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**International
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Court**



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

Date: **4 October 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 the ‘Decision on Defence request to bar the Prosecution from eliciting evidence concerning P-1707 and P-1717 during the testimony of P-0641’

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**

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I. Introduction

1. The Trial Chamber should dismiss the Defence's request for leave to appeal¹ the Chamber's decision concerning the elicitation by the Prosecution of evidence concerning P-1707 and P-1717, during the testimony of P-0641.²
2. All of the Defence's three proposed issues either misread and mischaracterise the Decision, or contest matters that did not arise from the Decision, and are thus not appealable under article 82(1)(d) of the Statute.³
3. Even *arguendo*, if any of the issues did arise from the Decision, none of the proposed issues meets the rest of the article 82(1)(d) cumulative criteria. They do not significantly affect the fair and expeditious conduct of the proceedings and their immediate resolution by the Appeals Chamber would not materially advance the proceedings.

II. Confidentiality

4. Pursuant to regulation 23bis(2) of the Regulations of the Court ("Regulations"), this response is filed confidentially because the Request was filed with this classification. A public redacted version will be filed in due course.

III. Submissions

A. The Request does not raise any appealable issue.

First Issue: Whether the Chamber erred in law and violated the protection against ne bis in idem by permitting the Prosecution to prosecute conduct concerning charged facts and circumstances that were rejected by the Pre-Trial Chamber in a decision that has become final under the Rome Statute framework (the 'First Issue')

5. This proposed issue mischaracterises the Decision as permitting the Prosecution to prosecute conduct concerning charged facts and circumstances that were rejected by the Pre-Trial Chamber in a decision that has become final.⁴ It does not arise from the Decision. The Chamber stated that it agreed with the Defence "that it would be wholly inappropriate to re-

¹ ICC-01/12-01/18-1782-Conf ("Request").

² Email from Trial Chamber X to all parties and participants dated 22 September 2021, at 16:49 ("Decision").

³ [ICC-01/04-01/10-487, paras. 32-33](#); ICC-01/05-01/13-1278, para. 9.

⁴ Request, para. 20.

introduce charges that were rejected by the Pre-Trial Chamber” and further added that “this does not mean that the parties [we]re barred from posing all questions relating to the incidents involving [P-1707 and P-1717]”.⁵

6. Accordingly, the Chamber did not grant authorisation to the Prosecution to elicit evidence from P-1717 and P-1707, to reintroduce the charges. The Chamber in fact stated that, “as put forward by the Prosecution, the parties may still explore issues relevant to the charges as concerns P-1707 and P-1717, without exceeding the parameters of the charges set by PTC 1”.

7. In doing so, the Chamber granted authorisation to the Prosecution to elicit the evidence, for different purposes. As put forward by the Prosecution, in its response dated 22 September 2021,⁶ evidence concerning P-1707 and P-1717 are relevant to, *inter alia*: the issue of the intent and knowledge of the Accused, who amongst other defences is claiming that he acted under duress; background or context to the nature of his conduct as charged; the nature of his membership of the armed groups; and contextual evidence of the widespread or systematic nature of the attack on the civilian population for the purposes of crimes against humanity.⁷ The relevance of this evidence was further emphasised in oral submissions made by the parties, including in relation to the intent and knowledge of the Accused.⁸

8. In the Decision, the Chamber further stated that it “will decide on the relevance of particular lines of questioning to the charges on a case by case basis, taking into account the fact that Pre-Trial Chamber I refused to confirm the charges as concerns P-1707 and P-1717.”⁹ The Chamber has indeed a discretion under article 69(3) and (4) of the Statute and Rule 63 of the Rules of Procedure and Evidence to freely admit and assess evidence, in its role in determination of the truth and acting in the interests of justice. It has the discretion to authorise parties to elicit such evidence even in relation to non-charged incidents.

9. Prior jurisprudence of this Court and the *ad hoc* tribunals have confirmed that the Chamber may rely on evidence falling outside the scope of the charges, to assess issues otherwise of relevance to the charges. Prior jurisprudence of this Court granted the Prosecution with the authorisation to elicit evidence related to acts and conduct of the Accused, going

⁵ Decision, para. 2.

⁶ Email by the Prosecution the parties and participants, dated 22 September 2021, at 15:23.

⁷ Email by the Prosecution the parties and participants, dated 22 September 2021, at 15:23, para. 1.

⁸ ICC-01/12-01/18-T-137-CONF-ENG ET 23-09-2021, p. 29-33, and in particular p. 31.

⁹ Decision, para. 3.

beyond specific charges against the accused regarding named victims. In the *Prosecutor v. Bosco Ntaganda*, the Prosecution was authorised to elicit evidence regarding the alleged murder by Bosco Ntaganda of an individual, who was not a named victim in the charges of direct perpetration of murder against Mr. Ntaganda.¹⁰ In the same case, the Prosecution was also authorised to elicit evidence regarding the direct perpetration of rape and sexual slavery by Mr. Ntaganda, although he had not been charged as a direct perpetrator of these counts.¹¹ Further, in the *Prosecutor v. Dominic Ongwen*, the Prosecution was granted authorisation to elicit evidence related to criminal conduct outside the facts and circumstances of the charges.¹²

10. In the *Prosecutor v. Thomas Lubanga*, the Chamber found admissible evidence where it “relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the Accused”¹³; or where it concerns “issues and events (or information) that are sufficient proximity to the charges the accuse faces to be, prima facie, of potential assistance in this trial.”¹⁴

11. The Prosecution also refers to relevant jurisprudence of the ad hoc tribunals. For instance, chambers of the ICTY have deemed admissible evidence of other non-charged conduct, for the purpose of proving the accused’s state of mind in connection to acts charged in the indictment.¹⁵ The ICTR Appeals Chamber affirmed that it is possible even to adduce evidence of acts beyond the tribunal’s jurisdiction – quite apart from matters outside the scope of the charges – if it is relevant and probative for matters which are charged. For instance, the Chamber said this may include for purposes such as “clarifying a given context”; “establishing by inference the elements (in particular, criminal intent) of criminal conduct [occurring within the temporal scope]” or “demonstrating a deliberate pattern of conduct”.¹⁶

12. In conclusion, since the first proposed issue is based on a misunderstanding and

¹⁰ ICC-01/04-02/06-T-99-CONF-ENG, p. 11, l. 15 to p. 12, l. 11; ICC-01/04-02/06-T-99-CONF-ENG, p. 61, l. 15, to p. 63, l. 1.

¹¹ ICC-01/04-02/06-968, para.13-17.

¹² ICC-02/04-01/15-T-85-CONF-ENG, p.7, l.15-p.9, l.1; ICC-02/04-01/15-1210, para.10; ICC-02/04-01/15-T-182, p.7, l.11-15.

¹³ ICC-01/04-01/06-1399, para. 27.

¹⁴ ICC-01/04-01/06-1981-Anx, 24 June 2009, Anx 8, 9, 36, 39, 48 and 82.

¹⁵ See e.g. *Prosecutor v. Milorad Krnojelac*, Judgment, IT-97-25-T, 15 March 2002, para 67; *Prosecutor v. Kunarac et al.* Judgment, IT-96-23-T; 22 February 2001, para.589; *Prosecutor v. Kupreskic et al.*, Judgment, IT-96-23-T & IT-96-23/I-T, 22 February 2001, para. 589; *Prosecutor v. Kvočka et al.*, Judgment, 2 November 2001, para. 652.

¹⁶ In *Nahimana et al. v The Prosecutor*, ICTR-99-52-A, Judgment, 28 November 2007, para.315. See also *Prosecutor v. Pavle Strugar*, Decision on the Defence Objection to the Prosecution’s Opening Statement Concerning Admissibility of Evidence’, IT-01-42-T, 22 January 2004, p.3.

mischaracterisation of the Decision, it does not give rise to an identifiable appealable issue under article 81(2)(d). It should not be certified for appeal.

Second Issue: Whether the Trial Chamber erred in law by indicating that it may rely on alleged material facts concerning charged incidents that were explicitly rejected by the Pre-Trial Chamber, thereby exceeding the factual scope of the trial delimited by the Pre-Trial Chamber (the ‘Second Issue’)

13. The Defence’s further claim that the Decision indicates that the Chamber may rely on alleged material facts concerning charged incidents that were explicitly rejected by the Pre-Trial Chamber similarly misreads the Decision, and does not arise from the Decision.

14. The Chamber in fact stated that “the parties may still explore issues relevant to the charges as concerns P-1707 and P-1717, without exceeding the parameters of the charges set by PTC 1”. The Decision clearly indicates that the Chamber will not revisit the decision of the Pre-Trial Chamber and that it will stay within the parameters of the charges set by the latter decision. The Chamber is not granting the authorisation to elicit facts that were rejected by the Pre-Trial Chamber, but rather, granting the authorisation to elicit evidence relevant to other issues of the case, such as issues as described in paragraph 4.

15. Based on the above, the second proposed issue does not give rise to an identifiable appealable issues, and should not be certified for appeal.

Third Issue: Whether the Trial Chamber erred in law by finding that the Defence has sufficient notice as concerns the introduction of evidence relating to P-1707 and P-1717, where these incidents and facts were not provided in the confirmed charges, the Trial Brief, or any accusatory or auxiliary documents disclosed in advance of the commencement of trial (the ‘Third Issue’)

16. The proposed issue that the Defence did not have sufficient notice as concerns the introduction of evidence relating to P-01707 and P-1717, where these incidents and facts were not provided in the confirmed charges, also does not arise from the Decision.

17. The evidence relating to P-1707 and P-1717 is not related to charged incidents, it is circumstantial evidence of other issues relevant to the case, as described at paragraph 4 above, such as the intent and knowledge of the Accused, for the determination of the charges. Accordingly, it suffices if notice was provided by way of the witness’s statement. The Chamber therefore did not err when it found that the Defence “was on sufficient notice as concerns the fact that evidence relating to P-1707 and P-1717 may be elicited via P-0641, notably by virtue

of the witness's statement.”

18. The statement of P-0641 was disclosed with redactions to P-0641's identity on 16 January 2020.¹⁷ Additionally, contrary to the Defence's assertion that these incidents were never described in any ancillary or charging documents, reference to the incidents concerning P-1717 and 1707 was made in the Prosecution request for corrections and amendments of the Confirmation Decision on 31 January 2020.¹⁸ P-0641's statement was re-disclosed without redactions to his identity on 6 March 2020¹⁹ and without redaction to paragraph 94 related to P-1707 and without redaction to the name of P-1717 on 19 August 2020.²⁰ Since Defence have had the relevant information concerning P-1717 and P-1707 for more than a year before P-0641's appearance in court for his testimony, there is no prejudice to Defence because it has had ample notice. Moreover, Defence had the opportunity to cross-examine P-0641 on these issues- and chose to do so, in relation to P-1717.²¹ The Chamber will assess this evidence, together with the totality of other evidence at the end of this case.

19. Since the third proposed issue is based on a mischaracterisation of the Decision and does not arise from the Decision, it does not give rise to an appealable issue under article 81(2)(d). It should not be certified for appeal.

B. The Request fails to meet the cumulative criteria under article 82(1)(d) of the ICC Statute.

20. Even assuming *arguendo* that any of the three above proposed questions identifies an appealable issue, the Request should still be denied because it does not show that the proposed questions affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, or that appellate intervention will materially advance the proceedings.

21. As shown above, the Decision neither deviates from nor exceeds the decision on the confirmation of charges rendered by the Pre-Trial Chamber, nor does it violate the Defence right to sufficient notice, by allowing the Prosecution to elicit evidence on P-1717 and P-1707.

22. Moreover, the testimony of P-0641 has been completed and the Prosecution and Defence

¹⁷ 20200116 ICC-01/12-01/18 Disclosure - Pre-Trial INCRIM package 46.

¹⁸ ICC-01/12-01/18-568-Conf, para. 48-49 and para. 59-60.

¹⁹ 20200306 ICC-01/12-01/18 Disclosure - Pre-Trial INCRIM package 57.

²⁰ 20200819 ICC-01/12-01/18 Disclosure - Trial INCRIM package 88.

²¹ ICC-01/12-01/18-T-140-CONF-ENG ET, p. 38-48.

have had the opportunity to examine and cross-examine him on the issues concerning P-1707 and P-1717.

23. Since the evidence at issue has already been elicited and is already on record, an appellate intervention in this matter is moot and will not materially advance the proceedings. Defence will be able to make arguments regarding the probative value of this evidence in its final arguments and it will be ultimately for the Chamber to assess whether it will rely on this evidence for issues relevant to the case and the determination of the truth.

IV. Conclusion

24. For the reasons set out above, the Defence's Request should be denied.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan QC, Prosecutor

Dated this 4th of October 2021

At The Hague, The Netherlands