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**International
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26 November 2019

TRIAL CHAMBRE 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 MOHAMOUD

Public

**Public redacted version of the "Prosecution's Response to Defence Request
for Leave to Appeal *Décision relative aux observations de la défense en vertu
de la règle 122-3 du Règlement de procédure et de preuve*",
11 October 2019, ICC-01/12-01/18-468-Conf-Exp**

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Introduction

1. The Defence's request for leave to appeal ("Request")¹ the "*Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement de procédure et de preuve*" ("Decision")² should be rejected.
2. The Defence seeks leave to appeal in relation to a broad question of the judicial oversight by Pre-Trial Chamber I ("Chamber") over the pre-confirmation phase of this case, which it argues should be assessed by reference to the cumulative impact of the Chamber's rulings on a range of sub-issues which had been raised by the Defence.³
3. The Request fails to meet the requirements for leave to appeal under article 82(1)(d) of the Rome Statute ("Statute").
4. The Defence fails to identify a discrete legal or factual issue requiring a decision by the Appeals Chamber for its resolution. The issue proposed by the Request has already been considered and rejected by the Chamber, and in any event does not arise from the impugned Decision.
5. The Request merely repeats arguments previously made in the Defence's *Submissions requested by the Pre-Trial Chamber* ("Original Filing")⁴ and expresses the Defence's disagreement with the Decision.
6. Further, the proposed issue does not meet the remaining cumulative requirements under article 82(1)(d) of the Statute. It does not have any impact on the fair and expeditious conduct of the proceedings or the outcome of the trial, and its

¹ ICC-01/12-01/18-464 [REDACTED].

² ICC-01/12-01/18-460 [REDACTED] Red.

³ Request, para. 1-2.

⁴ ICC-01/12-01/18-426-Red.

immediate resolution by the Appeals Chamber would not materially advance the proceedings.

Confidentiality

7. 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 and the Defence as it responds to a filing of the same classification.

Submissions

The Defence fails to identify a discrete appealable issue arising from the Decision

8. According to the established jurisprudence of this Court, an “issue” for the purpose of article 82(1)(d) of the Statute is “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.⁵

9. The issue raised by the Defence regarding whether the Pre-Trial Chamber exercised judicial oversight over the pre-confirmation phase in a manner that was fair and impartial, and consistent with the principle of equality of arms and the right to expeditious proceedings issue⁶, does not qualify as an appealable issue.

10. Firstly, article 82(1)(d) of the Statute requires the party seeking leave to appeal to identify a discrete legal or factual issue arising from the impugned decision.⁷ However, the issue proposed by the Defence is, in essence, whether the Chamber should have found violations as alleged in its Original Filing. Rather than identifying a discrete issue requiring a decision for its resolution, the Defence is seeking to litigate *ex novo* the entirety of the Decision before the Appeals Chamber.

⁵ ICC-01/04-168, para. 9.

⁶ Request, para. 1.

⁷ See for example, ICC-02/11-01/11-307, para. 70; ICC-01/05-01/13-2030, para. 6.

11. Second, the issue does not arise from the Decision. Rather, this broad question relates to various aspects of the pre-confirmation proceedings, which the Defence waited to challenge until the first day of the confirmation hearing or its submission of the Original Filing.

12. Thirdly, this alleged issue constitutes no more than a mere disagreement with the findings of the Chamber. In the Decision, the Chamber already considered and dismissed the Defence arguments regarding the alleged lack of effective oversight.⁸ In that context, it noted, *inter alia*, that the Defence could have seized the Chamber regarding disclosure issues.⁹ The Defence argument that even if it had raised these issues before the confirmation hearing, it would not have obtained a timely and effectively remedy¹⁰ rests on pure speculation.

13. Similarly, the Defence arguments in relation to a range of alleged sub-issues have already been considered and rejected by the Chamber. They constitute no more than a mere disagreement with the findings of the Chamber:

) With respect to the disclosure of potentially exculpatory information, the Defence only reiterates its arguments made in its Original Filing.¹¹ In the Decision, the Chamber explicitly took note of such arguments,¹² but found *inter alia* that there was no sufficient information to evaluate if the Prosecution failed in its disclosure obligations.¹³ Contrary to the Defence's contention,¹⁴

⁸ Decision, para. 117-134.

⁹ Decision, para. 130.

¹⁰ Request, para. 39.

¹¹ Request, para. 8-10.

¹² For example, Decision, para. 77: "*La Chambre prend note des arguments de la défense quant au fait que le Procureur aurait dû divulguer des éléments de preuve relatifs aux conditions de détention de M. Al Hassan au Mali proprio motu, avant toute requête de la défense en ce sens.*"

¹³ Decision, para. 77: "*La Chambre estime toutefois qu'elle ne dispose pas d'éléments suffisants pour évaluer, dans l'abstrait, si le Procureur avait connaissance, à un moment déterminé, de la pertinence des documents en question pour la préparation de la défense et si elle a dès lors manqué à ses obligations en matière de divulgation en ne les communiquant pas directement.*"

¹⁴ Request, para. 8.

nowhere in the Decision did the Chamber find a failure on the part of the Prosecution to disclose certain information as exculpatory;

) Similarly, the Chamber in the Decision already addressed the Defence argument regarding the disclosure of [REDACTED] [REDACTED] in the form of investigator's notes;¹⁵

) The Chamber also took into consideration all facts and information, including the investigator's note [REDACTED] relied upon in the Request,¹⁶ when it found that the Defence's request for correspondence between the Prosecution and the authorities of France and Mali lacked specificity;¹⁷

) Contrary to what the Defence implies,¹⁸ the Chamber in its Decision found no violation on the part of the Prosecution regarding the identification of dual victim-witnesses, or the taking of a statement from P-0577.¹⁹ The Defence mostly reiterates its submissions in the Original Filing and expresses its disagreement with this finding;

) With respect to the definition of "witness" under the Witness Protocol ("Protocol"), the Defence contends that the Chamber's endorsement of the interpretation advanced by the Prosecution constituted a "reconsideration" of its earlier decision. Contrary to the Defence's suggestion, however, the term "witness" under the Protocol for the purpose of the pre-trial proceedings had never been clarified by the Chamber until the Decision. Indeed, this was why there had been a disagreement between the Parties resulting in [REDACTED] [REDACTED] prior to the confirmation hearing.²⁰ As noted by the

¹⁵ Decision, para. 74-79. Contra, Request, para. 11-14.

¹⁶ Request, para. 15, referring to [REDACTED].

¹⁷ Decision, para. 83-84.

¹⁸ Request, 16-19.

¹⁹ Decision, para. 104-106.

²⁰ Original Filing, Annex B, p .66-67.

Chamber, the Defence nevertheless failed to bring the issue to its attention until the confirmation hearing.²¹ The Defence's new arguments, such as the drafting history of the Protocol, represent no more than a disagreement with the Chamber's interpretation;

) The Defence's complaints regarding the conduct of the confirmation proceedings, including the list of questions posed by the Chamber ahead of the confirmation hearing and the role of the Legal Representatives of Victims, have already been raised in its Original Filing, and dismissed by the Chamber in the Decision.²² Again, this is merely a question over which there is a disagreement.

14. By raising the same issues already decided by the Chamber, the Defence is effectively seeking a reconsideration of the Decision without demonstrating a clear error of reasoning or other exceptional circumstances justifying such a measure.²³

The issue does not meet the other cumulative article 82(1)(d) requirements

15. Even accepting *arguendo* that the proposed issue arises from the decision, the Defence has failed to demonstrate that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. The Request fails to substantiate the Defence's claims that the requirements of article 82(1)(d) are met.

16. The arguments, advanced concerning the effect of the Decision on the fairness and expeditiousness of the proceedings or the outcome of the trial, are conclusory and unsubstantiated. The Defence's assertion that immediate appellate intervention may materially advance the proceedings is likewise unjustified.

²¹ Decision, para. 116.

²² Decision, para. 135-141.

²³ See, for example, ICC-01/05-01/13-1854, para. 75-76.

17. Claiming that disclosure was conducted in a tardy, piecemeal and incomplete manner is based on a general and unsubstantiated assertion that runs at odds with the Chamber's findings.²⁴

18. The Defence's argument that as a result of the Prosecution's conduct of disclosure it was unable to challenge the Prosecution's reliance on key witness statements is misplaced. First, the Prosecution has duly effected its disclosure obligations in a timely manner in line with the Chamber's instructions, including with regard to information pertaining to [REDACTED]. Second, with respect to interviewing OTP investigators, the Prosecution, as previously noted, requested the Defence to provide a list of proposed questions only for the purpose of taking a position on the Defence request.²⁵ The Defence failed to provide these questions and failed to seize the Chamber of the matter until after the commencement of the confirmation hearing in the context of rule 122-3 written submissions.²⁶ In any event, the impact of the Defence's inability to interview the OTP investigators was duly considered by the Chamber, which found that the Defence may present such a request at a later stage of the proceedings.²⁷

19. The Defence's claim that it has yet to receive a range of important documentation and evidence including exculpatory information concerning dual-victim-witnesses is speculative and should therefore be disregarded. The Defence does not explain on what basis it claims that information pertaining to dual-status witnesses is in the Prosecution's possession or that it is exculpatory.

20. As noted, the issue identified by the Defence has already been considered and rejected by the Chamber. A re-litigation of the same issue-based on a disagreement

²⁴ Decision, para. 68, 70, 71, 77, 78, 79, 84, 91, 95, 106.

²⁵ ICC-01/12-01/18-440 [REDACTED] Red, para. 36-41.

²⁶ ICC-01/12-01/18-426-Red.

²⁷ Decision, para. 87.

with the Decision would not only be unwarranted but would also trigger additional layers of litigation, the result of which is an inevitable delay to the proceedings.

21. There is no basis to find that immediate appellate review would materially advance these proceedings. The Defence failed to articulate, let alone substantiate its claim that an immediate resolution of the issue would materially advance the proceedings.

22. The Defence's argument that the possibility that the charges have been confirmed on the basis of a flawed and unfair confirmation process would contaminate the trial process is beyond the scope of this Decision, unfounded, and does not demonstrate how the resolution of the issue would materially advance the proceedings.

23. Further, nothing prevents the Defence from raising the underpinning sub-issues before the Trial Chamber in the course of the post-confirmation proceedings – a possibility that was acknowledged by both the Defence²⁸ and the Chamber.²⁹

24. At this juncture, where the charges have been confirmed and the suspect has been committed to trial, an appellate litigation of this issue would result in an unnecessary prolongation of the pre-trial proceedings. As such, appellate intervention at this advanced stage of the proceedings for this issue would delay rather than advance the proceedings forward.

²⁸ Request, para. 41.

²⁹ Decision, para. 87.

Conclusion

25. For the reasons set out above, the Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 11th day of October 2019
At The Hague, the Netherlands