



Original: English

No. **ICC-01/12-01/18**
Date: **20 December 2019**

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

Decision on the Prosecution request for access to the identity and applications of participating victims and inviting report and submissions on victim application procedure

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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Judge Kimberly Prost, acting as Single Judge of Trial Chamber X (‘Single Judge’ and ‘Chamber’, respectively) of the International Criminal Court (‘Court’), in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (‘Al Hassan Case’), issues this ‘Decision on the Prosecution request for access to the identity and applications of participating victims and inviting report and submissions on victim application procedure.’

I. Procedural history

1. On 24 May 2018, the Single Judge of Pre-Trial Chamber I (‘PTC I’) issued his first decision on the principles applicable to applications for participation of victims.¹ In this decision, he categorised the applicants into three categories: 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).² The Single Judge of PTC I ordered the Registry to transmit all victim applications to the Chamber, but to disclose only Group C applications to the parties, redacted as necessary.³
2. On 17 September 2018⁴ and 25 January 2019,⁵ the Registry transmitted to the Office of the Prosecutor (‘Prosecution’) and the Defence redacted versions of the Group C victim applications, from which all identifying information was removed.

¹ Décision fixant les principes applicables aux demandes de participation des victimes, ICC-01/12-01/18-37 (‘First PTC Decision’).

² First PTC Decision, ICC-01/12-01/18-37, para. 59(i).

³ First PTC Decision, ICC-01/12-01/18-37, para. 59(ii) and (iv). With regard to victim applications provided to the Defence, the Single Judge of PTC I ordered the Registry to remove all identifying information when redactions were necessary.

⁴ Registry’s First Transmission of Group C Applications for Victims’ Participation in Pre-Trial Proceedings (with 14 annexes in both confidential *ex parte* form, only available to the Registry, and confidential redacted form), ICC-01/12-01/18-128.

⁵ Registry’s Second Transmission of Group C Victims’ Applications for Participation in Pre-Trial Proceedings, (with 15 annexes in both confidential *ex parte* form, only available to the Registry, and confidential redacted form), ICC-01/12-01/18-228.

3. On 20 March 2019, a team of Legal Representatives was appointed to represent the participating victims ('LRVs').⁶
4. On 1 July 2019, the Single Judge of PTC I issued a decision authorising 882 applicants to participate in the proceedings in this case ('Participating Victims') and directing the Registry to transmit to the LRVs their applications.⁷
5. On 21 November 2019, after the Chamber was constituted and the *Al Hassan* Case referred to it,⁸ the Prosecution filed a request to the Chamber to order the Registry to disclose to the Prosecution: (i) the identity of the Participating Victims; and (ii) unredacted versions of their victim applications ('Request').⁹ The Prosecution submits that the disclosure is required to allow it to establish a list of Prosecution witnesses who are also Participating Victims in the case ('dual status witnesses') and to discharge its related obligations.¹⁰ It also states that, should the Request be granted, it intends to inform the Defence of the pseudonyms of any dual status witnesses identified, and to provide it with any disclosable information contained in their applications, with redactions as appropriate.¹¹
6. On 29 November 2019, the Prosecution filed an addendum to its Request ('Addendum') in which it withdrew the request to receive all identities and applications of Participating Victims and instead proposed an alternative procedure effectively limiting the scope of the original Request to the applications of dual status witnesses only.¹²

⁶ Décision relative aux principes applicables aux demandes de participation des victimes, à leur représentation légale et aux modalités de leur participation à la procédure, ICC-01/12-01/18-289-Conf-Exp (confidential *ex parte*, only available to the Registry; a public redacted version was filed on the same day, ICC-01/12-01/18-289-Red).

⁷ Décision relative à la participation des victimes à la procédure, ICC-01/12-01/18-391-Conf-Exp (confidential *ex parte*, only available to the Registry, with confidential Annex A; a public redacted version was filed on the same day, ICC-01/12-01/18-391-Red), para. 38 and p. 14.

⁸ Presidency, Decision constituting Trial Chamber X and referring to it the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 21 November 2019, ICC-01/12-01/18-501.

⁹ Prosecution Request for access to the identity and applications of participating victims, ICC-01/12-01/18-502 ('Request'), para. 13.

¹⁰ Request, ICC-01/12-01/18-502, paras 2, 8-9.

¹¹ Request, ICC-01/12-01/18-502, paras 4, 12.

¹² Addendum to Prosecution Request for access to the identity and applications of participating victims, 21 November 2019, ICC-01/12-01/18-502, ICC-01/12-01/18-510.

7. On 2 December 2019, the LRVs filed a response to the Addendum,¹³ in which they indicate that they have no objection to the alternative procedure proposed.¹⁴ They insist on the need to be informed of the existence of dual status witnesses without delay and seek to be consulted at all stages of the procedure.¹⁵ The LRVs further indicate that they have no objection to the communication to the parties of redacted victim applications of the Participating Victims, and indicate that they would provide further and separate written submissions on this issue.¹⁶
8. On 11 December 2019, the Defence filed a response to the Addendum,¹⁷ opposing the procedure proposed in the Addendum and asking the Chamber to either direct the Registry to adopt the procedure on victim participation as set out in paragraphs 96(v) and 96(vi) of the Chambers Practice Manual, or in the alternative grant the initial Request.¹⁸ The Defence submits, *inter alia*, that the Prosecution's revised position in the Addendum is inconsistent with its duties under Article 54(1) of the Statute, would prevent the Defence from accessing information that is exculpatory or otherwise material to Defence preparation, and is particularly prejudicial in light of the specific scheme for victim participation adopted in this case.¹⁹

¹³ Réponse à la requête du Bureau du Procureur « Prosecution Request for access to the identity and applications of participating victims » et son addendum (ICC-01/12-01/18-502 et ICC-01/12-01/18-510), ICC-01/12-01/18-513 ('LRV Response').

¹⁴ LRV Response, ICC-01/12-01/18-513, para. 5.

¹⁵ LRV Response, ICC-01/12-01/18-513, paras 7-9.

¹⁶ LRV Response, ICC-01/12-01/18-513, paras 10-13. *See also* Observations des Représentants légaux suite à l'« Order Scheduling First Status Conference » (ICC-01/12-01/18-507), ICC-01/12-01/18-516 ('LRV Further Observations'), paras 10-11.

¹⁷ Response to "Addendum to Prosecution Request for Access to the Identity of and Applications of Participating Victims, 21 November 2019, ICC-01/12-01/18-502", ICC-01/12-01/18-524-Conf (confidential with confidential ex parte Annex A, available to the Prosecution and Defence only; a public redacted version of the main filing was filed the next day, ICC-01/12-01/18-524-Red) ('Defence Response').

¹⁸ Defence Response, ICC-01/12-01/18-524-Red, p. 8.

¹⁹ Defence Response, ICC-01/12-01/18-524-Red, para. 1.

II. Analysis

9. The Single Judge notes Articles 54(1), 61(6), 67(2) and 68 of the Rome Statute ('Statute'), and Rules 77 and 89 of the Rules of Procedure and Evidence ('Rules').
10. The Single Judge recalls that, pursuant to Article 54(1)(a) of the Statute, the Prosecutor has an obligation to investigate incriminating and exonerating circumstances equally. The Single Judge considers that, in the context of the present Request as modified by the Addendum, this means that, in order to properly discharge its statutory obligations, the Prosecution must obtain and provide the Defence with the victim applications of dual status witnesses.²⁰
11. Accordingly, and in the interests of time, the Single Judge grants the Request as modified by the Addendum and directs:
 - a) the Prosecution, Registry and LRVs to liaise in order to identify the dual status witnesses amongst the Participating Victims;
 - b) the Registry to transmit to the Prosecution unredacted versions of the victim applications of those individuals, if any, together with any supporting documents; and
 - c) the Prosecution to apply redactions, as necessary and in consultation with the LRVs, to those victim applications and disclose them to the Defence at the earliest opportunity.
12. However, the Single Judge notes the submissions from the LRVs²¹ and the Defence,²² which touch the procedure for victim participation in this case more broadly. Therefore, the above-mentioned procedure with regard to dual status witnesses is without prejudice to a further decision on the procedure to be

²⁰ See also Trial Chamber VI, *Prosecutor v. Bosco Ntaganda*, Order on the provision of victim application forms of dual status witnesses, 17 December 2015, ICC-01/04-02/06-1060, para. 3; and Pre-Trial Chamber II, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaiissona*, Decision on Motion for Disclosure of Witnesses with Dual Status, 13 September 2019, ICC-01/14-01/18-339, para. 11.

²¹ LRV Further Observations, ICC-01/12-01/18-516, paras 10-11.

²² Defence Response, ICC-01/12-01/18-524-Red, paras 8-10.

adopted for the admission of victims to participate in the trial proceedings, which will be issued following receipt of further submissions. In particular, the Single Judge notes that the procedure adopted in pre-trial departs from the recommendations made in the Chamber's Practice Manual.²³

13. To this end, the Single Judge directs:
 - A. the Registry to file a report which: (i) updates the Chamber on victims' applications; and (ii) provides observations on the procedure for victim participation in trial, particularly in light of paragraphs 95-98 of the Chambers Practice Manual,²⁴ and
 - B. the Prosecution, Defence and LRVs to make final submissions on the victim participation procedure to be adopted and, where appropriate, responding to observations contained in the aforementioned Registry report.

²³ Chambers Practice Manual 2019, Section (II)(D)(V)(A). Available at: <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf>.

²⁴ Chambers Practice Manual 2019, Section (II)(D)(V)(A). *See also* Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision concerning the procedure for admission of victims to participate in the proceedings in the present case, 3 September 2015, ICC-02/04-01/15-299 *endorsed by* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Order Scheduling First Status Conference and Other Matters, 4 May 2016, ICC-02/04-01/15-432, para. 4.

FOR THESE REASONS, THE SINGLE JUDGE

GRANTS the Request in part;

DIRECTS the parties, participants and the Registry to proceed in accordance with paragraph 11 above with the transmission and disclosure of victim applications of dual status witnesses;

DIRECTS the Registry to file a report in accordance with paragraph 13 above, by **24 January 2020**; and

INVITES the Prosecution, Defence and LRVs to file submissions in accordance with paragraph 13 above, by **3 February 2020**.

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



Judge Kimberly Prost, Single Judge

Dated this 20 December 2019

At The Hague, The Netherlands