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No. ICC-01/12-01/18
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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 ABDLOU AZIZ AG MOHAMED AG
MAHMOUD

Public redacted version of

**Decision on Defence motion seeking disclosure of Prosecution's correspondence
with national authorities**

Decision 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 Victims

Seydou Doumbia
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Fidel Luvengika Nsita

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

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REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Kimberly Prost, acting as Single Judge of Trial Chamber X (the ‘Single Judge’ and the ‘Chamber’, respectively) of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 54(3)(f), 64(2), (3)(c) and (6)(c), and 67(2) of the Rome Statute (the ‘Statute’), Rules 77 and 81 of the Rules of Procedure and Evidence (the ‘Rules’), and Regulation 24(5) of the Regulations of the Court (the ‘Regulations’), issues the present ‘Decision on Defence motion seeking disclosure of Prosecution’s correspondence with national authorities’.

I. Procedural history

1. On 27 March 2020, the Defence filed the ‘Defence Motion for Order of Disclosure – Correspondence with National Authorities’ (the ‘Request’).¹ Specifically, the Defence seeks disclosure of 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), which it submits are [REDACTED] and to the legality and conditions of their arrest and detention by national authorities, including by Operations Barkhane and Serval.² In particular, the Defence identifies [REDACTED] while detained in Mali, and/or [REDACTED] Mr Al Hassan.³
2. On 9 April 2020, the Office of the Prosecutor (the ‘Prosecution’) filed its response, opposing the Request (the ‘Response’), as it considers it overly broad and unfounded.⁴ In particular, the Prosecution states it has been disclosing and continues to disclose material related to the Request, in light of the current deadline for disclosure set on 12 May 2020.⁵
3. On 17 April 2020, the Defence sought leave to reply (the ‘Request for leave to reply’), specifically to (a) submit a table setting out items it submits are subject

¹ Request, ICC-01/12-01/18-686-Conf.

² Request, ICC-01/12-01/18-686-Conf, para. 1.

³ Request, ICC-01/12-01/18-686-Conf., para. 8.

⁴ Prosecution’s response to Defence Motion for Disclosure Order – Correspondence with National Authorities, ICC-01/12-01/18-736-Conf, paras 2, 4.

⁵ Response, ICC-01/12-01/18-736-Conf, paras 2-3.

to disclosure, and (b) make submissions on how the disclosure of notes are insufficient and inadmissible.⁶

4. On 21 April 2020, the Prosecution filed a response, opposing the aforesaid Request for leave to reply.⁷

II. Analysis

5. At the outset, the Single Judge notes the Defence Request for leave to reply. Pursuant to Regulation 24(5) of the Regulations, and having notably considered that her determination would not be materially assisted by further submissions on the two issues identified by the Defence, the Single Judge dismisses the Request for leave to reply.
6. Turning to the merits of the Request, the Single Judge considers that in principle, documents related to cooperation between the Prosecution and national authorities are not disclosable *per se*. In fact, as noted in the Prosecution's Response,⁸ confidential correspondence with States is expected and necessary under Part 9 of the Statute. 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.⁹ Although confidentiality is not absolute, it is often required in the communication of cooperation requests and responses, and may be lifted only in particular circumstances, if the specific need for disclosure is demonstrated in accordance with the disclosure regime.¹⁰ In the instance case, the specific need that must be demonstrated is whether the correspondence sought is potentially exculpatory material under Article 67(2) of the Statute or material for the preparation of the Defence pursuant to Rule 77 of the Rules.

⁶ Defence Request for Leave to Reply to the Prosecution's Response to Defence Motion for Disclosure Order, ICC-01/12-01/18-759-Conf.

⁷ Prosecution's response to "Defence request for Leave to reply to the Prosecution's Response to Defence Motion for Disclosure Order" – ICC-01/12-01/18-759-Conf, ICC-01/12-01/18-763-Conf.

⁸ Response, ICC-01/12-01/18-736-Conf, para. 16.

⁹ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of "Decision on Mr Bemba's preliminary application for reclassification of filings, disclosure, accounts, and partial unfreezing of Mr Bemba's assets and the Registry's Request for guidance", 18 October 2018, ICC-01/05-01/08-3660-Red2, para. 16.

¹⁰ ICC-01/05-01/08-3660-Red2, para. 16.

7. However, the Single Judge recalls that the right to disclosure is not absolute and there can be exceptions to disclosure. 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). In such instances, alternatives to full disclosure may be appropriate, including in the form of summaries or excerpts. However, such exceptions and the alternatives to full disclosure must be analysed on a case-by-case basis and balancing the different interests at stake.
8. As to the category of correspondence sought by the Defence, the Single Judge is of the view that the general category identified by the Defence as: *all* records of formal or informal correspondence with national authorities relevant to the [REDACTED] is too broad and cannot be considered ‘in bulk’ as falling under Article 67(2) of the Statute or Rule 77 of the Rules and warranting full disclosure without exceptions or alternative measures.
9. The Single Judge further notes that the Prosecution has confirmed that it is aware of its disclosure obligations towards the approaching disclosure deadline on 12 May 2020. In particular, the Prosecution states it has disclosed and continues to disclose ‘in suitable format information determined as material in records of correspondence with national authorities, such as between the Prosecution and national authorities [REDACTED]’.¹¹ The Single Judge observes that the Defence acknowledges that in its understanding ‘the Prosecution does not dispute that the subject-matter of the Sought Correspondence is subject to disclosure’,¹² and would ‘naturally’ be disclosed.¹³ The Defence also acknowledges that, given the pending disclosure deadline, disclosure of material is yet to come.¹⁴
10. Accordingly, the Single Judge considers that the order sought by the Defence is unnecessary and premature, as the Prosecution has confirmed its understanding

¹¹ Response, ICC-01/12-01/18-736-Conf, para. 2.

¹² Request, ICC-01/12-01/18-686-Conf, para. 6.

¹³ Request, ICC-01/12-01/18-686-Conf, para. 9.

¹⁴ Request, ICC-01/12-01/18-686-Conf, paras 9, 20.

of the disclosure obligations, in line with the Defence's requests for disclosure.¹⁵ The Single Judge observes that the Prosecution in its correspondence with the Defence¹⁶ and in its Response has stated that when 'materiality is not clear to the Prosecution at the outset; there is a risk that disclosure might be delayed'.¹⁷ Although such an assertion does not exempt the Prosecution from its obligation to complete disclosure by the established deadline, the Single Judge considers that *inter partes* communications and collaboration in good faith must continue with the aim of satisfying disclosure obligations before 12 May 2020.

11. Specifically, the Single Judge observes the Defence's indication that it has prepared a table setting out specific categories and specific items for which disclosure is sought.¹⁸ In order to facilitate disclosure before the 12 May 2020 deadline, the Single Judge hereby instructs the Defence to transmit the aforesaid table to the Prosecution as soon as possible and before the aforesaid deadline.
12. If and when the deadline comes, and when *inter partes* communications have failed, and if the Defence then considers that there has been a breach to the Prosecution's disclosure obligations, the Defence may seise the Chamber, who will then make a determination and if necessary, order the disclosure of any pending material.
13. Notwithstanding, the Single Judge notes that in some aspects the Request is general and could constitute a 'fishing expedition'. In particular, the Single Judge notes that materiality is not shown by making general allegations referring to the Defence's interests in having a general picture of the cooperation and assistance between the national authorities and the Prosecution.¹⁹ Accordingly, the Single Judge emphasises that any eventual request should be specific and must demonstrate materiality of the information sought pursuant to Article 67(2) of the

¹⁵ Request, ICC-01/12-01/18-686-Conf-AnxA, p. 34.

¹⁶ Request, ICC-01/12-01/18-686-Conf-AnxA, p. 34. In this correspondence referred to by the Defence in its Request, the Prosecution states: *Pouvez-vous précisez ». L'Accusation ne comprend pas ce à quoi vous faites référence/allusion par « documents obtained from the relevant national authorities » par rapport à cette annexe H. En tout état de cause, tout document des autorités nationales qui pourrait être en possession de l'Accusation sera naturellement divulgué.*

¹⁷ Response, ICC-01/12-01/18-736-Conf, para. 24.

¹⁸ Request for leave to reply, ICC-01/12-01/18-759-Conf, para. 6.

¹⁹ Request, ICC-01/12-01/18-686-Conf, paras 16, 18.

Statute or Rule 77 of the Rules and particularly how the information has a direct connection to the charges or a live issue in this case.²⁰

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Defence Request.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'K. Prost', is written over a horizontal line.

Judge Kimberly Prost, Single Judge

Dated this Thursday, 23 April 2020

At The Hague, The Netherlands

²⁰ *Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Remedies in Light of Disclosure Violations, 22 April 2020, ICC-02/04-01/15-1734, para. 22.