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No. ICC-01/12-01/18

Date: 29 October 2020

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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

**Public redacted version of ‘Decision on Defence request for leave to appeal the
“Decision on the Defence request to terminate the proceedings and related
requests”’**

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

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**Unrepresented Applicants for
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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*, issues the present decision.

I. Procedural history and submissions

1. On 16 June 2020, the Defence filed a request to terminate this case and immediately release Mr Al Hassan (the ‘Termination Motion’).¹
2. On 24 August 2020, the Chamber issued its ‘Decision on the Defence request to terminate the proceedings and related requests’,² in which it rejected the Termination Motion and a number of related requests (the ‘Impugned Decision’).
3. On 31 August 2020, the Defence filed a request for leave to appeal the Impugned Decision (the ‘Defence Request’).³ Specifically, the Defence requests leave to appeal on the following issues:⁴
 - ‘Whether the Trial Chamber’s approach to disclosure and evidentiary matters deprived the Defence of a fair and effective right to be heard on the issues that were determinative to the outcome of the Termination Request’(the ‘First Issue’);
 - ‘Whether the Trial Chamber applied an erroneous legal interpretation of Article 55(1) of the Statute’ (the ‘Second Issue’);

¹ Defence Request to terminate the proceedings, ICC-01/12-01/18-885-Conf-Exp (confidential *ex parte*, available only to the Defence and Prosecution; with ten confidential and confidential *ex parte* Annexes; a confidential redacted version of the main filing was notified simultaneously, ICC-01/12-01/18-885-Conf-Red; these filings were all notified on 17 June 2020; corrigenda of the main filing were later notified on 25 June 2020, ICC-01/12-01/18-885-Conf-Exp-Corr and 24 August 2020, ICC-01/12-01/18-885-Conf-Red-Corr; public redacted versions of the main filing were also later notified and subsequently reclassified as confidential; a final public redacted version was later notified on 29 July 2020, ICC-01/12-01/18-885-Corr-Red3; a corrected version of Annex B was also filed, in accordance with the decision of the Chamber).

² Decision on the Defence request to terminate the proceedings and related requests, ICC-01/12-01/18-1009-Conf.

³ Defence request for leave to appeal the ‘Decision on the Defence request to terminate the proceedings and related requests’, ICC-01/12-01/18-1021-Conf.

⁴ Defence Request, ICC-01/12-01/18-1021-Conf, paras 1, 42.

- ‘Whether the Trial Chamber applied an erroneous legal standard as concerns the application of the abuse of process doctrine in this case’ (the ‘Third Issue’); and
 - ‘Whether the Trial Chamber erred in its assessment that the future exclusion of evidence could remedy the prejudice and unfairness generated by the use of tainted evidence, to reach adverse factual conclusions, throughout the investigations, pre-trial and trial stage’ (the ‘Fourth Issue’, collectively, the ‘Issues’).
4. The Defence argues, *inter alia*, that the Impugned Decision (i) raises the question of whether the Chamber’s approach to disclosure of material that formed the factual basis for the Termination Motion and the burden of proof was consistent with Mr Al Hassan’s right to be heard in a fair and effective manner, in relation to the disposition of the Termination Motion;⁵ (ii) raises the question of whether the Chamber correctly interpreted the content and scope of Article 55(1), in light of applicable sources of law, including Article 54(1)(c) of the Statute;⁶ (iii) raises the question of whether, including by focusing ‘primarily on a narrow reading of the test set out by the *Gbagbo* Pre-Trial Chamber’, the Chamber resolved the Termination Motion by reference to an ‘overly narrow’ legal standard of the abuse of process doctrine, which ‘failed to take into consideration’ the specific obligations and related right to a remedy, which apply in connection with alleged violations of preemptory norms of international law;⁷ and (iv) raises the issue of whether the Chamber erred in its assessment, and abused its discretion in concluding that the future exclusion of evidence could remedy the prejudice and unfairness generated by the use of ‘tainted torture evidence’ to make adverse factual findings, throughout the investigations, pre-trial and trial stage.⁸
5. The Defence further submits that, *inter alia*, the Issues are intrinsically tied to the accused’s core fair trial rights, including the right to silence, the privilege against self-incrimination, the right to an impartial Chamber, and the right to an

⁵ Defence Request, ICC-01/12-01/18-1021-Conf, paras 3-10.

⁶ Defence Request, ICC-01/12-01/18-1021-Conf, paras 3, 11-18.

⁷ Defence Request, ICC-01/12-01/18-1021-Conf, paras 3, 19-31.

⁸ Defence Request, ICC-01/12-01/18-1021-Conf, paras 3, 32-38.

effective remedy; and that, by reference to the issues at stake, an incorrect determination on the part of the Chamber on these issues would affect and invalidate the trial process as a whole.⁹ It submits that the Chamber has resolved the Issues by reference to a legal philosophy that will continue to frame the resolution of the issues arising in this trial, including any future application to exclude evidence, including its views concerning the Court’s cooperation regime, and the applicable sources of law.¹⁰ It finally observes that the *Gbagbo* test applied by the Chamber in the Impugned Decision has not been endorsed or interpreted by the Appeals Chamber, and that the abuse of process scenario in this case differs from the illegal arrest and detention scenarios that have been litigated in the past at this Court. The Defence submits that accordingly, ‘there is an urgent need for appellate scrutiny as to the scope and content of the Court’s responsibility to ensure an effective remedy for the violations of peremptory norms of international law that allegedly occurred in this case’.¹¹

6. On 4 September 2020, the Office of the Prosecutor (the ‘Prosecution’) filed its response, opposing the Defence Request (the ‘Prosecution Response’).¹² The Prosecution first argues that none of the Issues are appealable issues arising from the Impugned Decision within the meaning of Article 82(1)(d).¹³ In relation to the First Issue, the Prosecution argues, *inter alia*, that (i) the Defence Request is not the appropriate tool to challenge disclosure decisions that the Chamber has made in the past and that any issues concerning these previous decisions do not arise from the Impugned Decision;¹⁴ (ii) any potential non-disclosure of information concerning alleged torture and cruel, inhumane and degrading treatment (‘CIDT’) of Mr Al Hassan [REDACTED] had no bearing on the Impugned Decision since the Chamber took those allegations at their highest;¹⁵ (iii) that the Chamber rejected some of the Defence’s disclosure

⁹ Defence Request, ICC-01/12-01/18-1021-Conf, para. 39.

¹⁰ Defence Request, ICC-01/12-01/18-1021-Conf, para. 40.

¹¹ Defence Request, ICC-01/12-01/18-1021-Conf, para. 41.

¹² Prosecution response to Defence request for leave to appeal the “Decision on the Defence request to terminate the proceedings and related requests”, ICC-01/12-01/18-1039-Conf.

¹³ Prosecution Response, ICC-01/12-01/18-1039-Conf, paras 3, 12, 18, 27, 37 and generally 6-37.

¹⁴ Prosecution Response, ICC-01/12-01/18-1039-Conf, para. 7.

¹⁵ Prosecution Response, ICC-01/12-01/18-1039-Conf, para. 8.

requests in this case is irrelevant to the Impugned Decision;¹⁶ (iv) while the Termination Motion centred on allegations concerning the Prosecution's collection and reliance on information and evidence allegedly tainted by torture, the Impugned Decision does not;¹⁷ and (v) the mere fact that the Chamber rejected the Defence arguments on the burden and standard of proof does not constitute an appealable issue.¹⁸

7. In relation to the Second Issue, the Prosecution, *inter alia*, avers that the Defence does not correctly represent the Chamber's findings with respect to Article 55(1) and many of the Defence's arguments consist of mere disagreements with the Impugned Decision.¹⁹ In relation to the Third Issue, the Prosecution argues, *inter alia*, that it is predicated on an incomplete - and therefore incorrect - reading of the Chamber's findings on the applicable abuse of process doctrine.²⁰ In relation to the Fourth Issue, the Prosecution submits, *inter alia*, that it misrepresents the Impugned Decision, is an inappropriate attempt by the Defence to challenge previous decisions of the Pre-Trial Chamber and the Chamber and merely re-litigates its position that the exclusion of evidence is not an appropriate remedy in this case.²¹
8. Finally, the Prosecution submits that, in any event, the Issues fail to meet the remaining criteria under Article 82(1)(d) of the Statute, namely that they do not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial,²² nor do they require immediate resolution by the Appeals Chamber to materially advance the proceedings.²³

II. Analysis

9. 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

¹⁶ Prosecution Response, ICC-01/12-01/18-1039-Conf, para. 9.

¹⁷ Prosecution Response, ICC-01/12-01/18-1039-Conf, para. 10.

¹⁸ Prosecution Response, ICC-01/12-01/18-1039-Conf, para. 11.

¹⁹ Prosecution Response, ICC-01/12-01/18-1039-Conf, paras 13-18.

²⁰ Prosecution Response, ICC-01/12-01/18-1039-Conf, paras 19-27.

²¹ Prosecution Response, ICC-01/12-01/18-1039-Conf, paras 28-37.

²² Prosecution Response, ICC-01/12-01/18-1039-Conf, paras 4, 38-45.

²³ Prosecution Response, ICC-01/12-01/18-1039-Conf, paras 4, 38, 46-49.

its previous decisions.²⁴ 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.

10. At the outset, and as noted by the Prosecution,²⁵ the Chamber observes that much of the Defence’s submissions in the Request go to the merits of the issues which it seeks leave to appeal. The Chamber recalls that the present decision only determines whether the Defence Request fulfils the requirements under Article 82(1)(d) of the Statute, and thus the Chamber has not considered these submissions on the merits.
11. The Chamber will now turn to its examination of whether the Defence has met the requirements under Article 82(1)(d) of the Statute in relation to the Issues identified above.
12. The Chamber will first examine whether the Issues are ‘appealable issues’.
13. In its submissions on the First Issue, the Chamber notes that the Defence expresses its disagreement with previous disclosure decisions taken by the Pre-Trial Chamber and this Chamber, including those which the Defence sought leave to appeal before this Chamber and were rejected.²⁶ The Chamber agrees with the Prosecution that the current Request is not the appropriate forum to seek leave to appeal those decisions.

²⁴ 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; [REDACTED]; Decision on Defence request for leave to appeal the ‘Decision on the conduct of proceedings’, 28 May 2020, ICC-01/12-01/18-831; Decision on Defence request for reconsideration and leave to appeal the Decision on the Defence Adjournment Request, 28 July 2020, ICC-01/12-01/18-983-Conf; Decision on Defence request for leave to appeal the ‘Decision on the Self-contained set of charges’, 14 August 2020, ICC-01/12-01/18-996.

²⁵ Prosecution Response, ICC-01/12-01/18-1039-Conf, paras 3, 26.

²⁶ See in particular [REDACTED].

14. In relation to the disclosure determination contained within the Impugned Decision itself,²⁷ the Chamber recalls that the request was dismissed primarily on the basis that the suggested materiality was speculative and hypothetical.²⁸ Contrary to the Defence suggestion, the Impugned Decision did not ‘ultimately [turn] on the existence and content of the very contacts that the Chamber had deemed irrelevant’²⁹ in relation to this disclosure determination. Rather, the Chamber conducted a much broader examination in assessing whether the Prosecution’s conduct could ‘in any way be said to amount to collusion in the alleged actions of the national authorities, or indeed any acquiescence, complicity or concerted action’.³⁰ This assessment considered all relevant surrounding factual information, including the relevant Article 56 application of the Prosecution and associated decision of the Pre-Trial Chamber, material relating to the issue of prior knowledge of the Prosecution of Mr Al Hassan’s arrest, Registry information on the arrest and surrender of Mr Al Hassan, and records of interview of Mr Al Hassan [REDACTED] which demonstrated safeguards and steps taken by the Prosecution.³¹ In addition, as noted by the Prosecution,³² any potential non-disclosure of information concerning alleged torture and CIDT of Mr Al Hassan [REDACTED] had no bearing on the Impugned Decision in any event, since the Chamber took those allegations at their highest.³³
15. Finally, in relation to the Defence’s submission regarding the burden of proof, as noted by the Prosecution,³⁴ the First Issue represents a mere disagreement with the Chamber’s rejection of the Defence arguments on this point.³⁵ For all of the above reasons, the Chamber therefore considers that the First Issue is not an ‘appealable issue’ and it is not considered further for the purpose of the present decision.

²⁷ Impugned Decision, ICC-01/12-01/18-1009-Conf, paras 35-39.

²⁸ Impugned Decision, ICC-01/12-01/18-1009-Conf, para. 37.

²⁹ Defence Request, ICC-01/12-01/18-1021-Conf, para. 9.

³⁰ Impugned Decision, ICC-01/12-01/18-1009-Conf, para. 100, 112 and 116.

³¹ Impugned Decision, ICC-01/12-01/18-1009-Conf, paras 92-100. *See also* paras 105-112, 116.

³² Prosecution Response, ICC-01/12-01/18-1039-Conf, para. 8. *See also* paras 9-10.

³³ Impugned Decision, ICC-01/12-01/18-1009-Conf, para. 80.

³⁴ Prosecution Response, ICC-01/12-01/18-1039-Conf, para. 11.

³⁵ Impugned Decision, ICC-01/12-01/18-1009-Conf, paras 68-72.

16. In relation to the Second Issue, the Chamber's view is that the Defence mischaracterises the Impugned Decision and takes out of context the Chamber's findings on the interpretation of Article 55(1) of the Statute, and merely disagrees with the Chamber's assessment of the evidence. As noted by the Prosecution,³⁶ in the Impugned Decision the Chamber did not merely assess whether Article 55(1)(b) and (d) confer an obligation on the Prosecution 'not to commit or request the torture or arbitrary detention of a suspect',³⁷ but made a much broader assessment. In particular, the Chamber held that Article 55(1) stipulates that it is applicable '[i]n respect of an investigation under this Statute', meaning that it encompasses 'any investigative steps taken either by the Prosecutor or by national authorities at his or her behest'.³⁸ The Chamber further assessed three broad categories of alleged acts or omissions by the Prosecution, concluding that none could in any way be said to amount to collusion in the alleged actions of the national authorities, or indeed any acquiescence, complicity or concerted action.³⁹ The Chamber considers therefore that the Second Issue is not an 'appealable issue' and it is not considered further for the purpose of the present decision.
17. In relation to the Third Issue, the Chamber notes that the Defence simply re-litigates its submissions on the merits of this matter in the Impugned Decision.⁴⁰ As regards its submissions on the applicable law, the Defence correctly points out⁴¹ that the test for attribution in the *Gbagbo* case applied in the Impugned Decision has not been the subject of appellant consideration. However, the Chamber notes that the basic principles on the conditions for the termination of the proceeding have been established in previous decisions of the Court,

³⁶ Prosecution Response, ICC-01/12-01/18-1039-Conf, para. 14.

³⁷ Defence Request, ICC-01/12-01/18-1021-Conf, para. 16.

³⁸ Impugned Decision, ICC-01/12-01/18-1009-Conf, para. 63.

³⁹ Impugned Decision, ICC-01/12-01/18-1009-Conf, paras 86-116. For disagreement with the Chamber's evidentiary analysis see e.g. Defence Request, ICC-01/12-01/18-1021-Conf, para. 13, 'By expressly requesting national authorities to secure Mr. Al Hassan's attendance at multiple interviews (while knowing that he was hooded in transit), the ICC Prosecution also participated directly in his arbitrary detention, and based its investigative activities on this status', *contra* Impugned Decision, ICC-01/12-01/18-1009-Conf, para. 92-100.

⁴⁰ Defence Request, ICC-01/12-01/18-1021-Conf, paras 19-31; *see for example* Impugned Decision, ICC-01/12-01/18-1009-Conf, paras 57-67.

⁴¹ Defence Request, ICC-01/12-01/18-1021-Conf, para. 41.

including the Appeals Chamber in the *Lubanga* case,⁴² which served as precedent to the aforesaid *Gbagbo* case decision. The Chamber agrees with the Prosecution's submissions⁴³ that the Defence arguments under this issue are predicated on an incomplete and therefore incorrect reading of the Chamber's findings on the applicable abuse of process doctrine in the Impugned Decision. In particular, the Chamber observes that by asserting that the Chamber resolved the Defence Termination Request by reference to an 'overly narrow legal standard of the abuse of process doctrine', the Defence fails to acknowledge the Chamber's reasoning and the relevant jurisprudence it relied on.⁴⁴ In conclusion therefore, the Third Issue is not an 'appealable issue' and is not considered further for the purpose of the present decision.

18. In relation to the Fourth Issue, the Chamber notes that it is predicated on the assumption of evidence having the status of being 'tainted'.⁴⁵ As the Defence itself points out, the Chamber made no findings in the Impugned Decision as to whether particular items of evidence were 'tainted' or not, and rather, for the purpose of the Impugned Decision, took the Defence's allegations of torture and CIDT at their highest and then focussed on what the Chamber considered to be the key issue, namely the attributability of the alleged violations to the Prosecution.⁴⁶ The Chamber's conclusion that Article 69(7) of the Statute presented one of the appropriate statutory mechanisms to adjudicate the issues raised by the Termination Motion followed from its finding that the relevant acts were not attributable to the Prosecution, and therefore that the high threshold required to justify termination of proceedings had not been met.⁴⁷ The Chamber also agrees with the Prosecution's submission that this Issue represents an inappropriate attempt by the Defence to challenge previous decisions of the Pre-Trial Chamber and the Chamber, and merely re-litigates its position that the remedy provided by the statutory framework for the exclusion of evidence is not appropriate in this case. The Chamber therefore considers that

⁴² Impugned Decision, ICC-01/12-01/18-1009-Conf, paras 49-57 and the references therein.

⁴³ Prosecution Response, ICC-01/12-01/18-1039-Conf, para. 19.

⁴⁴ Impugned Decision, ICC-01/12-01/18-1009-Conf, paras 49-67.

⁴⁵ In particular, Defence Request, ICC-01/12-01/18-1021-Conf, para. 33.

⁴⁶ Impugned Decision, ICC-01/12-01/18-1009-Conf, para. 80.

⁴⁷ Impugned Decision, ICC-01/12-01/18-1009-Conf, paras 119-122.

the Fourth Issue does not arise from the Impugned Decision as the Chamber made no findings on which the Issue is predicated. It is not considered further for the purpose of the present decision.

19. Given the Chamber's conclusions above, it is not necessary to address the remainder of the cumulative criteria of Article 82(1)(d).

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

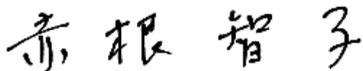
REJECTS the Defence Request.

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 12 October 2020

At The Hague, The Netherlands