



**Original: English**

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

**Date: 20 May 2021**

**Date of original: 17 March 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**

**Public redacted version of ‘Decision on the LRVs’ request on access to material  
submitted in support of Defence Article 69(7) Application’**

**Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**

Fatou Bensouda  
James Stewart

**Counsel for the Defence**

Melinda Taylor  
Kirsty Sutherland  
Antoine Vey

**Legal Representatives of Victims**

Seydou Doumbia  
Mayombo Kassongo  
Fidel Luvengika Nsita

**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*

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**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 the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Article 68(3) of the Rome Statute (the ‘Statute’), Rules 91, 92(5) and 131(2) of the Rules of Procedure and Evidence (the ‘Rules’), and Regulation 23bis(3) of the Regulations of the Court (the ‘Regulations’), issues the following decision.

1. On 8 March 2021, the Defence filed an ‘Article 69(7) Application’, in which it argues that the record of Mr Al Hassan’s interviews with representatives of the Office of the Prosecutor (the ‘Prosecution’) was obtained by means of violations of the Statute and/or internationally recognised human rights law, that this material is inherently unreliable, and that admitting it into evidence would undermine the integrity and fairness of the proceedings.<sup>1</sup>
2. On 11 March 2021, the Legal Representatives of Victims (the ‘LRVs’) filed a request (the ‘LRVs Request’) seeking access to: (i) Annex D to the Article 69(7) Application, which is currently classified *ex parte*, only available to the parties and the Registry; as well as (ii) five documents which are referred to by the Defence in support of certain factual allegations contained in this same application (the ‘Material’).<sup>2</sup>
3. On 11 March 2021, the Single Judge shortened the deadline for responses to the LRVs Request to 15 March 2021.<sup>3</sup>
4. On 15 March 2021, the Defence filed its response,<sup>4</sup> in which it submits: (i) with respect to Annex D, that the LRVs have not demonstrated any justification for access to this information and disclosure would not be necessary as the Article

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<sup>1</sup> ICC-01/12-01/18-1346-Conf (with three confidential annexes and one annex confidential, *ex parte*, only available to the parties and the Registry).

<sup>2</sup> Requête sollicitant l’accès à l’annexe D de la requête de la Défense fondée sur l’article 69(7) (ICC-01/12-01/18-1346-Conf) et à plusieurs éléments de preuve déposés par la Défense, ICC-01/12-01/18-1354-Conf. The five documents are MLI-D28-0003-2186; MLI-D28-0003-2272 (listed twice by the LRVs); MLI-D28-0003-1203-R01; MLI-D28-0003-0417-R01; and MLI-D28-0003-0017.

<sup>3</sup> Email from the Single Judge to the parties and participants at 13:15.

<sup>4</sup> Defence response to ‘Requête sollicitant l’accès à l’annexe D de la requête de la Défense fondée sur l’article 69(7) (ICC-01/12-01/18-1346-Conf) et à plusieurs éléments de preuve déposés par la Défense’, ICC-01/12-01/18-1384-Conf, with one confidential annex.

69(7) Application sufficiently describes the content of Annex D;<sup>5</sup> (ii) with respect to three documents (MLI-D28-0003-2186, MLI-D28-0003-2272, and MLI-D28-0003-1203-R01, together the ‘Uncontested Items’), that they were released to the LRVs on that same day and that this part of the LRVs Request is therefore moot;<sup>6</sup> and (iii) with respect to the remaining two documents (MLI-D28-0003-0417-R01 and MLI-D28-0003-0017, together the ‘Contested Items’), that they contain sensitive, personal information relating to Defence sources, are of peripheral relevance to the allegations contained in the Article 69(7) Application, and non-disclosure is accordingly warranted.<sup>7</sup>

5. As indicated in a prior decision,<sup>8</sup> the Single Judge recalls that, pursuant to Rules 92(5) and 131(2) of the Rules, the LRVs have access to the case file in its entirety, with the exception of documents classified as *ex parte* Prosecution, Defence, another participant, and/or Registry only. The Single Judge stresses that this access is given to the legal representatives, but not the participating victims themselves.<sup>9</sup>
6. Pursuant to Regulation 23*bis* of the Regulations, the Single Judge will now assess the appropriateness of the chosen classification for Annex D and the Material.
7. Concerning Annex D, the Single Judge notes that it contains a copy of email exchanges between the Defence and the Prosecution related to P-0165. Essentially, this *inter partes* correspondence addresses issues related to the timing of the provision of the Arabic translation of P-0165’s statement, as well as his willingness and availability to be interviewed by the Defence. The Single Judge observes that no specific or heightened risks have been identified and that no reasons were provided to maintain the *ex parte* classification of these exchanges

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<sup>5</sup> Response, ICC-01/12-01/18-1384-Conf, para. 8.

<sup>6</sup> Response, ICC-01/12-01/18-1384-Conf, para. 9

<sup>7</sup> Response, ICC-01/12-01/18-1384-Conf, paras 10-12.

<sup>8</sup> Decision on Defence request regarding LRVs’ access to material submitted in support of Defence motion to terminate the proceedings, 15 July 2020, ICC-01/12-01/18-958-Conf-Red (the ‘15 July 2020 Decision’), paras 4-5, referring to Pre-Trial Chamber I, Decision on Principles Applicable to Victims’ Applications for Participation, to Legal Representation of Victims, and to the Manner of Victim Participation in the Proceedings, 20 March 2019, ICC-01/12-01/18-289-Red-tENG-Corr (the ‘PTC Decision on Victim Participation’), paras 45-46.

<sup>9</sup> See Transcript of a hearing held on 12 December 2019, ICC-01/12-01/18-T-008-ENG ET, page 58, lines 6 to 9; and PTC Decision on Victim Participation, ICC-01/12-01/18-289-Red-tENG-Corr, para. 47.

which were put on the record by the Defence. In fact, the Single Judge notes that the LRVs have been privy since at least March 2020 that the Defence is in contact with the Prosecution in order to arrange an interview with the [REDACTED].<sup>10</sup> In light of the above, in the absence of submissions in response from the Prosecution,<sup>11</sup> the Single Judge finds it appropriate to order the reclassification to ‘confidential’ of Annex D in order to grant access to the LRVs.

8. Turning to the Material, the Single Judge observes that, as reported by the Defence in its Response,<sup>12</sup> the Uncontested Items are now available to the LRVs. Since the access issue raised by the LRVs is now moot, the Single Judge dismisses this part of the LRVs Request *in limine*.
9. As to the Contested Items, the Single Judge notes that the Defence opposes the LRVs Request. The Single Judge notes that the Defence submits that these materials contain sensitive personal information relating to Defence sources and that it has not been able to obtain the consent of the individuals covered in these documents given the short amount of time between the receipt of the LRVs Request and the time limit set of the provision of its response.<sup>13</sup> Concerning MLI-D28-0003-0017, a 7-page court document, the Single Judge refers back to the findings reached in a prior decision, where an LRVs’ request to access identifying information of D28-P-0003 and D28-P-0009 was denied on the basis of a related risk assessment.<sup>14</sup> With respect to MLI-D28-0003-0417, the Single Judge observes that, in providing his 5-page statement, D28-P-0002 indicated that he had security concerns and specifically refused for his interview with the Defence to be recorded.<sup>15</sup> In the circumstances, the Single Judge finds that there exist

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<sup>10</sup> Prosecution’s response to Defence Motion for Disclosure Order – Prosecution Biographical and Security Questionnaires, 30 March 2020, ICC-01/12-01/18-699-Conf, para. 46; and Defence Motion for Disclosure Order – Prosecution Biographical and Security Questionnaires, 17 March 2020, ICC-01/12-01/18-667-Conf, paras 16-18.

<sup>11</sup> The Prosecution informed that it will not file a response to the LRVs Request (Email from the Prosecution to the Chamber on 11 March 2021 at 14:08).

<sup>12</sup> Response, ICC-01/12-01/18-1384-Conf, para. 9.

<sup>13</sup> Response, ICC-01/12-01/18-1384-Conf, para. 12.

<sup>14</sup> 15 July 2020 Decision, ICC-01/12-01/18-958-Conf-Red, paras 6-7.

<sup>15</sup> MLI-D28-0003-0417, at 0420, para. 25.

specific and heightened risks which warrant the exercise of particular caution in the dissemination of the information contained in the Contested Items.

10. The Single Judge further observes that the Article 69(7) Application itself is available in full to the LRVs. Indeed, the LRVs have access to all arguments formulated by the Defence in support of the remedy sought, as well as the bulk of the material submitted in support of its allegations. In this regard, the Single Judge observes that each of the Contested Items is referred only once in the Article 69(7) Application, both in support of discrete allegations of violence being committed at the DGSE.<sup>16</sup> Taking the above into consideration, the Single Judge is of the view that the *ex parte* information does not impact the LRVs' ability to meaningfully communicate the victims' views and concerns on the issues at stake.
11. Accordingly, the Single Judge finds the Defence's original classification of the Contested Items appropriate and dismisses the remainder of the LRVs Request. The Single Judge clarifies that the present ruling is without prejudice to LRVs' access to the relevant material or information, should the Defence seek to rely on it as evidentiary material during the course of the trial.
12. Finally, the Single Judge wishes to echo the Defence's invitation to the LRVs to first contact the Defence (as disclosing party), before seizing the Chamber, when an issue first arises with the provision of or access to discrete material. The Single Judge agrees that this constitutes best practice and that it should be adopted to avoid unnecessary litigation in the future.

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<sup>16</sup> Article 69(7) Application, ICC-01/12-01/18-1346-Conf, fn 78 and 80.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**PARTIALLY GRANTS** the LRVs Request;

**INSTRUCTS** the Registry to reclassify Annex D to ‘confidential’; and

**DISMISSES** the remainder of the LRVs Request.

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



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**Judge Kimberly Prost, Single Judge**

Dated this Wednesday, 17 March 2021

At The Hague, The Netherlands