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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
‘Defence request for leave to appeal the “Second decision on requests
related to the submission into evidence of Mr Al Hassan’s statements”’
(ICC-01/12-01/18-1513-Conf)**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. On 08 June 2021, Trial Chamber X ('the Chamber') issued its 'Second decision on requests related to the submission into evidence of Mr Al Hassan's statements' ('Decision'),¹ rejecting the Defence's requests under Article 69(7) of the Statute in relation to P-0620, P-0653 and P-0655 and some of the Related Material, authorising the submission into evidence of the Related Material and Other Material, and rejecting the Related Evidentiary Requests without prejudice.
2. The Defence hereby seeks leave to appeal² the Decision in relation to the following issues ('the Two Issues'):
 - (i) The First Issue: 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 has changed since the warning was provided, can be used for the purpose of incrimination.
 - (ii) The Second Issue: 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.

II. Confidentiality

3. Pursuant to Regulation 23(*bis*)(2) of the Regulations of the Court, the Defence files this Request confidentially because it refers to material of the same classification. A public redacted version will be filed in due course.

¹ ICC-01/12-01/18-1508.

² Article 82(1)(d) of the Statute.

III. Submissions

The Two Issues arise from the Decision

4. The Appeals Chamber has held that ‘[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.’³

The First Issue: 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 has changed since the warning was provided, can be used for the purpose of incrimination

5. The issue arises squarely from the Decision and its resolution is essential for the determination of the matters arising in the judicial causes under consideration.
6. The Decision cites the ‘Decision on Mr Al Hassan’s Statements’ to support the proposition that ‘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.’⁴ Both examples cited make explicit warnings about self-incrimination in the context of suspect interviews. Relying only on MLI-OTP-0062-1268 from 1271-1272, the Chamber ‘further observes that, as noted by the Defence, Mr Al Hassan was given specific warnings about the privilege against self-incrimination in relation to four of the objected handwriting samples.’⁵ While this example never uses the word ‘incrimination’ the interviewer does ask Mr Al Hassan whether he accepts to provide a writing sample for authentication by an expert and asks whether he wants to speak with his lawyer. While merely implicit, and thus arguably inadequate, it is clear that the interviewer/s believed that a warning was required and that the suspect was entitled to legal advice. These examples emphasise both the importance of clear and meaningful warnings in order to effectuate the

³ [ICC-01/04-168](#), para. 9.

⁴ Decision, para. 26, referring to [ICC-01/12-01/18-1475-Red](#), paras 55 and 57, which in turn refers to MLI-OTP-0051-1067 at 1078 and MLI-OTP-0051-0967 at 0986-0987.

⁵ Decision, para. 26.

protective imperatives of Article 55, and, given their repetition, that a warning cannot be and is not considered to persist eternally.

7. The Chamber neglected to address a number of concerns regarding self-incrimination raised by the Defence.⁶ International human rights courts emphasise that authorities must notify, caution, or warn individuals about the incriminating nature of statements made during questioning.⁷ General voluntariness to participate in a standard investigative interview does not constitute voluntariness to be subject all investigative techniques: consent to be interviewed does not extrapolate to informed consent to be subject to undisclosed investigative actions. As found by the European Court of Human Rights, the freedom of choice to speak or to remain silent will be ‘effectively undermined’ in a case where the authorities use subterfuge to elicit evidence of an incriminating nature and where such evidence is adduced as evidence at trial.⁸
8. The Chamber permitted the submission of MLI-OTP-0056-0421,⁹ a [REDACTED] image allegedly [REDACTED] signed by Mr Al Hassan in the course of a Biographic Security Questionnaire (‘BSQ’) session. The interviewers explicitly stated at the beginning of the session that it was a security session.¹⁰ [REDACTED].¹¹ The Chamber did not address the fact that Mr Al Hassan was *not* warned about the privilege against self-incrimination in respect of MLI-OTP-0056-0421, failing properly to determine the impact of this omission on the admissibility of the material.
9. In the Decision, the Chamber stated that it ‘is not convinced that the right against self-incrimination applied 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.’¹² The ICTY has held that ‘where the material factor absent in the incriminating elements is the handwriting sample of the accused, the Trial Chamber cannot compel the accused to supply the

⁶ ICC-01/12-01/18-1249-Conf-AnxC, pp. 12-25.

⁷ See ECtHR: [Brusco v. France](#), para. 54; [Navone and Others v. Monaco](#), para. 74; [Stojkovic v. France and Belgium](#), para. 54; [Ibrahims and Others v. United Kingdom](#), para. 272.

⁸ ECtHR: [Allan v. United Kingdom](#), para. 50.

⁹ Decision, paras 26 and 28.

¹⁰ MLI-OTP-0069-1806 at 1807, lines 6-8.

¹¹ [REDACTED].

¹² Decision, para. 26.

missing element’ because this would ‘infringe the provisions of [the ICTY Statute] which protects the accused from self-incrimination.’¹³

10. The Decision relies upon the fact that (i) the Prosecution gave general information to Mr Al Hassan about his rights during interviews, (ii) in some circumstances the Prosecution warned Mr Al Hassan about self-incrimination, and (iii) ‘Mr Al Hassan was given specific warnings about the privilege against self-incrimination in relation to four of the objected handwriting samples’ (emphasis in original).¹⁴ The Chamber simply did not address whether it is consistent with Article 55 to allow material elicited in the absence of adequate or any warning against self-incrimination in the process of BSQs.
11. Article 55 is clear. It mandates critical protections for vulnerable individuals under the Court’s physical and legal jurisdiction. It is not for the Chamber to carve out an exception where clear statutory rights are in play.
12. If BSQ sessions fall under Article 55, then the obligation to warn against self-incrimination is heightened by the extreme vulnerability of the detained suspect, who is providing information in an attempt to ensure [REDACTED]. In this regard, the impact of Mr Al Hassan’s arbitrary detention was also relevant to whether the investigative actions were acceptable. Article 69(4) requires the Chamber to consider the prejudice that material gathered may cause to the fairness of a trial. The Chamber did not do so.
13. In deciding that there is no barrier to submission because the information was ‘used by expert P-0620 for signature comparison, rather than for purposes relating to their substantive content,’ the Chamber directly contradicts the approach of the Single Judge in refusing the Defence access to material emanating from the BSQs:¹⁵

¹³ ICTY, [Prosecutor v Delalic and Delic](#), ‘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, para. 47.

¹⁴ *Ibid.*

¹⁵ ICC-01/12-01/18-777-Conf, paras 15-16.

The Single Judge further notes that the Prosecution informs that the questioning for the preparation of the BSQs is conducted before the main interviews ‘with the view to eliciting personal and security-related information’. It submits that, accordingly, BSQs questioning is not intended to elicit information about the case, but instead information required to assess any security risks [REDACTED]. This questioning is mainly conducted to allow the Prosecution to comply with its protection obligations under Article 68(1) of the Statute.

The Single Judge therefore observes that, in principle, BSQs bear no connection to the events relevant to the charges and are of a purely personal and operational nature. They are the result of questioning on security-related matters and contain [REDACTED] that is not *per se* material or otherwise disclosable to the Defence. The Single Judge agrees with the Prosecution submission that they are of an exceptional character and, accordingly, that they require particular attention from the Chamber as regards its protection obligations under Article 68(1) of the Statute.

14. The Single Judge’s Decision demonstrates that BSQ sessions are distinguished in that material emanating therefrom does not constitute evidence. This is supported by the Appeals Chamber finding in Ntaganda that information provided by witnesses relating to matters other than knowledge of the case, including security concerns or purely logistical matters, do not fall within Rule 76(3) and carry an expectation of confidentiality as protected by Rules 81 and 82.¹⁶ This emphasises that the nature of BSQ sessions invoke a heightened need to put the accused on notice that an expectation of confidentiality does not apply.

15. The First Issue, 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 has changed since the warning was provided, can be used for the purpose of incrimination, therefore arises from the Decision and necessitates appellate consideration.

¹⁶ Ntaganda, [ICC-01/04-02/06-1330 OA3](#), paras 16 and 20.

The Second Issue: 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

16. The Trial Chamber discusses two differing types of recordings in the Decision: (i) court recordings, and (ii) statement recordings. In doing so, 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 either category. The Decision thus raises an issue as to whether rights to privacy and the privilege against self-incrimination should prevent the Prosecution's use of visual, audio or written recordings for the purposes of incrimination when taken in circumstances in which an accused has no choice and does not provide informed consent. In other words, the Decision raises an issue as to whether the legal framework of the court can automatically compel a suspect or an accused to provide evidence that is to be used against them while respecting Article 55.
17. The Decision also failed to point to any evidence indicating that Mr Al Hassan was informed that signing a necessary administrative form to appoint Counsel to represent him could be used against him by the Prosecution. Mr Al Hassan was required to submit the appointment of Counsel form to the ICC Registry in order to exercise a fundamental right enshrined in the Statute.¹⁷ Mr Al Hassan could not have reasonably anticipated that signing a private and crucial administrative document could lead to the public dissemination of his signature, nor its use in an attempt to inculcate him.

Self-incrimination

18. The Decision presupposes that an accused could or should reasonably waive their right to be present for the entirety of their trial. The corollary of this is a presupposition that they remain silent in order to preclude recording of their voice. Such an interpretation conflicts with the jurisprudence of the Appeals Chamber in *Ruto*, which makes clear

¹⁷ Article 67(1)(d).

that there is a duty on the Accused to be present at their trial.¹⁸ In other words, Mr Al Hassan did not have a right *not* to participate and be filmed.

19. Following the Chamber's reasoning would unfairly pressure individuals by placing them in a coercive double bind. In this instance neither Mr Al Hassan nor his Defence were informed, nor able to anticipate, that such material could be taken and used in this way.

Privacy

20. Contrary to its enduring obligations under Article 21(3), the Trial Chamber did not engage with any considerations related to Mr Al Hassan's internationally recognised right to privacy.¹⁹ The right to privacy is inherently linked to issues of consent; if there is no right to privacy, this triggers issues of compulsion and thus engages Articles 55(1)(a) and 67(1)(g).

21. The 'purpose limitation principle' expounded in the General Data Protection Regulation ('GDPR'), "means that personal data must be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes."²⁰ The GDPR has been interpreted to be an expression of the Article 8 of the European Convention on Human Rights ('ECHR') articulation of the right to privacy.²¹

6.37. The ECHR provides for a minimum level of protection of the fundamental right to respect for private life. The substance and scope of the EU fundamental rights in the Charter are the same as those of the ECHR rights, insofar as the Charter contains rights that correspond with the ECHR (Article 52 paragraph 3 Charter). The rights safeguarded by the ECHR also form part of Union law as general principles (Article 6 paragraph 3 TFEU). Therefore, as regards Union law, there is at least the same minimum level of protection as in the ECHR. However, Union law may provide more extensive protection (Article 52 paragraph 3 Charter). Under the Charter and the GDPR, the protection of EU citizens' right to protection of personal

¹⁸ [ICC-01/09-01/11-1066 OA5](#), paras 49 to 56. See para. 56 affirming the Trial Chamber finding cited at para. 20 that "the general rule as to presence, dictated by the duty on the accused to be present, is one of continuous presence at trial."

¹⁹ Privacy rights are enshrined, for example, at Article 12 of the UN Charter, Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention on Human Rights, Article 11 of the American Convention on Human Rights, and Articles 16 and 21 of the Arab Charter on Human Rights.

²⁰ [SyRI case](#), Rechtbank Den Haag, C-09-550982-HA ZA 18-388 (English), para. 6.32.

²¹ [SyRI case](#), Rechtbank Den Haag, C-09-550982-HA ZA 18-388 (English).

data is specified in more detail and in some instances extends beyond the protection under the ECHR.

[...]

6.41. The court will take into account the aforementioned general principles of data protection from the Charter and the GDPR in its review of whether the SyRI legislation meets the requirements of Article 8 ECHR. In other words: the court will also interpret Article 8 paragraph 2 ECHR on the basis of these principles. There are no indications to assume that the minimum level of protection of the right to respect for private life, including the protection of personal data under the ECHR, is less extensive than the data protection offered by the Charter and the GDPR under the general principles laid down in these instruments.

22. As found by the European Court of Human Rights, the fact that an event occurs in public does not in of itself negate the protections of the right to privacy:²²

The present applicant was in a public street but he was not there for the purposes of participating in any public event and he was not a public figure. It was late at night, he was deeply perturbed and in a state of distress. While he was walking in public wielding a knife, he was not later charged with any offence. The actual suicide attempt was neither recorded nor therefore disclosed. However, footage of the immediate aftermath was recorded and disclosed by the Council directly to the public in its CCTV News publication. In addition, the footage was disclosed to the media for further broadcasting and publication purposes. Those media included the audiovisual media: Anglia Television broadcast locally to approximately 350,000 people and the BBC broadcast nationally, and it is “commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media” (*Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 23-24, § 31). The *Yellow Advertiser* was distributed in the applicant's locality to approximately 24,000 readers. The applicant's identity was not adequately, or in some cases not at all, masked in the photographs and footage so published and broadcast. He was recognised by certain members of his family and by his friends, neighbours and colleagues.

As a result, the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation (as in *Herbecq and the association “Ligue des droits de l'homme”*, cited above) and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995.

Accordingly, the Court considers that the disclosure by the Council of the relevant footage constituted a serious interference with the applicant's right to respect for his private life.

²² ECtHR, [Peck v United Kingdom](#), paras 62-63.

23. Interferences with the right to privacy must be ‘in accordance with the law’ which has been interpreted by human rights courts to mean the law is ‘clear, foreseeable, and adequately accessible’.²³ In the prison context, such law must be ‘sufficiently clear in its terms to give citizens an adequate indication of the conditions and circumstances in which the authorities are empowered to resort to any measures of secret surveillance and collection of data.’²⁴

24. The Prosecution did not seek the leave of the Court to use public footage in this way. Indeed, the Defence is unaware of any occasion in the history of this Court of the Prosecution using public footage in the way it has been in this case. At the very least, neither Mr Al Hassan nor his Defence could have foreseen this at the time the court created the footage.

(i) *Court recordings*

25. The Decision concludes that lack of consent by the Accused to the use of the Court recordings for the purpose of incrimination was irrelevant to the submission of material based upon them.²⁵

26. The Trial Chamber did not discuss the issue of Mr Al Hassan’s consent for the use of his images and voice regarding the court recordings. Rather, it concluded that the use of publicly available material did not ‘infringe the accused’s rights, particularly in relation to self-incrimination.’²⁶

27. The Chamber’s finding raises an issue as to whether an accused can consent to the use of images recorded in the courtroom when they are compelled to be present by the Chamber. Notwithstanding that Mr Al Hassan was not asked or even informed that these recordings would be used for the purposes of incrimination, this logic of the Chamber’s finding would mean that the only way to uphold an accused’s privilege against self-incrimination in such circumstances would require an accused to waive their right to be present at trial.

(ii) *Statement recordings*

²³ [Silver and Others v. United Kingdom](#), para. 87.

²⁴ [Shimovolos v. Russia](#), para. 68.

²⁵ Decision, para. 17.

²⁶ Decision, para. 16.

28. Since it concluded that Mr Al Hassan consented to the interviews, the Chamber reasoned that the subsequent use of the audio recordings to instruct a Prosecution expert did not violate Mr Al Hassan's right to privacy or privilege against self-incrimination.²⁷

29. The Decision thus raises an issue as to whether 'consent to be interviewed' can fairly be read to mean 'fully informed consent to all uses of the recordings of interviews for any purpose' without contravening rights to privacy and/or the privilege against self-incrimination.

(iii) Counsel appointment form

30. Mr Al Hassan was (and remains) compelled to attend trial. Mr Al Hassan was compelled to sign the form appointing counsel in order to obtain legal representation. The issue thus arising directly from the Decision is whether the legal framework of the court can automatically compel a suspect or an accused to provide evidence that is to be used against them while respecting Article 55.

31. The Chamber applied its prior reasoning concerning public video broadcasts analogously to the appointment of Counsel form since it had been publicly filed in the case record.²⁸ These issues are not sufficiently analogous to warrant the application of the same reasoning.

32. Given that international mechanisms applying both human rights and international criminal law have issued decisions that have a legal relevance through the application of Article 21(3) to the issue arising from the Decision, and given that those decisions suggest other possible resolutions of the issue, the Second Issue merits appellate review.

²⁷ Decision, para. 20.

²⁸ Decision, para. 17.

The Two Issues affect the fair and expeditious conduct of the proceedings, and an immediate resolution of the issues by the Appeals Chamber would materially advance the proceedings

a. The fairness and expeditiousness of proceedings

33. Trial fairness requires consistency in how issues about categories of evidence are resolved. A legal process must not favour one party in the process.²⁹
34. The First Issue that arises from the Decision relates in part to inconsistency of rulings concerning a category of material in the case. If there is a doubt regarding the application of a statutory provision, the principle of strict construction mandates that it be interpreted in favour of the accused;³⁰ however, in practice, this inconsistency has played out to the detriment of the Defence. As noted above, in a prior decision the Single Judge denied the Defence access to exculpatory information contained within BSQs when it sought to challenge the legality of the material.³¹ In the Decision, the Chamber has contrarily permitted the Prosecution to use material from the very same sessions to generate and submit incriminatory material in the form of P-0620's report.
35. The privilege against self-incrimination is a foundational right of a fair trial. The right appears in all international human rights treaties. If the Trial Chamber applied the scope of the right too narrowly, then this impacts upon the fairness of proceedings. Even a minor deviation of a core right such as this significantly impacts the fairness of proceedings.
36. Consistency is a hallmark of fairness and predictability, so an inconsistent position raises issues of fairness. In view of the starkly different approaches concerning information arising during BSQ sessions (*supra*, paras 13 and 34), the Decision raises the issue of whether the Chamber acted unfairly by determining that information and evidence collected during BSQ sessions could be used as evidence against the Defendant. The Two Issues also raise questions of notice and informed consent, which are cardinal to criminal procedural fairness. They also draw in other important considerations about the Court's legal structure, as incriminatory material was drawn

²⁹ Article 64(2) of the Statute.

³⁰ Articles 22(2) and 24(2) of the Statute make explicit reference to this principle.

³¹ ICC-01/12-01/18-777-Conf.

from Mr Al Hassan's exercise of fundamental Statutory rights. It is unfair – and inherently coercive – to condition the exercise of these rights upon self-incrimination.

37. Prompt determination of these fundamental issues will clarify the evidential bases on which the trial may continue. Swift resolution will enable the parties and Chamber to focus their arguments appropriately, thus streamlining the proceedings. If these materials remain in the case, the Defence will need to call multiple experts during its case, slowing the proceedings. The retention of improper evidence in the case will lead to unnecessary litigation and unduly burden the proceedings, including at the Article 74 decision stage. In this way, the Two Issues affect the expeditiousness of the proceedings.

b. Immediate resolution by the Appeals Chamber may materially advance the proceedings

38. Issues concerning the fairness of the trial proceedings and the extent of the protections afforded by Article 55 of the Statute should be resolved immediately, in order to avoid the miscarriage of justice that could result from proceeding upon violations of core rights. Given their significance, an immediate decision by the Appeals Chamber on the Two Issues would materially advance the proceedings by 'removing doubts about the correctness' of the Chamber's resolution of these two Issues, and further 'map (...) a course of action along the right lines' thereby providing 'a safety net for the integrity of the proceedings.'³²

³² [ICC-01/04-168](#), para. 15.

IV. Relief Sought

39. For the reasons set out above, the Defence for Mr Al Hassan respectfully requests that the Trial Chamber **GRANT LEAVE TO APPEAL** in relation to the Two Issues identified herein.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 14th Day of June 2021
At The Hague, The Netherlands