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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 de l'identité du témoin MLI-OTP-P-0577 [REDACTED]"

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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Mr Peter Lewis

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**Victims Participation and
Reparations Section**

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 de l'identité du témoin MLI-OTP-P-0577" ("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 and its investigations 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 23bis(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 currently 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 the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-

¹ Décision relative à la requête du Procureur aux fins d'autorisation de la non-communication de l'identité du témoin MLI-OTP-P-0577, 10 October 2019, ICC-01/12-01/18[REDACTED]. All references are to the Al Hassan proceedings unless stated otherwise.

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 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 detailed 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 P-0577's identifying information 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, the Single Judge recalled [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. In relying on the Prosecution’s [REDACTED], the Single Judge did not account for the fact that [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] but that it also precluded the Defence from access to potentially exculpatory material ahead of its final submissions regarding the confirmation of charges. Had the Single Judge properly assessed [REDACTED].
11. As a result of this error, [REDACTED].⁷
12. [REDACTED] therefore goes to the issue of whether the principles of both open justice and equality of arms were undermined and which would therefore impinge on the significant fairness, impartiality, expeditiousness and outcome of these proceedings.

ii. Second Issue

13. In the Decision, the Single Judge [REDACTED].⁸ It did so [REDACTED].⁹
14. Whilst the Decision [REDACTED],¹⁰ [REDACTED].
15. Nor did it [REDACTED].¹¹ This for example, would have included the withdrawal of allegations which concern or relate to the evidence of P-0577 particularly in

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, [REDACTED]

⁸ Decision, [REDACTED].

⁹ Defence’s final submissions regarding the confirmation of charges, ICC-01/12-01/18-442-Conf, 31 July 2019 and Defence request for leave to appeal the Pre-Trial Chamber I’s “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), ICC-01/12-01/18-463-Conf, 7 October 2019 respectively.

¹⁰ Decision, [REDACTED].

circumstances whereby the underlying evidence, [REDACTED], was deemed erroneous by the Prosecution and corrected by a Statement which was not available to the Defence.¹² More pertinently, [REDACTED]. In this regard, whilst the Chamber ultimately did not confirm the incident concerning P-0577, the evidence in P-0577's Witness Statement appears to undermine the Pre-Trial Chamber's ultimate assumption that Ansar Dine was the only armed group in Timbuktu during the relevant time period.¹³ The Defence was therefore denied access to evidence which would have undercut this assumption.

16. Notwithstanding the Defence's prior submissions with regard to the lack of substantiated objective risk,¹⁴ [REDACTED].¹⁵

17. The Single Judge's failure 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 also 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

18. As reflected in the Decision, the Single Judge's findings [REDACTED].¹⁶ By its very nature, the Prosecution's request constituted an exception to the general rule for full disclosure,¹⁷ and which required the Single Judge to conduct a thorough assessment of

¹¹ Defence response to the Prosecution Motion for Authorisation to Withhold the Identity of Witness MLI-OTP-P-0577, ICC-01/12-01/18-437[REDACTED], 29 July 2019 ("Response"), para. 4.

¹² Confidential redacted version of the "Prosecution Motion for Authorisation to Withhold the Identity of Witness MLI-OTP-P-0577 from the latter's statement, upon which the Prosecution does not rely for the confirmation of charges, 16 July 2019, ICC-01/12-01/18-410[REDACTED], 18 July 2019, paras 17-18.

¹³ 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, para. 637.

¹⁴ Response, paras 14-15.

¹⁵ 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.

¹⁶ Decision, [REDACTED].

¹⁷ 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

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”.¹⁸

19. However, [REDACTED]. This is contrary to the Defence’s right to be heard particularly in relation to matters which impact on its preparations and investigations ahead of the confirmation hearing. [REDACTED].¹⁹ [REDACTED].²⁰ [REDACTED].

20. Consequently, there remains an appearance arising from the Decision, that the adjudication of matters relating to the provision of disclosable material were not conducted in a manner which protected Mr. Al Hassan’s right to fair, expeditious and impartial proceedings.

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

21. As stated above, P-0577’s Witness Statement concerned both [REDACTED].²¹

22. 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

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.

¹⁸ 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. 57.

¹⁹ 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.

²⁰ 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.

²¹ Response, paras. 26-28.

the trial,”²² and further “remove doubts about the correctness of a decision or map a course of action along the right lines.”²³

IV. Conclusion

23. 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

²² 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.

²³ 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.