



Original: English

No. **ICC-01/12-01/18**
Date of original: **12 June 2020**
Date: **5 January 2021**

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 reconsideration of 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

Fatou Bensouda
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Legal Representatives of Victims

Seydou Doumbia
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

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*, 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 reconsideration of the ‘Decision on Defence request for disclosure of material related to Mr Al Hassan’s arrest and detention in Mali’.

I. Procedural history and submissions

1. On 27 March 2020, the Defence filed the ‘Defence Motion for Order of Disclosure – Correspondence with National Authorities’ (the ‘First 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 ‘Second Request’),⁴ seeking disclosure of key documents and information that in its view relate to the knowledge and complicity of the Office of the Prosecutor (the ‘Prosecution’) in Mr Al Hassan’s arrest, detention and mistreatment in Mali.⁵ Alternatively, the Defence requested the Prosecution should adduce relevant admissions of fact in lieu of disclosure.⁶

¹ First 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 Second Request, ICC-01/12-01/18-829-Conf.

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

⁶ Second Request, ICC-01/12-01/18-829-Conf. para. 4.

5. On 5 June 2020, the Single Judge rejected the Second Request (the ‘Second Decision’).⁷ In her Second Decision, the Single Judge decided, *inter alia*, that materiality of [REDACTION] Mali Request for Assistance (the ‘RFA’) and the [REDACTION] French RFA had not been shown and that as such, they were not disclosable pursuant to either Article 67(2) or Rule 77 of the Rules⁸. She further considered that the Prosecution had gone beyond its disclosure obligations by providing to the Defence a note explaining the nature of the sought RFAs.⁹ The Single Judge also took note of the Prosecution’s confirmation that it had disclosed to the Defence all relevant items in its possession; an affirmation the Single Judge has no reason to doubt on the basis of information on the record.¹⁰ As regards the RFAs to Ireland, and considering that the Prosecution had conceded on this point and disclosure would be effected, the Single Judge decided this part of the Request was moot.¹¹
6. On 11 June 2020, the Defence filed a request for reconsideration of the Second Decision (the ‘Third Request’).¹² The Defence requests the Single Judge to reconsider, on an urgent basis the following determinations of the Second Decision: (a) ‘the provision allowing the Prosecution to consult with the Government of Ireland, before disclosing the Facebook RFA to the Defence’; and (b) ‘The Single Judge’s determination that the contents of the [REDACTION] RFAs were not disclosable to the Defence’.¹³ Alternatively, it requests the Single Judge to vary the deadline for the upcoming Defence’s termination request no earlier than three working days from the disclosure of the requested material.¹⁴

⁷ 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.

⁸ Second Decision, ICC-01/12-01/18-859-Conf, paras 20-23.

⁹ Second Decision, ICC-01/12-01/18-859-Conf, para. 21.

¹⁰ Second Decision, ICC-01/12-01/18-859-Conf, paras 21, 23.

¹¹ Second Decision, ICC-01/12-01/18-859-Conf, para. 25.

¹² Defence urgent request to reconsider ICC-01/12-01/18-859-Conf, ICC-01/12-01/18-873-Conf.

¹³ Third Request, ICC-01/12-01/18-873-Conf, para. 1.

¹⁴ Third Request, ICC-01/12-01/18-873-Conf, para. 2.

II. Analysis

7. The Single Judge, considering the urgency of the Third Request, exceptionally has ruled on this matter prior to receiving any responses from the Prosecution.
8. The Single Judge recalls that the Chamber has the power to reconsider its decisions upon request of the parties or *proprio motu*, particularly in light of Articles 64(2) and 67 of the Statute. Nevertheless, reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.¹⁵
9. The Single Judge also recalls that in addition to the power afforded to the Chamber to decide whether to reconsider its decisions, the Statute defines exhaustively the right to appeal against decisions rendered by a first instance chamber and no other avenue is permissible in the Statute.¹⁶
10. The Single Judge notes that the Defence explicitly recognised that it has chosen not to apply the reconsideration criteria. Instead, the Defence submits that ‘the Chamber is subject to an ongoing obligation to review the necessity and proportionality of non-disclosure orders and redactions, and, in deciding whether such measures continue to be justified, no burden can be placed on the Defence to justify why they should be lifted’.¹⁷ In its view, ‘the Chamber must assess, on an ongoing basis, whether it is necessary and proportionate to maintain measures in question, taking into consideration the potential prejudice occasioned to the Defence’.¹⁸
11. The Single Judge finds the above argument has no legal basis within the statutory framework and is thus without merit. As noted above, the Statute clearly identifies

¹⁵ 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. 11; Decision on the Prosecution’s request for reconsideration regarding the presentation of opening statements, 9 June 2020, ICC-01/12-01/18-867, para. 5.

¹⁶ Appeals Chamber, *DRC Situation*, Judgement 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, paras 39-42.

¹⁷ Third Request, ICC-01/12-01/18-873-Conf, para. 3.

¹⁸ Third Request, ICC-01/12-01/18-873-Conf, para. 3.

procedural avenues available to the parties when they believe there has been judicial error. The Defence has chosen not to use the available remedies and has failed to show why an alternative avenue would be warranted in the instant case. Its alternative avenue is also premised on a mere disagreement with the Single Judge as regards the disclosability of the material sought.

12. Specifically, as regards the [REDACTION] Mali RFA and French RFA, the Defence merely disagrees with the Single Judge's decision that they are not disclosable either pursuant to Rule 77 of the Rules or Article 67(2) of the Statute.¹⁹ In respect of the Irish RFA, the Defence simply disagrees that disclosure of this item is subject to approval by the relevant State Party. The Defence has failed to show any change in circumstances which would require a new assessment by the Single Judge.
13. As regards the alternative request seeking an extension of time limit, the Defence has failed to demonstrate how the pending disclosure of the Irish RFA is of such significance that, pending disclosure, the Defence is unable to file its upcoming termination request.²⁰ Moreover, the Defence can always bring to the attention of the Single Judge any matter arising out of the Irish RFA. As regards the Mali RFA and the French RFA, and considering that in her Second Decision the Single Judge found that the items were not disclosable, this part of the alternative request is also without merit.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request *in limine*.

¹⁹Third Request, ICC-01/12-01/18-873-Conf, paras 9-18.

²⁰Third Request, ICC-01/12-01/18-873-Conf, paras 6-8.

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, 12 June 2020

At The Hague, The Netherlands