

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **28 November 2022**

**TRIAL CHAMBER X**

**Before:** Judge Antoine Kesia-Mbe Mindua, Presiding  
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**

**Defence request for leave to appeal the “Decision on Defence request for disclosure of  
*ex parte* communication between the Chamber and the VWU”**

**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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## I. Introduction

1. The Defence for Mr Al Hassan respectfully seeks leave to appeal the “Decision on Defence request for disclosure of *ex parte* communication between the Chamber and the VWU” (‘the Decision’),<sup>1</sup> pursuant to Article 82(1)(d) of the Rome Statute (‘Statute’). This application is also for suspensive effect of the Decision pending resolution by the Appeals Chamber.
2. This Decision was made following a Defence request to the Chamber, on 17 November 2022, seeking disclosure of *ex parte* communication between the Trial Chamber and the VWU concerning Defence witnesses (‘the Request’).<sup>2</sup>

## II. Background

3. The Trial of Mr Al Hassan is in its final stages of Defence evidence.
4. The Decision acknowledges the following:
  - a. That the VWU is a neutral body independent of the Chamber and the parties;<sup>3</sup>
  - b. That there have been communications between the Trial Chamber and VWU concerning Defence witnesses (“the Communications”). This was not limited by reference to two witnesses referred to in the Request;<sup>4</sup>
  - c. That such communications do not involve the Prosecution;<sup>5</sup> and
  - d. The content of the Communications was not reviewed by the Trial Chamber to address the issues raised by the Defence in the Request.<sup>6</sup>
5. The Trial Chamber had the following facts when making the Decision :
  - a. That there had been *ex parte* communications between the VWU and the Trial Chamber that did not include the defence team;

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<sup>1</sup> [ICC-01/12-01/18-2413](#).

<sup>2</sup> Email from the Defence to the Chamber and the VWU dated 17 November 2022 at 13:22.

<sup>3</sup> [ICC-01/12-01/18-2413](#), para. 7. *See also* [strategic plan](#).

<sup>4</sup> [ICC-01/12-01/18-2413](#), paras. 9-10.

<sup>5</sup> [ICC-01/12-01/18-2413](#).

<sup>6</sup> [ICC-01/12-01/18-2413](#).

- b. The context of the Communications would relate to arrangements for defence witness attendance in person or remotely where information held by VWU would be held confidentially;
- c. That the timing of the Request concerned witnesses D-0246 and D-0147;
- d. That *ex parte* communications had been made by the VWU in relation to other Defence witnesses; and
- e. The evidence of defence witnesses.

*The issues for appeal*

6. It is submitted that the issues which justify leave to appeal are as follows:
  - a. The Trial Chamber erred in categorizing the Communications as ‘administrative communications’ and not material that falls within the ambit of proceedings and filings.<sup>7</sup>
  - b. The Trial Chamber erred in construing the disclosure of communications between VWU and the Trial Chamber to be only applicable to ‘submissions’ from an opposing party but not to administrative communications.<sup>8</sup>
  - c. The Trial Chamber erred in focusing on the ‘form’ of the Communications rather than the ‘content’ and in doing so improperly placed a burden on the Defence concerning the *ex parte* communications between the Trial Chamber and VWU.
  - d. The Trial Chamber erred by placing the onus of argumentation on the Defence to demonstrate why access should be granted, rather than focusing on the converse question as to why access should not be granted.
  - e. The Trial Chamber erred in rejecting specific arguments concerning the likelihood of prejudice arising from The Communications as being speculative.<sup>9</sup>

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<sup>7</sup> [ICC-01/12-01/18-2413](#), para. 7.

<sup>8</sup> [ICC-01/12-01/18-2413](#), para. 6.

<sup>9</sup> [ICC-01/12-01/18-2413](#), para. 9.

### *Why leave should be granted*

7. It is submitted that Article 82(1)(d) of the Statute applies because the Decision is one which both “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” and “an immediate resolution by the Appeals Chamber may materially advance the proceedings” at this late stage.<sup>10</sup> The necessary precision<sup>11</sup> as to how the asserted errors would have materially affected the impugned decision are set out below.
8. It is submitted that the Decision is “materially affected” by errors of fact, law, and process.<sup>12</sup> This standard of ‘material effect’, generally for Article 81 appeals, has been held to apply to Article 82 appeals. Leave to appeal should be granted because the Appeals Chamber can justifiably interfere with the decision because the findings of the Chamber are flawed on fact, law and process.<sup>13</sup> The Appeals Chamber could also “determine whether or not the Trial Chamber misinterpreted the law”.<sup>14</sup>
9. Further, the issues for appeal are of general significance to all cases before the Trial Chamber where Defence witnesses are to be called in a range of circumstances and thus the issues raised in this appeal have the potential to affect the jurisprudence of the Court.<sup>15</sup>

### *Categorisation*

10. At the core of this application for leave is the error in categorisation: In deciding that the Communications were administrative, the Trial Chamber erred: Whilst it is accepted that the VWU is not a party to the proceedings, it is a body that is working at the time of the Decision to facilitate the evidence of Defence witnesses. This includes arranging travel and accommodation to and from a range of risky locations that involve input

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<sup>10</sup> See O. Triffterer 9ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* –, Second Edition C.H. Beck, Hart, Nomos, 2008, p. 1478(11) (‘Triffterer’).

<sup>11</sup> Triffterer, p. 1476(3); G. Sluiter (ed.), *International Criminal Procedure – Principles and Rules*, OUP, 1<sup>st</sup> ed., 2013, p. 971. See also [ICC-01/04-168](#).

<sup>12</sup> See Triffterer, p. 1468(42). It is also worth noting that while the Appeals Chamber has “all the powers of the Trial Chamber” under Article 83(1) with respect to Article 81 appeals, this does not extend to Article 82 appeals. See Triffterer, p. 1476(3).

<sup>13</sup> [ICC-01/05-01/08-962](#), para. 63.

<sup>14</sup> [ICC-02/05-03/09-295](#), para. 20.

<sup>15</sup> *Prosecutor v. Stakic*, IT-97-24-A, [Judgement](#), 22 March 2006, para. 7; *Prosecutor v. Limaj et al.*, IT-03-66-A, [Judgement](#), 27 September 2007, paras 8-9; *Prosecutor v. Kunarac et al.*, IT-96-23&23/1-A, [Judgement](#), 12 June 2002, para. 36.

from witnesses on the ground in Mali. Plainly such a situation involves people capable of expressing opinion and causing difficulties for the VWU and thus risks the expression of opinion or the passing of relevant and / or prejudicial information by VWU.

11. The role of VWU at this acute stage is to act independently and neutrally and this can only be achieved by communications that include the defence team. By treating the Communications as administrative, the Trial Chamber has erred by treating the VWU as an arm of the Trial Chamber and not independent and neutral.
12. Where those communications relate to Defence witnesses, it is fundamentally unfair for the Defence representatives not to be included in those communications in order to (a) ensure the communications do not expressly or impliedly impugn witnesses and (b) that the detail of the communications over travel and other arrangements does not risk bias as against witnesses due to give evidence and therefore prejudice the fairness of the trial for the Accused.
13. The Defence team for Mr Al Hassan has never seen the Communications but have been party to the complexities of the arrangements for Defence witnesses. It is not speculative to conclude that the Communications are capable of containing relevant and/or prejudicial material that could be dealt with in the trial process.
14. In finding the Request was speculative, the Trial Chamber has placed an impossible burden on the Defence to identify what was said in the Communications to which they have no access. Such a burden is based on an assumption that VWU has remained neutral and independent rather than the application of the principle of open justice that allows the Defence to assess any material before the Trial Chamber that concerns Defence witnesses.
15. Similarly, by placing the burden on the Defence through a test of speculation, the impact on fairness through the lack of open justice is an error capable of invalidating the Decision because giving primacy to mere administration diminishes the openness and fairness of the proceedings as against Mr Al Hassan and accused persons before the International Criminal Court (ICC) generally.

*Impact on fairness*

16. The Trial Chamber appears to have considered that the prescription against *ex parte* communications derives solely from the principle of equality of arms rather than the broader principles of open and impartial justice. In line with this broader principle, the Defence is entitled to be appraised of any exchanges or communications that are likely to bear on the issues that will be adjudicated as part of the proceedings.<sup>16</sup> This broader principle is embodied in Regulation 23 *bis*, which specifies that Registry filings must include factual and legal justification for designation of an *ex parte* classification and further, that this classification can be lifted in case the justification no longer exists.
17. These principles are essential features of the right to a fair trial. The Trial Chamber's exclusion of these factors from its decision has therefore narrowed the ambit of fair trial rights applicable to this case and to the Communications exchanged in this case. The issue thus necessarily impacts on the fairness of the proceedings as Mr Al Hassan has no opportunity to respond to any or all content nor its effects.
18. Being able to see those communications (at the time or through disclosure) enables the Defence to counter any inappropriate content during the trial process. Alternatively, if such communications are to be withheld from the Defence, without any issue of public interest immunity, then a request by the Defence to view the Communications should have been met with an assessment of content, not merely a blanket denial of access.

#### *Burden on the defence*

19. The Appeals Chamber has emphasized that if information should in principle be communicated to the Defence, then no burden can be placed on the Defence to justify why redactions or non-disclosure orders should be lifted.<sup>17</sup>
20. As set out in The Request, the use of *ex parte* communications is exceptional and should only be employed where necessary and on a proportionate basis. The Appeals Chamber in *Ntaganda* found that:

“[R]esort to [ex parte] proceedings should be limited. When deciding on the advisability or modalities of the notification of an ex parte submission to the accused person, a trial chamber must be

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<sup>16</sup> See for example, [ICC-01/05-01/08-2410-Red](#), para.8, finding that sections of the ex parte VWU report, which concerned issues raised during the hearing of a Defence witness, should be disclosed pursuant to article 64(6)(f) of the Statute.

<sup>17</sup> [ICC-02/11-01/15-915-Red](#), paras. 61-63.

mindful of the duty to respect the principle of the equality of arms.”<sup>18</sup>

21. Citing the *Lubanga* jurisprudence,<sup>19</sup> the Appeals Chamber also found that *ex parte* submissions may be used only to the extent that they are strictly necessary. It further considers that: “[w]hether *ex parte* proceedings are acceptable, and for how long *ex parte* submissions can be withheld from the other party, will depend on the specific circumstances of the case and, in particular, the risk of prejudice to the fair trial of an ongoing case.”<sup>20</sup>
22. Accordingly, it is submitted that the error in categorisation is one that could result in a miscarriage of justice<sup>21</sup> which means it was one that is capable of being “critical to the verdict”<sup>22</sup> because it removes the opportunity for the Defence to see or deal with the content of the Communications during the trial process. Further maintaining that categorisation without a review of content is wholly erroneous, such that no reasonable trier of fact could have come to the same conclusion based on the evidence before it.<sup>23</sup>

#### *Impact on expeditiousness*

23. The Defence case is ongoing so the opportunity to correct improper communications remains open.
24. The fact that the information is replicated in the Decision also militates for, not against the reclassification of Registry filings.<sup>24</sup> Ultimately, it is not suggested that all

<sup>18</sup> [ICC-01/04-02/06-2666-Red](#), para. 119.

<sup>19</sup> [ICC-01/04-01/06-568](#), para. 67.

<sup>20</sup> [ICC-01/04-02/06-2666-Red](#), paras. 120-121.

<sup>21</sup> *Prosecutor v. Stakic*, IT-97-24-A, [Judgement](#), 22 March 2006, para. 7; *Prosecutor v. Kunarac et al.*, IT-96-23&23/1-A, [Judgement](#), 12 June 2002, para. 36; *Prosecutor v. Limaj et al.*, IT-03-66-A, [Judgement](#), 27 September 2007, para. 8.

<sup>22</sup> *Prosecutor v. Limaj et al.*, IT-03-66-A, [Judgement](#), 27 September 2007, para. 13.

<sup>23</sup> *Prosecutor v. Dusko Tadic*, IT-94-1-A, [Judgement](#), 15 July 1999, para 64; *Prosecutor v. Kunarac et al.*, IT-96-23&23/1-A, [Judgement](#), 12 June 2002, para. 39.

<sup>24</sup> [ICC-01/04-01/07-532](#), p. 5, “Pursuant to regulation 23bis of the Regulations, the Defence does not have an automatic right that a document be reclassified; that, nevertheless, in the view of the Single Judge the information included in the Registry’s Report is similar to the information available in the confidential version of the Decision on the Evidentiary Scope of the Confirmation Hearing, the Decision on the Requests for Leave to Appeal and the Decision on Prosecution’s Urgent Application; and that therefore, there is no reason to maintain this document classified as confidential *ex parte* only available to the Prosecution”. See also ECtHR, *Nideröst-Huber v. Switzerland*, 18990/91, [Judgment](#), 18 February 1997, para. 29: “Nor is the position altered when, in the opinion of the courts concerned, the observations do not present any fact or argument which has not already appeared in the impugned decision. Only the parties to a dispute may properly decide whether this is the case; it is for them to say whether or not a document calls for their comments. What is particularly at stake here is litigants’ confidence in the workings of justice, which is based on, inter alia, the knowledge that they have had the opportunity to express their views on every document in the file”.



communications between the VWU and the Trial Chamber should be disclosed but those that concern the Accused and his witnesses must be disclosed to the defence.

*Materially advance the proceedings*

25. The Pre-Trial Chamber in this case has already confirmed that such Communications will materially advance the proceedings by finding at an earlier stage that the Defence had a legitimate interest in reviewing *ex parte* VWU reports and communications that concerned the Defence, with a view to being heard in relation to any content of a potentially prejudicial nature and also to provide input as concerns whether information should be redacted prior to any further dissemination.<sup>25</sup>
26. The Decision is contrary to this previous approach and suggests that the Trial Chamber gave short shrift to the Request as a hindrance rather than a sensible, balanced and fair requirement. All of which could have been avoided if the Defence had been copied in in the first place. By opting for *ex parte*, the Trial Chamber and VWU give the appearance of justice being dealt with in coordination and in the absence of the defence.
27. In the premises, it is submitted that immediate resolution of these issues during the continuing trial process is precisely why the interlocutory appeal process exists and this application raises the very type of issues that allows this case to proceed fairly and expeditiously according to law and in such a manner that can advance the integrity of the court as a whole.

### **III. Relief sought**

28. For the foregoing reasons, the Defence respectfully requests Trial Chamber X to:

**GRANT** Leave to Appeal the Decision on the issues mentioned above.

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<sup>25</sup> [ICC-01/12-01/18-367-Conf-Exp-Red](#), para. 33



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Melinda Taylor  
Counsel for Mr. Al Hassan

Dated this 28<sup>th</sup> Day of November 2022  
At The Hague, The Netherlands