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**International
Criminal
Court**



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

Date: **02 June 2021**

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**

Confidential

**Defence Request for Leave to Reply to ‘Prosecution Response to
Defence Request for Leave to Appeal the “Decision on requests related
to the submission into evidence of Mr Al Hassan’s statements”’**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

Document 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
Alka Pradhan

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
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

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. On 24 May 2021, the Defence requested leave to appeal ('Request')¹ the Chamber's 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements' ('Decision').² On 28 May 2021, the Prosecution submitted its 'Prosecution response to Defence request for leave to appeal the "Decision on requests related to the submission into evidence of Mr Al Hassan's statements"' ('Prosecution Response').³
2. Pursuant to Regulation 24(5) of the Regulations of the Court, the Defence for Mr Al Hassan respectfully requests the leave of the Chamber to reply to the Prosecution Response in respect of three fundamental misapprehensions, namely (i) the erroneous claim that the Defence did not previously argue that the OTP's reliance on the DGSE system of arbitrary detention triggered the Article 69(7) threshold, (ii) the erroneous claim that issues of prejudice and taint can be addressed by the attribution of evidential weight, and (iii) the Prosecution's improper attempt to erode Article 82(1)(d).

II. Confidentiality

3. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, this request for leave to reply is filed confidentially because it refers to filings so classified. The Defence will file a public redacted version in due course.

III. Submissions

4. Pursuant to Regulation 24(5) of the Regulations of the Court, the Defence for Mr Al Hassan respectfully seeks leave to reply to the Prosecution Response in relation to (i) the Prosecution's claim that the Defence did not previously argue that the OTP's reliance on the DGSE system of arbitrary detention triggered the Article 69(7) threshold,⁴ (ii) the Prosecution's claim that issues of prejudice and taint can be

¹ ICC-01/12-01/18-1498-Conf-Corr.

² ICC-01/12-01/18-1475-Conf.

³ ICC-01/12-01/18-1502-Conf ('Prosecution Response').

⁴ Prosecution Response, para. 27.

addressed by the attribution of evidential weight,⁵ and (iii) the Prosecution's improper attempt to erode Article 82(1)(d).⁶

5. These issues all arise directly and solely from the Prosecution Response, and could not have been anticipated by the Defence at the time of submitting its Request.

(i) Prosecution reliance on DGSE arbitrary detention

6. In relation to the Defence's argument that the Prosecution's reliance on the DGSE to secure Mr Al Hassan's presence at interviews violated his rights as protected by UNCAT, the Prosecution argues '[i]f the Defence is raising a purported new violation not previously raised in the Exclusion Request, this would shift goalposts.'⁷ The Defence has consistently argued that the Prosecution's interviews relied on Mr Al Hassan's arbitrary detention, and that this reliance meets the Article 69(7) threshold.⁸ The Prosecution cannot claim that this allegation is 'new'. Such an attempt to distort the record of the case could not have been anticipated by the Defence at the time of drafting its Request. There is therefore good cause to permit the Defence to provide a substantive reply to this manifest misrepresentation of its arguments in order to correct any misapprehension arising.

(ii) Issues of prejudice and taint cannot be cured by attribution of weight

7. The Prosecution raises a novel argument that Article 82(1)(d) cannot be satisfied because Article 69(4) and (7) issues can be remedied by the attribution of evidentiary weight in the course of judicial consideration of all evidence submitted in accordance with Article 74(2) and (5).⁹ Whether such an approach is in fact consistent with Article 69, the Rome Statute more broadly, and extensive crystalline jurisprudence dictating the exclusion of evidence obtained in contravention of internationally recognised human rights is an issue that merits proper argument and judicial consideration. This requires consideration of arguments regarding the fairness of impugned material reaching the cognizance of the judges, potential impact on the

⁵ Prosecution Response, para. 53.

⁶ Prosecution Response, para. 53.

⁷ Prosecution Response, para. 27.

⁸ ICC-01/12-01/18-1346-Conf, paras 7, 15, 16; ICC-01/12-01/18-1411-Conf, paras 5, 8, 13. See also: ICC-01/12-01/18-885-Conf-Exp-Corr, paras 2, 9, 10, 14, 27-31, 56, 58, 65-75, 78; ICC-01/12-01/18-991-Conf, paras 2, 16, 17-19, 21, 27-31; ICC-01/12-01/18-1411, paras 5, 8.

⁹ Prosecution Response, paras 51, 53, 54.

outcome of the case, and whether the intrinsic prejudice of tainted material entering the case can be remedied through the attribution of evidentiary weight, no matter how little.

8. The Defence observes that in analogous litigation a previous Trial Chamber dismissed the Prosecution's argument on the basis that the question of the potential assessment of weight is wholly divorced from the question as to whether, 'noting the scope and content of the prior recorded testimonies,' these 'may objectively be expected to have a significant impact on the outcome of the trial.'¹⁰ This jurisprudence underscores that the Prosecution's arguments were not foreseeable to the Defence. The Defence should be afforded the opportunity to provide arguments before judicial interpretation of these issues.
9. There is therefore good cause to permit the Defence to reply to this novel argument, which could not have been anticipated at the time of drafting the Request.

(iii) The Prosecution's improper attempt to erode Article 82(1)(d)

10. The Prosecution seeks to amend the bases of appeal available under Article 82(1)(d) by arguing (i) that the Defence must demonstrate a concrete impact on the outcome of the trial, and (ii) that this cannot be done until the conclusion thereof.¹¹ Whether this is consistent with Article 82(1)(d) is an issue that merits proper argument and judicial consideration. As the Prosecution has raised this spectre anew, the Defence ought to be afforded the opportunity to provide its arguments regarding the proper interpretation of Article 82(1)(d) through a reply.
11. If the Prosecution's interpretation were accurate, then no appeal regarding issues impacting the outcome of the proceedings could be brought during the proceedings. This would be inherently absurd as well as inefficient and unfair. It is also contrary to the plain wording of Article 82(1)(d), namely: 'Either party may appeal [...] 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' (emphases added). The Prosecution

¹⁰ [ICC-01/09-01/11-1953-Red-Corr](#), para. 24.

¹¹ Prosecution Response, para. 53.

Response thus raises an issue of statutory interpretation, with potential ramifications for the future application of Article 82(1)(d).

12. The Prosecution's interpretation raises an issue regarding Article 82(1)(d)'s use of the conditional clause (would) rather than the simple future tense (will) and the manner in which these clauses need to be reconciled with the Appeals Chamber's seminal ruling in the Situation in the Democratic Republic of the Congo:

*The outcome of the trial is postulated as a separate and distinct consideration warranting the statement of an issue for consideration by the Appeals Chamber, where the possibility of error in an interlocutory or intermediate decision may have a bearing thereupon. The Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence.*¹²

13. Similarly, determining whether 'an immediate resolution by the Appeals Chamber may materially advance the proceedings' requires only the possibility that it will. Again, the Appeals Chamber explains:

*[T]he issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.*¹³

14. Faced with identical arguments from the Prosecution regarding the admission of prior recorded testimonies, a previous Trial Chamber granted leave to appeal on the bases that the admission of incriminatory evidence into the record (i) 'would' significantly affect the fairness and expeditiousness of the proceedings and (ii) if relied upon, 'may' objectively be expected to have a significant impact on the outcome of the trial.¹⁴ That Trial Chamber's use of the conditional clause emphasises that it is necessary to forecast only the possible implications of a faulty decision on the outcome of the case. Again, the Prosecution's attempt to erode Article 82(1)(d) at this point of the litigation warrants proper argument and judicial consideration and thus justifies the granting of leave to reply.

15. The Prosecution Response thus raises issues of statutory interpretation with significant ramifications, which warrant proper argument and informed judicial

¹² [ICC-01/04-168](#), para. 13.

¹³ [ICC-01/04-168](#), para. 14.

¹⁴ [ICC-01/09-01/11-1953-Red-Corr](#), paras 15, 23, 24.

consideration. It is inconceivable that the Defence could be expected to litigate issues regarding the 'concrete' impact on the outcome of a trial in the course of an Article 82(1)(d) application. Such a threshold would be unreachable; in view of the five day time limit imposed by Rule 155(1) of the Rules of Procedure and Evidence, it is clear that this was not the intention of the drafters. There therefore cannot be a requirement to forecast the concrete impact on the outcome of the trial for the purposes of a request for leave to appeal pursuant to Article 82(1)(d). That notwithstanding, in view of the significance of the impugned material to this trial, and as in *Ruto*, a decision of the Appeals Chamber would impact every aspect of the trial going forward, including the totality of the Prosecution's evidence to be considered at the end of its case, which witnesses to be called in any eventual Defence case, and the material to be relied upon by the Chamber in its Article 74 judgment.

16. The Defence cannot be expected to anticipate new and counter-intuitive interpretations of the Statute. There is therefore good cause to permit the Defence to reply to the Prosecution's improper attempt to erode Article 82(1).

Conclusion

17. In light of the above, the Defence could not have reasonably anticipated these issues at the time of requesting leave to appeal. There is therefore good cause to grant the Defence leave to reply in order to address (i) the Defence's previous consistent argument regarding the Prosecution's knowing reliance on the DGSE system of arbitrary detention, (ii) that issues of prejudice and taint cannot be addressed through the attribution of evidentiary weight, and (iii) the Prosecution's improper attempt to erode Article 82(1)(d).

IV. Relief sought

18. For all the reasons outlined herein, the Defence respectfully requests that the Chamber
GRANT LEAVE TO REPLY to the Prosecution Response.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 2nd Day of June 2021
At The Hague, The Netherlands