

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **4 September 2020**

Date of submission:

17 December 2020

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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

Public redacted version of the "Prosecution response to Defence request for leave to appeal the "Decision on the Defence request to terminate the proceedings and related requests", 4 September 2020, ICC-01/12-01/18-1039-Conf

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Gilles Dutertre

Counsel for the Defence

Ms Melinda Taylor
Ms Kirsty Sutherland

Legal Representatives of the Victims

Mr Seydou Doumbia
Mr Mayombo Kassongo
Mr Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Trial Chamber should dismiss the Defence application for leave to appeal¹ the “Decision on the Defence request to terminate the proceedings and related requests”.²
2. The Application raises four issues:³
 - A. Whether the Trial Chamber’s approach to disclosure and evidentiary matters deprived the Defence of a fair and effective right to be heard on the issues that were determinative to the outcome of the Termination Request (“First Issue”);
 - B. Whether the Trial Chamber applied an erroneous legal interpretation of Article 55(1) of the Statute (“Second Issue”);
 - C. Whether the Trial Chamber applied an erroneous legal standard as concerns the application of the abuse of process doctrine in this case (“Third Issue”); and
 - D. Whether the Trial Chamber erred in its assessment that the future exclusion of evidence could remedy the prejudice and unfairness generated by the use of tainted evidence, to reach adverse factual conclusions, throughout the investigation, pre-trial and trial stage (“Fourth Issue”).
3. None of these Issues are appealable issues arising from the Decision within the meaning of article 82(1)(d). This is primarily because the Application is predicated on multiple misunderstandings of the Trial Chamber’s findings, many of the Defence’s arguments consist of mere disagreements with the Decision and because significant portions of the Application argue the merits of the Issues, instead of properly demonstrating how they arise from the Decision.

¹ ICC-01/12-01/18-1021-Conf (“Application”).

² ICC-01/12-01/18-1009-Conf (“Decision”). The Decision ruled on the “Defence request to terminate the proceedings and related requests”: ICC-01/12-01/18-885-Conf-Exp-Corr (“Termination Request”).

³ Application, para. 1; collectively referred to as the “Issues”.

4. In any event, should the Trial Chamber decide not to dismiss the Application on the basis that it does not demonstrate appealable issues arising from the Decision, the Application should be denied as the Issues fail to meet the remaining cumulative criteria under rule 82(1)(d) of the Statute. The proposed Issues do not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, nor do they require immediate resolution by the Appeals Chamber to materially advance the proceedings.

Confidentiality

5. This filing is classified as confidential, pursuant to regulation 23*bis* (2) of the Regulations of the Court (“Regulations”), because it responds to the Application, which was filed confidentially and because it refers to other documents which are currently subject to the same classification.

Submissions

A. The Application does not raise appealable issues arising from the Decision

(a) The First Issue is not an appealable issue arising from the Decision

6. The First Issue—whether the Trial Chamber’s approach to disclosure and evidentiary matters deprived the Defence of a fair and effective right to be heard on the issues that were determinative to the outcome of the Termination Request—is not an appealable issue arising from the Decision. The Defence argues that Mr Al Hassan’s right to be heard has been violated as a result of the Prosecution’s failure to disclose relevant information to the Defence⁴ and as a result of the Trial Chamber’s findings on the burden and standard of proof.⁵ However, the Defence’s assumptions underlying this First Issue do not arise from the Decision.

7. First, the Application seeking leave to appeal the Decision is not an appropriate tool to challenge disclosure decisions that the Trial Chamber has made in the past

⁴ Application, para. 4-9.

⁵ Application, paras. 9-10.

and that are now *res judicata*. Any issues concerning these previous decisions do not arise from *this* Decision and they could only have been raised in challenges against those decisions and within the time limit foreseen in rule 155(1).

8. Second, any potential non-disclosure of information concerning alleged torture and cruel, inhumane and degrading treatment (“CIDT”) of Mr Al Hassan [REDACTED] [REDACTED] by French and Malian authorities had no bearing on the Decision. This is because for the purposes of the Decision, the Chamber took any such allegations raised by the Defence at their highest and instead focussed on the “issue of attributability of the alleged violations to the Prosecution”.⁶

9. Third, that the Trial Chamber rejected some of the Defence’s disclosure requests in this case is irrelevant to the Decision.⁷ The Trial Chamber rejected those requests because the information sought by the Defence was irrelevant.⁸ By definition, non-disclosure of irrelevant information cannot violate Mr Al Hassan’s right to a fair and effective hearing. Moreover, the fact that some information concerning contacts between the Prosecution and national authorities has been deemed irrelevant and other information regarding such contacts was disclosed (some in summary form) and relied upon by the Chamber, does not constitute a “dissonance” in the Trial Chamber’s approach.⁹ Each item of evidence must be assessed on its own content.

10. Fourth, while the Defence’s Termination Request centred on allegations concerning the Prosecution’s collection and reliance on information and evidence allegedly tainted by torture,¹⁰ the Decision does not. This aspect of the First Issue therefore does not arise from it. As further elaborated in the Prosecution’s response to the Fourth Issue,¹¹ the Chamber did not make any findings on whether the Defence’s allegations concerning torture and CIDT impacted on the admissibility of evidence. Instead, it expressly held that the findings in its Decision are without

⁶ Decision, para. 80.

⁷ *Contra* Application, paras. 7-8.

⁸ [REDACTED]; Decision, para. 38.

⁹ *Contra* Application, para. 9.

¹⁰ Application, para. 6.

¹¹ See paras. 28-37 below.

prejudice to a potential future challenge to the admissibility of evidence that the Defence may decide to bring pursuant to article 69(7).¹²

11. Finally, the Defence argues that Mr Al Hassan's right to be heard in a fair and effective manner has been violated because the Trial Chamber rejected its arguments concerning the burden and standard of proof.¹³ However, the Defence fails to elaborate on this argument. The mere fact that the Chamber rejected the Defence arguments¹⁴ does not constitute an appealable issue within the meaning of article 82(1)(d). Instead, it is merely a question over which there is a disagreement or conflicting opinion.¹⁵ For certification to be granted, the Defence must show that the Decision involves "an identifiable subject or topic requiring a decision for its resolution".¹⁶ The mere fact that the Trial Chamber rejected the Defence arguments in its Termination Request is insufficient. Otherwise, every decision rejecting the position of an applicant would automatically constitute an appealable issue.

12. For all these reasons, the First Issue fails to demonstrate an appealable issue arising from the Decision and should be rejected.

(b) The Second Issue is not an appealable issue arising from the Decision

13. The Second Issue—whether the Trial Chamber applied an erroneous legal interpretation of Article 55(1) of the Statute—is not an appealable issue arising from the Decision. Critically, the Defence does not correctly represent the Trial Chamber's findings with respect to article 55(1) and many of the Defence's arguments consist of mere disagreements with the Decision.

14. Contrary to the Defence's contention,¹⁷ the Trial Chamber did not merely assess whether article 55(1)(b) and (d) confer an obligation on the Prosecution "not to commit or request the torture or arbitrary detention of a suspect", but made a much

¹² Decision, paras. 80, 119-122.

¹³ Application, paras. 9-10.

¹⁴ Decision, para. 71.

¹⁵ ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

¹⁶ ICC-01/04-168 OA3, paras. 9. ICC-02/04-01/05-367, para. 22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7.

¹⁷ Application, para. 16.

broad assessment. In particular, the Trial Chamber held that article 55(1) stipulates that it is applicable “[i]n respect of an investigation under this Statute”, meaning that it encompasses “any investigative steps taken either by the Prosecutor or by national authorities at his or her behest”.¹⁸ Accordingly, the Trial Chamber broadly assessed the following categories of allegations:

- (i) Complicity/acquiescence/concerted action/collusion through interviewing Mr Al Hassan [REDACTED] and reliance on the DGSE [REDACTED] [REDACTED] and evidence and reliance on information obtained from DGSE interviews;¹⁹
- (ii) Complicity/acquiescence/concerted action/collusion through the Prosecution exploiting the situation of Mr Al Hassan [REDACTED] [REDACTED]²⁰ and
- (iii) Complicity/acquiescence/concerted action/collusion through omissions, including failure to take safeguards and other measures, and to ascertain voluntariness and fitness.²¹

15. The Defence further submits that the phrase “not [...] be subjected to” in article 55(1)(b) equates to a broader proscription than the phrase “not to commit”. Accordingly—so the Defence argues—the Prosecution must also “refrain from instigating or exercising investigative activities in relation to a person, who is being subjected to torture, particularly where there is a close association between the investigative activities and ongoing forms of torture/CIDT”.²²

16. As demonstrated in the previous paragraph, this is exactly what the Chamber did. Consistent with the *chapeau* of article 55(1), the only investigative acts that the Trial Chamber excluded from its scope were those which were not conducted “[i]n respect of an investigation under this Statute”. The Chamber interpreted those to be “investigation[s] conducted by an entity other than the Prosecutor, and which is not

¹⁸ Decision, para. 63.

¹⁹ Decision, paras. 86-100.

²⁰ Decision, paras. 101-212.

²¹ Decision, paras. 113-116.

²² Application, para. 13.

related to proceedings before the Court”.²³ This is consistent with the Prosecution’s obligation under article 54(1)(c) to “[f]ully respect the rights of the person arising under this Statute”.²⁴

17. The remainder of the Defence’s submissions in respect of the Second Issue consist of mere disagreements with factual conclusions reached by the Trial Chamber and its assessment of the evidence.²⁵ The Defence mainly argues that by requesting national authorities to secure Mr Al Hassan’s attendance at multiple interviews, the ICC Prosecution participated in his arbitrary detention and based its investigative activities on this status.²⁶ According to the Defence, the alleged torture/CIDT therefore “related directly to ICC investigative activities”.²⁷ The Trial Chamber, having conducted an extensive analysis of the facts of the case, rejected the Defence’s arguments.²⁸ The Defence now disagrees with the Trial Chamber’s factual conclusions and its assessment of the evidence. But this does not constitute an appealable issue within the meaning of article 82(2)(d),²⁹ much less in the context of a question of law, as the Defence tries to couch its Second Issue.

18. For all these reasons, the Second Issue fails to demonstrate an appealable issue arising from the Decision and should be rejected.

(c) The Third Issue is not an appealable issue arising from the Decision

19. The Third Issue—whether the Trial Chamber used an erroneous legal standard in applying the abuse of process doctrine in this case—is not an appealable issue arising from the Decision. This is because the Application is predicated on an incomplete—and therefore incorrect—reading of the Trial Chamber’s findings on the applicable abuse of process doctrine. In addition, the Defence’s submissions with

²³ Decision, para. 63.

²⁴ *Contra* Application, paras. 13, 18.

²⁵ Application, paras. 13-14, 17.

²⁶ Application, para. 13.

²⁷ Application, para. 14.

²⁸ See in particular, Decision, paras. 94-100.

²⁹ ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

respect to the Third Issue mainly consist of re-litigating the merits of the Issue, putting forward its alternative legal theory.

20. Under its Third Ground, the Defence challenges the Trial Chamber's findings that "violations of fundamental rights, however serious, can have the requisite impact on proceedings to constitute an abuse of process only insofar as they can be attributed to the Court".³⁰ The Chamber clarified that "[a]ttribution in this sense means that the act of violation of fundamental rights is: (i) either directly perpetrated by persons associated with the Court; or (ii) perpetrated by third persons in collusion with the Court."³¹

21. To support its argument that the Third Issue arises from the Decision, the Defence primarily relies the Appeals Chamber's decision in the *Lubanga* case which stated: "where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his right, no fair trial can take place and the proceedings can be stayed".³² According to the Defence, "[n]othing in this position requires or turns on the need to demonstrate that the ICC Prosecution directly participated in, or colluded as concerns the commission of the violations of the rights of the accused."³³

22. However, the Defence fails to discuss this statement in its proper context, including other holdings of the *Lubanga* Appeals Chamber, on which the Trial Chamber relied in its Decision. In fact, concerning human rights violations against an accused alleged to have been mistreated by national authorities prior to his transfer to the Court, the Appeals Chamber held that: "[a]t issue is the process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court. The Pre-Trial Chamber determined that it is in relation to this process that breaches of the rights of the suspect or the accused may provide ground for halting the process. And none was shown".³⁴ In a separate decision, the *Lubanga*

³⁰ Decision, paras. 57, 67.

³¹ Decision, para. 57.

³² Application, para. 19, referring to ICC-01/04-01/06-1401, para. 90.

³³ Application, para. 20.

³⁴ ICC-01/04-01/06-772 OA4, para. 44.

Appeals Chamber endorsed its prior finding and clarified as follows: “As noted by the Appeals Chamber in paragraph 44 of the Judgment on the Challenge to Jurisdiction, issues regarding prior detention are relevant where they are part of the ‘process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court’.”³⁵

23. Relying on these statements, the Trial Chamber in its Decision held that “[t]his was considered to logically entail that the breach of his or her rights must be related to the process of bringing the person to justice for the crimes that form the subject-matter of the proceedings before the Court”.³⁶ The Chamber then endorsed the *Gbagbo* Pre-Trial Chamber’s logical conclusion that “violations of fundamental rights, however serious, can have the requisite impact on proceedings to constitute an abuse of process only insofar as they can be attributed to the Court.”³⁷

24. The Defence’s failure to acknowledge the Trial Chamber’s reasoning, and the relevant jurisprudence it relied on, misrepresents the Decision. This is fatal to the Defence’s Application with respect to the Third Ground, because the Defence’s question whether the Trial Chamber erred in its interpretation of the legal standard for the abuse of process doctrine in this case is predicated on a misunderstanding as to the law that the Chamber actually applied. Accordingly, the Third Issue, as articulated by the Defence, does not arise from the Decision.

25. In addition, the Third Issue misrepresents the Decision in alleging that the abuse of process doctrine adopted by the Trial Chamber requires the Court’s “direct involvement or collusion”.³⁸ As noted in response to the Defence’s Second Issue above,³⁹ this is incorrect. The Chamber held that the applicable notion of abuse of process includes “any investigative steps taken either by the Prosecutor or by national authorities at his or her behest”.⁴⁰ It then broadly assessed various

³⁵ ICC-01/04-01/06-824 OA7, para. 121.

³⁶ Decision, para. 54, citing to ICC-01/04-01/06-772 OA4, para. 44 and ICC-02/11-01/11-212, para. 92.

³⁷ ICC-02/11-01/11-212, para. 92, cited in Decision, paras. 54 and 57. See also, ICC-02/11-01/11-167-Red-Corr, para. 24.

³⁸ Application, para. 30.

³⁹ See paras. 14-16 above.

⁴⁰ Decision, para. 63.

categories of allegations of the Prosecutor's collusion in the alleged actions of national authorities, or any acquiescence, complicity or concerted action and found none to exist.⁴¹ This further demonstrates that the Third Issue, as alleged by the Defence, does not arise from the Decision.

26. In any event, the bulk of the Defence's arguments on the Third Issue litigate the merits of the issue instead of demonstrating that an appealable issue arises from the Decision. The Defence alleges that the Trial Chamber erred in adopting the above legal standard in applying the abuse of process doctrine in this case and puts forward an alternative legal theory.⁴² However, as established by the Court's jurisprudence, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether an issue meets the criteria set out in that provision.⁴³ The Application fails to do so.

27. For all these reasons, the Third Issue fails to demonstrate an appealable issue arising from the Decision and should be rejected.

(d) The Fourth Issue is not an appealable issue arising from the Decision

28. The Fourth Issue concerns the question of the correctness of the Trial Chamber's conclusion that "the future exclusion of evidence could remedy the prejudice and unfairness generated by the use of tainted torture evidence throughout the investigations pre-trial and trial stage, to make adverse factual findings". This is not an appealable issue arising from the Decision, because it misrepresents the Decision. In addition, the Fourth Issue is an inappropriate attempt by the Defence to challenge previous decisions of the Pre-Trial Chamber and the Trial Chamber and merely re-litigates its position that the exclusion of evidence is not an appropriate remedy in this case.

⁴¹ See para. 14 above. See also Decision, paras. 86-116.

⁴² Application, paras. 20-30.

⁴³ ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52. Because arguments on the merits of an issue are irrelevant to the question of whether to grant leave to appeal, the Prosecution will not address the merits of the Defence's arguments in this response, but reserves its right to do so before the Appeals Chamber if the Application is granted.

29. Having rejected the Defence’s Termination Request, the Trial Chamber recalled jurisprudence from the Court, according to which “alternative remedies to address abuse of process allegations and resulting demonstrated prejudice to the defence, short of ordering a stay [are available]”.⁴⁴ It also held that these remedies include ruling certain evidence inadmissible or giving it little or no weight.⁴⁵ The Chamber specifically held that the findings in its Decision are “without prejudice to any challenges to the admissibility of evidence the Defence may decide to bring pursuant to Article 69(7) of the Statute”.⁴⁶

30. The Trial Chamber did not, however, make the findings upon which the Fourth Issue is predicated. Accordingly, it cannot be faulted for failing to assess the impact of findings that it did not make (and did not need to make at that stage).

31. First, the Chamber did not generally accept that Mr Al Hassan or any other persons were subjected to torture or CIDT by the French or Malian authorities. Instead, for the purposes for the Decision only, it took the Defence’s allegations of torture and CIDT at their highest and then focussed on the key issue, namely the attributability of the alleged violations to the Prosecution.⁴⁷

32. Second, and as a logical consequence of the above, the Trial Chamber did not make a finding that any of the evidence relied upon by the Prosecution was tainted by torture or CIDT. The Defence concedes that this is the case,⁴⁸ but nevertheless argues that the Chamber erred by failing to assess the impact of the tainted evidence on the fairness of the proceedings.⁴⁹

33. Third, the Trial Chamber did not accept that any prejudice or unfairness had occurred. Instead, it left it open to the Defence—if it sought an alternative remedy,

⁴⁴ Decision, para. 119.

⁴⁵ Decision, para. 119.

⁴⁶ Decision, para. 122; *see also* para. 80.

⁴⁷ Decision, para. 80.

⁴⁸ Application, para. 32.

⁴⁹ Application, paras. 33 (alleging the impact of the “tainted evidence” that the Trial Chamber failed to address); paras. 35-36 (referring to “highly prejudicial” findings based on alleged tainted evidence”); para. 37 (further elaborating on the broader impact of the “illegal [...] evidence”); and para. 38 (alleging that “tainted evidence” has already been used throughout the proceedings).

such as seeking the exclusion of evidence under article 69(7)—to *demonstrate* that Mr Al Hassan has been prejudiced or treated unfairly.⁵⁰

34. The Defence further alleges that the proceedings in this case have already been tainted by previous factual finding of the Pre-Trial Chamber and the Trial Chamber, as they were also based on tainted evidence.⁵¹ This argument must likewise be rejected based on the same three points above.

35. In addition, an application for leave to appeal against this Decision is not an appropriate remedy to challenge the correctness of previous decisions of the Pre-Trial Chamber and the Trial Chamber. These are already *res judicata*. Nor can the Defence retroactively challenge findings of the Pre-Trial Chamber or the Trial Chamber with arguments that were not before the respective chambers at the time. If, for instance, the Defence was of the view that the Pre-Trial Chamber should not have relied on certain evidence in its decision on the confirmation of charges against Mr Al Hassan,⁵² it should have raised all the relevant issues before the Pre-Trial Chamber. In fact, the Trial Chamber saw no reason why Mr Al Hassan could not reasonably have raised the matter before the Pre-Trial Chamber⁵³ and expressed its “regret” that the Termination Request was filed at such a late stage.⁵⁴ The Fourth Issue should also be dismissed on that basis.

36. Finally, the Defence argued previously that the exclusion of evidence would not be an appropriate remedy in this case.⁵⁵ In its Application, the Defence merely re-litigates its position, which is a mere disagreement with the Trial Chamber’s Decision, but fails to raise an appealable issue within the meaning of article 82(1)(d).

37. For all these reasons, the Fourth Issue fails to demonstrate an appealable issue arising from the Decision and should be rejected.

⁵⁰ Decision, paras. 80, 119.

⁵¹ See for instance, Application, paras. 35-36 (referring to “highly prejudicial” findings based on alleged tainted evidence”); para. 37 (further elaborating on the broader impact of the “illegal [...] evidence”); and para. 38 (alleging that “tainted evidence” has already been used throughout the proceedings).

⁵² Application, para. 37.

⁵³ Decision, para. 45.

⁵⁴ Decision, para. 48.

⁵⁵ Termination Request, paras. 103-108.

B. The Application does not meet the remaining criteria for leave to appeal under article 82(1)(d)

38. Should the Trial Chamber decide not to dismiss the Application on the basis that it does not demonstrate appealable issues arising from the Decision, the Application should in any event be denied as the Issues fail to meet the remaining cumulative criteria under rule 82(1)(d) of the Statute. The proposed Issues do not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, nor do they require immediate resolution by the Appeals Chamber to materially advance the proceedings.

(a) The Issues do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial

39. The Defence correctly argues that in previous decisions on requests for leave to appeal rulings on abuse of process motion, chambers have often found that the issues raised in the respective applications met the criteria for leave to appeal.⁵⁶ However, this does not relieve the Defence from its burden to demonstrate on a case-by-case basis that the Issues raised in its Application meet the criteria for leave to appeal.

40. The Application should be dismissed because it fails to properly articulate—on an issue-by-issue basis—how *each* Issue satisfies the criteria under article 82(1)(d). Rather, the Defence argues generally that the four Issues “are intrinsically tied to core fair trial rights, including the right to silence, the privilege against self-incrimination, the right to an impartial Trial Chamber, and the right to an effective remedy.”⁵⁷ This is plainly insufficient to show how each of the four Issues raised in the Application individually meet the criteria for leave to appeal. Trial Chamber III in the *Bemba* case held that “[i]n [...] circumstances [where] the Defence fails to

⁵⁶ Application, para. 39; see also footnote 43.

⁵⁷ Application, para. 39.

provide reasons as to how *each* Issue satisfies the relevant criteria, the Chamber is entitled to dismiss [the request] *in limine*.”⁵⁸

41. In any event, when submitting that the four Issues generally affect the fair and expeditious proceedings, the Defence repeats its arguments that previous decisions of the Pre-Trial Chamber and the Trial Chamber were affected by evidence tainted by torture and CIHD.⁵⁹ As submitted in response to the Fourth Issue above,⁶⁰ these arguments are predicated on a misrepresentation of the Decision. The Chamber did not generally accept that Mr Al Hassan or any other persons were subjected to torture or CIDT by the French or Malian authorities; it did not make a finding that any of the evidence relied upon by the Prosecution was tainted by torture or CIDT; and it did not accept that any prejudice or unfairness had occurred. Accordingly, the Defence’s arguments on the impact of the Issues on the Decision are hypothetical and speculative. An applicant seeking leave to appeal cannot merely speculate in the abstract that a decision causes prejudice to the rights of an accused in order to invoke that the fairness of the proceedings are affected.⁶¹ It does not suffice for an issue to have merely a hypothetical impact on the fairness/expeditiousness of proceedings.⁶²

42. The Defence’s argument also fails because it alleges that any (hypothetical) prejudice arises from *previous* decisions of the Pre-Trial Chamber and the Trial Chamber. For an issue to meet the criteria for leave to appeal, it must be shown that an issue arising from the appealed Decision affects the fair and expeditious conduct of the proceedings. A purely general complaint does not meet this test.⁶³

43. The Defence further argues that, under its understanding of the Decision, “the imperative of obtaining cooperation [from States] can qualify or indeed trump certain fair trial rights, such as the right to be interviewed while held in an unlawful

⁵⁸ ICC-01/05-01/08-3382, para. 12 (emphasis added).

⁵⁹ Application, para. 39.

⁶⁰ See paras. 29-36 above.

⁶¹ See ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 para. 33 and 39; ICC-01/09-02/11-88, para. 25, see also paras. 23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.

⁶² ICC-01/04-01/07-1958, para. 20. See also: ICC-02/04-01/05-367, para. 21-22

⁶³ ICC-01/04-01/06-2463, para. 31.

environment free from coercion, torture, and CIDT”.⁶⁴ However, the Defence fails to demonstrate the correctness of its understanding nor how this argument relates to any of the Issues raised in the Application, let alone how its understanding demonstrates that the Issues meet the criteria for leave to appeal under article 82(1)(d). In fact, the Defence’s argument is irrelevant to the Issues and the fair and expeditious conduct of the proceedings.

44. Finally, the Defence argues that the Decision is underpinned by the suggestion that “the ICC’s status as a ‘Court’ warrants a departure from preemptory legal standards that would apply to domestic officials or international organization”, which—in the Defence’s view—raises issues regarding the principle of legality, which in turn is a central plank of the right to a fair trial.⁶⁵ The Defence’s broad and overstated assertion does not even try to demonstrate how it can be drawn from the Decision. Without needing to analyze the Defence’s assertion in detail, it suffices to say that the Decision is not underpinned by any such suggestion. It should be therefore be rejected.

45. For all these reasons, the Defence fails to show how any of the Issues affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

(b) An immediate resolution of the Issues by the Appeals Chamber would not materially advance the proceedings

46. The Defence does not provide any arguments demonstrating that the immediate resolution of the Issues by the Appeals Chamber would materially advance the proceedings.⁶⁶ The Applicant’s failure to show this is a sufficient basis to reject the Application.

47. In any event, the Application is premature as the Defence has additional avenues to pursue before resorting to the Appeals Chamber. In fact, the Decision

⁶⁴ Application, para. 40.

⁶⁵ Application, para. 41.

⁶⁶ The Defence’s arguments focus on the alleged impact of the Issues on the fair and expeditious conduct of the proceedings. This also applies to the Defence’s argument that because the Issues involve the fairness of the proceedings, they must be resolved immediately by the Appeals Chamber (Application, para. 41).

refers to the Court's jurisprudence allowing for alternative remedies to address alleged abuse of process allegations and resulting alleged demonstrated prejudice to an accused, short of ordering a stay. Such remedies include ruling certain evidence inadmissible or giving it little or no weight.⁶⁷ Thus, resolution of the four Issues by the Appeals Chamber at this stage will not "move forward" the proceedings.⁶⁸ Instead, it will only cause an unnecessary delay to them.

48. In addition, because any suggested unfairness, at this stage, is wholly speculative, it follows that an immediate resolution of the issue by the Appeals Chamber would not materially advance the proceedings.⁶⁹ The Trial Chamber in the *Ruto et al.* case specifically held that "[h]aving regard to the [...] speculative nature of the Defence's arguments of prejudice", an immediate resolution of the Issue would not materially advance the proceedings.⁷⁰

49. Finally, because the alleged prejudice caused to Mr Al Hassan is alleged to derive, at least in part, from previous decisions of the Pre-Trial Chamber and the Trial Chamber, an immediate resolution by the Appeals Chamber of any Issues arising from this Decision cannot remedy any such alleged prejudice. This is another reason why it is unnecessary to resort to the Appeals Chamber's intervention against this Decision.

⁶⁷ Decision, para. 119; see also paras. 80, 122.

⁶⁸ ICC-01/04-168, paras. 14-15, 18.

⁶⁹ ICC-01/04-01/06-2109, para. 22.

⁷⁰ ICC-01/09-01/11-1154, para 28.

Conclusion

50. For the foregoing reasons, the Prosecution respectfully requests the Chamber to reject the Application.



Fatou Bensouda
Prosecutor

Dated this 4th day of September 2020

At The Hague, The Netherlands.