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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD

Public Document

**Public Redacted Version of the “Decision on the Defence Request for Leave to
Appeal the Decision Concerning Rule 122(3) of the
Rules of Procedure and Evidence”**

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

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Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) issues the following decision on the request filed by the Defence team of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Defence” and “Mr Al Hassan”) for leave to appeal the *“Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement de procédure et de preuve”*.

I. Procedural history

1. On 27 March 2018, the Chamber issued an arrest warrant for Mr Al Hassan¹ (“Arrest Warrant”) pursuant to article 58 of the Rome Statute (“Statute”).
2. On 31 March 2018, Mr Al Hassan was surrendered to the Court; he is now held at its Detention Centre in The Hague.²
3. On 3 April 2018, the Single Judge set the first appearance for 4 April 2018.³
4. On 4 April 2018, the first appearance hearing was held; Mr Al Hassan appeared before the Single Judge, in the presence of his counsel and the Prosecutor.⁴
5. On 22 May 2018, the Single Judge issued his decision on the Arrest Warrant⁵ (“Decision on the Arrest Warrant”).
6. On 20 July 2018, the Single Judge postponed the date of the confirmation hearing (“Hearing”) to 6 May 2019.⁶

¹ “Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 27 March 2018 and reclassified as public on 31 March 2018, ICC-01/12-01/18-2-tENG.

² ICC-01/12-01/18-11-US-Exp.

³ “Order Scheduling the First Appearance of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 3 April 2018, ICC-01/12-01/18-12-tENG.

⁴ Transcript of the first appearance hearing held on 4 April 2018, ICC-01/12-01/18-T-1-CONF FRA ET.

⁵ “Decision on the Prosecutor’s Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, ICC-01/12-01/18-35-Conf-Exp-Red-tENG. A public redacted version was issued the same day (ICC-01/12-01/18-35-Red2-tENG).

⁶ “Decision Postponing the Date of the Confirmation Hearing”, ICC-01/12-01/18-94-Conf-Exp-tENG. The Single Judge issued a public redacted version of his decision that same day, ICC-01/12-01/18-94-Red-tENG.

7. On 7 February 2019, the Single Judge directed the Prosecutor to file specific submissions on the procedural requests she intended to file before the start of the Hearing.⁷

8. On 12 February 2019, the Prosecutor filed her submissions and requested a further postponement of the Hearing.⁸

9. On 18 April 2019, the Single Judge issued a decision rescheduling the Hearing for Monday, 8 July 2019.⁹

10. The Hearing was held from 8 to 17 July 2019, in the presence of Mr Al Hassan, the Defence, the Prosecutor, and the Legal Representatives of Victims.¹⁰

11. Pursuant to rule 122(3) of the Rules of Procedure and Evidence, before the substantive part of the Hearing commenced the Chamber invited the Parties to raise objections or make observations concerning issues related to the proper conduct of the proceedings prior to the Hearing.¹¹ The Prosecutor stated that she had no objection or observation to present.¹² The Defence, for its part, raised several issues related to the proper conduct of the proceedings prior to the Hearing, under rule 122(3) of the Rules¹³ ("Oral Submissions of the Defence of 8 July 2019").

⁷ "Order Directing the Prosecutor to File Precise Submissions for Requests concerning the Proceedings which She Intends to File before the Start of the Confirmation of Charges Hearing", ICC-01/12-01/18-236-tENG.

⁸ "Éléments d'information concernant notamment la communication des éléments de preuve et les requêtes aux fins d'expurgation à venir et demande d'extension de délai pour déposer le Document contenant les charges ainsi que la Liste des témoins et des éléments de preuve", ICC-01/12-01/18-243-Secret-Exp. The Prosecutor filed a secret redacted version of her request *ex parte* Defence on 14 February 2019, ICC-01/12-01/18-243-Secret-Exp-Red, and a public redacted version, ICC-01/12-01/18-243-Red2, on 15 February 2019.

⁹ "Decision Rescheduling the Date of Filing of the Document Containing the Charges and the Commencement of the Confirmation Hearing", ICC-01/12-01/18-313-tENG, paras. 18-20.

¹⁰ "Ordonnance portant calendrier aux fins de l'audience de confirmation des charges", 24 June 2019, ICC-01/12-01/18-385, and "Ordonnance modifiant l'Ordonnance portant calendrier de l'audience de confirmation des charges", 27 June 2019, ICC-01/12-01/18-390; Transcript of the hearing of 8 July 2019, ICC-01/12-01/18-T-003-Red-FRA; Transcript of the hearing held on 9 July 2019, ICC-01/12-01/18-T-004-Red-FRA; Transcript of the hearing of 10 July 2019, ICC-01/12-01/18-T-005-Red-FRA; Transcript of the hearing of 11 July 2019, ICC-01/12-01/18-T-006-Red-FRA; Transcript of the hearing of 17 July 2019, ICC-01/12-01/18-T-007-Red-FRA.

¹¹ Transcript of the hearing of 8 July 2019, ICC-01/12-01/18-T-003-FRA ET, p. 5, lines 10-21.

¹² Transcript of the hearing of 8 July 2019, ICC-01/12-01/18-T-003-FRA ET, p. 5, lines 23-24.

¹³ Transcript of the hearing of 8 July 2019, ICC-01/12-01/18-T-003-FRA ET, pp. 6-27.

12. On 22 July 2019, the Defence filed submissions in connection with its oral submissions of 8 July 2019¹⁴ (“Defence Submissions of 22 July 2019”).

13. On 30 July 2019, the Prosecutor filed her response to the Defence Submissions of 22 July 2019¹⁵ (“Prosecutor’s Response of 30 July 2019”).

14. On 30 September 2019, the Chamber issued its “*Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement*” (“Decision Concerning Rule 122(3) of the Rules” or “Impugned Decision”).¹⁶

15. The same day, the Chamber issued its decision on the confirmation of the charges brought against Mr Al Hassan¹⁷ (“Decision on the Confirmation of the Charges”).

16. On 7 October 2019, the Defence filed a request seeking leave of the Chamber to appeal the Decision Concerning Rule 122(3) of the Rules (“Request”).¹⁸

17. On 11 October 2019, the Prosecutor filed her response (“Response”).¹⁹

¹⁴ “Submissions requested by the Pre-Trial Chamber”, ICC-01/12-01/18-426-Secret-Exp. On 5 September 2019, the Defence filed a public redacted version of that document, ICC-01/12-01/18-426-Red.

¹⁵ “Prosecution’s response to Defence’s written submissions under rule 122(3) of the Rules of Procedure and Evidence”, ICC-01/12-01/18-440-Secret-Exp. The same day, the Prosecutor filed a secret redacted version of that document available to the Defence, ICC-01/12-01/18-440-Secret-Exp-Red. On 10 October 2019, the Prosecutor filed a public redacted version of that document, ICC-01/12-01/18-440-Red2.

¹⁶ “*Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement de procédure et de preuve*”, 30 September 2019, ICC-01/12-01/18-460-Conf-Exp. The same day, the Chamber issued a confidential redacted version of its decision available to the Defence, ICC-01/12-01/18-460-Conf-Exp-Red.

¹⁷ “*Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*”, 30 September 2019, ICC-01/12-01/18-461-Conf.

¹⁸ “Defence request for leave to appeal the ‘*Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement de procédure et de preuve*’ (ICC-01/12-01/18-460-Conf-Exp-Red)”, 7 October 2019, ICC-01/12-01/18-464-Conf-Exp.

¹⁹ “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.

II. Analysis

A. Submissions of the parties

18. The Defence submits one ground of appeal.²⁰ The Defence claims that the Chamber failed to exercise sufficient judicial oversight over the confirmation of charges proceedings in a manner that was fair and impartial and consistent with the principle of equality of arms and the right to expeditious proceedings.²¹ The Defence goes on to say that this lack of judicial oversight must be assessed by reference to the cumulative impact of the Chamber's rulings on a range of sub-issues.²²

19. First, the Defence argues that the Chamber erred in failing to question the Prosecutor's interpretation of her duties in respect of the disclosure of potentially exonerating evidence, even though the Prosecutor had failed to identify and disclose *proprio motu* a number of items of potentially exculpatory evidence to the Defence²³ ("First Sub-Issue").

20. Second, the Defence asserts that the Chamber erred in finding that the Prosecutor had complied with her disclosure obligations by disclosing summaries of the security assessments relating to [REDACTED], instead of the transcripts of the relevant interviews, and doing so moreover after the time limit for filing Defence evidence for the Hearing²⁴ ("Second Sub-Issue").

21. Third, the Defence contends that the Chamber erred in finding that the Prosecutor had disclosed to the Defence all the relevant documents arising from [REDACTED], despite evidence to the contrary provided by the Defence²⁵ ("Third Sub-Issue").

²⁰ Request, para. 1.

²¹ Request, paras. 1 and 5-7.

²² Request, para. 2.

²³ Request, paras. 8-10.

²⁴ Request paras. 11-14.

²⁵ Request, para. 15.

22. Fourth, the Defence claims that the Chamber erred in failing to have regard to the prejudice caused to the Defence by the Prosecutor's failure to take all the necessary steps to identify which of her witnesses were also participating in the proceedings as victims, even though she was in a position to collect that information from the Legal Representatives of Victims or from the witnesses themselves²⁶ ("Fourth Sub-Issue").

23. Fifth, the Defence claims that the Chamber erred by reconsidering its own decision on the "Protocol on the Handling of Confidential Information During Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant"²⁷ ("Witness Contact Protocol" or "Protocol") and, by interpreting the definition of "witnesses" in a manner that conflicts with the Defence's right to conduct confidential investigations, that renders article 67(2) of the Statute devoid of any practical utility for the Defence, and that is contrary to the decisions of the Appeals Chamber, which has held that no burden should be placed on the Defence in relation to any matter concerning the imposition of restrictions on the information to which the Defence has access²⁸ ("Fifth Sub-Issue").

24. Sixth, the Defence claims that the Chamber erred in determining that the confirmation of charges proceedings had been conducted adversarially and impartially, since the list of questions that the Chamber sent to the parties and participants before the Hearing created an impression that the Chamber was taking part in the prosecution of the case against Mr Al Hassan and since the Chamber permitted the Legal Representatives of Victims to submit evidence of fact, thereby exceeding the terms of the decision on victim participation²⁹ ("Sixth Sub-Issue").

²⁶ Request, paras. 16-19.

²⁷ Annex to the "Decision on the Adoption of a Protocol on the Handling of Confidential Information During Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant", 31 May 2018, ICC-01/12-01/18-40-Anx-tENG.

²⁸ Request, paras. 20-32.

²⁹ Request, paras. 33-35, referring to the "Decision on Principles Applicable to Victims' Applications for Participation, to Legal Representation of Victims, and to the Manner of Victim Participation in the Proceedings", 20 March 2019.

25. Seventh, the Defence states that the Chamber erred in determining that it had exercised efficacious and swift judicial supervision when the Defence put issues before it for consideration, insofar as: (i) the Chamber failed to take into consideration the cumulative impact of a series of disclosure issues, which arose during the proceedings and prevented the Defence from conducting its investigations; and (ii) the remedy proposed by the Chamber, which determined that the Defence should have brought before the Chamber each of its disagreements with the Prosecutor on issues relating to the disclosure process, is not an effective remedy consistent with Mr Al Hassan's right to expeditious proceedings and his right to adequate time and facilities to prepare his defence³⁰ ("Seventh Sub-Issue").

26. The Defence avers that all those issues would affect both the fair and expeditious conduct and the outcome of the proceedings.³¹ According to the Defence, the immediate resolution of those issues by the Appeals Chamber would materially advance the proceedings, ridding "the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial" and mapping "a course of action along the right lines".³²

27. The Prosecutor counters that the Chamber should reject the Request because the ground of appeal raised by the Defence does not meet the criteria of article 82(1)(d) of the Statute.³³ The Prosecutor submits that the Defence has not identified an appealable issue, since that issue has not arisen from the Impugned Decision, and since not only the main issue but also all the sub-issues raised by the Defence have already been considered and rejected by the Chamber.³⁴ In the Prosecutor's view, the Defence is therefore expressing nothing more than a

³⁰ Request, paras. 36-39.

³¹ Request, paras. 40-41.

³² Request, para. 42, referring to Appeals Chamber, *Situation in the Democratic Republic of the Congo*, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168 ("Judgment of 13 July 2006"), paras. 14-15.

³³ Prosecutor's Response, paras. 1, 3 and 25.

³⁴ Prosecutor's Response, paras. 4-5 and 9-13.

disagreement with the findings of the Chamber and is in reality seeking to re-litigate the entirety of the Decision Concerning Rule 122(3) of the Rules before the Appeals Chamber, advancing the same arguments as during the pre-trial proceedings.³⁵ The Prosecutor argues that, by doing so, the Defence is effectively seeking reconsideration of the Impugned Decision without showing an error of law or other exceptional circumstances justifying such a measure.³⁶ Lastly, the Prosecutor submits that the Defence has not shown that the issue would affect the fair and expeditious conduct of the proceedings or the outcome of the trial, or how resolution of that issue could materially advance the proceedings.³⁷

B. Applicable law

28. The Chamber refers to articles 54(1), 61, 67, 68 and 82(1)(d) of the Statute, rules 76, 77, 81, 122(3) and (6) and 155 of the Rules and regulation 65 of the Regulations of the Court.

29. The Chamber recalls that article 82(1) of the Statute provides:

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

30. Thus the Chamber may allow an application for leave to appeal brought by either party where the following three cumulative criteria are met:

1. The issue is appealable;
2. The issue raised may significantly affect:
 - (i) the fair and expeditious conduct of the proceedings; or

³⁵ Prosecutor's Response, paras. 4-5 and 9-13.

³⁶ Prosecutor's Response, para. 14.

³⁷ Prosecutor's Response, paras. 6 and 15-24.

(ii) the outcome of the trial; and

3. In the opinion of the Pre-Trial Chamber or the Trial Chamber, an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings.

31. The Chamber underscores in this regard that since the criteria set out in article 82(1)(d) of the Statute are cumulative an application for leave to appeal will be denied where one or more of them are not satisfied.³⁸

32. The Chamber also refers to its earlier analyses of the decisions applicable to applications for leave to appeal.³⁹ It recalls that when assessing the criteria under article 82(1)(d) of the Statute, the Chamber is not, in principle, supposed to address the merits of the request.⁴⁰

33. The Chamber also recalls that the Appeals Chamber has held that only an “issue” raised in a decision may form the subject-matter of an appeal, that is to say, “an identifiable subject or topic requiring a decision for its resolution”, or “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.⁴¹ In that regard, the Chamber points out that an

³⁸ *Situation on Registered Vessels of the Union of the Comoros and Others*, “Decision on the Prosecutor’s request for leave to appeal the ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros””, 18 January 2019, ICC-01/13-73, para. 24. See also “Decision on the Defence ‘Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts’”, 18 September 2018, ICC-01/12-01/18-130-tENG (“Decision of 18 September 2018”), paras. 29 and 31-32.

³⁹ “Decision on the Defence Request for Leave to Appeal the Order Setting a Deadline for the Filing of the Applications”, 10 May 2019, ICC-01/12-01/18-342-Red-tENG, (“Decision of 10 May 2019”), paras. 21-25; Decision of 18 September 2018, paras. 27-32.

⁴⁰ Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on the Defences’ Applications for Leave to Appeal the Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute”, 9 March 2012, ICC-01/09-01/11-399 (“Decision of 9 March 2012 (*Ruto and Sang*)”), para. 12; *The Prosecutor v. Bosco Ntaganda*, “Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’”, 4 July 2014, ICC-01/04-02/06-322 (“Decision of 4 July 2014”), paras. 7 and 19; *The Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges”, 9 March 2012, ICC-01/09-02/11-406 (“Decision of 9 March 2012 (*Kenyatta*)”), para. 20 and cited references in footnote 18.

⁴¹ Judgment of 13 July 2006, para. 9.

appealable issue cannot be “merely a question over which there is disagreement or conflicting opinion.”⁴²

34. The Chamber also notes that the “issue” identified must emanate from the impugned decision itself, and cannot be a hypothetical concern or an abstract legal question.⁴³

35. Lastly, the Chamber notes that the appeal under article 82(1)(d) of the Statute is an exceptional remedy. As the Appeals Chamber has noted, a right to appeal under article 82(1)(d) of the Statute arises only where the Pre-Trial Chamber is of the opinion that the impugned decision must receive the immediate attention of the Appeals Chamber.⁴⁴

C. The Chamber’s determination

36. The Chamber notes that the Defence has raised the issue of whether the Chamber exercised sufficient judicial oversight over the confirmation of charges proceedings, in a manner that was fair and impartial and consistent with the principle of equality of arms and the right to expeditious proceedings, having regard to the cumulative impact of the Chamber’s findings on a range of sub-issues.⁴⁵

37. In this instance the Chamber finds that the issue raised by the Defence is too broad. Specifically, by claiming that the Chamber failed to exercise sufficient judicial

⁴² Judgment of 13 July 2006, para. 9.

⁴³ See, for example, Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges”, 31 July 2013, ICC-02/11-01/11-464 (French version registered on 13 September 2013), para. 8; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, “Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’”, 4 July 2014, ICC-01/04-02/06-322.

⁴⁴ *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168 (“Judgment of 13 July 2006”), para. 20; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’”, 1 November 2016, ICC-02/11-01/15-744, para. 12.

⁴⁵ Request, para. 2.

oversight over the confirmation of charges proceedings and attributing that issue to the alleged cumulative impact of the Chamber's findings on various sub-issues examined in the Impugned Decision, the Defence is, in the Chamber's view, expressing its overall dissatisfaction with the manner in which it assessed the various factors and interests at issue and is thereby attempting to litigate afresh before the Appeals Chamber the point that was the very subject matter of the Impugned Decision and has already been disposed of in that decision. The Chamber underscores in that regard that the Decision Concerning Rule 122(3) of the Rules addressed precisely the same submissions advanced by the Defence in relation to the Chamber's lack of judicial oversight over the activities of the Prosecutor and to the overall organization of the confirmation of charges proceedings.

38. Accordingly, by arguing that the Chamber failed to give proper consideration to the cumulative impact of a number of factors, on the premise that its decision would have been different if it had done so, the Defence is merely showing that it disagrees with the outcome of the exercise of the Chamber's discretion in the Impugned Decision. Since an appealable issue cannot be "merely a question over which there is disagreement or conflicting opinion" on the reasoning of a decision made by a Chamber (that is to say, the position taken on the substance of the issue), the issue identified by the Defence is therefore not an appealable issue for the purposes of article 82(1)(d) of the Statute.

39. The Chamber also notes that in addition to that main issue, the Defence submits a series of sub-issues relating to the Impugned Decision. In that connection, the Chamber believes it is also necessary to examine whether the sub-issues identified meet the criteria under article 82(1)(d) of the Statute when considered individually. The Chamber points out that the various sub-issues that the Defence presents in the introduction to its Request⁴⁶ do not sit entirely squarely with those

⁴⁶ See Request, para. 2.

upon which it elaborates in the body of its Request.⁴⁷ For the purposes of this analysis the Chamber believes that regard should be had to the wording of the sub-issues that comprise the substance of the Defence's submissions and are supported by the concrete arguments summarized above,⁴⁸ rather than the sub-issues that the Defence merely lists by way of an introduction.

40. In relation to the First Sub-Issue, which concerns the Chamber's assessment of the Prosecutor's disclosure obligations in relation to potentially exonerating evidence, the Chamber points out that in the Impugned Decision it has already examined in detail the Defence's various submissions on the Prosecutor's alleged failures to discharge her disclosure obligations.⁴⁹ The Chamber is therefore of the view that, through this sub-issue, the Defence is expressing its disagreement with the manner in which the Chamber assessed the various factors at issue in making its finding. Accordingly, for the same reasons as set out above,⁵⁰ this sub-issue is not an appealable issue for the purposes of article 82(1)(d) of the Statute.

41. The Chamber sees that the Second Sub-Issue, concerning the Chamber's findings on the fact that the Prosecutor disclosed to the Defence summaries of security assessments of [REDACTED], likewise relates to arguments already advanced by the Defence in its submissions in connection with rule 122(3) of the Rules, which the Chamber addressed in the Impugned Decision.⁵¹ The Chamber therefore takes the view that this sub-issue in actual fact represents a disagreement with its findings on the matter. Accordingly, for the same reasons as set out above,⁵² this sub-issue is not an appealable issue for the purposes of article 82(1)(d) of the Statute.

⁴⁷ See Request, paras. 8-39.

⁴⁸ See paras. 19-25 above.

⁴⁹ Decision Concerning Rule 122(3) of the Rules, paras. 64-73.

⁵⁰ See paras. 37-38 above.

⁵¹ Decision Concerning Rule 122(3) of the Rules, paras. 77-79.

⁵² See paras. 37-38 above.

42. The Chamber considers that through the Third Sub-Issue, which relates to the disclosure of documents [REDACTED], the Defence is once again expressing its disagreement with the Chamber's findings and the manner in which it assessed the various Defence arguments and other factors on which the Chamber relied in making the Impugned Decision.⁵³ Accordingly, for the same reasons as set out above,⁵⁴ this sub-issue is not an appealable issue for the purposes of article 82(1)(d) of the Statute.

43. As regards the Fourth Sub-Issue, on the lack of a remedy provided by the Chamber to counter the Prosecutor's failure to take steps to identify which witnesses were also participating in the proceedings as victims,⁵⁵ the Chamber points out that the Defence is advancing arguments on which it relied in its original submissions. The Chamber also notes that the Defence advances new arguments in its Request but does not explain why it could not include them in its original submissions. The Chamber believes that the Defence is thereby expressing its disagreement with the Chamber's findings in that respect and is attempting to litigate the point afresh before the Appeals Chamber. Accordingly, for the same reasons as set out above,⁵⁶ this sub-issue is not an appealable issue for the purposes of article 82(1)(d) of the Statute.

44. As to the Fifth Sub-Issue, which goes to the interpretation of the definition of "witnesses" covered by the Witness Contact Protocol, the Chamber notes that the third criterion set out in article 82(1)(d) of the Statute, which provides that immediate resolution of the issue by the Appeals Chamber may "materially advance the proceedings", has been interpreted by the Court as imparting "legal certainty" to the proceedings,⁵⁷ and as affecting the expeditiousness of the proceedings.⁵⁸ It is not clear

⁵³ Decision Concerning Rule 122(3) of the Rules, para. 84.

⁵⁴ See paras. 37-38 above.

⁵⁵ Request, paras. 16-19.

⁵⁶ See paras. 37-38 above.

⁵⁷ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, [ICC-01/04-168](#) ("Judgment of 13 July 2006"), paras. 15-16 ("A crucial word in the second leg of article 82 (1) (d) is 'advance'; a term having a number of nuances depending

to the Chamber how, in the circumstances of the instant case, appellate interference on the issue raised by the Defence could “materially advance the proceedings”, regardless of the interpretation given to that criterion. Turning first to the “legal certainty” that a decision of the Appeals Chamber might afford, legal certainty is understood to be the mapping by that Chamber of “a course of action along the right lines” or of the “right course”, whereby said Chamber “provides a safety net for the integrity of the proceedings.”⁵⁹ In a sense, appellate interference is brought to bear in order to “correct” at the earliest opportunity in the proceedings the error by the Chamber whose decision is impugned, where the Appeals Chamber finds that an error was made. Here, however, it is noted that the Defence was able to make contact with Witness P-0612.⁶⁰ Furthermore, regarding the expeditiousness of the

on the context in which it is used. Here, the context is judicial proceedings. The word cannot be associated with the expeditiousness of the proceedings, one of the prerequisites for defining an appealable issue. The meaning conveyed by ‘advance’ in the latter part of sub-paragraph (d) is ‘move forward’; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings. [...] A wrong decision on an issue in the context of article 82 (1) (d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances the proceedings will not be advanced but on the contrary they will be set back.”). See also *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, “Decision on requests for leave to appeal the ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and (68(3))’”, 7 July 2016, ICC-02/11-01/15-612, para. 24; *Situation in the Democratic Republic of Congo*, “Decision on Request for leave to appeal the ‘Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor’”, 23 January 2008, [ICC-01/04-438](#), pp. 7-8.

⁵⁸ Pre-Trial Chamber II, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Application by the Defence Team for Thomas Lubanga Dyilo for Leave to Appeal Against the Decision of 7 February 2019”, 4 March 2019, [ICC-01/04-01/06-3445-tENG](#), para. 22 (“the Chamber finds that the Defence has failed to establish that immediate resolution by the Appeals Chamber of the Identified Question might materially advance the proceedings. The Chamber considers that, on the contrary, lodging a new appeal before the Appeals Chamber against a matter already pending before it will only delay, rather than advance, the final – implementation – phase of the reparations proceedings.”); Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Corrigendum to the ‘Decision on Request of Mathieu Ngudjolo Chui for Leave to Appeal the ‘Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case’””, 29 May 2008, [ICC-01/04-01/07-527-Corr](#) (“Decision of 29 May 2008”), p. 8. Observing that interlocutory appeal proceedings takes on average four to five months, the Chamber found that “‘an immediate resolution by the Appeals Chamber’ will not materially advance the proceedings”.

⁵⁹ Judgment of 31 March 2006, paras. 15-16.

⁶⁰ Request, para. 28.

proceedings, as the Prosecutor has observed, appeal proceedings will inevitably delay, rather than expedite, the proceedings. The Chamber is therefore of the view that “immediate resolution by the Appeals Chamber” would not “materially advance the proceedings”. The third criterion under article 82(1)(d) of the Statute is therefore not satisfied in relation to the Fifth Sub-Issue.

45. The Chamber also underlines that the Trial Chamber is not bound by the interpretation on which the present Chamber relies, and so the Defence will be free to advance these arguments again at the trial stage and to request that a new Protocol be adopted should it consider it necessary.

46. As regards the Sixth Sub-Issue, the Chamber notes that in the Impugned Decision it already acquainted itself with the Defence’s arguments on the fact that the Chamber issued a list of questions and on the participation of the Legal Representatives of Victims in the proceedings.⁶¹ The Chamber considers that once again the Defence is expressing nothing more than its disagreement with the findings of the Chamber in the Impugned Decision. Accordingly, for the same reasons as set out above,⁶² this sub-issue is not an appealable issue for the purposes of article 82(1)(d) of the Statute.

47. Lastly, in relation to the Seventh Sub-Issue, the Chamber notes that it has assessed and adjudicated all the disclosure-related matters raised by the Defence in its original submissions and, in particular, the alleged lack of oversight by the Chamber when raised by the Defence for consideration.⁶³ The Chamber therefore believes that the Defence is disputing the manner in which it assessed the various factors and interests at issue, which is however inherent in the Chamber’s exercise of its discretion. As specifically concerns the arguments of the Defence that the remedies proposed by the Chamber in the Impugned Decision are not effective or

⁶¹ Decision Concerning Rule 122(3) of the Rules, paras. 139-140.

⁶² See paras. 37-38.

⁶³ Decision Concerning Rule 122(3) of the Rules, paras. 64-73, 77-79, 83-84, 87, 90-91, 93-95, 98-100, 104-106 and 125-133.

consistent with Mr Al Hassan's rights,⁶⁴ to the Chamber's mind, those allegations are speculative and unfounded.

48. Furthermore, claim though the Defence might that the Chamber disregarded a number of its arguments in the Impugned Decision, specifically in relation to the prejudice allegedly caused to it as a result of the various shortcomings levelled against the Chamber and the Prosecutor, the Chamber underscores that, in order to reach its decision, it examined the various arguments of the parties in their entirety and looked at the applicable legal framework and the prejudice that might have been caused by any violation found by the Chamber, and that the findings of the Impugned Decision reflect that fact.

49. In the light of the foregoing, the Chamber notes that the main issue submitted by the Defence in support of its request for leave to appeal the Decision Concerning Rule 122(3) of the Rules is not an "issue" within the meaning of article 82(1)(d) of the Statute. The Chamber also points out that none of the sub-issues raised by the Defence satisfy the criteria of article 82(1)(d) of the Statute, either because they are not "issues" within the meaning of that article or because an immediate resolution of the issue by the Appeals Chamber would not materially advance the proceedings. Since the criteria set out in article 82(1)(d) of the Statute are cumulative, the Chamber finds that it would serve no purpose to examine the other criteria.

50. Lastly, the Chamber is of the view that in order to ensure the public character of the proceedings a public version of this decision should be issued. To that end, the Chamber instructs the parties to file public redacted versions of their submissions. The Chamber also instructs the parties to submit to the Chamber any proposed redactions they consider necessary, on the basis of which it will issue a public redacted version of this decision.

⁶⁴ Request, paras. 36-39.

FOR THESE REASONS, the Chamber

REJECTS the Defence request for leave to appeal the Decision Concerning Rule 122(3) of the Rules;

INSTRUCTS the parties to file public redacted versions of their submissions within five days of notification of this decision; and

INSTRUCTS the Prosecutor and the Defence to submit, for the purposes of a public redacted version, proposed redactions to the Chamber within five days of notification of this decision.

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

[signed]

Judge Péter Kovács
Presiding Judge

[signed]

Judge Marc Perrin de Brichambaut

[signed]

Judge Reine Adélaïde Sophie
Alapini-Gansou

Dated this 18 November 2019