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**International
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15 January 2020

TRIAL CHAMBER X

Before: **Judge Kimberly Prost, Single Judge**

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
THE PROSECUTOR V. AL HASSAN AG ABDOUL AZIZ AG MOHAMED
AG MAHMOUD**

**URGENT
Public**

**Public redacted version of "Prosecution's request for extension of
time limits in the *Decision on the evidence disclosure protocol and other
related matters*", 14 January 2020, ICC-01/12-01/18-552-Conf-exp**

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. Pursuant to regulation 35 of the Regulations of the Court (“Regulations”), the Prosecution requests an extension, until 16 March 2020, of the time limits in the “Decision on the evidence disclosure protocol and other related matters”¹ for reviewing the redactions applied to the evidence disclosed in this case.
2. The time limits requested to be extended are those set out by the Single Judge to (i) fully and thoroughly review and report on non-standard redactions and file applications before the competent Chamber to either maintain those authorised by Pre-Trial Chamber I in this case or to lift, pursuant to regulation 42, those authorised by a Chamber in other proceedings (currently, 10 February 2020);² and (ii) review and report on standard redactions under categories B.2. and B.3. (currently, 24 February 2020)³ (“Time Limits”).
3. As explained in previous submissions,⁴ the Prosecution team in the *Al Hassan* case continues its review of redactions alongside witness management efforts to enable disclosure as soon as possible. While the Prosecution had earlier estimated needing four months to do so, the Prosecution team is presently entirely dedicating its resources to this review and related witness management so as to complete these tasks expeditiously particularly given the short Time Limits.
4. Nevertheless, extending these Time Limits until 16 March 2020, by an additional 35 and 21 days respectively, is justified on the grounds that the volume of material and amount of work involved simply make it unfeasible for the Prosecution to comply with the given deadlines for completing the ordered tasks. The additional time requested would further facilitate the timely contacting of witnesses and finalising of protection arrangements. These grounds constitute good cause for the

¹ ICC-01/12-01/18-546 (“Decision”).

² Decision, para. 20-21, p.11.

³ Decision, para. 22, p. 11.

⁴ See section III below (Procedural Background).

limited extension requested, which is not only necessary to enable the Prosecution to complete the ordered tasks but also reasonable.

II. Confidentiality

5. Under regulation 23*bis* (1) and (2) of the Regulations, the Prosecution files this application as confidential and *ex parte*, available only to the Prosecution and the Victims and Witness Unit, since (i) it refers to submissions and decisions of the same classification; and (ii) contains confidential information regarding Prosecution witnesses and other persons. A confidential redacted version available also to the Defence and a public redacted version are submitted on the same day.

6. The Prosecution files this application as an urgent request, and respectfully requests that the Single Judge decide on this request on an expedited basis given the currently applicable Time Limits.

III. Procedural background

7. Pursuant to an order by Trial Chamber X (“Chamber”),⁵ on 6 December 2019 the Prosecution filed written submissions in preparation for a first status conference addressing among other topics the disclosure of outstanding material in the Prosecution’s possession, including witnesses’ identities which the Prosecution had been authorised not to disclose to the Defence.⁶

8. The Prosecution submitted that in the context of the security situation in Mali and given the number of Prosecution (INCRIM) witnesses for whom protection measures needed to be pursued and/or finalised, a minimum of four months starting from January 2020 was necessary to comply with its article 68 obligations under the

⁵ ICC-01/12-01/18-507.

⁶ ICC-01/12-01/18-518-Conf-Exp. A confidential redacted version was submitted on 9 December 2019: ICC-01/12-01/18-518-Conf-Exp-Red2. A public redacted version was submitted on 9 December 2019: ICC-01/12-01/18-518-Red (“Prosecution Submissions on Status Conference”).

Rome Statute (“Statute”) by conducting witness management.⁷ The Prosecution also envisaged that the biggest disclosure effort would derive *inter alia* from the re-disclosure of lesser redacted versions of previously disclosed material, in particular for the translations into Arabic of (INCRIM) witnesses’ statements.⁸ Subject to any delayed disclosure requests, the Prosecution anticipated carrying out the last witness-related disclosures in mid-May 2020.⁹ During this time, it estimated that disclosure would be made on a continuous basis.¹⁰ The Prosecution reiterated these submissions at the first status conference.¹¹

9. Also on 6 December 2019, the Prosecution submitted a request for an *ex parte* status conference on witness protection and security issues before the Chamber and with the presence of the Victims and Witnesses Unit (“VWU”), so as to provide information on the witnesses’ security situation and its impact on the preparation of the trial.¹² [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED].¹³

10. [REDACTED]
[REDACTED]¹⁴ [REDACTED]
[REDACTED]

11. On 30 December 2019, the Single Judge issued the Decision, “put[ting] in place a procedure and set[ting] time limits for the review of existing redactions and the re-

⁷ Prosecution Submissions on Status Conference, para. 6-8 (defining witness management as the necessary management in collaboration with the VWU of the security situation of each witness prior to disclosing their identity and lesser redacted statements). In addition to that, the Prosecution also needs to review the Rule 77 and PEXO witness-related material within the Time Limits.

⁸ Prosecution Submissions on Status Conference, para. 27.

⁹ Prosecution Submissions on Status Conference, para. 8.

¹⁰ Prosecution Submissions on Status Conference, para. 7.

¹¹ ICC-01/12-01/18-T-008-ENG, p. 28-29, 31-32.

¹² [REDACTED]
[REDACTED]

¹⁴ [REDACTED]
[REDACTED]

disclosure of material in lesser redacted forms”.¹⁵

12. In the Decision, the Single Judge “recall[ed] and emphasise[d] the disclosing party’s ongoing obligation to review the redactions applied to ensure that they remain justified.”¹⁶ She determined that where standard redactions are no longer justified, the disclosing party will immediately lift the redactions and re-disclose the material.¹⁷ She instructed the Prosecution to lift non-standard redactions not covered by regulation 42, “on a rolling basis and at the earliest opportunity”.¹⁸ To that aim among other aims, she set out the Time Limits referred to above. Pursuant to these Time Limits, “any application to seek authorisation to delay the disclosure of the identity of a witness” should be made by 10 February 2020.¹⁹

13. On 6 January 2020, the Chamber issued a decision setting the commencement date of the trial and fixing the calendar up to that date.²⁰

IV. Applicable law

14. Regulation 35 of the Regulations provides that a time limit may be extended “if good cause is shown.”²¹

V. Submissions

A. Unfeasibility for the Prosecution to comply with the Time Limits given the volume of material and amount of work involved constitutes good cause justifying the requested extension

15. The Prosecution acknowledges the importance of completing the review of

¹⁵ Decision, para. 7.

¹⁶ Decision, para. 18.

¹⁷ Decision, para. 19.

¹⁸ Decision, p. 10. *See also* para. 19.

¹⁹ Decision, para. 20.

²⁰ ICC-01/12-01/18-548.

²¹ Regulation 35(1) of the Regulations.

redactions applied to the evidence disclosed (“Review”),²² as expeditiously as possible, specifically the review of non-standard redactions and categories B.2 and B.3 redactions. However, having assessed the volume of material for Review and the average time involved in thoroughly conducting such Review, the Prosecution is regrettably unable to complete this Review and carry out the other tasks ordered by the Single Judge (reports to the Chamber and filing of applications) (“Other Tasks”) within the allocated Time Limits, notwithstanding its efforts so far and despite having adopted measures to expedite this exercise.²³ In the Prosecution’s respectful submission, this constitutes “good cause” within the terms of regulation 35 of the Regulations.

i. The volume of material for Review justifies the requested extension

16. The volume of material for Review justifies the requested extension.

17. The volume of disclosed material containing redactions and the number of such redactions justify *of themselves* the requested extension.

18. In the *Al Hassan* case, redactions have been applied to 5,798 disclosed documents.²⁴ These documents amount to a total 34,981 pages, out of which 5,481 pages contain redactions to the content (41,774 redaction boxes). More specifically, 5,045 documents contain redactions to the metadata and 1,284 documents also or only to the content (the latter amounting to 12,554 pages, out of which 5,481 pages contain redactions to the content (41,774 redaction boxes)).

19. Of the disclosed documents containing redactions:

J Non-standard redactions (code F) have been applied to the content of 264 documents, amounting to a total of 4,343 pages, out of which 2,897 pages

²² See Decision, para. 18 (recalling and emphasising the disclosing party’s ongoing obligation to review the redactions applied to ensure that they remain justified, and considering that the stage of the proceedings impacts on the assessment of the appropriateness of non-disclosure).

²³ See section V. C below (The requested extension of time is reasonable).

²⁴ For technical reasons, the numbers provided in this paragraph are subject to a small margin of error.

contain redactions (24,099 redaction boxes);

-) Standard category B.2. redactions (code B.2.) have been applied to the content of 281 documents, amounting to a total of 4,581 pages, out of which 886 pages contain redactions (3,338 redaction boxes);
-) Standard category B.3. redactions (code B.3.) have been applied to the content of 205 documents, amounting to a total of 3,356 pages, out of which 788 pages contain redactions (3,205 redaction boxes).

20. Moreover, the material for Review is broader. This is because the Single Judge has ordered the Prosecution to file, within the 10 February 2020 time limit, applications to maintain already approved non-standard redactions, including applications to seek authorisation for delayed disclosure witnesses.²⁵ This implicitly requires Review of all witness-related material, whether or not it has already been disclosed. Such witness-related material is not limited to INCRIM witnesses but extends to Rule 77 and PEXO witnesses.

21. Thus, in addition to the disclosed material containing redactions, in order to conduct the Review thoroughly, the material for Review comprises *inter alia*:

-) material which the Prosecution was previously judicially authorised not to disclose, including the material of those witnesses for whom an anonymous summary was disclosed rather than their statement or transcript of interview. By way of illustration, the summaries of several witnesses are referred to in the Document Containing the Charges [REDACTED]²⁶;

-) [REDACTED]
[REDACTED] and

²⁵ Decision, para. 20.

²⁶ [REDACTED]
[REDACTED]

) any witness-related material newly obtained or INCRIM material not relied on during the confirmation of charges hearing.

ii. The amount of work involved to thoroughly conduct the Review and carry out the Other Tasks justifies the requested extension

22. Notwithstanding its efforts to date and the measures adopted by the Prosecution to expedite the Review,²⁷ the amount of work involved to thoroughly conduct the Review and carry out the Other Tasks justifies the requested extension.

23. In particular, notwithstanding the ability to automate some of the Review tasks, the bulk of these tasks continues to require manual effort and individualised attention. These tasks are resource-intensive and time-consuming, which reflects in the amount of work involved and its nature.

24. As for the Review of the redactions, the lifting of non-standard (code F) redactions from the metadata cannot be automated but needs to be done manually. This includes populating the “related to” field [REDACTED]

25. As for redactions to the content of documents, even if non-standard (code F) redactions can be automatically lifted in most instances, be it for INCRIM or Rule 77 or PEXO witnesses, these redactions nevertheless need to be individually reviewed in order to ensure that other standard redactions (e.g. B.2. or B.3.) should not be implemented instead.²⁸ Such implementation can only be done manually.

26. [REDACTED]

²⁷ See section V. C below (The requested extension of time is reasonable).

²⁸ For example, where information was previously redacted under non-standard Code F redaction in order to prevent the witness from being identified, this information may warrant B.1, B.2 or B.3 redactions nonetheless, even where B.2 or B.3 categories are narrowly construed as envisaged in the Decision, para. 22.

27. Regarding standard redactions, whether to the content or the metadata, all B.2. and B.3. categories redactions need to be individually reviewed and manually lifted. Furthermore, thoroughly conducting the Review of redactions extends to reviewing whether *other* standard redactions are still justified, individually reviewing them and manually lifting those that are not, including any redactions under category A.1., A.4. or B.5. It also extends to reviewing and manually applying redactions to material not yet disclosed, including the material of Prosecution witnesses for whom an anonymous summary was provided instead of their statements or interview transcripts.

28. To give an example of a witness for whom the provision of an anonymous summary had been authorised previously, the review and redaction of Witness [REDACTED] [REDACTED] required around seven working days for a Prosecution staff lawyer and two additional working days for an [REDACTED] one to two days are also necessary to prepare the disclosure package.

29. Where redacted documents have an Arabic translation, the lifting—or in selected cases the replacement of redactions—needs to be mirrored in the Arabic translation, which again can only be done individually and manually and by Prosecution staff with Arabic language skills.

30. Finally, the Single Judge in the Decision indicated the need, when re-disclosing material formerly subject to non-standard redactions, to clearly specify which information is newly available to the Defence. This requires considerable additional work to record this information, bearing in mind that all metadata pseudonym fields also have to be edited accordingly.

31. Considering the amount of work involved in thoroughly carrying out the Review, the Prosecution is unable to complete it within the Time Limits and carry out the Other Tasks, despite its efforts to date and measures adopted to expedite this exercise as much as possible.

32. In addition to the Review, Other Tasks need to be conducted within the Time Limits, further justifying the requested extension. The tasks that must be completed *by 10 February 2020* are:

-) reporting to the Chamber specifying the amount of redactions remaining and their nature;²⁹
-) filing applications to maintain non-standard redactions approved by Pre-Trial Chamber I in this case, including “any application to seek authorisation to delay the disclosure of the identity of a witness.”³⁰ Applications to maintain standard redactions must set out the required justification (necessity and appropriateness) of the redaction sought, while the Defence must be simultaneously provided with a redacted version of the application.³¹ Subject to further on-going assessment, the Prosecution had earlier estimated that it would seek delayed disclosure for about ten witnesses;³²
-) filing applications pursuant to regulation 42 before the competent Chamber to lift non-standard redactions which are no longer justified. The redaction of 18 witnesses’ identities is covered by regulation 42, out of which four to five are INCRIM.

33. By 24 February 2020, the Prosecution must also report to the Chamber on the standard redactions applied under categories B.2 and B.3.³³

²⁹ Decision, para. 20.

³⁰ Decision, para. 20.

³¹ Decision, para. 20 (applications to maintain non-standard redactions approved by Pre-Trial Chamber I in this case shall follow the procedure described in Decision, para. 15).

³² Prosecution Submissions on Status Conference, para. 30.

³³ Decision, p. 11.

B. Additional time would further facilitate the timely contacting of witnesses and finalising of protection arrangements, justifying the requested extension

34. The Prosecution has continuously emphasised in its submissions the importance of witness management in this case given the security situation in Mali due *inter alia* to the threat posed by the armed groups associated with the Accused. The objective risk to witnesses' safety and security posed by these armed groups causes a direct threat to the current proceedings and the Prosecution's ability to present its witnesses at trial.³⁴

35. The additional time requested would assist the Prosecution's witness management efforts by further facilitating the timely contacting of witnesses and finalising of protection arrangements. This amounts to good cause justifying the requested extension.

36. Under rule 81(3) of the Rules of Procedure and Evidence, when the disclosure of information kept confidential to protect the safety of witnesses and victims and members of their families "may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance." Under regulation 42(3) of the Regulations, before making a determination to vary protective measures, "the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application" to vary protective measures has been made. The additional time requested would further facilitate the Prosecution contacting witnesses to inform them of any upcoming disclosure of their identity and, when authorisation to withhold it comes from other proceedings, would further facilitate the Prosecution obtaining the information regarding whether such person consents to variation.

37. The additional time requested would also increase the likelihood of the Prosecution filing fewer applications for delayed disclosure of witnesses' identity. The Prosecution is continuously seeking to restrict the number of delayed disclosure

³⁴ [REDACTED]

witnesses.³⁵ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]³⁶ The longer that the Prosecution has to conduct witness management, including where possible finalising protection arrangements, the higher the likelihood that delayed disclosure becomes unnecessary. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁷ the additional time would increase the likelihood of protection arrangements being implemented, which might obviate the need to apply for delayed disclosure.

C. The requested extension of time is reasonable

38. The requested extension of the Time Limits by an additional 35 and 21 days respectively is reasonable. It is a limited extension designed to address the volume of material and amount of work involved in completing the Review and Other Tasks. Notwithstanding its efforts so far and the measures taken to expedite the Review, these are insufficient to allow the Prosecution to comply with the short Time Limits. Nevertheless, these measures contribute to any requested extension being circumscribed in time.

39. The Prosecution has taken the following additional measures to expedite the Review:

) Directed all relevant staff members on the team to work only on the Review,

³⁵ [REDACTED]

³⁶ [REDACTED]

³⁷ [REDACTED]

except for urgent pressing tasks that need to be carried out concurrently;

) Within the limited possibilities of the Office of the Prosecutor, borrowed additional staff members from other teams for the purpose of carrying out the Review for the limited amount of time those teams can spare them;

) Directed all staff to review all categories of information at the same time (Codes F, A.1., A.4., B.2., B.3. etc.) to save time and avoid duplication of work and disclosure;

) Automated processes to the appropriate extent when possible;

)

40. In addition, the Prosecution has taken appropriate measures to prioritise the Review, such as completing INCRIM witnesses first [REDACTED] to seek to ensure that—depending *inter alia* on the ability to put protection measures in place—the Prosecution can disclose the most relevant witnesses for its case and for the Defence first. The Prosecution has taken into account the Single Judge’s indication in this regard,³⁸ and will strive to carry out the disclosure of material on a rolling basis to ensure that the Defence receives as much of it as early as possible.

41. Finally, the non-standard redactions subject to Review were judicially authorised.³⁹ [REDACTED]

[REDACTED]

³⁸ Decision, para. 8, p. 10.

³⁹ For material related to individuals who have been contacted or screened by the Prosecution but who have not provided formal statements, the Prosecution was authorised to redact their identity *proprio motu*. Nevertheless, this was decided by the Single Judge of Pre-Trial Chamber I: ICC-01/12-01/18-66-tENG, para. 30.

⁴⁰ This underscores the reasonableness of the extension requested to enable the Prosecution to conduct the Review and the care needed to do so, and further militates in favour of granting the additional time, bearing in mind that article 68 creates obligations for the Court as a whole.

VI. Requested Relief

42. For the foregoing reasons, the Prosecution requests that the Single Judge grant the requested extension, until 16 March 2020, of the Time Limits.



Fatou Bensouda, Prosecutor

Dated this 14th January 2020

At The Hague, The Netherlands