



Original: English

No.: ICC-01/12-01/18

Date: 16 October 2019

Date of submission: 25
November 2019

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

**Public redacted version of Request for leave to appeal the Single Judge's
"Décision relative à la requête du Procureur aux fins d'autorisation de la non-
communication des déclarations des témoins MLI-OTP-P-0554 et MLI-OTP-P-
0984" (ICC-01/12-01/18-465-Conf-Exp-Red)**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
Mahmoud

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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(Participation/Reparation)**

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**Victims Participation and
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Other

I. Introduction

1. Pursuant to Article 82(1)(d) of the Statute, the Defence for Mr Al Hassan respectfully seeks leave to appeal the Single Judge's "Décision relative à la requête du Procureur aux fins d'autorisation de la non-communication des déclarations des témoins MLI-OTP-P-0554 et MLI-OTP-P-0984" ("the Decision")¹ in relation to the following issues :
 - a) [REDACTED] ("First Issue") ;
 - b) [REDACTED] ("Second Issue"); and
 - c) [REDACTED] ("Third Issue") (collectively "Three Issues").
2. All Three Issues significantly affect both the fair and expeditious conduct, and outcome of these proceedings as they concern the provision of incriminating material to the Chamber on an *ex parte* basis outside the permitted statutory timeframe, and the non-disclosure of information which was both potentially exculpatory and material to the preparation of the Defence ahead of the confirmation hearing. An immediate resolution by the Appeals Chamber may materially advance the proceedings in order to purge the pre-trial process of errors which would diminish the integrity of trial proceedings.

II. Classification

3. In accordance with Regulation 23*bis*(2) of the Regulations of the Court, this request is classified as confidential *ex parte*, available only to the Prosecution, Defence and the Victims and Witness Unit, as the Decision to which it relates is classified the same. The Defence does not object to the reclassification of its request upon the public reclassification of the Decision.

III. Submissions

4. In accordance with Article 82(1)(d) of the Statute, a party may appeal a decision that involves an issue that would significantly affect the fair and expeditious conduct of

¹ Décision relative à la requête du Procureur aux fins d'autorisation de la non-communication des déclarations des témoins MLI-OTP-P-0554 et MLI-OTP-P-0984, ICC-01/12-01/18-[REDACTED], 10 October 2019. All references are to the Al Hassan proceedings unless stated otherwise.

the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

5. In determining whether to grant leave to appeal, the Chamber's assessment should be confined to the determination as to whether the criteria under Article 82(1)(d) are fulfilled: it is neither necessary nor appropriate to pre-condition this decision on an assessment as to whether the Defence has demonstrated that the Chamber committed specific errors of law, fact or procedure.²
6. All Three Issues fulfil these criteria. In accordance with the Appeal Chamber's findings, all Three Issues arise out of the standard applied and considerations relied upon by the Single Judge in the Decision.³ Further, as described below, each issue is essential to the determination of the decision in that, had these errors not occurred, the Single Judge would not have authorised the non-disclosure of both statements and identities of P-0554 and P-0984 to the Defence in the absence of any other counter balancing measures which would safeguard the rights of Mr. Al Hassan.

a. All Three Issues arise from the Decision, and significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

i. First Issue

7. In the Decision, the Single Judge considered the Prosecution's [REDACTED].⁴ In doing so, [REDACTED].⁵
8. However, in accordance with the Appeals Chambers findings, the Prosecution's continued investigatory activities "must be directed towards the identification of evidence that can eventually be presented in open court, in order to establish the truth

² Pre-Trial Chamber II, *Prosecutor v. Kony et al.*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Application for Warrants of Arrest under Article 58, ICC-02/04-01/05-US-EXP, 19 August 2005, para. 15.

³ Appeals Chamber, *Situation in the DRC*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 9.

⁴ Decision, [REDACTED]

⁵ *Ibid.*

and to assess whether there is criminal responsibility under the Statute”.⁶ Accordingly, the Prosecution can only be said to be fulfilling its investigative duties provided it collects information with the purpose of providing the same to the Defence with due regard to the principles of open justice.

9. However, in relying on the Prosecution’s [REDACTED], the Single Judge did not account for the fact that the Prosecution evidently [REDACTED].
10. As a result of this approach, the Chamber placed itself in a position whereby it had access to, and reviewed material which was presented to it by the Prosecution as being incriminatory. [REDACTED].
11. As a result of this error, the Defence has been prevented access to incriminating evidence to be used against it as well as Article 67(2) and Rule 77 material which was material to lines of investigation and defence which it was entitled to raise at the confirmation hearing and which may have impacted on the outcome of particular charges and incidents. The delayed access to this material therefore not only delays the subsequent preparation and investigations of the Defence, but further, has diluted the effectiveness of the confirmation proceedings as a filtering process.⁷
12. [REDACTED].

ii. Second Issue

13. In the Decision, the Single Judge [REDACTED].⁸
14. The Decision fails to [REDACTED].⁹ For example, in relation to P-0984 this appears, [REDACTED],¹⁰ [REDACTED] and which were subsequently confirmed by the

⁶ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1486 OA 13, 21 October 2008, para. 41.

⁷ *Supra*, para. 18.

⁸ Decision, [REDACTED]

⁹ Defence response to the Prosecution’s Request for non-disclosure of statements of witnesses MLI-OTP-P-0554 and MLI-OTP-P-0984, ICC-01/12-01/18-424-Conf, 19 July 2019 (“Response”), paras 3 and 22.

¹⁰ Response, para. [REDACTED]

Chamber.¹¹ The Prosecution could have also provided admissions of fact concerning the exculpatory information covered by these Statements.

15. Notwithstanding the Defence's prior submissions with regard to the lack of substantiated objective risk,¹² [REDACTED].¹³

16. The Single Judge's failure to [REDACTED]. As a result, the Decision failed to [REDACTED]. This has frustrated Mr. Al Hassan's right to fair and expeditious proceedings and has prevented him from effectively challenging the allegations against him at the confirmation stage. It has further delayed his access to exculpatory material which, when considering the dearth of PEXO-marked material, has only further protracted the effective commencement of defence investigations in this regard. This therefore affects the significance of the fairness and expeditiousness of these proceedings and has an outcome on the trial.

iii. Third Issue

17. As reflected in the Decision, the Single Judge's findings are predicated on submissions from the Prosecution which were heavily redacted from the Defence despite the fact that they related to the non-disclosure of material Article 67(2) and Rule 77 material.¹⁴ By its very nature, the Prosecution's request constituted an exception to the general rule for full disclosure,¹⁵ and which required the Single Judge to conduct a thorough assessment of the potential relevance of the information to the Defence on a case-by-case basis and to balance the interests at stake with "particular care".¹⁶

¹¹ E.g. *Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-461-Conf, 30 September 2019, paras 277, 490, 919.

¹² Response, paras 10-11.

¹³ Appeals Chamber, *Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-476, 13 May 2008, para. 63.

¹⁴ Decision, [REDACTED].

¹⁵ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1486 OA 13, 21 October 2008, para. 64.

¹⁶ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused,

18. However, the approach adopted in the Decision has meant that [REDACTED]. This is contrary to the Defence's right to be heard particularly in relation to matters which impact on its preparation for the confirmation hearing. [REDACTED]. When considered in its entirety, the circumstances resulting in the non-disclosure of Article 67(2) and Rule 77 material runs a very real and concrete risk whereby the weakness of the Prosecution's case has been [REDACTED].¹⁷ This process frustrates the very purpose of the confirmation stage and the necessity to safeguard against the confirmation of inherently flawed and deficient cases thereby unnecessarily elongating proceedings against Mr. Al Hassan.

19. As a result, the Defence's ability to effectively exercise its right to be heard was central to the adjudication of the Prosecution's untimely and prejudicial request for non-disclosure. Consequently, there remains an appearance, arising from the Decision, that [REDACTED].

b. An immediate resolution by the Appeals Chamber may materially advance proceedings

20. As stated above, the withheld material concerned both incriminating material which was provided to [REDACTED]. Both matters underpin the process around the Chamber's confirmation of charges against Mr. Al Hassan which if perceived to have been conducted on a flawed and unfair manner would contaminate the trial process. An immediate resolution of the Three Issues by the Appeals Chamber would rid "the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial,"¹⁸ and further "remove doubts about the correctness of a decision or map a course of action along the right lines."¹⁹

together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1486 OA 13, 21 October 2008, para. 57.

¹⁷ E.g. Trial Chamber V, *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, ICC-01/09-02/11-728, 26 April 2013.

¹⁸ Appeals Chamber, Situation in the DRC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 14.

¹⁹ Appeals Chamber, Situation in the DRC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 15.

IV. Conclusion

21. For the abovementioned reasons, the Defence for Mr. Al Hassan respectfully requests leave to appeal the Decision in relation to the Three Issues.



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Dated this 16th Day of October 2019
At The Hague, The Netherlands