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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
With public Annex**

**Request for an alternative mechanism to facilitate disclosure or, in the
alternative, request for leave to appeal the decision concerning in-depth
analysis charts**

**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:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for the Defence

Yasser Hassan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. It is the duty of the Chamber “to ensure that the disclosure system provides no less than the minimum guarantees set out in articles 67(1)(a) and 67(1)(b) of the Rome Statute and to ensure fairness in the disclosure system and respect for equality of arms between the parties.”¹ However the conditions for disclosure set by the Single Judge, in the absence of any tool to assist with the organisation and presentation of evidentiary material, fail to meet these minimum guarantees.
2. The Defence accordingly submits its request for the Single Judge to adopt an alternative mechanism to facilitate the disclosure of evidentiary material between the parties. In the alternative, the Defence requests leave to appeal the decision of the Single Judge not to impose any requirement for the orderly disclosure of evidentiary material as it unfairly constrains the preparation of the Defence’s case and fails to protect the Suspect’s right to a fair trial.

II. Procedural history

3. On 4 April 2018, the Prosecution requested the Pre-Trial Chamber to adopt the redaction protocol used in the *Al Mahdi* case.²
4. On 6 April 2018, the Single Judge requested additional information from the Prosecution in relation to the request.³ The Prosecution subsequently filed its observations on 12 April 2018 and its supplementary observations on 8 May 2018.⁴
5. The Defence was not given an opportunity to provide observations on the Prosecution’s request concerning the redaction protocol.

¹ *Bemba*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, [ICC-01/05-01/08-55](#), para 21.

² Prosecution’s Request in relation to its Disclosure and Redaction Practice, 4 April 2018, [ICC-01/12-01/18-15](#), para 8.

³ Order for Information from the Prosecution further to the “Prosecution’s Request in relation to its Disclosure and Redaction Practice”, 6 April 2018, [ICC-01/12-01/18-17-tENG](#).

⁴ Version confidentielle expurgée de la « Réponse du Bureau du Procureur à l’ « Ordonnance sollicitant des informations de la part du Procureur suite à sa requête intitulée « Prosecution’s Request in relation to its disclosure and Redaction Practice » » », 12 April 2018, ICC-01/12-01/18-18-Conf-Exp-Red; and Précisions supplémentaires concernant l’état des transcriptions et des traductions du Bureau du Procureur suite à l’ « Ordonnance sollicitant des informations de la part du Procureur suite à sa requête intitulée “Prosecution’s Request in relation to its disclosure and Redaction Practice” », 8 May 2018, ICC-01/12-01/18-27-Conf-Exp.

6. On 16 May 2018, the Single Judge issued the “*Décision relative au système de divulgation et à d’autres questions connexes*”, which establishes the process for disclosure and redaction of evidentiary material at the pre-trial stage.⁵ The Single Judge also ordered the parties to submit their observations on the use of an in-depth analysis chart (**IDAC**) with each disclosure batch.⁶
7. The Defence was notified of the Prosecution’s observations on 25 May 2018.⁷ On 6 June 2018, the Defence submitted its observations on the use of an IDAC, in accordance with the instructions of the Single Judge.⁸
8. On 29 June 2018, the Single Judge issued the decision on the use of in-depth analysis charts in which he determined that the parties were not required to provide any analysis of evidentiary material with disclosure batches, or indeed any tool to assist with the organisation or presentation of disclosed materials.⁹

III. Request for an alternative mechanism to facilitate disclosure

9. In the absence of any mechanism to facilitate the orderly disclosure of evidentiary material, the disclosure system set by the Single Judge does not meet the minimum guarantees provided under articles 67(1)(a) and 67(1)(b) of the Rome Statute.
10. The decision simply reiterates the Prosecution’s claim that an IDAC would postpone the confirmation hearing until September 2019, and dismisses the Defence’s concerns that the absence of an IDAC would prejudice the Suspect’s fair trial rights, including his right to be properly informed of the case against him.¹⁰
11. The lack of any tool to navigate evidentiary material makes it impossible to connect the material with the charges sought, particularly given the number of documents

⁵ *Décision relative au système de divulgation et à d’autres questions connexes*, 16 May 2018, [ICC-01/12-01/18-31](#).

⁶ *ibid*, p 23.

⁷ Public redacted version of the “Prosecution’s observations regarding the « *Décision relative au système de divulgation et à d’autres questions connexes* (ICC-01/12-01/18-31)”, 25 May 2018, [ICC-01/12-01/18-38-Red2](#) (the **Prosecution’s observations**).

⁸ Public redacted version of “Response to “Confidential redacted version of the “Prosecution’s observations regarding the « *Décision relative au système de divulgation et à d’autres questions connexes* (ICC-01/12-01/18-31) », 24 May 2018, ICC-01/12-01/18-38-Conf-Exp”, 6 June 2018, [ICC-01/12-01/18-45-Red](#).

⁹ *Décision relative au tableau d’analyse approfondie des éléments de preuve divulgués*, 29 June 2018, [ICC-01/12-01/18-61](#) (the **decision**).

¹⁰ Article 67(1)(a) of the Rome Statute.

expected to be disclosed,¹¹ and unfairly burdens the Defence in the preparation of its case. The Defence, which has significantly less financial, human and investigative resources than the Prosecution, cannot reasonably be expected to do in less time what the Prosecution purportedly requires one year to complete.

12. The Chamber has already identified evidence relied on by the Prosecution in its application for an arrest warrant¹² that does not specifically correspond to its allegations against the Suspect.¹³ It is therefore imperative that the Chamber adopt a system for disclosure that minimises such errors, and obligates the Prosecution to clearly set out its case.

A. Amended table for organising and presenting evidentiary material

13. In order to minimise delay and ensure that the Suspect is given proper notice of the charges, the Defence respectfully requests the Single Judge to adopt an alternative mechanism for organising disclosure batches based on the table provided in the Prosecution's earlier observations to the Chamber.¹⁴
14. To be clear, the format proposed by the Prosecution is of limited functionality, as it does not set out the counts alleged with sufficient specificity. This however can be rectified by way of small amendment to the presentation of the counts and modes of liability. An amended version of the Prosecution's table is included in the Annex.
15. Use of the amended table with each disclosure batch, as well as an updated version at the time of filing the document containing the charges, will ensure that the material disclosed between the parties is properly organised, and its relevance clearly

¹¹ « L'Accusation indique aussi que le nombre de documents de nature incriminatoire qui sera communiqué sera plus probablement entre 2000 et 3000 ». See Précisions supplémentaires concernant l'état des transcriptions et des traductions du Bureau du Procureur suite à l' « Ordonnance sollicitant des informations de la part du Procureur suite à sa requête intitulée "Prosecution's Request in relation to its disclosure and Redaction Practice" », 8 May 2018, ICC-01/12-01/18-27-Conf-Exp, para 5.

¹² Version confidentielle expurgée de la « Requête urgente du Bureau du Procureur aux fins de délivrance d'un mandat d'arrêt et de demande d'arrestation provisoire à l'encontre de M. Al Hassan Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud, 20 mars 2018, ICC-01/12-54-Secret-Exp », 31 March 2018, ICC-01/12-01/18-1-Conf-Exp-Red2.

¹³ Décision relative à la requête du Procureur aux fins de délivrance d'un mandat d'arrêt à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 22 May 2018, ICC-01/12-01/18-35-Conf-Exp-Red, para 9.

¹⁴ Annex A to Confidential redacted version of the "Prosecution's observations regarding the « Décision relative au système de divulgation et à d'autres questions connexes (ICC-01/12-01/18-31)", 24 May 2018, ICC-01/12-01/18-38-Conf-Exp-AnxA.

explained in relation to the charges and counts. The Defence considers that this mechanism would protect the Suspect's right to fully understand the case against him without imposing a disproportionate burden on the Prosecution.

16. The Prosecution has already stated that the document containing the charges will provide "a comprehensive and [...] up-to-date assessment of the underlying material facts, as well as legal elements, hyper-linked to the corresponding relevant evidence".¹⁵ The amended table will allow the Prosecution to connect the counts with the evidentiary material disclosed after the document containing the charges has been prepared.
17. The Defence's request is consistent with the Chamber's instructions that the document containing the charges indicate "avec le plus de précision possible la qualification juridique la plus appropriée des faits qui sont imputés à la personne poursuivie".¹⁶ The Chamber has also underlined that the DCC must, for each form of participation, include in detail "quels sont les crimes qui sont imputés à la personne poursuivie sous ce mode de participation à l'infraction et les raison pour lesquelles ce mode de participation a été choisi pour ces crimes."¹⁷

B. Document containing the charges

18. In addition to the proposed disclosure table, the Defence requests certain amendments to the filing of the document containing the charges.
19. In the decision, the Single Judge stated:

20. [...] La communication de grandes quantités d'éléments de preuve aux fins de l'audience de confirmation des charges 30 jours seulement avant l'ouverture de cette audience peut porter atteinte au droit du suspect à disposer du temps nécessaire pour préparer sa défense.

21. C'est pourquoi le juge unique attend des parties qu'elles s'acquittent de leurs obligations de divulgation et de communication dès que possible, sans attendre l'expiration des délais fixés par les textes.

¹⁵ Prosecution's observations, para 6.

¹⁶ Décision relative à la requête du Procureur aux fins de délivrance d'un mandat d'arrêt à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 22 May 2018, ICC-01/12-01/18-35-Conf-Exp-Red, para 98.

¹⁷ *ibid*, para 191.

20. In the absence of any tool to organise and present disclosure batches, the document containing the charges would be the only document for the Defence to understand the Prosecution's case in advance of the confirmation hearing. This document should therefore be as comprehensive as possible, with annotations and hyperlinks to the relevant evidentiary material. To this end, the Defence suggests using the model adopted in *Abu Garda*, where the Prosecution submitted a table aligning each paragraph in the DCC to the corresponding evidentiary material.¹⁸
21. Further, the DCC should be filed much earlier than 30 days before the confirmation hearing if the Defence is to be given adequate time and facilities to prepare its case. The Defence requests that the Prosecution be instructed to fulfil its obligation pursuant to Rule 121(3) no later than 60 days prior to the confirmation hearing, and Rules 121(4) and (5) no later than 45 days. This includes submission and amendment of the document containing the charges, an updated version of the table of corresponding evidentiary material, and the Prosecution's list of evidence.
22. The Defence considers that, in lieu of an in-depth analysis chart, the early submission of an annotated DCC and the Prosecution's list of evidence, as well as provision of the proposed table with each disclosure batch, will ensure that the Suspect is given notice of the charges and the Defence has adequate time and facilities to prepare its case, as required under articles 67(1)(a) and 67(1)(b) of the Statute.

IV. Request for leave to appeal

23. In the event that the Single Judge does not accept the Defence's request for an alternative mechanism to ensure orderly disclosure and proper notice of the charges, the Defence respectfully requests leave to appeal the impugned decision.
24. An interlocutory appeal, in short, can be allowed in respect of "issues essential for the disposition of the matter" and for which "immediate appellate resolution may

¹⁸ *Abu Garda*, "Public Redacted Version of Prosecution's "Document containing the charges submitted pursuant to article 61(3) of the Statute" filed on 10 September 2009", 24 September 2009, [ICC-02/05-02/09-91-Red](#); and Annex 1, Public redacted version of the Prosecution List of Evidence under Rule 121(3), 24 September 2009, [ICC-02/05-02/09-91-Anx1-Red](#).

materially advance the proceedings.”¹⁹ In the view of the Defence, the issues raised in the decision meet the legal threshold.

25. At the pre-trial stage, “the Chamber has the duty to ensure that the disclosure system provide no less than the minimum guarantees set out in articles 67(1)(a) and 67(1)(b) of the Statute and to ensure fairness in the disclosure system and respect for equality of arms.”²⁰ However the current conditions for disclosure fall short of this.
26. The decision, which lacks clear reasoning, fails to consider whether the Prosecution’s disclosure obligations, absent the requirement for orderly presentation of evidentiary material, are sufficient for giving the Suspect proper notice of the charges in advance of the confirmation hearing. This includes the failure to assess whether the totality of the documents to be provided by the Prosecution will contain sufficient detail of the charges, or whether the Defence will have adequate time and facilities to prepare its case. The Defence, accordingly, seeks leave to appeal the decision.

A. *Inadequate notice of the charges*

27. As recently emphasised by the Appeals Chamber, it is “axiomatic that an accused person be informed promptly and in detail of the nature, cause and content of a charge”.²¹ The right to proper notice is firmly grounded in the Court’s statutory framework and well established by its jurisprudence.²² Articles 67(1)(a) and 67(1)(b) of the Statute provide, in relevant part, that an accused is entitled “[t]o be informed promptly and in detail of the nature, cause and content of the charge” and “to have adequate time and facilities for the preparation of the defence.”

¹⁹ Article 82(1)(d) Rome Statute; and *Gbagbo and Ble Goude*, Decision on the “*Demande d’autorisation d’interjeter appel de la décision orale rendue par la Chambre de première instance le 4 septembre 2017*”, 11 October 2017, [ICC-02/11-01/15-1051](#), para 4. See also *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), paras 9 and 14; *Katanga*, Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, 14 December 2007, [ICC-01/04-01/07-108](#), p 3; *Katanga*, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, 19 December 2007, [ICC-01/04-01/07-116](#), pp 3-4; *Lubanga*, Decision on Defence Motion for Leave to Appeal, 18 August 2006, [ICC-01/04-01/06-338](#), pp 6-7; and *Lubanga*, Decision on Second Defence Motion for Leave to Appeal, 28 September 2006, [ICC-01/04-01/06-489](#), pp 4-5.

²⁰ *Bemba*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, [ICC-01/05-01/08-55](#), para 21.

²¹ *Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, 8 June 2018, [ICC-01/05-01/08-3636-Red](#), para 186.

²² *Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, [ICC-01/04-01/06-3121-Red](#), para 118.

28. The right to be informed of the “nature and cause” of the charges, and the right to adequate time and facilities to prepare a defence, are further enshrined in article 14(3) of the ICCPR,²³ article 6(3) of the ECHR²⁴ and article 8(2) of the ACHR.²⁵ In the case of *Pélissier and Sassi v. France*, the ECtHR highlighted the “need for special attention to be paid to the notification of the ‘accusation’ to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him”.²⁶
29. Disclosure of evidentiary material, without context or reference to the charges at the core of the proceedings, has limited value and does not, on its own, constitute notice of the charges. In fact, under the current conditions for disclosure, which does not require the parties to connect evidentiary material to the charges, much of the material disclosed will have little relevance until the Prosecution fully articulates its case against the Suspect.
30. The decision also fails to consider the estimated timing for delivering an Arabic version of the Prosecution’s application for an arrest warrant. In his decision granting the request for translation of the Prosecution’s application, the Single Judge emphasised the importance of informing the Suspect of the nature, cause and content of the charges.²⁷ Nevertheless, the Prosecution has indicated that the translation of this document will not start until the witness statements the Prosecution intends to rely on at the confirmation hearing have been translated into Arabic.²⁸ The Prosecution estimates that the translation of the public redacted version of its application will then

²³ “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, [...] (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence”. See [ICCPR](#), adopted 16 December 1966, entered into force 23 March 1976.

²⁴ “Everyone charged with a criminal offence has the following minimum rights : (a) to be informed promptly, in a language which he understand and in detail, of the nature and cause of the accusation against him ; (b) to have adequate time and facilities for the preparation of his defence”. See [ECHR](#), entered into force on 21 September 1970, as amended on 1 June 2010.

²⁵ “During the proceedings, every person is entitled, with fully equality, to the following minimum guarantees: [...] (b) prior notification in detail to the accused of the charges against him; (c) adequate time and means for the preparation of his defense”. See [ACHR](#), entered into force 22 November 1969.

²⁶ *Pélissier and Sassi v. France*, Application no. [25444/94](#), 25 March 1999, para 51

²⁷ Décision relative à la requête de la défense sollicitant la traduction en arabe de la requête du Procureur aux fins de délivrance d’un mandat d’arrêt, 1 June 2018, [ICC-01/12-01/18-42](#), para 12.

²⁸ Prosecution’s notice in relation to the implementation of the “*Décision relative à la requête de la défense sollicitant la traduction en arabe de la requête du Procureur aux fins de délivrance d’un mandat d’arrêt*”, 14 June 2018, [ICC-01/12-01/18-49](#), paras 7-8.

take six to eight weeks to complete, after sourcing a qualified translator,²⁹ making it unlikely that this document can be relied on to provide notice of the charges before the confirmation hearing.

31. Nor can the document containing the charges constitute proper notice given the short time between the statutory deadline for its submission and the confirmation hearing. The Prosecution is not obligated to submit the DCC until at least 30 days before the confirmation hearing, and may amend the charges up to 15 days before the hearing.³⁰ This does not provide the Defence with adequate time or facilities to prepare its case as required under article 67(1)(b) of the Statute.

B. *Inequitable mechanism for disclosure*

32. In its search for truth, the Chamber not only has the duty “to conduct properly the confirmation hearing” but also “to organise meaningfully the disclosure proceedings” in accordance with the rights of the Suspect to a fair trial and the principle of equality of arms.³¹
33. Equality of arms requires equitable processes that appropriately reflect the role of the parties in the proceedings.³² The current disclosure system however does not prove equitable, and exacerbates the already wide disparity of financial, human and investigative resources between the parties. The Defence is now required to organise the large amount of evidentiary material disclosed by the Prosecution – the driving force of the proceedings – without an understanding of the case against the Suspect. The Defence is also prevented from starting meaningful preparation of its case until such information is made available.
34. Given its importance in safeguarding the Suspect’s right to a fair trial, the conditions required for transparent and organised disclosure should be established at the outset. It also prevents poor disclosure practices from escalating into larger appeal issues at a later stage in the proceedings. Indeed, as emphasised by the Appeals Chamber, “[b]reach of or derivation from the rules of a fair trial at the pre-trial stage of the

²⁹ *ibid*, para 6.

³⁰ Rules 121(3) and (4) of the Rules of Procedure and Evidence.

³¹ *Bemba*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, [ICC-01/05-01/08-55](#), para 11.

³² *ibid*, para 21.

proceedings may have implications on the proceedings and may affect the outcome of the trial.”³³ The Defence therefore considers that immediate resolution of this matter, which goes to the heart of the Suspect’s fair trial rights, would materially advance the proceedings.

V. Conclusion

35. The current conditions for disclosure are neither equitable to the Defence nor do they adequately safeguard the Suspect's right to a fair trial. The Defence accordingly requests the Single Judge to implement its proposed alternative to an IDAC, including use of a table to organise evidentiary material in view of the charges sought and early submission of an annotated DCC.
36. In the alternative, the Defence requests leave to appeal the impugned decision and, in particular, whether the absence of guidelines for the orderly disclosure of evidentiary material satisfies the guarantees set out under articles 67(1)(a) and 67(1)(b) of the Rome Statute. The resolution of this matter will clarify the disclosure process, and the minimum conditions required to ensure the process is fair and expeditious, and the rights of the Suspect are protected. Further, immediate resolution of these issues by the Appeals Chamber will ensure that the parties’ disclosure obligations are clearly defined, and equitable practices are established, at the earliest opportunity.

Yasser Hassan
Lead Counsel for Mr Al Hassan

Dated this 4th Day of July 2018
At The Hague, The Netherlands

³³ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), para 11.