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**International
Criminal
Court**

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October 2021**

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 oral decision of 10
September 2021 concerning the conduct of cross-examination by the Defence”, 20
September 2021, ICC-01/12-01/18-1735-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 10 September 2021, the Chamber issued an oral decision concerning the conduct of cross-examination by the Defence¹ ('Decision').
2. By the Decision, the Chamber, *inter alia*:
 - (a) indicated that the Chamber would 'remain especially vigilant with regard to needlessly embarrassing questions which a priori have little or no impact on the Chamber's upcoming assessment of a witness' credibility [...] thinking *inter alia* of the questions asked to several crime-base witnesses as to the financial assistance that they may have requested or obtained in the context of their collaboration with the Court';²
 - (b) directed that 'unless the relevance is clearly apparent to the Chamber', Counsel for the Prosecution and the Defence 'shall abstain from putting questions of a strictly private nature' and 'therefore avoid unnecessarily seeking to obtain the names of family members, the names of friends or even members of an association to which the witness belongs' as the Chamber 'deems such questions to be intimidating, even potentially threatening';³ and
 - (c) indicated that the Chamber 'will not permit the Defence to continue its practice of putting, without any foundation whatsoever, leading questions to the witness that are also purely speculative in nature' as '[i]n the absence of some evidentiary basis, these questions are purely speculative and improper.'⁴
3. Furthermore, the Decision was delivered without providing the Defence the opportunity to be heard on these issues.
4. The Defence respectfully requests leave to appeal the Decision on the Four Appealable Issues identified below.

¹ ICC-01/12-01/18-T-131-CONF-ENG ET 10-09-2021, p. 96, line 9 to p. 99, line 8; ICC-01/12-01/18-T-131-CONF-FRA ET 10-09-2021, p. 93, line 17 to p. 96, line 12.

² ICC-01/12-01/18-T-131-CONF-ENG ET, p. 97, line 24 to p. 98, line 4.

³ ICC-01/12-01/18-T-131-CONF-ENG ET, p. 98, lines 10-15.

⁴ ICC-01/12-01/18-T-131-CONF-ENG ET, p. 98, lines 18-20.

II. Confidentiality

5. Pursuant to Regulation 23bis(2) of the Regulations of Court, this request has been filed confidentially as it refers to confidential evidence. A public redacted version will be filed forthwith.

III. Submissions

6. Pursuant to Article 82(1)(d) of the Statute, the Defence may appeal:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the [...] Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

7. There are four issues which arise from the Decision, and which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings, being:

- (a) whether the Chamber erred in law by restricting the Defence's ability to question witnesses concerning payments and assistance received from the Prosecution;
- (b) whether the Chamber erred in law by restricting the Defence's right to conduct investigations through cross-examination;
- (c) whether the Chamber erred in law in requiring the Defence to adduce evidence as a pre-condition for putting questions to a witness; and
- (d) whether the Chamber erred in law in delivering the Decision without giving the Defence the opportunity to be heard,

(collectively, the 'Four Appealable Issues').

First Appealable Issue: Whether the Chamber erred in law by restricting the Defence's ability to question witnesses concerning payments and assistance received from the Prosecution, thereby effectively curtailing the Defence's right to

cross-examine witnesses in violation of Mr Al Hassan's right to fair proceedings and equality of arms with the Prosecution

8. By the Decision, the Chamber indicated that it would:⁵

remain especially vigilant with regard to needlessly embarrassing questions which a priori have little or no impact on the Chamber's upcoming assessment of a witness' credibility [...] thinking inter alia of the questions asked to several crime-base witnesses as to the financial assistance that they may have requested or obtained in the context of their collaboration with the Court...

9. This raises a serious issue as to whether the Chamber is adopting a different *a priori* materiality test to the *prima facie* test well established in ICC jurisprudence. In any event, this position as concerns the relevance of financial assistance to witness credibility is inconsistent with the practice of this Court which has repeatedly found such matters to be squarely material. In *Bemba et al*, Trial Chamber VII held:⁶

The Statute does not specify which kinds of false testimony fall under Article 70(1)(a) of the Statute. Considering that witnesses make statements on a plethora of issues during their testimony, the Chamber holds that not all information can trigger the applicability of Article 70(1)(a) of the Statute; rather, only such information as is 'material'. It is noted that certain national jurisdictions have such a requirement. The Chamber understands 'materiality' to pertain to any information that has an impact on the assessment of the facts relevant to the case or the assessment of the credibility of witnesses. In relation to the latter point, the Chamber considers information such as (i) prior contacts with the calling party and the contents of such contacts; (ii) receipt of telephone calls and/or payments of money by the calling party and/or their associates, regardless of their purpose; (iii) meetings with other prospective witnesses; (iv) acquaintance with the accused or other persons associated with them; and (v) the making of promises to the witness in exchange for his or her testimony to be of crucial importance when assessing the credibility of witnesses. Indeed, such questions, especially when put by the non-calling

⁵ ICC-01/12-01/18-T-131-CONF-ENG ET, p. 97, line 24 to p. 98, line 4.

⁶ [ICC-01/05-01/13-1989-Red](#), para 22 (*emphasis added*).

party, provide indispensable information and are deliberately put to witnesses with a view to testing their credibility. If the Judges are not furnished with genuine information, they will not be able to assess duly the credibility of the witnesses.

10. Similarly, in *Ruto & Sang*, Trial Chamber V(a) found:⁷

The Chamber finds it pertinent to recall that only prima facie materiality is required to be shown by the Defence. The Chamber considers that it is not necessary for any showing of malfeasance in order to make a determination of materiality in respect of payments and benefits paid to witnesses. In the Chamber's view, benefits, payments or other assistance provided to a witness, in connection with their status as such, are *prima facie* material to preparation of the defence case as they could, amongst other things, go to the credibility of the witness.

11. In *Bemba*, Trial Chamber III stated:⁸

As previously emphasized, international criminal jurisprudence has established the principle that information pertaining to payments, benefits or other forms of assistance that go beyond the ordinary requirements of subsistence may affect the credibility of witnesses and information related thereto may be material to the preparation of the defence and are therefore disclosable to the defence.

12. Similar statements regarding the materiality of payments to witnesses were made by Trial Chamber VI in two separate decisions in *Ntaganda*⁹ and the Single Judge of Trial Chamber IX in *Ongeven*.¹⁰

13. Given the clear jurisprudence of this Court finding that financial assistance provided to witnesses by calling parties is clearly material to their credibility, and that the absence of cross-examination on these issues may mean that the Chamber is not

⁷ [ICC-01/09-01/11-904-Red2](#), para 59 (emphasis added).

⁸ [ICC-01/05-01/08-2924-Red](#), para 19.

⁹ [ICC-01/04-02/06-904](#), para 32; [ICC-01/04-02/06-1497](#), para 5.

¹⁰ [ICC-02/04-01/15-1444](#), para 18.

aware of all relevant factors pertaining to their credibility, the issue arises as to whether the Chamber erred in its directions on this issue.

Second Appealable Issue: Whether the Chamber erred in law by restricting the Defence's right to conduct investigations through cross-examination, thereby effectively curtailing the Defence's right to cross-examine witnesses in violation of Mr Al Hassan's right to fair proceedings and equality of arms with the Prosecution

14. This issue arises from the Decision as settled principles preserve the right of the Defence to conduct investigations and the making of its own case through cross-examination. The case law of both ICC Chambers and other international courts and tribunals make it clear that the non-calling party has the right to ask questions relevant to their own case, even when those questions go beyond matters raised in examination-in-chief. In *Katanga & Ngudjolo*, the Presiding Judge of Trial Chamber II stated:¹¹

Cross-examination shall be limited to matters raised during examination-in-chief and matters affecting the credibility of the witness. In addition, where the witness is able to give evidence relevant to the case for the cross-examining party, it may ask questions about such matters, even if they were not raised during examination-in-chief.

15. Similar statements were consistently made in the jurisprudence of the ICTY in *Prlic et al*,¹² *Tolimir*,¹³ and *Karadzic*.¹⁴

16. In *Katanga*, the Presiding Judge of Trial Chamber II also noted that '[c]ross-examination allows the party not calling the witness to elicit all further relevant

¹¹ [ICC-01/04-01/07-1665](#), para 69.

¹² *Prlic et al*, [Decision on Scope of Cross-Examination under Rule 90\(H\) of the Rules](#), para 11: 'Consequently, Rule 90 (H) (i) should be interpreted broadly as authorizing the cross-examining party to ask questions relevant to its own case, even when those questions go to matters that were not raised in direct examination.'

¹³ *Tolimir*, [Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties During Trial](#), para 10: 'Pursuant to Rule 90(H)(i) of the Rules, cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.'

¹⁴ *Karadzic*, [Transcript of 22 January 2013](#), T.32383-32384: '[D]uring the Prosecution case, the Chamber adopted an interpretation of Rule 90(H) which allowed the accused to adduce evidence relevant to his case during his cross-examination of Prosecution witnesses and did not preclude him from using leading questions during such cross-examination. The Chamber is of the view that this interpretation is consistent with the plain wording of Rule 90(H), which speaks of cross-examination throughout.'

evidence as may be useful for the case of that party or necessary for the determination of the truth.’¹⁵ In considering the Prosecution’s questioning of a Defence witness, the Presiding Judge ruled:¹⁶

Maybe you are correct that this is not the time to continue building the Prosecution case, but you cannot deprive the Prosecutor of his cross-examination, and the Prosecutor quite correctly referred to paragraph 73 of decision 1665 which states that the cross-examination allows the party that did not call the witness to obtain from him any other relevant evidence that might be useful to his case or necessary for the ascertainment of the truth. Consequently, it is incumbent on the party doing the cross-examination to raise any questions that they wish to put to the witness.

In principle, the Chamber will not authorise a party to recall a witness if that party has already had the possibility to cross-examine that witness. So obviously everything depends on the knowledge that any specific witness might have. But insofar as a witness, such as this one who has been with us since yesterday, has lived in Zumbe, and has lived in Aveba, it is not unreasonable on the part of the Prosecutor to seek information about the people that he might have met both in Zumbe or in Aveba, based either on the statement of the witness to one of the Defence teams or something else.

17. The Chamber’s ruling also required that the questions pertaining to investigation must meet the standard of being ‘clearly relevant to the Chamber’. This threshold is higher than the threshold for materiality established by the Appeals Chamber (i.e. that it may be or is likely to be relevant¹⁷). The application of this threshold also creates a ‘Catch-22’ because relevance may depend on the witness’s answers so the Defence may need to be afforded some leeway to ask the witness preliminary questions to establish the necessary link.

18. The Chamber’s ruling on these issues is inconsistent with these principles and unnecessarily confines the scope of the Defence’s questioning. Furthermore, as the

¹⁵ [ICC-01/04-01/07-1665](#), para 73.

¹⁶ [ICC-01/04-01/07-T-277-Red-ENG CT](#), pp. 46-47.

¹⁷ [ICC-02/05-03/09-501](#), paras 38-39.

Chamber is aware, the Defence's ability to investigate and effectively examine in this case has been substantially prejudiced by factors including the COVID-19 pandemic, the delayed disclosure of witness identities and the repeated eliciting by the Prosecution of new evidence in preparation sessions and on the stand.¹⁸ Denying the Defence its right to investigate through examination further compounds the prejudice already suffered by the Defence, and is inconsistent with clearly established legal principles operating at this Court. The issue of whether the Chamber erred in this ruling therefore arises from the Decision.

Third Appealable Issue: Whether the Chamber erred in law in requiring the Defence to adduce evidence as a pre-condition for putting questions to a witness, thereby effectively curtailing the Defence's right to cross-examine witnesses in violation of Mr Al Hassan's right to fair proceedings and equality of arms with the Prosecution

19. In the Decision, the Chamber indicated that it:

will not permit the Defence to continue its practice of putting, without any foundation whatsoever, leading questions to the witness that are also purely speculative in nature. [...] In the absence of some evidentiary basis, these questions are purely speculative and improper.¹⁹

20. By this Decision, in order for a question to be put, the Chamber is requiring the Defence to have an evidentiary basis that is capable of being described or furnished to the Chamber. This imposes a significant upfront disclosure obligation that has ramifications for the defendant's right of silence (as concerns instructions that emanate from the defendant), the confidentiality of Defence sources, the protection of potential Defence witnesses whose names will be potentially prematurely divulged, and the capacity of the Defence to complete its investigations in advance of cross-examination. In the alternative, if the Defence cannot furnish or describe tangible or disclosable evidence, it will be denied the opportunity of putting its case to the witness or raising matters that could controvert the witness's testimony or impeach their credibility.

¹⁸ ICC-01/12-01/18-T-126-CONF-ENG ET 03-09-2021, p. 9, line 20 to p. 13, line 16.

¹⁹ ICC-01/12-01/18-T-131-CONF-ENG ET, p. 98, lines 18-20.

21. This is clearly inconsistent with the Directions on the Conduct of Proceedings which states:²⁰

The non-calling party shall put to a witness the substance of its case which in its view conflicts with the evidence of the witness, as well as any facts or evidence upon which the non-calling party intends to rely to impeach his or her credibility in order to give the witness an opportunity to respond thereto. Failure to do so may result in the Chamber disregarding or assigning less weight to the impeaching evidence.

22. Rule 140(2)(b) of the Rules of Procedure and Evidence state that the Prosecution and the Defence have the right to question a witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters. The jurisprudence of the ICC is very clear that *first*, the non-calling party should put to the witnesses any bases it has to impeach the witness's evidence and *second*, the parties should avoid having to recall any witnesses.

23. In *Lubanga*, Trial Chamber I found:²¹

In line with Article 69(3) of the Statute, the Trial Chamber considers that a party may question a witness it has not called about matters which go beyond the scope of the witness's initial evidence. The concept of "other relevant matters" under Rule 140(2)(b) of the Rules, includes, inter alia, trial issues (e.g. matters which impact on the guilt or innocence of the accused such as the credibility or reliability of the evidence), sentencing issues (mitigating or aggravating factors), and reparation issues (properties, assets and harm suffered). The parties are under an obligation to put such part of their case as is relevant to the testimony of a witness, inter alia, to avoid recalling witnesses unnecessarily.

24. Relatedly, in *Ntaganda*, Trial Chamber VI noted that:²²

The non-calling party may go beyond matters previously discussed in the

²⁰ [ICC-01/12-01/18-789-AnxA](#), para 51.

²¹ [ICC-01/04-01/06-1140](#), para 32.

²² [ICC-01/04-02/06-619](#), para 28 (**emphasis added**).

examination-in-chief and may address, in accordance with Rule 140(2)(b) of the Rules, other matters relevant to the case, including those affecting the credibility of the witness. The cross-examining party is required to put to the witness any facts or evidence, **available at the time** and upon which it intends to rely to impeach his or her credibility.

25. In sum, while the Defence is required to put its case to the witness regarding facts or evidence that contradict the witness's testimony, it cannot be required to adduce evidence of such facts as a pre-condition (particularly if such evidence is not available at the time).
26. The Defence does not object to the necessity of there being a basis for questioning, but the Decision as delivered indicates that the Chamber requires there to be a basis in disclosed evidence. This is inconsistent with the previous jurisprudence, as it would prevent questions which impeach a witness's credibility or reliability being put to the witness unless such an item has been produced. Defence lines of questioning can derive not only from open source evidence which has been disclosed and can be shown to the witness in court, but also from instructions from the client, from field investigations or from potential future witnesses for the Defence.
27. This ruling is problematic for any Defence lines of questioning which derive from these sources. If the Defence is required to disclose the content of instructions from its client, this will raise issues of privilege. If information from investigative leads is required to be put into finalised witness statements at this early stage of the proceedings, then individuals connected with the Defence would need to be placed under protective measures. These protective measures may in turn jeopardise their ability to continue these investigations and/or their willingness to assist the Defence. This is also fundamentally premature given that this case is still at the stage of the Prosecution case. Furthermore, as the Chamber is well aware, the Defence has been prevented from carrying out effective *in situ* investigations due to the COVID-19 pandemic: if Defence witness statements are required before lines of questioning can be put to Prosecution witnesses, this would have to occur at such a time when Counsel for the Defence is able to travel to the situation country to obtain such statements and this would necessarily require the recalling of many witnesses which would cause

needless delay and expense to the proceedings, and additional stress and inconvenience for these witnesses.

28. These issues are particularly well illustrated by the circumstances of Witness P-0603 (whose testimony was one of the aspects addressed by the Decision). Witness P-0603's identity was disclosed only on 1 July 2021 during the intensive period [REDACTED] and shortly before the judicial recess. As the Defence stated in its submissions concerning the scheduling of this witness, there were a substantial number of factors complicating the Defence's ability to investigate, [REDACTED],²³ circumstances which still prevail. The Defence would not have been in a position to obtain witness statements from its sources in this significantly compressed timeline it had available to investigate, and should not be penalised for using leads obtained in its investigations in questioning the witness. It is unclear in the Decision whether the Chamber anticipates that the Defence will have an opportunity to indicate whether something emanates from a non-written evidentiary source and if so, will be able to communicate such matters without being required to compromise privilege or the safety of Defence sources. The issue therefore arises from the Decision as to whether the Chamber erred in issuing this ruling.

Fourth Appealable Issue: Whether the Chamber erred in law in delivering the Decision without giving the Defence the opportunity to be heard

29. Although Articles 64(6), 64(8) and 64(9) of the Rome Statute vest the Chamber with the discretion to issue directions for the conduct of the proceedings, this discretion is fettered by the obligations to confer with the parties,²⁴ to comply with the overarching duty to ensure a fair and impartial trial²⁵ and to provide a reasoned opinion.²⁶ In implementing these principles, a fundamental tenet of procedural fairness is that the legal obligations of the parties should be defined in a manner that is sufficiently certain, specific, and foreseeable.²⁷

²³ [REDACTED].

²⁴ Rome Statute, Article 64(3)(a).

²⁵ Rome Statute, Articles 64(2) and 64(8)(b), read with Article 67(1).

²⁶ [ICC-01/04-01/06-3121-Red](#), para 24; [ICC-01/04-01/06-3466-Red](#), para.248. See similarly ICTY, *Kupreškić*, [Appeal Judgment](#), para 32 and ICTR, *Muvinyi*, [Appeal Judgment](#), para 147.

²⁷ [ICC-02/11-01/15-498-Anx1](#), paras 2-5.

30. The Defence was given no prior opportunity to adduce arguments as concerns the impact of the Decision on fundamental Defence rights, including the right to examine witnesses,²⁸ which is of key importance given the difficulties faced by the Defence in conducting investigations in general, and specifically in relation to the witness whose testimony was specifically invoked in this ruling. This is particularly important because the Decision appears to be based on a finding that Counsel for the Defence has acted inappropriately and was accompanied by a ‘warning’ being issued to the Defence.²⁹ This finding appears to be a retrospective application of the directions and guidelines given in the Decision, particularly given that the original question invoked as inappropriate in the Decision was not the subject of objection by either the Prosecution or the Chamber when originally answered by the witness.³⁰ Furthermore, the Decision was made during the testimony of [REDACTED] in this case where [REDACTED] witnesses remain to testify in person. This type of determination has a bearing on the Defence’s strategy in cross-examination and it is therefore prejudicial for the Decision to have been made at this advanced stage of the Prosecution case. This is particularly the case as the Chamber has not foreshadowed any adjournment or break in the proceedings to enable the Defence to collect the evidence as would be required under the new standard imposed. The issue therefore arises from the Decision whether the Chamber erred in law by not providing the Defence its fundamental right to be heard before directions adverse to the interests of the accused were made.

The Four Appealable Issues will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trials, and an immediate resolution by the Appeals Chamber

31. International courts and tribunals have consistently recognised the importance of the Defence’s right to cross-examination, and the corollary need to exercise care in limiting Defence cross-examination.³¹ An incorrect determination concerning the

²⁸ Rome Statute, Article 67(1)(e).

²⁹ ICC-01/12-01/18-T-131-CONF-ENG ET, p. 99, lines 7-8: ‘With respect to all these points, I hereby issue a warning to the Defence team of Mr Al Hassan.’

³⁰ ICC-01/12-01/18-T-127-CONF-ENG ET 06-09-2021, p. 13, line 21 to p. 14, line 1.

³¹ See [IT-04-74-AR73.2](#), pp. 2-3: ‘[T]he right to cross-examine witnesses is a fundamental right recognized under international human rights law and restated in Article 21(4) of the Statute of this Tribunal’. The ECHR

proper scope of Defence cross-examination will necessarily undermine the prospects for a fair and impartial adjudication of the charges, based on an equal and adversarial process.

32. The Four Appealable Issues will also significantly affect the expeditiousness of the trial, as this Decision will require the Defence to either limit its lines of cross-examination or spend valuable preparation and court time providing extensive explanations for routine questions clearly connected to the credibility and reliability of the witness's testimony and as required as a matter of fairness by, *inter alia*, the Directions on the Conduct of Proceedings.³²
33. This would significantly affect the fairness of the proceedings, as such a procedure would have a chilling effect on Defence examinations, and hence the protection of Mr Al Hassan's interests during the proceedings, as it could discourage Counsel from asking fair and appropriate questions relevant to Defence lines of argument.
34. This could also bear upon the outcome of the trial, as witnesses may not be examined with as much rigour and detail, out of the same fears. Furthermore, in particular in relation to the First and Third Appealable Issues, the proposed approach would necessitate the recalling of many witnesses, which would obviously run counter to the efficiency of the proceedings and, furthermore, the willingness of witnesses to be available to testify (knowing that they may be required to commit the time necessary to travel to Bamako or The Hague, complete necessary quarantine and preparation sessions, and testify not once, but twice).
35. An immediate resolution by the Appeals Chamber on this issue would materially advance the proceedings, as the strategy to be applied in relation to cross-examination affects the rest of the hearings in this case (totaling approximately [REDACTED] Prosecution witnesses still to be heard, and the Defence case) and witnesses are currently being heard and further issues may therefore arise pursuant to this Decision.

found a violation of Articles 6(1) and 6(3)(d) where the Defence was not given an 'adequate and proper' opportunity to cross-examine a witness either before or at the hearing: *Delta v. France*, [11444/85](#), paras 36-37.

³² [ICC-01/12-01/18-789-AnxA](#), para 51.

IV. Relief sought

36. The Defence respectfully requests that Trial Chamber X **GRANT LEAVE TO APPEAL** the Decision on the Four Appealable Issues.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 20th Day of September 2021
At The Hague, The Netherlands