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No.: ICC-01/12-01/18
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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 confidential Annex A**

**Prosecution position on amendments proposed by the Defence to
the Confidentiality Protocol**

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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1. The Prosecution files its position on amendments proposed by the Defence to the “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” (“Confidentiality Protocol”),¹ in order to facilitate consideration of the related agenda item at the upcoming status conference of 18 February 2020.
2. In the “Order setting the agenda for the second status conference” (“Order”) of 13 February 2020,² the Single Judge of Trial Chamber X (“Chamber”) issued the agenda for the upcoming status conference of 18 February 2020 to include an item entitled “[u]pdate on Confidentiality Protocol and related issue of contacts with witnesses and/ or victims.”³
3. This item relates to the Chamber’s direction, at the first status conference of 12 December 2020,⁴ for the parties and participants to get in contact with one another with a view to coming up with a joint proposal regarding any amendment to the Confidentiality Protocol.
4. The Prosecution has since received from the Defence a marked up version of the Defence proposed amendments to the Confidentiality Protocol,⁵ and has provided the Defence with its position on those proposed amendments and with a proposed amendment of its own.⁶ The parties and participants are also expected to meet on 17 February 2020 potentially regarding these proposals.

¹ ICC-01/12-01/18-40-Anx-tENG (English translation).

² ICC-01/12-01/18-587.

³ ICC-01/12-01/18-587, para. 2 (E).

⁴ ICC-01/12-01/18-T-008, p. 54, l. 1-6. *See also* ICC-01/12-01/18-507, para. 3(h), requesting views on the need for additional protocols or amendments to the existing protocols, such as the Confidentiality Protocol.

⁵ The proposed amendments from the Defence to the Confidentiality Protocol were received via e-mail on 24 January 2020 and the marked-up version of the Confidentiality Protocol, highlighting those amendments, was received on 27 January 2020.

⁶ *See* Annex A. The Prosecution sent its comments to the Defence and the Legal Representative of Victims on 9 February 2020. This Annex is confidential as it contains *inter partes* communication.

5. Given that the Defence has placed its proposed amendments to the Confidentiality Protocol on the record,⁷ the Prosecution also submits for the record its position on those amendments in the marked-up version found in Annex A.

6. As developed in more detail in Annex A for individual proposed amendments, some of the amendments proposed by the Defence have the effect of limiting or amending the provisions of the Confidentiality Protocol in ways that risk defeating the Protocol's stated purpose.⁸ The Defence otherwise proposes the inclusion of provisions, such as governing disclosure, which are unnecessary as otherwise already provided for and/ or falling outside the scope of the Protocol.⁹ In this regard, a number of the amendments proposed by the Defence to the Confidentiality Protocol,¹⁰ are already regulated by the Protocol on dual status witnesses that the Chamber is minded to adopt.¹¹ The two protocols have different purposes,¹² as well as different scopes of application,¹³ and in the Prosecution's assessment the disadvantages of merging provisions from the two outweigh the advantages.¹⁴

7. The Prosecution has also reflected in Annex A its proposal to modify the Confidentiality Protocol to expressly indicate that paragraph 39 of the Protocol—appearing in the section addressing interviews with witnesses of other parties or participants, and providing that “A video or audio recording of the interview shall be provided to the calling party or participant, to the extent possible, within five days of the interview date”—applies also to any audio or video recording as well as

⁷ See ICC-01/12-01/18-590-AnxA.

⁸ See e.g. Annex A, para. 4(a) and 4(e), 6, 7, 8, 30. See also Confidentiality Protocol, para. 1 (“The purpose of this Protocol is to protect the safety of witnesses, victims and other individuals at risk, as well as the integrity of investigations, in a manner consistent with the rights of suspects and accused”).

⁹ See e.g. Annex A, para. 3.

¹⁰ See e.g. Annex A, para. 4(g) ff.

¹¹ See ICC-01/12-01/18-562, para. 6, referring to ICC-02/04-01/15-504-Anx2.

¹² See Confidentiality Protocol, para. 1. See also ICC-01/12-01/18-30-tENG, para. 13 (the protocol's “purpose is primarily to set the practical modalities for handling confidential information.”) Compare with ICC-02/04-01/15-504, para. 31 (special considerations apply to dual status witnesses—persons represented by the LRVs who are also called as witnesses in the case—and something like a protocol is required to regulate the exchange of information regarding them).

¹³ See e.g. Annex A, para. 4(g).

¹⁴ See also ICC-02/04-01/15-504 (providing that to the extent that the Protocol on dual status witnesses overlaps with any other protocol adopted in this case, the parties are to act in accordance with the obligations set out in each of them).

any type of notes relating to an accidental contact with a witness by a party or participant.¹⁵



Fatou Bensouda, Prosecutor

Dated this 17th February 2020

At The Hague, The Netherlands

¹⁵ See Annex A, para. 43. See also ICC-01/12-01/18-518-Red, para. 41.