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**International
Criminal
Court**



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

Date: 23 July 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

**Prosecution response to “Defence Request for Leave to Appeal
‘Decision on the introduction into evidence of P-0570’s prior recorded testimony
pursuant to Rule 68(2)(c) of the Rules’”**

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Court to:

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I. Introduction

1. The Trial Chamber (“Chamber”) should dismiss the Defence’s (“Request”)¹ for leave to appeal “Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules” (“Decision”),² in which the Chamber decided to authorise the introduction into evidence of the prior recorded testimony of P-0570 and associated material.³
2. In its Request, the Defence identifies two issues (“Issues”) which allegedly arise from the Decision. However, neither of these Issues constitute an appealable “issue” within article 82(1)(d) of the Statute. The Issues misread the Decision, are predicated on incorrect assumptions as to the Chamber’s findings and/or constitute mere disagreements with the Decision. The Request should therefore be dismissed.
3. The Request should in any event be denied as the Issues fail to meet the remaining cumulative criteria under article 82(1)(d) of the Statute. The proposed Issues would not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, nor would an immediate resolution by the Appeals Chamber materially advance the proceedings.

II. Confidentiality

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“Regulations”), this response is filed confidentially because it responds to a filing of the same classification. A public redacted version will be filed in due course.

¹ ICC-01/12-01/18-1595-Conf.

² ICC-01/12-01/18-1588.

³ P-0570’s prior recorded testimony and associated items introduced pursuant to rule 68(2)(c) of the Rules will be collectively referred to as “P-0570’s Material”.

III. Submissions

A. The Issues do not constitute appealable issues under article 82(1)(d) of the Statute

5. An “issue” for the purpose of article 82(1)(d) of the Statute must be “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.⁴ Further, the party seeking leave to appeal under article 82(1)(d) of the Statute must identify a discrete legal or factual issue arising from the impugned decision.⁵ The Request fails to do so.

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

6. The Defence enunciates the First Issue as: “Whether the Chamber erred in finding that it can rely on other evidence that does not concern the same incident or facts to resolve intrinsic inconsistencies in evidence introduced under Rule 68(2)(c).”⁶

7. This does not constitute an “appealable issue” within the meaning of article 82(1)(d) of the Statute. Firstly, the First Issue is predicated on the incorrect assumption that the Chamber found “intrinsic inconsistencies” in P-0570’s prior recorded testimony and that it decided to rely on “other evidence that does not concern the same incident or facts” to resolve such inconsistencies. While the Chamber referred to what the Defence termed as “obvious inconsistencies”, it concluded that they did not make P-0570’s testimony “so manifestly unbelievable or incoherent so as to render it unsuitable for introduction under Rule 68(2)(c)(i) of the Rules”.⁷ And in respect of the specific issue of whether P-0570’s place of detention

⁴ ICC-01/04-168, para. 9.

⁵ See for example, ICC-01/12-01/18-130-tENG, para. 34. See also ICC-02/11-01/11-307, para. 70; ICC-01/05-01/13-2030, para. 6.

⁶ Request, para. 2.

⁷ Decision, para. 27.

was the “BDM”, the Chamber simply noted that “[it] can only be assessed holistically in light of all evidence submitted”.⁸ It is clear from the Chamber’s findings that issues of inconsistencies were to be resolved at the deliberation stage when it would conduct its ultimate assessment of the probative value and weight to be attributed to P-0570’s prior recorded testimony in light of all evidence on the record.⁹

8. Secondly, and in any event, the First Issue represents a mere disagreement with the Chamber’s reasonable approach in assessing the indicia of reliability under rule 68(2)(c) of the Rules and its findings as to the reliability of P-0570’s prior recorded testimony. In assessing whether a statement bears “sufficient indicia of reliability”, a Trial Chamber has “discretion to consider those factors that may be relevant to its determination on a case-by-case basis”.¹⁰ The manner in which a Chamber would address inconsistencies in evidence falls within this discretion. By seeking to impugn the Chamber’s approach, the Defence merely advances alternative interpretations. As underscored by many Chambers at the Court, such an approach is not a sufficient basis to grant leave to appeal under article 82(1)(d) of the Statute.¹¹

9. Given that the First Issue is based on a misrepresentation of the Chamber’s findings and is no more than a mere disagreement, it does not constitute an “appealable issue” arising from the Decision.

⁸ Decision, para. 27.

⁹ Decision, para. 29.

¹⁰ See e.g., ICC-02/11-01/15-744 OA8, para. 103-104. In the Decision, the Chamber referred to this Appeals Chamber’s finding that “in their assessment of indicia of reliability under rule 68(2)(b)(i) of the Rules, trial chambers are not obliged to consider factors beyond formal requirements”, and expressed its view that this finding equally applies to the assessment of indicia of reliability under rule 68(2)(c) of the Rules. Based on this approach, the Chamber concluded that: “P-0570’s prior recorded testimony bears sufficient indicia of reliability of formal nature” while recalling that the absence of cross-examination and the extent to which a prior statement is corroborated by other evidence are factors to be considered in its ultimate assessment of the probative value and weight, if any. See Decision, para. 28-29.

¹¹ See e.g., ICC-02/05-02/09-267, paras. 4, 11-12; ICC-01/05-01/13-801, paras. 9-11 (underscoring, among other considerations: “[A]s repeatedly clarified by the relevant case law, it takes more than the highlighting of the existence of a possible alternative interpretation of facts for an “issue” to be suitable to trigger the leave to lodge an interlocutory appeal”).

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

10. The Second Issue raised by the Defence concerns “[w]hether the Chamber abused its discretion in finding that the introduction of intrinsically inconsistent prior recorded testimony under Rule 68(2)(c) was not prejudicial to or inconsistent with the rights of the accused where core aspects of P-0570’s testimony are materially in dispute and uncorroborated, and the absence of cross-examination prevents the Defence from eliciting further evidence or clarification in relation to such inconsistencies and the credibility of the witness.”¹² This is not an “appealable issue” arising from the Decision within the meaning of article 82(1)(d) of the Statute.

11. Firstly, the Second Issue misreads the Decision by presupposing that the Chamber has found that “core aspects of P-0570’s testimony are materially in dispute and uncorroborated”. To the contrary, the Chamber has found that while some of P-0570’s evidence goes beyond background information, “most of it is of a cumulative or corroborative nature”.¹³ It also noted that “other witnesses have given or are expected to give testimony of similar facts, such as P-0636, P-0547 and P-0542”.¹⁴

12. Secondly, the Second Issue represents a mere disagreement with the Chamber’s conclusions regarding the reliability of P-0570’s prior recorded testimony and the issue of whether its introduction would be prejudicial to or inconsistent with the rights of the Accused. In the Decision, the Chamber carefully considered the Defence’s arguments as to potential prejudice that the introduction of P-0570’s prior recorded testimony might cause to a fair trial.¹⁵ While noting that many of the issues raised by the Defence relate to the probative value of P-0570’s Material or the Defence’s effective opportunity to challenge it, the Chamber considered that the Defence was now “fully able to obtain and submit evidence to challenge P-0570’s

¹² Request, para. 2.

¹³ Decision, para. 39.

¹⁴ Decision, para. 39.

¹⁵ Decision, para. 33-41.

evidence and credibility, and that other individuals may equally be in a position to provide the Defence with information regarding the contested issues it wishes to investigate".¹⁶ The Chamber accordingly dismissed the Defence argument that the introduction of P-0570's Material under rule 68(2)(c) of the Rules is incompatible with the Accused's fair trial rights or unduly prejudicial.¹⁷ In contesting this conclusion, the Defence merely disagree with the Trial Chamber's reasonable assessment, and does no more than repeat its previous submissions.¹⁸

13. Given that the Second Issue is predicated on incorrect assumptions as to what the Chamber found and constitutes a mere disagreement, it does not constitute an "appealable issue" arising from the Decision.

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

14. The Request should also be dismissed as the Issues fail to meet the remaining cumulative criteria under article 82(1)(d) of the Statute.

(i) The Issues would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

15. The Defence fails to show that the Issues affect the fair and expeditious conduct of the proceedings, or the outcome of the trial.¹⁹

16. In relation to both Issues, the Defence suggests that they raise questions of notice as concerns the case which is being put against the Accused, including as to potential links between evidence considered to be related to this witness.²⁰ However, many items related to P-0570, including photographs of relevant individuals and

¹⁶ Decision, para. 40.

¹⁷ Decision, para. 40.

¹⁸ See e.g. ICC-01/12-01/18-1547-Conf, para. 37-39.

¹⁹ See Request, para. 19-23.

²⁰ Request, para. 20.

locations, were already shown during her interview and clearly identified as associated material which the Prosecution sought to admit under rule 68(2)(c) of the Rules.²¹ In any event, the Defence fails to demonstrate how the specific two Issues it identified would significantly affect the fairness of the proceedings, including the right to notice.

17. With respect to potential impact of the two Issues on the expeditious conduct of the proceedings, the Defence submits that “the retention of improper evidence in the case will lead to unnecessary litigation and unduly burden the proceedings”.²² However, this argument merely speculates abstract legal or factual challenges that may be raised against the submitted material. This cannot suffice to meet the criteria for leave to appeal under article 82(1)(d) of the Statute. Otherwise, this provision would not serve its function of limiting interlocutory appeals to Issues that truly require the Appeals Chamber’s intervention.

18. The Defence also fails to substantiate its argument that the Issues would affect the outcome of the trial.²³

(ii) An immediate resolution of the Issues would not materially advance the proceedings

19. The Defence does not make any concrete argument as to why the Issues require the immediate intervention by the Appeals Chamber.²⁴ As argued above, abstract or speculative arguments are insufficient for a party to meet its burden of demonstrating that the criteria for leave to appeal are met.²⁵

20. In any event, the Request is premature. The Chamber expressly held that full consideration of the Material’s probative value will be conducted and it will attribute

²¹ See ICC-01/12-01/18-1408-Conf-AnxA.

²² Request, para. 21.

²³ Request, para. 22.

²⁴ Request, para. 25.

²⁵ See *e.g.* 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; ICC-01/09-01/11-1154, para 28.

weight, if any, to this evidence during the deliberation for its judgement.²⁶ It also recalled that the absence of cross-examination and the extent to which a prior statement is corroborated by other evidence are factors to be considered in its ultimate assessment of the probative value and weight, if any,²⁷ and at that stage, it will “have to assess the extent of the counterbalancing factors necessary”.²⁸ If and when the Chamber bases its conclusions on P-0570’s Material as part of its final decision under article 74 of the Statute, the Defence retains the possibility to raise the Issues as part of an appeal pursuant to article 81 of the Statute. An immediate resolution of the Issues by the Appeals Chamber is thus not required.

IV. Conclusion

21. For the reasons set out above, the Prosecution requests that the Chamber deny the Request.



Karim A. A. Khan QC, Prosecutor

Dated this 23rd of July 2021

At The Hague, The Netherlands

²⁶ See Decision, para. 40.

²⁷ Decision, para. 29.

²⁸ Decision, para. 40.