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TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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 "Prosecution response to "Defence request for leave to appeal the 'Second decision on requests related to the submission into evidence of Mr Al Hassan's statements'", 18 June 2021, ICC-01/12-01/18-1516-Conf

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I. Introduction

1. The request filed by the Defence for Mr Al Hassan (“Request”)¹ for leave to appeal Trial Chamber X’s (“Chamber”) “Second decision on requests related to the submission into evidence of Mr Al Hassan’s statements” (“Decision”)² should be dismissed.
2. In its Request, the Defence identifies two issues (“Issues”) which allegedly arise from the Decision. However, neither of these Issues constitute an appealable “issue” arising from the Decision within article 82(1)(d) of the Statute. This is because the Defence misconstrues the Decision and the Issues are predicated on incorrect assumptions as to what the Chamber found. The Request should therefore be dismissed.
3. The Request should in any event be denied as the Issues fail to meet the remaining cumulative criteria under article 82(1)(d) of the Statute. The proposed Issues would not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, nor would an immediate resolution by the Appeals Chamber materially advance the proceedings.

II. Confidentiality

4. Pursuant to regulation 23bis(2) of the Regulations of the Court (“Regulations”), this response is filed confidentially because it responds to a Request and refers to material of the same classification. A public redacted version will be filed in due course.

III. Submissions

A. The Issues do not constitute appealable issues within the terms of article 82(1)(d)

(i) The First Issue is not an appealable issue arising from the Decision

5. The Defence enunciates the First Issue as: “Whether, when collecting information from a vulnerable detained suspect, the effective application of the protective rights under Article 55 requires that the suspect be put on notice that information or material collected outside the confines of suspect interviews, or where the nature of the interview or investigative activity

¹ ICC-01/12-01/18-1513-Conf.

² ICC-01/12-01/18-1508.

has changed since the warning was provided, can be used for the purpose of incrimination”.³ However this is not an appealable issue arising from the Decision within article 82(1)(d) of the Statute.

6. As a preliminary matter, the First Issue appears confined to item MLI-OTP-0056-0421 (“Marked Image”), a [REDACTED] image [REDACTED] signed by Mr Al Hassan during an updated Biographical and Security Questionnaire (“BSQ”) conducted with him by the Prosecution on 8 March 2018 during his ICC Interviews.⁴ The Marked Image is the only item of the relevant underlying material addressed in the Chamber’s Decision, which the Defence expressly identifies as being subject to the First Issue.⁵ In the Decision, the Chamber assessed Defence objections to relevant underlying material by reference to categories of material.⁶ The Marked Image challenged by the Defence belonged to the category of Related Material.⁷

7. The First Issue as framed by the Defence misconstrues the Decision and thus does not arise from it. In so doing, the Defence also expresses mere disagreement with the Chamber’s findings in the Decision.

8. First, the First Issue is predicated on the assumption that the Chamber accepted in its Decision that the privilege against self-incrimination applies to the Marked Image.⁸ However, this is incorrect. As regards the Related Material, the Chamber found that “[a]t the outset, the Chamber is *not* convinced that the right against self-incrimination applies to Mr Al Hassan’s handwriting samples in this instance, noting the fact that the objected items were used by expert P-0620 for signature comparison, rather than for purposes relating to their substantive content.”⁹ The Defence merely disagrees with the Chamber’s finding on this point, repeating

³ Request, para. 2(i), p. 4.

⁴ MLI-OTP-0056-0421 (Translation MLI-OTP-0077-0479). *See also* MLI-OTP-0069-1806 (transcript of BSQ update dated 8 March 2018), p. 1807-1812.

⁵ *See* Request, para. 8, referring to MLI-OTP-0056-0421 and to Decision, para. 26, 28.

⁶ *See* Decision, para. 13.

⁷ *See* Decision, para. 9 (setting out the objected material underlying the P-0620 Report), and fn. 26 (specifically setting out the objected underlying material from the Related Material, including the Marked Image MLI-OTP-0056-0421, and appearing in part of section 1 and in section 2 of ICC-01/12-01/18-1218-Conf-Exp-AnxB). *See also* Decision, para. 3, categorising materials signed or produced by Mr Al Hassan during his ICC Interviews as the “Related Material”, by reference to ICC-01/12-01/18-1218-Conf-Exp-AnxB. *See further* Decision, para. 21.

⁸ *See* Request, para. 2(i) (framing the Issue in part as “the effective application of the protective rights under Article 55”). *See also* para.15.

⁹ Decision, para. 26 (emphasis added).

its previous submissions including its reliance on an ICTY Decision.¹⁰

9. Second, the First Issue is predicated on the incorrect assumption that the Marked Image was collected “from a vulnerable detained suspect”.¹¹ However, the Defence fails to identify the Chamber’s finding in the Decision that Mr Al Hassan was “a vulnerable detained suspect”. In the Decision, the Chamber noted that “all Defence objections made on the basis of allegations of torture and CIDT are moot as a result of the Chamber’s findings in the Decision on Mr Al Hassan’s Statements.”¹² The Chamber made no finding in the Decision that Mr Al Hassan was a “vulnerable detained suspect”. Given that the First Issue is predicated on this incorrect assumption, it does not arise from the Decision.

10. Third, the First Issue as framed by the Defence incorrectly assumes that Mr Al Hassan was not “put on notice” that the Marked Image could be used for an incriminating purpose.¹³ When it found that there was no violation of the Statute or internationally recognised human rights under Article 69(7) of the Statute by the collection of the Related Material,¹⁴ the Chamber looked at the ICC Interviews as a whole.¹⁵ By reference to its previous findings in the Decision on Mr Al Hassan’s Statements, the Chamber took into account that: “(i) questions of procedure and rights in the context of Mr Al Hassan’s ICC interviews were clearly and thoroughly explained by the Prosecution, and Mr Al Hassan confirmed that he understood these and decided to proceed with the interview; (ii) the Prosecution duly informed Mr Al Hassan that the interview was conducted in particular pursuant to Article 55(2) of the Statute, considering that there were grounds to believe that he had committed crimes under the Statute; and (iii) the Prosecution systematically informed Mr Al Hassan of his right to silence and his privilege against self-incrimination, giving not only general but also specific warnings.”¹⁶ The Chamber also considered that Mr Al Hassan “*was* given specific warnings about the privilege against self-incrimination in relation to four of the

¹⁰ See Request, para. 9. Compare with ICC-01/12-01/18-1249-Conf-AnxC, pp. 12-25 (containing Defence email dated 15 October 2020 at 15:39 regarding Defence objections to the Prosecution’s submissions of items associated with Witness P-0620), in particular p. 16 (citing in connection with documents written/ signed by Mr Al Hassan during Prosecution interviews and used in P-0620’s report, *Prosecutor v Delalic et al.*, Decision on the Prosecution’s oral requests for the admission of exhibit 155 into evidence and for an order to compel the Accused, Zdravko Mucic, to provide a handwriting sample, 19 January 1998).

¹¹ Request, para. 2(i). See also para.15.

¹² Decision, para. 12, referring to Decision on Mr Al Hassan’s Statements, ICC-01/12-01/18-1475-Red. See also Decision, para. 6, fn. 19.

¹³ Request, para. 2(i). See also para.15.

¹⁴ Decision, para. 26.

¹⁵ See Decision, para. 26. See also para. 20 (in the context of the Statement Recordings).

¹⁶ Decision, para. 26, citing Decision on Mr Al Hassan’s Statements, ICC-01/12-01/18-1475-Red, para. 55, 57.

objected handwritten samples [...] Mr Al Hassan indicated that he had no problem with this exercise.”¹⁷ Premised on an incorrect reading of the Decision, the First Issue does not arise from it. The Defence simply disagrees with the Chamber’s assessment and repeats its previous submissions.¹⁸

11. Fourth, the First Issue as framed by the Defence also contends that the Marked Image was “collected outside the confines of suspect interviews”.¹⁹ This appears to refer to the Marked Image being labelled and signed by Mr Al Hassan during an updated BSQ.²⁰ However the way the First Issue is framed misconstrues the Decision. The Chamber looked at the ICC Interviews²¹ as a whole, and in doing so, recalled its earlier findings in the Decision on Mr Al Hassan’s Statements regarding the procedural safeguards in place for the ICC interviews of Mr Al Hassan.²² Contrary to the Defence’s suggestion,²³ BSQs were not excluded from the Chamber’s findings. To the contrary, in the Decision on Mr Al Hassan’s Statements, the Chamber clarified that the Chamber’s reference to “interviews” in that decision “also encompasses the sessions devoted to the biographical and security questionnaires.”²⁴ The Defence’s related argument that the Chamber “did not address the fact that Mr Al Hassan was *not* warned about the privilege against self-incrimination in respect of

¹⁷ Decision, para. 26 (emphasis in the original), citing 8 March 2018 MLI-OTP-0062-1268 from 1271 to 1272.

¹⁸ See Request, para. 7. Compare with ICC-01/12-01/18-1249-Conf-AnxC, p. 12-25 (containing Defence email dated 15 October 2020 at 15:39 regarding Defence objections to the Prosecution’s submissions of items associated with Witness P-0620), in particular p. 13 (referring to “Prosecution’s failures to explain the potentially incriminating nature of the handwriting samples relied upon in the Report to Mr. Al Hassan (and therefore its implications for his right to silence and privilege against self-incrimination”)), p. 18 (“[t]his is particularly true in respect of the real evidence obtained, as (with the exception of Items 107-110), the Prosecution did not explain the purpose for which such evidence was being extracted from him (i.e. the Prosecution did not inform Mr. Al Hassan that his signature on the seals could be used for an incriminating purpose to identify other documents allegedly authored or signed by him) or the Prosecution explicitly informed Mr. Al Hassan that the evidence was obtained for another purpose (i.e. in respect of Item 106, in respect of which Mr. Al Hassan was informed that the evidence was obtained for the purpose of the security questionnaire)). The Defence also relies on previous submissions to speculate—but does not show—that the Chamber “neglected to address a number of concerns regarding self-incrimination raised by the Defence” (Request, para. “7, citing ICC-01/12-01/18-1249-Conf-AnxC, p. 12-25 ((containing Defence email dated 15 October 2020 at 15:39 regarding Defence objections to the Prosecution’s submissions of items associated with Witness P-0620), and repeating its reliance there on certain ECtHR cases).

¹⁹ Request, para. 2(i). See also para.15.

²⁰ See Request, para. 8.

²¹ See Decision, para. 1 (“Some of the objections related to P-0620’s and P-0655’s reliance on evidence provided by Mr Al Hassan during his interviews with the ICC Prosecution (the ‘ICC Interviews’).”)

²² See Decision, para. 26, citing Decision on Mr Al Hassan’s Statements, ICC-01/12-01/18-1475-Red, para. 55, 57.

²³ See Request, para. 10 (arguing that “[t]he Chamber simply did not address whether it is consistent with Article 55 to allow material to be elicited in the absence of adequate or *any* warning against self-incrimination in the process of BSQs”). See also, para. 6, fn. 4.

²⁴ Decision on Mr Al Hassan’s Statements, ICC-01/12-01/18-1475-Red, fn. 5.

[the Marked Image]”,²⁵ once again merely disagrees with the Chamber’s approach of looking at the ICC Interviews as a whole,²⁶ repeats previous submissions,²⁷ and does not support that there is an appealable issue.

12. The Defence relies on the Single Judge’s decision denying its request for disclosure of BSQs (“Disclosure Decision”)²⁸ in support of its contentions that the principle against self-incrimination applies to Mr Al Hassan’s handwriting samples in this instance,²⁹ and that there is a heightened need for a self-incrimination warning in BSQs.³⁰ However this reliance is inapposite. Contrary to the Defence’s argument, the Disclosure Decision does not show that the privilege against self-incrimination applies to the Marked Image (used for signature comparison), or that there was a need to issue an additional and separate warning against self-incrimination in relation to it. Rather, the Disclosure Decision dealt with disclosure of BSQs and in particular the form of disclosure of rule 77 information contained therein.³¹ In the case of Mr Al Hassan’s BSQs, these have been disclosed in their original form in any event.

13. Fifth, the First Issue as framed by the Defence also refers to the Marked Image being collected “where the nature of the interview or investigative activity has changed since the warning was provided.”³² In the Request, the Defence does not specify what circumstances it alleges amounted to a change in the nature of the interview or investigative activity. Insofar as it may be referring to the Marked Image being collected during an updated BSQ, the Defence arguments have been addressed above. The Defence appears to merely disagree with

²⁵ Request, para. 8 (emphasis in the original).

²⁶ Decision, para. 26.

²⁷ See ICC-01/12-01/18-1249-Conf-AnxC, pp.12-25 (containing Defence email dated 15 October 2020 at 15:39 regarding Defence objections to the Prosecution’s submissions of items associated with Witness P-0620), in particular p. 13 (referring to “Prosecution’s failures to explain the potentially incriminating nature of the handwriting samples relied upon in the Report to Mr. Al Hassan (and therefore its implications for his right to silence and privilege against self-incrimination”)), p. 18 (“[t]his is particularly true in respect of the real evidence obtained, as [...] the Prosecution explicitly informed Mr. Al Hassan that the evidence was obtained for another purpose (i.e. in respect of Item 106, in respect of which Mr. Al Hassan was informed that the evidence was obtained for the purpose of the security questionnaire)), p. 21 (“Item 106 is a [REDACTED] image allegedly [REDACTED] signed by Mr. Al Hassan in the course of a biographical and security questionnaire (BSQ) session. The interviewers explicitly state at the beginning of the session that it was a security session (MLI-OTP-0069-1806 at 1807, lines 6-8) [REDACTED]”).

²⁸ ICC-01/12-01/18-777-Conf.

²⁹ See Request, para. 13, citing ICC-01/12-01/18-777-Conf, para. 15-16, and Decision, para. 26 (finding that “the Chamber is not convinced that the right against self-incrimination applies to Mr Al Hassan’s handwriting samples in this instance, noting the fact that the objected items were used by expert P-0620 for signature comparison, rather than for purposes relating to their substantive content”).

³⁰ See Request, para. 12, 14.

³¹ See ICC-01/12-01/18-777-Conf, para. 17, 24-25, 29-30, 33.

³² Request, para. 2(i). See also para.15.

the manner in which the Chamber assessed that there was no violation of the Statute of internationally recognised human rights under Article 69(7) of the Statute with respect to the collection of the Marked Image.

14. Given that the Defence misconstrues the Decision, the First Issue is predicated on incorrect assumptions as to what the Chamber found. It therefore does not arise from the Decision and should be dismissed.

(ii) The Second Issue is not an appealable issue arising from the Decision

15. “Whether the Chamber erred in finding that taking visual, audio, and written samples without the Defendant’s consent does not trigger self-incrimination and privacy protections”³³ is not an appealable issue arising from the Decision within article 82(1)(d) of the Statute.

16. To argue that the Second Issue arises from the Decision, the Defence alleges that “the Chamber did not consider that consent was relevant to the protection of the privilege against self-incrimination or infringements of the right to privacy” for the categories of Court Recordings, Statement Recordings and for the appointment of Counsel form.³⁴ However, the Defence’s submissions misrepresent the Decision, and the Second Issue therefore does not arise from it.

17. In its findings on the Court Recordings, the Chamber noted the Parties’ arguments regarding Mr Al Hassan’s right to privacy and his privilege against self-incrimination.³⁵ It recalled that it had already rejected similar arguments by the Defence in an earlier decision and repeated those findings.³⁶ It then held that the use of Mr Al Hassan’s voice available from public Court Recordings does not infringe on his rights, particularly in relation to self-incrimination.³⁷ Contrary to the Defence’s argument, the Chamber did not fail to consider the relevance of Mr Al Hassan’s right to privacy and his privilege against self-incrimination. In particular, the Chamber did not conclude that lack of consent by Mr Al Hassan to the use of the Court Recordings for the purpose of incrimination was irrelevant to the submission of material based upon them.³⁸ Instead, the Chamber assessed the relevance of Mr Al Hassan’s

³³ Request, para. 2 (ii), p. 8.

³⁴ Request, para. 16-17; *see also* para. 25-32.

³⁵ Decision, para. 14-15.

³⁶ Decision, para. 16-17.

³⁷ Decision, para. 16-17.

³⁸ *Contra*, Request, para. 25.

rights, and concluded that they were not infringed in the case at hand. As a result, it found that article 69(7) was not violated and dismissed the Defence's objections on the basis of the Court Recordings.³⁹ The Chamber applied the same approach to the administrative form to appoint Counsel.⁴⁰ It noted that this form is a public document and dismissed the Defence's objections.⁴¹

18. Similarly, in its findings on the Statement Recordings, the Chamber noted the Parties' arguments regarding Mr Al Hassan's right to privacy and his privilege against self-incrimination.⁴² The Chamber rejected the Defence's arguments, finding that "Mr Al Hassan consented to the recording of the interview in which he freely participated".⁴³ Accordingly, the Chamber did not fail to consider the relevance of Mr Al Hassan's right to privacy and his privilege against self-incrimination. Instead, it concluded that the use of the consensual recordings to instruct a Prosecution expert to prepare a report in this proceedings does not violate Mr Al Hassan's right to privacy and his privilege against self-incrimination. It therefore found article 69(7) was not violated and dismissed the Defence's objections based on the Statement Recordings.⁴⁴

19. The bulk of the Defence's arguments under its Second Issue merely reiterate its prior submissions that "the right to privacy and the privilege against self-incrimination should prevent the Prosecution's use of visual, audio or written recordings".⁴⁵ The Defence also expresses its disagreement with the Chamber's conclusions referred to above.⁴⁶ However, these arguments do not demonstrate that the Second Issue, as framed by the Defence, arises from the Decision.

20. Given that the Defence misconstrues the Decision, the Second Issue is predicated on incorrect assumptions as to what the Chamber found. It therefore does not arise from the Decision and should be dismissed.

³⁹ Decision, para. 17.

⁴⁰ Decision, para. 17. *See also* MLI-OTP-0061-0950 (ICC-01/12-01/18-19-AnxI).

⁴¹ Decision, para. 17; *contra*, Request, paras. 17, 30-32.

⁴² Decision, para. 18-19.

⁴³ Decision, para. 20.

⁴⁴ Decision, para. 20.

⁴⁵ *See* Request, paras. 16-32. *Compare with* Email from the Defence, 19 October 2020, at 13:50; Email from the Defence, 21 October 2020, at 15:03; ICC-01/12-01/18-1249-Conf-AnxC, pp.12-25 (containing Defence email dated 15 October 2020 at 15:39), p. 22..

⁴⁶ Request, paras. 17-32.

B. The Issues do not meet the remaining criteria for leave to appeal under article 82(1)(d)

21. In any event, if the Chamber decides not to dismiss the Request on the basis that it does not demonstrate appealable issues arising from the Decision, the Request should nonetheless be dismissed as the Issues also fail to meet the remaining cumulative criteria under article 82(1)(d) of the Statute.

(i) The Issues would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

22. The Defence maintains that the First Issue affects the fair and expeditious conduct of the proceedings,⁴⁷ but fails to show that it does.

23. The Defence mischaracterises the Disclosure Decision when it argues that, “the Single Judge denied the Defence access to exculpatory information contained within BSQs”.⁴⁸ To the contrary, the Disclosure Decision was premised on such information being extracted and disclosed. Thus, in reaching her decision that “the withholding of the original items [the BSQs themselves] is an appropriate and proportional measure”, the Single Judge especially took into account that “the material information they contain is being extracted and disclosed to the Defence by way of investigation notes.”⁴⁹ The Defence’s reliance on the Disclosure Decision in support of its First Issue is inapposite. The claimed inconsistency in rulings does not arise.⁵⁰ As a result the Defence also fails to demonstrate that the First Issue would significantly affect the fair conduct of the proceedings.

24. Also, the First Issue is confined to the Marked Image. The Marked Image is just one item among the objected material underlying the P-0620 Report belonging to the category of Related Material. The Marked Image’s exclusion would not affect the submission of the rest of the objected material underlying the P-0620 Report from this category.

25. The Defence argues that the First Issue involves the privilege against self-incrimination and that “[e]ven a minor deviation” of such a core right “significantly impacts the fairness of

⁴⁷ See Request, p. 13.

⁴⁸ Request, para. 34, citing ICC-01/12-01/18-777-Conf.

⁴⁹ Disclosure Decision, ICC-01/12-01/18-777-Conf, para. 24. See also para. 25, 29.

⁵⁰ Contra Request, para. 34, 36.

the proceedings”.⁵¹ The Defence however overlooks that in respect of the Related Material—including the Marked Image—the Chamber found that it was “similarly unconvinced that the second step of the Article 69(7) test would be satisfied.”⁵² Thus, even if the Chamber had found a violation, this would not have led to exclusion of the Related Material. This further demonstrates that the First Issue would not significantly affect the fair conduct of the proceedings.

26. In relation to both Issues, the Defence generally argues that they raise questions of notice and informed consent and other important considerations about the Court’s legal structure, allegedly affecting the exercise of Mr Al Hassan’s fundamental statutory rights.⁵³ However, contrary to the Court’s practice on the requirements under article 82(1)(d), the Defence does not substantiate its submissions⁵⁴ by articulating how these general questions are affected by the Decision.⁵⁵ The Defence cannot speculate in the abstract that the Decision causes prejudice in order to argue that the fairness of the proceedings is affected.⁵⁶ It does not suffice for an issue to have merely a hypothetical impact on the fairness and expeditiousness of proceedings.⁵⁷

27. In arguing that the Issues affect the expeditious conduct of the proceedings, the Defence submits that if the submitted material remains in the case, this will slow the proceedings down as it will generate unnecessary litigation and the Defence will need to call multiple experts during its case.⁵⁸ However, this argument is speculative. Anticipating abstract legal or factual challenges to the submitted material cannot suffice to meet the criteria for leave to appeal under article 82(1)(d). Otherwise, this provision would not serve its function of limiting interlocutory appeals to Issues that truly require the Appeals Chamber’s intervention.

28. Accordingly, the Issues would not significantly affect the fair and expeditious conduct

⁵¹ Request, para. 35.

⁵² Decision para. 27. *See also* para. 8 (recalling the applicable law on Article 69(7) which envisages two consecutive inquiries).

⁵³ Request, para. 36.

⁵⁴ ICC-01/09-01/11-1154, para. 26. ICC-01/04-01/06-2463, para. 31.

⁵⁵ ICC-01/05-01/08-2925, para. 34.

⁵⁶ ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 para. 33 and 39; ICC-01/09-02/11-88, para. 25; *see also* para. 23-27; ICC-01/04-01/06-2109, para. 22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, para. 28-29; ICC-01/09-01/11-301, para. 30.

⁵⁷ ICC-01/04-01/07-1958, para. 20; ICC-02/04-01/05-367, para. 21-22.

⁵⁸ Request, para. 37.

of the proceedings and the Request should therefore be dismissed.⁵⁹

(ii) *An immediate resolution of the Issues would not materially advance the proceedings*

29. The Defence does not make any concrete argument as to why the Issues require the immediate intervention by the Appeals Chamber.⁶⁰ As argued above, abstract or speculative arguments are insufficient for a party to meet its burden of demonstrating that the criteria for leave to appeal are met.⁶¹

30. In any event, the Request is premature as the Defence has additional avenues to pursue before resorting to the Appeals Chamber in an interlocutory appeal. The Chamber expressly held that it is yet to assess the relevance and weight, if any, to give to the submitted material, as part of its holistic assessment of all evidence when deciding on the guilt or innocence of the accused.⁶² Thus, resolution of the Issues by the Appeals Chamber at this stage will not “move forward” the proceedings.⁶³ Instead, it could cause unnecessary delay to the ongoing trial if the Appeals Chamber were to grant a Defence request for suspensive effect of an appeal based on the Issues.

31. In addition, immediate resolution of the Issues by the Appeals Chamber is not required. If and when the Chamber bases its conclusions on the submitted material as part of its final decision under article 74, the Defence retains the possibility to raise the Issues as part of an appeal pursuant to article 81 of the Statute. Relevantly, when rejecting leave to appeal on issues related to the application of article 69(7), Trial Chamber VII in *Bemba et al.* held as follows:⁶⁴

The Chamber is not of the opinion that their immediate resolution by the Appeals Chamber may materially advance the proceedings. As held elsewhere: ‘To form such a view, the Chamber needs to be persuaded, inter alia, that there is advantage in resolving the [i]ssues at this stage, bearing in mind that issues of this kind may also be raised in an appeal against the final decision under Article 74 of the Statute’. No such advantage exists here.

⁵⁹ The Defence does not argue that the Issues affect the outcome of the trial.

⁶⁰ Request, para. 38.

⁶¹ See ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 para. 33 and 39; ICC-01/09-02/11-88, para. 25; ICC-01/09-01/11-1154, para 28.

⁶² See Decision, para. 12.

⁶³ ICC-01/04-168, para. 14-15, 18.

⁶⁴ ICC-01/05-01/13-1898, para. 17.

IV. Conclusion

32. For the reasons set out above, the Prosecution requests that the Chamber deny the Request.



Karim A. A. Khan QC, Prosecutor

Dated this 18th of June 2021

At The Hague, The Netherlands