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**International
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Court**



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PRE-TRIAL CHAMBER I

Before:

**Judge Péter Kovács, Presiding
Judge Marc Perrin de Brichambaut
Judge Reine Alapini-Gansou**

SITUATION IN 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 filing - ICC01/12-01/18-847-Confand, in the alternative, request for leave to reply”, ICC-01/12-01/18-862-Conf, 5 June 2020

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

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I. Introduction

1. In its filing submitted on 1 June 2020, based on allegations that the Prosecution intentionally withheld key information regarding Witness [REDACTED] from Pre-Trial Chamber I (“Chamber”), the Defence requests that the Chamber invite the Prosecution to withdraw the charged incidents based on [REDACTED] testimony, or rescind its decision to permit the Prosecution to invoke article 61(9) of the Statute on the basis of her evidence (“Defence filing”).¹

2. While the Defence filing was submitted as a response to the Prosecution filing of 20 May 2020, in light of the entirely new and serious allegations and, more importantly, the far-reaching remedies requested, the Prosecution considers that this specific aspect of the response effectively constitutes a fresh motion or request, to which the Prosecution is entitled to respond directly. It is accordingly doing so, rather than seeking leave to reply. However, should the Chamber consider that a reply is the correct procedural avenue to address the new request made by the Defence, the Prosecution requests the Chamber in the alternative to treat this document as a request for leave to reply, and to exceptionally authorise the substantive arguments to be conflated with the request in a single document, in the interests of expediency. For these purposes, the Prosecution is filing this document within the time-limits for requests for leave to reply, and not under the longer time-limit applicable to responses.

3. The Prosecution opposes the reliefs requested by the Defence for the following reasons (that, alternatively, can be viewed as the issues on which the Prosecution seeks leave to reply):

) Contrary to the Defence allegations, the Prosecution was not aware on, or before 12 March 2020, that its submissions to Pre-Trial Chamber I

¹ ICC-01/12-01/18-847-Conf (“Defence filing”), para. 30-33.

(“Chamber”) concerning the date on which it first received [REDACTED] contact details and full name were incorrect;

- J There was no unreasonable delay on the part of the Prosecution in informing the Chamber of the error relating to the date on which it first received [REDACTED] contact details and full name; and
- J The two investigation notes relating to the information provided by [REDACTED] regarding [REDACTED] entailed no omission, distortion of facts, or falsification of evidence, as alleged by the Defence.² In any event, article 70(1)(a) of the Statute is not applicable to investigation notes.

II. Procedural Background

4. 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”).³
5. 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] and [REDACTED] (“New Witnesses”) were obtained after the filing of the updated Document containing the Charges (“DCC”) on 11 May 2019.⁴
6. On 4 March 2020, the Prosecution submitted its supplementary observations regarding the New Witnesses (“Supplementary Observations”).⁵

² Defence filing, para. 22-24.

³ ICC-01/12-01/18-568-Conf, and four annexes ICC-01/12-01/18-568-Conf-AnxA, ICC-01/12-01/18-568-Conf-AnxB-Corr, ICC-01/12-01/18-568-Conf-AnxC, ICC-01/12-01/18-568-Conf-AnxD.

⁴ ICC-01/12-01/18-608-Conf, p.19, para.54, p.23.

⁵ ICC-01/12-01/18-625-Conf-Exp; ICC-01/12-01/18-625-Conf-Red.

7. On 6 March 2020, the Defence requested, via email, disclosure of, *inter alia*, all information concerning the payments received by [REDACTED] as [REDACTED] and a contact log [REDACTED].⁶
8. On 12 March 2020, the Prosecution sent an email in response to the Defence email of 6 March 2020 concerning [REDACTED] and information provided by her about victims and witnesses including [REDACTED] ("12 March 2020 email").⁷
9. On 14 April 2020, the Prosecution disclosed material in its possession insofar possible at that stage and provided a final list of Prosecution witnesses with summaries of their anticipated testimony and a provisional list of evidence.⁸
10. On 11 May 2020, the Defence requested, via email, clarifications regarding the information received from [REDACTED] as concerns [REDACTED].⁹
11. On 12 May 2020, the Prosecution disclosed remaining material in its possession and provided further detail in the list of witnesses and its final list of evidence.¹⁰
12. On 18 May 2020, the Prosecution submitted its Trial Brief.¹¹
13. Then, on 20 May 2020, the Prosecution submitted the "Prosecution's Amendment to its further observations regarding its request for corrections and amendments concerning the Confirmation Decision ("Amendment to the Supplementary Observations"), informing the Chamber that it has identified

⁶ [REDACTED] the Defence Annex B, ICC-01/12-01/18-847-Conf-Exp-AnxB, p. 9-10-11.

⁷ See e.g. [REDACTED] the Defence Annex B, ICC-01/12-01/18-847-Conf-Exp-AnxB, p. 9-10.

⁸ ICC-01/12-01/18-740-Conf.

⁹ [REDACTED], the Defence Annex A, ICC-01/12-01/18-847-Conf-Exp-AnxA, p. 2.

¹ See e.g. ICC-01/12-01/18-805-Conf.

¹¹ ICC-01/12-01/18-819-Conf.

an error in the factual circumstances regarding [REDACTED] described in the Supplementary Observations.¹²

14. On the same day, the Prosecution responded to the Defense email of 11 May 2020, apologising for the delayed response due to the other deadlines, and referring to the Amendment to the Supplementary Observations in which it sought to provide answers to the questions raised by the Defence.¹³
15. On 1 June 2020, the Defence filed its response to the Prosecution's Amendment, requesting that the Chamber invite the Prosecution to withdraw the charged incidents based on [REDACTED]'s testimony, or rescind its decision to permit the Prosecution to invoke article 61(9) of the Statute on the basis of her evidence.¹⁴

III. Confidentiality

16. This filing is classified as confidential under regulation 23bis(2) of the Regulations, to be consistent with the classification of the prior filings of the Parties.

IV. Submissions

17. The Prosecution submits that the reliefs requested by the Defence should be dismissed for the following reasons:

A. The Prosecution was not aware of the error in its Supplementary Observations on or before 12 March 2012

18. The Defence is mistaken that the Prosecution was aware as at 12 March 2020 that it had erred in its Supplementary Observations when it stated that it did not know of [REDACTED]'s full name or contact details until May 2019 when it

¹² ICC-01/12-01/18-823-Conf.

¹³ [REDACTED] the Defence Annex A, ICC-01/12-01/18-847-Conf-Exp-AnxA, p.

2.

¹⁴ ICC-01/12-01/18-847-Conf.

interviewed [REDACTED]¹⁵ As explained in the Amendment to the Supplementary Observations and in further detail below, the Prosecution only realised subsequently that it overlooked the [REDACTED] for [REDACTED] obtained from [REDACTED]¹⁶, which contained information concerning [REDACTED]'s name and contact details.

19. On 4 March 2020 when the Prosecution submitted its Supplementary Observations, it had overlooked the fact that the [REDACTED] for [REDACTED]¹⁷ contained her contact details and full name.

20. It was only on 11 May 2020 that the Prosecution realised its error in this regard. Indeed, on 11 May 2020, the Prosecution conducted additional searches following the Defence's email of 11 May 2020 seeking clarifications regarding the information received from [REDACTED] as concerns [REDACTED] and requesting to

[REDACTED]

[REDACTED]¹⁸ It was only at that point that the Prosecution realised that when preparing its Supplementary Observations, it had overlooked the [REDACTED] for [REDACTED]¹⁹

21. At the time the Prosecution's email of 12 March 2020 to Defence was drafted, the Prosecution was responding to a Defence query, *inter alia*, as to what information had been provided by [REDACTED] regarding [REDACTED] and [REDACTED] [REDACTED] This is what was checked. In this context, the [REDACTED] obtained [REDACTED] [REDACTED] was not taken into account. It was not of relevance to the specific Defence query to clarify what information was provided by [REDACTED]

¹⁵ Supplementary Observations, para. 24.

¹⁶

¹⁷

¹⁸ [REDACTED], ICC-01/12-01/18-847-Conf-Exp-AnxA, p. 2.

¹⁹

Supplementary Observations²⁰ and indicated in the two investigation notes dated 24 March 2020²¹ and 4 May 2020²² respectively, the information provided by [REDACTED] regarding [REDACTED] in [REDACTED] was limited to background biographical information, and did not include her full name or contact details other than confirmation that [REDACTED] lived [REDACTED] [REDACTED]. In the 24 March 2020 investigation note, the Prosecution stated that [REDACTED] provided information in relation to [REDACTED] who [REDACTED] at that time 'anonymous' to the OTP;²³ the Prosecution, when it communicated with [REDACTED], was using [REDACTED]; the Prosecution did not ask nor receive the name of [REDACTED] from [REDACTED] in [REDACTED]. The [REDACTED] for [REDACTED] (that contained her name and town) was obtained on [REDACTED] from [REDACTED]. This [REDACTED] was obtained before the exchanges of information with [REDACTED] in [REDACTED], but the Prosecution had not determined that the person in the [REDACTED] as [REDACTED]. The [REDACTED] did not contain [REDACTED].

24. It is unfortunate that the 12 March 2020 email contained an error and was insufficiently clear. It is also regrettable that the Prosecution overlooked the [REDACTED] for [REDACTED] (which was also acknowledged in the Amendment to the Supplementary Observations).
25. However, there was no bad faith, misleading conduct, attempt to distort the facts or to falsify evidence by the Prosecution, as the Defence has claimed. There was also no attempt to hide this information from the Defence. Indeed, the Defence also had the version of the [REDACTED] for [REDACTED] [REDACTED].

²⁰ Amendment to the Supplementary Observations, para. 6.

²¹ [REDACTED]

²² [REDACTED]

²³ [REDACTED]. As explained, the Prosecution used [REDACTED] in its interactions with [REDACTED] at that time.

²⁴ The [REDACTED] was first disclosed in Pre-Confirmation INCRIM package 12, on 3 August 2018.

redacted, from 3 February 2020,²⁵ before the Supplementary Observations were filed. Additionally, if the Defence had contacted the Prosecution to query the apparent contradictions with information contained in the 12 March 2020 email, this could have been checked and clarified without recourse to litigation or spurious and serious allegations of violations under article 70 of the Statute.

26. Moreover, the other factors as outlined in the original Supplementary Observations justifying the timing of interviewing [REDACTED] remain entirely valid: namely, the Prosecution assessed [REDACTED] as a person of interest for an interview only after the Prosecution interviewed [REDACTED] in May 2019 and received evidence from [REDACTED] supporting [REDACTED]'s account, together with the fact that [REDACTED] identified [REDACTED] (in which a different name was used for her); the Prosecution then requested and obtained contact details for [REDACTED] from [REDACTED] to arrange an interview.

B. There was no unreasonable delay in informing the Chamber of the error in the Supplementary Observations

27. Second, there was no unreasonable delay on the part of the Prosecution in informing the Chamber of the error relating to the date on which it first received [REDACTED]'s contact details and full name.
28. The Prosecution notes for the record that contrary to the Defence's allegations,²⁶ the Prosecution only became aware of its error on 11 May 2020 as to when it had the witness's name and contact details.
29. As soon as it became aware of this error and oversight relating to [REDACTED] on 11 May 2020, the Prosecution conducted a review of information relating to all the New Witnesses, in order to ensure that all other information included in the Supplementary Observations was correct. Moreover, the Prosecution was in

²⁵ Pre-Trial INCRIM package 49, 3 February 2020.

²⁶ See, e.g., Defence filing, para. 21.

the process of finalising its update of its list of incriminatory evidence due on 12 May 2020²⁷ and its Trial Brief, which was due on 18 May 2020.²⁸ Thereafter, it submitted the Amendment to the Supplementary Observations on 20 May 2020.

C. The Prosecution did not provide false testimonial evidence

30. Third, contrary to the Defence allegations, the Prosecution did not provide false testimonial evidence by way of investigator's notes, falling within the parameters of article 70(1)(a) of the Statute.
31. The two investigation notes relating to the information provided by [REDACTED] regarding [REDACTED] entailed no omission, distortion of facts, or falsification of evidence, as alleged by the Defence.²⁹ Both investigation notes related to what information was provided by [REDACTED] so: (a) covered a different issue to what information was contained in the [REDACTED] for [REDACTED], which was received [REDACTED] [REDACTED] and (b) were drafted without taking into account the [REDACTED] of [REDACTED] or its contents.
32. The Prosecution also observes that contrary to the Defence's submissions,³⁰ article 70(1)(a) of the Statute is not applicable to investigation notes, based on the plain language of Article 70(1)(a) of the Statute as well as the Appeals Chamber's judgement in *Bemba et al.*, cited by the Defence,³¹ which make it clear that this provision is only applicable to witnesses testifying in court when under an obligation to tell the truth pursuant to article 69(1) of the Statute.³²

²⁷ ICC-01/12-01/18-677, para. 15.

²⁸ ICC-01/12-01/18-770, para. 11

²⁹ Defence filing, para. 22-24.

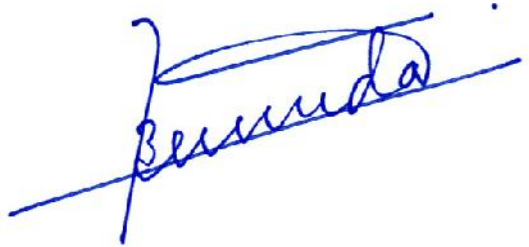
³⁰ See Defence filing, para. 22-23.

³¹ ICC-01/05-01/13-2275-Red, para. 690, cited in the Defence filing, para. 23: "In the view of the Appeals Chamber, the phrase 'giving false testimony' must therefore be understood in the context of the witness's obligation to speak 'the whole Truth' under article 69 (1) of the Statute and rule 66 of the Rules. [...]".

³² ICC-01/05-01/13-2275-Red, para. 300-308, recalling that testimonial evidence may only be introduced as evidence if the conditions enumerated in rule 68 of the Rules are satisfied, and deciding that the Trial Chamber erred by relying on an investigator's note, which the Appeals Chamber found to be of testimonial nature, when

Relief Requested

33. Based on the foregoing, the Prosecution requests the Chamber to dismiss the reliefs requested by the Defence. In the alternative, the Prosecution requests the Chamber to treat this document as a request for leave to reply, and to exceptionally authorise the substantive arguments to be conflated with the request in a single document, in the interests of expediency, and to dismiss the reliefs requested by the Defence.



Fatou Bensouda, Prosecutor

Dated this 5th day of June 2020
At The Hague, The Netherlands

such requirements were not met. While the Appeals Chamber acknowledged that in certain circumstances, an investigator's note may be deemed testimonial in nature, this finding was made in the context of examining whether such a note may be relied upon evidence.