

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 22 January 2020

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3 February 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*

Public

Public redacted version of the "Prosecution's request for leave to reply to the Defence Response to 'Confidential 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', ICC-01/12-01/18-554-Conf-Exp", 22 January 2020, ICC-01/12-01/18-559-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 24(5) of the Regulations of the Court (“Regulations”), the Prosecution requests leave to reply to the Defence Response¹ to the Prosecution’s Request for extension of time limits to review redactions for disclosure.²

2. The Prosecution seeks to respond to new issues raised in the Response which the Prosecution could not reasonably have anticipated in its original Request. Specifically, the Prosecution seeks to respond to the Defence submission that the Prosecution has impermissibly circumscribed its disclosure obligations, for instance by disclosing relevant information [REDACTED]

[REDACTED] in the form of an investigation note.³ Although the Prosecution does not propose to respond to every mischaracterisation made by the Defence regarding the fulfilment of the Prosecution’s disclosure obligations, its silence on any of these matters should not be viewed as agreement. Instead, the Prosecution seeks leave to reply to the limited issues regarding disclosure of [REDACTED]

3. The Prosecution is mindful that it filed its original Request as an urgent application, and that the Single Judge shortened the time-limits for any responses accordingly. While it is not the Prosecution’s intention to delay the Request’s resolution, the issues on which the Prosecution seeks leave to reply have potential security and resource implications [REDACTED]

[REDACTED]
[REDACTED]. If the Single Judge is minded to

¹ “Response to ‘Confidential 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’, ICC-01/12-01/18-554-Conf-Exp (“Response”). The Defence filed a public redacted version on 20 January 2020: ICC-01/12-01/18-554-Red.

² ICC-01/12-01/18-552-Conf-Exp, filed on 14 January 2020. The Prosecution filed a confidential redacted version on 15 January 2020: ICC-01/12-01/18-552-Conf-Red (“Request”), as well as a public redacted version: ICC-01/12-01/18-552-Red2.

³ See Response, para. 30, 32-34, 38.

decide on the new issues, the Prosecution respectfully requests an opportunity to be heard.

II. Confidentiality

4. Under regulation 23*bis*(2) of the Regulations, the Prosecution files this application as confidential and *ex parte*, available only to the Defence, the Prosecution and the Victims and Witness Unit, since it refers to filings of the same classification. A public redacted version will be submitted as soon as possible.

IV. Application for leave to reply

5. Regulation 24(5) of the Regulations provides that, in general, (1) participants may only reply to a response with the leave of the Chamber and (2) a reply shall be limited to new issues raised in the response which the replying party could not reasonably have anticipated.

6. Here, the Prosecution seeks leave to file a reply in order to respond to issues raised in the Defence Response which could not reasonably have been anticipated in the Prosecution Request.

7. Specifically, the Prosecution seeks leave to respond to the Defence submission that the Prosecution has engaged in impermissibly narrow “disclosure circumscriptions”⁴ by disclosing an investigation note containing the relevant disclosable information [REDACTED]

[REDACTED],⁵

including the submission that “ICC case law has also affirmed that [...] the Prosecution must disclose [security assessments] if they contain information falling

⁴ Response, para. 34. *See also* para. 30, 32-33 (Prosecution defining disclosure obligations in an impermissibly narrow manner). *See further* para. 38 (relief sought).

⁵ With respect to this note, [REDACTED] (Response, para. 21, 33), the Prosecution has recently filed a public redacted version of its request regarding the disclosure of material concerning witnesses whose evidence was disclosed in the form of anonymous summary or with redactions, where the Prosecution submitted the investigator’s note for Pre-Trial Chamber I’s consideration as to whether it could be disclosed at that stage [REDACTED].

under Rule 77 or Article 67(2).”⁶

8. These are new issues which could not have been reasonably anticipated in the Request. With the Request, the Prosecution sought an extension of the time-limits for review of redactions for disclosure, arguing *inter alia* that the volume of material and amount of work involved made it unfeasible for the Prosecution to comply with the given deadlines. In this context, the Prosecution referred to the time required for review and redaction of Witness [REDACTED] as an example of said amount of work.⁷ The content of disclosure related to this witness or its form and the rules governing it were not discussed further in the Request.

9. The Defence attempts to shoehorn the new issues into the Response further illustrating that these issues could not reasonably have been anticipated in the Request.⁸ Rather than seeking expanded relief,⁹ the Defence should have made a separate application. The Single Judge does not need to consider the new issues in order to decide on the Request. However, if minded to rule on them, the Prosecution should be given the opportunity to file a reply.

10. The Defence’s unnecessary annexing of correspondence between the Parties cannot suffice to portray the Prosecution’s position on the new matters. Be that as it may, the correspondence [REDACTED]

[REDACTED],¹⁰ does not fully and adequately address the new issues,

⁶ Response, para. 32, and accompanying citations.

⁷ See Request, para. 28.

⁸ See *e.g.* Response, para. 33 (“The Prosecution’s insistence that it will only disclose investigators’ notes, even if the underlying security assessment contains PEXO or Rule 77 materials (as is the case with [REDACTED]), therefore suggests that its formal adherence to disclosure deadlines might not constitute full compliance in reality.”) See also paras. 30 (“Although the Request formally concerns the deadlines for reviewing and reporting on redactions [...]”), 38 (relief sought).

⁹ Beyond asking the Single Judge to reject the Request and make future provision for any further delays, the Defence adds a request that the Single Judge “[a]ffirm the Prosecution’s ongoing duty to comply fully with its investigative and disclosure obligations under Rule 77 and Article 67(2)”. Response, para. 38 (i to iii).

¹⁰ ICC-01/12-01/18-554-Conf-Exp-AnxD [REDACTED].

particularly since in the Response the Defence expands [REDACTED].¹¹ Leave to brief these issues is therefore requested.

VI. Requested Relief

11. For the foregoing reasons, the Prosecution requests that the Single Judge grant it leave to file a limited reply to the Response, addressing the issues outlined above.



Fatou Bensouda, Prosecutor

Dated this 22nd January 2020

At The Hague, The Netherlands

¹¹ Response, para. 32, fn. 25 and citations therein [REDACTED]
[REDACTED]