



Original: English

No. ICC-01/12-01/18

Date: 8 October 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 ‘Decision on Defence request to
bar the Prosecution from eliciting evidence concerning P-1707 and P-1717
during the testimony of P-0641’**

To be notified in accordance with Regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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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 on Defence request for leave to appeal “Decision on Defence request to bar the Prosecution from eliciting evidence concerning P-1707 and P-1717 during the testimony of P-0641”’.

I. Procedural history and submissions

1. On 22 September 2021, the Defence submitted a request seeking that the Chamber confirm that the Prosecution will not be entitled to elicit evidence from P-0641 concerning incidents pertaining to P-1707 and P-1717.¹ The Office of the Prosecutor (the ‘Prosecution’) responded on the same date, seeking that the aforementioned request be rejected.²
2. Also on 22 September 2021, the Chamber rendered via email its ‘Decision on Defence request to bar the Prosecution from eliciting evidence concerning P-1707 and P-1717 during the testimony of P-0641’, rejecting the aforementioned request and a related Defence request for leave to reply (the ‘Impugned Decision’).³
3. From 23 until 28 September 2021, P-0641 testified before the Chamber.⁴
4. On 28 September 2021, the Defence filed a request seeking leave to appeal the Impugned Decision (the ‘Request’).⁵ The Defence seeks leave to appeal on the following three issues, and submits that they significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and an immediate resolution by the Appeal Chamber would materially advance the proceedings: (i) whether the Trial Chamber erred in law and violated the protection against *ne bis in idem* by permitting the Prosecution to prosecute

¹ Email from the Defence dated 22 September 2021 at 10:48.

² Email from the Prosecution dated 22 September 2021 at 15:23.

³ Email from the Chamber dated 22 September 2021 at 16:49.

⁴ Transcripts of hearings on 23, 24, 27 and 28 September 2021, ICC-01/12-01/18-T-137-CONF-ENG, ICC-01/12-01/18-T-138-CONF-ENG, ICC-01/12-01/18-T-139-CONF-ENG, and ICC-01/12-01/18-T-140-CONF-ENG.

⁵ Defence request for leave to appeal ‘Decision on Defence request to bar the Prosecution from eliciting evidence concerning P-1707 and P-1717 during the testimony of P-0641’, ICC-01/12-01/18-1782-Conf (with one confidential annex).

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’); (ii) 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’); and (iii) 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’).

5. On 4 October 2021, the Prosecution filed its response to the Request.⁶ The Prosecution submits that the Request is based on a mischaracterisation and misunderstanding of the Impugned Decision and as such fails to identify an ‘appealable issue’ and that in any event the remainder of the cumulative requirements of Article 82(1)(d) of the Statute are not satisfied.

II. Analysis

6. The Chamber incorporates by reference the legal framework applicable to the assessment of requests for leave to appeal pursuant to Article 82(1)(d) of the Statute.⁷
7. At the outset, as concerns the First and Second Issues, the Chamber notes that the Defence is not challenging discrete lines of questioning during the testimony of P-0641. Rather, the Defence argues that the Impugned Decision *per se* violates the protection against *ne bis in idem* and has exceeded the facts and circumstances of the case. The Chamber considers that such arguments misconstrue the Impugned Decision and do not constitute ‘appealable issues.’

⁶ 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’, ICC-01/12-01/18-1798-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, para. 12.

8. In this regard, the Chamber recalls that the Impugned Decision explicitly recognised that ‘it would be wholly inappropriate to re-introduce charges that were rejected by the Pre-Trial Chamber’ and that ‘the parties may explore issues relevant to the charges as concerns P-1707 and P-1717, *without exceeding the parameters of the charges set by PTC I.*’⁸ Thus, the Chamber neither authorised the Prosecution to re-introduce charges rejected by the Pre-Trial Chamber, nor did it authorise the expansion of the facts and circumstances as delimited by Pre-Trial Chamber I. Whether or not particular lines of questioning were to be authorised was to be decided, as clearly set out in the Impugned Decision, on a case by case basis and ‘taking into account the fact that Pre-Trial Chamber I refused to confirm the charges as concerns P-1707 and P-01717’. The First and Second Issues are accordingly not ‘appealable issues’ but rather the Defence mischaracterising the Impugned Decision, repeating its prior submissions, and expressing its disagreement with what it submits are necessary consequences of the approach adopted.
9. Turning to the Third Issue, the Chamber observes that the Defence appears to suggest that in order to find that the Defence had sufficient notice, the Chamber should have satisfied itself that the evidence relating to P-1707 and P-1717 are contained in ‘the Amended DCC, Trial Brief, or any other auxiliary documents.’⁹ In doing so, the Defence refers to the Appeals Chamber’s Judgment in the *Ntaganda* case and the Article 74 Judgment in the *Bemba* case, which concerns, as is clearly stated in the cited paragraphs, the description of the charges or whether the accused has been ‘meaningfully informed of the nature, cause, and content of the charges.’¹⁰ In so far as this argument is premised on the Defence’s assertion that the Impugned Decision entails a change in the scope of the charges, the Third Issue must be dismissed for the same reasons mentioned above in relation to the First and Second Issues. The Defence’s argument that a lesser redacted version of P-0641’s statement and a victim application form of an individual appearing to be P-1707 was disclosed in the midst of the testimony of

⁸ Email from the Chamber dated 22 September 2021 at 16:49 (emphasis added).

⁹ Request, ICC-01/12-01/18-1782-Conf, paras 41, 45.

¹⁰ Request, ICC-01/12-01/18-1782-Conf, paras 42-43.

P-0641¹¹ has no bearing on the present decision as it concerns developments after the issuance of the Impugned Decision.¹²

10. For the aforementioned reasons, the Chamber finds that none of the issues identified by the Defence are ‘appealable issues.’ Thus it is unnecessary to address the remainder of the cumulative requirements of Article 82(1)(d) of the Statute.
11. Finally, the Chamber observes that the Defence mentions *en passant* that the Impugned Decision is contrary to the spirit of the Chamber’s own directions.¹³ The Chamber considers that such comments are misplaced. As clearly reflected in their language, the Chamber’s directions reiterated the importance of limiting questions to issues of *relevance* to the case.¹⁴ In no way did these directions suggest that the scope of questions should be limited to facts underlying charged incidents.

¹¹ Request, ICC-01/12-01/18-1782-Conf, para. 44.

¹² *Similarly see* Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense’, ICC-01/12-01/18-601-Red, para. 114.

¹³ Request, ICC-01/12-01/18-1782-Conf, para. 46.

¹⁴ Transcript of hearing, 10 September 2021, ICC-01/12-01/18-T-131-CONF-ENG, p. 97 lines 16-17. *See also* Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 41.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request;

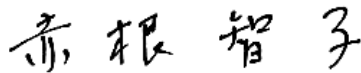
INSTRUCTS the Defence to file a public redacted version of ICC-01/12-01/18-1782-Conf within 20 days of notification of the present decision; and

RECLASSIFIES ICC-01/12-01/18-1798-Conf as public.

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 this Friday, 8 October 2021

At The Hague, The Netherlands