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TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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 *ex parte* Annex A (Prosecution, Registry and Defence)

Public redacted version of 'Defence Motion for Order of Disclosure – Correspondence with National Authorities' (ICC-01/12-01/18-686-Conf) filed 27 March 2020

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
Kirsty Sutherland

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

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. Pursuant to Articles 64(3)(c) and 67(2) of the Rome Statute ('Statute') and Rules 77 and 84 of the Rules of Procedure and Evidence ('Rules'), the Defence for Mr. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ('Defence') respectfully requests that the Trial Chamber order the Prosecution to disclose all records of formal or informal correspondence with national authorities – including but not limited to Requests for Assistance ('RFAs'), '*Notes verbales*', *procès-verbaux*, letters and emails – relevant to the mental and physical state of [REDACTED], and/or to the legality and conditions of their arrest and detention by national authorities, including by Operations Barkhane and Serval ('Sought Correspondence').
2. The Sought Correspondence is exculpatory and material to Defence preparations, especially with regard to the pending Defence application concerning the arrests, detention and interrogation of Mr Al Hassan [REDACTED] ('Application'). The Sought Correspondence should be immediately disclosed, so as to allow Defence preparation of the Application to continue in a timely manner, thus ensuring that the Application can be filed sufficiently prior to the scheduled commencement of trial and within the deadline fixed by the Single Judge for pre-trial motions.

II. Classification

3. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, this Motion is filed confidentially, as it relates to and references confidential information regarding [REDACTED]. A public redacted version will be filed forthwith.

III. Submissions

4. The Sought Correspondence is subject to disclosure. It is exculpatory in nature, as it affects the credibility of Prosecution evidence arising from interviews with [REDACTED].¹ Similarly, the Sought Correspondence is material to Defence preparation, and therefore subject to disclosure pursuant to Rule 77 of the Rules.² The Defence recalls that 'materiality' under Rule 77 is to be construed broadly, and refers to all objects relevant for the preparation

¹ Statute, Article 67(2).

² Rules, Rule 77.

of the Defence;³ an item will be considered material to Defence preparation if it would undermine the Prosecution case or support a line of argument of the Defence.⁴ As is clear from ICC jurisprudence, Prosecution correspondence with national authorities, including RFAs, is not *per se* exempt from disclosure.⁵ Further, it is established in ICC jurisprudence that any such correspondence leading to information relied upon by the Prosecution is subject to disclosure; as held by Trial Chamber IX in *Ongwen*, it is ‘imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them’.⁶

5. Specifically, the Sought Correspondence is highly relevant to the pending Application. It will provide the Defence with a more comprehensive picture of the arrest, detention conditions, and interrogation of Mr Al Hassan [REDACTED]. In this respect, the Sought Correspondence is relevant to the Prosecution’s cooperation and coordination with French and Malian authorities in relation to [REDACTED]; to [REDACTED] the facts and circumstances of the arrests, detention, and interrogation of these individuals, including as regards their legality; and to [REDACTED].⁷
6. Again, it is the Defence’s understanding that the Prosecution does not dispute that the subject-matter of the Sought Correspondence is subject to disclosure, given the Prosecution’s position as outlined in *inter partes* correspondence;⁸ and in light of the fact that the Prosecution has disclosed [REDACTED] Malian authorities have been summarised and disclosed pursuant to Rule 77.⁹
7. The Defence has previously sought to obtain the Sought Correspondence via *inter partes* communication with the Prosecution. In May 2018, the Defence requested disclosure of

³ ICC-01/04-01/06-3017, para. 10; ICC-01/11-01/11-392-Red-Corr, para. 39; ICC-02/05-03/09-501, para. 38.

⁴ ICC-01/05-01/08-1594-Red, para. 21; ICC-01/05-01/08-3100, para. 11.

⁵ See e.g., ICC-01/04-01/06-3017, para. 11; ICC-01/04-01/10-275, pp 3-5.

⁶ See, ICC-02/04-01/15-457, paras 13-14; ICC-02/04-01/15-1161, para. 3; see also, ICC-01/05-01/13-1234, para. 13.

⁷ See, [REDACTED].

⁸ See, *infra*.

⁹ See *infra*, para. 15, fn. 26, disclosed in Pre-Trial Rule 77 Package 35, 5 February 2020. This submission should not be interpreted as a concession that the Prosecution should be permitted to disclosed ‘summaries’ of material subject to disclosure contained in the Sought Correspondence; as discussed *infra*, the interaction in question relates to a ‘courtesy meeting’ rather than an exchange of correspondence falling within the Sought Correspondence. See also, ICC-01/12-01/18-667-Conf (‘BSQ Disclosure Motion’), para. 5, fn. 6, regarding Prosecution de facto concessions as regards detention-related information being subject to disclosure.

correspondence, including RFAs, exchanged between the Prosecution and Malian and French authorities in relation to the arrest and detention of Mr Al Hassan in Mali.¹⁰

8. More recently, on 9 January 2020, the Defence sent an email attaching [REDACTED], and/or [REDACTED], and are therefore likely to have information relevant to the conditions of Mr Al Hassan's detention in Mali.¹¹ In that email, the Defence sought *inter alia* 'Any correspondence or information that is otherwise relevant to [the] mental and physical state [REDACTED] in detention, and the legality and conditions of their arrest and detention by national authorities (Malian and/or Barkhane/Serval)'.
9. On 24 January 2020, the Prosecution responded, stating that all documents from national authorities in its possession would 'naturally' be disclosed.¹² However, while the Prosecution subsequently disclosed Malian judicial records and case files with respect to [REDACTED], it is apparent that the Prosecution is yet to disclose material information within its possession falling within the Sought Correspondence, as detailed below. This also runs contrary to Prosecution Counsel's submission during the 18 February 2020 Status Conference, that he 'think[s] we have answered most of the [Defence disclosure] requests'.¹³
10. Further, on 6 March 2020, the Defence sought via email the disclosure *inter alia* of specific correspondence involving Malian and French authorities in relation [REDACTED].¹⁴ In this email, the Defence provided targeted requests for documents and information, on the basis of evidence (with specified ERN numbers) indicating [REDACTED], demonstrating *inter alia* the collection by the Prosecution of information from national authorities in preparation [REDACTED]. However, at time of filing the Prosecution is yet to provide a substantive response to this request, despite the Prosecution's undertaking to 'separately respond' thereto, received on 12 March.¹⁵ In this respect, the Defence recalls the following recent comments of the Single Judge of Trial Chamber X, with regard to Defence disclosure requests relating to the preparation of the Application:

I hear from the Prosecution that they are endeavouring to respond to those specific requests. Obviously I would encourage the Prosecution to continue to prioritise those

¹⁰ See, ICC-01/12-01/18-426-Secret-Exp, para. 24.

¹¹ Annex A, pages 4 and 29, Email from Defence to Prosecution, 9 January 2020.

¹² Annex A, page 34, Email from the Prosecution to the Defence, 24 January 2020.

¹³ ICC-01/12-01/18-T-011-CONF-ENG ET 18/02/2020, 58:8-11.

¹⁴ Annex A, pages 4 and 50, Email from the Defence to the Prosecution, 6 March 2020.

¹⁵ Annex A, pages 5 and 50, Email from the Prosecution to the Defence, 12 March 2020.

*and to provide as much specifics as you can. If you have the information or you don't and you're able to reveal that, I think it's a reasonable request of the Defence; so as specifically as you can.*¹⁶

11. There is a concrete basis to believe that the Prosecution remains in possession of as-yet-undisclosed information that would fall within the category of Sought Correspondence.
12. First, as has been previously raised by the Defence, [REDACTED].¹⁷ For example, [REDACTED], Mr Al Hassan informed the latter that DGSE security guards had physically beaten him and other detainees, some of whom had been imprisoned for four years, who had been tapping on cell doors to demand that their cases be heard before a judge; in response, [REDACTED], and send [REDACTED] a note in relation to the incident.¹⁸ Similarly, [REDACTED] stated that the issue would be raised with [REDACTED].¹⁹ To this end, according to [REDACTED] of Mr Al Hassan's concerns regarding 'his detention, health issues, and medication he may require for toothaches and headaches, as well as his wish to be transferred [REDACTED].²⁰ Further, in relation to [REDACTED], it is apparent ([REDACTED]) that [REDACTED] an improvement in his detention conditions.²¹
13. Again, it is reasonable to assume that the Prosecution would have kept records of any correspondence with the Malian authorities – whether formal or informal – in which such concerns were raised and/or discussed. In this respect, the Defence recalls that part of the Prosecution's obligations under Article 54(1)(b) of the Statute and Rule 10 of the Rules are to preserve any correspondence it uses in the course of conducting its investigation.²² It also recalls that even informal and/or preparatory correspondence in this regard – including for example, emails – falling within the category of Sought Correspondence would be subject to disclosure, comprising, as it does, material that would enable the Defence to assess the legality of evidence obtained from the [REDACTED] that the Prosecution intends to rely on at trial.²³

¹⁶ ICC-01/12-01/18-T-011-CONF-ENG ET 18/02/2020, 60:1-6.

¹⁷ In relation to the apparently [REDACTED], see, [REDACTED], and references cited therein.

¹⁸ MLI-OTP-0060-1374, 1378-1379.

¹⁹ MLI-OTP-0051-0967, 0991.

²⁰ MLI-OTP-0071-0286, 0287.

²¹ An impression that, if false, went uncorrected by the Prosecution investigators present; see, MLI-OTP-0068-3346-R01, 3361 ([REDACTED]: '[REDACTED]').

²² ICC-02/04-01/15-1161, para. 14.

²³ See, ICC-01/05-01/13-1542-Red, paras 4-6, 11-12, in which correspondence between the Prosecution and Dutch authorities preparatory and prior to the Prosecution's sending of a formal RFA, including emails, were found to be

14. Records of such external correspondence are manifestly relevant to Defence preparation: specifically, in relation to [REDACTED], and Prosecution investigators' conduct in this regard, [REDACTED] with Malian authorities. However, no such correspondence has been disclosed.²⁴
15. Further, it is apparent that prior to [REDACTED] in Mali, the Prosecution would request the assistance of [REDACTED] [REDACTED].²⁵ In this respect, the Prosecution's cooperation with Malian [REDACTED] authorities appears to have extended to 'courtesy' meetings; including one during which [REDACTED].²⁶ In this context of close coordination, it is evidently reasonable to assume that the Prosecution exchanged correspondence with the Malian authorities in relation to [REDACTED] – whether it be correspondence in relation to the general implementation thereof, or in relation to specific [REDACTED] requests – and in relation to the Malian authorities' assistance and involvement in Prosecution investigations as regards [REDACTED].
16. Such correspondence would be subject to disclosure. It would provide a more complete picture of the assistance and coordination between Prosecution and the Malian authorities in the former's investigations [REDACTED]. It would also allow the Defence to ascertain the extent to which Prosecution investigations were influenced by the Malian authorities, and acted on information provided by the latter – itself highly relevant to the question of where and [REDACTED]. To this end, the Defence notes that [REDACTED] regarding Mr Al Hassan's arrest and detention at the DGSE – as well as information regarding Mr Al Hassan's [REDACTED].²⁷
17. Similarly, the Defence has a legitimate interest in exploring whether [REDACTED]. In this regard, it is apparent that [REDACTED] made various allegations against Mr Al Hassan [REDACTED].²⁸ The Defence's interest in this issue is especially important given that the Defence is yet to be provided with information comprising the basis of his arrest and

'relevant to assessing the procedure by which evidence against the accused was collected' and therefore subject to disclosure; see also, ICC-01/05-01/13-1632, paras 1-2 (referring to the disclosure of emails pursuant to the above Decision).

²⁴ See also, BSQ Disclosure Motion, paras 16-18.

²⁵ See, MLI-OTP-0064-0797, 0797, wherein [REDACTED]; MLI-OTP-0071-0286, 0286, wherein it is stated that [REDACTED]; see also, MLI-OTP-0062-3606, 3617 ([REDACTED]); MLI-OTP-0065-0940-R02, 0950 ([REDACTED]); MLI-OTP-0062-2631, 2639 ([REDACTED]); MLI-OTP-0068-2935, 2955 ([REDACTED]).

²⁶ MLI-OTP-0064-0797, 0797.

²⁷ ICC-01/12-01/18-328-Conf-Exp-Red2, paras 5, 13, 19.

²⁸ Annex A, pages 4 and 29, Email from the Defence to the Prosecution dated 9 January 2020.

detention by the French and Malian authorities, or information that might explain why he was targeted by these authorities.

18. Further, according to the 2013 Agreement between the Governments of France and Mali with regard to the French armed forces' intervention in Mali (the 'Agreement'), the very transfer of Mr Al Hassan to the custody of the ICC Prosecution would have required express authorisation from the French authorities.²⁹ Likewise, confidential information regarding the circumstances and reasons for Mr Al Hassan [REDACTED] by French Operation Barkhane forces, and their subsequent transfers to the Malian authorities, could not have been disclosed to the ICC Prosecution without prior agreement of the French authorities.³⁰ It is reasonable to assume that the Prosecution – [REDACTED]; and into whose custody Mr Al Hassan was transferred – would have been the origin of, or party to, RFAs or correspondence involving the Malian and/or French authorities in this regard. Such correspondence would be manifestly relevant to Defence preparations. Prosecution RFAs sent to Operation Barkhane would provide a picture of the scope of information requested from the latter, which in turn would allow the Defence to ascertain [REDACTED]; [REDACTED]; and the Prosecution's consideration of Mr Al Hassan's legal status – [REDACTED].
19. Further, it is apparent that the Prosecution and the Malian authorities continue to closely cooperate with respect to [REDACTED]. For example, according to a Prosecution Investigator's Note, [REDACTED], the Prosecution was provided with .³¹ The Defence notes that the Prosecution has previously [REDACTED]; and also notes [REDACTED].³² Furthermore, the Prosecution recently disclosed [REDACTED].³³ In each of these letters, reference is made to a [REDACTED]; however no such [REDACTED] appears to have been disclosed to the Defence.
20. In sum, it is apparent from the above that the Prosecution is yet to disclose highly relevant and exculpatory material that would fall within the category of Sought Correspondence. The

²⁹ See, *Décret n° 2013-364 du 29 avril 2013 portant publication de l'accord sous forme d'échange de lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force « Serval », signées à Bamako le 7 mars 2013 et à Koulouba le 8 mars 2013* (the 'Agreement'), Article 10 ('Aucune personne remise aux autorités maliennes en application du présent article ne peut être transférée à une tierce partie sans accord préalable des autorités françaises'); see also, MLI-OTP-0061-1622, 1627.

³⁰ See e.g., MLI-OTP-0061-1622, 1622; MLI-OTP-0071-0212-R01, 0212; MLI-OTP-0071-0219-R01, 0219.

³¹ MLI-OTP-0030-0316, 0317.

³² MLI-OTP-0035-0933, 0935; see also, Annex A, p. 4 and 50, [REDACTED].

³³ See, MLI-OTP-0074-2121; MLI-OTP-0074-2123; MLI-OTP-0074-2125; and MLI-OTP-0074-2127.

Defence therefore requests that the Prosecution be ordered to review its holdings and to immediately disclose the Sought Correspondence, as a matter of priority. Such an order is necessary so as to ensure that the pending Application can be filed in a timely manner, prior to the scheduled commencement of trial and within the deadlines imposed by the Single Judge.

21. Any Prosecution argument that an order to disclose the Sought Correspondence would be overbroad would be without merit. First, as demonstrated above, and in accordance with the Single Judge's recent comments, the Defence's specific and targeted requests for information falling within the Sought Correspondence have not received any substantive response.³⁴ Further, such a position would run counter to the above-cited ICC jurisprudence,³⁵ and would unduly limit Trial Chamber X's powers as regards finding disclosable certain defined classes or categories of documents.³⁶ The Sought Correspondence, and their materiality, are clearly defined and delineated in these submissions; specific examples of evidence indicating that this information remains in the possession of the Prosecution have also been provided. Likewise, any Prosecution attempts to disclose Article 67(2) or Rule 77 material in 'summary' form should be rejected.³⁷
22. An order for disclosure of the Sought Correspondence would be in the interests of fairness and expeditiousness, in accordance with the statutory powers and functions of Trial Chamber X.³⁸ A definitive order in this regard would streamline the proceedings, not only by facilitating the timely preparation and filing of the Application, but by allowing both parties to proceed with a clear and specific understanding of the Prosecution's disclosure obligations, thereby minimising the risk of further, repeated disclosure-related litigation in relation to the Application.

³⁴ See, *supra*, paras 7-10.

³⁵ See *supra*, para. 4 and references cited therein; see also, ICC-01/05-01/13-1632, paras 13-15, where Prosecution arguments seeking to limit disclosure of correspondence with Dutch authorities to that relating to intercepted communications were rejected, and the Prosecution was ordered to disclose 'all records concerning the legality of the collection of telecommunication evidence by the Dutch authorities [emphasis added]' in line with a previous ruling that 'material which enables the defence to assess the legality of evidence which the Prosecution intends to rely upon at trial is relevant to the preparation of the defence'.

³⁶ See, ICC-02/04-01/15-468, paras 1-2, 6.

³⁷ For the purposes of judicial economy, the Defence respectfully refers Trial Chamber X to its submissions in the BSQ Disclosure Motion, at paras 6-22; while these paragraphs relate to Biographical and Security Questionnaires, the arguments contained therein are applicable *mutatis mutandis* to the present Motion, *inter alia* with regard to the undue prejudice that would be occasioned to Defence preparations should the Prosecution be permitted to disclose Article 67(2)/Rule 77 material in 'summary' form.

³⁸ See, Article 64(2).

IV. Conclusion and relief sought

23. For the above reasons, the Defence respectfully requests that the Trial Chamber **ORDER** that the Prosecution disclose the Sought Correspondence.



Melinda Taylor
Lead Counsel for Mr Al Hassan

Dated this 30th Day of November 2020
At The Hague, The Netherlands