p. 614.

¹¹² *Bearing Witness at the International Criminal Court*, p. 23.

59. The Prosecution tries to reduce contacts with witnesses to reduce the security risks arising from their association with the Court. The principal protective measure for many witnesses (and their family members) is keeping their cooperation with the Prosecution (and the Court) confidential. As such, witnesses often only meet the lawyer who will question them in court when they present themselves to testify. Having a brief 10-minute courtesy meeting with the witness at this point is insufficient for counsel to establish the rapport with the witness that is necessary to put them at ease and assist them in providing the most accurate and complete account of their experience.¹¹³ The courtesy meeting does not provide the “human dimension”, as the Defence claims.¹¹⁴

60. Furthermore, it is important to have the opportunity immediately before a witness’s testimony to discuss any particular safety or security concerns, including whether the witness has been interfered with since his or her last contact with the calling party, and take appropriate measures to address such concerns.

61. Trial Chamber V found that: (a) limited pre-testimony contact between counsel and witnesses, such as that provided for in the Victims and Witnesses Unit (“VWU”) Familiarisation Protocol, does not best serve the Chamber’s duty to protect witnesses’ dignity and well-being, as set out in article 68(1); and, (b) enabling counsel to interact with witnesses on the substantive aspects of their evidence may increase witnesses’ confidence and reduce their reluctance to reveal sensitive evidence during their testimony. The role played by VWU in familiarising witness, while vital, is not a substitute for this interaction.¹¹⁵

62. While the testimony of unprepared witnesses hinders the Chamber in its determination of the truth, testimony that follows careful witness preparation is not to be equated with witness interference as the Defence implies.¹¹⁶ Counsel are professional. Not only are counsel bound by a strict code of conduct and ethics,¹¹⁷ but in addition witness preparation sessions are video-recorded, the record is preserved and if necessary and a proper basis is established, may be disclosed to the opposing party.

¹¹³ ICC-01/09-01/11-524 and ICC-01/09-02/11-588, para.37 (partly dissenting opinion of Judge Eboe-Osuji).

¹¹⁴ Defence Submissions, para.22.

¹¹⁵ ICC-01/09-01/11-524, para.37 and ICC-01/09-02/11-588, para.41.

¹¹⁶ Defence Submissions, para.15-22.

¹¹⁷ *E.g.*, Code of Professional Conduct for counsel; OTP Regulations; OTP Code of Conduct.

VII. Witness preparation is appropriate for the specific circumstances of this case

63. In contrast to what the Defence argues,¹¹⁸ the circumstances in this case warrant adopting the procedure of witness preparation.

64. It is crucial that witnesses are given the opportunity to be properly prepared to testify. Events occurred 7 to 8 years ago in 2012 to 2013. The events involved traumatic and violent incidents, and complex crimes. Overlaying this complexity is the cultural and linguistic remoteness of the Court processes, and the particular vulnerability of witnesses, including victims of intense violence and trauma, including gender based sexual crimes. Unlike domestic proceedings where arguably the witness, counsel and the Judges share the same culture and language, the experience of testifying in an international criminal trial is unique.¹¹⁹ Many of the witnesses will be unfamiliar with the system of questioning by both the calling and the non-calling parties.¹²⁰ Witness preparation sessions would allow the witnesses to be at ease and despite these cultural differences, practise effective communication with the Judges and the lawyers who are to question them.¹²¹

VIII. Relief Sought

65. For all of the reasons outlined, the Prosecution maintains its position that the Chamber should adopt the *Ntaganda* Protocol, with the few suggested amendments as proposed by the Prosecution,¹²² and reject all of the suggested amendments as proposed by the Defence.



Fatou Bensouda, Prosecutor

Dated this 24th February 2020

At The Hague, The Netherlands

¹¹⁸ Defence Submissions, para.8-9.

¹¹⁹ ICC-01/04-02/06-652, para. 18; ICC-01/09-01/11-524, para. 36; ICC-01/09-02/11-588, para. 40; ICC-02/11-01/15-355-AnxI, para. 13.

¹²⁰ ICC-01/09-01/11-524, para. 36; ICC-01/09-02/11-588, para. 40.

¹²¹ *Ibid.*

¹²² ICC-01/12-01/18-591.