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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding
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 motion for clarification relating to the time-limits applicable to filing ICC-01/12-01/18-568-Conf

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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I. Introduction

1. The Defence for Mr. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the “Defence”) submits the present motion seeking to clarify that pursuant to the procedure established under Article 61 of the Statute and Rule 121 of the Rules of Procedure and Evidence (the “RPE”) the time-limits applicable to the response on the merits of the Prosecution Request for corrections and amendments concerning the Confirmation Decision¹ will only start running from the filing of the Arabic translation and relevant incriminating evidence.
2. The Prosecution Request appears to be a request for correction, a request for reconsideration, a request for leave to appeal, and a request for amendment of the charges, all at once. At the same time, the legal basis referred to in the Request suggests that it is a “description of the charges by the Prosecutor under rule 121, sub-rule 3”, namely, a Document Containing the Charges.²
3. This cultivated confusion around the nature of the Request is prejudicial and creates uncertainty regarding applicable standards, as well as time and page limits. The Defence respectfully requests the Pre-Trial Chamber to clarify the procedural rules applicable to the Prosecution Request.
4. The present motion is not a response on the merits of the Prosecution Request. The Defence will submit a full response within the applicable time-limits, once they have been clarified.

II. Classification

5. In accordance with Regulation 23*bis*(1) of the Regulations of the Court (the “RoC”), this request is classified as confidential, as it relates to a confidential filing.

III. Submissions

6. In the Request, the Prosecution lists and describes various elements to correct, or new incidents which it requests be added to the charges under the existing Counts confirmed by the Pre-Trial Chamber. These new allegations are sought to be added to

¹ ICC-01/12-01/18-568-Conf (the “Request”, or “Prosecution Request”).

² Request, para. 1.

the charges, and if granted, will form an integral part of the charges against Mr. Al Hassan in the trial proceedings.

7. The Defence notes that under Rule 128 RPE, the Chamber may request the parties to submit observations on issues of fact or law raised by the Prosecution Request. In doing so, the Defence respectfully submits that the Chamber should be mindful of the significant character of the amendments sought by the Prosecution, and of the importance of fully respecting Mr. Al Hassan's rights under Article 67(1) of the Statute.
8. First, the amendments sought in the Request are not minor in nature, and do not constitute mere corrections.³ As opposed to the very minor amendments that were requested in the Kenyan cases,⁴ the Prosecution Request is 32 pages long and lists several new incidents, supported by 271 pages of evidence. Annex D to the Request lists 17 new factual allegations, in addition to the new modes of liability the Prosecution is seeking to add in relating to eight incidents. The review of the relevant evidence and analysis of the new charges represent a time-consuming process before the Pre-Trial Chamber whilst the Defence is currently getting trial ready for a start date of 14 July 2020.
9. Second, the Request and the supporting evidence have not yet been communicated in Arabic.
10. Upon receipt of the Prosecution Request, the Defence immediately contacted the Prosecution to inquire as to when it intended to file an Arabic version of the Request. The Prosecution suggested that the Defence should contact LSS to request such translation, implying that they would not themselves provide an Arabic translation of their Request, which was drafted in English.⁵ After contacting LSS, the Defence was informed that the translation of the Request had not yet been initiated as of 4 February 2020.⁶

³ *Contra* Request, para. 2.

⁴ In *Kenyatta*, the Prosecution was seeking to add one limited factual allegation (ICC-01/09-02/11-700-Corr, para. 26); while in *Ruto*, the requested amendment sought to add two days to the temporal scope of the case (ICC-01/09-01/11-859).

⁵ See Annex A.

⁶ See Annex B.

11. Similarly, the Defence contacted the Prosecution to know when it could expect to receive Arabic versions of the incriminating evidence used in support of the new charges included in the Request. The Prosecution has not yet given a final answer to the Defence's email.⁷
12. The Prosecution Request is not just any regular filing: it contains new incidents, which the Prosecution is seeking to add to the charges against Mr. Al Hassan and against which Mr. Al Hassan will have to defend himself. The Prosecution further invokes Regulation 38(3)(g) of the Regulations of the Court to justify the high page count of its Request. This provision only applies to a "description of the charges by the Prosecutor". If this Request is indeed what the Prosecution purports it to be, the absolute necessity of filing an Arabic version should be obvious.
13. It has long been recognised in the present proceedings that, pursuant to Article 67(1) of the Statute, Mr. Al Hassan is entitled to be informed of the charges against him in a language he understands, namely, Arabic. The Single Judge stated as much in multiple filings, from the very beginning of the case.⁸ The Request, as filed, is incompatible with the requirements of Article 67(1) of the Statute.
14. The sought amendments to the charges are of the same nature as the original DCC, as is demonstrated by the similar language and formulation used in both, and it makes no difference that they do not result in the addition of new counts. Mr. Al Hassan has an absolute right to be informed of these new charges in a language he fully understands, and to benefit from an appropriate time-limit to evaluate these lengthy and convoluted amendments and file a response to the Request. These rights should not be derogated by the mere fact that the Prosecution has selected this juncture to file its Request, in the absence of any just cause for not seizing the Chamber sooner.
15. This is supported by the practice adopted by the Single Judge at the confirmation stage, whereby the Arabic version of the DCC was ordered to be filed 30 days prior to the confirmation of charges hearing, as per the terms of Rule 121(3) of the Rules of

⁷ See Annex C.

⁸ See, e.g., ICC-01/12-01/18-31, para. 26; ICC-01/12-01/18-42-tENG, paras. 11-13; ICC-01/12-01/18-94-Red-tENG, para. 26.

Procedure and Evidence. The same time-limits should naturally apply here. This would be consistent with the Singe Judge's previous finding that:

... the two provisions – concerning respectively the 30-day time limit, and the right of the suspect to be informed of the nature, cause and content of the charge against him in a language which he fully understands and speaks – must be read together. Effect is given to a suspect's right to understand the nature, cause and content of the charge against him, only if the person receives, in a language which he fully understands and speaks, the document containing a detailed description of the charges together with a list of the evidence which the Prosecutor intends to present at the confirmation hearing, "no later than 30 days before the date of the confirmation hearing".⁹

16. The requested 30-day deadline is further justified by the fact that the Prosecution Request represents a mutation of charges from the initial DCC. Indeed, the Prosecution is requesting to add four new witnesses and 16 new alleged victims, at the same time that it filed a provisional witness list containing 25 new witnesses on which it did not rely at the confirmation stage.¹⁰
17. In addition, the Defence notes that it was not disclosed Arabic versions of all of the documents referred to in support of the sought amendments of the charges,¹¹ even though all items were disclosed under Rule 76 of the Rules of Procedure and Evidence.¹² In line with established practice in the present case, such Arabic translations form an integral part of the right of the defendant under Article 67(1).
18. Therefore, the Chamber should order the Prosecution to file an Arabic version of its Request, and to disclose Arabic version of all supporting evidence, prior to time-limits for response to run. Given that the Prosecution has been planning to file its Request for amendments since at least November 2019 i.e. over two months ago,¹³ there is no reasonable justification as to why such disclosure cannot be promptly provided.
19. The Defence intends to file a response on the merits of the Prosecution Request within the timeframe that will be determined by the Pre-Trial Chamber. The Defence also

⁹ ICC-01/12-01/18-94-Red-tENG, para. 26.

¹⁰ ICC-01/12-01/18-572-Conf-AnxA.

¹¹ The documents relating to Witnesses [REDACTED] have not yet been communicated in Arabic, despite having been disclosed under Rule 76. Similarly, documents [REDACTED], contained in Annex B of the Prosecution Request have not been communicated in Arabic.

¹² ICC-01/12-01/18-553, ICC-01/12-01/18-565, ICC-01/12-01/18-578.

¹³ ICC-01/12-01/18-487-Conf-Exp-Red, para. 11.

underlines that in accordance with the principles set out in Rule 122, it is entitled to have the last word on this matter.

IV. Conclusion

20. For these reasons, the Defence respectfully requests the Pre-Trial Chamber to:

- (1) Order the Prosecution to prepare and file an Arabic version of the Request;
- (2) Order that the Prosecution disclose Arabic versions of all items of evidence cited in support of the new charges;
- (3) Order that a 30-day time-limit for any response on the merits of the Prosecution Request start running from the filing of the Arabic version;
- (4) Order that the 30-day deadline must fall at least 15 days after any observations filed by the Legal Representatives of victims;
- (5) Suspend any time-limit to respond to the Prosecution Request pending a decision on the present motion.



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Dated this 5th Day of February 2020
At The Hague, The Netherlands