



Original: English

**No. ICC-01/12-01/18
Date: 22 November 2022**

TRIAL CHAMBER X

**Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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

**Decision on Defence request for disclosure of *ex parte* communication between
the Chamber and the VWU**

To be notified in accordance with Regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, pursuant to Articles 43(6), 64, 67 and 68 of the Rome Statute (the ‘Statute’), Rules 16 to 18 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulations 79 and 80 of the Regulations of the Registry, issues the following ‘Decision on Defence request for disclosure of *ex parte* communication between the Chamber and the VWU’.

1. On 17 November 2022, the Defence submitted a request seeking disclosure of all communication between the Chamber and the VWU concerning Defence witnesses (the ‘Request’).¹ The Defence expresses its concern that ‘the *ex parte* character of the communications concerning its witnesses impacts on the efficiency of its communications with the VWS and the Chamber’.
2. The Defence submits that if the VWU were to communicate with the Chamber without consulting the Defence: (i) ‘[t]he VWU might not appreciate fully the sensitivity of certain information or alert the Chamber to this sensitivity, leading to the possibility that the Chamber might not have means to appreciate the risk of citing this information in decisions or exchanges that are then notified to the Prosecution’; and (ii) ‘[t]he Chamber might be provided without the full background or context of exchanges, which could create a misleading or inaccurate impression that impacts on the Chamber’s perception of witnesses’.² The Defence further adds that it would be highly concerned if information from exchanges with the VWU, which may evolve over time, were to be transmitted to the Chamber, without either prior consultation and verification of accuracy with the Defence, or a *post facto* opportunity for the Defence to clarify or correct this information.³
3. The Defence avers that all *ex parte* communications between the Chamber and the VWU that concern Defence witnesses must be disclosed as it is necessary for the Defence to have access to all material that may affect the judgement of the Chamber about Defence witness evidence, and because the Defence needs to

¹ Email from the Defence to the Chamber and the VWU dated 17 November 2022 at 13:22.

² Email from the Defence to the Chamber and the VWU dated 17 November 2022 at 13:22.

³ Email from the Defence to the Chamber and the VWU dated 17 November 2022 at 13:22.

ensure that it is fully apprised about any exchanges that concern the protection of Defence witnesses.

4. As a preliminary matter, the Chamber notes that the Request fails to identify any legal basis within the statutory provisions justifying disclosure. Nonetheless, the Chamber considers the Request.
5. The Chamber notes the Appeals Chamber's findings that while '*ex parte* proceedings are not subject to a general prohibition', '*ex parte* submissions may be used only to the extent that they are strictly necessary'.⁴ As outlined above, the Defence submits that this finding applies to the case at hand and that all *ex parte* communications between the Chamber and the VWU constitute '*ex parte* submissions', within the meaning of the *Ntaganda* Appeals Judgment.
6. The Chamber notes that in the *Ntaganda* Appeals Judgment, the Appeals Chamber added that '[w]hen deciding on the advisability or modalities of the notification of an *ex parte* submission to the accused person, a trial chamber must be mindful of the duty to respect the principle of the equality of arms'.⁵ In this context, the Appeals Chamber referred to the *Lanz* Judgment of the European Court of Human Rights which found, *inter alia*, that 'a party which is not informed about written submissions of the opposing party and thus deprived from reacting thereto is put at a substantial disadvantage vis-à-vis its opponent'.⁶ It follows that the primary purpose of allowing *ex parte* submissions only when strictly necessary is to ensure that the principle of equality of arms is fully respected and that a party to the proceedings is not adversely affected by a determination being made on the basis of such *ex parte* submissions.
7. The Defence's Request does not relate to submissions received from either party in the present proceedings but rather to communications between the Chamber

⁴ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, ICC-01/04-02/06-2666-Red (the '*Ntaganda* Appeals Judgment'), paras 119, 121.

⁵ *Ntaganda* Appeals Judgment, ICC-01/04-02/06-2666-Red, para. 119.

⁶ ECtHR, *Lanz v. Austria*, Judgment, 31 January 2002, Application No. 24430/94, para. 62.

and the VWU, a neutral organ of the Court tasked with assisting witnesses and victims before the Court pursuant to Article 43(6) of the Statute.⁷

8. Pursuant to Article 64 of the Statute, the Chamber bears the ultimate responsibility to ensure that the trial is fair and expeditious. As part of its trial management functions, the Chamber may, if deemed necessary, communicate with neutral organs of the Court, including the VWU, to ensure, *inter alia*, that all logistical arrangements for the calling of witnesses have been put in place and that witnesses will appear before the Chamber as planned. However, the Chamber considers that such administrative communications between the Chamber and the VWU do not fall within the ambit of the aforementioned ruling in the *Ntaganda* Appeals Judgment.
9. The Defence's assertion that the Communications 'may affect the judgement of the Trial Chamber' on Defence witnesses is highly speculative. The Defence cites witnesses D-0246 and D-0147 as its basis to believe that the Chamber and the VWU have been communicating on an *ex parte* basis. The Chamber recalls that in the decision on the scheduling of D-0147,⁸ the Chamber based its ruling on the submissions of the Defence as well as the VWU, submissions that the VWU also provided to the Defence. With respect to D-0246, the Chamber notes that in the course of its organisation of its calendar, the Chamber learnt that D-0246 had not travelled to the seat of the Court as previously scheduled; thus, the Chamber instructed the Defence to provide further information.⁹ The Chamber also notes that while the Defence misrepresented the Chamber's ruling *vis-à-vis* the witness;¹⁰ to date, the Chamber has not issued a final determination on the modality of D-0246's testimony. In these circumstances, the Chamber fails to see how the Chamber's administrative communications with the VWU would have

⁷ The Chamber also notes that Rule 18(b) of the Rules notably mandates the VWU to 'act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers.'

⁸ Email dated 30 September 2022 at 15:29.

⁹ Email dated 10 November 2022 at 15:00; Email dated 14 November 2022 at 15:34; Email dated 15 November 2022 at 15:55. In this regard, the Chamber notes that the Defence failed to promptly inform the Chamber that a witness scheduled to testify was no longer available as scheduled and only provided vital information in this regard upon the Chamber's request for an explanation.

¹⁰ Email dated 17 November 2022 at 06:42.

any repercussions on the determination with respect to Defence witnesses or the fair trial rights of the accused.

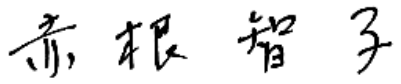
10. In support of the Request, the Defence also avers that the sensitivity of the information at stake requires the Defence to screen any communication from the VWU to the Chamber. The Chamber strongly rejects the Defence's suggestion that the VWU is not competent to assess the sensitivity of information concerning witnesses. Pursuant to Article 43(6) of the Statute and Rules 17 and 18 of the Rules, the VWU is specifically tasked with providing security arrangements and other appropriate assistance for witnesses while respecting the interest of witnesses. Contrary to the Defence's assertions, the Chamber considers that it is specifically within the competence of the VWU to assess the sensitivity of information relating to witnesses in order to carry out its mandate. Furthermore, noting that the Chamber also bears the responsibility, under Article 68 of the Statute, to protect witnesses, the Chamber is unconvinced that, as a general principle, administrative communications between the VWU and the Chamber would risk the security of Defence witnesses, should the Defence not be privy to them.
11. The remainder of the arguments raised in the Request are similarly speculative and do not necessitate further discussions for the purpose of the present decision. The Chamber nonetheless emphasises the need to avoid conflating submissions made in the context of trial proceedings and administrative communications between the Chamber and the VWU, and, for reasons outlined in the present decision, finds that the Defence has failed to substantiate that the latter would have any repercussions on the Chamber's determination with respect to Defence witnesses.
12. For the aforementioned reasons, the Chamber rejects the Defence's submissions that all *ex parte* communication between the Chamber and the VWU concerning Defence witnesses should be disclosed.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY
REJECTS** the Request.

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



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated this Tuesday, 22 November 2022
At The Hague, The Netherlands