



Original: English

No. ICC-01/12-01/18

Date: 01 October 2021

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 oral decision of 10 September
2021 concerning the conduct of cross-examination by the Defence**

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

The Office of the Prosecutor

Karim A. A. Khan
James Stewart

Counsel for the Defence

Melinda Taylor

Legal Representatives of Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

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*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following decision.

I. Procedural history

1. On 10 September 2021, the Chamber provided oral directions concerning the conduct of cross-examination by the Defence (the ‘Impugned Decision’).¹
2. On 20 September 2021, the Defence filed a request for leave to appeal the Impugned Decision (the ‘Request’).²
3. On 24 September 2021, the Prosecution filed its response, opposing the Request (the ‘Response’).³

II. Submissions and analysis

4. The Chamber incorporates by reference the applicable legal framework for granting leave for interlocutory appeals as set out in its previous decisions.⁴
5. As a First Issue, the Defence submits that the Chamber erred in law by restricting the Defence’s ability to question witnesses concerning payments and assistance received from the Prosecution.⁵ Specifically, the Defence essentially suggests that the Impugned Decision forbade the Defence to cross-examine witnesses on the subject of financial assistance received from the various ICC organs.⁶ The Chamber is of the view that the First Issue entirely misrepresents the Impugned Decision. Indeed, the Chamber did not prohibit any such questions, but merely

¹ Transcript of hearing, 10 September 2021, ICC-01/12-01/18-T-131-CONF-ENG ET, p. 96, line 9 to p. 99, line 8.

² Defence request for leave to appeal oral decision of 10 September 2021 concerning the conduct of cross-examination by the Defence, ICC-01/12-01/18-1735-Conf.

³ Prosecution response to Defence request for leave to appeal oral decision of 10 September 2021 concerning the conduct of cross-examination by the Defence, ICC-01/12-01/18-1762-Conf.

⁴ Decision on Defence request for leave to appeal the ‘Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules’, 16 August 2021, ICC-01/12-01/18-1658; 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.

⁵ Request, ICC-01/12-01/18-1735-Conf, para. 7(a).

⁶ Request, ICC-01/12-01/18-1735-Conf, paras 9-13.

expressed its concern that the questions must be relevant in the context of the witness and that they be asked in a manner which would not needlessly embarrass witnesses.⁷

6. The Defence submits as a Second Issue that the Chamber erred in law by restricting the Defence's right to conduct investigations through cross-examination.⁸ More specifically, the Defence suggests that the Impugned Decision forbade the Defence 'to ask questions relevant to their own case [...] when those questions go beyond matters raised in examination-in-chief'.⁹ Again, such arguments misrepresent the Impugned Decision, which merely requires that the Defence demonstrate the relevance of a particular line of questioning where such relevance is not immediately apparent to the Chamber. Notably, the Chamber provided that where it 'questions the relevance of a specific question, it will of course expect from the Defence a specific response identifying the nexus to the issues in the case or credibility. If this nexus is not established, counsel will move on in response to the relevant directions provided by the Chamber.'¹⁰ This by no means prevents the Defence from questioning witnesses on issues 'beyond matters raised in examination-in-chief', as claimed in the Request. In addition, the Chamber recalls that the Directions on the Conduct of proceedings clearly provides that ' [c]ross-examination is not limited to issues raised during the questioning by the calling party'.¹¹
7. The Defence submits as a Third Issue that the Chamber erred in law in requiring the Defence to adduce evidence as a pre-condition for putting questions to a witness.¹² Whilst the Impugned Decision required the Defence not to ask leading questions to the witness that are also purely speculative in nature, it did not impose nor imply that the Defence had to disclose any such evidence prior to or during its relevant cross-examination. The Third Issue misrepresents the Impugned Decision in this regard. The Chamber consequently finds without basis

⁷ Transcript of hearing, 10 September 2021, ICC-01/12-01/18-T-131-CONF-ENG ET, p. 98, lines 7-9

⁸ Request, ICC-01/12-01/18-1735-Conf, para. 7(b).

⁹ Request, ICC-01/12-01/18-1735-Conf, paras 14-18.

¹⁰ ICC-01/12-01/18-T-131-CONF-ENG ET, p. 97, lines 17 to 20.

¹¹ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, para. 41.

¹² Request, ICC-01/12-01/18-1735-Conf, paras 7(c).

the Defence's arguments concerning the purported impact of the Impugned Decision on the confidentiality of sources, the protection of potential witnesses, its ability to complete investigations in advance of cross-examination, as well as the defendant's right to remain silent.

8. The Defence argues under a Fourth Issue that leave to appeal should be granted for the reason that the Impugned Decision was issued without first affording the Defence a right to be heard.¹³ This Fourth Issue identified by the Defence simply does not arise from the Impugned Decision.
9. Accordingly, in regards of all four Issues submitted by the Defence, the Chamber considers that they do not constitute appealable issues within the meaning of Article 82(1)(d) of the Statute. Furthermore, even assuming *arguendo*, that any of the submitted Issues should be considered an 'appealable issue', the Chamber finds that none of them would fulfil the remaining criteria laid down in Article 82(1)(d) of the Statute, *i.e.* would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and their resolution by the Appeals Chamber might materially advance the proceedings.
10. As the requirements under Article 82(1)(d) of the Statute are not met, the Request is dismissed.

¹³ Request, ICC-01/12-01/18-1735-Conf, para. 7(d).

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

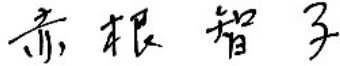
INSTRUCTS the Prosecution and the Defence to respectively file by 15 October 2021 public redacted versions of the Request and the Response.

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 01 October 2021

At The Hague, The Netherlands