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

Date: **16 November 2023**

Date of original: **26 October 2020**

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

**Corrigendum of ‘Decision on the Prosecution’s urgent request to summon
witnesses’**

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

Legal Representatives of Victims

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

REGISTRY

Registrar
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit
Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other
The Government of the Republic of Mali

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*, having regard to Articles 64(6)(b), 86, 87, 93(1)(b) and (d) and 96 of the Rome Statute (the ‘Statute’) and Rules 176 and 194 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on the Prosecution’s urgent request to summon witnesses’.

I. Procedural history and submissions

1. At the pre-trial stage, the Office of the Prosecutor (the ‘Prosecution’) made multiple applications pursuant to Article 56 of the Statute, in order to allow the taking of evidence with respect to insider witnesses who were detained in [REDACTED] (the ‘Article 56 Requests’).¹
2. On 13 December 2018, Pre-Trial Chamber I (hereinafter: ‘PTC-I’) issued a decision in which it found that there was a unique investigative opportunity within the meaning of Article 56 of the Statute, but deferred its decision on whether to authorise the sought measures.²
3. On 7 February 2019, PTC-I issued a decision rejecting the Article 56 Requests.³
4. On 7 October 2020, the Prosecution informed the Chamber that it appeared that a number of its witnesses who were detained in [REDACTED] had been released [REDACTED].⁴ The Chamber received a further communication from

¹ Prosecution application for the Single Judge to take measures under article 56 of the Rome Statute and preserve evidence of Witness MLI-OTP-P-0605, 29 October 2018, ICC-01/12-01/18-164-Secret-Exp; Prosecution application for the Single Judge to preserve evidence and take measures under article 56 of the Rome Statute for Prosecution Witness MLI-OTP-P-0582, 1 November 2018, ICC-01/12-01/18-168-Secret-Exp; Prosecution application for the Single Judge to take measures under article 56 of the Rome Statute and preserve evidence of Witness MLI-OTP-P-0537, 5 November 2018, ICC-01/12-01/18-173-Secret-Exp (Confidential redacted versions of the three filings were notified on 31 January 2020).

² Décision relative aux requêtes du Procureur aux fins de prendre des mesures nécessaires en application de l'article 56-2 du Statut pour les témoins MLI-OTP-P-0066, MLI-OTP-P-0004, MLI-OTP-P-0605, MLI-OTP-P-0582 et MLI-OTP-P-0537, 13 December 2018, ICC-01/12-01/18-204-Secret-Exp (secret redacted version available to the Defence notified on the same date).

³ Deuxième décision relative aux requêtes du Procureur aux fins de prendre des mesures nécessaires en application de l'article 56-2 du Statut pour les témoins MLI-OTP-P-0066, MLI-OTP-P-0004, MLI-OTP-P-0605, MLI-OTP-P-0582 et MLI-OTP-P-0537, 7 February 2018, ICC-01/12-01/18-235-Secret-Exp (secret redacted version available to the Defence notified on the same date).

⁴ Email from the Prosecution to the Chamber, 7 October 2020, at 15:36.

the Prosecution on 10 October 2020, in which the latter identified [REDACTED] witnesses who had potentially been released.⁵

5. On 19 October 2020, the Prosecution filed a request pursuant to Articles 64(6)(b) and 93 of the Statute (the ‘Request’).⁶ With respect to witnesses P-0582, P-0605, P-0647 and P-0634 (the ‘Released Witnesses’), the Prosecution requests the Chamber to urgently request the Government of Mali to: (a) serve summonses on the Released Witnesses; (b) compel and ensure their appearance to give testimony before the Chamber on the territory of Mali *via* audio visual link; and (c) make appropriate arrangements for the security of the Released Witnesses, in consultation with the Victims and Witnesses Unit (the ‘VWU’).⁷
6. The Prosecution submits that its Request fulfils the requirements of relevance, specificity and necessity. As regards relevance, the Prosecution argues that the Released Witnesses’ testimony is relevant to the present case as, due to their specific profiles, they can attest to *inter alia* the role, authority and contribution of the accused.⁸ The Prosecution submits that it has also sufficiently specified the identities of the Released Witnesses and established that, on the basis of currently available information, the Released Witnesses are on the territory of Mali.⁹ Concerning necessity, the Prosecution explains the steps it has taken so far in order to obtain the testimony of the Released Witnesses,¹⁰ and contends that the relief sought in the Request is necessary for obtaining the testimony of the Released Witnesses.¹¹ Furthermore, the Prosecution submits that the anticipated testimony of the Released Witnesses is necessary for the

⁵ Email from the Prosecution to the Chamber, 10 October 2020, at 15:15.

⁶ Prosecution Urgent Request under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses, 19 October 2020, ICC-01/12-01/18-1117-Conf-Exp (with secret *ex parte* annex A and confidential *ex parte* annexes B to E). The Prosecution clarifies that, on 12 October 2020, it was informed that one of the five witnesses appears to remain in detention. *See* Request, ICC-01/12-01/18-1117-Conf-Exp, para. 30.

⁷ Request, ICC-01/12-01/18-1117-Conf-Exp, paras 2, 35, 62.

⁸ Request, ICC-01/12-01/18-1117-Conf-Exp, paras 37-41.

⁹ Request, ICC-01/12-01/18-1117-Conf-Exp, para. 42.

¹⁰ Request, ICC-01/12-01/18-1117-Conf-Exp, paras 4-9, 17-24, 27, 29.

¹¹ Request, ICC-01/12-01/18-1117-Conf-Exp, paras 43-45.

determination of the truth and that the summonses as a compulsory measure are necessary to obtain their testimony.¹²

II. Analysis

7. Pursuant to Article 64(6)(b) of the Statute, the Chamber has the power to compel witnesses to appear before it, thereby creating a legal obligation for the individuals concerned.¹³ In issuing summonses, the Single Judge will consider: (i) whether the anticipated testimony of the witnesses is potentially necessary for the determination of the truth; and (ii) whether a summons, as a compulsory measure, is necessary to obtain the testimony of the witness.¹⁴
8. Having had regard to the arguments set out in the Request, the Single Judge is satisfied that the anticipated testimony of the witnesses is potentially necessary for the determination of the truth, noting that, as submitted by the Prosecution,¹⁵ it goes to matters concerning, *inter alia*, the alleged role, authority and contribution of the accused.
9. In light of the information provided by the Prosecution on the steps that have been taken in order to secure the testimony of the Released Witnesses, the Single Judge also finds that summonses are necessary to obtain the testimony of the Released Witnesses. In particular, the Single Judge observes that, notwithstanding the fact that the Prosecution had diligently filed requests pursuant to Article 56 of the Statute and that PTC-I found that there was a unique investigative opportunity, no measures under Article 56 of the Statute were taken at the pre-trial stage. As it stands, there are considerable difficulties in obtaining the testimony of the Released Witnesses, as reflected in the various

¹² Request, ICC-01/12-01/18-1117-Conf-Exp, paras 47-60.

¹³ Appeals Chamber, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1598 (hereinafter: '*Ruto OA7 OA8 Judgment*'), para. 113.

¹⁴ Similarly see Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on the 'Prosecution's Requests under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses', 3 December 2015, ICC-01/05-01/13-1343-Red, para. 18; Trial Chamber V(a), *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2, 17 April 2014, para. 181.

¹⁵ Request, ICC-01/12-01/18-1117-Conf-Exp, paras 37-41.

reasonable and unsuccessful steps taken to date by the Prosecution. In the present circumstances, the Single Judge is satisfied that the summonses as a compulsory measure are necessary to obtain the testimony of the Released Witnesses. For these reasons, the Single Judge grants the requested summons.

10. The Single Judge will now turn to the question of whether the assistance of the Government of Mali should be sought pursuant to Article 93 of the Statute. Under Article 93(1)(d) of the Statute, the Chamber may request States Parties to cooperate with the Court to serve summonses.¹⁶ Furthermore, as confirmed by the Appeals Chamber, the Chamber may issue a request to States Parties to compel witnesses to appear before the Chamber pursuant to Article 93(1)(b) of the Statute.¹⁷ For the Chamber to intervene pursuant to Part 9 of the Statute, the moving party must show that a cooperation request is sufficiently: (i) relevant; (ii) specific; and (iii) necessary.¹⁸
11. As to the requirement of relevance, the Single Judge is satisfied with the Prosecution's arguments that the witnesses' testimony is relevant to the present case *inter alia* for establishing the alleged role, authority and contribution of the accused. The Single Judge also notes that the Released Witnesses were included in the Prosecution's list of witnesses, and that P-0582 was scheduled to testify in November 2020.¹⁹
12. As to the requirement of specificity, the Single Judge is satisfied that the Released Witnesses have been clearly identified by the Prosecution and are, or may be, on the territory of Mali.²⁰ The relief sought by the Prosecution in the Request also meets the requisite standard of specificity.
13. As to necessity, as explained above, the Single Judge considers that the testimony of the Released Witnesses are potentially necessary and that, in view of the various reasonable and unsuccessful steps taken by the Prosecution to

¹⁶ *Ruto* OA7 OA8 Judgment, para. 114.

¹⁷ *Ruto* OA7 OA8 Judgment, para. 128.

¹⁸ See Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Deadline Extension and Cooperation from Uganda, 4 May 2018, ICC-02/04-01/15-1254, para. 7 and jurisprudence cited therein.

¹⁹ ICC-01/12-01/18-805-Conf-AnxA.

²⁰ See ICC-01/12-01/18-1117-Secret-Exp-AnxA.

date, summonses as a compulsory measure is necessary. The Single Judge is also satisfied that the Released Witnesses may face particular security risks and threats due to their specific profile and considers that it may be necessary, in consultation with the VWU, to make further arrangements for the security of the Released Witnesses.

14. For the foregoing reasons, the Single Judge grants the Request. In accordance with Part 9 of the Statute and in particular Article 97, the Government of Mali may consult with the Court, should there be challenges in relation to the execution of the present request for assistance.
15. The Registry is directed to prepare and transmit forthwith, in consultation with the Prosecution, the necessary summonses to witnesses P-0582, P-0605, P-0634 and P-0647 together with the present decision.
16. Considering that any inadvertent disclosure of information contained in the present decision or filing ICC-01/12-01/18-1117-Conf-Exp and its annexes may seriously jeopardise the safety of the Released Witnesses and put them at significant risk, the Single Judge emphasises that extreme caution should be employed in executing the present decision.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request;

SUMMONS witnesses P-0582, P-0605, P-0634 and P-0647;

REQUESTS the assistance of the Government of Mali, in ensuring the appearance of witnesses P-0582, P-0605, P-0634 and P-0647, using all available means including:

- (i) to cooperate in serving the summons upon the Released Witnesses;
- (ii) to compel and ensure the appearance of the Released Witnesses to give testimony before the Chamber on the territory of Mali via audio-visual link; and
- (iii) to make appropriate arrangements for the security of the Released Witnesses, in consultation with the Victims and Witnesses Unit; and

INSTRUCTS the Registry to proceed in accordance with paragraph 15 above.

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



Judge Kimberly Prost
Single Judge

Dated this Monday, 26 October 2020

At The Hague, The Netherlands