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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 with public Annex A

Defence Submissions on Protocol on Dual Status Witnesses

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:

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I. Introduction

1. Pursuant to the Trial Chamber's Decision on Outstanding Protocols,¹ the Defence for Mr. Al-Hassan (the 'Defence') respectfully requests the Chamber to postpone the submission of the Protocol on Dual Status Witnesses, as adopted in the Ongwen case,² onto the record pending resolution on matters concerning the interpretation and application of the Contact Protocol³ and Familiarisation Protocol,⁴ and directions on the modalities of victims' participation and potential self-incrimination of witnesses.⁵

II. Submissions

2. At the outset, the Defence underscores the fact that it is not opposed to the application of a majority of the principles advanced in the Ongwen Protocol on Dual Status Witnesses.
3. However, a number of these principles: (i) are either unnecessary and/or already encapsulated within the Regulations 80, 96, 97 and 99 Regulations of the Registry,⁶ (ii) will be subject to forthcoming directions on modalities of victims' participation,⁷ or (iii) are better suited for inclusion within the Contact Protocol.⁸ To this end, prior to the Chamber's Decision,⁹ the Defence incorporated a number of the principles from the Ongwen Protocol on Dual Status Witnesses directly into its proposed version of the Contact Protocol.¹⁰ It did so with a view to securing the agreement of the Prosecution and Legal Representatives of the Victims and facilitate the submission of a joint contact protocol in accordance with the Chamber's directions.¹¹ The

¹ ICC-01/12-01/18-562 ("Decision").

² [ICC-02/04-01/15-504-Anx2](#) ("Ongwen Protocol on Dual Status Witnesses").

³ ICC-01/12-01/18-542-Conf-Red with reference to ICC-01/12-01/18-40-Anx ("Contact Protocol").

⁴ See Decision, para. 4 with reference to [ICC-01/04-02/06-656-AnxA](#) ("Familiarisation Protocol").

⁵ ICC-01/12-01/18-566, paras. 2(vi) and 2(viii).

⁶ This includes for example paragraphs 1(a)-(d) and 2(a)-(c) of the Ongwen Protocol on Dual Status Witnesses.

⁷ This includes for example paragraphs 7(b)-(d) of the Ongwen Protocol on Dual Status Witnesses which concern the provision of material to the Legal Representatives of Victims.

⁸ This includes for example paragraphs 3(a)-(c), 4(a)-(b), 5(a)-(d), 7(a), 8 (a)-(b), 10 (a)-(b) of the Ongwen Protocol on Dual Status Witnesses. The Defence notes that paragraph 8(b) of the Ongwen Protocol Dual Status Witnesses contains a typographical error which impinges on the interpretation of the provision i.e. "The presence of the legal representative must **not** in any way obstruct a proper medical examination [**omission emphasised**]".

⁹ The Defence sent its proposed amendments to the Contact Protocol to the Prosecution and LRV on 24 January 2020 at 10:27am prior to notification of the Chamber's Decision.

¹⁰ See Annex A ("Proposed Contact Protocol"). The Defence notes that at the time, it did not include paragraphs 8 (a)-(b), 10 (a)-(b) within its proposed amendments to the Contact Protocol. The Defence notes it has since received the Prosecution's comments on 10 February 2020 and is awaiting comments of the LRV.

¹¹ ICC-01/12-01/18-542-Conf-Red, para. 19.

incorporated provisions from the Ongwen Protocol on Dual Status Witnesses, along with other proposed amendments, is currently the subject of on-going *inter partes* discussions which involve the Legal Representatives of Victims.

4. The streamlining of protocols is both in the interests of judicial economy and would provide more clarity to parties and participants in these proceedings. For example, communications amongst the parties and the Legal Representatives of Victims concerning the existence and identity of a dual status witness (i.e. paragraphs 3 and 4 of the Ongwen Protocol on Dual Status Witnesses) are better regulated within the Proposed Contact Protocol which provides for a clear definition of a “witness” so as to trigger the basis for any such communications.¹² The incorporation of these principles into the Contact Protocol would also allow for the consistent application of communications from the Legal Representatives of Victims as concerns Prosecution witnesses *and* Defence witnesses which is currently overlooked within the Ongwen Protocol on Dual Status Witnesses.
5. Similarly, the Contact Protocol already provides a framework for the logistics involved in obtaining the consent of a witness of another party or participant and the arrangement of the interview including the disclosure of the corresponding recording. The modalities concerning notification to the Legal Representatives of Victims (i.e. paragraph 5 and 7(a) of the Ongwen Protocol on Dual Status Witnesses) are therefore best read in this context and with due regard for the processes involved in obtaining the consent of a witness through a single uniform channel. Moreover, provisions which are already regulated under the Regulations of the Registry (i.e. paragraphs 1 and 2 of the Ongwen Protocol on Dual Status Witnesses) do not need to be replicated across protocols particularly where they relate to standard practices concerning the Victims and Witnesses Unit.¹³
6. The fact that other trial proceedings have adopted separate protocols on dual status witnesses is, on balance, unpersuasive. It would appear that the adoption of provisions

¹² See ICC-01/12-01/18-40-Anx, para. 4(f). In this regard, the Defence has proposed that the Contact Protocol also regulates contacts between parties and a participating victim who has been authorised to be called as a witness for the Legal Representative of Victims see Annex A, para. 4(f).

¹³ See also Decision, para. 5 as concerns redundancy of the Vulnerability Protocol on account of the “standardised nature of this protocol, which mainly regulates processes internal to the Victims and Witnesses Unit”.

concerning dual status witnesses in a distinct decision or protocol derives from the application in the *Lubanga* case prior to the development of trial practice before the ICC.¹⁴ In the intervening period, Chambers' have sought to adopt practices which enhance judicial efficiency. The proposed consolidation of protocols in this case supports such efforts.

7. Finally, and without prejudice to ongoing *inter partes* discussions, the Defence highlights its objection to paragraphs 6 and 9 of the Ongwen Protocol on Dual Status Witnesses which regulates the contact between dual status witnesses and the Legal Representatives of Victims, and the latter's attendance at interviews with dual status witnesses. The security concerns of witnesses have repeatedly been raised and relied upon by the Prosecution in these proceedings. Accordingly, it would be inconsistent with the security of dual status witnesses to engage in multiple communications with various persons on matters which are of concern to this case particularly with regard to the fact that the Contact Protocol already provides for a framework to protect witnesses of a calling party to minimise any risk(s) which arise from contact with the non-calling party. However, the Defence reserves its right to file further submissions in this regard pending agreement on the Proposed Contact Protocol and submissions on the Familiarisation Protocol in so far as it concerns contact between the Legal Representatives of Victims and dual status witnesses during this phase. In this regard, the Defence intends to provide its submissions concerning the role of Legal Representatives of Victims as Rule 74 counsel by 27 February 2020 at the latest in accordance with the Chamber's directions.¹⁵

III. Conclusion

8. For the foregoing reasons, the Defence respectfully requests the Trial Chamber to postpone the submission of the Ongwen Protocol on Dual Status Witnesses onto the record pending resolution on matters concerning the interpretation and application of the Proposed Contact Protocol, resolution of the Familiarisation Protocol and directions on the modalities of victims' participation and potential self-incrimination of witnesses.

¹⁴ [ICC-01/04-01/06-1379](#).

¹⁵ ICC-01/12-01/18-566.



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Dated this 13th Day of February 2020
At The Hague, The Netherlands