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TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Kimberly Prost

SITUATION IN THE REPUBLIC OF MALI

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

Public

With confidential Annexes A and B

**Public redacted version of the “Prosecution’s further observations regarding its request for corrections and amendments concerning the Confirmation Decision”,
4 March 2020, ICC-01/12-01/18-625-Conf-Exp**

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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. On 31 January 2020, the Prosecution submitted its request for corrections and/or amendments to the Decision on the confirmation of the charges (“Prosecution’s Request”).¹ On 5 February 2020 the Defence submitted a request for clarification regarding the time-limits applicable to the Prosecution’s Request, and an order requiring the Prosecution to provide an Arabic translation of its Request and all supporting evidence (“Defence’s Request”).² On 7 February 2020, Pre-Trial Chamber I (“Chamber”) granted the Defence’s request to suspend the time limits pending its decision on the Defence’s Request. On 13 February 2020, the Legal representatives of the victims submitted their observations regarding the Prosecution’s Request.³ On 17 February 2020, an Arabic translation of the Prosecution’s Request, and of the witness statements of [REDACTED] was communicated to the Defence.

2. On 21 February 2020, as regards part III of the Prosecution’s Request, the Chamber ordered the Prosecution to submit by 4 March 2020 supplementary observations explaining the circumstances and reasons for which the witness statements of [REDACTED] were obtained after the filing of the updated Document containing the Charges (“DCC”) on 11 May 2019.⁴

3. The Prosecution provides its supplementary observations. The Prosecution is legally entitled to continue collecting evidence after the filing of the DCC, and the confirmation hearing. In particular, there are reasonable justifications as to why the witness statements of these four witnesses were obtained after the filing of the updated DCC in May 2019, and after the hearing of the confirmation of charges in July 2019.

¹ ICC-01/12-01/18-568- [REDACTED] and four annexes [REDACTED]

² ICC-01/12-01/18-580- [REDACTED] and three annexes [REDACTED]

³ ICC-01/12-01/18-593- [REDACTED]

⁴ ICC-01/12-01/18-608- [REDACTED] p.19, para.54, p.23.

4. The witnesses were interviewed subsequent to the DCC and confirmation hearing, because: (a) witnesses were previously unwilling to cooperate; (b) witnesses were not previously identified; (c) witnesses' locations were not previously obtained; and/or (d) witnesses were unable to meet with the Prosecution before then. The Prosecution sought to meet with them at the earliest opportunity once it was able to do so. Additionally, the Prosecution was constrained by the very difficult security context of this case in Mali, so that contacts are only made when strictly necessary, and when individuals are properly confirmed and assessed as being individuals of potential interest.

5. Even after their statements were obtained, and before the Prosecution's Request could be made, the Prosecution needed to: (a) assess their evidence against other available information to ensure that there was a sufficient basis to request an amendment; (b) assess their individual security situations to ensure their evidence could be relied upon and they could be called to testify; (c) secure their agreement to testify at trial; and (d) request the Arabic translations of their rule 76 witness statements.

6. There is no prejudice to the Accused as he has received: notice of the Prosecution's Request six months in advance of trial, disclosure of the rule 76 statements since 2019, and Arabic translations of these documents five months in advance of the start of trial. Moreover, subject to their security needs, [REDACTED]

[REDACTED]

[REDACTED] Accordingly, the Accused will have sufficient time to adequately prepare for trial and to prepare for their testimony.

Confidentiality

7. These observations are filed on an *ex parte* basis, only to the Prosecution and the Victims and Witnesses Unit, as they contain information that is potentially identifying of Prosecution witnesses. A redacted confidential version of the filing

will be submitted the same day. Annexes A and B are confidential because they contain confidential information regarding Prosecution witnesses and innocent third parties.

Submissions

Circumstances and reasons for obtaining witness statements of [REDACTED] [REDACTED] after filing of the DCC

I. Legal basis for collecting evidence after filing of the DCC and the confirmation hearing

8. There is a legal basis for the Prosecution to conduct further, focussed investigations, after the DCC is filed, and following confirmation of the charges, in support of an amendment to the charges.

9. As the Chamber recalls, under article 61(9) of the Statute: “[a]fter the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges”.

10. The Chamber adopts the reasoning of Pre-Trial Chamber II that the Prosecution does not have *carte blanche* to conduct investigations post-confirmation, but it is possible to do so if: “‘it is necessary in order to establish the truth’ or ‘certain circumstances’ exist that justify doing so.” The Chamber refers to the rationale stated by Pre-Trial Chamber II that: “continued investigation should be related only to such essential pieces of evidence which were not known or available to the Office of the Prosecutor prior to the confirmation hearing or could not have been collected for any other reason, except at a later stage”.⁵ The Chamber considers that it is more relevant to know the basis for justifying ongoing investigations after the updated DCC was submitted on 11 May 2019.⁶

⁵ ICC-01/12-01/18-591, para.53-54. Citing ICC-01/09-02/11-700 (“Kenyatta Decision”).

⁶ ICC-01/12-01/19-591, para.54.

11. However, the Prosecution respectfully recalls as well the Appeals Chamber's decision in the *Prosecutor v. Lubanga*, where it confirmed that ongoing investigations are allowable after a confirmation hearing including to support an amendment to the charges. In particular, the Appeals Chamber considered that: "[t]he fact that article 61 (9) of the Statute does not make reference to the investigation indicates that the Prosecutor's flexibility with respect to the investigation that is acknowledged by article 61 (4) of the Statute remains unaffected by the confirmation of the charges; the Prosecutor does not need to seek permission from the Pre-Trial Chamber to continue his investigation. Furthermore [...] the possibility to amend the charges after their confirmation, albeit with the permission of the Pre-Trial Chamber, must necessarily mean that the investigation could continue after the confirmation of the charges. If it were otherwise the sole purpose of article 61 (9) of the Statute with respect to the amendment or withdrawal of confirmed charges would be to allow the Prosecutor to correct errors in the evaluation of evidence."⁷

12. As the Appeals Chamber further observed, whilst "ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing... this is not a requirement of the Statute. The Appeals Chamber accepts ... that in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence – particularly in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing".⁸ The Appeals Chamber rejected an argument that additional investigations and post-confirmation hearing would be to the accused's detriment, observing that other safeguards were possible, notably, the

⁷ ICC-01/04-01/06-568 OA3, para.53.

⁸ ICC-01/04-01/06-568 OA3, para.54.

accused would receive disclosure of the necessary information and material sufficiently in advance of trial.⁹

13. Moreover, as the Appeals Chamber also observed, there are different thresholds applicable at confirmation stage and trial stage that make it logical that further investigations take place post-confirmation of charges. The threshold required for confirmation of charges (substantial grounds to believe under article 61(7) of the Statute) is lower than for a conviction (beyond reasonable doubt under article 66(3) of the Statute), so that it is logical that the lower threshold at confirmation stage would be “satisfied before the end of the investigation”. So that: “[i]f further investigations lead the Prosecutor to reassess his theory about the suspect’s liability for the crimes charged, he may seek, within the limits of article 61(9) of the Statute, an amendment or withdrawal of the charges, as necessary”.¹⁰

14. Accordingly, the Appeals Chamber in *Lubanga* confirmed that post-confirmation hearing investigations is allowable, in particular where ruling out further investigations would otherwise deprive the Court of significant and relevant evidence.

II. Reasonable justification for obtaining statements of [REDACTED] and [REDACTED] after filing the updated DCC and after con

15. In any event, in this instance there is factually a reasonable justification for continuing the investigation after filing of the updated DCC and the confirmation hearing, which resulted in obtaining the witness statements of [REDACTED]
[REDACTED]

16. Moreover, their evidence is significant and relevant to the existing charges as confirmed, including the proposed amendments.¹¹

⁹ ICC-01/04-01/06-568 OA3, para.55.

¹⁰ ICC-01/04-01/06-568 OA3, para.56.

¹¹ See para.12 above.

a. Context of this case: security concerns and focussed investigations

Security considerations

17. The Prosecution submits that it is relevant to consider the specific context of this case, including the security considerations that the Prosecution must take into account, before making contact with any individual during its investigations.

18. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹²

19. The Prosecution has sought to avoid unnecessarily exposing individuals to potential risk [REDACTED] by making contact only where strictly necessary, in particular with those living in high risk areas. The Prosecution takes an equally cautious approach to protect third parties from whom it obtains contact details of individuals of potential interest. This approach necessarily slows down the process of locating, contacting and organising a meeting with any witness living in such high risk areas.

Focussed investigations

20. Further, in full compliance with Prosecution's obligations under articles 54 and 68 of the Statute, it takes some time before an individual initially identified as being of potential interest is contacted, because his or her security situation must be assessed and investigations must be focussed. Information from different sources is compared and considered against the overall evidence and anticipated charges, to

¹² See e.g. [REDACTED]; [REDACTED]; [REDACTED];
ICC-01/12-18-505-[REDACTED]

determine whether there is a solid and worthwhile basis for pursuing the matter and organising a meeting with the individual.

Voluntary cooperation

21. At this stage, the Prosecution relies primarily on voluntary cooperation of victims and witnesses, and their willingness and availability to be interviewed and to testify at trial. Cooperation is on a voluntary basis, *inter alia*, because of the potential consequences such as disclosure and witness protection-related issues. Although it may be feasible to compel a witness to testify under article 93(1) of the Statute through cooperation with Mali,¹³ the Prosecution only uses this possibility when strictly necessary. Further, the Prosecution ensures that any discussion/assessment regarding a witness's security situation, fitness to be interviewed, and willingness to provide a statement and to testify, is undertaken in person. This contact is usually a time-consuming exercise to organise, especially where contact must be done through a third person and/or the individual lives in a high-risk area.

b. The individual circumstances of [REDACTED]

[REDACTED]

22. The Prosecution interviewed [REDACTED] in [REDACTED] 2019.¹⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

¹³ See e.g. ICC-01/09-01/11-1598, para.1. The Appeals Chamber considered the ability to compel a witness to appear before the Court, or by video-link, *albeit* in the context of testifying at trial.

¹⁴ See [REDACTED], p.0246.

23. [REDACTED]

[REDACTED]

[REDACTED]

24. It was only during [REDACTED] 2019, that the Prosecution obtained the name and contact details for [REDACTED]¹⁵ [REDACTED]

[REDACTED]

25. The Prosecution was able to reach [REDACTED] 2019. [REDACTED] confirmed [REDACTED] willingness to be met, but was only able to travel to [REDACTED] for the meeting after [REDACTED] [REDACTED] 2019 [REDACTED] travelled on [REDACTED] 2019, and was interviewed and provided [REDACTED] statement [REDACTED] 2019.

[REDACTED]

26. The Prosecution has actively sought on an ongoing basis, through different sources and contacts, to identify and locate individual victims and other potential

¹⁵ [REDACTED]

¹⁶ [REDACTED]

[REDACTED] [REDACTED] [REDACTED]
 [REDACTED]
 [REDACTED]. The Prosecution has also sought to find individuals, who may be able to identify these flogged victims and to testify about what happened to them, including because of their close proximity to the incidents at the time, [REDACTED]
 [REDACTED].

27. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED].

28. On [REDACTED] 2019, the Prosecution was able to reach [REDACTED] or the first time [REDACTED] confirmed [REDACTED] identity and expressed [REDACTED] availability to meet in [REDACTED] 2019. [REDACTED] was interviewed from [REDACTED] 2019.

[REDACTED]

29. It was only on [REDACTED] 2019, that the Prosecution was able to obtain from [REDACTED] summarising the information about victims of AQIM and Ansar Dine during the occupation of Timbuktu in 2012 to 2013.

[REDACTED]
 [REDACTED]
 [REDACTED]

[REDACTED]
[REDACTED]¹⁷

30. Amongst the [REDACTED] provided on [REDACTED] 2019 was a [REDACTED] information regarding [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. [REDACTED] was not previously contacted because the Prosecution did not consider [REDACTED] to be a person of interest. [REDACTED]

31. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. [REDACTED] [REDACTED] agreed to be interviewed and was found to have information of relevance, [REDACTED]

c. Process undertaken before the Prosecution's Request was submitted

32. After the Prosecution obtained the information from witnesses [REDACTED] [REDACTED] and before it could submit the Prosecution's Request it needed to further: (a) assess these witnesses' information against other information previously collected to determine whether there is an adequate basis for seeking an amendment to the charges; (b) assess their individual security situations to determine whether it

¹⁷ [REDACTED]
[REDACTED].

is possible to rely on their evidence at trial and to call them to testify; (c) obtain their agreement to testify at trial; and, (d) request the Arabic translations of the rule 76 witness statements.

33. The Prosecution observes that it requested translations of the four rule 76 witness statements between [REDACTED] 2019. The translations were completed on 11 February 2020. After implementing necessary redactions, the translations were able to be disclosed on 17 February 2020. The translation process is extremely time-consuming, for instance a translator will on average translate 4 to 5 pages per day. In general, the Prosecution has thousands of pages to translate. In this instance, the Prosecution had a lack of sufficient translation resources to complete them sooner.

34. After this process, including to obtain the witnesses' agreement to testify, the Prosecution was able to submit its Request on 31 January 2020.

d. No prejudice to the Defence

35. There will be no prejudice to the Defence, for the following reasons:

-) The original versions of the witness statements of [REDACTED] and [REDACTED] and other supporting evidence have been provided several months in advance of trial, including since 2019;
-) Arabic translations of the four witness statements and the Prosecution's Request have been available five months in advance of the start of trial;
-) Notice of the potential new amendments to the charges have been provided since January 2020, about six months in advance of the start of trial; and
-) [REDACTED]
[REDACTED]

██████████ Accordingly, the Defence will have sufficient time to prepare in advance of trial and in advance of their proposed testimony.

III. Relief Sought

36. For all of the reasons outlined above, and as set out in the Prosecution's Request, the Prosecution reiterates its request that the Chamber allow the amendments to the charges as detailed in part III of its Request.



Fatou Bensouda, Prosecutor

Dated this 4 March 2020

At The Hague, The Netherlands