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**International
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15 December 2020

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

**Public redacted version of the “Prosecution’s response to the
“Urgent Defence Request for Disclosure”, ICC-01/12-01/18-829-Conf”,
3 June 2020, ICC-01/12-01/18-857-Conf**

Source: Office of the Prosecutor

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 requests¹ the Single Judge of the Trial Chamber X² to order the Prosecution to disclose the requested Information ("Requested Information"), on an urgent basis. The Defence also makes passing reference to an alternate request: should disclosure not be possible due to national security or witness protection issues, it suggests the Single Judge should order the Prosecution "to adduce relevant admissions of fact *in lieu* of disclosure".³ However, this is not listed among the forms of relief sought in the Request,⁴ nor is any basis made out for such alternate relief in the Defence's submissions. This part of the Request should be summarily dismissed for these reasons alone. The entire Request should be dismissed for the reason set out below.

2. The Prosecution has met its obligations under article 67(2) of the Rome Statute⁵ and rule 77 of the Rules of Procedure and Evidence⁶ by proactively discharging its disclosure obligations, and also in response to all specific requests for disclosure by the Defence. The Defence has shown no good reasons for the Single Judge to doubt that the Prosecution has not discharged its disclosure duties scrupulously and fairly.⁷

3. Contrary to the Defence's repetitive and premature requests to the Single Judge seeking judicial intervention in the *inter partes* disclosure process, the Prosecution has made utmost efforts to identify and disclose all information and documents falling under the ambit of article 67(2) of the Statute or necessary to the preparation of the Defence pursuant to rule 77.

¹ ICC-01/12-01/18-829-Conf ("Request").

² "The Single Judge".

³ Request para.4.

⁴ Request, para. 32.

⁵ "The Statute".

⁶ "The Rules".

⁷ Trial Chamber III, Situation in the Central African Republic, Prosecutor v. Jean-Pierre Bemba Gombo, "Decision on the defence application for additional disclosure relating to a challenge on admissibility", 2 December 2009, ICC-01/05-01/08-632, para. 22

4. Where requested material existed but could not be disclosed for reasons related to security of witnesses, integrity of ongoing investigations, or confidentiality under existing cooperation agreements and necessary to preserve cooperation with States or other relevant entities, relevant information has been diligently disclosed to the Defence in a suitable format.
5. By now, the Prosecution has disclosed relevant and disclosable material totalling 31,473 documents. E-Court shows how much material the Prosecution has disclosed to Defence, including its nature, its category (incriminating, rule 77, etc.) and its disclosure date.⁸
6. Where the requested information was not in the Prosecution's possession or control, the Defence was duly advised and, where relevant, details of the efforts to secure such information were also shared with the Defence.
7. The Defence is simply dissatisfied with the disclosed information and material since it does not support its contentions and line of defence. The Defence's unsupported assertions that the Prosecution is withholding relevant information, are premised on the speculative misplaced assumption that the Prosecution has played a particular role in the arrest and surrender of Al Hassan by Barkhane to Malian authorities, or was otherwise complicit – directly or indirectly – in the alleged torture or mistreatment of detainees at the DGSE.⁹
8. Furthermore, the Defence's requests for information are based on an assumption that the Prosecution must have been aware of, or in coordination with, military operations by Barkhane forces prior to the arrest of individuals suspected of belonging to armed groups in Mali. This assumption disregards all disclosure and clarifications on the matter and deliberately rests on a

⁸ *Inter alia* 16148 incrim documents.

⁹ Defence request, para. 1.

flawed understanding of the context in which such arrests took place. It also disregards the inherent limitations of the Office of the Prosecutor's investigation, based on its mandate and resources, to be privy to such operations.

9. The Request accordingly fails to demonstrate that the Prosecution has failed to discharge its disclosure duties scrupulously and fairly.

II. Confidentiality

10. Under regulation 23bis(2) of the Regulations of the Court, the Prosecution files this response as confidential, since it responds to a motion of the same classification. The Request relates to and makes reference to confidential information [REDACTED]. A public redacted version will be filed as soon as possible.

III. Submissions

1. The Prosecution has discharged its disclosure duties scrupulously and fairly including for the subject matters highlighted in the Request

11. The Prosecution has made utmost efforts, consistent with its obligations, to disclose - either proactively or in response to specific requests by the Defence - relevant information falling within the scope of Article 67(2) and/or Rule 77. A total of 31,473 documents, videos, witness transcripts, investigators notes, etc., have been communicated to the Defence.
12. Where requested information concerned confidential cooperation requests or interactions with national authorities, the Prosecution has assessed the materiality of such requests. It has balanced its disclosure obligations and the critical need to preserve cooperation for its investigation, security for

witnesses and operations, and the overall integrity of ongoing investigations,¹⁰ and prepared and disclosed in suitable formats the requested information when it existed.

13. The Defence's contention that confidentiality is no longer a valid basis "to withhold" disclosure because the "Prosecution's investigation of Mr. Al Hassan is complete" is inaccurate. It assumes that disclosable information exists and ignores the overarching reason for confidentiality of cooperation requests, namely the critical need to preserve the trust of national authorities and other relevant entities providing crucial cooperation to the Office's investigations and prosecutions, which goes beyond the Al Hassan case. Additionally, the Office's investigation in Mali – which is wider than the current case – is ongoing.
14. Nonetheless, the Prosecution has made all necessary efforts, in good faith, to disclose existing material information in a suitable format.

2. The Prosecution has disclosed all relevant information in relation to its interactions with national authorities

2.1 Meetings with Malian authorities: the minutes of the meeting between the ICC investigators and the DGSE [REDACTED] concerning [REDACTED] Mr. Al Hassan, and the lifting of the redactions to the name of the DGSE [REDACTED]

15. The Prosecution has disclosed a note [REDACTED] pertinent to the meeting with the DGSE [REDACTED] on 16 June 2017 in Bamako. The note explains what information was requested from the [REDACTED] and what responses were provided to the Prosecutor. Furthermore, the note explains what steps were taken in order to secure necessary authorisation to

¹⁰ "Exceptions to full disclosure may be necessary to protect the safety and well-being of persons at risk (Article 68(1) of the Statute and Rule 81(4) of the Rules), for purposes of national security (Article 72 of the Statute) but also for operational purposes related to Prosecution investigations (Rule 81(1) and (2) of the Rules).

interview Mr Al HASSAN. The note is drafted in a clear way, with precise dates, contrary to what Defence submits.¹¹

- 16 With regard to the name of the DGSE [REDACTED]¹² which is redacted in the note [REDACTED], the Prosecution will lift the redaction thereto. The Defence has this name already.
- 17 The Defence¹³ is also aware of the dates when the Prosecution first received information. Clear and detailed notes [REDACTED], [REDACTED] or [REDACTED] illustrate the way the Prosecution first obtained some information through verbal discussion or screening. It is also apparent for each collected document from the “*chain of custody notes*” in the disclosed metadata. Contrary to what Defence submits, these metadata are reliable. This is the very reason why they are disclosed. Arguments made by the Defence in paragraph 10 of its request are speculative.
18. With regard to the “*Synthèse de briefing*”, this document is not in the Prosecution possession.

2.2 Information as to whether the Prosecution interviewed or requested to interview, obtained information, or requested to obtain information, in relation to [REDACTED]

19. The Prosecution has been informed that [REDACTED] [REDACTED]. No interview has been realised yet.

3. Request for specific RFAs to Mali, France [REDACTED]

20. Consistent with the Court’s relevant case law as recently reiterated by the Single Judge in her order issued on 23 April 2020,¹⁴ RFAs are considered

¹¹ [REDACTED]; Defence request, para. 5, 16 and 19.

¹² Defence request, para. 11.

¹³ Defence request, para. 7, 8 and 18.

¹⁴ Infra, note 6.

confidential correspondence¹⁵ which, in principle, are excluded from routine disclosure. The importance of preserving the confidentiality of RFAs and interactions with States from routine disclosure cannot be overstated. As stressed by the Single Judge: “The cooperation regime under the Statute is integral to the effective functioning of the Court and central to that regime is the relationship of trust between the State Parties and the organs of the Court, in this instance, the Prosecution.” Preserving confidentiality is critical to maintaining and fostering necessary support and facilitation by States for effective implementation of the Court’s mandate.

21. In this regard and taking into account different competing interests, the Defence’s requests for disclosure related to RFAs have been assessed on a case-by-case basis and relevant information has been disclosed in suitable format.

3.1 The Request for Assistance (‘RFA’) to Mali of 8 November 2013 concerning the

22. This 8 November 2013 request is a request for assistance pertinent [REDACTED]
[REDACTED]
[REDACTED].
23. A note explaining the generic and continuous nature of this request for assistance has been disclosed. In the specific case of Al Hassan, relevant investigative notes have been disclosed to the Defence. [REDACTED]
[REDACTED]
[REDACTED] have been disclosed. This request for assistance simply does not contain information which the Defence seeks to

¹⁵ Articles 69(5), 87(3), 93(8) of the Statute.

support its collusion theory. The disclosure of the full RFA is accordingly not justified under either article 67(2) or rule 77.

24. The general allegations of torture and mistreatment in detention facilities in Mali does not provide a valid basis for the Defence to request the disclosure of this general and standard request.

3.2 The RFA of 7 November 2017 to Mali concerning Prosecution requests to receive personal data and DGSE interviews conducted with Mr. Al Hassan, and related follow up requests

25. The Prosecution has disclosed a specific note pertaining to the request and the follow-ups carried out for its full execution. Material collected in this regard has been disclosed.
26. The Defence has a full list of the items seized from Al Hassan during his arrest by Barkhane, as the relevant copies of *procès-verbaux* of arrest and surrender which were received from Malian authorities have been disclosed e. The Prosecution has also disclosed a specific note explaining that it has only received copies of *procès-verbaux* themselves and a "Compilation d'auditions du terroriste Hassane Ag Abdel Aziz" from the DGSE.
27. Therefore, the Defence cannot reasonably suggest that the disclosure of the RFA itself is necessary for the preparation of their own RFA. The Defence's general contention is that whatever the Prosecution deems relevant in its requests for assistance is automatically relevant to the Defence.¹⁶ The Defence argues that, as such, the request ought to be disclosed. This is both speculative and unreasonable.¹⁷ It is however consistent with the unacceptable "fishing expedition" approach of the Defence.

¹⁶ Defence request, para. 11.

¹⁷ Defence request, para. 12 and 13 and 23: e.g. "It is still possible that the Prosecution was made privy of their content" (para. 12) and "if the Malian authorities claimed verbally..." (para. 13).

3.3 The RFA of 7 November 2017 to France to access private data and evidence obtained by Barkhane concerning Mr. Al Hassan, related follow-up requests, and the French response dated 15 January 2019

28. This RFA was in fact sent to French authorities on 3 November 2017. This specific RFA is addressed in the note prepared and disclosed to the Defence detailing specific steps taken in seeking cooperation from the French authorities in relation to the Al Hassan case.¹⁸ All the documents received pursuant to that request were disclosed to the Defence. However, the Prosecutor [REDACTED]

[REDACTED] All this information has been disclosed to the Defence.

29. The Defence has a full list of the items seized from Al Hassan during his arrest by Barkhane, as the relevant documents of arrest and surrender which were received from French authorities have been disclosed. The Prosecution has also disclosed a specific note explaining that, apart from the disclosed documents themselves, [REDACTED]

[REDACTED]¹⁹ The Defence speculation to the contrary is unfounded.

30. Therefore, the Defence cannot reasonably suggest that the disclosure of the RFA is necessary for the preparation of their own RFA. The Prosecution refers to paragraph 27 above.

31. Further, the Defence's suggestion that because Al Hassan was interviewed by the Prosecution on [REDACTED] and his links with Iyad Ag Ghaly, the Prosecution must have had prior information from DGSE or Barkhane is unfounded. This is a mere speculation.

¹⁸ [REDACTED].

¹⁹ *Ibid.*

- 32 The factual basis for the allegation that [REDACTED]
[REDACTED],²⁰ is found in the transcripts of Al Hassan's interviews with the OTP,²¹ in which Al Hassan stated himself that he [REDACTED]
[REDACTED].²² This information has already been disclosed as early as July 2018.
- 33 Furthermore, Al HASSAN's extended association with the armed groups after the 2012/2013 events is supported by other disclosed evidence. However, this corroborative evidence had been received by the Prosecution after it had concluded its interviews with Al HASSAN in March 2018 and therefore had no bearing on the Prosecution's interviews of Al Hassan, and did not form the basis of the information obtained from Al HASSAN during such interviews.²³
- 34 As with other witnesses, the Prosecution's investigation of h Al HASSAN was not limited to the 2012/2013 events. While the focus was on those events, the investigation had to extend beyond this limited temporal scope, to cover other related facts and circumstances to give the proper context to his account and to cover facts that may fall within the broader scope of the investigations in the Mali situation, such as Al HASSAN's personal and professional background as well as his extended association with the armed groups involved in the 2012/2013 events leading to his arrest in April 2017. It is common practice for the investigation to cover events taking place before and after the 2012/2013 crisis.

²⁰ Request, para. 21, 22.

²¹ [REDACTED]

²² [REDACTED]

²³ See e.g. [REDACTED] which was collected from the French authorities on 12 July 2018, and later collected in a better quality on 16 April 2020. See [REDACTED]. See also [REDACTED] which was collected from the Malian authorities on 27 November 2018.

35 Al Hassan, who was at all times assisted by a lawyer, provided such information spontaneously. In this context, he was notified of his rights regarding [REDACTED]

36 Concerning the specific reference in the Prosecution's article 56 application that Al Hassan [REDACTED] the Prosecution has already disclosed a note explaining that in a meeting with the Malian authorities on 16 June 2017, the OTP sought verification from the Malian authorities of publically available information suggesting that Al Hassan [REDACTED] in DGSE detention. In that meeting the Malian authorities confirmed that Al Hassan [REDACTED] indeed detained in the DGSE in Bamako.²⁴

37 The reference in the article 56 application that Al Hassan [REDACTED] was an assumption, as was clearly articulated in the application. Given that this was specifically raised in the Request as a ground for disclosure of further information, the Prosecution will disclose forthwith an additional note about the basis of this assumption.

3.4 RFAs to [REDACTED] and requests to [REDACTED] to obtain access to the [REDACTED] of Mr. Al Hassan [REDACTED]:

38. The Prosecution has disclosed the relevant production order by the [REDACTED] authorities and all data obtained pursuant to this order,²⁵ along with a specific note providing information on the request for assistance sent to the [REDACTED] authorities.²⁶

39 Th [REDACTED] of Al Hassan [REDACTED] having been collected by the Prosecution in the course of its investigation, the request addressed to the [REDACTED]

²⁴ [REDACTED]

²⁵ [REDACTED]

authorities was necessary to advance that investigation. The records pursuant to that request were obtained in strict compliance with applicable [REDACTED] law.

40. In this particular case and in addition to the production order (already disclosed), the Prosecution will consult with the [REDACTED] authorities to check if they would agree with the disclosure of the RFA. Upon approval, the Prosecution would disclose it.

4. General contention as to *whether* the Prosecution may have relied on information obtained from torture for its requests for assistance

41. The Prosecution has carried out its disclosure obligation scrupulously and fairly. The Defence is currently in possession of the relevant disclosable information necessary for its preparation.
42. The Prosecution notes that the current request to the Single Judge is premised on the presumption that there must be more information that the Prosecution has not disclosed. Particularly, the Defence is interested in information that may assist its proposed request for the termination of proceedings in order to show an alleged collusion with national authorities.²⁷ Since the existing information disclosed to date does not include material supporting the Defence's theory, the Defence has concluded that the Prosecution must be withholding relevant information. This is not correct and the Defence does not even attempt to provide any basis for their contention, beyond speculation and inferences based on faulty premises and assumptions.
43. It is incumbent upon the Prosecution to assess material possession and comply with its disclosure obligations. However, it cannot disclose what is not in its possession or control. Nor should the Prosecution be obliged to disclose confidential material for the sole purpose of allowing the Defence to satisfy itself that the Prosecution has indeed complied with its disclosure obligations,

²⁷ Defense Request par. 1.

far less so when the Defence has not demonstrated any reason to doubt that it has done so.

44. In relation to the specific requests for disclosure of RFAs and meetings records with national authorities, the Prosecution has acted diligently and responsibly and has disclosed to the Defence in relation to meetings: notes that described the dates and objectives of meetings; and for the RFAs, the existence, dates and objects that were comprised in the notes.
45. As far as the Prosecution's RFAs are concerned, it has been clarified to the Defence that information or assistance requested from States or other entities are prepared based on the totality of information at its disposal, as collected in the course of the Office the Prosecutor's investigation. The Office does not necessarily have to reveal to the requested entity the source of its information.
46. The Defence suggests that a general allegation of torture and mistreatment of detained individuals in Mali requires the Prosecutor to request assurances with respect to each item of information obtained from the Malian authorities to the effect that it was not obtained by means of torture. Based on this premise, the Defence requests the Prosecution to disclose relevant RFAs for its inspection. However, absent any reasonable ground to believe that the requested information was obtained by means of torture, the Prosecution disputes that it is required to engage in such speculative requests.
47. More importantly, it is plain [REDACTED] [REDACTED] that the Prosecution did not rely on any information allegedly obtained from torture. Rather, it conducted interviews on a voluntary basis, respecting all the rights and provisions set forth in Article 55(2) of the Statute, including the presence of duty counsel, and Rule 112 of the Rules. The Defence fails to identify any piece of information purportedly obtained from torture that was used by the Prosecution in any way during a

specific interview, let alone show how that has affected the voluntariness of the statement made by [REDACTED] the Accused. In this regard, the information the Defence referred to above concerning the Accused were obtained from him, during his interview, and/or after the said interview.

48. While the Defence is pursuing its own logic and line of defence aimed at the termination of proceedings, sweeping and speculative theories cannot be accepted as basis for disclosure of confidential RFAs. As recalled by the Single Judge in her recent decision: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] "28

IV. Conclusion

49. The Prosecution has fully met its disclosure obligations under article 67(2) and Rule 77 as necessary, and has conducted its investigation diligently and objectively in conformity with article 54(1). Throughout the disclosure process, including in response to the Defence's requests, the Prosecution has provided copies of, or access to, all material information in its possession or control. In some cases, it has indicated to the Defence that requested information is not in its possession or under its control, or that it was in the process of obtaining that information from relevant entities.
50. The Prosecution has also been ready and willing to assist as far as possible, as the Defence endeavoured to conduct its own investigations.
51. For the foregoing reasons, the Prosecution will lift the redaction mentioned above and will disclose the RFA t [REDACTED] n question, would [REDACTED] agree to

²⁸ Trial Chamber X, Situation in The Republic of Mali, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, "Confidential, Decision on Defence motion seeking disclosure of Prosecution's correspondence with national authorities, No: ICC-01/12-01/18, para. 13

it. It respectfully requests that the Chamber deny the reminder of the Defence Request.



Fatou Bensouda, Prosecutor

Dated this 3rd day of June 2020

At The Hague, The Netherlands