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

Date: 17 May 2018

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Single Judge

SITUATION IN MALI

IN THE CASE OF

***THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD***

Public

With a public Annex A

***Supplementary observations on 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”***

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Introduction

1. As ordered by the Single Judge,¹ the Prosecution submits its supplementary observations to its request to adopt 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's proposed Protocol").²
2. In particular, the Prosecution responds to the Single Judge's questions regarding any notable differences between the Prosecution's proposed Protocol and the version of the Protocol as attached to the Chambers Practice Manual ("Practice Manual Protocol").³
3. The Prosecution submits that the Prosecution's proposed Protocol is an appropriate model for the Single Judge to adopt in this case, including with appropriate modifications as indicated by the Single Judge.

Procedural background

4. On 26 April 2018, the Prosecution submitted its "*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*". The Prosecution annexed the Prosecution's proposed Protocol for the Single Judge's consideration.⁴
5. On 11 May 2018, the Defence submitted its observations arguing that the Single Judge should reject in its entirety the Prosecution's proposed Protocol and instead use the Practice Manual Protocol as a starting point. In the alternative, the

¹ ICC-01/12-01/18-30.

² ICC-01/12-01/18-23; ICC-01/12-01/18-23-AnxA.

³ ICC-01/12-01/18-30.

⁴ ICC-01/12-01/18-23; ICC-01/12-01/18-23-AnxA.

Defence argued that certain amendments should be made to the Prosecution's proposed Protocol.⁵ The Defence acknowledged that it has been "a common practice in cases before the Court for parties to use, as a starting point, protocols from previous cases".⁶ Moreover, the Defence, although advocating for a complete replacement with the Practice Manual Protocol, acknowledged that the Chambers Practice Manual "is in no way binding to the Honourable Single Judge".⁷

Prosecution's submissions

Provisions contained in the Practice Manual Protocol that should be included in the final Protocol

6. The Prosecution agrees as proposed by the Single Judge that there are a number of provisions contained in the Practice Manual Protocol that are appropriate and should be included in the final Protocol as adopted.
7. In particular, the Prosecution agrees that the following paragraphs of the Practice Manual Protocol be incorporated and adopted, namely: paragraphs 5, 7, 13, 14, 17, 18, 30, 34 and 36.⁸
8. However, if paragraph 30 of the Practice Manual Protocol is adopted the Prosecution submits that it is important that paragraph 37 of the Prosecution's proposed Protocol be retained, albeit with two modifications in light of concerns raised by the Single Judge,⁹ as highlighted in bold below.
9. Paragraph 37 would then read as follows: "[i]f an investigating party or participant contacts a witness of an opposing party or participant inadvertently,

⁵ ICC-01/12-01/18-29 and ICC-01/12-01/18-29-Anx.

⁶ ICC-01/12-01/18-29, para. 4.

⁷ ICC-01/12-01/18-29, para. 5.

⁸ ICC-01/12-01/18-30, para. 10.

⁹ ICC-01/12-01/18-30, paras. 10 and 12.

or merely for courtesy purposes **during VWU-organised courtesy meetings**, the investigating party or participant shall refrain from any discussion of the case and shall under no circumstances seek the witness's consent to be interviewed. Consent to be interviewed may be obtained only through the calling party using the procedure described in the preceding paragraphs, **subject to paragraph [30]**".

10. As demonstrated by incidents occurring in past cases, there is a real risk that opposing parties may inadvertently contact witnesses of the calling party, and may directly request consent to interview the calling party's witness during such inadvertent contact, or even during courtesy meetings organised by the Victims and Witnesses Section ("VWU").¹⁰ For this reason, it is important that it is made explicitly clear that it is a violation of the Protocol if an opposing party directly asks the witness of a calling party if they consent to be interviewed.
11. For the same reasons, it needs to be made explicitly clear that the request to obtain the witness's consent should in the first instance be made through the calling party, never the opposing party, and only where the calling party is unable to contact the witness within five days (or ten days: see below paragraph 16)¹¹ should the opposing party be able to apply to the Chamber to instruct the VWU to attempt to contact the witness. This could otherwise lead to lack of clarity on this point.
12. Accordingly, the Prosecution asks the Single Judge to: (a) reject the Defence's request to delete the phrase "through the calling party or participant to the interview" from paragraph 34 of the proposed Protocol; and (b) retain the language at paragraph 37 of the proposed Protocol that "[c]onsent to be

¹⁰ See e.g. ICC-01/04-02/06-866-Red; ICC-01/04-02/06-T-25-Red-Eng, p. 9, l. 3-p. 22, l. 2; ICC-01/04-02/06-T-29-ENG, p. 45, l. 22-p. 47, l. 7.

¹¹ The Practice Manual Protocol refers to a maximum of five business days but the Prosecution submits ten days is a more appropriate timeframe.

interviewed may be obtained only through the calling party using the procedure described in the preceding paragraphs, **subject to paragraph [30]**".

13. The Defence argues that deleting this phrase "through the calling party or participant to the interview" would be "in line with the Chamber's Protocol and the Court's jurisprudence".¹²

14. As a matter of fact, the Court's jurisprudence does not change the presumption that contact with a witness should first be through the calling party or participant to the interview. Indeed, in the decision relied upon by the Defence, Trial Chamber VII did not accept the Defence's argument that VWU or the interviewing party should be able to contact the witness directly. Instead, Trial Chamber VII granted the investigating party the ability to apply to the Chamber to instruct the VWU to contact the witness concerning an interview *if the calling party is unable to contact the witness* after an appreciable period of time.¹³ Moreover, it is implicit in Trial Chamber VII's decision and in the Practice Manual Protocol that contact should first be *via* the calling party or participant.¹⁴

15. Nevertheless, the Prosecution agrees that additional language be added to paragraph 37 of the Prosecution's proposed Protocol to make it clear that: (a) any contact by an opposing party with a witness of a calling party for courtesy purposes can only be during VWU-organised courtesy meetings; and (b) whilst requests for consent to be interviewed should be obtained in the first instance through the calling party, this is subject to the language of paragraph 30 of the Practice Manual Protocol that "[i]f the calling party is unable to contact the witness within [five]¹⁵ days, the party seeking to interview the witness may apply

¹² ICC-01/12-01/18-29, paras. 13, 15, referring to ICC-01/05-01/13-1093-Anx, para. 37.

¹³ ICC-01/05-01/13-1093, paras. 17-19; and ICC-01/05-01/13-1093-Anx, para. 37. This provision is reflected at paragraph 30 of the Practice Manual Protocol.

¹⁴ See in particular paragraphs 26 and 29 of the Practice Manual Protocol.

¹⁵ The Prosecution submits that ten days is a more appropriate timeframe. Refer to paragraph 16.

to the Chamber and request that the VWU be instructed to attempt to contact the witness”.

*Language in the Prosecution’s proposed Protocol that differs from
the language found in the Practice Manual Protocol*

16. The Prosecution responds to the Single Judge’s following questions regarding language in the Prosecution’s proposed Protocol that differs from the language found in the Practice Manual Protocol:¹⁶

- First, the Prosecution included State representatives in the definition of ‘public’ rather than ‘participant’ in proceedings¹⁷ because it is not automatic that a State or its representatives have the legal status of a ‘participant’ in specific proceedings, although relevant States may have standing to participate in certain procedures (such as proceedings under articles 18, 19, or 72, or Part 9 of the Rome Statute (“Statute”)), and where invited or granted the ability to participate by a Chamber. However, the Protocol is designed to control how confidential information is provided to State representatives more broadly, regardless of whether they are designated participants in legal proceedings or not.
- Second, the Prosecution submits that a calling party should seek consent of its witness within ten business days of receiving notification of a request as set out in the Prosecution’s proposed Protocol, rather than five days as set out in the Practice Manual Protocol,¹⁸ because of the potential logistical difficulties in making contact with certain witnesses including those in remote areas requiring possibly the assistance of an intermediary.

¹⁶ ICC-01/12-01/18-30, para. 11.

¹⁷ ICC-01/12-01/18-30, para. 11.

¹⁸ ICC-01/12-01/18-30, para. 11.

*Provisions found in the Prosecution's proposed Protocol
that are not contained in the Practice Manual Protocol*

17. The Prosecution further responds to the Single Judge's question as to whether the following provisions found in the Prosecution's proposed Protocol that are not contained in the Practice Manual Protocol, should be retained or not:¹⁹

- Paragraph 4(f): "provided that such intention has been conveyed to the non-calling party or participant by means that establish a clear intention on behalf of the calling party or participant to rely upon the individual as a witness". The Prosecution submits that this language used as part of the definition of a 'witness' of a calling party should be retained, because it is not otherwise clear for the investigating or opposing party whether or not an individual is a witness of a calling party. Accordingly, the investigating party should not be prohibited from making contact with an individual unless it has been clearly communicated to them that the calling party does intend to rely upon them as a witness.
- Paragraph 30: "This consent should be provided before the provision of any witness statement".²⁰ The Prosecution submits that this language should be retained. Paragraph 30 deals with the situation where parties and participants should obtain their witness' informed consent to being involved with the Court. Pursuant to article 68 of the Statute, it should be made clear that the calling party or participant is obliged to obtain such informed consent before obtaining a witness statement.
- Paragraph 47: The Prosecution observes that the time period stipulated in this provision as to when a video or audio-recording of an interview

¹⁹ ICC-01/12-01/18-30, para. 12.

²⁰ The Prosecution observes that there appear to be certain inaccuracies in the French translation of the English version of the Prosecution's proposed Protocol (for instance, "*enregistrement*" does not reflect accurately the expression "provision of any witness statement": "*enregistrement*" is more about audio/video recording).

should be disclosed, is “as soon as practicable, and not more than five business days”, and not ten business days.²¹ The Prosecution submits that this timeframe is reasonable as it allows for various exigencies including time taken to make recordings.

- Paragraph 37: The Prosecution refers to its submissions above at paragraphs 8 to 15.
- Paragraphs 40 to 41: The Prosecution submits that these provisions, that address where a calling party or participant can object to an interview by the opposing party, should be included as they allow a calling party where necessary to have recourse to the Chamber if there are problems with an interview proceeding. For instance, there may be situations, pursuant to article 68, where it is appropriate to object to an interview proceeding immediately. For example, there may be health, welfare, or even security concerns, which must first be addressed before an interview can proceed. These provisions are not in contradiction with paragraphs 35 and 36 that concern obtaining consent from a witness to an interview, because paragraphs 40 and 41 instead allow for a mechanism for a Chamber to intervene where an immediate interview is not in the best interests of a witness.
- Paragraphs 28 and 29 can be retained as these provisions illustrate why it is important for parties and participants to obtain prior informed consent of witnesses whom they intend to call to testify.
- Paragraph 16: This provides a mechanism by which the parties should resolve any disputes regarding disclosure, namely in the first instance *inter*

²¹ ICC-01/12-01/18-30, para. 12. There appears to be an error in the translation of the English version of the Prosecution’s proposed Protocol that refers to a time period of five and not ten business days.

partes or to the Chamber if it is not possible to resolve the matter. In addition, paragraph 20 of the Practice Manual Protocol limits resolution of disputes to the provisions of rule 81 of the Rules of Procedure and Evidence (“Rules”). Whilst rule 81 is a key rule regarding disclosure and sets out a process related to disputes, it is not the only relevant provision regarding disclosure. For instance, rules 76, 77, 78, 79, 82, 83 and 84 of the Rules, and article 67, paragraph 2 of the Statute, are also relevant to issues concerning disclosure.

18. The Single Judge also sought the Prosecution’s observations on any other notable differences between the content of the Prosecution’s proposed Protocol and the Practice Manual Protocol, not raised by the Single Judge.²² The Prosecution sets out below language, highlighted in bold and italics, from additional provisions that are found in the Prosecution’s proposed Protocol but that are not contained in the Practice Manual Protocol, and which the Prosecution submits should be retained in any final version of the Protocol adopted by the Single Judge:

- Definition of “Party” at paragraph 4(a): “Any other persons properly designated as members of the Defence team ***including resource persons and investigators***”. The Code of Professional Conduct for counsel defines the “defence team” as “counsel and all persons working under his or her oversight”. Accordingly, this should include resource persons and investigators. However, the Prosecution submits that the explicit reference to “resource persons and investigators” should be retained to avoid any lack of clarity as to the scope of persons regulated by the terms of the Protocol, whether they are formal members of the Defence team or not.

²² ICC-01/12-01/18-30, para. 15.

- Definition of “Public” at paragraph 4(c): “Public shall include any person, *government, organisation, entity, association, and group*, except...”. A broader definition of “Public” is necessary to avoid improper distribution of confidential information through entities other than individual persons.
- Definition of “Others at Risk” at paragraph 4(d): “*‘Others at Risk’ are persons at risk on account of the activities of the Court*”. There should be an explicit inclusion of “Others at Risk” on account of the activities of the Court, within the scope of those protected by the terms of the Protocol, in line with the Court’s jurisprudence.²³
- Definition of “Confidential information” at paragraph 4(e): “shall mean any information classified as such in accordance with regulation 14 of the Regulations of the Registry, *or classified as ‘ex parte’, ‘confidential’, or ‘under seal’, only known to the parties, and if appropriate, to the participants, and not to be disclosed to the public*”. The broader concept of what constitutes a “confidential information” is necessary to ensure protection against improper disclosure of confidential information contained in other forms of confidential documents.
- General provisions – paragraph 5: “*All obligations listed in the current Protocol that apply to the parties and participants also apply to their staff, the intermediaries they use, any other individuals who perform tasks on their behalf and the suspects or accused*”. This language is necessary to ensure there is clarity regarding the scope of all of those covered by the obligations contained in the Protocol.

²³ ICC-01/04-01/07-475, paras. 40-60 (in particular para. 54).

- Witnesses whose identity has not yet been made public – paragraph 18:
 “This section of the Protocol applies to witnesses whose identity or relationship with the Court has not yet been made public by a party, participant or by the Chamber, *or who have other protective measures known to the investigating party or participant*”. This language is necessary to ensure other forms of Court-ordered protective measures are respected by the investigating party or participant.
- Inadvertent disclosure – paragraph 15: “*The receiving party or participant shall delete any electronic copies in its possession*”. This language is necessary to make it clear that any electronic copies, and not only hard copies, must be destroyed.
- Inadvertent disclosure – paragraph 17: “*Moreover, the receiving party or participant will instruct any individuals who have read or have had access to the inadvertently disclosed material to refrain from using the material any further and will ensure that all remaining copies of the inadvertently disclosed material are returned to the disclosing party and any electronic copies destroyed*”. This additional language is necessary to make it clear that the receiving party is also responsible for taking steps to prevent further improper disclosure through third parties.
- Consent of the witness – paragraph 35: “The party or participant seeking to contact a witness of the opposing party or participant will provide the latter with *reasonable notice* of its intent to do so”. There should be an obligation incumbent upon the interviewing or opposing party to provide reasonable notice of its request to contact the calling party’s witness.

Relief Requested

19. Based on the foregoing, the Prosecution requests that the Single Judge adopt the Prosecution's proposed Protocol, with the modifications as set out in the revised Protocol attached as an annex to these supplementary observations.²⁴ The Prosecution is able to provide the Single Judge with a French translation of the revised version of the Prosecution's proposed Protocol.



Fatou Bensouda, Prosecutor

Dated this 17th day of May 2018
At The Hague, The Netherlands

²⁴ See Annex A to these Supplementary Observations. The proposed modifications are highlighted in bold and italics.