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No. ICC-01/12-01/18

Date: 12 January 2021

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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

Decision on Defence request for provision of victims' applications

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

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TRIAL CHAMBER X of the International Criminal Court (the ‘Chamber’), in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, issues the following decision.

I. Background

1. On 20 December 2019, the Single Judge ordered that the applications of Prosecution witnesses who are also participating victims in the case (‘Dual Status Witnesses’) be transmitted, together with any supporting documents, to the Prosecution in unredacted form, and then disclosed to the Defence with necessary redactions (the ‘20 December 2019 Decision’).¹
2. On 12 March 2020, the Chamber issued its ‘Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial’ (the ‘12 March 2020 Decision’).² In this Decision, the Chamber set a procedure for the admission of victims to participate in the trial proceedings. Relevantly, the Chamber essentially maintained the admission procedure determined by Pre-Trial Chamber I, whereby applicants are categorised by the Registry into Group A (applicants who clearly qualify as victims), Group B (applicants who clearly do not qualify as victims), and Group C (applicants for whom the Registry could not make a clear determination for any reason). Thus, the parties receive only Group C applications – the Prosecution in unreacted form and the Defence in redacted form.³
3. On 27 November 2020, the Defence filed a request for provision of victims applications (the ‘Request’).⁴ Specifically, the Defence seeks provision of victim applications or lesser redacted versions of victim applications of the following individuals: (a) direct family members of testifying witnesses; (b) extended family members mentioned in the witness statements of testifying witnesses; and

¹ Decision on the Prosecution request for access to the identity and applications of participating victims and inviting report and submissions on victim application procedure, ICC-01/12-01/18-536, para. 11.

² Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial, ICC-01/12-01/18-661. *See also* Decision on request for extension of deadlines for the final transmission of victim applications for participation at trial, 12 June 2020, ICC-01/12-01/18-880.

³ 12 March 2020 Decision, ICC-01/12-01/18-661, paras 17-24, 31-32.

⁴ Defence request for provision of Victims’ Applications, ICC-01/12-01/18-1164-Conf.

(c) any other individuals mentioned in testifying witness statements.⁵ It argues, *inter alia*, that the Court's jurisprudence confirms that in the event that victim applications contain information that is relevant to the Defence, they should be duly transmitted to the Defence.⁶ In relation to the provision of lesser redacted versions, the Defence submits that where a witness had already provided information concerning the names of their family or other individuals (in the content of their witness statement), the basis for redacting this information becomes moot and the balance shifts in favour of disclosure.⁷ Alternatively, the Defence requests that the Prosecution be precluded from questioning witnesses based upon excerpts of statements that refer to individuals for whom an undisclosed victim application exists and that the Chamber refrain from relying upon sections referring to such individuals for any incriminatory purpose.⁸

4. On 8 December 2020 the Prosecution responded, seeking that the Chamber dismiss the Request in its entirety (the 'Prosecution Response').⁹ The Prosecution submits, *inter alia*, that the Defence has not met the threshold for reconsideration,¹⁰ and that in any event, the Request is speculative as the Defence has not established that exculpatory information exists and is in the possession of Legal Representatives of Victims (the 'LRVs') or the Chamber.¹¹
5. On 10 December 2020, the LRVs responded, also asking the Chamber to dismiss the Request (the 'LRVs Response').¹² The LRVs, *inter alia*, join the Prosecution in arguing that the Request is unfounded in that it seeks reconsideration of the 12 March 2020 Decision,¹³ affirm the Appeals Chamber jurisprudence regarding the narrow scope of the LRVs' disclosure obligations, and argue that the Request is

⁵ Request, ICC-01/12-01/18-1164-Conf, paras 4, 23.

⁶ Request, ICC-01/12-01/18-1164-Conf, paras 7, 10-14, 20.

⁷ Request, ICC-01/12-01/18-1164-Conf, para. 5.

⁸ Request, ICC-01/12-01/18-1164-Conf, paras 15, 23.

⁹ Prosecution's observations on the Defence request for provision of Victims' Applications, ICC-01/12-01/18-1194-Conf, para. 14.

¹⁰ Prosecution Response, ICC-01/12-01/18-1194-Conf, paras 2, 6-11.

¹¹ Prosecution Response, ICC-01/12-01/18-1194-Conf, paras 3, 12-13.

¹² Observations des Représentants légaux à la requête de la Défense relative à la communication des formulaires des victimes (ICC-01/12-01/18-1164-Conf), ICC-01/12-01/18-1201-Conf.

¹³ LRVs Response, ICC-01/12-01/18-1201-Conf, paras 11-12.

unfounded due to its general nature in the absence of the demonstration of relevance.¹⁴

II. Preliminary matter

6. As a preliminary matter, the Chamber notes the Defence submission that the Request required urgent resolution in relation to witness P-0557,¹⁵ who testified before the Chamber between 30 November and 4 December 2020. The Chamber notes that the Request was filed on the eve of P-0557's testimony and that it is the responsibility of the party to establish urgency where it asserts this factor in relation to a request. The Defence justified the lateness of the Request by stating that it depended on a response from the LRVs which only came on 24 November 2020.¹⁶ This is misleading, noting that the relevant Defence email to the LRVs was only sent the day before.¹⁷ In the present case therefore, the Chamber did not see any reason why the Request could not have been filed earlier and therefore declined to give urgent consideration to the Request in relation to P-0557.

III. Analysis

7. The Chamber notes that although not strictly framed as such,¹⁸ the Request essentially constitutes a request for reconsideration of part of the 12 March 2020 Decision, where the Chamber confirmed that the parties should only receive a limited number of victim applications, namely Group C applications – the Defence in redacted form.
8. The Chamber recalls that it 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

¹⁴ LRVs Response, ICC-01/12-01/18-1201-Conf, paras 13-18.

¹⁵ Request, ICC-01/12-01/18-1164-Conf, para. 3.

¹⁶ Request, ICC-01/12-01/18-1164-Conf, para. 3.

¹⁷ Email from the Defence to the LRVs, 23 November 2020, at 16:28 and email from the LRVs, 24 November 2020, at 17:03, the latter copied to the Chamber.

¹⁸ Request, ICC-01/12-01/18-1164-Conf, para. 17, referring to directions issued in the pre-trial phase.

prevent an injustice; new facts and arguments arising since the decision was rendered may be relevant to this assessment.¹⁹

9. The Chamber recalls that in the Defence's submissions regarding the victim participation procedure, it touched on the issue which is now the subject of its Request – arguing that the Prosecution should be in receipt of all victim applications in order to be able to satisfy disclosure obligations under Rule 77 of the Rules of Procedure and Evidence and Article 67 of the Statute.²⁰ In rendering the 12 March 2020 Decision the Chamber considered these submissions, and noted the compatibility of the Group A, B and C procedure with the Court's statutory framework and determined to adopt that approach.²¹ In adopting the Group A, B and C procedure, the Chamber found that it was conducive to the expeditious conduct of proceedings, while being also in the interests of the accused and victims, also having regard to the security situation in Mali and the challenges with respect to gathering information from applicants.²² The Defence sought no leave to appeal the 12 March 2020 Decision. As argued by the Prosecution,²³ the Defence has demonstrated no clear error of reasoning in the 12 March 2020 Decision. Nevertheless, the Chamber will consider whether it is necessary, on the basis of the Request, to reconsider this aspect of the 12 March 2020 Decision to prevent an injustice.
10. First, on the issue of lesser redacted versions of victim applications, the Chamber agrees with the Defence that to the extent that redactions have been rendered moot by other disclosures, those redactions should be lifted. The Prosecution in consultation with the LRVs is instructed to review the Dual Status Witness applications to determine whether redactions may be lifted and lesser redacted versions of applications can be transmitted to the Defence.

¹⁹ 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.

²⁰ Defence submissions on modalities of victims' participation, 3 February 2020, ICC-01/12-01/18-574, paras 17, 18.

²¹ 12 March 2020 Decision, ICC-01/12-01/18-661, paras 20, 32. See also generally paras 17-24, 31.

²² 12 March 2020 Decision, ICC-01/12-01/18-661, paras 19, 21.

²³ Prosecution Response, ICC-01/12-01/18-1194-Conf, para. 8.

11. Turning to the remainder of the Request, the Chamber notes that according to the Appeals Chamber, no general obligation must be imposed on victims to disclose to the accused all evidence in their possession, whether incriminating or exculpatory; however, there may be specific instances in which a chamber may require victims to disclose exculpatory evidence in their possession to the accused, such as when a party or participant brings to the attention of the Chamber that such information is available and the Chamber finds that such information is necessary for the determination of the truth.²⁴

12. In this regard, the Chamber notes that the Defence Request is formulated very broadly. It captures the application forms of direct family members of testifying witnesses, and extended family members and any other individuals mentioned in the witness statements of testifying witnesses. In substantiating its Request, the Defence submits that a redacted list of alleged victims provided by the LRVs to the Prosecution ‘suggests that it contains individuals whose applications may have relevant information whereas meta-data disclosed along with this list suggests that the individuals have been assigned witness pseudonyms thus suggesting the Prosecution considers them to be persons of interest for the case’.²⁵ The Defence further submits that the victim applications it seeks may be relevant to its preparation since those applications ‘can be expected to shed light on information such as the periods of time individuals were or were not in detention, and sequences of events’, that ‘[f]amily members applications may be expected to refer to accounts given by witnesses of their experiences’, ‘and that ‘[g]iven the public nature of some of the allegations, it might also be expected that family members could be present at and may offer accounts of punishments’.²⁶

13. The Chamber is not satisfied that this Request falls within the abovementioned parameters outlined by the Appeals Chamber. The Chamber considers it speculative at this stage that family members or other persons mentioned in the Prosecution witnesses’ statements have applied for participation in the

²⁴ Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, 16 July 2010, ICC-01/04-01/07-2288 (OA11), paras 71, 81.

²⁵ Request, ICC-01/12-01/18-1164-Conf, para. 8.

²⁶ Request, ICC-01/12-01/18-1164-Conf, para. 9.

proceedings in this case and that their applications may contain information relevant to the preparation of the Defence. This in particular, taking account of the Prosecution's submission that pseudonyms are assigned for the purpose of redactions and are not an indication that the Prosecution considers all these individuals as persons of interest for the case.²⁷

14. The Chamber also notes the Defence's argument that victim applications in this case have been provided to the Pre-Trial Chamber and this Chamber, and that whatever information is contained in them about Prosecution witnesses and charged acts and conduct is already in the proceedings but *ex parte*, which is contrary to a fair adversarial process 'as material which may *inter alia* impact upon the credibility of one party's witnesses is not available to the Accused for use to challenge them'.²⁸ To the extent that the Defence is suggesting that unfairness arises because Groups A and B forms are technically transmitted to the Chamber and therefore that relevant information contained therein is available to the Chamber but not the Defence, this argument is misconceived. The Chamber conducts a review of the Group A and B applications that is limited to confirming that there has been no clear and material error in the Registry assessment. The only applications individually assessed by the Chamber are those in Groups C,²⁹ to which the Defence has access. This assessment is conducted for purposes of determining whether the applicants qualify as victims.
15. Similarly, in relation to the Defence's submission that the LRVs have 'introduced [victim applications] into the record',³⁰ as noted by the Prosecution³¹ victim applications are not as such part of the evidentiary record of this case. They may only become 'evidence' for the purpose of the Chamber's eventual decision under Article 74 of the Statute if submitted in accordance with the Chamber's Directions on the Conduct of Proceedings.
16. For the reasons set out above, the remainder of the Request is accordingly rejected. This determination is without prejudice to the Defence's ability to make

²⁷ Prosecution Response, ICC-01/12-01/18-1194-Conf, paras 12-13.

²⁸ Request, ICC-01/12-01/18-1164-Conf, para. 15.

²⁹ 12 March 2020 Decision, ICC-01/12-01/18-661, para. 21.

³⁰ Request, ICC-01/12-01/18-1164-Conf, para. 16.

³¹ Prosecution Response, ICC-01/12-01/18-1194-Conf, para. 11.

specific substantiated applications in relation to specific testifying witnesses which the Chamber would consider on a case by case basis.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

INSTRUCTS the Prosecution and the LRVs to proceed in accordance with paragraph 10 in relation to redactions to Dual Status Witness applications; and

REJECTS the remainder of the Request, without prejudice.

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

Judge Antoine Kesia-Mbe Mindua
Presiding Judge

Judge Tomoko Akane

Judge Kimberly Prost

Dated this 12 January 2021

At The Hague, The Netherlands