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**No. ICC-01/12-01/18
Date: 2 December 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 the ‘Decision on Defence request for disclosure of *ex parte* communication between the Chamber and the VWU’

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

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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 the “Decision on Defence request for disclosure of *ex parte* communication between the Chamber and the VWU”’.

1. On 17 November 2022, the Defence submitted a request seeking disclosure of all *ex parte* communication between the Chamber and the VWU concerning Defence witnesses (the ‘Disclosure Request’).¹
2. On 22 November 2022, the Chamber rejected the Disclosure Request (the ‘Impugned Decision’).²
3. On 28 November 2022, the Defence filed a request seeking leave to appeal the Impugned Decision with respect to five issues (the ‘Request’).³
4. On 29 November 2022, the Office of the Prosecutor submitted its response to the Request, arguing that the Defence failed to identify appealable issues, that the Request erroneously makes arguments on the merits of the appeal, that the Defence’s arguments are speculative and that no suspensive effect can be requested at this stage.⁴
5. 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.⁵ It is recalled, in particular, that the party seeking leave must demonstrate that immediate resolution by the Appeals Chamber may materially advance the proceedings. The applicable law reflects the intention of the drafters of the Statute to defer, in principle, appellate proceedings until the final judgment and limit interlocutory appeals to a few, strictly defined exceptions, where

¹ Email from the Defence to the Chamber and the VWU at 13:22.

² Decision on Defence request for disclosure of *ex parte* communication between the Chamber and the VWU, ICC-01/12-01/18-2413.

³ Defence request for leave to appeal the “Decision on Defence request for disclosure of *ex parte* communication between the Chamber and the VWU”, ICC-01/12-01/18-2427.

⁴ Email from the Office of the Prosecutor at 11:56.

⁵ 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.

deferral would risk that large parts or the entire proceedings may be invalidated.⁶ As such, it is insufficient to allege that the approach adopted in the Impugned Decision was simply erroneous; the party seeking leave must demonstrate that it is necessary to resolve the issues at this point in time, taking into account the stage of the proceedings at present.⁷

6. In the Request, the Defence argues that an immediate appellate resolution may indeed materially advance the proceedings. In support, the Defence submits that '[t]he Pre-Trial Chamber in this case has already confirmed that such Communications will materially advance the proceedings by finding at an earlier stage that the Defence had a legitimate interest in reviewing *ex parte* VWU reports and communications that concerned the Defence' and that the Impugned Decision runs contrary to this approach.
7. The Chamber considers these Defence arguments unmeritorious. Contrary to the submissions advanced in the Request, nothing in the decision cited by the Defence supports its contention that Pre-Trial Chamber I (hereinafter 'PTC I') adopted a different approach with respect to administrative communications between Chambers and the VWU.⁸
8. In the Impugned Decision, the Chamber notably rejected the Defence's submissions that merely administrative communications between the Chamber

⁶ Pre-Trial Chamber II, *Situation in Uganda*, Decision on Prosecutor's Application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under article 58', 19 August 2005, ICC-02/04-01/05-20, para. 19; Pre-Trial Chamber II, *The Prosecutor v. Walter Osapiri Barasa*, Decision on the "Defence request for leave to appeal decision ICC-01/09-01/13-35", 29 October 2015, ICC-01/09-01/13-41, para. 7.

⁷ See Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Babala, Arido and Mangenda Defence Requests to Appeal 'Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7)', 23 May 2016, ICC-01/05-01/13-1898, para. 17.

⁸ The Chamber notes that in the Request, the Defence cites the procedural history section of the PTC I decision and as such it is arduous to fully comprehend the purported relevance of the PTC I decision. See Request, ICC-01/12-01/18-2427, para. 25 *citing* *Décision suite au dépôt par le Greffe de rapports concernant deux incidents allégués survenus lors de la surveillance active des communications téléphoniques de M. Al Hassan*, 7 June 2019, ICC-01/12-01/18-367-Conf-Exp-Red, para. 33. In any event, at paragraph 113 of the PTC I decision, PTC I merely found that the Defence should be notified in advance where specific Registry reports would be disclosed to the Prosecution particularly 'lorsque ceux-ci contiennent des informations personnelles relatives à M. Al Hassan ou son interlocuteur, ou touchant au droit de conduire sa défense'. The Chamber considers that due to the difference in the nature of the information emanating from the Registry as well as the fact that the PTC I decision concerned disclosure to the Prosecution (as opposed to communications with the Chamber), it would be erroneous to characterise the PTC I decision as having pronounced on the same matter as the Impugned Decision.

and the VWU would have any repercussions on the Chamber's determination with respect to Defence witnesses.⁹ For the same reason, the Chamber is unable to discern any compelling basis to conclude that immediate resolution by the Appeals Chamber may materially advance the proceedings. The Chamber observes that the testimony of all *viva voce* Defence witnesses have concluded and that the Defence's presentation of evidence is expected to conclude in a matter of weeks.¹⁰ In light of the current stage of the proceedings, the Chamber is unconvinced that there is a need to certify the Impugned Decision for an interlocutory appeal based on a speculative argument that administrative communications between the Chamber and the VWU would have an impact on the credibility or other determinations with respect to Defence witnesses.¹¹

9. The Defence also raises general arguments that 'the issues for appeal are of general significance to all cases before the Trial Chamber [...] and thus the issues raised in this appeal have the potential to affect the jurisprudence of the Court' or that immediate appellate resolution would 'advance the integrity of the court as a whole'.¹² However, the Chamber considers that, under the statutory framework, leave to appeal cannot be granted based on arguments addressing proceedings before the Court in general or broader effects on the jurisprudence, as opposed to the impact of an immediate resolution on the specific trial proceedings at issue.¹³
10. In light of the above, it is unnecessary to address the other cumulative requirements under Article 82(1)(d) of the Statute and the Request is rejected as

⁹ Impugned Decision, ICC-01/12-01/18-2413, para. 11.

¹⁰ Sixth decision on matters related to the conduct of proceedings: end of Defence case, potential rebuttal/rejoinder evidence, and closure of evidence, 29 August 2022, ICC-01/12-01/18-2308, para. 9; email from the Chamber dated 28 November 2022 at 16:25.

¹¹ *Similarly see* Trial Chamber V(a), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Leave to Appeal the Decision on Disclosure of Information on VWU Assistance, 21 January 2014, ICC-01/09-01/11-1154, paras 27-28, finding that the Defence's argument that non-disclosure of information in the possession of the VWU, to which the Defence has no access, would affect the credibility of a witness is too speculative to conclude that the issues would significantly affect the outcome of the trial or that immediate appellate resolution may materially advance the proceedings.

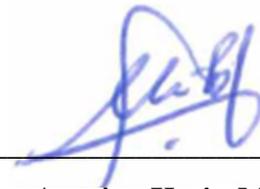
¹² Request, ICC-01/12-01/18-2427, paras 9, 27.

¹³ Pre-Trial Chamber II, *Situation in Uganda*, Decision on Prosecutor's Application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under article 58', 19 August 2005, ICC-02/04-01/05-20, para. 53.

the Defence failed to demonstrate that immediate resolution by the Appeals Chamber of the issues identified may materially advance the proceedings.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY
REJECTS** the 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 this Friday, 2 December 2022

At The Hague, The Netherlands