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TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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
With one public annex**

Decision on witness preparation and familiarisation

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

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Other

TRIAL CHAMBER X (the ‘Chamber’) of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 64 and 68(1) of the Rome Statute (the ‘Statute’), Rule 140 of the Rules of Procedure and Evidence (the ‘Rules’), and Regulation 43 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on witness preparation and familiarisation’.

I. Procedural history

1. On 24 January 2020, the Chamber issued its ‘Decision on outstanding protocols’, indicating that it is in favour of allowing witness preparation and informing the parties that it is minded to adopt the witness preparation and familiarisation protocols previously adopted by Trial Chamber VI in the context of the *Ntaganda* proceedings (respectively the ‘*Ntaganda* Preparation Protocol’ and the ‘*Ntaganda* Familiarisation Protocol’; together, the ‘*Ntaganda* Protocols’).¹ The Chamber therefore instructed the Registry to put said familiarisation protocol onto the record, unless the parties and participants made objections to the above procedure or proposed amendments to these protocols by 13 February 2020.
2. On 13 February 2020, the Office of the Prosecutor (the ‘Prosecution’) filed its submissions on the appropriate procedure for witness familiarisation and preparation, proposing a few amendments to the *Ntaganda* Protocols based on lessons learnt (the ‘Prosecution Submissions’).²
3. Also on 13 February 2020, the Defence for Mr Al Hassan filed submissions in which it requests the Chamber to prohibit witness preparation in this case or, in the alternative, restrict its application, including by imposing a number of safeguards (the ‘Defence Submissions’).³ The Defence notably argues that it

¹ICC-01/12-01/18-562, *referring to* Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Witness preparation protocol *annexed to* Decision on witness preparation, 16 June 2015, ICC-01/04-02/06-652-Anx and Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Protocol on the practices to be used to familiarise witnesses for giving testimony at trial *annexed to* Decision on the protocol on witness familiarisation, 17 June 2015, ICC-01/04-02/06-656-AnxA.

² Prosecution submission on proposed amendments to Witness Familiarisation and Preparation Protocols, ICC-01/12-01/18-591.

³ Defence Submissions on Witness Preparation, ICC-01/12-01/18-592.

would not be appropriate or efficient to adopt witness preparation in the present case and submits that it would engender prejudicial consequences for both the impartial determination of the truth and the rights of the Defence.⁴

4. On 24 February 2020, the Prosecution filed a response to the Defence Submissions (the ‘Prosecution Response’) in which it maintains its position that the Chamber should adopt a witness preparation protocol, formulating supplemented arguments in this regard, and opposing all amendments proposed by the Defence.⁵ The Prosecution further argues that the potential risks described in the Defence Submissions either do not arise or are mitigated by the protocol itself or other safeguards.⁶
5. On 25 February 2020, the Defence filed a request seeking leave to reply to the Prosecution Response on two issues, namely: (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 Prosecution Response 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.⁷
6. Also on 25 February 2020, by way of an email decision rendered pursuant to Regulation 24(5) of the Regulations, the Single Judge granted the abovementioned Defence request for leave to reply.⁸
7. On 2 March 2020, the Defence filed its reply, making submissions on the two issues identified (the ‘Defence Reply’).⁹

⁴ Defence Submissions, ICC-01/12-01/18-592, para. 1.

⁵ Prosecution response to Defence submissions regarding Protocol on Witness Preparation (ICC-01/12-01/18-592), ICC-01/12-01/18-612.

⁶ Prosecution Response, ICC-01/12-01/18-612, paras 3, 31-39.

⁷ 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-01/1-01/18-612), ICC-01/12-01/18-613, para. 8.

⁸ Email from the Chamber to the parties and participants, 25 February 2020, at 14:33.

⁹ 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), ICC-01/12-01/18-620.

II. Submissions and analysis

8. The Chamber will first discuss the appropriateness of authorising parties to conduct preparation sessions with the witnesses they intend to call at trial in the present case. After, the Chamber will address any required amendments to the *Ntaganda* Protocols on the basis of the parties' proposals and submissions.

A. Appropriateness of witness preparation in the present case

9. In the exercise of its discretion pursuant to Article 64(2) of the Statute, the Chamber finds it appropriate, for the reasons set out below, to adopt a witness preparation protocol for the *Al Hassan* trial proceedings.
10. While this practice is not provided for explicitly in the Court's statutory framework, it has been retained by two trial chambers at this Court, relying essentially on their obligations as laid out in Articles 64 and 68(1) of the Statute.¹⁰ Most trial chambers, however, have decided not to allow witness preparation.¹¹ The Chamber generally agrees with Trial Chamber VI that 'any decision on witness preparation should be made after a careful review of the circumstances prevailing in each case at the court'.¹²
11. As provided for in the first paragraph of the protocol, the purpose of witness preparation is two-fold. It serves: i) 'to assist the witness who will be giving evidence during the proceedings'; as well as ii) 'for the calling party to assess and clarify the witness's evidence in order to facilitate the focused, efficient and effective questioning of the witness during the proceedings'.¹³
12. The Chamber first emphasises that quite some time has passed since the relevant events and witnesses will be called upon to testify to what happened more than eight years before.. Witness preparation sessions will allow them an

¹⁰ Trial Chambers V and VI adopted a witness preparation protocol.

¹¹ Trial Chamber I (in both the *Lubanga* and *Gbagbo and Blé Goudé* cases), III (by majority, Judge Ozaki dissenting), VII, VIII, and IX. Trial Chambers II and IV did not pronounce on this issue.

¹² *The Prosecutor v. Bosco Ntaganda*, Decision on witness preparation, 16 June 2015, ICC-01/04-02/06-652, para. 17.

¹³ See paragraph 1 of the protocol annexed to the present decision.

opportunity to review their previous statements and understand the areas they will be asked to testify about.

13. Further, most witnesses will be unfamiliar with the judicial process and are appearing for the first time in a foreign courtroom. The Chamber finds that preparation sessions conducted by the calling party are conducive to ensuring that the witnesses are more comfortable and confident when testifying. While VWU can provide neutral sensitization, it is particularly helpful that the witness has a chance to meet and interact with the person who will actually be questioning him or her in the courtroom. These sessions are especially important for vulnerable witnesses who will already be dealing with difficult challenges in presenting evidence. The Chamber observes that the expected testimony of a number of crime-based witnesses relates to alleged traumatic experiences of mistreatments over prolonged periods of time. Preparatory sessions in which vulnerable witnesses will have more time to meet with counsel may reassure them and contribute to their well-being, particularly during and after their testimony.¹⁴
14. Turning to the parties' arguments related to the security situation, which are formulated both in favour and against the adoption of the protocol, the Chamber acknowledges that minimising the time for which a witness is required to be present in The Hague is desirable for their own safety. However, the Chamber is of the view that in the particular circumstances of this case, there are more significant challenges related to meeting and interviewing witnesses in the field. In the Chamber's view, the use of the witness preparation will assist in reducing the various interactions with them in the field and that is particularly important given the security situation.
15. Finally, the Chamber considers that the procedure for witness preparation set out in the protocol will contribute to the fair and expeditious conduct of the trial proceedings. It will provide an opportunity for the witness to refresh his or her

¹⁴ It is further emphasised that paragraph 5 of the protocol provides that the calling party shall exercise 'particular care with regard to vulnerable witnesses' and that 'the VWU should be available to assist with vulnerable witnesses if necessary'.

memory, to clarify any issues, and to understand generally what he or she will be questioned about. In this way the Chamber finds that more efficient and focused witness examination can be expected and, more generally, that their testimonies are more likely to be structured and clear. The Chamber emphasises that it considers this advantage to be, in principle, valid for the entire questioning of a witness, i.e. not only for the examination-in-chief. The Chamber also sees no merit in the Defence's general submission that the conduct of witness preparation, because of the Prosecution's burden of proof, constitutes undue prejudice toward the accused or that it raises an issue of equality of arms.¹⁵

16. The Chamber observes that, in the case at hand, the Prosecution indicated its intention to rely on Rule 68(3) of the Rules for more than 30 of its witnesses, many of them expected to provide relatively technical testimonies. In this regard, the Chamber notes that, as already observed by Trial Chamber VI,¹⁶ witness preparation is particularly well-suited for the introduction of previously recorded testimonies under Rule 68(3) of the Rules. During their preparation sessions, these witnesses will have a further opportunity to confirm the truth of their written statements for the purpose of their admission into evidence and pre-identify any corrections required, thereby further contributing to the expeditiousness of the subsequent testimony.
17. Undue influence of witnesses should obviously be prevented, but it is the Chamber's view that the protocol provides the necessary safeguards to ensure that the procedure remains fully consistent with the fairness of the overall proceedings and the rights of the accused. The risks of witness proofing, undue influence or interference, are sufficiently mitigated by the safeguards provided in the protocol and, in the view of the Chamber, the benefits of witness preparation here outweighs the potential risks identified by the Defence. Importantly, the Chamber underlines that preparation sessions are not proofing or rehearsing sessions, and notes in this regard that the purpose and scope of the authorised sessions are appropriately regulated by the protocol.

¹⁵ Defence Reply, ICC-01/12-01/18-620, paras 21-34.

¹⁶ *The Prosecutor v. Bosco Ntaganda*, Decision on witness preparation, ICC-01/04-02/06-652, para. 18.

18. In light of the above,¹⁷ and further considering that the process will assist the Chamber in its search for the truth during the trial, the Chamber authorises the parties to have preparation sessions with the witnesses they will call to testify at trial within the defined parameters set out in the protocol annexed to the present decision.

B. Amendments to the preparation protocol

19. The Chamber will address the Prosecution's proposed amendments to the *Ntaganda* Preparation Protocol and, subsequently, the Defence's.
20. At the outset, the Chamber considers it necessary to amend paragraph 23 of the *Ntaganda* Preparation Protocol for the sake of clarity. This provision now clearly indicates that the explanation provided to the witnesses informs them of the possibility that certain matters on which they were previously questioned might not be raised in court.

1. Prosecution's proposed amendments

21. The Prosecution proposes two amendments to the *Ntaganda* Preparation Protocol.
22. First, the Prosecution suggests that paragraph 24 be amended to specify that exhibits shown to a witness during preparation sessions may include materials which the witness has not previously seen in order to ascertain whether the witness can usefully comment on them during testimony.¹⁸ It argues that this amendment would facilitate the witness's evidence in court and submits that it is in line with the procedure followed during the *Ntaganda* trial proceedings.¹⁹
23. The Defence opposes the inclusion of the amendment proposed, stressing that the procedure suggested may unfairly exempt the Prosecution from its

¹⁷ The Chamber also refers to the discussion below at paragraphs 31-35.

¹⁸ Prosecution Submissions, ICC-01/12-01/18-591, paras 11-12.

¹⁹ Prosecution Submissions, ICC-01/12-01/18-591, paras 11-12, *referring to* Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Supplemental decision on matters related to the conduct of proceedings, ICC-01/04-02/06-1342, para. 10.

disclosure obligations as well as judicial controls.²⁰ It submits that the Prosecution has the means and the duty to put new matters to its witnesses and, where appropriate, to disclose new materials before the commencement of the trial.²¹ The Defence proposes that, where new information concerning a Prosecution witness arises at a very late stage, the procedure adopted by Trial Chamber II — requiring prior judicial authorisation for interviews with the witnesses at the seat of the Court, as well as the filing of a Regulation 35 application thereafter should the Prosecution wish to rely on the new information — should be followed.²² Finally, the Defence identifies what it considers severe logistical problems in the event that the Chamber allows the procedure for the presentation of new exhibits, notably relating to (i) Mr Al Hassan's right to have Rule 76 materials in a language he fully understands; (ii) increased and routine litigation at the start of the witness's testimony and resulting impact on trial fairness, scheduling, and efficiency; and (iii) challenges for the Defence to conduct effective investigations at short notice.²³

24. The Chamber considers that the proposed amendment to paragraph 24, noting the safeguards and limitations in place, is in line with the objectives of the protocol discussed above²⁴ and that the resulting procedure is consistent with the fair and expeditious conduct of the proceedings. An amended provision has therefore been retained, as suggested by the Prosecution.
25. The Chamber however clarifies that this amended provision does not create a right for the Prosecution to conduct last-minute investigations or seek to obtain completely new evidence from witnesses immediately prior to their testimony. Judicial control over the Prosecution's ability to introduce at trial information which is not disclosed in a timely manner shall remain intact.

²⁰ Defence Reply, ICC-01/12-01/18-620, paras 4-8.

²¹ Defence Reply, ICC-01/12-01/18-620, para. 10.

²² Defence Reply, ICC-01/12-01/18-620, para. 13, *referring to The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Oral decision, transcript of a hearing held on 11 October 2011, ICC-01/04-01/07-T-200-Red-ENG, p. 1, line 15 to p. 4, line 21.

²³ Defence Reply, ICC-01/12-01/18-620, paras 15-18.

²⁴ *See above* paragraphs 9-18.

26. In this regard, the Chamber recalls that, as indicated in the ‘general principle’ introduced at paragraph 2 of the protocol, witness preparation ‘should not be conducted for the purpose of seeking new evidence or continuing the calling party’s investigation’. To respect this principle, materials which the witness has not previously seen may be presented only if they were disclosed to the Defence, appear on the Prosecution’s (amended) list of evidence, and where they relate to a known issue for which adequate notice was provided.²⁵
27. The Chamber observes that the bulk of the Defence submissions on this amendment assumes that *new* evidence will be sought and obtained when a witness is presented with an exhibit he or she has not already seen, but the Chamber does not consider that this will be the case. As noted above, this procedure shall always remain in compliance with other principles regulating the conduct of preparation sessions. The Chamber expects that the disclosure of entirely new information on the eve of a witness’s testimony, as a result of the procedure authorised by way of the amendment retained or otherwise, will be rare and refers to the Prosecution’s duty of diligence in this regard.
28. Moreover, the Chamber notes that, even if the Prosecution obtains and discloses new evidence after having presented to a witness an exhibit he or she had not already seen, it does not mean that the Chamber will necessarily authorise the production of the related evidence during the witness’s testimony. Concretely, should the questioning of a witness on certain topics be considered prejudicial because of insufficient notice provided to the accused, objections to certain lines of questioning or motions seeking further time to prepare may be formulated by the Defence prior to or during the course of a witness’s testimony. It is on a case-by-case basis, being moved by the Defence or *proprio motu*, that the Chamber will exercise control over the evidence sought from witnesses, notably as well as, more generally, in light of the impact their introduction may have on the fair trial rights of the accused.

²⁵ The Chamber notes that, by presenting a new exhibit to a witness, the scope of the newly obtained information may be relatively limited and, at times, duplicative. For example, the calling party may seek confirmation of the date of an event which was already discussed in the witness’s statement. A witness may also be brought to confirm that a certain exhibit presented to him for the first time is indeed the document he or she previously referred to when giving a statement.

29. As a second amendment, the Prosecution requests that it be stated that the list of documents the calling party intends to use with a witness in court be submitted prior to the completion of the witness's preparation session and that it provisionally include items which are intended to be shown to the witness during the preparation session, including when they are shown for the purpose of ascertaining whether the witness can usefully comment on them during testimony.²⁶
30. The issue of the provision of a notice, by the calling party, of a notice of the documents it intends to use in court with a specific witness will be addressed in the Chamber's decision on the conduct of proceedings. It is thus unnecessary to discuss this issue at this point in time.

2. Defence's proposed amendments

31. At the outset, the Defence submits that preparation sessions should only be allowed on a case-by-case basis and, particularly, that preparation should only be allowed for certain categories of witnesses.²⁷ Alternatively, and to ensure, in its submission, that the procedure is compatible with a fair, impartial and expeditious trial, the Defence requests that additional safeguards be adopted with regard to the conduct of preparation sessions as well as resulting disclosure obligations.²⁸
32. Specifically, the Defence argues that witness preparation should not be employed in relation to three categories of witnesses: (i) witnesses who are participating victims in the case ('dual status witnesses'); (ii) witnesses who are otherwise suspects and may be assisted by Rule 74 counsels; and (iii) witnesses 'who have been interrogated in a coercive manner, or a coercive environment', such as former detainees.²⁹
33. Concerning dual-status witnesses and suspect witnesses, the Chamber considers unsubstantiated the Defence's submissions that the potential for unfairness and

²⁶ Prosecution Submissions, ICC-01/12-01/18-591, para. 13.

²⁷ Defence Submissions, ICC-01/12-01/18-592, paras 31-35.

²⁸ Defence Submissions, ICC-01/12-01/18-592, paras 36-47.

²⁹ Defence Submissions, ICC-01/12-01/18-592, paras 32-33.

prejudice resulting from the conduct of preparation sessions is ‘heightened’.³⁰ The Chamber notes that these individuals, when called by the Prosecution to testify, are subjected to the same procedure as any other trial witness. The conduct of the preparation sessions is entrusted to the calling party and, as noted below,³¹ the appointed victims’ legal representatives (the ‘LRVs’) are not to be part of the preparation sessions. The Chamber however considers that the presence of Rule 74 counsel, whose role is sufficiently circumscribed, is warranted, should it be requested by the witness.³² The Chamber particularly notes that the Defence identified no specific reasons as to why attendance of Rule 74 counsel during preparation sessions would be prejudicial.

34. With regard to the last category of witnesses the Defence submits should not take part in preparation sessions, the Defence points to ‘reasons which will be developed in a forthcoming application concerning detained witnesses’.³³ Obviously, the Chamber is not in a position to rule on the merits of a challenge where reasons have not yet been provided.
35. Accordingly, and having been unpersuaded by the Defence submissions on certain categories of witnesses,³⁴ the Chamber rejects the Defence’s request for preparation sessions to be authorised on a case-by-case basis and, on the basis of the reasons set out above,³⁵ confirms that pre-testimony sessions may be held by the calling parties to prepare any and all of their witnesses.
36. In support of a first set of proposed amendments, the Defence submits that dual status witnesses and suspect-witnesses ‘should not be entitled to retain copies of their statements’ and that they should not be authorised to discuss with their legal representatives or Rule 74 counsel during or after the preparation sessions.³⁶

³⁰ Defence Submissions, ICC-01/12-01/18-592, para. 35.

³¹ See below paragraph 38-39.

³² See below paragraphs 40-41.

³³ Defence Submissions, ICC-01/12-01/18-592, para. 32.

³⁴ Defence Submissions, ICC-01/12-01/18-592, paras 31-35.

³⁵ See above paragraphs 9-18.

³⁶ Defence Submissions, ICC-01/12-01/18-592, para. 35.

37. The Chamber notes that the protocol specifies that the questioning lawyer must ‘provide the witness with an opportunity to review’ their statements,³⁷ but does not indicate that witnesses are to be provided with a copy thereof. Since the procedure in place does not provide for any witness to retain copies of statements, the Chamber considers that this safeguard is not required and therefore decides not to amend the protocol in this respect.³⁸
38. Concerning discussions that dual status witnesses may have with the LRVs during or after preparation sessions, the Chamber observes that the protocol specifies that witness preparation is the responsibility of the calling party and does not otherwise provide that the LRVs have a role in this process. Having in mind the purpose and content of these sessions, the Chamber considers that the presence of the LRVs is not required nor warranted. In the absence of specific submissions from the LRVs on this point, and with the understanding that this is common practice in other cases where preparation sessions were held, the Chamber decides that LRVs are not to be attending the preparation session of dual-status witnesses.³⁹
39. Turning to the Defence submissions that the LRVs should not be authorised to discuss with their clients during or after preparation sessions, the Chamber observes that it is the familiarisation protocol, notably the version retained in the present case and discussed below, which regulates the issue of contacts between the LRVs and dual-status witnesses prior to and during the course of their testimony. Specifically, the familiarisation protocol provides that the LRVs are ‘entitled to speak with their clients during the whole duration of the witnesses’ stay at the location of testimony’.⁴⁰ The exception being where the LRVs act as a calling party and, in these instances, the protocol indicates that the regime for

³⁷ See paragraph 18 of the protocol annexed to the present decision.

³⁸ The Chamber notes that the Defence also repeats this submission – for witnesses not to be allowed to retain copies of their statement during or after the preparation session – more generally (Defence Submissions, ICC-01/12-01/18-592, paras 45-47.) For the reasons stated above, no amendment is required in this respect.

³⁹ The Chamber notes that cases where the LRVs would have to provide advices on the application of Rule 74 could give rise to a discrete request for exception (see *Ntaganda* Familiarisation Protocol, ICC-01/04-02/06-656-AnxA, para. 57).

⁴⁰ See *Ntaganda* Familiarisation Protocol, ICC-01/04-02/06-656-AnxA, para. 34.

contacts by the calling party applies.⁴¹ Importantly, it is clearly stated that LRVs ‘should refrain from holding substantive discussions with witnesses about the topics that are to be dealt with in Court during their evidence or the exhibits which may be produced’ and that such discussion ‘should only occur after the close of the evidence in the case’.⁴² The Chamber considers that the relevant framework,⁴³ notably the provisions described above, offers sufficient clarity and adequately regulates contacts between the LRVs and their clients, including those who are being called as witnesses by any of the parties. Accordingly, the Chamber does not find it necessary nor appropriate to adopt the additional safeguards requested by the Defence.

40. Concerning discussions witnesses may have with their Rule 74 counsel during or after preparation sessions, the Chamber notes that these individuals are professionals appointed by the Court to provide legal advice pursuant to Rule 74 of the Rules when an issue of self-incrimination arises. Rule 74(10) in fact states that the Chamber ‘shall suspend the taking of the testimony and provide the witness with an opportunity to obtain legal advice if he or she so requests for the purpose of the application of the rule’. It is therefore clear from the relevant legal framework, but also the practice of various trial chambers, that suspect-witnesses are to be allowed to discuss with their Rule 74 counsel during the course of their in-court testimony. *A fortiori*, the Chamber considers that contacts and discussions are permitted during and after preparation sessions.
41. In this regard, the Chamber emphasises that the role of a Rule 74 counsel is otherwise well defined, sufficiently limited in scope, and that they are to act in accordance with the core legal texts, particularly the Code of Professional Conduct for counsel. They are to advise the witnesses on issues relating to self-incrimination alone and are not to otherwise discuss other aspects of the witness’s testimony.⁴⁴ In sum, the Chamber considers that, if the witness so requests, the appointed Rule 74 counsel shall be attending the preparation

⁴¹ *Ntaganda* Familiarisation Protocol, ICC-01/04-02/06-656-AnxA, para. 34, n. 7.

⁴² *Ntaganda* Familiarisation Protocol, ICC-01/04-02/06-656-AnxA, para. 34.

⁴³ The Chamber notes in this regard the principles and duties set out in the Code of Professional Conduct for counsel.

⁴⁴ See e.g. *Ntaganda* Familiarisation Protocol, ICC-01/04-02/06-656-AnxA, para. 63.

session and he or she may have discussions with the relevant witness during or after the preparation session. Language to that effect, for the sake of completeness and clarity, has been introduced at paragraph 7 of the protocol.

42. The Chamber accordingly finds that the Defence did not substantiate its first set of requests for additional specific safeguards for the preparation sessions of dual status or suspect witnesses and decides that no amendment is required in this regard.
43. Second, the Defence seeks that the protocol be amended in order to be in line with the parties' respective disclosure obligations. The Defence argues that, pursuant to Rule 76 of the Rules, the Prosecution should always disclose the videos and summaries of its preparation sessions.⁴⁵ Conversely, the Defence submits that it should not be required to disclose the recording of its preparation sessions to the Prosecution and further contends that it would be problematic if the Chamber would review the recordings in case the Prosecution raises claims of potential impropriety.⁴⁶
44. The Chamber first observes that the protocol includes a section entitled 'Disclosure' which indicates that the calling party shall provide the non-calling party with 'all of the information that is subject to the calling party's disclosure obligations'.⁴⁷ The Chamber hence reiterates that the general principles of disclosure indeed apply to the information gathered during the preparation sessions. As a consequence, disclosure is to be effected, where necessary, at the earliest opportunity prior to the start of the testimony.
45. The Chamber further recalls that the disclosure system already entrusts the calling party with the responsibility to assess the disclosability of any and all information in its possession. As such, it is always the case that the calling party has to review material that comes into its possession, decide whether it falls within the scope of its disclosure obligations, and effect disclosure. Having this

⁴⁵ Defence Submissions, ICC-01/12-01/18-592, paras 36-39. *See also* Defence Reply, CC-01/12-01/18-620, paras 19-20.

⁴⁶ Defence Submissions, ICC-01/12-01/18-592, paras 40-42.

⁴⁷ *See* paragraph 32 of the protocol annexed to the present decision.

in mind, the Chamber considers that Defence submission concerning the additional burden to justify access to recordings is misplaced as it is expected that the relevant disclosure note and log will already contain all information that falls within the Prosecution's disclosure obligations.

46. Turning specifically to the Defence submission that video recordings of preparation sessions held by the Prosecution should automatically be disclosed, the Chamber is not convinced by the Defence argument that the disclosure of these recordings is always warranted by Rule 76 of the Rules. The Chamber further notes that the mandatory video-recording of the preparation sessions was included by Trial Chamber V in its relevant protocol as a guarantee against misconduct,⁴⁸ and not for disclosure purposes. The Chamber also notes that the timely provision of a detailed disclosure note and log is most often likely to be sufficient to comply with the Prosecution's disclosure obligations. The Chamber therefore finds that automatic disclosure of the video recordings of the Prosecution's preparation sessions is not warranted.⁴⁹
47. The Chamber also notes that the Defence is entirely right in submitting that its disclosure obligations are different than those of the Prosecution. In this regard, the Chamber observes that the wording of the protocol's relevant provision, reproduced above, contains the required level of flexibility. While the provision of a summary document describing the unfolding of the session (as a safeguard to ensure that the principles behind the protocol are respected) and setting out any (new) information from the witness (to comply with the calling party's disclosure obligations) is required from both the Prosecution and the Defence, it is understood that the content of any such disclosure note and log will be different for witnesses called by each party. Further, the Chamber clarifies that, upon being seised of a Prosecution request to access the video of a preparation session conducted by the Defence, the Chamber may consider whether to view

⁴⁸ *Kenyatta* Preparation Decision, ICC-01/09-02/11-588, paras 50-51.

⁴⁹ This is not to say that disclosure of the recordings may not at times be required, depending on the content and unfolding of the preparation session. This assessment should be made, as for all material in the Prosecution's possession, on a case-by-case basis.

the video recording prior to making any disclosure order.⁵⁰ The Chamber does not find it appropriate to completely discharge the Defence from recording its preparation sessions, but considers that the relevant procedure, if any disclosure is requested, can be better clarified once the modalities of disclosure by the Defence are determined towards the end of the Prosecution case.

48. The Chamber therefore dismisses the Defence's request for the protocol to be amended to better reflect the parties' respective disclosure obligations.
49. Third, the Defence asserts that allowing the calling party to ask witnesses about the accuracy of their prior statements can be unhelpful and may even risk distorting the testimonial process.⁵¹ It notes, in this regard, that there may be further risks associated with the fact that it is the Prosecution who is also tasked with investigating offences against the administration of justice under Article 70 of the Statute.⁵² The Defence therefore submits that any confirmation of truthfulness and accuracy should only be done under oath and before the Judges⁵³ and, insisting on the principle of orality, suggests that the preparation protocol avoids any language or procedure which might have the effect of 'crystallising' a particular version of the witness's account prior to their appearance in court.⁵⁴
50. The Chamber notes that the protocol refers to the importance to 'clarify the witness's evidence'⁵⁵ and indeed, as noted by the Defence, refers to them being given an opportunity to 'confirm whether [their] prior statements are accurate and to explain any changes as necessary'.⁵⁶ As discussed above, and noted by the Prosecution,⁵⁷ corrections required are identified prior to the testimony, reflected in the notes of the meeting, and duly disclosed. While the starting point is that the statements are accurate, this process allows witnesses to review

⁵⁰ See Prosecution Response, ICC-01/12-01/18-612, para. 36, *referring to Ruto Preparation Decision*, ICC-01/09-01/11-524, para. 47.

⁵¹ Defence Submissions, ICC-01/12-01/18-592, paras 43-44.

⁵² Defence Submissions, ICC-01/12-01/18-592, para. 43.

⁵³ Defence Submissions, ICC-01/12-01/18-592, para. 43.

⁵⁴ Defence Submissions, ICC-01/12-01/18-592, para. 44.

⁵⁵ See paragraph 1(b) of the protocol annexed to the present decision.

⁵⁶ See paragraph 19 of the protocol annexed to the present decision.

⁵⁷ Prosecution Response, ICC-01/12-01/18-612, para. 22.

their statements and identify whether corrections or clarifications are necessary in advance of their upcoming testimony. In this sense, the Chamber emphasises that the aim of this process is not to discourage witnesses from deviating from their prior statements during trial, but rather to allow them to correct or clarify any parts thereof that they would find to be inaccurate or inconsistent with their recollection. As such, the Chamber considers that this process contributes to the efficiency of the questioning in court and therefore to the expeditiousness of the witness's subsequent testimony. The Chamber further notes that witnesses will be reminded about their obligation to tell the truth not only during the preparation sessions,⁵⁸ but also immediately before testifying when they appear before the Chamber in court.⁵⁹ In light of the above, the Chamber sees no prejudice in the procedure whereby the calling party facilitates the witnesses' review of their prior statements, allowing them to identify potential errors or inconsistencies, with a view to determining whether their statements accurately reflect their expected evidence.

51. Finally, the Chamber notes that the Defence also suggests, in passing, that witnesses should not access their statement during or after their preparation session.⁶⁰ Instead, the Defence proposes that, should a witness ask to consult a prior statement to refresh his or her memory during a preparation session, the procedure for witness refreshing should be followed and the record of this session should reflect the fact that this procedure was used.⁶¹
52. The Chamber notes that this submission appears to be based on a misunderstanding of the *Ntaganda* Preparation Protocol, which indicates that the questioning lawyer may 'provide the witness with an opportunity to review his or her prior statements' and 'provide the witness with an opportunity to confirm whether his or her prior statements are accurate and to explain any changes as necessary'. Essentially, during a preparation session, a witness will review alone, or with limited assistance, his or her statements, after which or during which, he or she will have an opportunity to discuss or correct any

⁵⁸ See paragraph 16 of the protocol annexed to the present decision.

⁵⁹ Article 69(1) of the Statute.

⁶⁰ Defence Submissions, ICC-01/12-01/18-592, paras 4(c), 47.

⁶¹ Defence Submissions, ICC-01/12-01/18-592, para. 47.

inaccuracies or required changes with the calling party. There is no subsequent ‘preparation exercise’ regarding the substance of the witness’s testimony and the Defence’s argument of a ‘combined effect’, and related request to remove from the preparation session the witness’s review of their statement, is unfounded.

53. In this regard, the Chamber recalls that all witnesses who have appeared before this Court, across all cases, have systematically been invited to read and review their statements in the days prior to their appearance in court.⁶² This review was conducted either in the context of a familiarisation session⁶³ or, as appropriate, a preparation session.

C. Amendments to the familiarisation protocol

54. The Chamber notes that, beyond the four amendments sought by the Prosecution discussed below, it received no specific objections or submissions on the provisions of the familiarisation protocol by the parties and participants. Having decided to authorise the calling parties to conduct witness preparation sessions with their witnesses, the Chamber finds it appropriate to adopt the corresponding procedure for witness familiarisation. The Registry is therefore instructed to put on the record by 1 April 2020 a version of the *Ntaganda* Familiarisation Protocol amended in line with the following paragraphs and including any other further non-substantial corrections required to adapt it to the case or changed in the Registry’s internal structure.
55. First, the Prosecution suggests to amend the language of the protocol to reflect that joint travel and joint accommodation are the exception, rather than the rule. Concretely, the Prosecution seeks that the expression ‘wherever possible’ be removed from paragraphs 24 and 39 of the protocol.⁶⁴ The Chamber notes that

⁶² See e.g. Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on witness preparation and familiarisation, 2 December 2015, ICC-02/11-01/15-355-Anx, paras 79-94; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049, paras 55-57.

⁶³ The Chamber underlines that the Defence did not make similar submissions for the Chamber’s consideration in relation to the familiarisation procedure.

⁶⁴ Prosecution Submissions, ICC-01/12-01/18-591, para. 5.

footnote 3 to the protocol provides further clarification on this issue. It states that '[a]s a general rule, [joint travel and joint accommodation] will not apply to witnesses who participate in the Court's protection programme and who do not live together'. The Chamber finds that, with this in mind, it is already sufficiently clear that this procedure is to be used only where it is consistent with the relevant witnesses' security and where, notably they have already had repeated contacts. Since, in these circumstances, no additional risk arises, the Chamber does not consider that the amendment sought by the Prosecution is necessary. Accordingly, the Chamber decides not to modify the language of paragraphs 24 and 39 of the protocol.

56. The Prosecution further proposes, to lower the risks that the witnesses' interactions with the Court becomes known, that paragraph 25 of the protocol could be supplemented to indicate that the Victims and Witnesses Unit (the 'VWU') should specifically tell witnesses not to share any information on social media, including photographs related to their travel to the place of testimony and to their testimony before the Court.⁶⁵ The Chamber observes that this paragraph of the protocol already specifies that witnesses are 'to be reminded of their role in preserving their evidence and in avoiding any unnecessary exposure'. Noting that this provision is sufficiently clear and inclusive, the Chamber considers that VWU is already in a position to issue the relevant warnings, adjusting its message to the individual witnesses who are under its care. Accordingly, the Chamber finds it unnecessary to amend the protocol by introducing the added language suggested by the Prosecution.
57. Concerning the limitation on contact between the calling party and a witness in the 24 hours preceding the witness's testimony, the Prosecution seeks that the provision at paragraph 30 be amended, replacing the expression 'not prohibited' by 'should be exceptional and should only be allowed if authorised by the Chamber'. As noted by the Prosecution,⁶⁶ this proposed amendment is consistent with paragraph 29 of the protocol, which is, in turn, also consistent with the provision of the preparation protocol retained in the present case, which

⁶⁵ Prosecution Submissions, ICC-01/12-01/18-591, para. 6.

⁶⁶ Prosecution Submissions, ICC-01/12-01/18-591, para. 8.

indicates that the preparation session shall be completed at least 24 hours before the witness's testimony is due to commence.⁶⁷ The Chamber therefore finds it appropriate to indeed require authorisation for any contact between a calling party and any of its witnesses in the 24 hours prior to the scheduled testimony.

58. Finally, the Prosecution seeks minor modifications to paragraphs 92, 93, and 95, to ensure timely communication after the testimony of any concerns regarding the witnesses' security, health and psycho-social condition.⁶⁸ The Prosecution requests that the provisions be amended to specify that communication be effected 'as soon as possible'. The Chamber considers that the suggested amendment is reasonable, in line with the intent of the provision, and sees no reason not to retain it. Accordingly, the proposed language should be added to the relevant three paragraphs of the protocol.

⁶⁷ See paragraph 11 of the protocol annexed to the present decision.

⁶⁸ Prosecution Submissions, ICC-01/12-01/18-591, para. 9.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

AUTHORISES the preparation of witnesses by the calling party;

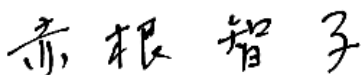
ADOPTS the witness preparation protocol annexed to the present decision; and

ORDERS the Registry to put on the record, by 1 April 2020, a version of the *Ntaganda* Familiarisation Protocol amended in accordance with paragraphs 54-58 above.

Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated this Tuesday, 17 March 2020

At The Hague, The Netherlands