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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 MOHAMED  
AG MAHMOUD***

**Public**

**Prosecution's Response to "Defence 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: 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. On 29 June 2018, the Single Judge ruled, in the light of all the arguments of the Parties, that in the present case, it was not required for the Parties to submit an In-Depth Analysis Chart (“IDAC”) or any other table of evidence analysis, at the time of disclosing evidence.<sup>1</sup> The Single Judge instead ordered the disclosure of evidence in accordance with the instructions in the Disclosure System Decision of 16 May 2018.<sup>2</sup>

2. The Defence’s request for “an alternative mechanism”<sup>3</sup> in the form of an “amended table”<sup>4</sup> allegedly to facilitate disclosure, is a veiled request for the Single Judge to reconsider this Decision. It does not demonstrate a clear error of reasoning or a necessity of preventing an injustice. It should be dismissed.

3. The Defence’s alternative request for leave to appeal the Decision is similarly without merit. It does not meet any of the article 82(1)(d) cumulative criteria.<sup>5</sup> It is impermissibly directed at the entire Decision, thus failing to identify any appealable issue.<sup>6</sup> Even *arguendo*, it misreads the Decision and merely disagrees with it.<sup>7</sup> Furthermore, it does not show that a fair or expeditious conduct of the proceedings or outcome of the trial would significantly be affected, and that immediate appellate resolution is warranted.<sup>8</sup>

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<sup>1</sup> ICC-01/12-01/18-61, 29 June 2018 (“Decision”), paras. 22-24 (referring to all the arguments of the Parties summarised in paragraphs 11-21).

<sup>2</sup> See ICC-01/12-01/18-31.

<sup>3</sup> ICC-01/12-01/18-65, 4 June 2018 (“Defence Request”).

<sup>4</sup> Defence Request, paras. 13, 15, 22.

<sup>5</sup> *Situation in the DRC*, Judgement on the Prosecutor’s application for extraordinary review of Pre-Trial Chamber I’s 31 March 2006 decision denying leave to appeal, ICC-01/04-168, (“*Situation in the DRC*, Judgment on Extraordinary Review”), 13 July 2006, paras. 7-19.

<sup>6</sup> *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, Decision on Babala’s request for leave to appeal, ICC-01/05-01/13-800, 27 March 2015, para. 7.

<sup>7</sup> *Situation in the DRC*, Judgment on Extraordinary Review, para. 9; *Prosecution v. Ruto & Sang*, Decision on disclosure of information related to Prosecution intermediaries, ICC-01/09-01/11-1018-Red, 8 October 2013, para. 6; *Prosecutor v. Mbarushimana*, Decision on the “Prosecution’s application for leave to appeal the ‘Decision on the confirmation of charges,’” ICC-01/04-01/10-487, 1 March 2012, paras. 32-33.

<sup>8</sup> *Situation in the DRC*, Judgment on Extraordinary Review, paras. 10-13.

## II. SUBMISSIONS

### (A) The Defence Request is a veiled reconsideration request

4. The Defence Request for an “alternative mechanism” in the form of “an amended table” purportedly to facilitate disclosure,<sup>9</sup> is a veiled attempt for the Single Judge to reconsider his Decision. The Decision exempted the Parties from submitting “any table of analysis of the evidence at the time of their disclosure.”<sup>10</sup> The Decision thus covered the Defence’s so-called “amended table”.

5. The Defence Request does not meet the criteria for reconsideration. Reconsideration can only be granted if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.<sup>11</sup> New facts and arguments arising since a decision was rendered may be relevant to this assessment.<sup>12</sup>

6. Here, the Defence Request does not identify any new facts, or any change of circumstances<sup>13</sup> since the Decision was rendered. Moreover, the Defence merely repeats its arguments that the Single Judge considered in rendering the Decision. In a nutshell, the Defence had advocated for the filing of an IDAC or a table of evidence analysis purportedly to ensure its right to be promptly informed of the

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<sup>9</sup> Defence Request, paras. 13, 15, 22.

<sup>10</sup> Decision, p. 12.

<sup>11</sup> *Prosecutor v. Ongwen*, Decision on Request for Reconsideration of the Order to Disclose Request for Assistance, ICC-02/04-01/15-468 (“*Ongwen* Decision”), 15 June 2016, para. 4; *Prosecutor v. Ntaganda*, Decision on Prosecution’s requests relating to in-court protective measures for Witness P-0039, ICC-01/04-02/06-1049-Red (“*Ntaganda* Decision”), 10 December 2015, para. 12.

<sup>12</sup> *Ongwen* Decision, para. 4 ; *Ntaganda* Decision, para. 12.

<sup>13</sup> *Prosecutor v. Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343 (“*Bemba* TJ”), 21 March 2016, para. 30.

charges, as well as its right to have adequate time and facilities to prepare a defence.<sup>14</sup> The Defence Request repeats the same arguments.<sup>15</sup>

7. By not requiring the Parties to submit an IDAC or any table of evidence analysis as the Defence had requested, the Decision considered but rejected the Defence's submissions. The Defence's repetition of arguments already rejected by the Decision cannot constitute compelling reasons for a reconsideration of the Decision.<sup>16</sup> They should be dismissed.

**(B)The request for leave to appeal is unfounded**

8. The Defence's alternative request for leave to appeal the Decision does not meet any of the article 82(1)(d) criteria. It does not show that there is an appealable issue, that would significantly affect the fair and expeditious conduct of the proceedings, or outcome of the trial and for which appellate resolution may materially advance the proceedings.

*(i) The Defence Request does not identify any appealable issue*

9. The Defence Request is directed at the entire Decision.<sup>17</sup> It generally claims, without focusing on any specific issue, that the Decision lacks reasoning, and fails to consider whether the Prosecution's disclosure obligations, absent the requirement for orderly, or equitable presentation of evidentiary material, are sufficient to give effect to the suspect's proper notice of the charges in advance of the confirmation hearing.<sup>18</sup> The Defence Request thus does not identify any

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<sup>14</sup> Decision, paras. 17-20 (summarising the Defence's arguments); Defence's Response: ICC-01/12-01/18-45-Red, 6 June 2018, paras. 15-40.

<sup>15</sup> Defence Request, paras. 1, 2; 9-22.

<sup>16</sup> *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, Decision on Requests to exclude Western Union Documents and other evidence pursuant to article 69(7), ICC-01/05-01/13-1854, 29 April 2016, paras. 75-76.

<sup>17</sup> Defence Request, paras. 25-34.

<sup>18</sup> Defence Request, para. 26.

particular appealable issue.<sup>19</sup> Given the cumulative nature of the article 82(1)(d) criteria, the Chamber should deny the Defence Request on this deficiency alone.<sup>20</sup>

10. Even assuming, *arguendo*, that the Defence Request restricts itself to the issue it mentions in the conclusion, namely, whether the absence of guidelines for the orderly disclosure of evidentiary material satisfies fair trial guarantees in article 67(1)(a) and (b),<sup>21</sup> it would still fail.

11. First, it is not an appealable issue because it misreads, or merely disagrees with the Decision.<sup>22</sup> The Defence Request incorrectly asserts an absence of guidelines for the orderly disclosure of evidentiary material. It ignores that the Decision ordered the Prosecution to begin the process of evidence disclosure in accordance with the instructions in the Disclosure System Decision of 16 May 2016.

12. Second, the Defence Request merely disagrees with the Single Judge's exercise of discretion in rendering the Decision. Whether a Chamber is to order an IDAC or any other table of evidence analysis at the time of evidence disclosure, falls within the discretion of the Chamber.<sup>23</sup> Before issuing a decision, a Chamber must hear from the Parties.<sup>24</sup> This is what the Single Judge did in this case.<sup>25</sup> In exercising its discretion, a Chamber may consider relevant factors in the Parties' submissions,

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<sup>19</sup> *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, Decision on Babala's request for leave to appeal, ICC-01/05-01/13-800, 27 March 2015, paras. 8-10.

<sup>20</sup> *Prosecutor v. Bemba*, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para. 7; *Prosecutor v. Ongwen*, Decision on Prosecution's request for leave to appeal the decision on witness preparation, ICC-02/04-01/15-537, 19 September 2016, para. 13.

<sup>21</sup> Defence Request, para. 36.

<sup>22</sup> *Situation in the DRC*, Judgment on Extraordinary Review, para. 9; *Prosecution v. Ruto & Sang*, Decision on disclosure of information related to Prosecution intermediaries, ICC-01/09-01/11-1018-Red, 8 October 2013, para. 6; *Prosecutor v. Mbarushimana*, Decision on the "Prosecution's application for leave to appeal the 'Decision on the confirmation of charges,'" ICC-01/04-01/10-487, 1 March 2012, paras. 32-33.

<sup>23</sup> *Prosecutor v. Ongwen*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-02/04-01/15-251 OA3 ("Ongwen IDAC Appeal Judgment"), 17 June 2015, paras. 1, 32.

<sup>24</sup> *Ongwen IDAC Appeal Judgement*, paras. 36-46

<sup>25</sup> Decision, para. 11. See Prosecution's observations: ICC-01/12-01/18-38-Red2, 25 May 2018; Defence's Response: ICC-01/12-01/18-45-Red, 6 June 2018.

including the amount of work involved in preparing the in-depth analysis charts, the time that this would take, the potential delay this could cause to the proceedings and the corresponding impact that these circumstances would have upon the suspect's or accused's right to be tried without undue delay under article 67(1)(c) of the Statute.<sup>26</sup>

13. The Single Judge considered similar and additional factors, before rendering the Decision.<sup>27</sup> In not requiring the Parties to prepare an IDAC or any tables analysing evidence at the time of disclosure, the Decision rejected the Defence's arguments advocating for in-depth evidence analysis charts or tables. The Defence Request, which repeats the arguments the Decision rejected, is therefore a mere disagreement with the Single Judge's exercise of discretion in reaching the Decision.

*(ii) It does not address or demonstrate that any issue will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which immediate appellate intervention is warranted*

14. The Defence Request does not address or demonstrate that any issue arising from the Decision will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which immediate appellate intervention is justified under article 82(1)(d).

15. Overall, the Defence Request fails to consider the current stage of the proceedings and speculates, without any substantiation, an alleged impact on the suspect's right to adequate notification of the charges and equality of arms.<sup>28</sup>

16. The Defence Request ignores that the Decision ordered Prosecution disclosure in accordance with the instructions in the Disclosure System Decision of 16 May

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<sup>26</sup> *Ongwen* IDAC Appeal Judgment, paras. 43, 45.

<sup>27</sup> Decision, paras. 22-24. The Single Judge reached the conclusions "in the light of the arguments of the parties" (para. 23). The Single Judge reviews these arguments in paragraphs 12-21 of the Decision.

<sup>28</sup> Defence Request, paras. 27-34.

2018. In addition to the warrant of arrest, the Suspect will obtain a full notification of the charges when the Document Containing the Charges (“DCC”) is filed. The DCC will provide a comprehensive and more up-to-date assessment of the underlying material facts, as well as legal elements, hyper-linked to the corresponding relevant evidence.<sup>29</sup>

17. The Defence Request wrongly claims that the Decision failed 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.<sup>30</sup> It also wrongly claims unequity in the disclosure process without an understanding of the case against the Suspect.<sup>31</sup> Since the DCC is yet to be filed, and was not the subject of the Decision, the Request impermissibly speculates on its sufficiency to notify the charges. It also wrongly questions the sufficiency of notifying the DCC 30 days prior to the confirmation hearing<sup>32</sup> – a time-line specifically allowed by rule 121(3). The Request does not therefore demonstrate that any issue in the Decision, concerned with disclosure of evidence, will affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

18. Finally, the Defence Request does not make any submissions on how the immediate resolution by the Appeals Chamber of any purported issues in the Decision, would materially advance the proceedings. It generally refers to the importance of safeguarding the Suspect’s rights,<sup>33</sup> without demonstrating how, in the light of the concrete context of this case, immediate appellate intervention

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<sup>29</sup> Prosecution’s observations: ICC-01/12-01/18-38-Red2, 25 May 2018, para. 6.

<sup>30</sup> Defence Request, para. 26.

<sup>31</sup> Defence Request, paras. 32-34.

<sup>32</sup> Defence Request, para. 31.

<sup>33</sup> Defence Request, paras. 34, 36.

would materially advance the proceedings. Appellate intervention is unavailable for resolving abstract issues, but issues grounded in the facts of the case.<sup>34</sup>

19. Conversely, appellate intervention may only further delay the proceedings in this case. Since the Defence (i) misreads the Decision or merely disagrees, without substantiation, with the Single Judge's exercise of discretion to not order an IDAC or any evidence analysis table in the concrete circumstances of the case<sup>35</sup> and, (ii) ignores or merely disagrees with the Single Judge's assessment that imposing an additional obligation to prepare and submit in-depth charts may be a disproportionate measure that may ultimately lead to delays in the proceedings in the circumstances of this case,<sup>36</sup> the Defence cannot show how immediate appellate intervention would materially advance the proceedings in this case. Appellate intervention in these sort of circumstances, where the Appeals Chamber is called upon to first correct a misreading of the basic facts upon which the Single Judge exercised discretion before the Chamber may offer any redress, will only delay, rather than advance the proceedings.

### III. CONCLUSION

20. For the reasons above, the Defence Request should be dismissed.

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<sup>34</sup> *Prosecutor v. Bemba*, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para. 11.

<sup>35</sup> Appeals Chamber jurisprudence confirms a Chamber's discretion in this regard. See *Ongwen* IDAC Appeal Judgment, paras. 1, 2, 32, 42, 43.

<sup>36</sup> *Ongwen* IDAC Appeal Judgment, paras. 2, 42, 43.



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Fatou Bensouda, Prosecutor

Dated this 9<sup>th</sup> day of July 2018  
At The Hague, The Netherlands