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No. ICC-01/12-01/18
Date: 30 September 2021
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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 leave to appeal the Single Judge's 'Decision on
Defence motion seeking disclosure of Prosecution's correspondence with national
authorities'**

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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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

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Defence**

States Representatives

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

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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 Defence request for leave to appeal the Single Judge’s “Decision on Defence motion seeking disclosure of Prosecution’s correspondence with national authorities”’.

I. Procedural history and submissions

1. On 23 April 2020, the Single Judge issued the ‘Decision on Defence motion seeking disclosure of Prosecution’s correspondence with national authorities’ (the ‘Impugned Decision’).¹
2. On 29 April 2020, the Defence requested leave to appeal on the following issue (the ‘Issue’) that it submits arises from the Impugned Decision (the ‘Request’):²

[W]hether for Cooperation Correspondence³ that falls under Rule 77 or Article 67(2), the Prosecution may make its own determination as to the suitability of the format for disclosure, without applying for, and obtaining case-by-case judicial rulings that the format is consistent with the standards developed by the ICC as concerns the application of redactions/non-disclosure measures to Rule 77/Article 67(2) materials.⁴

3. The Defence submits that the issue arises from the Impugned Decision because in the decision, the Single Judge ‘accept[ed] that the Prosecution had fulfilled its disclosure obligations by disclosing information in a format deemed “suitable” by the Prosecution’, and thereby ‘appears to endorse the notion that the Prosecution can make its own determination as to whether summaries/testimonial notes are a “suitable” format, without first filing specific case-by-case applications’⁵ that comply with the relevant criteria applicable to any restriction

¹ ICC-01/12-01/18-768-Conf.

² Defence request for leave to appeal the Single Judge’s “Decision on Defence motion seeking disclosure of Prosecution’s correspondence with national authorities” (ICC-01/12-01/18-768-Conf), ICC-01/12-01/18-778-Conf.

³ This includes Requests for Assistance (RFAs), letters in response, records of meetings with national authorities, emails and electronic communications with national authorities, and contemporaneous call logs, Request, ICC-01/12-01/18-778-Conf, footnote 2. The Defence notes that the Request is restricted to correspondence that falls under either Rule 77 of the Rules of Procedure and Evidence or Article 67(2) of the Statute, and which is, therefore, disclosable, and subject to the related presumption of full disclosure, Request, ICC-01/12-01/18-778-Conf, para. 5.

⁴ Request, ICC-01/12-01/18-778-Conf, paras 1, 9, 22.

⁵ Request, ICC-01/12-01/18-778-Conf, para. 7.

to disclosure.⁶ The Defence submits that: (i) as a result, it has not been put on notice, or given any opportunity to be heard on whether the threshold for employing summaries, redactions, or non-disclosure has been met in relation to specific records, or the prejudicial effects of the disclosure of narrative summaries;⁷ (ii) if information has been withheld for confidentiality reasons, it has not been notified of that fact and has had no opportunity to request alternative measures or an effective remedy;⁸ and (iii) it is unclear whether there has been any judicial oversight as concerns the completeness and accuracy of the narrative summaries.⁹

4. The Defence further submits that the Issue has significant ramifications as concerns Mr Al Hassan's fair trial rights, including the right to be heard,¹⁰ the right to judicial control over the disclosure process,¹¹ and the right to expeditious proceedings.¹² Finally, the Defence submits that an immediate decision of the Appeals Chamber would materially advance the proceedings,¹³ since the Issue will generate consequences and litigation for the entirety of the trial process, is relevant to future applications, and will affect the scope of the materials made available to the Defence, and the probative value and utility of the specific information which is disclosed.¹⁴
5. On 4 May 2020, the Prosecution filed its response, opposing the Request (the 'Response').¹⁵ The Prosecution submits that there is no appealable issue; the Issue was not essential for the determination of the Impugned Decision, and in any event, it is raised prematurely.¹⁶ Additionally, the Prosecution submits that

⁶ Request, ICC-01/12-01/18-778-Conf, para. 6.

⁷ Request, ICC-01/12-01/18-778-Conf, para. 8.

⁸ Request, ICC-01/12-01/18-778-Conf, para. 8.

⁹ Request, ICC-01/12-01/18-778-Conf, para. 8.

¹⁰ Request, ICC-01/12-01/18-778-Conf, paras 10-14.

¹¹ Request, ICC-01/12-01/18-778-Conf, paras 15-17.

¹² Request, ICC-01/12-01/18-778-Conf, para. 18.

¹³ Request, ICC-01/12-01/18-778-Conf, paras 19-21.

¹⁴ Request, ICC-01/12-01/18-778-Conf, para. 20.

¹⁵ Prosecution's response to the Defence request for leave to appeal Decision ICC-01/12-01/18-768-Conf, ICC-01/12-01/18-783-Conf.

¹⁶ Response, ICC-01/12-01/18-783-Conf, paras 2, 11-18.

the Request does not meet the two remaining cumulative requirements under Article 82(1)(d) of the Statute.¹⁷

II. Analysis

6. The Single Judge incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Statute, as set out in the Chamber's decision of 9 April 2020 (the 'First Leave to Appeal Decision').¹⁸ The Single Judge will accordingly examine whether the Defence has met the requirements under Article 82(1)(d) of the Statute.
7. Turning to the first criteria, that the matter must be an 'appealable issue', the Single Judge is of the view that the Defence has not identified an appealable issue in the Request.
8. The Single Judge recalls that in the Impugned Decision, she considered that the order sought by the Defence was unnecessary and premature, in light of the fact that the Prosecution had confirmed its understanding of the disclosure obligations, and that disclosure was ongoing, with the final deadline for disclosure not being until 12 May 2020. In identifying the Issue, the Defence relies on Single Judge's observation that, in confirming its awareness of its disclosure obligations, the Prosecution stated that it has disclosed, and continues to disclose, the relevant information in a 'suitable format'.¹⁹ However, the Impugned Decision did not determine that any related disclosure effected so far was in fact suitable in format or substance. It simply stated that, since final disclosure was pending and *inter partes* communications were ongoing, the judicial determination requested by the Defence was premature and unnecessary. Accordingly, the Single Judge considers that the Issue does not arise from the Impugned Decision.

¹⁷ Response, ICC-01/12-01/18-783-Conf, paras 3, 19-25.

¹⁸ 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, paras 12-14.

¹⁹ Impugned Decision, ICC-01/12-01/18-768-Conf, para. 9.

9. The Single Judge further notes the Defence submission that it is unclear whether, in any new application made to the Chamber after the final disclosure deadline, the Defence can oppose the specific format applied to particular material, without facing the burden of fulfilling the threshold for reconsideration.²⁰ Again, this submission reflects a misrepresentation of the Impugned Decision, which did not decide on the merits of the matter but dismissed it as premature and inappropriate at that stage.
10. In addition, in formulating the Issue, the Defence simply reiterates submissions already made in the context of the Impugned Decision, that the Single Judge should make a general determination relating to the category of the relevant documents, their disclosability, and restrictions thereof (i.e. in summary, excerpts or with redactions). Here the Defence merely repeats its disagreement with the Single Judge's approach²¹ that the disclosure regime entrusts to the Prosecution the main responsibility to assess disclosability of information in its possession and also the need for any restrictions to the disclosure. The Single Judge recalls that a mere disagreement is not an appealable issue.²²
11. Additionally, the Defence does not demonstrate how any of the other criteria under Article 82(1)(d) of the Statute are met. Contrary to what is alleged in the Request,²³ there is, *inter alia*, no infringement of Mr Al Hassan's right to be heard. Relevant safeguards, including the availability of judicial assessment, are in place to ensure the appropriateness and proportionality of exceptions to the rule of full disclosure. As clearly stated in the Impugned Decision, the Defence has an effective remedy if it considers, after the final disclosure deadline, that there has been a breach to the Prosecution's disclosure obligations: it 'may seize the Chamber, who will then make a determination and if necessary, order the

²⁰ Request, ICC-01/12-01/18-778-Conf, para. 8.

²¹ Impugned Decision, ICC-01/12-01/18-768-Conf, para. 9. *See also* Decision on a Defence motion seeking disclosure of Biographical and Security Questionnaires conducted by Prosecution investigators with [REDACTED], 29 April 2020, ICC-01/12-01/18-777-Conf, para. 18 (the 'BSQ Disclosure Decision').

²² First Leave to Appeal Decision, ICC-01/12-01/18-734, para. 14.

²³ Request, ICC-01/12-01/18-778-Conf, paras 10-18.

disclosure of any pending material’.²⁴ As noted by the Prosecution,²⁵ the fact that the Chamber has established a step-by-step process - *inter partes* consultations followed by judicial assessment in case of dispute - is not, as alleged by the Defence,²⁶ an abdication of judicial control of the disclosure process to the Prosecution.

12. Also contrary to what is alleged in the Request,²⁷ the Single Judge recalls that pursuant to the disclosure regime, once materiality has been established, the burden is on the Prosecution to establish that specific restrictions on disclosure are warranted.²⁸ Beyond the limited and circumscribed restrictions in the form of standard redactions, the Prosecution is to submit discrete applications to the Chamber in order to apply any other restriction to disclosure.²⁹ Finally, the Single Judge does not consider that immediate resolution of the Issue by the Appeals Chamber would materially advance the proceedings. Indeed, as noted by the Prosecution,³⁰ the opposite would be the case where the Appeals Chamber would be intervening in a matter that has been raised prematurely by the Defence.
13. Accordingly, the Request does not meet the requirements of Article 82(1)(d) of the Statute.

²⁴ Impugned Decision, ICC-01/12-01/18-768-Conf, para. 12. *See also* Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546 (the ‘Disclosure Decision’), para. 16: ‘the Defence may **at any given time** after the disclosure is effected challenge redactions applied *proprio motu* by the Prosecution’ (emphasis added). *See also* BSQ Disclosure Decision, ICC-01/12-01/18-777-Conf, para. 18.

²⁵ Response, ICC-01/12-01/18-783-Conf, para. 21.

²⁶ Request, ICC-01/12-01/18-778-Conf, paras 15-17.

²⁷ Request, ICC-01/12-01/18-778-Conf, para. 14.

²⁸ Pre-Trial Chamber I, Decision on the Evidence Disclosure Protocol and Other Related Matters, 16 May 2018, ICC-01/12-01/18-31-tENG-Corr, para. 31. *See also* Disclosure Decision, ICC-01/12-01/18-546, para. 16. *See also* BSQ Disclosure Decision, ICC-01/12-01/18-777-Conf, para. 18.

²⁹ *See* Disclosure Decision, ICC-01/12-01/18-546, para. 15: ‘**Redactions falling outside of the abovementioned categories** will be subject to a discrete application to the Chamber for authorisation. The disclosing party shall submit an application providing the required justification for the redaction sought and the Chamber will decide on a case-by-case basis on the necessity and appropriateness of any such redaction’.

³⁰ Response, ICC-01/12-01/18-783-Conf, paras 23-24.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request.

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

A handwritten signature in grey ink, appearing to read 'K. Prost', is positioned above a solid black horizontal line.

Judge Kimberly Prost, Single Judge

Dated this Friday, 8 May 2020

At The Hague, The Netherlands