

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**
Date: **21 October 2019**
Date of submission:
22 November 2019

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 MOHAMOUD

Public

Public redacted version of the "Prosecution's Response to Defence Request for Leave to Appeal the Single Judge's *"Décision relative à la requête du Procureur aux fins d'autorisation de la non-communication des déclarations des témoins MLI-OTP-P-0554 et MLI-OTP-P-0984"* [REDACTED],
21 October 2019, ICC-01/12-01/18-476-Conf-Exp

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Other

Introduction

1. The Defence's request for leave to appeal ("Request")¹ the "*Décision relative à la requête du Procureur aux fins d'autorisation de la non-communication des déclarations des témoins MLI-OTP-P-0554 et MLI-OTP-P-0984*" ("Decision")² should be rejected. The Request fails to meet the requirements for leave to appeal under article 82(1)(d) of the Rome Statute ("Statute").

2. The Defence fails to identify a discrete legal or factual issue requiring a decision by the Appeals Chamber for its resolution. The Request raises nothing more than a disagreement with the Single Judge's findings and the procedure that led to the Decision. Since disagreements are not appealable issues,³ the Request should be dismissed on this basis alone.

3. Even if, *arguendo*, appealable issues did arise from the Decision, none of the issues identified by the Defence ("Three Issues") meets the remaining cumulative requirements for leave to appeal under article 82(1)(d) of the Statute. The alleged impact on the fairness and expeditiousness of the proceedings is unsubstantiated.

4. The Defence does not demonstrate how the resolution of any of the Three Issues would materially advance the proceedings. Instead, it merely advances a general and speculative argument regarding the possibility that the trial would be contaminated *if* the confirmation of charges were *perceived* to have been conducted on a flawed and unfair manner.⁴ At this juncture, where the charges have been confirmed and the suspect has been committed to trial, an appellate litigation of any of the Three Issues would delay rather than advance the proceedings forward.

¹ [REDACTED].

² [REDACTED].

³ ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para. 17; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

⁴ [REDACTED].

Confidentiality

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this document is filed as confidential *ex parte*, available only to the Prosecution, the Defence and the Victims and Witnesses Unit as it responds to a filing of the same classification.

Submissions

6. An “issue” for the purpose of article 82(1)(d) of the Statute must be “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.⁵ Further, the party seeking leave to appeal under article 82(1)(d) must identify a discrete legal or factual issue arising from the impugned decision.⁶ The Request fails to do so.

7. Assuming *arguendo* that any of the Three Issues constitutes an appealable issue, they otherwise fail to meet the other requirements of article 82(1)(d) of the Statute.

The First Issue

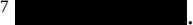
8. The Defence’s First Issue is “




”.⁷ This does not constitute an “issue” arising from the Decision, and does not meet the other criteria under article 82(1)(d) of the Statute.

⁵ ICC-01/04-168 OA3, para. 9.

⁶ See for example, ICC-02/11-01/11-307, para. 70; ICC-01/05-01/13-2030, para. 6.

⁷ .

9. The Defence previously raised the same arguments in the Defence Response⁸ [REDACTED].⁹ Rather than pointing to an issue arising from the Decision, the Defence merely reiterates its prior arguments. As such, the alleged First Issue constitutes no more than a mere disagreement with the Decision.

10. Moreover, and in any event, the resolution of the First Issue does not significantly affect the fair and expeditious conduct of the proceedings, because, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹⁰

11. Contrary to what the Defence suggests,¹¹ the Prosecution is [REDACTED]

[REDACTED]. [REDACTED], [REDACTED]

[REDACTED]¹² [REDACTED]

[REDACTED]

[REDACTED].¹³

The Second Issue

12. The Defence's Second Issue – "[REDACTED]"

[REDACTED]

[REDACTED]

⁸ See ICC-01/12-01/18-424-Conf, *Defence response to the Prosecution's Request for non-disclosure of statements of witnesses MLI-OTP-P-0554 and MLI-OTP-P-0984* ("Defence Response"), para. 6-8, raising the issues of: (a) whether incriminating material could be provided to the Chamber on an *ex parte* basis outside the permitted statutory timeframe; and (b) whether there could be non-disclosure of information that was both potentially exculpatory and material to the preparation of the Defence ahead of the confirmation hearing because of the Prosecution's continued investigative and disclosure obligations.

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

[REDACTED].¹⁷ This does not constitute an “issue” arising from the Decision, nor meet the other criteria under article 81(2)(d) of the Statute.

16. Firstly, the issue [REDACTED] had already been raised by the Defence. [REDACTED]

[REDACTED]

[REDACTED].¹⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹⁹ The Third Issue therefore represents nothing more than the Defence’s disagreement with the Decision and its dissatisfaction with the process that led to it.

17. Secondly, the Defence misrepresents the Decision. Contrary to the Defence’s suggestion, [REDACTED]

[REDACTED]: “[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].²⁰ The Third Issue therefore does not arise from the Decision.

18. [REDACTED]

[REDACTED]

¹⁷ [REDACTED].

¹⁸ ICC-01/12-01/18-88-Conf-Exp-Red.

¹⁹ [REDACTED].

²⁰ [REDACTED].

Besunda

21 [REDACTED].