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

Date: 26 November 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 the Response to the Prosecution's « Eléments d'information concernant notamment la communication des éléments de preuve, les requêtes aux fins d'expurgation [REDACTED] et des questions de traduction »

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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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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**Victims Participation and
Reparations Section**

Other

I. Introduction

1. The Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud hereby responds to the Prosecution's Observations on the communication of evidentiary material, the requests for withholding identity [REDACTED] and the translation issues.¹
2. The Defence currently faces challenges that seriously affect the Suspect's fair trial rights during the Pre-Trial phase and the ability of the Defence to prepare for the confirmation hearing. Indeed, important sections regarding the nature and scope of the charges against the Suspect remain unknown to the Defence due to the delay in the disclosure of key documents, the remaining redactions imposed on the article 58 application as well as the [REDACTED].

II. Confidentiality

3. In accordance with regulation 23bis(1) of the Regulations of the Court, this document is classified as confidential as it refers to information that is not yet in the public domain.

III. Submissions

(A) Observations on the disclosure process

4. The Prosecution submits that the "*défense dispose d'ores et déjà de la vaste majorité des éléments de preuve à charge, et ce des mois avant l'audience de confirmation des charges*"². In fact, the Defence is only now informed of the size of the Prosecution database in the Al Hassan case and is now aware of the limited information made available to the Defence by the Prosecution contrary to their disclosure obligations.
5. While the Defence is currently analysing over [REDACTED] of evidentiary material, representing more than [REDACTED], the Prosecution's case is

¹ *Al Hassan*, Version confidentielle expurgée des « Eléments d'information concernant notamment la communication des éléments de preuve, les requêtes aux fins d'expurgation [REDACTED] et les questions de traduction », 13 novembre 2018, ICC-01/12-01/18-180-Conf-Red (**Prosecution's motion**).

² Prosecution's motion, para 11.

currently composed of [REDACTED], representing over [REDACTED].³ The Defence only has access to a fraction of these documents.⁴

6. Moreover, the Defence is left to rely on the Prosecution's assessment of these documents when in fact documents disclosed under Rule 77 may be of equal importance to the Defence. The Defence would also like to recall the Pre-Trial disclosure obligation of the Prosecution to investigate exculpatory circumstances pursuant to article 54(1)(a) and 67(2) of the Rome Statute.
7. Several aspects, as shown below, also demonstrate that the Prosecution has withheld or delayed a large amount of relatively significant evidence from the Defence, at times without cause and other times under the pretext of delayed disclosure [REDACTED]. While the Statute and Rules of Procedure and Evidence do, in principle, provide for the possibility of delayed disclosure at this stage of the proceedings, the Prosecution must genuinely attempt to use these exceptions in a manner that does not hinder the fairness of the proceedings as a whole.
8. Despite the submission of the lesser redacted version of the article 58 application today, 22 November 2018, *in French*, important paragraphs and sections of the article 58 application remain withheld or entirely redacted from the Defence. These parts refer to arguably the most important elements of the Prosecution's case, i.e. evidence related to the alleged establishment of a common plan and Mr Al Hassan's alleged participation in the crimes committed. This constitutes a major impediment to the Defence in understanding the Prosecution's case.
9. The Prosecution has also still not provided the Arabic translation of the lesser redacted version of the article 58 application. The Defence stresses that this delay deprives Mr Al Hassan from being notified of the allegations against him in a language he fully understands. The delay of the Arabic translation of the lesser-redacted version of the article 58 application also prevents the effective analysis of the case and stalls defence investigations.

³ Prosecution's motion para 6.

⁴ Version publique expurgée des « Observations du Bureau du Procureur sur la date de confirmation des charges », 9 juillet 2018, ICC-01/12-01/18-75-Conf-Exp, para 11.

10. In addition to the already heavily redacted article 58 application, the Prosecution refers to evidence that is, to date, withheld from the Defence. This includes, for example, an item which was referred to at least 15 times in the article 58 application,⁵ in order to substantiate the Prosecution's claims on the alleged control over Timbuktu,⁶ systematic attack against civilians,⁷ and more importantly, Mr Al Hassan's alleged implication in the crimes,⁸ and his individual responsibility.⁹
11. The Prosecution has also failed to justify [REDACTED]. This further illustrates the Prosecution's unjustified practice of delaying the disclosure of important evidence to the Defence.
12. The unnecessary burden imposed on the Defence due to this disclosure practice is further exacerbated by [REDACTED].

(B) [REDACTED]

13. The table provided by the Prosecution [REDACTED].
14. [REDACTED].
15. [REDACTED].
16. [REDACTED].
17. [REDACTED].
18. Finally, [REDACTED].

⁵ [REDACTED]

⁶ « Requête urgente du Bureau du Procureur aux fin 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 March 2018, ICC-01/12-54-Secret-Exp, paras 73, 77. *See also*, [REDACTED] which were also not disclosed.

⁷ Ibid, paras 110-111, 114, 130.

⁸ Ibid, paras 195, 203 (three times), 205.

⁹ Ibid, paras 264, 280, 283, 285 (twice).

IV. Conclusion

19. In light of the above, the Defence currently faces serious challenges due to the delays in disclosing key documents, the heavy redactions imposed on the article 58 application and decision. Additionally, [REDACTED].
20. The Prosecution's practice of keeping the Defence in the dark for a long period of time places the Defence in a *fait accompli* situation where it is expected to perform its duties under unnecessarily challenging conditions within unreasonable delays. Accordingly, the Defence cannot request additional resources in advance based on estimation only.



Yasser Hassan
Lead Counsel for Mr Al Hassan

Dated this 26th Day of November 2018
At The Hague, The Netherlands