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

Date: 11 May 2018

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD

Public

With Public Annex

Response to the “Demande d’adoption par le Juge unique d’un Protocole relatif au traitement des informations confidentielles pendant les enquêtes et aux contacts entre une partie ou un participant et les témoins de la partie opposée ou d’un participant”

Source: Defence for Mr. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
Mahmoud

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Ms. Fatou Bensouda, Prosecutor

Mr. James Stewart

Counsel for the Defence

Mr. Yasser Hassan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

Mr. Xavier-Jean Keïta

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I. INTRODUCTION

1. On 17 April 2018, the Defence for Mr. Al-Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“the Defence”) received a protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant (“Prosecution Protocol”), for comments. On 24 April 2018, it has expressed to the Prosecution the need for more time for assessment.
2. On 26 April 2017, The Prosecution has submitted a request before the Single Judge to adopt a protocol, filed as an annex, on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant (“Prosecution Protocol”).¹ The Defence herein submits its response to the Prosecution’s request.

II. MAIN DEFENCE REQUEST

3. The Defence notes that the updated Chambers Practice Manual, as of February 2016 and May 2017, has provided an annex containing a “Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant” (“Chambers Protocol”).²
4. While it has been a common practice in cases before the Court for parties to use, as a starting point, protocols from previous cases, it is crucial to highlight that the Chambers Practice Manual during the proceedings of these cases did not contain a suggested protocol on this matter.³ The Defence wishes to emphasise on the importance of using the Chambers Protocol as a reference point for the current case, in line with the Court’s efforts to maintain uniformity of procedure and to guarantee judicial economy, when possible. Should the parties wish to introduce amendments at any stage of the proceedings, they may do so in compliance with paragraph 3 of the Chambers Protocol.

¹ ICC-01/12-01/18-23 and ICC-01/12-01/18-23-AnxA.

² Chambers Practice Manual, May 2017, pp. 32-38.

³ *See for example*, Chambers Practice Manual, September 2015.

5. While the Chambers Practice Manual is in no way binding to the Honourable Single Judge, it contains “general recommendations and guidelines reflecting best practices” that were “based on the experience and expertise of judges across trials at the Court”,⁴ and its purpose is to “contribute to the overall effectiveness and efficiency of the proceedings before the Court.”⁵ The Manual recommends that:

The Chamber, acting under article 57(3)(c) and 68(1) of the Statute, should order the parties and participants to comply with this protocol [annexed to the Practice Manual], and put it on the record of the case, ideally in the first decision regulating disclosure following the initial appearance. The protocol would then remain applicable throughout the proceedings.⁶

6. Therefore, the Defence finds it more appropriate to treat the Chambers Protocol as the only starting reference point, and respectfully requests the Honourable Single Judge to dismiss in whole the Prosecution Protocol and order the parties to comply with the Chambers Protocol.

III. DEFENCE REQUEST IN THE ALTERNATIVE

7. In the event that the Single Judge decides to consider the Prosecution Protocol as the starting point of reference, the Defence respectfully requests the Single Judge to accept the protocol suggested by the Defence following amendments to the Prosecution Protocol.⁷
8. The Defence will address the Prosecution Protocol in the chronological order of the paragraphs. Several changes have been introduced to the Prosecution Protocol in order to reflect the language previously used by the Pre-Trial and Trial Chambers in other cases as well as in the Chambers Practice Manual.

A. Reasons in support of Defence amendments

(i) Introduction

9. In paragraph 2 of the Prosecution Protocol, the Defence suggests the addition of the “Code of Conduct for Intermediaries and any binding national codes”, as

⁴ Chambers Practice Manual, May 2017, p. 3.

⁵ Chambers Practice Manual, May 2017, p. 5.

⁶ Chambers Practice Manual, May 2017, p. 31.

⁷ Annex.

reflected in the Chambers Protocol, and the Court's jurisprudence.⁸ Further, in paragraph 2, and where relevant in the protocol, the Defence has replaced any reference to "the accused" with "the suspect or accused". This is to ensure that terminologies cover all stages of proceedings, including the confirmation of charges stage.⁹

(ii) Use of confidential information in the course of the investigations

10. In paragraph 10 of the Prosecution Protocol, it is important to specify that its scope only covers witnesses whose identity is not known to the public, in order to avoid any confusion as to the implementation of this aspect of the protocol. As previously found by the Trial Chamber, "the text should clarify that visual material of witnesses who testified in public session without protective measures are not a disclosure of confidential information."¹⁰ This was also reflected through the Court's jurisprudence and the Chambers Protocol.¹¹ Paragraph 10 of the Prosecution Protocol has been amended accordingly.¹²

(iii) Disclosure of the identity of witnesses of other parties and participants in the course of investigations

11. Paragraph 24 of the Prosecution Protocol on the prohibition of making inquiries relating to the location of protected witnesses fits more appropriately in the section entitled: "Contact with Individuals Participating in the ICCPP and those subject to an assisted move". The same applies to paragraph 46 of the Prosecution Protocol on requests for meetings with witnesses who are in the ICC Protection Programme. The Defence has moved the two paragraphs accordingly.¹³
12. Paragraphs 28 and 29 of the Prosecution Protocol were drafted in a vague manner and using abstract expressions such as "objective level of risk", "management of expectations" and "processes to aid the individual in resuming control and psychosocial integrity". Ambiguous terms of this type may, in practice, create

⁸ Chambers Protocol, para. 2; ICC-01/05/01/13-1093-Anx, para. 2.

⁹ Annex, para. 2.

¹⁰ ICC-01/05-01/13-1093, para. 22.

¹¹ Chambers Protocol, [2. Witnesses whose identity has not been made public], para. 12; ICC-01/05-01/13-1093-Anx, para. 10.

¹² Annex, para. 10.

¹³ Annex, paras 38 and 39.

obstacles to the course of investigations by the parties due to potential conflicted interpretation. The wording used in the Chambers Protocol is sufficiently clear,¹⁴ as it addresses the needs of vulnerable witnesses in a rather concrete and practical manner by directly referring to the context which is relevant the current protocol, such as consent for disclosure, use of visual and/or non-textual material, and the role of VWS in interviews with vulnerable witnesses. The Defence has therefore removed the two paragraphs in question.

(iv) *Regulation of contacts between a party or participant and a witness of the opposing party or participants*

13. The Defence has removed the phrase “through the calling party of [sic] participant, to the interview” from paragraph 34 of the Prosecution Protocol, in line with the Chambers Protocol and the Court’s jurisprudence,¹⁵ and in order to allow for an alternative in case the party or participant is unable to contact the witness.¹⁶
14. The Defence opposes the insertion of paragraph 37 of the Prosecution Protocol as it believes that contact with a witness of the opposing party “merely for courtesy purposes” should, in principle, not be allowed. The Defence has introduced the alternative provided by the Chambers Protocol.¹⁷
15. The Defence has added an alternative procedure in case the calling party fails or is otherwise unable to contact the witness in question,¹⁸ in line with the Chambers Protocol and the Court’s jurisprudence.¹⁹
16. The Defence disagrees with the insertion of paragraphs 40 and 41 of the Prosecution Protocol, as they clearly contradict paragraphs 35 and 36 regarding the consent of the witness in question. The Defence, in agreement with paragraphs 35 and 36, strongly believes that consent for an interview is a matter for the witness to decide; granting this right to the calling party is a clear breach of the guarantees provided to the witness against any attempts to influence her or his decision. These

¹⁴ Chambers Protocol, paras 25 and 32.

¹⁵ Chambers Protocol, para. 28; ICC-01/05-01/13-1093-Anx, para. 34.

¹⁶ *Infra*, para. 15; *See* Annex, para. 34.

¹⁷ Annex, para. 35; *see* Chambers Protocol, para. 26.

¹⁸ Annex, para. 34.

¹⁹ Chambers Protocol, para. 30; ICC-01/05-01/13-1093-Anx, para. 37.

provisions were also not reflected in the Chambers Protocol. Paragraphs 40 and 41 have therefore been removed.

17. The Defence considers it appropriate to suggest a remedy in cases of disagreements with the representative of the calling party during the interview or if the said representative attempts to prevent or dissuade the witness from answering questions freely. A paragraph was added accordingly,²⁰ in line with the Chambers Protocol and the Court's jurisprudence.²¹
18. The Defence also suggests an alternative in case the calling party is unable to travel to the witness's location.²²

IV. RELIEF SOUGHT

With the greatest respect,

The Defence requests the Single Judge to

DISMISS in whole the Prosecution Protocol and;

ADOPT the Chambers Protocol; or

In the alternative, **ADOPT** the Protocol annexed hereto.



Yasser Hassan
Lead Counsel for Mr. Al Hassan

Dated this, 11th Day of May 2018
At, The Hague

²⁰ Annex, para. 42.

²¹ Chambers Protocol, para. 36; ICC-01/05-01/13-1093-Anx, para. 42; *see* ICC-01/09-02/11-469-Anx, para. 11; *see also* ICC-01/05-01/08-2293, para. 32.

²² Annex, para. 44; *see* Chambers Protocol, para. 34; ICC-01/05-01/13-1093-Anx, para. 44.