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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 response to the “Prosecution’s Amendment to its further observations regarding its request for corrections and amendments concerning the Confirmation Decision (ICC-01/12-01/18-625-Conf-Exp)” - ICC01/12-01/18-823-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:

The Office of the Prosecutor

Fatou Bensouda
James Stewart

Counsel for the Defence

Melinda Taylor
Marie-Hélène Proulx
Thomas Hannis

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

Trial Chamber X

I. Introduction

1. On 20 May 2020, the Prosecution filed an “Amendment to its further observations regarding its request for corrections and amendments concerning the Confirmation Decision” (the Amendment Request),¹ in which the Prosecution advised that it had “identified an error in the factual circumstances regarding witness [REDACTED] described in the Supplementary Observations”.² Specifically, the Prosecution informed the Pre-Trial Chamber that:³

The Prosecution erred when it stated that: “[i]t was only during the initial interview with [REDACTED] 2019, that the Prosecution obtained the name and contact details for [REDACTED]”. In fact, the Prosecution had in its possession the name of [REDACTED] and of her city of residence at the time, and a phone number, in the [REDACTED] obtained in 2016. Witness [REDACTED] provided certain background biographical information regarding [REDACTED] in 2016.

2. Rather than resting its submissions there, the Prosecution adduced additional arguments as to why it had not contacted [REDACTED] at an earlier juncture, and why the threshold for ‘diligence’ was met.
3. The Amendment Request is a manifestly incomplete account of the Prosecution’s conduct, and it is a manifestly inadequate response to the prejudice engendered by the Prosecution’s conduct.
4. The Prosecution was aware, from at least [REDACTED] 2020, that its submissions to the Pre-Trial Chamber were incorrect. The Prosecution not only failed to correct the record for [REDACTED] days, it also drafted, and submitted two investigators’ notes, which omitted key information, and used language which the Prosecution had reason to know, was misleading.
5. The Prosecution’s attempt to sweep its error under the carpet, and replace its incorrect submissions with new arguments, is inappropriate, and procedurally impossible. The Prosecution may withdraw the charged incidents or, the Prosecution can maintain the submissions that led to the Pre-Trial Chamber’s decision, and invite the consequences that might stem from doing so. However, having based its initial submission on a

¹ ICC-01/12-01/18-823-Conf

² ICC-01/12-01/18-823-Conf, para.5.

³ ICC-01/12-01/18-823-Conf, para. 6.

faulty factual plank, and having then withheld the disclosure of information that would have revealed the error in a more timely manner, the Prosecution cannot now rely on its own error to trigger a ‘third’ confirmation process, and third round of argument, concerning the Prosecution’s diligence in collecting evidence from [REDACTED], at an extremely advanced stage of the proceedings.

6. The Pre-Trial Chamber should therefore:

- a. Recognise the Prosecution’s withdrawal of the factual arguments relied upon by the Pre-Trial Chamber to confirm these incidents;
- b. Dismiss, *in limine*, any new or additional arguments as to why the Prosecution did not contact [REDACTED] before 2019; and
- c. Either invite the Prosecution to withdraw the charged incidents concerning [REDACTED] or rescind the decision to permit the Prosecution to invoke Article 61(9), on the basis of evidence related to [REDACTED].⁴

II. Submissions

7. On 31 January 2020, the Prosecution filed its ‘Request for corrections and amendments concerning the Confirmation Decision’ (‘the Request’), in which the Prosecution requested the Pre-Trial Chamber, amongst other things, to confirm additional incidents based on new evidence collected from [REDACTED].⁵ The Request contained no submissions as concerns why the Prosecution was unable to collect [REDACTED]’s evidence before the 2019 confirmation hearing. Rather than dismissing the Request *in limine*, the Pre-Trial Chamber clarified the applicable legal standard as concerns requests to confirm additional incidents under Article 61(9) of the Statute, and provided the Prosecution with an additional opportunity to file submissions as concerns whether this standard was met.⁶

⁴ The current response is filed on a confidential basis due to the fact that it cites confidential filings.

⁵ ICC-01/12-01/18-568-Conf.

⁶ ICC-01/12-01/18-608-Red.

8. The Prosecution's submissions, filed on 4 March 2020, were limited to the following arguments concerning [REDACTED]:⁷

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

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] 2019. [REDACTED] travelled on [REDACTED] 2019, and was interviewed and provided [REDACTED] statement [REDACTED] 2019.

9. On 6 March 2020, the Defence wrote to the Prosecution, and, noting that [REDACTED] was a former [REDACTED], requested the Prosecution to disclose:⁸

- All information concerning the payments [REDACTED]; and
- A contact log with the names (pseudonyms) and dates [REDACTED] Prosecution witnesses.

10. The Prosecution responded, on 12 March 2020, that:

In [REDACTED] 2016, [REDACTED] provided contact details and information relevant to their security situation. The following information shall be subsequently disclosed by way of an investigation note: [REDACTED] 2016, [REDACTED] provided information in relation to victims [REDACTED], namely: contact information and background information relevant to their security situation [REDACTED] (as disclosed to the Defence [REDACTED]) [REDACTED]). The victims for whom the Prosecution requested such information were [REDACTED].

11. The Prosecution had evidently consulted its records in order to prepare this response.

It was thus aware on, or before [REDACTED] 2020, that its submissions to the Pre-Trial Chamber concerning the date on which the Prosecution first received [REDACTED] contact details were incorrect. And yet the Prosecution did not correct its 4 March 2020 submissions or otherwise notify the Chamber and the Defence of the factual error in its submissions regarding [REDACTED].

12. Since the Prosecution had not yet disclosed its investigator's note at the time the Defence response was due, the Defence attached the Prosecution's email concerning [REDACTED], and argued that the threshold for diligence was not satisfied because:⁹

⁷ ICC-01/12-01/18-625-Conf-Red, paras. 24-25.

⁸ ICC-01/12-01/18-664-Conf-Exp-AnxB.

firstly, [REDACTED] knew [REDACTED] since at least [REDACTED] 2015, secondly, the Prosecution was in possession of [REDACTED]'s [REDACTED] since [REDACTED] 2016, and thirdly, the Prosecution requested, and obtained contact details for [REDACTED] **in 2016**.

13. The Prosecution did not seek leave to reply to either acknowledge that it had in fact erred in its 4 March 2020 submissions, or to adduce additional factual arguments as concerns why it had been unable to collect [REDACTED]'s evidence at an earlier point in time.

14. In its decision, the Pre-Trial Chamber found that:¹⁰

Concernant le témoin [REDACTED], la défense avance que le Procureur avait « obtenu » les coordonnées de ce témoin en 2016, et fait référence pour appuyer son argument à un courriel du Procureur. Néanmoins, la Chambre note que ce document mentionne plusieurs noms de témoins, et ne prouve pas que le Procureur avait bien reçu une réponse quant à sa demande concernant le témoin [REDACTED] ; la Chambre note par ailleurs l'affirmation du Procureur selon laquelle elle n'a obtenu ces informations que le [REDACTED] 2019. Or, la Chambre ne considère pas que le document mentionné par la défense soit de nature à remettre en cause l'affirmation du Procureur, et partant, rejette l'argument de la défense.

15. It was clear from this language that the Pre-Trial Chamber had explicitly relied on the Prosecution's (incorrect) affirmation in order to confirm that the diligence threshold was satisfied in relation to [REDACTED]. Nonetheless, although the Prosecution was aware that the Chamber's disposition rested on an incorrect affirmation of fact from the Prosecution, the Prosecution did not correct the record, or otherwise address this point in its response to the Defence request for leave to appeal, which was filed on 4 May 2020.¹¹ To the contrary, the Prosecution averred that:¹²

Defence simply disagrees with the Chamber's assessment of the facts before it to determine that the new evidence was not known or available to the Prosecution prior to filing the DCC, or could not have been collected. In doing so, the Defence repeats its earlier submissions, which the Chamber already considered.

16. Given that the Prosecution was aware at this point that the Pre-Trial Chamber's assessment of the facts was wrong (due to the Chamber's reliance on incorrect

⁹ ICC-01/12-01/18-664-Conf, para. 20.

¹⁰ ICC-01/12-01/18-767-Conf, para. 28.

¹¹ ICC-01/12-01/18-784-Red.

¹² ICC-01/12-01/18-784-Red, para. 11.

information furnished by the Prosecution), it was plainly improper for the Prosecution to characterize Defence arguments as a mere ‘disagreement’, and to remain silent as concerns its own error.

17. Concurrently, the Prosecution held off disclosing the investigator’s note concerning [REDACTED]. After repeated reminders from the Defence,¹³ on [REDACTED] 2020, the Prosecution finally disclosed a note, drafted [REDACTED] 2020,¹⁴ which replicated the language of its [REDACTED] 2020 email. Since this note was drafted after the Pre-Trial Chamber had issued its decision, the Prosecution was aware that this language was ambiguous, and had been interpreted by the Pre-Trial Chamber to mean that the Prosecution had not actually received [REDACTED]’s contact details. Put simply, the Prosecution submitted testimonial evidence, in an investigator’s note, which, by omitting key information, created an impression that was not true.
18. In light of the ambiguous nature of this language, and the importance of the issue to the Pre-Trial Chamber’s findings concerning [REDACTED], the Defence requested the Prosecution to disclose its original correspondence with [REDACTED] concerning [REDACTED].¹⁵ Instead, the Prosecution promised, in response, to disclose a second investigator’s note, which was then disclosed almost a week later, on [REDACTED] 2020.¹⁶ Whereas the second note provided specific details concerning the contact details for victims and witnesses, the second investigator’s note stated for [REDACTED] that the Prosecution had been informed that she was living [REDACTED]. The second investigator’s note, which had been drafted on [REDACTED] 2020, thus omitted the critical details that the Prosecution had in fact had received [REDACTED]’s name, and specific contact information.
19. Given the ongoing ambiguity, on 11 May 2020, the Defence requested the Prosecution to:¹⁷

disclose the original correspondence from [REDACTED] as concerns [REDACTED], or clarify whether the Prosecution had received or was otherwise aware of:

¹³ Email on 27 April 2020, 4 May 2020, Annex B.

¹⁴ [REDACTED]

¹⁵ Annex A.

¹⁶ [REDACTED].

¹⁷ Annex A, Email of 11 May 2020.

- Her name; and
 - The village where she was located ([REDACTED]); and
 - Any other details that would have been relevant to the ability of the Prosecution to identify and locate [REDACTED].
20. Rather than responding directly to the Defence, nine days later, the Prosecution filed its Amendment Request to the Pre-Trial Chamber.
21. In sum, throughout the course of 69 days, the Prosecution maintained an impression that it knew to be false and misleading as concerns whether it received [REDACTED]'s contact details from [REDACTED] for the first time in 2019, or 2016. The Prosecution also withheld crucial information that would have dispelled that false impression. This is a significant amount of time given that:
- a. The withheld information impacted directly on charged incidents;
 - b. The trial is scheduled to commence on 14 July 2020;
 - c. The Trial Chamber issued a schedule of charges, including the affected incidents, on 6 May 2020;
 - d. The Prosecution maintained the affected incidents, in its Pre-Trial Brief filed on 18 May 2020;
 - e. The Pre-Trial Chamber was seized of the Defence request for leave to appeal, dated 28 April 2020,¹⁸ and could have divested itself of its jurisdiction over the matter at an earlier juncture.
22. The Prosecution also drafted and submitted testimonial evidence (the two investigators' notes),¹⁹ using language which the Prosecution must have known would distort the truth, by omitting key details, and thus providing a partial factual account concerning an issue that was of pivotal importance to the Pre-Trial Chamber's determination that the threshold for confirming new incidents based on [REDACTED]'s evidence was met.

¹⁸ ICC-01/12-01/18-774-Conf.

¹⁹ The Appeals Chamber has confirmed that investigators' notes are 'testimonial': ICC-01/05-01/13-2275-Red, para. 304.

23. The Defence notes that the ICC has found, within the context of other cases, that failing to correct the record timeously, or, providing testimonial evidence that omits information that is relevant to the Chamber's determination of the truth, can fall within the parameters of Article 70 of the Statute. As established in the *Bemba et al.* case:

- a. "the phrase "giving false testimony" must (...) 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. Thus, distorting the truth by intentionally withholding part of the information amounts to "giving false testimony" in terms of article 70 (1) (a) of the Statute (...) it is clear that intentionally providing an incomplete response is contrary to the obligation to tell the "whole" truth. The Appeals Chamber considers that this does not impose a duty on the witness to volunteer to provide all information that she or he may have on the case but is not asked to provide. In the view of the Appeals Chamber, a witness gives false testimony when he or she intentionally provides incomplete responses to the questions by omitting facts that he or she is specifically asked about or by omitting facts that are necessarily encompassed within, or inseparably linked to, the information sought during the testimony."²⁰
- b. The issues need not relate to the merits of the case, or a material fact, but can encompass any issue that may have a bearing on the Chamber's determination. It therefore includes information concerning contacts with witnesses or intermediaries, and the contents of such contacts.²¹

24. These standards apply equally, if not with greater force, to the Prosecution, in light of its seminal role as an "impartial organ of justice",²² which assists the Chamber to determine the truth.

²⁰ [ICC-01/05-01/13-2275-Red](#), paras. 690, 692; [ICC-01/05-01/13-1989-Red](#), para. 21: "The witness would be responsible under Article 70(1)(a) of the Statute even if he or she did not give objectively false testimony but only a partially truthful account. Here again, assuming that the witness acted intentionally, he or she would not be giving the whole truth".

²¹ [ICC-01/05-01/13-1989-Red](#), para. 22.

²² [ICC-02/04-85](#), para. 32.

25. The Prosecution's conduct in this case impacted on the Pre-Trial Chamber's decision to confirm additional incidents: the conduct thus affected the integrity of the judicial proceedings in this case and led to an outcome that is capable of affecting the outcome of the case. The Chamber should not, therefore, countenance this conduct by either affording the Prosecution with an additional opportunity to litigate issues of diligence, or, allowing the Prosecution to replace its former submissions with a new account concerning why the Prosecution did not contact [REDACTED] at an earlier point in time, even though they had the statement she had provided to national authorities, and her contact details.
26. It would also be unfair to turn back the clock in a partial manner. The Pre-Trial Chamber determined that before considering the merits of an amendment request, the Chamber must first satisfy itself that the Prosecution has furnished a proper justification as to why the evidence was not collected at an earlier point, or included in the initial confirmation of charges proceeding.²³ This fundamental element of the Chamber's determination has now been invalidated. And yet the Prosecution has not suggested that the decision confirming the incidents related to [REDACTED] should be suspended or reversed, while the Chamber considers the arguments in the Amendment Request. Since the Prosecution has not withdrawn the charged incidents in the meantime, there is an appearance that the outcome would be a *fait accompli*.
27. The evidential considerations, set out in the Amendment Request, also continue to turn heavily on the Prosecution's interactions with [REDACTED]. Given the incomplete nature of disclosure on this point (including the Prosecution's ongoing refusal to disclose its original correspondence with [REDACTED]), it would be unsafe to rely on the Prosecution's latest account. There is also an element of unfairness in light of the possibility that the Prosecution has molded its explanation to conform to the explanations previously accepted by the Pre-Trial Chamber.
28. It is also too late for the Prosecution to attempt at compliance with Article 61(9). Due to the Prosecution's failure to correct the record in a timely manner, the Pre-Trial Chamber has already issued its decision concerning [REDACTED]. The Pre-Trial Chamber has maintained that it does not have the power to either 'reconsider' its

²³ ICC-01/12-01/18-608-Red, paras. 53-55.

decisions,²⁴ or “correct” the details of a confirmation decision that was based on an erroneous interpretation or evaluation of the evidence.²⁵ And yet, by submitting new arguments, that is exactly what the Prosecution is asking the Pre-Trial Chamber to do: to rely on these new arguments in order to correct its factual findings concerning the Prosecution’s contacts with [REDACTED].

29. Even if the Chamber had the power to reconsider or correct its factual reasoning, the Prosecution has adduced no compelling arguments as to why the Chamber should exercise such a power in order to assist the Prosecution to ventilate arguments that could, and should have been raised earlier. As noted above, since the Prosecution’s request to amend the charges initially did not include such a justification, the Pre-Trial Chamber provided the Prosecution with an additional opportunity to provide submissions on this essential point.²⁶ The Prosecution was thus on notice that all relevant and probative arguments concerning its approach to [REDACTED] should have been included in its 4 March submissions. As noted above, the 4 March submissions nonetheless make no reference to the evidential considerations that have now been included in the Amendment Request. It would thus turn notions of prosecutorial diligence on their head if the Prosecution were afforded a third opportunity to adduce submissions, that the Prosecution could have provided in either its initial January Request, or its 4 March additional submissions, but elected not to do so.
30. The fair and correct procedure would therefore be for the Prosecutor to withdraw the charged incidents. The Prosecution is aware that the Chamber’s decision was materially affected by incorrect information furnished by the Prosecution, and the Prosecution has a positive duty to remedy the consequences of its conduct. In light of the dilatory manner in which it was filed, the Amendment Request does not remedy the mistake or cure this prejudice.²⁷ To the contrary, the Amendment Request omits

²⁴ ICC-01/12-01/18-130-tENG, para. 25: “The Chamber, however, recalls that the legal framework established by the Statute and the Rules does not provide for motions for reconsideration as a procedural remedy against a decision taken by a Pre-Trial Chamber or Single Judge, and that Pre-Trial Chambers have constantly denied requests for reconsideration as having no statutory support”.

²⁵ ICC-01/12-01/18-608-Red, paras. 44-45, 48.

²⁶ ICC-01/12-01/18-608-Red, para. 55.

²⁷ Cf ICC-02/04-01/15-1207, para. 4, where the Prosecution apologised for its erroneous submissions, and disclosed all materials affected by its erroneous submissions, in order to cure the prejudice caused by the fact that the Trial Chamber had relied upon the Prosecution’s erroneous submissions.

key details as concerns when the Prosecution first became aware of its mistake, and its subsequent conduct in drafting and submitting investigators' notes, which maintained an impression that the Prosecution must have known to be false, and which obstructed the ability of the Defence to ascertain the truth at an earlier point in time. A withdrawal is thus the only response that will cure the prejudice created by the Prosecution's conduct.

31. The Prosecution will still have the opportunity to submit a new request under Article 61(9). It will then fall to the Pre-Trial Chamber to determine whether the standards of diligence are met, given the timing, and the Prosecution's failure to adduce submissions at an earlier point in time.
32. Alternatively, the Pre-Trial Chamber is now aware that a critical aspect of its determination concerning the date on which the Prosecution first obtained [REDACTED]'s contact details, is based on a factual submission that has now been withdrawn. The Chamber's initial determination that the Prosecution was not able to collect this evidence at an earlier point in time was the "*conditio sine qua non*" for the Chamber's permission to add the additional incidents.²⁸ The Chamber cannot therefore maintain the outcome, given that the initial determination has now been invalidated. It is also not necessary for the Chamber to 'reconsider' its finding concerning the Prosecution's contacts with [REDACTED] as this finding has now been negated, as a result of the Prosecution's Amendment Request.²⁹

III. Relief sought

33. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Pre-Trial Chamber to:

- a. Take note of the Prosecution's acknowledgment that paragraphs 24 to 25 of its submissions of 4 March 2020 were factually incorrect;

²⁸ [ICC-01/09-01/11-859](#), para. 31.

²⁹ See [ICC-01/04-01/06-2707](#), para. 33, where Judge Blattman distinguished between the remedy of reconsideration, and a situation where there has been a mistake which negates the factual basis for the original litigation. See also ICC-02/04-01/15-1207, paras. 8-9, where the Trial Chamber affirmed that it had the power to take steps to correct unfair consequences caused by erroneous submissions.

- b. Dismiss, *in limine*, any additional factual argument concerning the Prosecution's reasons for not contacting [REDACTED] before 2019; and
- i. Invite the Prosecution to withdraw the charged incidents based on [REDACTED]'s testimony; or
- ii. Rescind the Pre-Trial Chamber's decision to permit the Prosecution to invoke Article 61(9), on the basis of evidence related to [REDACTED].



Melinda Taylor
Lead Counsel for Mr. Al Hassan



Marie-Hélène Proulx
Associate Counsel for Mr. Al Hassan



Thomas Hannis
Associate Counsel for Mr. Al Hassan

Dated this 01st Day of June 2020
At The Hague, The Netherlands