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**International
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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

**Prosecution submission on proposed amendments to
Witness Familiarisation and Preparation Protocols**

Source: Office of the Prosecutor

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 “Decision on outstanding protocols” (“Decision”),¹ issued by Trial Chamber X (“Chamber”) on 24 January 2020, the Prosecution indicates that it supports the adoption of the versions of the (1) “Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial” (“Familiarisation Protocol”) that the Chamber is minded to adopt;² and (2) the “Witness preparation protocol” (“Preparation Protocol”) such as the Chamber considers adopting.³
2. Nevertheless, the Prosecution respectfully proposes discrete amendments to them, to further enhance the protocols’ intended purposes based on various lessons learnt and decisions of Trial Chamber VI regarding use of these protocols in *Prosecutor v. Ntaganda*.
3. The Prosecution also indicates that it supports the adoption of the version of the “Mechanism for exchange of information on individuals enjoying dual status” (“Protocol on dual status witnesses”) that the Chamber is minded to adopt, and the Prosecution does not propose any amendments to it.⁴

¹ ICC-01/12-01/18-562.

² Decision, para. 4, referring to ICC-01/04-02/06-656-AnxA. *See also* Decision, para. 2.

³ Decision, para. 4, referring to ICC-01/04-02/06-652-Anx. While the Chamber did not expressly request the Registry to submit the Preparation Protocol into the record (*see* Decision, p. 5, referring *inter alia* to para. 4), it noted in paragraph 4 of its Decision dealing with the Familiarisation Protocol that “it is in favour of allowing witness preparation and considers that adopting a witness preparation protocol, such as the one adopted in the *Ntaganda* case, may facilitate the fair and expeditious conduct of the proceedings”, and instructed the Registry to submit the Familiarisation Protocol into the record “unless the parties and participants submit objections to the above procedure or propose amendments to *these protocols*” (para. 4, emphasis added). The Prosecution therefore submits its discrete proposed amendments to the Preparation Protocol, in the interest of facilitating the Chamber’s deliberations.

⁴ Decision, para. 6, referring to ICC-02/04-01/15-504-Anx2. *See also* Decision, para. 2. In the course of making “terminology amendments” to the Protocol on dual status witnesses (Decision, para. 6), the Chamber may wish to also consider making the following typographical corrections, namely, deleting an “s” in the title of para. 7 (“a witness with duals status”) and adding “not” to para. 8 (b) (“The presence of the legal representative must not in any way obstruct a proper medical examination”).

II. Submissions

A. Proposed amendments to the Familiarisation Protocol

4. In the Prosecution's respectful submission, the proposed amendments outlined below are intended to enhance the Familiarisation Protocol's stated purpose of "facilitat[ing] the testimony of witnesses in the best possible circumstances."⁵

5. The Prosecution proposes that the clause "whenever possible" in paragraphs 24 (on joint travel) and 39 (on joint accommodation) of the Familiarisation Protocol should be deleted, in order to lower the risks that the evidence of witnesses may become 'contaminated' or that their interaction with the Court may become known. The expression "whenever possible" does not reflect that joint travel and joint accommodation of witnesses should be the exception rather than the norm. Such exceptionality is nevertheless recognised in and underscored by the accompanying footnote to paragraph 24 (footnote 3). Footnote 3 excludes from joint travel witnesses "who participate in the Court's protection programme and who do not live together, unless the Protection Officer takes a decision to the contrary".⁶ The use of the expression "whenever possible" in paragraphs 24 and 39 gives the impression that joint travel and joint accommodation are the default approach instead of the exceptional approach to be adopted, in consultation with the calling party, in limited circumstances, such as when witnesses are "either part of the same family or already live together".⁷ It is for these reasons that "whenever possible" should be removed.

6. In addition, to further lower the risks mentioned above, the Prosecution

⁵ Familiarisation Protocol, para. 1.

⁶ See also ICC-01/04-02/06-656 (Trial Chamber VI decision adopting the Familiarisation Protocol), para. 10 ("As an additional safeguard, the VWU suggests that the Familiarisation Protocol expressly state that joint travel and accommodation would *only* be offered to those witnesses who are not participating in the Court's Protection Programme and who are already aware of their respective interaction with the Court") (emphasis added), referring to VWU Submissions ICC-01/04-02/06-451, para. 17.

⁷ ICC-01/04-02/06-656, para. 9 ("The VWU therefore states that, in practice, witnesses who travel and are accommodated together are 'either part of the same family or already live together, and know themselves and are already aware of their respective status as witnesses before the Court'"), referring to VWU Submissions ICC-01/04-02/06-451, para. 11.

suggests that under paragraph 25 of the Familiarisation Protocol—indicating that witnesses “are also to be reminded of their role in preserving their evidence and in avoiding any unnecessary exposure”—the VWU should specifically tell witnesses not to share any information on social media, including photographs related to their travel to the place of testimony and to their testimony before the Court. This may be part of VWU’s standard practice already, making an amendment of the Protocol unnecessary. Nevertheless, the Prosecution takes the opportunity to highlight the need to alert witnesses in this regard.

7. Regarding limitation of contact between the calling party and a witness, paragraph 30 of the Familiarisation Protocol should be amended to more clearly reflect that “[n]on-substantive contact between the calling party and the witness in the 24 hours preceding the witness’s testimony” should not only “be appropriate in the circumstances and guided by due regard to professional responsibility”, but language needs to be added to make it clear that it should also be: “exceptional and should only be allowed if authorised by the Chamber.” As a result, the Prosecution proposes amending paragraph 30 of the Familiarisation Protocol by adding (underlined) and deleting (strikethrough) the following text:

Non-substantive contact between the calling party and the witness in the 24 hours preceding the witness’ testimony, ~~while not prohibited,~~should be exceptional and should only be allowed if authorised by the Chamber. It should be appropriate in the circumstances and guided by due regard to professional responsibility.

8. Paragraph 29 of the Familiarisation Protocol demonstrates the need for this amendment. Under that paragraph, “[t]he calling party shall endeavour to complete its witness preparations sessions as early as possible and in any event at least 24 hours before the witness’s testimony is due to commence”. As a result, any contact between the calling party and the witness in the 24 hours before the witness testifies should be, in addition to non-substantive, exceptional and subject to the Chamber’s

authorisation.

9. In order to enhance arrangements for witnesses' security, health and psycho-social condition *after* they have testified, the Prosecution proposes to include reference to VWU communicating any concerns regarding witnesses' security, health and psycho-social condition "as soon as possible" to the entity calling the witness under paragraphs 92 and 93, and to the Chamber and the party calling the witness under paragraph 95 of the Familiarisation Protocol.

B. Proposed amendments to the Preparation Protocol

10. In the Prosecution's respectful submission, the proposed amendments outlined below are intended to enhance the Preparation Protocol's stated purposes of (1) assisting the witness "to help ensure that the witness gives relevant, accurate and structured testimony" and (2) "[f]or the calling party to assess and clarify the witness's evidence in order to facilitate the focused, efficient and effective questioning of the witness during the proceedings."⁸

11. In order to facilitate the witness's evidence and the calling party's questioning in the ways mentioned earlier, the Prosecution proposes specifying under paragraph 24 of the Preparation Protocol that the potential exhibits that may be shown to a witness during preparation sessions may include materials which the witness has not previously seen, in order to ascertain whether the witness can usefully comment on them during testimony. As a result, the Prosecution proposes amending paragraph 24 of the Preparation Protocol by adding (underlined) and deleting (strikethrough) the following text:

Show the witness potential exhibits, regardless of whether or not the witness has previously seen them, and ask him or her to comment on them for the purpose of ascertaining whether the witness can usefully comment on them during testimony

⁸ Preparation Protocol, para. 1.

~~determining the utility of using the exhibits in court.~~

12. This approach is consistent with previous case-law from the *Ntaganda* Trial Chamber,⁹ which was using the Preparation Protocol such as the one that the Chamber considers adopting, and which added to its provisions through supplementary directions on the conduct of proceedings.¹⁰

13. In addition, depending on the content of the Chamber's upcoming directions on the conduct of the proceedings,¹¹ while "an opposing party may often not receive disclosure of information provided during a witness preparation session, including information regarding which documents were shown to the witness, until shortly prior to the commencement of testimony [...] the calling party will frequently have to provide the list of documents it intends to use with a witness prior to the completion of the witness preparation sessions."¹² The Prosecution respectfully requests that Trial Chamber X adopt the same approach as adopted by the *Ntaganda* Trial Chamber in its supplementary directions on the conduct of proceedings whereby "[i]n such circumstances, this list should provisionally include, and identify, items which the calling party intends to show to the witness during the preparation session for the purpose of ascertaining whether the witness can usefully comment on them during testimony."¹³ This would provide the opposing party, participants and the Chamber with advance notice of the material that may be shown to witnesses in Court.

⁹ See ICC-01/04-02/06-1342, para. 11, referring to ICC-01/04-02/06-T-78-CONF-ENG, p. 62. See also ICC-01/04-02/06-T-141, p. 19, l. 6-25.

¹⁰ See ICC-01/04-02/06-1342, para. 10-11.

¹¹ See ICC-12-01/18-566, para. 2 (setting out the matters that may be included in the directions to be issued by the Chamber, such as (iii) presentation of evidence by the parties and participants (length and duration, scheduling issues, notification of the forthcoming witnesses) and (iv) calling of witnesses (order, scope and mode of questioning, use of video-link, use of documents with witnesses, including notification and any related objection).

¹² ICC-01/04-02/06-1342, para. 11.

¹³ ICC-01/04-02/06-1342, para. 11.

III. Relief requested

14. For the reasons explained above, the Prosecution respectfully requests that the Chamber accept the proposed amendments to the Familiarisation Protocol and the Preparation Protocol.



Fatou Bensouda, Prosecutor

Dated this 13th February 2020

At The Hague, The Netherlands