

**Cour
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**International
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15 December 2020

TRIAL CHAMBER X

Before: Judge Kimberly Prost, Single Judge

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 response to Defence request for disclosure of RFAs containing specific allegations regarding Mr. Al Hassan, ICC-01/12-01/18-936-Conf”, 16 July 2020, ICC-01/12-01/18-959-Conf

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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. The Defence request for disclosure of requests for assistance (“RFAs”) submitted to Mali and France in 2017 and 2018 (“Fourth Request” or “Request”) containing specific allegations regarding Mr. Al Hassan should be dismissed.¹ The Defence Request misinterprets article 101 of the Rome Statute and mischaracterises the cooperation framework and the assistance provided to the Court by States Parties according to the Rome Statute system.² The Defence Request for disclosure lacks a proper basis and seeks to re-litigate issues that have already been litigated and decided.

II. Confidentiality

2. Under regulation 23*bis*(2) of the Regulations of the Court (“Regulations”), the Prosecution files this application as confidential since it refers to a filing of the same classification.

III. Procedural Background

3. On 27 March 2020, the Defence filed the ‘Defence Motion for Order of Disclosure – Correspondence with National Authorities’ (‘First Request’).³

4. [REDACTED]
[REDACTED]
[REDACTED].⁴

5. [REDACTED]
[REDACTED].⁶

¹ ICC-01/12-01/18-936-Conf (“Defence Request”).

² ICC-01/12-01/18-885-Conf-Exp and ICC-01/12-01/18-885-Conf-Exp-Corr.

³ ICC-01/12-01/18-686-Conf.

⁴ [REDACTED]
⁵ [REDACTED]
⁶ [REDACTED]

6. On 28 May, the Defence filed an ‘Urgent Defence request for disclosure’, seeking disclosure of key documents and information that in its view relate to the knowledge and complicity of the Prosecution in Mr Al Hassan’s arrest, detention and mistreatment in Mali (‘Second Request’).⁷

7. [REDACTED]
[REDACTED].⁸

8. [REDACTED]
[REDACTED].⁹

9. [REDACTED]
[REDACTED].¹⁰

10. On 7 July 2020, the Defence filed the present Request.¹¹

IV. Submissions

The Defence Request incorrectly relies on article 101 (the rule of speciality)

11. The Defence incorrectly relies on article 101 of the Rome Statute to substantiate its Request for disclosure of RFAs.

12. Article 101 contains the rule of speciality (“Rule”) which restricts the requesting jurisdiction to bringing proceedings with respect to a course of conduct for which the person was surrendered.¹² The basis for this Rule is States’ sovereignty as the requesting State or entity can only exercise jurisdiction if the requested State cooperates.

13. The principle admits exceptions: pursuant to paragraph 2 of article 101, the

⁷ ICC-01/12-01/18-829-Conf.

⁸ [REDACTED]
⁹ [REDACTED]
¹ [REDACTED]

¹¹ ICC-01/12-01/18-936-Conf.

¹² ICC-01/05-01/13-567, p. 5; ICC-02/11-02/11-151, para. 8-9.

Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the Suspect to the Court.

14. The Rule therefore operates between the State and the Court. The principle is not intended to vest a suspect or an accused with any additional rights to those afforded to him or her by the Statute; rather, it is a principle devised to ensure that requested State and the Court operate on a shared understanding of the basis and purpose of the surrender of a given person. This means that, barring specific and compelling reasons, the Defence will lack standing to claim a rule of speciality violation. As Pre-Trial Chamber I has held, a surrendered person is only entitled to provide views according to rule 196, but the Defence cannot claim a violation of the rights of the suspect/accused person for violation of the rule of speciality.¹³ Consequently, to the extent that the Defence seeks disclosure of the RFAs to claim an alleged violation of the rule of speciality, this request lacks a proper basis.¹⁴

15. Further, on the law, article 101 relates to the “course of conduct” for which a person may be surrendered to the Court and subsequently prosecuted. Contrary to the Defence’s views, the rule does not relate to ancillary matters, such as protective measures and detention.¹⁵ For these reasons, it cannot be used for the purpose of this disclosure request.

16. In addition, the Prosecution notes that in the present case the course of conduct for which Al Hassan was arrested and transferred is the course of conduct for which he is being prosecuted. The rule of speciality cannot therefore be used for the purposes of the Defence’s request.

17. Further, the position advanced by the Defence is factually inaccurate: [REDACTED]
[REDACTED]
[REDACTED]. The fact that JNIM and Iyad Ag Ghaly have been active in Northern Mali and involved in a number of grave

¹³ ICC-02/11-02/11-151, para. 8-9.

¹⁴ ICC-01/12-01/18-936-Conf, para. 20-25.

¹⁵ ICC-01/12-01/18-936-Conf, para. 20-25.

incidents is a matter of common knowledge: information about this can easily be viewed on the Internet, be it in newspaper articles, on the official MINUSMA website or even via the JNIM self-published propaganda. Further and as previously noted,¹⁶

[REDACTED]
[REDACTED].¹⁷ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

18. The Defence is wrong in suggesting that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]. Rule of speciality bans the prosecution for conduct falling outside the course of conduct underlying a suspect's arrest and transfer to the seat of the Court; it does not bar in any manner the universe of available and usable information for the purposes of ancillary procedural measures. The Defence's flawed arguments cannot in consequence constitute a valid basis for disclosure of requests for assistance.

The Defence Request mischaracterises the cooperation framework and the assistance provided to the Court by States Parties according to the Rome Statute system

19. The Defence's request for disclosure appears to be based on an unfounded presumption of bad faith, by assuming that formal exchanges between the OTP and requested States within the framework of Part 9 of the Statute may prove "collusion" between OTP and those States.

¹⁶ ICC-01/12-01/18-857-Conf, para. 32.

¹⁷ [REDACTED]
[REDACTED]

20. For instance, when substantiating its argument on the rule of speciality as a basis for disclosure, the Defence states that: "[...] if the Prosecutor sought [...] a waiver [of the rule of speciality], whether granted or not, this would be material for the Defence as evidence for concerted action between the Prosecutor and national authorities"¹⁸. The argument overlooks, *inter alia*, that the Rome Statute not only contemplates the possibility of requests for waiver being made by the Court; it also encourages States to grant those requests (Statute, article 101 (2)).

21. The same flawed approach seems to lie at the heart of the Defence's continuing efforts to obtain disclosure of RFAs and to re-litigate, under different legal angles, [REDACTED].¹⁹ Indeed, the Defence's claim that "the sought RFAs may be evidence of concerted action between the Prosecution and the French and Malian authorities",²⁰ is speculative [REDACTED]

[REDACTED].²¹

22. The aspersions supporting the Defence request—alleged collusion between OTP and requested states— could only lead to a proper request for disclosure of RFAs if they had a proper foundation establishing a legitimate forensic purpose – which the Defence has completely failed to do. Rather, the Defence position seems to be that it is enough for the Defence to merely raise a suspicion of collusion (even if completely hollow or, worse, based on the possible exercise of a statutory authority, such as the request for an article 101 (2) waiver) for a RFA to become disclosable. This peculiar position finds no support in the Statute, the Rules or the Court's jurisprudence. To the contrary, and as the Appeals Chamber has already held, whether RFAs are considered material under rule 77 necessarily depends on the

¹⁸ Defence Request, para. 25.

¹⁹ [REDACTED].

²⁰ Request, p. 6.

²¹ [REDACTED]

[REDACTED]

[REDACTED].

26. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].²⁷ The same finding is equally applicable to the present Request.

27. Finally, upon examination of the information and arguments contained in the Defence request, it remains unclear to the Prosecution how disclosing RFAs between the Court and France or Mali will advance the proceedings in relation to the “impact” and “nexus” between Mr Al Hassan’s detention in Mali and the ICC proceedings against him. [REDACTED]

[REDACTED].²⁸ [REDACTED]

[REDACTED].²⁹ [REDACTED]

[REDACTED]

[REDACTED]³⁰ Bringing a similar request for the disclosure of RFAs to France and Mali on a similarly broad ground without a clear showing of materiality does not merit a departure from the previous rulings already made on this matter.

27 [REDACTED]

28 [REDACTED]

29 [REDACTED]

30 [REDACTED]

V. Requested Relief

28. For the foregoing reasons, the Prosecution requests that the Single Judge dismiss the Defence Request in its entirety.



Fatou Bensouda, Prosecutor

Dated this 16th day of July 2020

At The Hague, The Netherlands