

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 25 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 request for leave to reply to the “Prosecution response to Defence submissions regarding Protocol on Witness Preparation (ICC-01/12-01/18-592)” (ICC-01/12-01/18-612)**

**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**

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**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

Nigel Verrill

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

## Introduction

1. On 24 January 2020, the Trial Chamber invited the parties and legal representatives for victims (LRV) to submit any proposals or objections as concerns the adoption of the Familiarisation Protocol, applied in the *Ntaganda* case, by the deadline of 13 February 2020.<sup>1</sup>
2. The Prosecution did not request staggered deadlines, nor did it indicate that it would not be able to comply fully with the deadline.
3. On 13 February 2020, the Prosecution filed its observations, in which it suggested several amendments, including as concerns the possibility of referring to new exhibits during witness preparation.<sup>2</sup> Although it was put on notice as concerns the possibility that the Defence might oppose witness preparation, the Prosecution did not include any submissions as concerns the propriety of adopting witness preparation in this particular case, beyond a blanket statement in support of the Protocol.
4. The Defence observations, filed on the same day, opposed witness preparation due to the potential impact on the length and impartiality of the process, and further proposed specific modifications to the *Ntaganda* Protocol, if it were to be adopted.<sup>3</sup>
5. On 24 February 2020, the Prosecution filed significantly more extensive arguments on these issues. Although framed as a purported ‘response’ to the Defence observations, the ‘response’ dedicates a substantial amount of argumentation to issues set out in the initial Prosecution observations, including the Prosecution’s proposal to amend the Protocol to specify that the Prosecution may discuss ‘new exhibits’ with the witness during the preparation sessions.<sup>4</sup> This focus is particularly concerning as concerns the likely impact on Mr. Al Hassan’s fair trial rights. The Prosecution avers that these sessions will not constitute ‘re-interviews’, and indeed, if witnesses are

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<sup>1</sup> ICC-01/12-01/18-562.

<sup>2</sup> ICC-01/12-01/18-591.

<sup>3</sup> ICC-01/12-01/18-592.

<sup>4</sup> ICC-01/12-01/18-612, paras. 26-29.

questioned for the first time on ‘new exhibits’,<sup>5</sup> it would be more accurate to characterize these sessions as ‘new interviews’ or ‘new investigations’ rather than ‘re-interviews’. Irrespective as to the particular nomenclature which is attached to these sessions, it is clear that if the proposed amendment is adopted, the Prosecution will attempt to elicit information from witnesses as to the potential relevance of specific exhibits to the charges. It will thereby generate information, which falls squarely within the four corners of Rules 76 and 77, and it will do so, at a time, when it will be impossible for the Defence to conduct timely investigations.

6. The Prosecution also (belatedly) bolsters its position as concerns the general utility of witness preparation in relation to witnesses from different linguistic and cultural backgrounds.<sup>6</sup> If these arguments are accepted by the Chamber, then they would have significant implications as concerns the ability of the Defence to cross-examine a witness, with whom they have not conducted a preparation session. This, in turn, will severely erode the adversarial nature of the proceedings (and equality of arms), and undercut the Prosecution’s claim that the Defence can address any issues concerning late disclosure or inappropriate contacts, through cross-examination.
7. Since the burden of proof falls on the Prosecution, and the Defence does not have a positive obligation to bring a Defence case, it is also no answer to suggest that the Defence might benefit from this procedural advantage during the Defence case. Similarly, although the Defence can attempt to establish such a rapport by requesting to meet Prosecution witness (in accordance with the Witness Contact Protocol), this will prolong the length of the witness’s stay in The Hague, and delay the commencement of their testimony. The Defence would also be obliged to record and disclose such communications: this would result in the perverse and unfair situation whereby the Defence, which has significantly reduced disclosure obligations under the Statute, would be required to record and disclose any records of its meeting to the Prosecution, whereas the Prosecution, which has much greater disclosure obligations, would not.

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<sup>5</sup> ICC-01/12-01/18-612, para. 28 “It is better (...) if a witness **is asked about** discrete exhibits during witness preparation, rather than to re-interview them on multiple occasions in the field”. See also para. 34, “asking the witness to comment upon potential exhibits for the purpose of determining the utility of using the exhibits in court”.

<sup>6</sup> ICC-01/12-01/18-612, paras. 56-59.

## Relief Sought

8. Given the ramifications of these issues, and the procedurally unfair nature by which they have been placed before the Chamber, there is good cause to grant the Defence reply to address the following specific issues arising from the ‘response’:
  - i. The fair trial implications as concerns the discussion of ‘new exhibits’ during preparation sessions; and
  - ii. The extent to which the specific features referred to in the response (including linguistic and cultural issues) would mean that the use of witness preparation in this case would afford the calling party an unfair procedural advantage, and thus violate equality of arms.
9. In the alternative, the Defence requests the Trial Chamber to convene a hearing to address these issues, and any remaining points of disagreement arising from the observations that will be submitted on 28 February 2020, in relation to the conduct of the proceedings




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Melinda Taylor  
Lead Counsel for Mr. Al Hassan




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Dated this 25th Day of February 2020  
At The Hague, The Netherlands