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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

Public redacted version of the "Prosecution response to Defence request for reconsideration, or in the alternative, leave to appeal the "Decision on witness preparation and familiarisation"", 27 March 2020, ICC-01/12-01/18-687-Conf

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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. The Defence's request for the reconsideration of, or leave to appeal,¹ the Chamber's decision on witness preparation and familiarisation² should be dismissed.
2. The Defence bases its requests on two issues: *first*, that the Decision does not adequately protect defence rights because it permits routine Prosecution witness preparation prior to testimony; and *second* that, by not requiring disclosure of audio recordings of preparation sessions, it is incompatible with Prosecution disclosure obligations.
3. The Defence does not show a clear error of reasoning, or that the potential limitations on defence general investigative activities arising from the COVID-19 pandemic is a new circumstance that justifies reconsideration of the witness preparation protocol to limit such activities to those authorised on a case-by-case basis.
4. Nor are the two proposed questions appealable issues under article 82(1)(d) of the Statute. The Defence Request misreads or misunderstands the function of the Decision—concerned with witness preparation—or merely disagrees with it. In any case, the Defence Request does not meet the two remaining cumulative requirements under article 82(1)(d) of the Rome Statute.

Confidentiality

5. This filing is classified as confidential, pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court ("Regulations") as it responds to a Defence request with the same classification. A public redacted version will be filed shortly.

¹ ICC-01/12-01/18-678-Conf (or "Defence Request").

² ICC-01/12-01/18-666 ("Decision").

Submissions

A. The Defence shows no basis justifying reconsideration of the Decision

6. Reconsideration is an exceptional remedy which may only be granted in some limited circumstances. They include the existence of a clear error of reasoning on the part of a Chamber and a necessity to prevent injustice.³ New facts and arguments arising since the impugned decision was rendered may be relevant to this assessment.⁴

7. Here, the Defence does not demonstrate any circumstances justifying reconsideration of the Decision. The two issues advanced by the Defence are addressed in turn.

(i) First Issue: Whether the witness preparation protocol fails to safeguard AL HASSAN's fundamental fair trial rights in an adequate manner insofar as it allows the Prosecution to routinely conduct preparation sessions, immediately before the witnesses' testimonies.

8. The Defence does not show that the potential limitations to defence investigations as a result of the emergence of the COVID-19 pandemic constitute a new circumstance that justifies reconsidering the Decision. In particular, the Defence does not show that such impediments necessitate requiring the Prosecution to submit applications for each witness, specifying (1) "[w]hy preparation at the seat of the Court is necessary and appropriate, by reference to the specific circumstances of the witnesses; and (2) the specific safeguards and measures that are in place to ensure that preparation of the witness in question will not undermine the defendant's right to notice, or adequate time and facilities to prepare his defence."⁵

³ ICC-02/04-01/15-1547, para. 7; ICC-01/04-02/06-519, para. 12; ICC-02/04-01/15-468, para. 4.

⁴ ICC-02/04-01/15-468, para. 4; ICC-01/04-02/06-1049-Red, para. 12.

⁵ Defence Request, para. 12.

9. *First*, the Defence's request attempts to rehash arguments already presented and rejected by the Chamber.⁶

10. *Second*, and significantly, the Defence mixes up any potential impact of the COVID-19 pandemic upon its current and ongoing investigations ([REDACTED] [REDACTED])⁷ with any limited investigations that may be conducted in the future, during the period between disclosure of witness preparation notes and the commencement of the witness' testimony.

11. Witness preparation by one party does not necessarily trigger any such further investigations by the other party—because witness preparation itself is not an investigative process. Indeed, the Protocol specifically states that “witness preparation should not be conducted for the purpose of seeking new evidence or continuing the calling party's investigative activities.”⁸ The need for such investigations by the non-calling party may thus only arise exceptionally if a witness spontaneously reveals new material during witness preparation.

12. In any event, the Witness Preparation Protocol identifies its own remedies should new material be revealed during witness preparation that may necessitate investigation or other action by the other party. The non-calling party may object to the use of such material or may seek additional time to investigate.⁹ The Defence is fully able to rely on these remedies, should the need arise, and consequently it fails to show that the protocol adversely affects its investigative activities to the extent it infringes upon Mr Al Hassan's fair trial rights.¹⁰ A blanket prohibition of witness preparation in The Hague shortly prior to testimony is therefore unwarranted.¹¹ Nor is it currently shown that any other aspect of the COVID-19 pandemic materially

⁶ Compare Defence Request, paras. 8-9, with ICC-01/12-01/18-620, paras. 15-19.

⁷ Defence Request, para. 9.

⁸ Witness Preparation Protocol, para. 2 (under “general principles”).

⁹ See e.g. Decision, para. 28.

¹⁰ Defence Request, para. 11.

¹¹ *Contra* Defence Request, paras. 7, 12.

affects the Decision and, should any such matters arise, the Chamber has also indicated its willingness to address them on a case-by-case basis.¹²

13. Moreover, one does not know at this stage what the pandemic situation will be by the time the Prosecution will conduct witness preparations.

14. The Defence's further claim—that the rationale in the Decision, for the authorisation of witness preparation on the basis of safety considerations, is not applicable to all witnesses in the trial—is irrelevant.¹³ Such a bald claim is insufficient to demonstrate a clear error of reasoning or a new circumstance justifying reconsideration. It overlooks that security considerations were only one of several factors that the Chamber took into account, which also included: i) the significant amount of time passed between the events and the witnesses' eventual appearance before the Court; ii) the witnesses' unfamiliarity with judicial processes and the courtroom, requiring preparation sessions to help ensure that they are comfortable and confident in testifying; and iii) the beneficial opportunity for witnesses to clarify issues with counsel, and generally to understand what they will be questioned about.¹⁴

15. In addition, the Chamber rightly explained that witness preparation was particularly suited for the introduction of previously recorded testimonies under rule 68(3), which is likely to apply for more than 30 Prosecution witnesses. Many of these witnesses are expected to testify on relatively technical matters, and witness preparation sessions will enable them to identify any limited corrections or clarifications which need to be made in direct examination, thereby contributing to the expeditious conduct of their subsequent testimonies.¹⁵

(ii) Second Issue: Whether the Prosecution has an obligation to disclose audio recordings of its witness preparation sessions.

¹² See also ICC-01/12-01/18-677, para. 9 (fn. 11).

¹³ *Contra* Defence Request, para. 8.

¹⁴ Decision, paras 12-13, 15.

¹⁵ Decision, para. 16.

16. The Defence incorrectly argues that by not obliging disclosure of audio recordings of witness preparation sessions, the Decision is incompatible with the Prosecution's disclosure obligations, and that it is a clear error of reasoning which would lead to an injustice or manifestly unsound result.¹⁶

17. The Defence wrongly relies on the Prosecution's obligation under rule 76 of the Rules of Procedure and Evidence ("Rules") to disclose copies of prior statements of witnesses.¹⁷

18. To the contrary, rule 76 is concerned with disclosure of statements "when *questioned* about their knowledge of the case".¹⁸ Yet, witness preparation is not an investigation, and thus unconcerned with questioning and taking of statements from witnesses. Indeed, as the Chamber emphasised, witness preparation "should not be conducted for the purpose of seeking new evidence or continuing the calling party's investigation."¹⁹

19. On this basis, the Witness Preparation Protocol in this case only obliges the calling party to disclose a log of the preparation session, and any disclosable information obtained during the session—including any new information obtained from the witness.²⁰

20. The Defence erroneously cites the Appeals Chamber's judgment in the *Banda* case to support its position that the Prosecution is obligated to disclose audio recordings of all witness preparation sessions rather than just disclosure notes.²¹ The issue before the Appeals Chamber in that case, however, was whether the Trial Chamber erred in finding that rule 111 of the Rules required the Prosecutor to create an *additional* signed, written record of the statements of *questioned* persons when the

¹⁶ Defence Request, p. 7.

¹⁷ Defence Request, para. 15.

¹⁸ ICC-01/04-02/06-1330 OA3, paras. 16, 32, 38 (emphasis added).

¹⁹ Decision, para. 26.

²⁰ Decision, paras. 44, 46; Witness Preparation Protocol, para. 32.

²¹ Defence Request, para. 18.

statements had been audio- or video-recorded.²² The Appeals Chamber ruled that rule 111 did not create such obligation.²³

21. Moreover, the *Banda* Appeals Chamber judgment did not lay down an obligation on the Prosecution to disclose audio and/or video recordings of all interviews and preparation sessions with witnesses. The Appeals Chamber merely noted that the audio- or video-record of the questioning of an individual subject to rule 112 of the Rules, and the transcripts thereof, “are *potentially* subject to disclosure”.²⁴

22. Therefore, whether such recordings are disclosable is a case-by-case determination. Since witness preparation is not an investigatory step, where witnesses are questioned and statements taken, the Decision correctly did not make the disclosure of the audio record mandatory. Instead, the Prosecution is to prepare disclosure notes extracting all disclosable information as noted under paragraph 32 of the Witness Preparation Protocol, along with the log of the session.

23. The Chamber noted that “the disclosure system already entrusts the calling party with the responsibility to assess the disclosability of any and all information in its possession.”²⁵ The Chamber further considered 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.”²⁶

24. In any event, although the Chamber did not deem the automatic disclosure of video recordings of Prosecution witness preparation sessions to be warranted,²⁷ paragraph 13 of the witness preparation protocol provides for a procedure by which the non-calling party can seek access to the video recording of the witness preparation session.

²² ICC-02/05-03/09-295, para. 24.

²³ ICC-02/05-03/09-295, paras.1-2, 23, 28.

²⁴ ICC-02/05-03/09-295, para. 23 (emphasis added).

²⁵ Decision, para. 45.

²⁶ Decision, para. 46.

²⁷ Decision, para. 46.

25. As with the First Issue, any concerns the Defence may have with respect to the comprehensiveness and accuracy of Prosecution disclosure notes²⁸ can always be raised by the Defence and accordingly resolved.

26. In conclusion, as regards the Second Issue, the Defence has failed to establish any clear error of reasoning on the part of the Chamber, in relation to the non-disclosure of audio recordings of Prosecution witness preparation sessions, which would lead to an injustice or manifestly unsound result.

B. The Defence's leave to appeal should also be dismissed

(i) No appealable issue

27. The Defence alternative request for leave to appeal the same above two issues underlying its reconsideration request should also be dismissed. The two proposed issues do not constitute appealable issues under article 82(1)(d).

28. Both proposed issues are predicated on a misreading or misunderstanding of the Decision or its underlying function,²⁹ or merely disagree with or ignore the remedies it provides.

29. As submitted above, concerning the *First Issue*, the Defence misunderstands the function of witness preparation in the Decision, and as a result mixes up the impact of the COVID-19 pandemic upon the Defence's current and ongoing investigations with any investigations that it may in the future conduct in the specific context of witness preparation.

30. Yet the latter investigations will only arise exceptionally if during the Prosecution preparation of any of its witnesses new information is spontaneously generated. Witness preparation is not an investigative measure. The Defence cannot thus invoke any difficulties which may currently be encountered in its general investigations (or indeed those which might exceptionally arise in the future) to

²⁸ Defence Request, para. 17.

²⁹ See ICC-01/04-01/10-487, paras. 32-33; ICC-01/05-01/13-1278, para. 9.

justify departing from the Witness Preparation Protocol, with which it merely disagrees.

31. Similarly, under the *Second Issue*, because witness preparation is not an investigative process for questioning a witness, the Defence is incorrect to suggest that all audio records of witness preparation sessions are disclosable under rule 76. Instead, whether the audio recording is disclosable will be determined case-by-case, under other material provisions, in particular if the witness reveals new information during preparation session.

32. Since the requirements of article 82(1)(d) are cumulative,³⁰ the Defence's request should fail on this basis alone. In any case, the Defence Request does not meet the two remaining cumulative requirements under article 82(1)(d) of the Rome Statute.

(ii) *The proposed two issues do not meet the remaining article 82(1)(d) criteria*

33. Even assuming, *arguendo*, that the two proposed issues are appealable, they should not be certified for appeal because the Defence does not show that they would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, *and* that their immediate resolution by the Appeals Chamber may materially advance the proceedings.

34. To the contrary the Defence request ignores the role of the Decision in promoting the fair and expeditious conduct of the proceedings.

35. Indeed, in permitting witness preparation by either calling party, the Decision correctly considered that "it would contribute to the fair and expeditious conduct of the trial proceedings. It will provide an opportunity for the witness to refresh his or her memory, to clarify issues, and to understand generally what he or she will be questioned about. In this way, the Chamber finds that a more efficient and focused witness examination can be expedited and, more generally, that their testimonies are more likely to be structured and clear. The Chamber emphasises that it considers this

³⁰ ICC-02/04-01/15-537, para. 13; ICC-01/05-01/08-75, para. 7.

advantage to be, in principle, valid for the entire questioning of a witness, i.e., not only for examination-in-chief.”³¹ Moreover, witness preparation would assist the Chamber in its search for the truth.³²

36. Furthermore, in accepting the Prosecution’s proposed amendment to paragraph 24 of the Witness Preparation Protocol regarding the exhibits which can be shown to the witness during preparation sessions, the Chamber categorically considered its impact upon the fair and expeditious conduct of the proceedings.³³ The Chamber emphasised 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.”³⁴ The Chamber stressed that “[j]udicial control over the Prosecution’s ability to introduce at trial information which is not disclosed in a timely manner shall remain intact.”³⁵

37. Moreover, the Defence wrongly raises possible delays in the trial due to litigation on issues of notice and the impact of late disclosures.³⁶ Since as noted, witness preparation is not an investigation to generate new statements, the Defence’s arguments on potential delays in this regard are speculative.³⁷

38. Furthermore, the Chamber had already dismissed Defence submissions on alleged undue prejudice to Mr Al Hassan and equality of arms, and found 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.”³⁸

39. It is therefore apparent that the Defence merely disagrees with the Chamber’s assessment that the witness preparation procedure in the Protocol is appropriate and fully respects Mr Al Hassan’s fair trial rights. The Chamber should therefore deny

³¹ Decision, para. 15.

³² Decision, para. 18.

³³ Decision, para. 24.

³⁴ Decision, para. 25.

³⁵ Decision, para. 25.

³⁶ Defence Request, para. 23.

³⁷ ICC-02/04-01/15-537, para. 12.

³⁸ Decision, paras. 15, 17.

leave to appeal as the proposed issues do not significantly affect the fair and expeditious conduct of the proceedings.

40. Finally, as noted above, since the Protocol includes remedies for redressing any disclosure and related matters, immediate appellate intervention will delay, rather advance the proceedings.

Relief Requested

41. Based on the above, the Chamber should deny the Defence request in its entirety.



Fatou Bensouda
Prosecutor

Dated this 27th day of March 2020

At The Hague, The Netherlands.