

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **24 June 2020**

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***

Confidential

**Decision on Defence request for leave to appeal the ‘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:**The Office of the Prosecutor**

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Peter Lewis

Counsel Support Section**Victims and Witnesses Unit****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*, issues this ‘Decision on the Defence request for leave to appeal the ‘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 ‘First Leave to Appeal Decision’).³
4. On 28 May 2020, the Defence filed an ‘Urgent Defence request for disclosure’ (the ‘Second Defence Request’).⁴
5. On 5 June 2020, the Single Judge issued a second decision, rejecting the Second Defence Request (the ‘Impugned Decision’).⁵
6. On 11 June 2020, the Defence filed a request for reconsideration of the Impugned Decision (the ‘Third Defence Request’).⁶

¹ First Defence Request, ICC-01/12-01/18-686-Conf (with confidential *ex parte* Annex A, available only to the Prosecution, Registry and Defence).

² First Decision, 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 Second Defence Request, ICC-01/12-01/18-829-Conf.

⁵ Decision on Defence request for disclosure of material related to Mr Al Hassan’s arrest and detention in Mali, ICC-01/12-01/18-859-Conf.

⁶ Defence urgent request to reconsider ICC-01/12-01/18-859-Conf, ICC-01/12-01/18-873-Conf (with confidential *ex parte* Annex A, available only to the Prosecution and Defence).

7. On 12 June 2020, the Single Judge rejected the Third Defence Request (the 'Third Decision').⁷
8. On that same date, and pending notification of the Third Decision, the Defence made a related request via e-mail (the 'Fourth Defence Request'),⁸ which was rejected by the Single Judge via e-mail later that same day (the 'Fourth Decision').⁹
9. On 15 June 2020, the Defence filed a request for leave to appeal the Impugned Decision (the 'Request for Leave to Appeal').¹⁰ The Defence requests leave to appeal in relation to the following three issues:¹¹
 - a. Whether the approach of the Decision in respect to the Prosecution's disclosure obligations accords with the rules and jurisprudence of the Court (the 'First Issue');
 - b. Whether the Single Judge construed the scope of Rule 77 of the Rules of Procedure and Evidence (the 'Rules') too narrowly (the 'Second Issue'); and
 - c. Whether the determination that the consent of the Irish authorities is a pre-condition for disclosure of the Irish Request for Assistance (the 'RFA') to the Defence accords with the Court's rules of disclosure (the 'Third Issue').
10. On 19 June 2020, the Prosecution filed its response, opposing the request (the 'Response').¹²

⁷ Decision on Defence request for reconsideration of the 'Decision on Defence request for disclosure of material related to Mr Al Hassan's arrest and detention in Mali', ICC-01/12-01/18-879-Conf.

⁸ Email from the Defence to Trial Chamber X Communications on 12 June 2020 at 13:51.

⁹ E-mail from Trial Chamber X Communications to the Defence on 12 June 2020 at 17:18.

¹⁰ Defence request for leave to appeal the Single Judge's "Decision on Defence request for disclosure of material related to Mr Al Hassan's arrest and detention in Mali" (ICC-01/12-01/18-859-Conf), ICC-01/12-01/18-884-Conf.

¹¹ Request for Leave to Appeal, ICC-01/12-01/18-884-Conf, para. 1.

¹² Prosecution's response to Defence request for leave to appeal the Single Judge's "Decision on Defence request for disclosure of material related to Mr Al Hassan's arrest and detention in Mali" (ICC-01/12-01/18-859-Conf), ICC-01/12-01/18-890-Conf (notified on 22 June 2020).

II. Analysis

11. The Chamber incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Rome Statute (the ‘Statute’), as set out in previous decisions.¹³ The Chamber will accordingly examine whether the Defence has met the requirements under Article 82(1)(d) of the Statute in relation to each of the three issues identified above.

A. First Issue: Whether the approach of the Decision in respect to Prosecution disclosure obligations accords with the rules and jurisprudence of the court

12. In relation to the First Issue, the Defence fails to identify an appealable issue. Again, and as already stated in the First Leave to Appeal Decision, the Defence merely repeats its disagreement with the Single Judge’s approach, namely that ‘documents related to cooperation between the Prosecution and national authorities are not disclosable *per se*’.¹⁴ As already noted by the Single Judge in the context of the First Leave to Appeal Decision, a mere disagreement is not an appealable issue.¹⁵
13. The Defence also clearly misrepresents the Single Judge’s findings in the Impugned Decision. While the Single Judge decided that the materiality of the said RFAs was not shown and therefore they were not disclosable,¹⁶ the Defence convolutes the various Single Judge decisions, repeating its previous arguments that RFAs are *per se* disclosable and thus that any restriction to disclosures should be justified under Rules 81 and 82 of the Rules.¹⁷

¹³ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, ICC-01/12-01/18-734; 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’, 8 May 2020, ICC-01/12-01/18-795-Conf.

¹⁴ First Decision, ICC-01/12-01/18-768-Conf.

¹⁵ First Leave to Appeal Decision, ICC-01/12-01/18-795-Conf, para. 10, *referring to* Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, ICC-01/12-01/18-734, para. 14.

¹⁶ Impugned Decision, ICC-01/12-01/18-859-Conf, paras 18-20, 22.

¹⁷ Request for Leave to Appeal, ICC-01/12-01/18-884-Conf, para. 7.

14. Moreover, as regards the Irish RFA, the Defence misrepresents the Single Judge findings in the Impugned Decision. In particular, the Single Judge did not make a determination as to its disclosability. She merely found that this part of the Defence request was moot, as the Prosecution had conceded to disclose the document.¹⁸ In fact, in formulating its Third Issue examined below, the Defence acknowledges that the Single Judge did not make any determination and declared the request as moot.¹⁹
15. Additionally, and as correctly referred to by the Prosecution in its Response, the Defence misinterprets the Appeals Chamber's jurisprudence, that has clearly stated that

‘[t]he legal framework of the Court does not contain any provision stipulating that requests for assistance must be disclosed to the accused person. Rather, such material *may* fall within the Prosecutor's residual obligation under rule 77 of the Rules [...] Whether this is the case necessarily depends on the content, context and purpose of any individual request for assistance in the specific circumstances of each case, and no general and abstract definition can be given as to the type of requests for assistance which may fall within rule 77 of the Rules.’²⁰

B. Second Issue: Whether the Single Judge construed the scope of Rule 77 too narrowly

16. The Second Issue is exceedingly general and challenges the entirety of the Single Judge's reasoning. It is thus not an appealable or discrete issue for the Appeals Chamber's resolution.²¹ Moreover, the Single Judge notes that in relation to the Defence's alternate request in the context of the Impugned Decision seeking admissions or confirmations from the Prosecution, the

¹⁸ Impugned Decision, ICC-01/12-01/18-859-Conf, para. 25.

¹⁹ Request for Leave to Appeal, ICC-01/12-01/18-884-Conf, para. 9.

²⁰ Response, ICC-01/12-01/18-890-Conf, para. 22. *Referring to Appeals Chamber, The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute” 8 March 2018, ICC-01/05-01/13-2275-Red, para. 10.

²¹ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, ICC-01/12-01/18-734, para. 14.

Defence is not formulating an appealable issue.²² Instead, it is adapting and shifting its original alternate request in light of the Impugned Decision.

17. Lastly, as noted above, the Defence misrepresents the Appeals Chamber's jurisprudence, which ruled on the matter and rejected the scope of Rule 77 of the Rules suggested by the Defence.²³

C. Third Issue: Whether the determination that the consent of the Irish authorities is a pre-condition for disclosure of the Irish RFA to the Defence accords with the Court's rules of disclosure

18. As noted above, and as submitted by the Defence,²⁴ the Single Judge made no determination as to whether authorisation from the Irish authorities was required or appropriate for disclosure to take place. However, as the Prosecution points out in its Response, the Single Judge's 'finding of mootness' may be considered as non-appealable as '[t]here is no longer any justiciable controversy'.²⁵
19. Moreover, even if the issue were to be considered appealable, the Single Judge does not consider that this discrete issue either would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would an immediate resolution by the Appeals Chamber materially advance the proceedings. In fact, the Prosecution has informed that the Irish authorities have consented to the disclosure of the said RFA.²⁶ Additionally, as already stated by the Single Judge in relation to the Third Defence Request, the Defence can always bring to the attention of the Single Judge any matter arising out of the Irish RFA.²⁷

²² Request for Leave to Appeal, ICC-01/12-01/18-884-Conf, para. 8.

²³ See para. 15 above.

²⁴ Request for Leave to Appeal, ICC-01/12-01/18-884-Conf, paras 11-12.

²⁵ Response, ICC-01/12-01/18-890-Conf, para. 32.

²⁶ Response, ICC-01/12-01/18-890-Conf, para. 35.

²⁷ Third Decision, ICC-01/12-01/18-879-Conf, para. 13. See also Fourth Decision.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request for Leave to Appeal.

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

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

Judge Kimberly Prost, Single Judge

Dated this Wednesday, 24 June 2020

At The Hague, The Netherlands