



Original: English

No. ICC-01/12-01/18

Date: 17 February 2021

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
MAHMOUD***

Public

Decision on Defence request for leave to appeal the ‘Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules’

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

Melinda Taylor
Kirsty Sutherland
Antoine Vey

Legal Representatives of Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

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

Detention Section

**Victims Participation and Reparations
Section**

Other

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 Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following decision.

I. Procedural history and submissions

1. On 26 January 2021, the Chamber issued its Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules (the ‘Impugned Decision’),¹ authorizing the introduction of the prior recorded testimony of *inter alia*, expert witnesses P-0587 and P-0617 (the ‘Experts’).
2. On 1 February 2021, the Defence filed a request for leave to appeal the Impugned Decision (the ‘Request’).² The Defence seeks leave to appeal the Impugned Decision on two issues, namely whether the Chamber: (i) conflated the timing of issuance of evidential rulings with the Article 69(4) evidential threshold required of the Prosecution for authenticity and reliability of electronic evidence such as the call data records associated with the Experts’ report (the ‘First Issue’); and (ii) failed to consider how the absence of sufficient information regarding reliability, authenticity, and legality of collection undermines the right of the Defence to object to the use of the electronic evidence and their admission through Article 69(4) and (7) of the Statute (the ‘Second Issue’; together, the ‘Issues’).³ The Defence submits that both Issues arise from the Impugned Decision.⁴ It argues that they significantly affect the fair and expeditious conduct of the proceedings, as well as the outcome of the trial, and are issues for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁵

¹ Impugned Decision, ICC-01/12-01/18-1267-Conf (a public redacted version was filed on 17 February 2021).

² Defence Request for Leave to Appeal the ‘Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules’ (ICC-01/12-01/18-1267-Conf), ICC-01/12-01/18-1273-Conf.

³ Request, ICC-01/12-01/18-1273-Conf, para. 1.

⁴ Request, ICC-01/12-01/18-1273-Conf, paras 3-9.

⁵ Request, ICC-01/12-01/18-1273-Conf, paras 10-18.

3. On 5 February 2021, the Prosecution responded to the Request, seeking that it be denied in its entirety (the ‘Response’).⁶

II. Analysis

4. The Chamber incorporates by reference the applicable legal framework as set out in its previous decisions,⁷ and will examine whether the Defence has met the cumulative requirements under Article 82(1)(d) of the Statute in relation to the Issues.
5. At the outset, the Chamber notes that in the context of the Impugned Decision, the Defence did not object to the introduction of the Experts’ report. Instead, its objections focused on the introduction of the underlying material which is the subject matter of the Experts’ report.⁸
6. The Chamber notes that both Issues, which are intertwined, are a mere disagreement and misinterpretation of the Chamber’s discretionary decision adopting the submission procedure for evidence in this case. The Chamber recalls that it was not in the Impugned Decision, but in the Directions on the conduct of proceedings,⁹ where the Chamber decided on the Issues contested by the Defence by the way of the present Request. The Defence thus contests anew the Chamber’s approach on the submission of evidence and particularly that the Chamber ‘will recognise the submission of items of evidence without a prior ruling on relevance and/or admissibility and will consider its relevance and probative value as part of

⁶ Prosecution response to the Defence Request for Leave to Appeal the ‘Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules’ (ICC-01/12-01/18-1267-Conf), ICC-01/12-01/18-1289-Conf.

⁷ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, ICC-01/12-01/18-734; Decision on Defence request for leave to appeal the ‘Decision on the conduct of proceedings’, 28 May 2020, ICC-01/12-01/18-831; Decision on Defence request for leave to appeal the ‘Decision on the conduct of proceedings’, 28 May 2020, ICC-01/12-01/18-831; Decision on Defence request for reconsideration and leave to appeal the Decision on the Defence Adjournment Request, 28 July 2020, ICC-01/12-01/18-983-Conf; Decision on Defence request for leave to appeal the ‘Decision on the Self-contained set of charges’, 14 August 2020, ICC-01/12-01/18-996; Decision on Defence request for leave to appeal the ‘Decision on the Defence request to terminate the proceedings and related requests’, 12 October 2020, ICC-01/12-01/18-1099-Conf (public redacted version filed 29 October 2020, ICC-01/12-01/18-1099-Red).

⁸ Defence Response to ‘Prosecution application under rule 68(3) to introduce Witnesses MLI-OTP-P-0587 and MLI-OTP-P-0617’s report and associated material into evidence, and regulation 35 request’, 13 November 2020, ICC-01/12-01/18-1155-Conf (the ‘Defence Response’), para. 3.

⁹ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 27-34.

the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.’¹⁰

7. Thus, contrary to what the Defence submits, the Chamber did not ‘fail to address issues of authenticity/legality of the collection of evidence’.¹¹ Instead, and in accordance with the aforesaid submission system, the Chamber will consider these and other issues holistically and in light of all the evidence submitted in the record, in the context of its judgment pursuant to Article 74 of the Statute.
8. Furthermore, in its Request the Defence repeats its submissions in the context of the Impugned Decision, as well as the objections it had already raised in the context of the Chamber’s previous decision authorising the Prosecution to call these Experts (the ‘Experts Decision’).¹² The Issues thus misinterpret and misunderstand the Impugned Decision, but equally the previous Experts Decision.¹³
9. Specifically as regards the First Issue, the Chamber observes that the Defence simply repeats its disagreement with the Chamber’s submission system, which it submits is the basis and justification for the Chamber’s disregard to key issues of authenticity, reliability and legality.¹⁴ As regards the Second Issue, the Chamber considers the Defence similarly misinterprets and disregards the Chamber’s determination in the Impugned Decision and the Experts Decision that during cross-examination the Defence will have the opportunity to question the Experts on issues such as the authenticity and the legality of collection of the data analysed in their report.¹⁵ As such, the Defence argument is premature and does not arise from the Impugned Decision.

¹⁰ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 29.

¹¹ Request, paras 4-5.

¹² Defence Response, ICC-01/12-01/18-1155-Conf, paras 9-33; Defence response to “Prosecution’s request for leave to reply to the Defence response to the Prosecution expert witness requests, ICC-01/12-01/18-895-Conf” (ICC-01/12-01/18-911-Conf), 1 July 2020, ICC-01/12-01/18-895-Conf, paras 18-20.

¹³ Decision on Prosecution’s proposed expert witnesses, 5 August 2020, ICC-01/12-01/18-989-Conf, paras 30-32.

¹⁴ Request, ICC-01/12-01/18-1273-Conf, para. 5.

¹⁵ Impugned Decision, ICC-01/12-01/18-1267-Conf, para. 31; Experts Decision, ICC-01/12-01/18-989-Conf, paras 30-32.

10. Given the Chamber's conclusions above, it is not necessary to address the remainder of the cumulative criteria of Article 82(1)(d) of the Statute.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY
REJECTS** the Request.

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



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated 17 February 2021

At The Hague, The Netherlands