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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 ABDOUL AZIZ AG MOHAMED AG
MAHMOUD***

Public redacted version of

**Decision on Defence request for disclosure of material related to Mr Al Hassan's
arrest and detention in Mali**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Kimberly Prost, acting as Single Judge on behalf of Trial Chamber X 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’), issues this ‘Decision on Defence request for disclosure of material related to Mr Al Hassan’s arrest and detention in Mali’.

I. Procedural history

1. On 27 March 2020, the Defence filed the ‘Defence Motion for Order of Disclosure – Correspondence with National Authorities’ (the ‘First Defence Request’).¹
2. On 23 April 2020, the Single Judge issued the ‘Decision on Defence motion seeking disclosure of Prosecution’s correspondence with national authorities’ (the ‘First Decision’).²
3. On 8 May 2020, the Single Judge rejected the Defence’s request for leave to appeal the First Decision (the ‘Leave to Appeal Decision’).³
4. On 28 May 2020, the Defence filed an ‘Urgent Defence request for disclosure’ (the ‘Request’).⁴ The Defence submits that for over a year it has requested the Office of the Prosecutor (the ‘Prosecution’) to disclose ‘key documents and information that relate to the Prosecution’s knowledge and complicity in Mr Al Hassan’s arrest, detention and mistreatment in Mali’.⁵ It states that a judicial ruling is now necessary, as the information ‘falls squarely within the parameters of Article 67(2) of the Statute’.⁶ Accordingly, the Defence requests the Single

¹ Request, ICC-01/12-01/18-686-Conf.

² ICC-01/12-01/18-768-Conf.

³ Decision on Defence request for leave to appeal the Single Judge’s ‘Decision on Defence motion seeking disclosure of Prosecution’s correspondence with national authorities’, ICC-01/12-01/18-795-Conf.

⁴ Request, ICC-01/12-01/18-829-Conf.

⁵ Request, ICC-01/12-01/18-829-Conf, para. 1.

⁶ Request, ICC-01/12-01/18-829-Conf, para. 3.

Judge to order the Prosecution to disclose the information, or alternatively, order the Prosecution to adduce relevant admissions of fact in lieu of disclosure.⁷

5. Specifically, the Defence states that the Prosecution disclosed two notes, drafted respectively on 1 and 5 May 2020, which list dates of contacts and correspondence with a summary thereof (the 'Prosecution Summaries').⁸ Instead, it argues, the Prosecution should have disclosed the correspondence, or contemporaneous minutes, contact logs or investigators notes as concerns its various contacts with the national authorities. The Defence submits that the Prosecution Summaries are insufficient as they omit key details, including whether the Prosecution had direct or indirect access to files concerning Mr Al Hassan [REDACTED].⁹
6. On the basis of the Prosecution Summaries, the Defence has identified the following particular information that, in its view, must be disclosed pursuant to Article 67(2) of the Statute:¹⁰
 - a) the minutes of the meeting between the ICC investigators, and the [REDACTED], which concerned [REDACTED] and Mr Al Hassan, and the lifting of the redaction concerning the name of the [REDACTED];
 - b) The Mali Request for Assistance ('RFA') of [REDACTED] concerning the modalities of interviews with [REDACTED];
 - c) The Mali RFA of [REDACTED] concerning Prosecution requests to receive personal data and [REDACTED] Mr Al Hassan, and related follow up requests;
 - d) The French RFA of [REDACTED] to access private data and evidence obtained by Barkhane concerning Mr Al Hassan, related follow up requests, and the French response dated [REDACTED];
 - e) Information as to whether the Prosecution interviewed or requested to interview, obtained information, requested to obtain information, or interviewed persons in relation to [REDACTED]; and

⁷ Request, ICC-01/12-01/18-829-Conf. para. 4.

⁸ [REDACTED].

⁹ Request, ICC-01/12-01/18-829-Conf. para. 5.

¹⁰ Request, ICC-01/12-01/18-829-Conf. para. 5.

- f) RFAs to Ireland, and requests to Facebook to obtain access to the Facebook accounts of Mr Al Hassan and [REDACTED].

7. The Defence submits that the aforesaid information is disclosable pursuant to Article 67(2) of the Statute as it concerns, *inter alia*, the date on which the Prosecution was first briefed, in relation to Mr Al Hassan, prior to interviewing him.¹¹ The Defence argues it has only received, through the Prosecution Summaries, vague information with no indication as to key dates concerning exchanges of information or the contents of such exchanges.¹²
8. On 3 June 2020, the Prosecution filed its response (the ‘Response’), opposing the Request.¹³ In particular, the Prosecution argues that the Defence’s alternate request, seeking the Prosecution to adduce relevant admissions of fact in lieu of disclosure should be summarily dismissed.¹⁴ The Prosecution states it has met its disclosure obligations pursuant to Rule 77 of the Rules and Article 67(2) of the Statute.¹⁵ It submits that the Defence has shown no good reasons to doubt that this has been done ‘scrupulously and fairly’,¹⁶ and is simply ‘dissatisfied with the disclosed information and material since it does not support its contentions and line of defence’.¹⁷ The Prosecution contends that the Defence’s submissions are speculative and are based on flawed assumptions regarding Mr Al Hassan’s arrest and detention.¹⁸

II. Analysis

9. At the outset, the Single Judge considers it relevant to recall that in her First Decision she determined, *inter alia*, the following:

¹¹ Request, ICC-01/12-01/18-829-Conf. para. 7.

¹² Request, ICC-01/12-01/18-829-Conf. para. 8.

¹³ Prosecution’s response to the “Urgent Defence Request for Disclosure”, ICC-01/12-01/18-829-Conf. The deadline for responses was shortened via e-mail dated 28 May 2020 at 16:24. The Legal representatives of victim (the ‘LRVs’) sent an email indicating that, while they noted the Request, they had no submissions on the merits (Email from the LRVs to the Chamber dated 3 June 2020 at 12:40).

¹⁴ Response, ICC-01/12-01/18-829-Conf, para. 1.

¹⁵ Response, ICC-01/12-01/18-829-Conf, paras 3-6, 11-14.

¹⁶ Response, ICC-01/12-01/18-829-Conf, para. 2.

¹⁷ Response, ICC-01/12-01/18-829-Conf, para. 7.

¹⁸ Response, ICC-01/12-01/18-829-Conf, paras 8-9.

- Documents related to cooperation between the Prosecution and national authorities are not disclosable *per se*.¹⁹
- 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.²⁰
- Confidentiality is not absolute but is often required and may be lifted only in particular circumstances, if the specific need for disclosure is demonstrated in accordance with the disclosure regime.²¹
- 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). Such exceptions must be analysed on a case-by-case basis and balancing different interests at stake.²²
- Disclosure is to be done *inter partes*, if and when *inter partes* communications have failed, the parties may seize the Chamber, who will then make a determination, and if necessary, order disclosure.²³
- When seizing the Chamber, the party making the request should be specific and demonstrate materiality of the information sought pursuant to Article 67(2) of the Statute or Rule 77 of the Rules, and particularly how the information has a direct connection to the charges or a live issue in the case.²⁴

10. The Single Judge will accordingly assess whether the relevant information identified by the Defence meets the aforesaid requirements. Particularly, the Single Judge will determine whether the Request: (a) is specific, (b) demonstrates the materiality of the information sought pursuant to Article 67(2) of the Statute or Rule 77 of the Rules; and (c) relates to information that has a direct connection to the charges or a live issue in the case. If all of the above are affirmative, the Single Judge will then decide whether any restrictions to disclosure apply in the instant case and if so, which alternatives are appropriate.

¹⁹ First Decision, ICC-01/12-01/18-768-Conf, para. 6.

²⁰ First Decision, ICC-01/12-01/18-768-Conf, para. 6.

²¹ First Decision, ICC-01/12-01/18-768-Conf, para. 6.

²² First Decision, ICC-01/12-01/18-768-Conf, para. 7.

²³ First Decision, ICC-01/12-01/18-768-Conf, paras 10-12.

²⁴ First Decision, ICC-01/12-01/18-768-Conf, para. 13.

11. As previously stated by the Single Judge, ‘pursuant to the disclosure regime, once materiality has been established, the burden is on the Prosecution to establish that specific restrictions on disclosure are warranted’.²⁵ Accordingly, the Prosecution is to submit discrete applications to the Chamber in order to apply any other restriction to disclosure.²⁶
12. In this regard, the Single Judge recalls such alternatives to full disclosure include, *inter alia*, disclosure with redactions, provision of a summary and/or of relevant extracts, or withholding of a disclosable item altogether.²⁷ Alternatives to full disclosure are permissible if the following are shown: (a) existence of a restriction to disclosure pursuant to Rule 81 of the Rules; (b) the necessity of such measure; (c) the proportionality of the measure in light of the rights of the accused and a fair and impartial trial.²⁸
13. In the instant case, and pursuant to Rule 81(2) of the Rules, restrictions to disclosure may be applicable to protect further or ongoing investigations and in relation to reports memoranda and other internal documents prepared in connection with the investigation or preparation of the case. Pursuant to Rule 81(3) of the Rules, restrictions to disclosure may also be necessary to safeguard State cooperation, particularly cooperation agreements or arrangements under Article 54(3) of the Statute, but also pre-trial cooperation with States in order to, *inter alia*, take investigative steps, take protective measures, and execute an arrest warrant, as foreseen in Article 57 of the Statute. Rule 81(3) of the Rules also authorises non-disclosure for the protection of national security information pursuant to Article 72 of the Statute as well as for any form of State cooperation as provided for in Article 93 of the Statute. Lastly, restrictions to disclosure may be necessary to protect the safety of witnesses and victims and members of their families, pursuant Rules 81(3) and (4) of the Rules.

²⁵ Leave to Appeal Decision, ICC-01/12-01/18-795-Conf, para. 12.

²⁶ Leave to Appeal Decision, ICC-01/12-01/18-795-Conf, para. 12.

²⁷ Decision on a Defence motion seeking disclosure of Biographical and Security Questionnaires conducted by Prosecution investigators with detained individuals, 29 April 2020, ICC-01/12-01/18-777-Red, para. 11.

²⁸ ICC-01/12-01/18-777-Red, para. 12.

a) The minutes of the [REDACTED] which concerned [REDACTED] Mr Al Hassan, and the lifting of the redaction concerning the name of the [REDACTED]

14. The Single Judge notes that the Request in this regard is specific, as it relates to two discrete items: (a) the [REDACTED] Malian authorities and the Prosecution [REDACTED]; and (b) the name of [REDACTED]. The Single Judge notes that in the view of the Defence, this [REDACTED].²⁹ The Defence submits that it has grounds to believe that in that [REDACTED] Mr Al Hassan and [REDACTED] with the Malian authorities.³⁰ As regards the [REDACTED], the Single Judge notes that although the Defence does not specify how this name is relevant, it argues that there is no basis for redacting this name, since the name of the current [REDACTED] Malian authorities have already been disclosed to the Defence.³¹
15. The Single Judge notes that the Prosecution states that the summary dated 1 May 2020³² is sufficient to fulfil its disclosure obligation in relation to this meeting of 16 June 2017.³³ The Prosecution also informs that it will lift the redaction to the [REDACTED], whose name the Defence already has.³⁴ The Prosecution further submits that it has disclosed all other relevant materials in its possession.³⁵ It also indicates that it does not have in its possession the minutes of the meetings (*‘synthèse de briefing’*) requested by the Defence.³⁶
16. The Single Judge considers that it is undisputed that any minute or document emanating or resulting [REDACTED] is disclosable. However, it also notes that the Prosecution has confirmed it has disclosed all items in its possession, a confirmation she has no reason to doubt. The Single Judge also notes that the name of the [REDACTED] will be disclosed and therefore this part of the Request is moot.

b) The Mali RFA [REDACTED]

²⁹ Request, ICC-01/12-01/18-829-Conf. para. 9, *referring to* ICC-01/12-45-Conf-Exp, para. 19.

³⁰ Request, ICC-01/12-01/18-829-Conf. para. 10.

³¹ Request, ICC-01/12-01/18-829-Conf. para. 16.

³² [REDACTED].

³³ Response, ICC-01/12-01/18-857-Conf, para. 15.

³⁴ Response, ICC-01/12-01/18-857-Conf, para. 16.

³⁵ Response, ICC-01/12-01/18-857-Conf, para. 17. The Prosecution refers to [REDACTED].

³⁶ Response, ICC-01/12-01/18-857-Conf, para. 18.

17. The Defence specifically identifies a RFA from the Prosecution to the Republic of Mali [REDACTED] which it submits relates [REDACTED].³⁷ The Single Judge considers that, contrary to the Defence submissions,³⁸ its relevance to live issues in this case has not been shown. Although the Defence makes reference to open source allegations of the detention conditions in Bamako prisons,³⁹ this does not automatically lead to a presumption, as suggested by the Defence,⁴⁰ of the Prosecution's complicity in torture and cruel and inhumane treatment. Moreover, as noted by the Prosecution in its Response, the overarching reason for confidentiality of cooperation requests is that [REDACTED].⁴¹ The Single Judge observes that the Prosecution has in fact confirmed that this RFA [REDACTED] and not relevant to the preparation of the Defence.⁴² Accordingly, the Defence has failed to identify any materiality as to why the said document is disclosable under either Rule 77 of the Rules or Article 67(2) of the Statute.
18. Since, as noted above, an RFA is not in principle or *per se* subject to disclosure, the Defence has failed to show disclosability either under Rule 77 of the Rules or Article 67(2) of the Statute. Accordingly, it is not necessary, as suggested by the Defence,⁴³ to authorise non-disclosure or remedy the non-disclosure. In fact, the Single Judge notes that the Prosecution has provided a brief summary explaining the general nature of this RFA to the Defence,⁴⁴ despite having no obligation to do so. To the contrary, as noted by the Prosecution in its Response, there is an overarching reason to keep such cooperation requests as confidential, [REDACTED].⁴⁵ Accordingly, and even though the RFA is not disclosable, the Single Judge considers the Prosecution has gone beyond its disclosure obligations in providing the explanatory note.⁴⁶

³⁷ Request, ICC-01/12-01/18-829-Conf, paras 5, 15.

³⁸ Request, ICC-01/12-01/18-829-Conf, para. 19.

³⁹ Request, ICC-01/12-01/18-829-Conf, para. 15.

⁴⁰ Request, ICC-01/12-01/18-829-Conf, para. 15.

⁴¹ Response, ICC-01/12-01/18-857-Conf, para. 13.

⁴² Response, ICC-01/12-01/18-857-Conf, para. 22.

⁴³ Request, ICC-01/12-01/18-829-Conf, para. 19.

⁴⁴ [REDACTED].

⁴⁵ Response, ICC-01/12-01/18-857-Conf, para. 13.

⁴⁶ Response, ICC-01/12-01/18-857-Conf, para. 23.

19. Moreover, the Single Judge notes that the Defence in fact acknowledges that the alleged materiality may be more related to the alleged inexistence of information or lack of steps taken by the Prosecution, which is generally speculative (*i.e.* whether the Prosecution obtained guarantees or assurance [REDACTED] Mr Al Hassan and [REDACTED]).⁴⁷ The Single Judge considers that the current Request is not the appropriate procedural avenue for the Defence to seek such a confirmation or admission from the Prosecution.⁴⁸ Although the Single Judge has encouraged the parties to discuss and agree on facts,⁴⁹ such admissions are ultimately at the discretion of the parties and cannot be ordered by the Chamber.

c) The Mali RFA [REDACTED] concerning Prosecution requests to receive personal data [REDACTED] and related follow up requests

20. The Request in this regard is specific, as it relates to an item clearly identified by the Defence as the Mali RFA [REDACTED]. However, the materiality has not been shown. Further, the Request is broad and relates to all and any material that could have been requested by the Prosecution and the basis for the Prosecution to request such material.⁵⁰ Accordingly, the Defence appears to be in a mere ‘fishing expedition’ that does not warrant disclosure of a cooperation request that, as noted above, is not, *per se*, disclosable. The fact that an item may, as suggested by the Defence ‘illuminate’ a point,⁵¹ or ‘facilitate the ability of [the] Defence to formulate its own requests to the Malian authorities’,⁵² is not enough to warrant disclosure. As regards the Defence’s submissions that disclosure of this item could show the Prosecution’s ‘complicity in torture or cruel and inhumane treatment’,⁵³ the Single Judge considers that, on the basis of the information currently before her, such submissions are speculative and hypothetical and fail to meet the test.

⁴⁷ Request, ICC-01/12-01/18-829-Conf, para. 18.

⁴⁸ Request, ICC-01/12-01/18-829-Conf. paras 17-18.

⁴⁹ Directions on the conduct of proceedings, ICC-01/12-01/18-795-AnxA, para. 21.

⁵⁰ Request, ICC-01/12-01/18-829-Conf. para. 11.

⁵¹ Request, ICC-01/12-01/18-829-Conf. para. 12.

⁵² Request, ICC-01/12-01/18-829-Conf. para. 13.

⁵³ Request, ICC-01/12-01/18-829-Conf. para. 14.

21. Accordingly, and even though the RFA is not disclosable, the Single Judge considers the Prosecution has gone beyond its disclosure obligations and has provided to the Defence a note explaining the nature of this RFA.⁵⁴ The Single Judge also takes note of the Prosecution's confirmation that it has disclosed to the Defence all relevant items [REDACTED].⁵⁵ The Single Judge considers there is no information on the record for her to doubt this affirmation.

d) The French RFA [REDACTED] to access private data and evidence obtained by Barkhane concerning Mr Al Hassan, related follow up requests, and the French response dated [REDACTED]

22. As with the previous RFA, the Request is specific, as it relates to two items clearly identified by the Defence: one RFA dated [REDACTED]. However, the Defence has failed to show its materiality and the Request is largely speculative (*i.e.* whether there was any other evidence, whether this evidence was obtained from a tainted source).⁵⁶ The Defence also alleges materiality in relation to steps taken or not taken by the Prosecution, which again is speculative (*i.e.* whether the Prosecution took steps to independently investigate or verify facts, whether the Prosecution had access to the information collected by the Barkhane/French authorities, whether the Prosecution had reason to believe that the French authorities had information that was not being transmitted).⁵⁷

23. As indicated above, the fact that an item may, as suggested by the Defence 'illuminate' a point,⁵⁸ or 'enable the Defence to formulate its own requests to the French authorities',⁵⁹ is not enough to warrant disclosure. The suggested materiality - that the response from the French authorities 'depending on the particular response of the French authorities, provide a basis for the Defence to ask the Chamber to draw certain inferences as concerns information that was not provided to the Prosecution'⁶⁰ is grossly hypothetical. Moreover, and although as

⁵⁴ Response, ICC-01/12-01/18-857-Conf, para. 25.

⁵⁵ Response, ICC-01/12-01/18-857-Conf, para. 26.

⁵⁶ Request, ICC-01/12-01/18-829-Conf. para. 22.

⁵⁷ Request, ICC-01/12-01/18-829-Conf. para. 22.

⁵⁸ Request, ICC-01/12-01/18-829-Conf. para. 23.

⁵⁹ Request, ICC-01/12-01/18-829-Conf. para. 23.

⁶⁰ Request, ICC-01/12-01/18-829-Conf. para. 23.

noted above, the present Request is not the appropriate procedural avenue to seek a confirmation or admission from the Prosecution as to the ‘absence of evidence or information’,⁶¹ the Prosecution has confirmed it has disclosed all information in its possession and has also informed and confirmed to the Defence when specific items sought have not been transmitted to the Prosecution and hence not in its possession.⁶² Accordingly, the Single Judge considers there is no information on the record for her to doubt this affirmation.

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

24. The Single Judge notes that the Defence does not identify in its Request a particular document or item for which it seeks disclosure. Instead, the Defence argues that it seeks disclosure of general ‘information’ that in its view the Prosecution should have sought on the basis of information that Mr Al Hassan and other [REDACTED].⁶³ The Single Judge considers that the Request in relation to this information is thus not specific enough. Moreover, the Request, on the basis of the information before the Chamber, is grossly speculative and again, appears to seek, more than disclosure of exculpatory material, a confirmation or admission from the Prosecution as regards the investigative steps it took, if any, in relation to information provided by [REDACTED]. As noted above, the present Request is not the appropriate procedural avenue to seek a confirmation or admission from the Prosecution.

f) RFAs to Ireland, and requests to Facebook to obtain access to the Facebook accounts of Mr Al Hassan and [REDACTED]

25. The Single Judge notes that the Prosecution has conceded on this point and if approval is obtained from the Irish authorities, it will disclose the RFA to the Defence.⁶⁴ Accordingly, this part of the Request is moot.

⁶¹ Request, ICC-01/12-01/18-829-Conf. para. 23

⁶² Response, ICC-01/12-01/18-857-Conf, paras 28-29.

⁶³ Request, ICC-01/12-01/18-829-Conf. para. 25.

⁶⁴ Response, ICC-01/12-01/18-857-Conf, para. 40.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY
REJECTS** the 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 Friday, 5 June 2020
At The Hague, The Netherlands