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

Date: **6 June 2018**

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Single Judge

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF

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

Public

**Public redacted version of "Response to "Confidential redacted version of the
"Prosecution's observations regarding the «*Décision relative au système de
divulgaration et à d'autres questions connexes (ICC-01/12-01/18-31)*», 24 May 2018,
ICC-01/12-01/18-38-Conf-Exp""**

**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. On 16 May 2018, the Single Judge issued the “*Décision relative au système de divulgation et à d’autres questions connexes*”,¹ in which it ordered the Prosecution and the Defence to submit, respectively on 24 and 31 May 2018, observations on the issue of production of an in-depth analysis chart (“IDAC”).
2. On 25 May 2018, the Prosecution submitted the confidential redacted version of its *ex parte* observations.² The Single Judge has subsequently extended the deadline for the Defence’s observations to 6 June 2018.³
3. The Prosecution requests the Single Judge not to order the production of an IDAC, or, in the alternative, use a disclosure table filed as an Annex.⁴
4. The Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the “Defence”) hereby submits its response to the Prosecution’s Observations.
5. The Defence respectfully requests the Single Judge to reject the Prosecution’s arguments on this matter and order the production of an IDAC. The production of an IDAC would ensure that Mr Al Hassan is informed promptly and in detail of the nature, cause and content of the charges brought against him, as well as his right to have adequate time and facilities for the preparation of the defence.

II. PROCEDURAL HISTORY

6. On 3 April 2018, the appointment of Duty Counsel for Mr Al Hassan was notified.⁵
7. On 4 April 2018, the Prosecution, requested the Pre-Trial Chamber to adopt the disclosure and redaction protocol adopted in the *Al-Mahdi* case.⁶ The Defence has

¹ ICC-01/12-01/18-31 (the “Decision”).

² ICC-01/12-01/18-38-Conf-Exp-Red (the “Prosecution’s Observations”).

³ Email on 25 May 2018.

⁴ Prosecution’s Observations, para. 57; *see also* ICC-01/12-01/18-38-Conf-Exp-AnxA.

⁵ ICC-01/12-01/18-14.

⁶ ICC-01/12-01/18-15, para. 8.

not been able to provide observations as the Prosecution's request was filed prior to the permanent appointment of Defence Counsel.⁷

8. On 6 April 2018, the Single Judge requested additional information,⁸ following which the Prosecution filed observations on 12 April 2018.⁹
9. On 16 April 2018, the appointment of Counsel for Mr Al Hassan was formalised and notified.¹⁰
10. On 8 May 2018, the Prosecution submitted supplementary observations.¹¹
11. On 16 May 2018, the Single Judge issued the Decision on disclosure and other related matters,¹² ordering the parties to submit observations on the production of an in-depth analysis chart.

III. SUBMISSIONS

A. *The Single Judge's discretion to adopt an IDAC*

12. The Prosecution claims that the Appeals Chamber has previously set out certain criteria when the Single Judge is exercising his/her discretion to adopt an IDAC, namely that it must be done in a "fair and reasonable manner", and that it must consider, *inter alia*, "the work involved in the [its] preparation."¹³
13. The Defence provides a different interpretation of the Appeals Chamber's findings. In fact, the Appeals Chamber found that "the Single Judge did not properly exercise her discretion when she ordered the production and submission of in-depth analysis charts without first receiving submissions from the parties."¹⁴ It was solely upon that basis that the Chamber found that the Single Judge's order was not issued in a fair and reasonable manner. The Chamber did not at all address the *raison d'être* of IDACs. The only criterion imposed by the Appeals Chamber on the Pre-Trial Chamber in the process of producing an IDAC is seeking observations from the parties, which is exactly the procedure that is being

⁷ See below, para. 9.

⁸ ICC-01/12-01/18-17.

⁹ ICC-01/12-01/18-18-Conf-Exp-Red2.

¹⁰ ICC-01/12-01/18-19.

¹¹ ICC-01/12-01/18-27-Conf-Exp.

¹² The Decision.

¹³ Prosecution's Observations, paras 12-13.

¹⁴ ICC-02/04-01/15-251, para. 36 (emphasis added).

observed in the current case, in light of the Single Judge's Decision. Therefore, the Prosecution's reading of the Appeals Chamber's judgment misinterprets the Chamber's findings and erroneously widens the scope of the Appeals Chamber's jurisprudence.

14. Similarly, contrary to the Prosecution's submissions,¹⁵ the Chamber's Practice Manual has not "rejected" the production of an IDAC nor has it even assessed whether it would be "an unhelpful and overly taxing tool." The Chamber's Practice Manual has simply refrained from imposing it on the parties.¹⁶

B. The use of an IDAC is necessary to ensure that evidence is relevant

15. The Single Judge highlights the "*nombre considérable d'éléments de preuve que le Procureur entend divulguer à la défense.*"¹⁷ This, in itself, already justifies the necessity to produce an IDAC in order to establish, in a detailed manner, the link between the facts alleged by the Prosecution and the constituent elements of each crime and modes of liability. Otherwise, the assessment of evidence by the Chamber or the Defence will be impossible, hence hindering Mr Al Hassan's right under Article 67(1)(a) and (b) to adequate time and facilities to prepare his defence.
16. As rightly reiterated by the Single Judge,¹⁸ the Defence would not be able to genuinely exercise this right if it became difficult or impossible to comprehend the usefulness of a considerable volume of evidence. In the absence of an IDAC, such usefulness would never be established.
17. The Pre-Trial Chamber in the *Bemba* case, stressed that the suspect's right to be "informed promptly and in detail of the nature, cause and content of the charge" must be read together with the right to "have adequate time and facilities for the preparation of the defence."¹⁹ Accordingly, the Chamber found that "the defence has to have all necessary tools to understand the reasons why the Prosecutor relies on any particular piece of evidence",²⁰ hence the "disclosure of truly relevant evidence presupposed an in-depth analysis by the Prosecutor of each piece of

¹⁵ Prosecution's Observations, paras 2, 14, 37-38.

¹⁶ Chamber's Practice Manual, pp 10, 14.

¹⁷ ICC-01/12-01/18-31, para. 44.

¹⁸ The Decision, para. 25.

¹⁹ ICC-01/05-01/08-55, para. 65.

²⁰ ICC-01/05-01/08-55, para. 66.

evidence prior to its disclosure, whether that evidence is incriminating or exculpatory.”²¹

18. The Prosecution claims that many of the incriminatory documents “should be relatively straight forward”²² and “uncomplicated for the Defence to asses.”²³ This assertion is a vague, relative, and unverifiable assumption that does not constitute sufficient grounds to disclose large evidentiary material without an IDAC.
19. Besides the fact that the said ‘straight forwardness’ and level of complication of evidence are a matter for the Defence and the Chamber to assess, it is in itself irrelevant to the discussion on the production of an IDAC. The question that will be raised by the Defence upon receiving material from the Prosecution is not only regarding what will be disclosed, but also why it is being disclosed and the form in which it is presented. In fact, one of the ways through which evidence might be ‘straight forward’ or ‘relatively uncomplicated’ for the Defence is if an IDAC is produced highlighting the relevance of each piece of evidence to the constituent elements of crimes and modes of liability.
20. The Prosecution, to illustrate its claim that the evidence is “relatively straight-forward” and “uncomplicated”, [REDACTED].²⁴ [REDACTED].
21. [REDACTED],²⁵ [REDACTED].²⁶
22. The Defence further notes that, as stated by the Prosecution, a significant part of the evidence emanates from the *Al-Mahdi* case.²⁷ This evidence, due to the guilty plea, was not contested or litigated in adversarial context. This already imposes the large burden on the Defence for Mr Al Hassan of meticulously assessing evidence differently from the Defence for Mr Al-Mahdi.
23. In these circumstances, the absence of a tool to assess the true relevance of evidence will make it impossible for Mr Al Hassan to prepare his defence in a timely and adequate manner.

²¹ ICC-01/05-01/08-55, para. 68.

²² Prosecution’s observations, para. 16.

²³ Prosecution’s observations, para. 17.

²⁴ Prosecution’s observations, para. 19.

²⁵ ICC-01/05-01/08-55, para. 69.

²⁶ ICC-01/05-01/08-55, para. 69.

²⁷ ICC-01/12-01/18-15, para. 7; [REDACTED]; [REDACTED].

24. As to the Defence's "*positive obligation to analyse incriminatory evidence independently*",²⁸ the Defence finds the Prosecution's arguments irrelevant to the matter at hand. It is important to draw a clear distinction between the Prosecution's obligation to ensure the true relevance of evidence to the case and the Defence's professional and deontological obligations to analyse the said evidence. The latter would be fully observed if the former is carefully fulfilled. Therefore, the review of every item of evidence by the Defence does not excuse the Prosecution from positively indicating their true relevance.

C. The necessity of producing an IDAC at the confirmation stage

25. The Prosecution states that the production of an IDAC at this stage of the proceedings would be premature for the reasons that:
- (i) an IDAC "would not necessarily reflect all of the charges";²⁹
 - (ii) an IDAC "will necessarily be incomplete [REDACTED]";³⁰
 - (iii) "the information analysed in the IDACs, will not necessarily correspond to the Prosecution's evidence at the confirmation hearing."³¹
26. The Prosecution's references to the possibility of disclosing incomplete IDACs [REDACTED] must be read conservatively and should in no way constitute grounds for rejecting the production of an IDAC.
27. As previously found by the Appeals Chamber "the investigation should largely be completed at the stage of the confirmation of charges hearing. Most of the evidence should therefore be available [...]."³² The lack of full evidence is therefore not a persuasive argument and should be dismissed by the Single Judge.
28. Further, the Appeals Chamber's judgment, referenced by the Prosecution in this regard, has acknowledged "the rule of speciality, contained in article 101 of the Statute, which, in principle, should prevent the Prosecution from including in the DCC a crime which had not been described in any way in the warrant of arrest, on the basis of which the requested State agreed to arrest and surrender the person."³³

²⁸ Prosecution's observations, paras 20-21.

²⁹ Prosecution's observations, para. 23.

³⁰ Prosecution's observations, para. 24.

³¹ Prosecution's Observations, para. 25.

³² ICC-01/04-01/10-514, para. 44. (Footnote omitted)

³³ ICC-01/04-01/10-465-Red, para. 89.

29. [REDACTED],³⁴ [REDACTED]. [REDACTED].
30. While the Prosecution is only obligated to submit the Document Containing Charges and list of evidence 30 days prior to the confirmation hearing pursuant to rule 121(3), Mr Al Hassan's right to prepare his defence is immediate and should not be dependent on the said deadlines. The Defence must therefore be provided with the adequate time and facilities to progressively follow the Prosecution's case and use the appropriate tools such as IDACs to closely analyse the evidence as the case develops.

D. Reference to statements in other cases

31. The Prosecution refers to previous cases where statements were made on the necessity of an IDAC.³⁵
32. While the Defence finds it more appropriate to use Chambers' findings as points of reference, it is important to provide the Single Judge with the full context that was ignored by the Prosecution.
33. The Prosecution has previously crafted the same argument in the *Kenyatta* case, using a part of a statement made by Mr. Ruto's Defence Counsel in another case on the use of IDACs.³⁶ The Defence can only reiterate the response that was provided then to the Prosecution:

Submissions of counsel in this case are relevant rather than what counsel for a different accused may or may not make. And as an aside, [...] that is fortified by the absence of any disclosure by the Prosecution from Kenya 1 in this case [...]. [T]he Prosecution perhaps should have been fair to [Defence Counsel for Mr Ruto], because [...] [t]he very next sentence that [the prosecution] omitted [...] is that "On the other hand, the IDAC, it does have utility in as much as it clearly gives the Chamber the opportunity to see exactly the way in which the OTP anchors its case in high detail."³⁷

34. Similarly, the Prosecution states that in the *Kenyatta* case, "the Chamber found that an IDAC was unnecessary."³⁸ The full context of this case needs to be brought to the attention of the Single Judge. The Chamber's determination was made with

³⁴ Prosecution's submissions, para. 24.

³⁵ Prosecution's submissions, paras 33-35.

³⁶ ICC-01/09-01/11-T-18-ENG, p. 40, lines 22-25.

³⁷ ICC-01/09-02/11-T-18-ENG, p. 43, lines 15-25 to p.44, lines 1-3.

³⁸ Prosecution's Observations, para. 35.

regards to the trial stage rather than the confirmation stage. The Defence notes that the disclosure procedure at trial is not being presently addressed.

35. In fact, during the debate on the exact same issue in the *Kenyatta* case, the Prosecution made that distinction stating that: “witness testimony in writing at confirmation is locked in for the purpose of those confirmation proceedings. It doesn’t change because the witnesses don’t testify. In that context it makes much more sense to have an in-depth analysis chart type document that links each and every document to [...] the charges or elements to which they relate.”³⁹ The Prosecution further added that the “[t]he practice to date of the Pre-Trial Chambers has been to order the submission of in-depth analysis charts in lieu of a pre-trial brief type document, and in that context it makes some sense [...]”⁴⁰ Therefore, the difference between the *Kenyatta* and the present case *vis-à-vis* the nature, type and size of the evidence as well the relevant stages of proceedings render the Prosecution’s argument in this regard irrelevant.
36. It is on the basis of these misrepresented instances, and the misinterpretation of the Chambers Practice Manual,⁴¹ that the Prosecution erroneously claims that adopting an IDAC would be a deviation from the Chambers’ recognised best practices.⁴² The Prosecution also ignores the relevant cases that adopted an IDAC, as cited by the Single Judge,⁴³ which have a far greater value than the instances cited by the Prosecution.

E. Alleged administrative burden on the Prosecution and effect on expeditiousness

37. The Prosecution submits that the production of an IDAC will constitute a burden on its time and resources.⁴⁴
38. The argument on additional administrative burden has previously been raised by the Prosecution in the *Katanga* case concerning the Table of Incriminating Evidence (the then equivalent to an IDAC). The Chamber has rejected this argument stating that:

³⁹ ICC-01/09-02/11-T-18-ENG ET, p. 39, lines 12-19.

⁴⁰ ICC-01/09-02/11-T-18-ENG ET, p. 40, lines 6-16.

⁴¹ See *above* para. 14.

⁴² Prosecution’s Observations, paras 37-38.

⁴³ The Decision, paras 43-46.

⁴⁴ Prosecution’s Observations, paras 7, 34, 48-50.

Without wishing to minimise the additional work that the production of the Table of Incriminating Evidence entails, the Chamber considers that workload, which is a consequence of the Chamber's normal exercise of its judicial powers and responsibilities [...] cannot be the legal basis for granting leave to appeal. The appropriate procedural avenue for raising such issues is by applying for a variation of time limit, as indeed the Prosecution has had occasion to do.⁴⁵

39. The prosecution unsuccessfully attempted to raise the same argument in the *Bemba* case.⁴⁶ The Chamber, referring to the abovementioned *Katanga* finding, rejected that argument and further indicated “its surprise that the prosecution did not refer to these recent Decisions by Trial Chamber II in its submissions before this Chamber” and that “Counsel has an obligation to bring any apparently relevant jurisprudence to the attention of the Bench.”⁴⁷ It is evident that this jurisprudence is directly relevant to the current discussion and should therefore not be selectively ignored.
40. The Prosecution further claims that the production of an IDAC will affect the expeditiousness of the proceedings.⁴⁸ Conversely, from the Defence’s point of view, the disclosure of voluminous evidence with no indication on their relevance to the factual allegations and constituent elements of crime or modes of liability is in fact what would truly affect the expeditiousness of the proceedings, in addition to shifting the burden of proof on the Defence. The Defence would neither be able to follow the Prosecution’s case nor prepare its own.

F. Prosecution’s proposed alternative

41. The alternative disclosure table suggested by the Prosecution⁴⁹ is inadequate and in no way helpful to the Defence. The proposed table would not establish the link between the alleged fact, constituent element of crime and the relevant charges and mode of liability, which is one of the most important tools for the Defence in order to understand the voluminous evidence that the Prosecution intends to provide and assess their relevance to the case.

⁴⁵ ICC-01/04-01/07-1088, para. 36 (footnotes omitted).

⁴⁶ ICC-01/05-01/08-682, para. 24.

⁴⁷ ICC-01/05-01/08-682, para. 25.

⁴⁸ Prosecution’s Observations, II. b.

⁴⁹ Prosecution’s Observations, paras 40-41; ICC-01/12-01/18-38-Conf-Exp-AnxA.

42. As previously established,⁵⁰ and in addition to the references made in the Decision,⁵¹ the following guidelines should also be respected when disclosing evidence, in order to ensure that the efficiency and utility of an IDAC are maximised:

-) Only relevant information must be extracted from evidence, hence avoiding the copy and pasting of large extracts.
-) Larger portions of information should be succinctly summarised.
-) A hyperlink must be included to indicate the essence of the relevant information.
-) Referencing must be detailed in a manner that includes the document ID, page, paragraph or lines.

IV. CONFIDENTIALITY

43. This document has been submitted as confidential *ex parte* as it contains information redacted by the Prosecution pursuant to Regulation 23bis(1) and (2).

V. RELIEF SOUGHT

44. In light of the above, the concerns raised in the Prosecution's Observations are clearly outweighed by the advantages of an IDAC in clarifying the Prosecution's case to the Chamber and to the Defence, hence ensuring that Mr Al Hassan enjoys the guarantees of Article 67(1)(a)(b) of the Statute on his right to be informed promptly and in detail of the nature, cause and content of the charges brought against him, as well as his right to have adequate time and facilities for the preparation of the defence.

With the greatest respect,

⁵⁰ ICC-01/04-02/06-47, para. 32.

⁵¹ The Decision, para. 45.

45. The Defence respectfully requests the Honourable Single Judge to adopt the production of an IDAC in the present case, following the model provided in the Decision.⁵²



Yasser Hassan
Lead Counsel for Mr. Al Hassan

Dated this 6th Day of June 2018
At, The Hague

⁵² The Decision, para. 44; ICC-01/05-01/08-232-Anx.