

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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3 February 2020

TRIAL CHAMBER X

Before: 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 "Prosecution Response to the Defence's "Request for Clarification and Disclosure"", 13 November 2019, ICC-01/12-01/18-485-Conf

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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Other

Introduction

1. On 7 November 2019, the Defence filed a request for clarification and disclosure (“the Request”)¹ asking the Chamber (i) permission to contact a Person of Interest, either in general or [REDACTED] of the Person of Interest in [REDACTED], and (ii) an order to the Prosecution to disclose a certain number of documents that may be related to [REDACTED] the Person of Interest or which otherwise fall under either article 67(2) of the Statute or rule 77 of the Rules of Procedure and Evidence.
2. The Defense should immediately communicate the name of the Person of Interest to the Prosecution (as it envisages in the Request²). Pending such disclosure, the Prosecution can only make a few observations.

Confidentiality

3. Pursuant to regulation 23bis(2) of the Regulations of the Court, this response is filed confidential, *ex parte*, available only to the Prosecution, the Defence and the Victims and Witnesses Unit (“VWU”), thereby mirroring the level of confidentiality of the Request itself.

Submissions

On the identity of the Person of Interest

4. Upon reading the Request, the Prosecution is unable to determine/ascertain who the Person of Interest is due to the fact that the information provided by the Defence is too vague.

¹ ICC-01/12-01/18-482 [REDACTED]

² Request, footnote 2.

5. The mere fact that Person of Interest [REDACTED] and claims to have been [REDACTED] [REDACTED] does not constitute sufficient information to that effect.
6. The Prosecution therefore requests the disclosure of the name of the Person of Interest in order to establish whether this person is a Prosecution witness or not. Absent such a disclosure, the Request cannot be meaningfully entertained.

On a potential breach of the Protocol on the Handling of Confidential Information

7. The Defence claims to have contacted VWU to discuss the situation:
-) However, the Prosecution notes that VWU is not in possession of the identity of all Prosecution witnesses and it is therefore not in a position to make a proper and independent assessment of the Defence's concerns;
 -) Further, it appears necessary to clarify whether or not VWU effectively expressed "the opinion that the situation described by the Defence was not regulated by the terms of the Protocol on the Handling of Confidential Information".³ In this sense, the Prosecution notes that it is not for VWU to express such an opinion, particularly in a situation such as the current one, where VWU is not in possession of information regarding all witnesses.
8. Most importantly, in the circumstances, the Defence should have contacted the Office of the Prosecutor directly to ask for a confirmation as to whether this person was a Prosecution witness or not and resolve this issue *inter partes*.
9. By failing to do so on 17 October 2019, when it became clear to Defence that "people from the Hague" had met the person [REDACTED] the Defence did

³ The Request, par. 10.

not act with the required caution and, depending on who the Person of Interest is, may have breached the *Protocol on the Handling of Confidential Information*. The Defence is certainly aware that there is a substantial likelihood that “people from the Hague” who met [REDACTED] of relevance to the present case in Mali are members of the Prosecution.

10. Should it become clear that the Person of Interest is in fact a Prosecution witness and that a breach occurred, the Defence should forthwith disclose all interviews, recordings of the same and investigation notes or logs relating to the Defence's contact and interactions with the witness to the Prosecution. An assessment of the impact of such a breach on the safety and security of the Person of Interest and his relatives may also have to be conducted.

On the Defence approach to individuals who may potentially be Prosecution witnesses

11. The Prosecution is concerned about the ability of the Defence Resource Person to properly handle such situation. It is established that the Resource Person [REDACTED] [REDACTED]⁴, but he seems to have failed to understand that the person he was meeting had met “people from The Hague” (*cf.* the Defence recording). This may also indicate a lack of clarity in relation to the instructions given to the Resource Person by the Defence Team.

The topic covered by Defence with the Person of Interest

12. Contrary to what the Defence seems to argue in paragraph 13 of its filing, the topics discussed with the Person of Interest have no bearing on whether the Protocol has been breached. Rather, in the present case, it is the fact that the Defence is entering into contact with, and interviewing a person who is potentially a Prosecution witness, that triggers the breach. That “the Defence

⁴ See [REDACTED].

could restrict the content of its communications to issues concerning [REDACTED] of the Person of Interest [REDACTED] " is not relevant⁵. Such an approach, if continued, could clearly lead to further breaches of the Protocol.

Relief requested

13. For the reasons set forth above, the Prosecution invites the Defence to provide immediately the full identity of the Person of Interest and reserves its right to make further submissions subsequently regarding *inter alia* the disclosure of any material.



Fatou Bensouda, Prosecutor

Dated this 13th day of November 2019
At The Hague, The Netherlands

⁵ The Request, para. 13.