

**Original: English****No. ICC-01/12-01/18****Date: 26 August 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

Reasons for the Chamber's email decision of 23 August 2022 rejecting the Prosecution's 'Request for Leave to Appeal the "Decision on Defence request pursuant to Rule 75 of the Rules for D-0605"' and urgent request to stay the scheduling order with respect to D-0605'

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.

I. Procedural history

1. On 22 August 2022, the Chamber issued, by Majority, the ‘Decision on Defence request pursuant to Rule 75 of the Rules for D-0605’ in which it found that Rule 75 of the Rules of Procedure and Evidence (the ‘Rules’) applied to D-0605’s testimony (the ‘Impugned Decision’).¹ Judge Kimberly Prost appended a dissenting opinion.²
2. On 23 August 2022, the Prosecution sent via email a request for leave to appeal the Impugned Decision on the following issue (the ‘Request’):³

whether the Majority erred in articulating the scope and purpose of rule 75 on the incrimination of family members, when it held that the rule applies not only in relation to a witness who is a spouse, child or parent of an accused who is charged with a crime within the meaning of article 61 of the Statute, but also extends to a witness who is a spouse, child or parent of persons for whom there are grounds to believe that they have committed a crime within the Court’s jurisdiction.

3. Later on that same day, which was the eve of the commencement of D-0605’s testimony, the Chamber rendered an email decision (the ‘Decision of 23 August 2022’) rejecting the Request and indicating that: (i) reasons would be communicated separately in due course; and (ii) the witness’s testimony would commence at 9:30 on 24 August 2022, as scheduled.

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.⁴ In particular, the Chamber recalls that the following criteria

¹ ICC-01/12-01/18-2299-Conf.

² ICC-01/12-01/18-2299-Conf-Anx.

³ Request for Leave to Appeal the “Decision on Defence request pursuant to Rule 75 of the Rules for D-0605” and urgent request to stay the scheduling order with respect to D-0605, filed and notified on 24 August 2022, ICC-01/12-01/18-2300-Conf.

⁴ E.g. 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.

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. The Chamber agrees with the Prosecution that the issue at stake – the interpretation and scope of Rule 75 of the Rules – is more than a simple disagreement with the Majority’s conclusion. Indeed, the Chamber considers that the issue identified in the Request arises from the Impugned Decision, was essential to the Majority’s determination with respect to D-0605’s testimony, and accordingly amounts to an ‘appealable issue’ under Article 82(1)(d) of the Statute.
6. While the Chamber finds that the legal issue identified in the Request is a question of interest, and one for which an Appeal Chamber’s determination could be of assistance to guide future jurisprudence at trial, the Chamber does not consider that it meets the ultimate criteria under Article 82(1)(d) of the Statute. In reaching this conclusion, the Chamber has had regard to the present stage of the proceedings, *i.e.* approaching the closure of the presentation of evidence, as well as the expected content and scope of D-0605’s testimony, notably how it relates to the charges, as well as the extent to which the Impugned Decision may impact (the Chamber’s assessment of) his evidence.
7. The Chamber further notes that the risks raised by the Prosecution that the Majority’s interpretation of Rule 75 would ‘deprive the Court of potentially highly relevant evidence’⁵ relates to trials at the Court in general. Indeed, this argument concerns potential implication of the precedent created by the Impugned Decision to other cases, notably the testimony of witnesses before other chambers. The Chamber is of the view that this argument is of no relevance to the Article 82(1)(d) assessment, which requires a determination with respect to the effect on the outcome or the material advancement of the present proceedings.

⁵ Request, CC-01/12-01/18-2300-Conf, para. 12.

8. Recalling that the Chamber is yet to determine what weight, if any, to ascribe to D-0605's evidence, and that the Prosecution retains the possibility to raise related issues as part of an appeal pursuant to Article 81 of the Statute at the end of the trial, the Chamber is unpersuaded that resolution of the identified issue by the Appeals Chamber at this stage may materially advance the proceedings.
9. It is for the reasons set out above that the Chamber unanimously rejected the Request in its Decision of 23 August 2022 and proceeded to hear the testimony of D-0605 the next day.⁶ In light of the time constraints, and considering the outcome, the Chamber found it appropriate to exceptionally rule on the Request without first receiving responses.

THE CHAMBER HEREBY

PUTS ON THE RECORD the above reasons for its Decision of 23 August 2022.

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, 26 August 2022

At The Hague, The Netherlands

⁶ See Transcript of hearing on 24 August 2022, ICC-01/12-01/18-T-192-Conf-ENG, where the Presiding Judge notably informed D-0605 of his right under Rule 75 of the Rules.