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

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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

Response to the “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*””

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

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I. INTRODUCTION

1. On 26 April 2018, the Prosecution submitted a 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 (“protocol proposed by the Prosecution”).¹
2. On 11 May 2018, the Defence for Mr Al-Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the “Defence”) submitted its response to the Prosecution’s request.²
3. On 14 May 2018, the Single Judge issued a decision ordering the Prosecution to submit supplementary observations, and the Defence to file observations in response to the Prosecution (the “Decision”).³
4. On 17 May 2018, the Prosecution filed its supplementary observations, and introduced amendments to its proposed protocol (the “Amended Prosecution Protocol”).⁴
5. The Defence, in accordance with the Single Judge’s orders, hereby submits its response and other related observations.

II. PROCEDURAL BACKGROUND

6. The Prosecution, in the protocol it originally proposed, mainly relied on the cases of Ntaganda, Gbagbo and Al Mahdi.⁵
7. The Defence’s response requested the Single Judge to reject the Prosecution’s request and adopt the protocol annexed to the Chambers Practice Manual (the “Practice Manual Protocol”),⁶ or, in the alternative, introduce amendments to the protocol proposed by the Prosecution in line with the Court’s jurisprudence and the Practice Manual Protocol.⁷

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

² ICC-01/12-01/18-29 and ICC-01/12-01/18-29-Anx.

³ ICC-01/12-01/18-30.

⁴ ICC-01/12-01/18-32 and ICC-01/12-01/18-32-AnxA.

⁵ ICC-01/12-01/18-23, para. 2.

⁶ ICC-01/12-01/18-29, para. 6.

⁷ ICC-01/12-01/18-29, para. 8.

8. The Decision, noted the differences between the content of the protocol proposed by the Prosecution and the Practice Manual Protocol.⁸ The Single Judge, relying on the Practice Manual Protocol, expressed concerns regarding these differences and required explanations from the Prosecution in this matter.⁹
9. The Prosecution, in line with the Decision, introduces amendments to its protocol in order to reflect some of the language used in the Practice Manual Protocol.¹⁰ It also provides responses to the Single Judge's questions regarding differences between the protocol proposed by the Prosecution and the Practice Manual Protocol.
10. The present response will address the Defence's points of disagreement with the Prosecution's supplementary observations.

III. THE DEFENCE'S RESPONSE

A. *The starting reference point*

11. With regards to the starting reference point upon which the protocol should be adopted, the Prosecution's references to the Defence's 'acknowledgments'¹¹ – on the common practice in previous cases and the non-binding effect of the Practice Manual – are taken out of context and are an unfortunate misrepresentation of the Defence's clear submissions.
12. The Defence's reference to the common practice of using protocols from previous cases was misunderstood by the Prosecution as it was followed by an inseparable conjunction that "the Chambers Practice Manual during the proceedings of these cases did not contain a suggested protocol on this matter."¹² The Defence stresses that the existence of a Practice Manual Protocol in the current case, differently from previous cases, is a legal development that should not be ignored and that must supersede the practice previously adopted by the Chambers.

⁸ ICC-01/12-01/18-30, para. 8.

⁹ ICC-01/12-01/18-30.

¹⁰ See for example, ICC-01/12-01/18-32-AnxA, paras 7, 14, 15, 16, 17, 49 and 53.

¹¹ ICC-01/12-01/18-32, para. 5.

¹² ICC-01/12-01/18-29, para. 4.

13. Similarly, with regards to the Prosecution's reference to the Defence's 'acknowledgment' that the Practice Manual is not binding on the Single Judge,¹³ the Prosecution disregards the Defence's conjoined argument, as accurately cited by the Single Judge,¹⁴ that the background, the purpose and the recommendations of the Chambers Practice Manual, give an undeniable weight to the Practice Manual Protocol as a starting point.¹⁵
14. The Defence therefore strongly agrees with the views adopted by the Decision to use the Practice Manual Protocol as a starting reference point.

B. Aspects in the protocol concerning consent of the witness

15. The protocol contains a procedure for an investigating party or participant to obtain the consent of the witness of the opposing party. The Defence does not see the purpose of retaining paragraph 37 of the original protocol proposed by the Prosecution (i.e. paragraph 41 of the Amended Prosecution Protocol). It is sufficiently clear from paragraphs 39 and 42 of the Amended Prosecution Protocol that the two and only means of obtaining the witness's consent for an interview are through the opposing party or participant, and VWS in case the latter fails to reach the witness. Paragraph 41 of the Amended Prosecution Protocol should therefore be removed.
16. With regards to the phrase "through the calling party of [sic] participant to the interview" in paragraph 38 of the Amended Prosecution Protocol, the Defence wishes to clarify that, contrary to the Prosecution's understanding, its request to remove it was not to argue for consent to be sought directly between the investigating party or participant and the witness.¹⁶ It is evident, through paragraphs 32 and 34 of the protocol proposed by the Defence,¹⁷ that the only two means of contacting a witness are through the calling party and through VWS if the calling party or participant fails to contact the witness. This is also reflected in the Practice Manual Protocol and the Court's jurisprudence which were relied

¹³ ICC-01/12-01/18-32, para. 5.

¹⁴ ICC-01/12-01/18-30, para. 9.

¹⁵ ICC-01/12-01/18-29, paras 4-5.

¹⁶ ICC-01/12-01/18-29, para. 13.

¹⁷ ICC-01/12-01/18-29-Anx.

upon by the Defence.¹⁸ The Prosecution included the contested phrase because due to the fact that the original protocol it proposed, as noted by the Single Judge¹⁹, did not provide for the VWS channel in case of failure by the calling party or participant. If the contested phrase is retained it would solely encompass paragraph 39 of the Amended Prosecution Protocol and hence contradict the insertion of paragraph 42 by the Prosecution. The Defence reiterates that this phrase should be removed.

C. Definitions

17. The Defence agrees with the Single Judge's concerns with regards to the relevance of State representatives in the *public* rather than *participant* category.²⁰ Indeed, the protocol should take into account the possibility that States may become participants through their representatives in the proceedings and hence be bound by certain aspects of the protocol as participants rather than third parties. The language used in the Practice Manual Protocol clearly reflects this possibility.²¹ Furthermore, if governments are not granted the status of a participant through their State representatives, then the definition in paragraph 4 (c) of the Practice Manual Protocol will sufficiently address this situation by treating them as "any person except a party or participant." Paragraph 4 (b) and (c) of the Amended Prosecution Protocol should be replaced by their equivalent in the Practice Manual Protocol.
18. The Amended Prosecution Protocol refers to the "public" in some parts of the protocol,²² and to "third parties" in other parts.²³ This might cause some confusion since the Amended Prosecution Protocol only defines the "public" in paragraph 4 (b). The protocol should be modified accordingly in order to ensure consistency.

¹⁸ ICC-01/12-01/18-29, paras 13 and 15.

¹⁹ ICC-01/12-01/18-30, para. 10.

²⁰ ICC-01/12-01/18-30, para. 11.

²¹ Practice Manual Protocol, para. 4(b) and (c).

²² ICC-01/12-01/18-32-AnxA, paras 9-11, 23 and 25.

²³ ICC-01/12-01/18-32-AnxA, paras 7, 9, 15 and 31.

D. Provisions in the protocol proposed by the Prosecution not found in the Practice Manual Protocol

19. The Prosecution submits observation explaining the insertion of some provisions which were not found in the Practice Manual Protocol.
20. Concerning paragraphs 40 and 41 of the original protocol proposed by the Prosecution (i.e. paragraphs 45 and 46 of the Amended Prosecution Protocol), the Prosecution submits that certain examples, such as health, welfare or security concerns, may justify an objection by the calling party or participant to an interview between the investigating party or participant and the witness. The Defence stresses that concerns regarding the witness's health, welfare and security should be addressed only by the procedure in paragraphs 32, 34, 35, 38 and 39 of the Practice Manual Protocol (i.e. paragraphs 48, 53, 51, 43 and 52, respectively, of the Amended Prosecution Protocol). While these concerns are important and must be taken into consideration throughout the preparation of interviews, they should not grant the calling party the power to interfere with the witness's exclusive right to provide consent to an interview. The Defence insists that the contested paragraphs are a deviation from the Practice Manual Protocol that may lead to abuse by the calling party and respectfully requests the removal of paragraphs 45 and 46 of the Amended Prosecution Protocol.
21. Concerning paragraphs 28 and 29, the Defence understands that the Honourable Single Judge's question was not regarding their importance *per se*, but rather their relevance to the current protocol. Paragraphs of this language should be the subject of discussion in the context of, for example, a protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses.²⁴ Further, the Prosecution asserts that these paragraphs provide a justification for the importance of obtaining prior consent of witnesses.²⁵ The Defence submits that, should the Single Judge approve the inclusion of prior consent, it would not be necessary to expressly justify its presence in writing in the text of the protocol. Therefore, paragraphs 28 and 29 should be removed from the Amended Prosecution Protocol.

²⁴ See Chambers Practice Manual, p. 22.

²⁵ ICC-01/12-01/18-32, para. 17 (p. 9).

E. Differences with the Practice Manual Protocol not addressed in the Prosecution's supplementary observations

22. The Single Judge had ordered the Prosecution to highlight any notable differences between the Practice Manual Protocol and the protocol proposed by the Prosecution. The Defence wishes to highlight some differences that were ignored in the Prosecution's supplementary observations.
23. The Amended Prosecution Protocol, in paragraph 2, does not contain "the Code of Conduct for Intermediaries and any binding national codes of conduct", which are provided for in paragraph 2 of the Practice Manual Protocol. The Defence reiterates its request to insert this reference,²⁶ as it is important to include all relevant codes of conduct on all members of legal teams, including intermediaries.
24. Paragraph 10 of the Amended Prosecution Protocol prohibits members of the public from retaining "a hard copy of the [confidential] information". This should be amended in order to include all types of copies, in line with the Practice Manual Protocol.²⁷
25. The Defence reiterates that it should be clarified in paragraph 11 of the Amended Prosecution Protocol that it only applies on "witnesses whose identity or relationship with the Court has not been made public," as clearly stated in the Practice Manual Protocol.²⁸
26. Paragraph 19 of the Amended Prosecution Protocol, differently from paragraph 20 of the Practice Manual Protocol, removes the option of destroying copies of inadvertently disclosed material. This might create a burden to the receiving party or participant, especially in cases of particularly large material or if the receiving party or participant had applied remarks on the said material that it is not obliged to share with the opposing party or participant. Destroying the documents would, in that case for instance, be a more effective way of not maintaining custody of inadvertently disclosed material. The Defence finds the language proposed in paragraph 20 of the Practice Manual Protocol more suitable in this context.
27. Paragraph 26 of the Amended Prosecution Protocol should also include "the types of organisations and institutions" to whom the identity of the relevant witness will

²⁶ See for example, ICC-01/12-01/18-29, para. 9.

²⁷ Practice Manual Protocol, para. 8.

²⁸ Practice Manual Protocol, paras 9 and 12; see ICC-01/12-01/18-29, para. 10.

be disclosed. This is to ensure that the measure is not restricted to individual persons and to be in line with the Practice Manual Protocol.²⁹

IV. RELIEF SOUGHT

With the greatest respect,

The Defence requests the Single Judge to

ADOPT the amendments proposed by the Defence.



Yasser Hassan
Lead Counsel for Mr. Al Hassan

Dated this 22nd Day of May 2018
At, The Hague

²⁹ Practice Manual Protocol, para. 10.