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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Alapini-Gansou

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 Defence Reply on Admissibility Challenge (Gravity)

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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1. Introduction

1. The Defence for Mr. Al Hassan respectfully submits the following discrete Reply to the 'Prosecution's observations in response to the Defence's admissibility challenge' (the Response),¹ and the more truncated observations submitted by the authorities of Mali ('the Observations of Mali').²
2. The Prosecution's attempt to inflate the gravity of this case is predicated on a flawed conception of the nature of the charges in this case. Essentially, the Prosecutor has invited the Pre-Trial Chamber to base its assessment of gravity on allegations that fall outside the scope of the Statute, or which fail to comport to the charging requirements of Article 67(1)(a) of the Statute and Regulation 52 of the Regulations of the Court. Their claim that virtually every single person in Timbuktu was a victim in this case is a striking testament to the extent to which this case is not being used as a forum to adjudicate the personal responsibility of Mr. Al Hassan, but to put Ansar Dine and Sharia Law on trial. [REDACTED].³
3. Although the Chamber cannot consider the merits of the charges in its determination, the admissibility assessment must be conducted on the basis of a proper definition of the scope of the case against the defendant. The admissibility of a case necessarily concerns an assessment of both the person and the conduct which are the subject matter of the case; the ICC is not called upon to judge crimes in the abstract, but specific conduct, which is attributable to a specific individual.

¹ ICC-01/12-01/18-432-Conf.

² ICC-01/12-01/18-441-Conf-Anx. The Reply has been filed on a confidential basis due to the fact it cites to this filing. The Defence nonetheless has no objection to the Reply being reclassified as public.

³ ICC-01/12-01/18-441-Conf-Anx, p. 3.

4. The Pre-Trial Chamber's assessment of the admissibility of the case must therefore be restricted to:
 - a. Specific incidents, or a specific course conduct, which are defined in time and space, with a sufficient degree of precision to comply with the requirements of Regulation 52 and Article 67(1); and
 - b. Conduct, which has been specifically attributed to Mr. Al Hassan.
5. When the gravity of this case is assessed in accordance with the correct legal framework, then it should be apparent that this case fails to satisfy the requisite gravity threshold for prosecution before this Court.

2. Submissions

6. Article 17 of the Statute employs a uniform definition of a case for the purpose of adjudicating different types of challenges to admissibility. It follows, therefore, that the Pre-Trial Chamber must apply the same definition that has been established in connection with other admissibility proceedings, to the current request.
7. Specifically, in order to assess whether domestic investigations encompass the same or substantially the same conduct as an ICC case, the definition of an ICC case is based on the same person/same conduct test. The latter is assessed by reference to incidents, which are "understood as referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators"⁴. As explained by the Prosecution:⁵

⁴ ICC-01/11-01/11-565, para. 99, citing para. 62 of the Gaddafi Admissibility Appeals Judgment (ICC-01/11-01/11-547-Red), which in turn states that, "[f]or the purposes of defining a 'case' in article 17 (1) (a) of the Statute, in situations such as the present, the Appeals Chamber considers that the conduct described in the incidents under investigation which is imputed to the suspect is a necessary component of the case. Such conduct forms the core of any criminal case because without it, there

the ordinary meaning of “case” and “conduct” indicates that a case before the ICC must be based on particular prohibited conduct, with reference to facts occurring during specific incidents. This constitutes the subject-matter before the Court. [...]

A cursory review of the definition of the terms “case” (“[a] thing that befalls or happens to anyone, an event” or “[t]he state of facts juridically considered”) “affaire” (defined as a trial, case or lawsuit, each of which are based on a particular set of facts placed before the court) and “asunto” (the subject matter which is being dealt with; criminal proceeding, judicial proceeding) –used in the English, French and Spanish versions of Article 17 –indicates that the term should be understood as being constituted by the underlying event, incident and circumstances –i.e. in the criminal context, the conduct of the suspect in relation to a given incident. The definition of the terms “conduct” (behaviour, acts or omissions), “comportement” (behaviour, conduct, reaction) and “conducta” (set of actions, behaviour) referred to in Article 17(1)(c) further confirms that this term should be understood as facts or acts related to a given event or incident.

8. Similarly, the ICC Presidency found that the DRC proceedings against Germain Katanga did not fall foul of the provision concerning *ne bis in idem* because the DRC case did not encompass any crimes, arising from the massacre in Bogoro on 24 February 2003.⁶ The defining feature of the ICC case was thus a specific event, circumscribed in time and space.
9. A significant proportion of the allegations set out in the Response are not circumscribed in time and space –a key example being the claim that Mr. Al Hassan is responsible for persecution, based on unidentified incidents, of virtually every identified and unidentified person in Timbuktu and its environs, over the entire period of the charges.⁷ The Prosecution also appears

would be no case. At the same time, it is the conduct of the suspect him or herself that is the basis for the case against him or her”.

⁵ ICC-01/11-01/11-321-Red, paras. 34 and 35.

⁶ ICC-01/04-01/07-3679, para. 25.

⁷ Response, para. 9.

to have confounded the distinction between evidence and charges; it has thus argued that each Islamic Tribunal Judgment tendered into evidence constitutes a charge,⁸ irrespective as to whether the DCC contains any pleadings or detail concerning whether the Judgment in question falls within the scope of Article 8(2)(c)(iv) (including, whether the charged offences was 'related to the armed conflict'),⁹ or whether there is any nexus to the individual responsibility of Mr. Al Hassan.

10. This issue of the role of the defendant is of critical importance to the distinction between challenges to the admissibility of a situation and challenges to the admissibility of a case. When assessing the latter, the Appeals Chamber has already affirmed that the definition of a case necessarily encompasses an assessment of the role of the defendant in the charged incidents.¹⁰ In the same manner that a State cannot rely on investigative activity that targets the same crimes, but not the same defendant,¹¹ the Prosecution also cannot rely on abstract crimes, that have not been tied to the individual conduct of the defendant on this case. In line with the Appeals Chamber's directive that the seriousness of defendant's role must be assessed on a case-by-case basis, and not by reference to overly rigid formulae,¹² it also follows that the seriousness of the defendant's conduct cannot be assessed solely by reference to the types of crimes included in the charges; the exercise would otherwise become wholly question-begging. Gravity cannot be assessed by reference to category of perpetrators, but the

⁸ Response, para. 11.

⁹ See Commentary to Article 6 of APII, which affirms that the scope of this prohibition is confined to "offences related to the armed conflict; these must be criminal offences and not merely administrative or disciplinary offences or procedures.": "Penal Prosecutions" ICRC Commentary of 1987, paras. 4589.

¹⁰ ICC-01/09-01/11-307, para. 1. See also paras. 41-47. See also ICC-01/11-01/11-547-Red, para. 1: "the 'conduct' that defines the 'case', in situations such as the present, is both that of the suspect and that described in the incidents under investigation which is imputed to the suspect."

¹¹ ICC-01/09-01/11-307, para. 1.

¹² ICC-01/04-169, para. 76.

Prosecutor is also incorrect to suggest that a gravity assessment should not encompass an evaluation of conduct by reference to the alleged role of the perpetrator in the conduct in question.

11. The very fact that there appears to be such a difference between the respective positions of the Prosecution and the Defence concerning the scope of the case speaks to the larger issue as to the extent to which the charges in this case are deficient, and fail to provide sufficient clarity and detail to enable the Defence to exercise its rights under the Statute, including the right to challenge the gravity of the case. Specifically, the notion – advanced by the Prosecution – that a defendant can be charged with ‘types’ of crimes, rather than specific criminal conduct,¹³ undermines the utility and effectiveness of the right to challenge admissibility on gravity grounds. If the Prosecution’s thesis is adopted by the Pre-Trial Chamber, this would mean that the counts set out in the DCC are empty envelopes, that the Prosecution can continue to fill with evidence of new incidents, throughout the proceedings. This, in turn, means that in practice, it will be impossible to assess the gravity of the particular case against the defendant until the envelopes have been filled and sealed. This degree of uncertainty is inimical to the defendant’s right to know, in advance, the specific contours of the case against him. It is also contrary to:

- Firstly, the fact that the Statute envisages that admissibility challenges should be addressed and resolved prior to the commencement of the trial;¹⁴ and
- Secondly, the Appeals Chamber’s affirmation that in order to conduct an informed admissibility assessment, it is necessary to know the

¹³ ICC-01/12-01/18-335-Conf-Corr, paras. 4, 212, fn. 1009, 966, 1002, 1027, 1034, 1035, 1036, 1038, 1039, 1042, 1075, 1077.

¹⁴ Article 19(4) of the Statute.

contours or parameters of case concerning the defendant.¹⁵ This obligation of clarity applies with equal force to investigations conducted by States, and those conducted by the ICC Prosecutor.¹⁶

12. It follows, therefore, that the Pre-Trial Chamber cannot resolve this challenge by simply accepting the Prosecution's interpretation of the scope of the charges. Rather, in the same manner that the Chamber is called upon to assess the contents of domestic case files for the purpose of ascertaining whether there is a sufficient basis to conclude that the scope of domestic proceedings encompasses the same person/conduct as the ICC,¹⁷ the Pre-Trial Chamber should also confine its analysis of gravity to charged incidents, that has been pleaded with a sufficient degree of precision to ascertain the parameters or contours of this case. This should necessarily exclude allegations identified by the Defence as being overly vague or improperly open-ended,¹⁸ or those which fail to include any conduct, on the part of Mr. Al Hassan, that would fall within the provisions of Articles 7 and 8 of the Statute.¹⁹

13. When the scope of the case is properly restricted to an analysis of the conduct of Mr. Al Hassan and his alleged contributions to the charged incidents,²⁰ then

¹⁵ ICC-01/11-01/11-547-Red, para. 2. See also para. 68, which cites to the Prosecution's argument that "The case which forms the subject of an admissibility determination must be denoted by a set of clearly defined parameters that will permit ready comparison. If the given parameters are overly broad, effective comparison is rendered meaningless".

¹⁶ ICC-01/11-01/11-547-Red, para. 83: "The Appeals Chamber does not consider it to be inherent in an on-going investigation that its contours are unclear. As noted by the Prosecutor, any investigation - irrespective of its stage - will have certain defining parameters, and it is an indication that there is no concrete case under investigation if those parameters are unclear. In this sense, in relation to what must be submitted by a State in its challenge to admissibility, it must be possible for a Chamber to compare what is being investigated domestically against what is being investigated by the Prosecutor in order for it to assess whether the same case (substantially the same conduct) is being investigated. To make this assessment, the contours of the case being investigated domestically (and indeed by the Prosecutor) must be clear."

¹⁷ ICC-01/11-01/11-547-Red, paras. 105, 116, 119.

¹⁸ ICC-01/12-01/18-394-Red, paras. 9-37; See also ICC-01/12-01/18-442-Conf, para. 6.

¹⁹ See for example, ICC-01/12-01/18-442-Conf, paras. 6, 18-33, 112-114.

²⁰ ICC-02/11-02/11-185, para. 12, which refers to "the degree of participation of the convicted person; the degree of intent".

the scope of the case is small, and lacking in gravity. The Document Containing the Charges (DCC) sets out a very small number of incidents that have any pleaded linkage to the conduct and participation of Mr. Al Hassan.²¹ The Prosecution has also not established that the specific incidents involving Mr. Al Hassan constitute serious violations of international criminal law, or otherwise reach the threshold of the type of conduct prescribed by Articles 7 and 8.²² In this regard, the existence of (unconfirmed) multiple charges under Articles 7 and 8 does not in itself make this case serious or grave; as emphasised by Pre-Trial Chamber II,²³

all crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases.

14. Mr. Al Hassan also neither bears the greatest responsibility for the alleged crimes, nor did he engage in conduct that is qualitatively grave.²⁴ Specifically, he is not alleged in the DCC to have played a role of particular significance or importance within the hierarchy of the common plan.²⁵ The Prosecution has also not alleged that his personal conduct involved “aggravating or qualitative factors” that would have enhanced the gravity of his conduct.²⁶ The particular circumstances concerning the alleged commission of the crimes in his case also diminish their gravity.²⁷ Mr. Al Hassan was a low level police administrator – he neither instigated the system of administration in

²¹ ICC-01/12-01/18-394-Red, paras. 246, 247, 263; ICC-01/12-01/18-442-Conf, paras. 69-168.

²² See for example, ICC-01/12-01/18-442-Conf, paras. 14, 66, 104, 110.

²³ ICC-01/09-19, para. 56.

²⁴ ICC-01/09-19, paras. 60-62.

²⁵ Cf ICC-01/12-01/18-335-Conf-Corr, paras. 243-250.

²⁶ Cf ICC-01/09-19-Corr, para. 62; see also ICC-02/11-02/11-185, para. 11.

²⁷ See ICC-02/11-02/11-185, para. 11, which refers to the “the circumstances of manner, time and location”.

Timbuktu nor controlled it. The circumstances also severely limited his sphere of authority and capacity for real choice.

3. Conclusion

15. The current Reply does not in any way seek to diminish the experience of all those who lived in Timbuktu in 2012. But the Court must draw a bright-line between cases, which justify the Court's reach into the realm of domestic matters, and those which do not. The pleaded case concerning Mr. Al Hassan does not cross the Court's gravity threshold, and as such, it should be found to be inadmissible.



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Dated this 6th Day of August 2019
At The Hague, The Netherlands