



Original: English

No. ICC-01/12-01/18

Date: 10 March 2022

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 the introduction into evidence of P-0524’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules’ and ‘Decision on the Prosecution’s fourth, fifth and sixth requests for the admission of evidence from the bar table’

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

The Office of the Prosecutor

Karim A. A. Khan
Nazhat Shameem Khan
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Counsel for the Defence

Melinda Taylor

Legal Representatives of Victims

Seydou Doumbia
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

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

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.

I. Procedural history and submissions

1. On 21 February 2022, the Chamber issued the ‘Decision on the introduction into evidence of P-0524’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules’ in which it authorised the introduction into evidence of the prior recorded testimony of P-0524 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’) (the ‘First Impugned Decision’).¹ On 23 February 2022, the Chamber issued the ‘Decision on the Prosecution’s fourth, fifth and sixth requests for the admission of evidence from the bar table’ in which it authorised the submission into evidence of a number of items of evidence via the bar table (the ‘Second Impugned Decision’²; together, the ‘Impugned Decisions’).
2. On 28 February 2022, the Defence filed a request for leave to appeal the Impugned Decisions on the following three issues (the ‘Defence Request’):³ (i) ‘whether the Chamber erred by concluding that the testimony of individuals who appeared in the Bamako proceedings could be introduced through Article 69(2) rather than Rule 68’ (the ‘First Issue’); (ii) ‘whether the Chamber erred by failing to exclude the evidence of P-0524, which concerned the testimonial evidence of individuals who appeared in the Bamako proceedings’ (the ‘Second Issue’); and (iii) ‘whether the Chamber erred by receiving evidence that was collected in a manner that violates the complementarity regime’ (the ‘Third Issue’).
3. On 4 March 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its response, opposing the Defence Request (the ‘Prosecution Response’).⁴ The

¹ ICC-01/12-01/18-2125-Conf.

² ICC-01/12-01/18-2127.

³ Defence request for leave to appeal ‘Decision on the introduction into evidence of P-0524’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules’ and ‘Decision on the Prosecution’s fourth, fifth and sixth requests for the admission of evidence from the bar table’, ICC-01/12-01/18-2130-Conf.

⁴ Prosecution response to “Defence request for leave to appeal ‘Decision on the introduction into evidence of P-0524’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules’ and ‘Decision on

Prosecution submits that none of the three issues are appealable issues arising from the Impugned Decisions within the meaning of Article 82(1)(d) of the Statute.⁵ The Prosecution further submits that, in any event, the issues fail to meet the remaining criteria under Article 82(1)(d) of the Statute.⁶

II. Analysis

4. The Chamber incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Statute as set out in previous decisions.⁷ In particular, the Chamber recalls that as regards the possibility to grant leave to appeal pursuant to Article 82(1)(d) of the Statute, the following criteria shall be fulfilled: (a) the matter must be an ‘appealable issue’; (b) the issue at hand is one that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (c) an immediate resolution by the Appeals Chamber may materially advance the proceedings.
5. In relation to the First Issue, the Chamber recalls that in the context of the Second Impugned Decision, the Defence had objected to the submission of certain documents on the grounds that they constituted a record of testimonial evidence that could only be introduced through Rule 68 of the Rules.⁸ For present purposes these documents comprised domestic court records from ‘domestic proceedings concerning the events of 2012, in which Mr Al Hassan has been named as a target of the proceedings’⁹ (the ‘Bamako Complaints’). The Chamber rejected this argument in the Second Impugned Decision, stating that it considered that none of the items the Prosecution seeks to introduce were prior recorded testimony the

the Prosecution’s forth, fourth, fifth and sixth requests for the admission of evidence’”, ICC-01/12-01/18-2135-Conf.

⁵ Prosecution Response, ICC-01/12-01/18-2135-Conf, paras 2, 5-16.

⁶ Prosecution Response, ICC-01/12-01/18-2135-Conf, paras 17-25.

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.

⁸ Defence Response to ‘Defence Response to ‘Corrigendum to Prosecution’s fourth request for the admission of documentary evidence from the bar table (ICC-01/12-01/18-2101-Conf)’, 18 February 2022, ICC-01/12-01/18-2120-Conf (with three confidential annexes), para. 12; ICC-01/12-01/18-2120-Conf-AnxB, pp 18-19.

⁹ Defence Request, ICC-01/12-01/18-2130-Conf, para. 1.

submission of which requires that the procedural requirements under Rule 68 of the Rules be satisfied.¹⁰

6. The Chamber considers that the First Issue amounts merely to a disagreement with the Chamber's aforementioned conclusion, and does not constitute an 'appealable issue' under Article 82(1)(d) of the Statute. In addition, in line with its previous approach,¹¹ the Chamber does not consider that the First Issue meets the remainder of the cumulative criteria under Article 82(1)(d) of the Statute. In particular, recalling that the Chamber is yet to determine what weight, if any, to ascribe to this submitted evidence as part of its final judgment, the Chamber is unpersuaded that resolution of the issue by the Appeals Chamber at this stage may materially advance the proceedings.

7. In relation to the Second Issue, the Chamber observes that the issue raised by the Defence – that certain evidence in P-0524's statement should have been excluded on the basis that it was confidential testimonial information that she learned by virtue of her role as an interpreter during victim interviews or court proceedings – was not raised by the Defence in its initial response to the Prosecution's P-0524 Rule 68(2)(b) application.¹² This, notwithstanding that the Chamber set out a procedure to be followed should parties seek to raise challenges regarding the exclusion of evidence under Article 69(7) of the Statute with respect to Rule 68(2) applications.¹³ Further, the Chamber recalls that the First Impugned Decision made no findings as to P-0524's role as an interpreter or a lawyer, nor on any confidentiality obligations which may be applicable in the context of her work with victims. The Chamber considers for these reasons that the Second Issue does not arise from the First Impugned Decision, and accordingly, it is not an 'appealable issue'.

¹⁰ Second Impugned Decision, ICC-01/12-01/18-2127, para. 22.

¹¹ Decision on Defence requests for leave to appeal two decisions related to the submission into evidence of Mr Al Hassan's statements, 24 June 2021, ICC-01/12-01/18-1542, para. 26.

¹² Defence response to 'Prosecution application under rule 68(2)(b) to introduce MLI-OTP-P-0524's prior recorded testimony', 14 February 2022, ICC-01/12-01/18-2113-Conf (with two confidential annexes).

¹³ See Decision on matters related to Defence challenges under Article 69(7) of the Statute, 6 November 2020, ICC-01/12-01/18-1150, para. 15, n. 26.

8. Turning to the Third Issue, the Chamber notes that at its core the Defence complains about the continuation of domestic proceedings against Mr Al Hassan ‘for the same acts and conduct as the current ICC case’.¹⁴ The Defence submits that ‘the continuation of such proceedings falls foul of Mali’s statutory obligation to defer to the competence of the ICC as concerns Mr Al Hassan’¹⁵ and notes the Chamber’s failure to issue ‘directives to the Malian authorities as concerns the status of these proceedings’.¹⁶ The Chamber notes that such matters are outside the scope of the Impugned Decisions, which were limited to authorising the introduction of evidence. To the extent that, from this premise, the Defence submits that ‘the decision to admit the Bamako complaints (and information obtained by P-0524 from these proceedings) into evidence also has the contrary effect of condoning [the] existence [of the domestic proceedings], while taking advantage of a process that fails to adhere to the testimonial requirements of the ICC Statute and Rules’,¹⁷ the Chamber considers such arguments misconceived. The Impugned Decisions in no way ‘condone’ the existence of any ongoing domestic proceedings. They simply authorised for submission into evidence the statement of P-0524 which touched on (historical) aspects of these proceedings, and authorised the submission into evidence of the Bamako Complaints. Not least noting that the Chamber has yet to determine the weight, if any, to be afforded to such evidence, the suggestion that the Chamber has ‘taken advantage’ of the domestic process through the introduction of items into evidence is entirely misplaced. The Third Issue is accordingly not an ‘appealable issue’.

¹⁴ Defence Request, ICC-01/12-01/18-2130-Conf, para. 12.

¹⁵ Defence Request, ICC-01/12-01/18-2130-Conf, para. 13.

¹⁶ Defence Request, ICC-01/12-01/18-2130-Conf, para. 14.

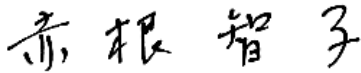
¹⁷ Defence Request, ICC-01/12-01/18-2130-Conf, para. 14.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY
REJECTS the Defence Request.

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 10 March 2022

At The Hague, The Netherlands