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**International
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Court**

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Date: **28 September 2021**
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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

With Confidential Annex A

Public Redacted Version of “Defence request for leave to appeal ‘Decision on Defence request to bar the Prosecution from eliciting evidence concerning P-1707 and P-1717 during the testimony of P-0641’”, 28 September 2021, ICC-01/12-01/18-1782-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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Other

I. Introduction

1. On 11 May 2019, the Office of the Prosecutor ('Prosecution') filed its amended and corrected Document Containing the Charges ('Amended DCC').¹
2. On 30 September 2019, Pre-Trial Chamber I confirmed charges against Mr Al Hassan ('Confirmation Decision').²
3. On 31 January 2020, the Office of the Prosecutor ('Prosecution') filed a request for corrections and amendments of the Confirmation Decision ('Prosecution Request to Amend the Charges').³
4. On 21 February 2020, Pre-Trial Chamber I issued a decision in which it *inter alia* rejected Parts I and II of the Prosecution Request to Amend the Charges.⁴
5. On 23 April 2020, following submissions from the Prosecution⁵ and the Defence,⁶ Pre-Trial Chamber I issued a decision amending the confirmed charges against Mr Al Hassan ('Amendment Decision').⁷
6. By way of the Amendment Decision, the Pre-Trial Chamber found that the evidence adduced by the Prosecution in relation to the charges concerning P-1701 and P-1717 failed to satisfy the threshold necessary to confirm these incidents for the purpose of adding them to the confirmed charges.⁸
7. On 6 May 2020, Trial Chamber X issued its 'Decision on the conduct of proceedings', with an annex containing 'Directions on the conduct of proceedings'.⁹
8. On 12 May 2020, the Prosecution filed its final list of evidence.¹⁰
9. On 18 May 2020, the Prosecution filed its Trial Brief.¹¹

¹ ICC-01/12-01/18-335-Conf-Corr.

² ICC-01/12-01/18-461-Conf-Corr; ICC-01/12-01/18-461-Corr-Red.

³ ICC-01/12-01/18-568-Conf; ICC-01/12-01/18-568-Red.

⁴ ICC-01/12-01/18-608-Conf-tENG; ICC-01/12-01/18-608-Red-tENG.

⁵ ICC-01/12-01/18-625-Conf-Exp; ICC-01/12-01/18-625-Red2.

⁶ ICC-01/12-01/18-664-Conf; ICC-01/12-01/18-664-Red.

⁷ ICC-01/12-01/18-767-Conf-Corr; ICC-01/12-01/18-767-Corr-Red.

⁸ ICC-01/12-01/18-767-Conf-Corr, paras. 55-57, 72-73.

⁹ ICC-01/12-01/18-789; ICC-01/12-01/18-789-AnxA.

¹⁰ ICC-01/12-01/18-805-Conf-AnxB.

10. On 14 July 2020, the trial against Mr Al Hassan opened.
11. On 8 September 2020, testimony in the trial against Mr Al Hassan commenced.
12. On 19 and 20 September 2021, [REDACTED], the Prosecution asked Witness P-0641 to clarify a point [REDACTED] pertaining to P-1707 and P-1717.¹²
13. On 22 September 2021, the Defence issued by email its ‘Request to bar the Prosecution from eliciting evidence concerning P-1707 and P-1717 during the testimony of P-0641’. (‘Request’) Specifically, the Defence requested that the Trial Chamber confirm that the Prosecution will not be entitled to elicit testimony from P-0641 concerning incidents pertaining to P-1707 and P-1717, which the Pre-Trial Chamber explicitly refused to confirm.¹³
14. On 22 September 2021, the Prosecution submitted by email its response to the Defence Request.¹⁴ The Prosecution argued that the elicitation of evidence regarding P-1707 and P-1717 is appropriate, even if this evidence relates to matters outside the specific charges concerning these named victims as confirmed by the Pre-Trial Chamber.
15. On 22 September 2021, the Defence sought leave by email to reply to the arguments made by the Prosecution.
16. On 22 September 2021, the Trial Chamber issued by email its ‘Decision on Defence request to bar the Prosecution from eliciting evidence concerning P-1707 and P-1717 during the testimony of P-0641’.¹⁵ (‘the Decision’) By the Decision, the Trial Chamber determined that the parties were not ‘barred from posing all questions relating to the incidents involving’ P-1707 and P-1717, notwithstanding the decision of the Pre-Trial Chamber declining to confirm the charges in relation to these incidents. In reaching this conclusion, the Trial Chamber noted that the defence received sufficient notice ‘as concerns the fact that evidence relating to P-1707 and P-1717 may be elicited via P-

¹¹ ICC-01/12-01/18-819-Conf; ICC-01/12-01/18-819-Conf-AnxA.

¹² [REDACTED].

¹³ Annex A, pp. 5-6.

¹⁴ Annex A, pp. 3-4.

¹⁵ Annex A, p. 2.

0641, notably by virtue of the witness's statement'. The Trial Chamber further rejected the Defence's request for leave to reply to the Prosecution's arguments.¹⁶

17. The Defence respectfully requests leave to appeal the Decision on the Issues identified below.

II. Confidentiality

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

III. Submissions

19. Pursuant to Article 82(1)(d) of the Statute, the Defence may seek leave to 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.

20. There are issues ('Issues') which squarely 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 Trial Chamber erred in law and violated the protection against *ne bis in idem* by permitting the Prosecution to prosecute conduct concerning charged facts and circumstances that were rejected by the Pre-Trial Chamber in a decision that has become final under the Rome Statute framework (the 'First Issue');
- (b) whether the Trial Chamber erred in law by indicating that it may rely on alleged material facts concerning charged incidents that were explicitly rejected by the Pre-Trial Chamber, thereby exceeding the factual scope of the trial delimited by the Pre-Trial Chamber (the 'Second Issue'); and

¹⁶ Annex A, p. 2.

(c) whether the Trial Chamber erred in law by finding that the Defence has sufficient notice as concerns the introduction of evidence relating to P-1707 and P-1717, where these incidents and facts were not provided in the confirmed charges, the Trial Brief, or any accusatory or auxiliary documents disclosed in advance of the commencement of trial (the ‘Third Issue’).

The First Issue arises from the Decision

21. Where the Prosecutor has not appealed the Pre-Trial Chamber’s confirmation of charges, or otherwise sought subsequent confirmation or amendment of the charges, the determination of the Pre-Trial Chamber rejecting any charges becomes final. As the Appeals Chamber explained in *Lubanga*:¹⁷

a trial must commence based on a set of clearly defined charges. This is evidenced by the fact that, once the trial has commenced, no amendment to the charges is permitted, as provided by article 61(9) of the Statute.

22. The Chambers Practice Manual likewise observes that ‘the confirmation decision’ ‘constitutes the *final*, authoritative document setting out the charges, and by doing so the scope of the trial’.¹⁸

23. According to the definition contained in the explanatory report of the European Convention on the International Validity of Criminal Judgments, a decision is final:

if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.¹⁹

24. The Court of Justice of the European Union has also held, including in ‘M’, that:²⁰

¹⁷ [ICC-01/04-01/06-3121-Red](#), para. 129.

¹⁸ [Chambers Practice Manual](#), 2017, p. 16 (emphasis added).

¹⁹ Council of Europe, [Explanatory Report to the European Convention on the International Validity of Criminal Judgments](#), 28 May 1970, p. 13.

²⁰ Court of Justice of the European Union, ‘M’ [Case C-398/12](#), 05 June 2014, particularly paras 10, 30, 31 and 37. The CJEU noted Article 246 of the Belgian Criminal Investigation Code, which, akin to the Rome Statute, provides: *Where the indictment division has decided that there is no cause to send the case to trial, the accused may not be tried on the basis of the same facts, unless new facts and/or evidence become available.*

an order making a finding of ‘non-lieu’ at the end of an investigation during which various items of evidence were collected and examined must be considered to have been the subject of a determination as to the merits, within the meaning of *Miaglia* EU:C:2005:156, in so far as it is a definitive decision on the inadequacy of that evidence and excludes any possibility that the case might be reopened on the basis of the same body of evidence.

[...]

‘[a]s regards the situations referred to by Article 4 of Protocol No 7, namely the application of the [*ne bis in idem*] principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR’. Given that Article 54 of the CISA makes the final nature of a judicial decision dependent, for the purposes of application of the *ne bis in idem* principle to possible prosecutions by another Contracting State, on whether or not that decision is final in the Contracting State in which it was made, that point in the explanations is relevant in the present case.

25. Similarly, the Appeals Chamber held in *Gaddafi* that the Pre-Trial Chamber did not err when it held that where a first-instance decision is no longer subject to appeal, it is final and obtains the status of *res judicata*.²¹ As *res judicata*, a final decision attracts the protections against re-litigation as provided by the principle of *ne bis in idem*.

26. In this instance, the Prosecutor has not appealed the decision by Pre-Trial Chamber I to reject these charges, nor sought subsequent confirmation of these incidents pursuant to Article 61(8) by supplying additional evidence, nor sought the amendment of the charges pursuant to Article 61(9). The Pre-Trial Chamber’s explicit rejection of this conduct is therefore final. The principle of finality would be vitiated if no consequences attached to the Pre-Trial Chamber’s decision to reject certain charged

²¹ *Gaddafi*, [ICC-01/11-01/11-695](#), para. 56.

conduct.²² Permitting the Prosecution to adduce material relating to explicitly rejected conduct would violate the protections afforded to the accused under Article 61(9).

27. Article 20(1) of the Statute guards the doctrine of *ne bis in idem* which provides that '[e]xcept as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court'. The final nature of the Pre-Trial Chamber's decision thus attracts the protection of Article 20.

28. In *Kenyatta*, Trial Chamber V(b) determined that the principle of *ne bis in idem* 'would not attach' 'where the Prosecution withdraws charges prior to the commencement of the trial'.²³ However, the instant circumstances are distinct: the principle does attach where the judicial decision explicitly rejecting the conduct has become final.²⁴ This is because after the trial has commenced, the Prosecution may no longer exercise its right to supply additional evidence and bring the charges again for confirmation.²⁵ The result is that at the commencement of trial, the determinations of the Pre-Trial Chamber with respect to charged conduct become final.

29. The Issue therefore arises squarely from the Decision as to whether the Trial Chamber erred in law and violated the protection against *ne bis in idem* by permitting the Prosecution to prosecute conduct concerning charged facts and circumstances that were rejected by the Pre-Trial Chamber in a decision that has become final under the Rome Statute framework.

The Second Issue arises from the Decision

30. The Second Issue is whether the Trial Chamber erred in law by permitting the Prosecution to elicit evidence which concerns facts explicitly rejected by the Pre-Trial Chamber, thus exceeding the scope of the facts and circumstances determined by the Pre-Trial Chamber.

²² See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2d Ed. 2016), p. 507 (noting risk that the reintroduction of dismissed charges 'could effectively circumvent [A]rticle 20').

²³ [ICC-01/09-02/11-981](#), para. 56.

²⁴ CJEU, 'M', [Case C-398/12](#), 05 June 2014, para. 37.

²⁵ Article 61(9).

31. Article 74(2) of the Statute binds the Trial Chamber to the ‘facts and circumstances described in the charges or any amendment thereto’.²⁶ While the ‘evidence presented during the pre-trial phase can . . . be amended or added to in the course of the trial’, ‘the facts can no longer be amended once the Pre-Trial Chamber has rendered its decision on the confirmation of the charges’.²⁷

32. As the Appeals Chamber in the *Ntaganda* judgment has explained:²⁸

The factual scope of a given trial – the facts and circumstances described in the charges that may not be exceeded in the conviction decision – is delineated in the course of the pre-trial proceedings, starting with the warrant of arrest or the summons to appear. In subsequent proceedings, the Prosecutor may include further particulars in the document containing the charges. Eventually the charges formulated by the Prosecutor are considered by the pre-trial chamber, which sets the parameters of the charges by confirming or declining to confirm them in the confirmation decision.

33. After the confirmation of charges, the Court’s statutory framework does not provide for the possibility of amendment of confirmation decisions by trial chambers as it is pre-trial chambers that hold ‘distinct powers . . . to determine the factual scope of the charges’.²⁹ As the Appeals Chamber in the *Lubanga* judgment has explained:³⁰

[G]iven the Court’s statutory framework and the respective roles of the Prosecutor and the Pre-Trial Chamber in the confirmation process, there can be no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial. If it were otherwise, a person could be tried on charges that have not been confirmed by the Pre-Trial Chamber, or in relation to which confirmation was even declined.

34. Accordingly, because ‘the Confirmation Decision, taken as a whole, defines the scope of the charges’, the ‘provision of additional information by the Prosecution relating to

²⁶ *Lubanga*, [ICC-01/04-01/06-2205](#), para. 93

²⁷ *Katanga and Ngudjolo*, [ICC-01/04-01/07-1547-tENG](#), para. 25.

²⁸ [ICC-01/04-02/06-2666-Red](#), para. 325 (emphases added).

²⁹ *Yekatom*, [ICC-01/14-01/18-542](#), para. 15.

³⁰ [ICC-01/04-01/06-3121-Red](#), para. 124 (emphasis added).

the charges should not exceed the scope of, and thereby result in any amendment to, the facts and circumstances described in the charges as confirmed'.³¹

35. In this case, the Pre-Trial Chamber expressly determined that the Prosecution failed to satisfy the threshold necessary to confirm these incidents for the purpose of adding them to the confirmed charges. The factual findings of Pre-Trial Chamber I in relation to the charges concerning P-1707 and P-1717 were as follows:

- 1) contrary to the Prosecution's submissions, the Chamber did not consider that the evidence supported a factual conclusion that [REDACTED]:³²

La Chambre note que la version très expurgée de la déclaration de [REDACTED] ne permet pas de reconstituer le récit tel qu'il est développé dans la Requête. La Chambre rappelle à ce propos qu'elle n'établit les faits que sur la base de la version des éléments de preuve tels que divulgués à la défense, et qu'elle ne peut donc pas établir les faits sur la base d'informations qui sont expurgées.

La Chambre note que [REDACTED] affirme qu'au cours d'un interrogatoire « à la police », [REDACTED], P-1707 a été menacé [REDACTED] par M. Al Hassan, [REDACTED] s'il ne disait pas la vérité. P-1707 aurait ensuite été libéré [REDACTED].

La Chambre note, qu'à l'appui de sa demande de confirmer les charges concernant le cas de P-1707, le Procureur fournit uniquement la déclaration fortement expurgée d'un témoin anonyme [REDACTED], à propos d'une victime anonyme (P-1707), sans que cette déclaration ne soit corroborée par un autre élément de preuve, ni même que l'on sache, à l'examen de la preuve, comment le témoin a obtenu l'information qu'il rapporte (soit, s'il est un témoin direct ou indirect). La Chambre note de surcroît que le Procureur déclare qu'il ne s'agit pas d'un témoin direct qui aurait assisté à la scène. La Chambre considère que les preuves présentées par le Procureur à l'appui de ce cas sont trop faibles afin d'établir les faits au standard requis.

³¹ Bemba, [ICC-01/05-01/08-3343](#), para. 32.

³² ICC-01/12-01/18-767-Conf-Corr, paras 55-57.

and

- 2) contrary to the Prosecution's submissions, the evidence was insufficient to establish that P-1717 was arrested by Mohamed Moussa [REDACTED] and subsequently lashed:³³

Le Procureur affirme que P-1717 a été arrêté par Mohamed Moussa [REDACTED], puis qu'il a reçu des coups de fouet devant la BMS.

La Chambre note, qu'à l'appui de sa demande de confirmer les charges concernant le cas de P-1717, le Procureur fournit uniquement la déclaration fortement expurgée d'un témoin anonyme [REDACTED], qui ne permet pas de déterminer s'il s'agit d'un témoin direct ou indirect, et à propos d'une victime anonyme (P-1717), et sans que cette déclaration ne soit corroborée par un autre élément de preuve. La Chambre considère que les preuves présentées par le Procureur à l'appui de ce cas sont trop faibles afin d'établir les faits au standard requis.

36. By its Decision, Trial Chamber X has nonetheless permitted the Prosecution to exceed the factual scope of the charges, overriding the determination of the Pre-Trial Chamber that the allegation was insufficiently reliable and not chargeable. The Issue therefore arises as to whether Trial Chamber X erred in law in permitting the Prosecution to elicit evidence regarding these incidents after the Pre-Trial Chamber explicitly rejected them from the factual scope of confirmed charges.

37. The case law from this Court does not support the possibility of introducing evidence in support of facts that the Pre-Trial Chamber has directly declined to confirm. In *Bemba*, Trial Chamber III 'instruct[ed] the prosecution to revise the Second Amended DCC' to 'delet[e] those factual assertions that were rejected by the Pre-Trial Chamber' from the general factual background' of that document.³⁴ In that case, the Pre-Trial Chamber had 'concluded that there was insufficient evidence to establish substantial grounds to believe that Mr Bemba had the requisite intent' necessary for murder, rape, and pillaging, and the Prosecution subsequently referred to pillaging. Trial Chamber

³³ ICC-01/12-01/18-767-Conf-Corr, paras 72-73.

³⁴ [ICC-01/05-01/08-836](#), para. 49; [ICC-01/05-01/08-593-Anx-Red](#), para. 15.

III also required the Prosecution to remove a reference to a victim in relation to whom the Pre-Trial Chamber had determined that ‘there [was] not sufficient evidence to establish substantial grounds to believe that MLC soldiers killed’ from the section ‘Facts Relevant to Individual Crimes Charged’ in the Document Containing the Charges.³⁵

38. While the Prosecution cites Trial Chamber VI’s decision in *Ntaganda* allowing for the submission of evidence relating to uncharged conduct,³⁶ in that case the Pre-Trial Chamber had in fact made ‘no express finding in relation to these allegations’ because Mr Ntaganda had never been charged as a direct perpetrator.³⁷ Further, while the Prosecution cites Trial Chamber IX’s decision in the *Ongwen* case, there the Pre-Trial Chamber had not explicitly rejected the facts and circumstances sought to be introduced,³⁸ as instead the ‘acts’ at issue were ‘*not mentioned* by the decision on the confirmation of charges’.³⁹
39. Further, the case law of the *ad hoc* tribunals does not provide support for introducing evidence of uncharged conduct absent a specific exceptional basis. For example, the *Krnjelac*,⁴⁰ *Kupreskic*⁴¹ and *Kvočka*⁴² cases cited by the Prosecution concerned the exceptional circumstance of uncharged conduct confirming a consistent pattern of conduct, while the *Kunarac*⁴³ and *Strugar*⁴⁴ cases involved the introduction of evidence for the exceptional purpose of disproving a coincidence involving the presence of the accused and the accused’s mental state.
40. The Second Issue therefore arises squarely from the Decision, namely whether Trial Chamber X erred in law in permitting the Prosecution to elicit evidence regarding these incidents after the Pre-Trial Chamber explicitly rejected them from the factual scope of confirmed charges.

³⁵ [ICC-01/05-01/08-836](#), para. 112; [ICC-01/05-01/08-593-Anx-Red](#), para. 57.

³⁶ [ICC-01/04-02/06-968](#), paras 13-17.

³⁷ [ICC-01/04-02/06-450](#), paras 44-45.

³⁸ [ICC-02/04-01/15-1199-Red](#), para. 57.

³⁹ [ICC-02/04-01/15-1199-Red](#), para. 57.

⁴⁰ ICTY, [Krnjelac Appeal Judgement](#), para. 67.

⁴¹ ICTY, [Kupreskić et al. Appeal Judgement](#), para. 589.

⁴² ICTY, [Kvočka et al. Appeal Judgement](#) para. 652.

⁴³ ICTY, [Kunarac et al Trial Judgement](#), para. 589.

⁴⁴ ICTY, *Strugar*, ‘[Decision on the Defence Objection to the Prosecution’s Opening Statement Concerning Admissibility of Evidence](#)’, p. 3.

The Third Issue arises from the Decision

41. The Third Issue which arises from the decision is whether the Trial Chamber erred in law by finding that the Defence has sufficient notice as concerns the introduction of evidence relating to P-1707 and P-1717 where this evidence was not provided in the Amended DCC, the Trial Brief, or any accusatory or auxiliary documents disclosed in advance of the commencement of trial.

42. Under the ICC system, an accused must be given sufficient notice to prepare for an effective defence. This requirement extends not only to those facts and circumstances alleged to have been part of the confirmed charges, but also those which are not. As the Appeals Chamber in *Ntaganda*, has explained:⁴⁵

For the purposes of article 74(2) of the Statute, the charges must be described in such a way that the trial chamber as well as the parties and participants are able to determine with certainty which sets of historical events, in the course of which crimes under the jurisdiction of the Court are alleged to have been committed form part of the charges, and which do not.

43. In determining whether the defence has been afforded sufficient notice, the Trial Chamber may assess whether an accused received notice through the Confirmation Decision as well as any ‘auxiliary documents’.⁴⁶ The ‘question is . . . whether the [a]ccused has been *meaningfully* informed of the nature, cause, and content of the charges so as to prepare an effective defence’.⁴⁷

44. In this case, material pertaining to P-1707 and P-1717 was not contained in the Amended DCC, the Trial Brief, or any other auxiliary documents. The Pre-Trial Chamber was unable to confirm the alleged facts in part due to the extent of the redactions to the original material.⁴⁸ Redactions to the material regarding these

⁴⁵ [ICC-01/04-02/06-2666-Red](#), para. 326 (emphases added).

⁴⁶ [ICC-01/05-01/08-3343](#), para. 33.

⁴⁷ [ICC-01/05-01/08-3343](#), para. 33 (emphasis added).

⁴⁸ ICC-01/12-01/18-767-Conf-Corr, paras 55 and 57:

La Chambre note que la version très expurgée de la déclaration de [REDACTED] ne permet pas de reconstituer le récit tel qu’il est développé dans la Requête. La Chambre rappelle à ce propos qu’elle n’établit les faits que sur la base de la version des éléments de preuve tels que divulgués à la défense, et qu’elle ne peut donc pas établir les faits sur la base d’informations qui sont expurgées.

(...)

individuals (including their identities) were only lifted on 19 August 2020,⁴⁹ long after these issues were originally litigated and determined by the Pre-Trial Chamber. Furthermore, the Defence has only recently come into possession of important information regarding these individuals, including through further lifting of redactions on 24 September 2021,⁵⁰ and through the victim application of P-1707, disclosed on 27 September 2021.

45. Moreover, the Defence has received no notice as to how the Prosecution intends to use the evidence from these witnesses, and in relation to which charges, in contravention of the principle of sufficiently precise notice mandating the content of the Prosecution's Pre-Trial Brief. In the *Ntaganda* case, where the Prosecution was allowed to rely on certain uncharged conduct (which had not been explicitly rejected), Trial Chamber VI explicitly relied the fact that the incident was included in the Prosecution pre-trial brief, which the defence had received seven months before commencing the trial.⁵¹ Contrary to Trial Chamber X's findings in the impugned Decision, a witness statement is not a 'document containing the charges', nor an 'auxiliary document' detailing the charges brought against the accused and for which he will be standing trial. Indeed, as this Chamber's own practice demonstrates, simply because a matter is discussed in a witness statement does not necessarily mean that parties will be permitted to ask questions concerning that topic. For example, Counsel for the Defence was prevented from [REDACTED].⁵²

46. In contrast, the Trial Chamber's Decision with respect to the elicitation of evidence concerning P-1707 and P-1717 during the testimony of P-0641 determines that the Prosecution is nonetheless not barred from posing questions relating to these incidents. This Decision also runs against the spirit of Trial Chamber X's own Directions, which

La Chambre note, qu'à l'appui de sa demande de confirmer les charges concernant le cas de P-1707, le Procureur fournit uniquement la déclaration fortement expurgée d'un témoin anonyme [REDACTED], à propos d'une victime anonyme (P-1707), sans que cette déclaration ne soit corroborée par un autre élément de preuve, ni même que l'on sache, à l'examen de la preuve, comment le témoin a obtenu l'information qu'il rapporte (soit, s'il est un témoin direct ou indirect). La Chambre note de surcroît que le Procureur déclare qu'il ne s'agit pas d'un témoin direct qui aurait assisté à la scène. La Chambre considère que les preuves présentées par le Procureur à l'appui de ce cas sont trop faibles afin d'établir les faits au standard requis.

⁴⁹ [REDACTED], disclosed in Trial INCRIM package 88 19 August 2020. Previously disclosed versions of these documents contained heavy redactions to paragraphs 91-95 and 212-214.

⁵⁰ [REDACTED], disclosed in Trial INCRIM package 147 24 September 2021.

⁵¹ [ICC-01/04-02/06-968](#), paras 13-15.

⁵² ICC-01/12-01/18-T-122-CONF-ENG ET 27-08-2021, p. 29, line 23 to p. 30, line 19: [REDACTED].

indicate that the scope of questioning in examination-in-chief and cross-examination should be ‘directly relevant to the charges and limited to relevant and/or contested issues’,⁵³ as well as the Trial Chamber X’s oral decision of 10 September 2021.⁵⁴

The 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 may materially advance the proceedings

47. First, there is a significant risk of grave prejudice given that the uncharged conduct involves alleged conduct on the part of Mr Al Hassan.

48. Second, the Issues also affect the expeditious conduct of the proceedings. Under Article 74(2), the Chamber cannot base the judgment on facts and circumstances that were explicitly rejected by the Pre-Trial Chamber. Accordingly, the introduction of evidence falling outside the scope of those facts and circumstances confirmed by the Pre-Trial Chamber is contrary to the interests of expeditious conduct of the proceedings, and would delay the progression of evidence responsive to the charges. An immediate resolution by the Appeals Chamber on this issue would therefore materially advance the proceedings.

IV. Relief sought

49. The Defence respectfully requests that Trial Chamber X **GRANT LEAVE TO APPEAL** the Decision on the Issues identified.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 28th Day of September 2021
At The Hague, The Netherlands

⁵³ ICC-01/12-01/18-789-Conf-AnxA, para. 41.

⁵⁴ 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.