

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 02 March 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 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
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. Although the ICC can and should benefit from the jurisprudential expertise of the ad hoc Tribunals, there are important structural differences between them, which impact on the suitability of certain approaches. Of key importance, the ICC is not vested with Chapter VII powers, or a vertical relationship with States. The ICC's dependence on horizontal cooperation from State parties and voluntary assistance from non-State parties directly impacts on the ability of the Defence to conduct *in situ* investigations, and to have adequate time and facilities to prepare its case. These structural difficulties are further aggravated by the fact many of the situations before the Court involve ongoing hostilities and/or extremely high levels of security.
2. The ICC has addressed these differences by:
 - Crafting legal principles as concerns the scope of post-confirmation investigations;
 - Imposing strict pre-trial disclosure deadlines;
 - Exercising rigorous judicial oversight as concerns any requests to vary these principles and deadlines; and
 - Delineating and demarcating the role of the VWU and the Prosecution, in order to ensure that the strong powers vested in the Prosecution as an organ of the Court, do not undermine equality of arms in a case specific context.
3. These safeguards are of heightened importance as concerns the prosecution of an individual, who has already been detained for almost three years. The adoption of witness preparation in this case would undermine the ability of the Defence to rely on the specific safeguards that have been devised by the ICC to ensure the right to a fair trial within the Rome Statute legal system, and serve to further fracture ICC case law as concerns trial proceedings.

Submissions

The fair trial implications as concerns the discussion of 'new exhibits' during preparation sessions

4. Shoe-horning investigative steps into the witness preparation/familiarisation process muddies the water as concerns the proper characterisation, and legal consequences of such interactions. The labels of ‘process’ and ‘preparation’ may unfairly exempt the Prosecution from judicial controls and disclosure obligations that would otherwise apply to such interactions.
5. The Prosecution’s response goes to great lengths to aver that the proposed forms of witness preparation would not amount to ‘proofing’, or a witness ‘interview’:¹ that it would focus on process, rather than content.² This avowal is, nonetheless, undercut by their repeated claim that preparation would allow them to ‘discuss’ exhibits (including new exhibits) with the witness.³ These forms of ‘preparation’ are, to all intents and purposes, synonymous with a witness interview and substantive investigation – with content, not just process.
6. The Prosecution does not have an unfettered right to continue its investigations, after the confirmation stage.⁴ The ability to do so is linked to the Prosecutor’s duty of diligence,⁵ and obligation to conduct its investigation in a manner, which comports

¹ ICC-01/12-01/18-612, para. 42: “Witness preparation does not constitute a rule 76 interview, as it not a re-interview of the witness”.

² ICC-01/12-01/18-612, para. 3: “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 reinterviewing 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”.

³ 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”.

⁴ [ICC-01/09-02/11-728](#), para. 119: “Although there may be no formal preconditions for the Prosecutor to continue investigating the same facts and circumstances after they have been confirmed, this is not an unlimited prerogative. In particular, the Majority of this Chamber (Judge Eboe-Osuji not joining in the reasoning) is of the view that under the procedural framework of the Statute, the Prosecution is expected to have largely completed its investigation prior to the confirmation hearing. Article 54(1)(a) of the Statute requires the Prosecutor to “extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.” As the Appeals Chamber has pointed out, this obligation is specifically linked to the Prosecutor’s responsibility to establish the truth. The Prosecutor is not responsible for establishing the truth only at the trial stage by presenting a complete evidentiary record, but is also expected to present a reliable version of events at the confirmation hearing. The Prosecutor should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case.”

⁵ [ICC-01/09-02/11-728](#), para. 120: “Post-confirmation investigation may be appropriate when it pertains to evidence which the Prosecution could not with reasonable diligence have discovered or obtained prior to confirmation. It may also be appropriate when certain evidence that was available prior to confirmation, unexpectedly and through no fault of the Prosecution, becomes unavailable for use at trial (e.g. a witness dies or otherwise becomes unavailable). Furthermore, if the Prosecution can establish that (a) it could not have taken a

fully with Article 54(1), and Mr. Al Hassan's statutory rights, including the right to a speedy trial. Thus, as soon as the Prosecution is aware that a potential exhibit might impact or be relevant to a witness's testimony, it is required to take the relevant investigative steps at that particular point in time.

7. For these reasons, ICC Chambers (including this Chamber) have imposed strict deadlines as concerns the disclosure of witness statements and exhibits in advance of the trial, and further required the Prosecution to link particular exhibits to the testimony of specific witnesses, in its witness list.⁶ Exceptions are tightly regulated,⁷ particularly if the information in question was not disclosed previously to the Defence.⁸ The Chamber must also ensure that the cumulative impact of such requests do not undermine the defendant's right to adequate time and facilities to prepare his Defence. In deciding such matters, the amount of time between the variation/additional disclosure request, and the proposed use of the information in question, has been found to be of critical importance.⁹
8. The prospect of the Prosecution taking additional investigative steps and generating new evidence on the very eve of a witness's testimony, would ride a coach and horse through these stringent deadlines and duties. The deadline for filing the final list of witnesses and list of exhibits is 14 April 2020. The Prosecution has been, or is currently, in direct contact with its witnesses during, for the purposes of obtaining their consent to disclosure.¹⁰ There is no justification or 'good cause' for postponing such investigative steps to a later date: the Prosecution cannot prioritise convenience over the defendant's rights to timely disclosure, and, adequate time and facilities to

particular investigative step prior to confirmation without unduly endangering the security of particular individuals or (b) that it had justifiable reasons for believing that this situation would significantly change after confirmation, it may be appropriate for the Prosecution to postpone such an investigative step until after confirmation."

⁶ ICC-01/12-01/18-548, para. 10.

⁷ [ICC-01/05-01/08-680](#), paras. 12-13, 28-29; See also [ICC-01/05-01/08-767-Red2](#).

⁸ Cf [ICC-02/04-01/15-600](#), para. 15.

⁹ [ICC-02/04-01/15-600](#), para. 16, noting that the items, which the Prosecution sought to add to its list, were not linked to the first batch of witnesses, and that as such, the Defence would have sufficient time to conduct investigations in advance of the affected witnesses' testimonies; ICC-01/05-01/08-767-Red2, para. 26, where the Trial Chamber placed weight on the fact that the Prosecution's disclosure of a statement from a re-interview with one of its witnesses had occurred more than two months before the start of the trial, and concerned issues that were corroborative of previously disclosed information, or otherwise fell within the personal knowledge of the defendant; ICC-01/05-01/08-680, para 38, Trial Chamber III underlined that the Prosecution was not precluded from asking to disclose new or additional statements after the disclosure deadline, but "**self-evidently the merits of any application may reduce the closer it is made to the beginning of the trial.**"

¹⁰ ICC-01/12-01/18-552-Conf-Red, para. 38.

prepare his Defence. It is also somewhat disingenuous for the Prosecution to claim that “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”, when their conduct reflects the opposite approach. Specifically, the Prosecution has conducted multiple re-interviews with its witnesses in the last few months.¹¹ Extensive witness preparation sessions in The Hague would also make it harder for witnesses to have plausible cover stories as concerns their prolonged absences from their homes. Conducting investigative steps at the last minute also gives rise to the prospect that witnesses might be withdrawn at the last minute – engendering unnecessary stress for the witness, and unnecessary expenditure and delays on the part of the Court.

9. It is also a false choice to posit that:

- it is better for the Defence to receive proofing notes as concerns new allegations, as opposed to being surprised on the stand; or
- that “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””.¹²

10. These arguments are based on two false premises: firstly, that the Prosecution is entitled, as of right, to question a witnesses about new matters, for the first time on the stand, and secondly, that if the Prosecution learns that an exhibit might be relevant to a potential witness, the only option is to question the witness about such matters during their testimony. But, as demonstrated above, the Prosecution’s ability to raise new issues or allegations after the commencement of the trial is limited, and subject to strict judicial control.¹³ For this reason, the Prosecution has both the means, and the duty to put such matters to its witnesses before the commencement of the trial, and to

¹¹ See for example MLI-OTP-0074-1890-R01, MLI-OTP-0071-0110-R01, MLI-OTP-0071-0186-R01, MLI-OTP-0071-0196-R01, MLI-OTP-0074-0004-R01, MLI-OTP-0073-1218-R01, MLI-OTP-0074-0004-R01, MLI-OTP-0069-3892-R01, MLI-OTP-0069-3928-R01, MLI-OTP-0069-3963-R01, MLI-OTP-0069-3989-R01, MLI-OTP-0069-4007-R01, MLI-OTP-0069-4019-R01, MLI-OTP-0069-4060-R01, MLI-OTP-0069-4083-R01, MLI-OTP-0069-0073-0965.

¹² ICC-01/12-01/18-612, para. 48.

¹³ See para. 7 *supra*, and paras. 11 and 13 below.

then seek authorisation from the Chamber to either disclose new materials, or amend its witnesses list before the commencement of the trial.

11. Although it cannot be excluded that a witness might spontaneously volunteer new information on the stand, witness preparation does not eliminate this risk. Moreover, even if such matters were identified during the preparation session, the fact that the Defence would receive proofing notes in the immediate lead up to the witness's testimony, would not eliminate the prejudice. It is notable, in this regard, that in instances where new allegations were proffered by the witness on the stand, it was deemed appropriate and necessary to either exclude or curtail the testimony on such points, or, to allow the Defence to recall the witness, after they had sufficient time to investigate the matters at issue.¹⁴ Giving the Defence a half days' notice is a patently inadequate remedy when judged in comparison with such measures.

12. Indeed, if one accepts the Prosecution's claim that:¹⁵

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.

then it is also true that receiving "as accurate a statement" as far "as possible in advance of testimony" would better assist the parties to achieve these goals.

13. Accordingly, in the event that new information concerning a Prosecution witness has arisen at a very late stage, rather than affording the Prosecution *carte blanche* to pursue such matters, it would be feasible, fair, and appropriate to adopt the approach

¹⁴ [ICC-01/04-01/07-T-146-Red-ENG](#), pp. 6-7, 39-44, 45-46; [ICC-01/04-01/07-T-144-Red-ENG](#), pp. 44-45; [ICC-01/04-01/07-T-112-Red-ENG](#), pp. 1-6; [ICC-01/04-01/07-3436-tENG](#), para. 225 (where the Trial Chamber did not rely on the new additions to P-161's testimony); [ICC-01/04-01/06-T-177-Red2](#), pp. 12-15. See in particular, p. 13, lns 12-22:

This is one of the problems, Mr. Sachdeva, of having not taken a witness statement from the witness. If a witness statement had been taken from the witness, within that statement there should have been covered all the material areas that the Prosecution wishes the individual to address. I mean, there may be a very large number of things that the witness knew about but which are not revealed in the materials currently before you. We can't possibly have examination-in-chief conducted with a witness on the hope that he might have heard about something which isn't revealed in a statement that he's given. Otherwise, we'd be here until the crack of doom investigating whether he might have heard about something. So that approach, I think, finishes here, Mr. Sachdeva.

¹⁵ ICC-01/12-01/18-612, para. 21.

applied in the *Katanga & Ngudjolo* case:¹⁶ the Prosecution filed an application setting out the reasons why it was necessary to conduct an interview with the witness at the seat of the Court; the Chamber ordered that the statement and recording would need to be disclosed to the Defence pursuant to Rules 76 and 77; if the Prosecution wished to rely on information from that statement, it was required to file an application under Regulation 35, and the Chamber would then determine whether the Defence required further time to conduct additional investigations.

14. This case by case system, which would be subject to prior judicial authorisation and control, would be more consistent with the Trial Chamber's duty under Article 64(3)(b) to "provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial," and its overarching obligation under Article 64(2), to "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused".
15. In contrast, the notion that the possibility of pursuing such steps would be left to the discretion of the calling party, would engender the following, severe logistical problems, which would undermine fundamental fair trial rights.
16. *First*, in the *Ntaganda* case, the deadline for completing witness preparation was 24 hours before the start of the witness's testimony.¹⁷ Even if this period is enlarged, it is clear that the Defence will not be notified of any changes or additions in the witness's testimony until just before the start of their testimony. Mr. Al Hassan has a right to receive Rule 76 materials in a language he fully understands, so that he can effectively participate in the case (and instruct the Defence in relation to potential lines of inquiry). Mr. Al Hassan also has the right to receive such materials, sufficiently in advance of the witness's testimony, so that this right can be exercised in a manner which is effective, and not illusory. Although the Registry has allocated the Defence with one language assistant, this person will be severely overloaded with the amount of translations required as part of Defence preparation and analysis. Given

¹⁶ Oral decision, 11 October 2010, [ICC-01/04-01/07-T-200-Red-ENG](#), pp. 1-4.

¹⁷ [ICC-01/04-02/06-656-AnxA](#), para. 29.

that Mr. Al Hassan is detained, he also has limited windows of opportunity as concerns his ability to consult with his Defence team (and the language assistant).

17. *Second*, the *Katanga* and *Bemba* case-by-case approach meant that such issues were litigated before the commencement of the trial (when witnesses were not holed up in hotels, and separated from their families), or at the very least, significantly in advance of the date of testimony.¹⁸ The case-by-case approach also meant that the knock-on effect as concerns trial scheduling was minimal. In contrast, the Prosecution's proposal would result in routine litigation, which would be deferred to the trial stage, and trial hearings. If the Defence receives new materials the day before the witness is scheduled to testify, its only option is to bring this issue before the Chamber on the day of the witness's testimony. There is then a risk that fundamental fair trial complaints might be addressed in a cursory manner, or glossed over, in the name of 'trial efficiency'. Conversely, if the Chamber adjourns the commencement of testimony each and every time that new issues and disclosure arise, the trial schedule will constantly change. The absence of a predictable trial schedule will also disrupt and undermine effective trial preparation.
18. *Third*, it cannot be assumed that the security situation in Mali will allow the Defence to conduct last minute investigations. Many individuals reside in areas, where there is no mobile reception: it is only possible to speak to such individuals in person. At present, it is necessary for the Defence to provide at last thirty days' notice as concerns requests to conduct any missions in the North of Mali. This notice period applies equally to resource persons who are located *in situ*. And, whereas the ICTY and ICTR did not face issues as concerns cooperation from non-State parties, many individuals of interest for the Defence reside in Mauritania, or other non-State parties. Since this situation was referred to the Court by the Malian State, it is also self-evident that the Prosecution is in a superior position as concerns its ability to conduct effective investigations and preparation at short notice. The proposed forms of preparation will further entrench the inequality of arms between the Prosecution and the Defence.

¹⁸ In *Katanga*, the Prosecution application to re-interview P-0028 was filed on 23 September 2010. It was triggered by information that came to the Prosecution's attention on 6-7 September 2010 (through Counsel for the witness). The Defence did not oppose the re-interview, and the witness did not testify until the end of November 2010. [ICC-01/04-01/07-T-200-Red-ENG](#), pp. 1-4.

19. *Fourth*, the notion that the Prosecution is not obliged to disclose the recordings of such sessions – even if exhibits are discussed with witnesses – cannot be reconciled with Mr. Al Hassan’s fair trial rights under the Statute. The Prosecution’s disclosure obligations underpin the right to a fair trial.¹⁹ These obligations increase, not decrease, in scope and content in connection with witness interactions that occur in close proximity to the date of the witness’s testimony. This was affirmed in the *Banda & Jerbo* case, in which the Trial Chamber ruled that it “would also be desirable, in the view of this Chamber, that post confirmation of charges investigations be completed as soon as possible”, and secondly, that additional safeguards were required in relation to post-confirmation re-interviews.²⁰ Accordingly, in addition to the disclosure of witness statements, the Chamber ordered the Prosecution to record these meetings and disclose the recordings to the Chamber and the Defence, “in order to guarantee that a permanent record is available to the defence and to the Chamber should an issue arise in relation to what occurred during the meetings” (emphasis added).²¹ It is also illogical for the Prosecution to claim that the Defence may cross-examine the witness in relation to the content of such interactions, while at the same time suggesting that the content should not be disclosed. Bearing in mind the Prosecutor’s stated concern for the well-being of their witnesses, it is also perverse that they would prefer their witnesses to be subjected to cross-examination on matters that could be addressed more easily through disclosure.

20. The Appeals Chamber has also confirmed that the burden of requesting disclosure or opposing non-disclosure – can never be placed on the Defence.²² The Chamber must also “bear in mind that the defence is at a disadvantage in being able to make a case given its inability to access the withheld information.”²³ This disadvantage is heightened during the trial proceedings, when the Defence is faced with an extremely intense workload, with minimal resources. The fact that the proposed preparation protocol requires the Defence to justify why it should be granted access to recordings of discussions, which touch on topics such as the exhibits that will be shown to

¹⁹ [ICC-02/05-03/09-501](#), para. 40: “the Appeals Chamber again recalls that the disclosure process is essential in ensuring the fairness of the proceedings.”

²⁰ [ICC-02/05-03/09-158](#), paras. 13, 16.

²¹ [ICC-02/05-03/09-158](#), para. 16.

²² [ICC-02/11-01/15-915-Red](#), para. 1.

²³ [ICC-02/11-01/15-915-Red](#), para. 1.

witnesses during their testimony, runs roughshod over these findings, and the fair trial principles underpinning them.

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

21. Article 67(1)(1)(e) sets out the defendant's right:

To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

22. This right is tied intrinsically to the principle of equality of arms, which dictates that the Defence should not be disadvantaged as concerns its ability to present its case before the Chamber. As emphasised by the ICTY Appeals Chamber in the *Tadic* case, the principle of equality of arms needs to be interpreted and applied in a more expansive manner within the framework of international trials, to take into consideration the range of external factors and State influence, that can impact on the ability of the Defence to enjoy the same procedural rights as the Prosecution, and the conditions under which it presents its case.²⁴

23. These notions are of crucial importance in a case, which:

- was brought to the ICC Prosecution by State authorities, who continue to 'neutralise' or detain individuals, believed to be associated with Ansar Dine;
- concerns a defendant, who originates from an extremely marginalised community within that State; and
- is predicated on allegations that are tied to ethnic, and religious group identity.

24. These case specific features speak to the importance of ensuring that witnesses are able to testify in a manner, which is consistent with the determination of truth. In an adversarial setting, this means that they must be equally open to providing full answers to questions put to them during cross-examination, as they are, in relation to those, which are posed during examination-in-chief. It is also critical that they are not

²⁴ *Prosecutor v. Tadic*, [Appeals Judgment](#), 15 July 1999, para. 52.

made to feel that they are the property of a particular party: irrespective of the identity of the calling party, they have an independent obligation to the Court.

25. It is, thus, highly concerning that the Prosecution has attempted to bolster its position as concerns the general utility of witness preparation, by referring to benefits, which would disturb the precarious adversarial balance in this case. Specifically, the Prosecution has averred that because witnesses are from different linguistic and cultural backgrounds, they would benefit from clear explanations provided by the Prosecution (as opposed to the VWU).²⁵ 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.
26. The Prosecution's argument is based on a non-existent lacuna. The VWU is currently vested with the responsibility for conducting these activities. And these tasks have been vested with a neutral service provider in order to ensure equality of arms between the parties. As highlighted by the VWU itself,²⁶ it is staffed with persons who have specific expertise in witness protection, security, psychology in criminal proceedings, gender and cultural diversity; (f) children, in particular traumatized children; (g) elderly persons, in particular in connection with armed conflict and exile trauma; (h) persons with disabilities; (i) social work and counselling; (j) health care; (k) interpretation and translation. According to the familiarisation protocol adopted in other cases,²⁷

The Registry provides information concerning the way in which the witness familiarisation process is currently carried out by the VWU. This includes informing witnesses of the way in which questioning by the opposing party will take place (without going into the content of their evidence), giving witnesses the chance to participate in "neutral role plays" in order to prepare for court, and allowing witnesses to read their previous statements in order to refresh their

²⁵ ICC-01/12-01/18-592, paras. 56-59.

²⁶ [ICC-01/09-01/11-455](#), paras. 14-16.

²⁷ [ICC-01/09-01/11-524](#), para. 23; See also ICC-01/09-01/11-455, paras. 14-16.

memories. The VWU submits that witnesses have generally given positive feedback as regards the current witness familiarisation process and felt that they were well-prepared and knew what to expect in the courtroom

27. The above familiarisation activities address in full the Prosecution's claim that it is necessary to have a mechanism, which can respond to questions asked by the witnesses as concerns "the process of giving evidence."²⁸ This approach, where preparation is conducted by a neutral service provider, bridges the divides between common law and civil law systems, and ensures that there are no 'gaps' as concerns the best interests of witnesses.
28. If the Prosecution is concerned that these activities are inadequate, then the solution is to provide constructive feedback as to how they can be improved or supplemented with input from the parties. The solution does not lie in transferring responsibility from the VWU for such matters to the calling parties.
29. The decision to vest the VWU with the responsibility for conducting gender/culturally/linguistically sensitive explanations is also bolstered by the Appeals Chamber's confirmation that, as a result of its neutrality and specialised services, the VWU (and not the in-house services of the Prosecution) should assume the responsibility for taking "care of the interests of the individuals who require protection".²⁹ This conclusion rested on the following considerations:³⁰
 - (1) The question of where the VWU should be located was specifically debated at the time that the Statute was drafted. The question was resolved in favour of locating the VWU within the Registry, as opposed to within the Office of the Prosecutor. (2) The neutrality of the Registry was expressly raised as a reason for the VWU to be placed there rather than within the Office of the Prosecutor. (3) The role of the VWU in relation to protective measures was not limited to the provision of advice alone. Those conclusions are relevant to the resolution of the present appeal. In the context of the current appeal, the intention of the drafters of the Statute - as reflected in the above paragraphs - cannot be overlooked.
30. The Appeals Chamber further underlined that:³¹

²⁸ ICC-01/12-01/18-612, para. 30.

²⁹ [ICC-01/04-01/07-776](#), para. 80.

³⁰ [ICC-01/04-01/07-776](#), para. 90.

³¹ [ICC-01/04-01/07-776](#), para. 92.

The fact that certain representatives to the Rome Conference referred to the neutrality of the Registry in deciding to locate the VWU within it, as set out above, is also of relevance. The function of the VWU is to provide, inter alia, appropriate protective measures and security arrangements, respecting the interests of the witness and acting impartially. This is of particular relevance in relation to the protective measure of relocation, given its significant and potential long-term consequences on the life of an individual witness. Assigning responsibility for relocation to the VWU ensures that all witnesses, whether ultimately appearing for the Prosecutor, the defence or otherwise, are treated equally - and by those with relevant expertise - in matters that will significantly affect their interests. Those interests are to be specifically respected by the VWU, which will not be influenced, even unintentionally, when deciding upon whether relocation is appropriate to protect a particular witness, by the additional pressing interest of a party to the case of needing itself to secure the evidence of the witness concerned. This could, in certain circumstances, render the longer term well-being of that witness to be a secondary concern. At the same time, the VWU must recognise the specific interests of, and cooperate with, the parties.

31. These considerations apply equally to the issue of witness preparation. If, as is claimed by the Prosecution, the testimony of witnesses is likely to be enhanced through pre-testimony communications and explanations, then it is important that such 'enhancements' apply equally to examination in chief, and cross-examination. Although the Defence can attempt to build 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 unbalanced 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.
32. This imbalance is also not rectified at the Defence stage. Not only is the VWU the section that is best equipped to perform this role, but the Defence would be severely disadvantaged and hampered if it were required to take this over. The Defence lacks the institutional resources of the Prosecution: the Defence team is not composed of multiple lawyers with standing to appear, and examine witnesses, and it cannot borrow lawyers from other teams at short notice in order to address sudden increases

in workload. The prospect of conducting witness preparation at the Defence stage would therefore mean that it would be compelled to attend hearings half-staffed, or, request substantial breaks between witness testimony. Neither prospect can be reconciled with Mr. Al Hassan's fair trial rights. The Defence also does not have the resources to appoint in-house witness specialists or individuals with specific gender/linguistic/cultural, expertise.

33. For this reason, it has been suggested that:³²

a protocol, with the primary responsibility of implementing witness familiarisation placed on a neutral part of the Court, *i.e.* the Registry's VWU, further ensures equal treatment of all witnesses, irrespective of which party or participant is introducing them. In particular in relation to vulnerable witnesses requiring special and individualised attention, this is an important aspect contributing to the principle of equality of arms. It is unlikely that defence teams, or indeed the legal representatives of victims, will be able to hire specialised staff to deal with the specific needs of vulnerable witnesses. The VWU, however, includes staff with such expertise, as listed in Rule 17 (2) of the Rules of Procedure and Evidence, to cater to such witnesses appropriately. Furthermore, it is obliged to act impartially when cooperating with all parties, as provided for by Rule 18 (b) of the Rules of Procedure and Evidence.

34. The Prosecution has also provided no persuasive explanation as to why discussions concerning witness security and protection need to occur in The Hague, rather than during the handover between the calling party and the VWU. The unified familiarisation protocol specifies that the calling party is responsible for ascertaining any protection concerns, and alerting the VWU to these concerns, prior to the handover that occurs in the field.³³ If the Prosecution has grounds to believe that a witness has "security concerns including as a result of interference or intimidation",³⁴ then it would be completely illogical and counterproductive to wait until the witness is in The Hague to discuss such concerns.

³² C. Shon, '[Telling their stories in their own words: witness familiarisation at the International Criminal Court](#)', *Revue internationale de droit pénal* 2010/1-2 (Vol. 81), pp. 189–208.

³³ [ICC-02/04-01/15-504-Anx1](#), paras. 4-5, 9: "the VWU relies on the entity calling the witness to communicate the necessary information in a timely manner with the 'Request for Provision of VWU Services for Victims/Witnesses Appearing before the Court and their Accompanying Persons' ('Witness Information Form'/'WIF')."

³⁴ ICC-01/12-01/18-612, para. 46.

Conclusion

35. The implementation of witness preparation in this particular case would undermine Mr. Al Hassan's right to a fair trial. It would create delays, which are costly, and inconsistent with Mr. Al Hassan's right to a speedy trial. The stated goals of witness preparation could also be met by less prejudicial alternatives, or at most, a case by case approach, which is subject to prior judicial authorisation and oversight, and implemented in a manner that fully respects the Prosecution's disclosure obligations.



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Dated this 2nd Day of March 2020
At The Hague, The Netherlands