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TRIAL CHAMBER X

Before: **Judge Antoine Kesia-Mbe Mindua, Presiding**
Judge Tomoko Akane
Judge Kimberly Prost

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD

Public

Public redacted version of "Prosecution response to Defence request for leave to appeal the "Decision on requests related to the submission into evidence of Mr Al Hassan's statements"", 28 May 2021, ICC-01/12-01/18-1502-Conf

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Introduction

1. The Trial Chamber X ("Chamber") should dismiss the Defence application for leave to appeal[1] the "Decision on requests related to the submission into evidence of Mr Al Hassan's statements"[2] ("Statements).

2. None of the six Issues raised in the Application[3] are appealable issues arising from the Decision within the meaning of article 82(1)(d) of the Statute. The Application is based on multiple misunderstandings of the Chamber's findings and conclusions and many of the Defence's arguments consist of mere disagreements with the Decision. The Application should be dismissed on that basis alone.

3. In any event, should the Chamber decide not to dismiss the Application on the basis that it does not demonstrate appealable issues arising from the Decision, the Application should be dismissed as the Issues also fail to meet the remaining cumulative criteria under article82(1)(d) of the Statute. While they have no merit and are not appealable issues, some of the Issues—in particular Issues 2.1, 2.2 and 2.3—(if found appealable) may affect the fair conduct of the proceedings, but none of the six Issues affects the expeditious conduct of the proceedings. This is primarily because the Statements have been admitted into evidence in written form, which will not impact further on the evidentiary phase of the trial. In addition, these Issues also do not affect the outcome of the trial. While the Chamber has admitted the Statements into evidence, it has yet to decide what weight, if any, to attribute to them. Any assumption in this respect is premature and speculative at this stage. For the same reason, the Issues do not require immediate resolution by the Appeals Chamber to materially advance the proceedings. If and when the Chamber bases its conclusions on the Statements as part of its final decision under article 74, the Defence may raise the Issues as part of an appeal pursuant to article 81.

[1] ICC-01/12-01/18-1498-Conf-Corr; ICC-01/12-01/18-1498-Corr-Red ("Application").
[2] ICC-01/12-01/18-1475-Conf ("Decision"). The Decision ruled on the Prosecution's request to introduce evidence preserved under article 56 of the Statute (ICC-01/12-01/18-1218-Red – "Request for Introduction"); the Defence's consolidated application regarding Article 69(7) procedural matters (ICC-01/12-01/18-1256-Red2 – "Defence's Procedural Article 69(7) Application"); and the Defence's request to exclude Mr Al Hassan's ICC interviews under article 69(7) (ICC-01/12-01/18-1346-Conf – "Exclusion Request").
[3] Application, footnote 2: "The 6 issues are: **(Issue 1.1)** whether the Chamber erred in law in finding that the burden for demonstrating that the Article 69(7) criteria are fulfilled falls on the Defence; **(Issue 1.2)** whether the Chamber abused its discretion by deciding not to convene a *voir dire* hearing; **(Issue 2.1)** whether the Chamber erred in law and abused its discretion by relying on irrelevant considerations and failing to rely on relevant considerations as concerns the causal nexus between violations and the means used to collect evidence; **(Issue 2.2)** whether the Chamber's conclusion that the causal nexus was not satisfied was legally incorrect and manifestly unreasonable; **(Issue 2.3)** whether the Chamber erred in law and misappreciated the facts set out in the evidential record through its conclusion that the Prosecution took sufficient steps to ensure the reliability of the evidence collected while Mr Al Hassan was detained at the DGSE; and **(Issue 3.1)** whether the Chamber erred in law by failing to issue a reasoned assessment concerning the prejudicial impact of the admission of such statements as part of its Article 69(4) assessment (collectively referred to as the "Issues").

Confidentiality

4. This filing is classified as confidential, pursuant to regulation 23*bis* (2) of the Regulations of the Court ("Regulations"), because it responds to the Application, which was filed confidentially and because it refers to other documents which are currently subject to the same classification. The Prosecution will file a public redacted version of this document in due course.

Submissions

A. The Application does not raise appealable issues arising from the Decision

(a) Issue 1.1 is not an appealable issue arising from the Decision

5. Issue 1.1—whether the Chamber erred in law in finding that the burden for demonstrating that the article 69(7) criteria are fulfilled falls on the Defence—is not appealable.[4] Rather than identifying a discrete topic for resolution, the Defence merely disagrees with the Chamber's findings and previous relevant case law of the Court.[5]

6. *First,* in challenging the Chamber's finding that the party bringing a motion under article 69(7) of the Statute (the Defence, in this case) bears the burden to show that the criteria for exclusion are met,[6] the Defence merely disagrees with the Chamber's conclusions which are based on established jurisprudence at this Court requiring a moving party to discharge its burden.[7] Moreover, contrary to the Defence's submissions,[8] the Chamber was not required to explain "the logic" of the different burdens under article 69(4) and 69(7). As the Chamber found, in both instances, the burden lay with the moving party.[9] Further, the Chamber may be assumed to have engaged with all the submissions before it; the Defence only speculates that it did not.[10] Nor is there any basis for the Defence's conjecture that the Chamber's determination "[was] lifted straight from the Prosecution response".[11] Merely because the Chamber declined to follow the Defence's interpretation of the burden of proof (and specific

[4] Application, paras. 3-9.
[5] Application, paras. 3-9; ICC-04-168 OA3 , para. 9; ICC-01/12-01/18-1099 ("Termination ALA Decision"), para. 15.
[6] Application, paras. 3-4; Decision, para. 37.
[7] Decision, para. 37, fn. 68, citing *inter alia* ICC-01/04-01/10-465-Red ("*Mbarushimana* CD"), paras. 59-60, 62-65; ICC-01/05-01/13-1257 ("*Bemba et al.* Communications Decision"), para. 22; ICC-01/05-01/13-1284 ("*Bemba et al.* Intercepts Decision"), para. 32; ICC-01/05-01/13-1432 ("*Bemba et al.* Arido Statements Decision"), paras. 26-27; ICC-01/05-01/13-1854 ("*Bemba et al.* First Western Union Decision"), para. 62.
[8] Application, para. 4.
[9] Decision, paras. 36-37.
[10] Application, para. 4.
[11] Application, para. 4.

case law it advanced in support) does not make this issue appealable—as this Chamber has already found in a similar context.[12]

7. *Second*, the Defence misreads the Chamber's findings on the requirements of the article 69(7) *chapeau* and related burden of proof, while continuing to argue for a strained, and incorrect, interpretation of the "real risk" standard in this context.[13] Rather than "adding two elements to the burden on the Defence",[14] the Chamber only required the Defence, as the moving party, to make a showing under article 69(7).[15] The Defence's legal argument is a mere disagreement with the Decision.

8. *Third*, while the Defence claims incorrectly that the Chamber provided no guidance on the "real risk" threshold,[16] this disregards several key aspects of the Decision.[17] The Chamber found that the "real risk" standard set out in the approach and jurisprudence of the European Court of Human Rights (ECtHR), and adopted by other criminal courts and tribunals, was instructive.[18] Accordingly, it noted that the Defence must show a real risk that the evidence in question was obtained by means of torture or cruel, inhumane and degrading treatment (CIDT).[19] It further explained, in some detail, the legal standards applying to the exclusionary rule under article 69(7).[20] The Defence fails to explain what further guidance was necessary, in the circumstances.

9. Further, while the Defence claims that the Chamber applied "an extremely exacting standard to the Defence evidence",[21] this is no more than the Defence's contrary view on the purported strength of its evidence, which the Defence merely re-litigates.[22] Likewise, the claim that the Chamber failed to give a reasoned opinion does not properly reflect the Chamber's careful consideration of the issue.[23] Merely because the Defence in this case asserts that it did not have contemporaneous evidence of Mr Al Hassan's state of mind and physical condition while in detention did not require this Chamber to formulate the burden of proof in a manner contradicting the Court's case law and practice.[24]

[12] Termination ALA Decision, para. 15.
[13] Application, paras. 5-6 (arguing that the Defence only needs to establish a real risk that an individual is a victim of torture or CIDT, based on medical or NGO reports, without establishing the article 69(7) chapeau).
[14] Application, para. 6.
[15] Decision, paras. 37-38.
[16] Application, para. 7.
[17] Decision, paras. 38-45.
[18] Decision, para. 38.
[19] Decision, para. 38.
[20] Decision, paras. 39-45.
[21] Application, para. 7.
[22] Application, para. 7 (including on Mr Al-Hassan's purported subjective state of mind).
[23] *Contra* Application, para. 8.
[24] *Contra* Application, para. 8.

10. *Fourth*, the Defence's submissions relating to several aspects of the Prosecution's actions and account of its interviews with Mr Al Hassan [redacted] are factually inaccurate and unsubstantiated.[25] They should be dismissed *in limine.*

11. For the above reasons, Issue 1.1 amounts to a mere disagreement and fails to demonstrate an appealable issue arising from the Decision. It should be dismissed.

(b) Issue 1.2 is not an appealable issue arising from the Decision

12. Issue 1.2—whether the Chamber abused its discretion by deciding not to convene a *voir dire* hearing[26]—is not an appealable issue arising from the Decision. Issue 1.2 is a mere disagreement with a discretionary decision by the Chamber.[27] The Defence claims that its fair trial rights were violated, but merely makes abstract arguments to that effect without showing how Issue 1.2 involves an "identifiable subject or topic requiring a decision for its resolution".[28] The purpose of the requested *voir dire* would have been, among other things, to request the Chamber to "admit the reports of [the Defence] consultants into evidence [and to] adduce and authenticate their testimony".[29] Because the Chamber has already held that portions of these consultants' reports were unreliable,[30] and it repeated this conclusion in the Decision,[31] the proposed *voir dire* could not affect the fairness of the proceedings and was simply not required.

13. Moreover, the Defence incorrectly claims that it was prevented from "adduc[ing] other witnesses [redacted]".[32] [redacted][33]

14. To the extent that the proposed *voir dire* was intended to hear other evidence,[34] the Chamber, in exercising its discretion, decided to reject the Defence's request in light of the "significant amount of written material before it regarding the issues at stake", which material

[25] Application, para. 9. *See e.g.,* ICC-01/12-01/18-1401-Conf ("Prosecution Article 69(7) Response"), para. 59 ("With respect to the Defence's request [redacted], the OTP has informed the Defence that it considers it necessary to wait for the Chamber's decision [redacted]. If allowed, [redacted] can give evidence and if necessary be available for cross-examination"), on the allegation that the [redacted] refused to be interviewed or examined by the Defence; Investigation notes describing contacts with [redacted] on the allegation that the Prosecution had [redacted] teractions with [redacted]).

[26] Application, para. 10.

[27] Decision, paras. 15-18.

[28] ICC-01/04-168 OA3, paras. 9. ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7.

[29] Decision, para. 16. ICC-01/12-01/18-1346-Red2, para. 9.

[30] ICC-01/12-01/18-1009-Conf ("Termination Decision"), para.106-109.

[31] Decision, para. 48.

[32] Application, para. 10.

[33] [redacted].

[34] Decision, para. 15.

and information it considered sufficient to make its determinations without hearing live evidence "[i]n light of the issues for central determination" it had identified.[35] The Defence's disagreement with this decision does not amount to an appealable issue.

15. For the above reasons, Issue 1.2 amounts to a mere disagreement and fails to identify an appealable issue arising from the Decision. It should be dismissed.

(c) Issue 2.1 is not an appealable issue arising from the Decision

16. Issue 2.1—whether the Chamber erred in law and abused its discretion by relying on irrelevant considerations and failing to rely on relevant considerations as concerns the causal nexus between the violations of the defendant's rights and the means used to collect evidence—is not an appealable issue arising from the Decision.[36] The Defence misreads the Decision, and speculates as to the rationale behind several findings without proper cause.[37] The Issue is based on multiple misinterpretations of the Decision, and to this extent, does not arise from the Decision.

17. *First,* in claiming that the Chamber relied on "practical realities *in situ*" to purportedly diminish the protection available to suspects,[38] the Defence accords to the Chamber's findings a meaning they do not have. The Chamber did not refer to "practical realities *in* situ" that differed "arbitrarily" from suspect to suspect,[39] but stated rather, as a matter of principle, that the Court's investigators were dependent on State cooperation to conduct investigative activities and their control of the overall circumstances in which those activities are carried out will be limited.[40] The Defence also does not explain how the obligations in several statutory provisions (articles 21(3), 54, 55, 67, for instance) can be read to exclude the import of State cooperation on investigative activities by the Court, a principle equally set out in several provisions under Part 9 of the Statute.[41]

18. *Second,* the Defence's claim that the Chamber's approach implied that "the ends justifies the means" is unsupported.[42] It can be dismissed on this basis alone. Further, the precedent that the Defence refers to is inapposite, since there is no indication that the Chamber's decision was

[35] Decision, para. 18.
[36] Application, paras. 11-15.
[37] Application, paras. 11-15.
[38] Application, para. 13.
[39] Application, para. 13.
[40] Decision, para. 42.
[41] Application, para. 13.
[42] Application, para. 14.

influenced in the manner suggested.[43] The Defence's arguments are simply not supported by the Decision.

19. *Third*, in arguing that the legal test prescribed on the causal nexus failed to consider relevant factors relating to the nature of the violations alleged,[44] the Defence, yet again, misreads the Decision. It conflates two distinct, but related, findings as one. The Chamber first found that there must be a causal link between the violation and the gathering of the evidence.[45] In this context, it found that the assessment must focus on the investigative activities of the ICC Prosecution in this case (as the entity which generated the evidence), also considering the general context in which the evidence was gathered and interaction with local authorities, to the extent relevant to the gathering of the specific evidence.[46] Separately, and in a related context, it then found that while the Prosecution's degree of control over the evidence gathering process was not necessarily a consideration in assessing whether a violation under article 69(7) had occurred, it nonetheless supported the view that the exclusionary rule must be read narrowly to focus on the circumstances of evidence gathering.[47] In claiming that the Chamber needed to adjust its "narrow nexus",[48] the Defence fails to distinguish between these different findings and to reflect the findings in their entirety. The Defence also fails to substantiate its claim that the Chamber failed to take into account the nature of the alleged violations.[49] The Chamber's Decision shows otherwise.[50]

20. For the reasons above, Issue 2.1 is not an appealable issue arising from the Decision. It should be dismissed.

(d) Issue 2.2 is not an appealable issue arising from the Decision

21. Issue 2.2—whether the Chamber's conclusion that the causal nexus was not satisfied was legally incorrect and manifestly unreasonable—is not an appealable issue arising from the Decision.[51] In disputing the Chamber's finding that there was no violation under article 69(7), the Defence misreads the Decision, misinterprets case law of this Court including that of the Appeals Chamber, and misstates Prosecution submissions on the record.[52]

[43] Application, para. 14 (referring to ICC-01/04-01/06-1981 "*Lubanga* Bar Table Decision", para. 44).
[44] Application, para. 15.
[45] Decision, para. 40.
[46] Decision, para. 42.
[47] Decision, para. 43.
[48] Application, para. 15.
[49] Application, para. 15.
[50] Decision, para. 38 (for example).
[51] Application, paras. 16-27.
[52] Application, paras. 16-27.

22. *First,* while the Defence claims, as a premise for this Issue, that Mr Al Hassan "was the victim of prolonged arbitrary detention",[53] the Chamber did not make such a finding. These aspects of the Issue, therefore, do not arise from the Decision. Moreover, speculating as to the import of the Prosecution's submissions does not assist the Defence in demonstrating an appealable issue.[54] The Defence must demonstrate such issue arises from *the Decision*, not the Prosecution's submissions. Moreover, although the Defence argues that "[Mr Al Hassan's] arbitrary and illegal deprivation of liberty facilitated the Prosecution's ability to collect the statements",[55] the Decision shows otherwise.[56] This is a mere disagreement.

23. *Second,* the Defence merely speculates that the Chamber "ignored" the "role of arbitrary DGSE detention in facilitating the interview process" because it was focused on the Prosecution's investigative activity.[57] This argument, again, incorrectly assumes that the Decision includes findings that Mr Al Hassan was arbitrarily detained. In addition, it disregards several key findings. Notwithstanding that the Chamber focused its inquiry on the specific context of evidence gathering, it carefully considered the various steps taken in relation to reports regarding treatment and detention conditions.[58] The Defence fails to mention any of these steps.

24. *Third,* the Defence's submissions that the Chamber's approach does not accord with existing case law, are arguments on the merits of Issue 2.2, but fail to demonstrate how the Issue is appealable and that it arises from the Decision. In any event, the Defence's interpretation of the two cases (*Bemba et al.* and *Lubanga*) it presents in support is inapposite and incorrect.[59]

25. Regarding the *Bemba et al.* Appeals Judgment, contrary to the Defence submissions, the Appeals Chamber did not find that the "causal nexus was met", such that a violation of the right to privacy had been established.[60] Further, and yet again contrary to the Defence submissions, the Appeals Chamber did not find that the Trial Chamber had erred by failing to take into account Austria's violation of domestic law.[61] Rather, it found the opposite, *i.e.,* that the Trial

[53] Application, para. 18.
[54] *Contra* Application, para. 18 (speculating as to the import of the Prosecution's submissions). *See e.g.,* Prosecution Article 69(7) Response, para. 28 (contesting the claim on incommunicado detention).
[55] Application, para. 18.
[56] Decision, paras. 65-69.
[57] Application, para. 19.
[58] Decision, paras. 65-69.
[59] Application, paras. 20-21.
[60] Application, para. 20 (referring to ICC-01/05-01/13-2275-Red "*Bemba et al.* AJ", paras. 332-333). *See Bemba et al.* AJ, paras. 333 (finding it necessary to determine whether Western Union Records were obtained in violation of the internationally recognised human right to privacy, but not that the "nexus" was met), 347-348.
[61] Application, para. 20.

Chamber had erred by taking into account such violations of domestic law,[62] and that neither violations of or compliance with national law are determinative of an article 69(7) violation.[63] Most notably, however, the Defence incorrectly suggests that the Appeals Chamber "did not base its determination as to nexus on the sufficiency of the steps or safeguards taken by the Prosecution".[64] Rather, in finding that all investigative conduct must conform to internationally recognised human rights (and in determining that the collection of the Western Union financial records was not a disproportionate interference with the right to privacy),[65] the Appeals Chamber implied that steps or safeguards taken by the Prosecution to protect the integrity of the investigation were significant. Contrary to the Defence's assertion,[66] in emphasising the measures taken by the Prosecution, the Chamber's approach was consistent with the *Bemba et al.* Appeals Chamber's approach.[67] The Defence submissions fail to persuade.

26. Likewise, the Defence's argument that the Chamber should come to the same conclusion as the Chambers in *Lubanga,* notwithstanding the different facts of the two cases, is also unconvincing.[68] Moreover, the Chamber has already found that merely because the Prosecution had an agreement with the Malian authorities did not establish its collusion in the alleged violations.[69] The Defence's attempt to re-open settled matters should be dismissed.

27. *Fourth,* the Defence's argument claiming that "the Prosecution's ongoing reliance on the DGSE to secure Mr Al Hassan's presence at interviews was a separate violation of Mr Al Hassan's rights under UNCAT" is unclear.[70] If the Defence is raising a purported new violation not previously raised in the Exclusion Request, this would shift goalposts. An application for leave to appeal is not the appropriate avenue to raise new arguments. Further, if the Defence is alleging "collusion", this set of arguments has been previously addressed and rejected.[71] Again, this is not the appropriate avenue to revive those settled issues.

28. Moreover, it is inaccurate to state, as the Defence does, that the article 69(7) chapeau elements were met on the basis of uncontested facts,[72] or on the basis of unsubstantiated claims

[62] *Bemba et al.* AJ, para. 298.
[63] *Bemba et al.* AJ, para. 332.
[64] Application, para. 20.
[65] *Bemba et al.* AJ, paras. 330, 332-333, 339; ICC-01/05-01/13-2275-Anx ("*Bemba et al.* Judge Henderson's Separate Opinion"), paras. 18-19.
[66] Application, para. 22.
[67] Decision, para. 45 ("[…] This includes examining steps, if any, were taken to ensure that the evidence gathering process afforded the necessary rights and protections to the person interviewed and safeguarded the product of the interview, pursuant to the applicable law under the Statute.").
[68] Application, para 21, citing *Lubanga* Bar Table Decision, para. 38.
[69] Termination Decision, paras. 93-95; Application, para. 21.
[70] Application, para. 24.
[71] Termination Decision, paras. 92-117; Application, paras. 18 (fn. 41), 24.
[72] Application, para. 25.

that Mr Al Hassan's rights were violated.[73] In doing so, the Defence fails to point to any concrete portion of the Decision to that effect, without attempting to demonstrate how the Issue is appealable. Such efforts should be dismissed.

29. Finally, in arguing that the Chamber was obliged to consider whether the use of evidence obtained was antithetical to the integrity of the proceedings, the Defence, and not the Chamber, "put[s] the cart before the horse".[74] When no article 69(7) violation has been found, any exercise to engage the second step of the two-step process (to assess the impact on the integrity of the proceedings) under article 69(7) (a) and (b) is premature and unnecessary. The Defence submission that not doing so was a "critical omission" is at odds with the statutory construction of article 69(7) and the Court's law.[75]

30. For the reasons above, Issue 2.2 is not an appealable issue arising from the Decision. It should be dismissed.

(e) Issue 2.3 is not an appealable issue arising from the Decision

31. Issue 2.3—whether the Chamber erred in law and in fact in concluding that the Prosecution took sufficient steps to ensure the reliability of the evidence collected while Mr Al Hassan was detained at the DGSE[76]—is not an appealable issue arising from the Decision.

32. *First*, the Defence alleges that Issue 2.3 involves an error of law, but it makes no arguments to that effect. Simply concluding that the Chamber's approach violated the Statute and internationally recognised human rights law[77] is insufficient to identify an appealable issue based on an alleged error of law.

33. *Second*, the Defence's factual arguments on Issue 2.3 are based on misinterpretations of the Decision or the underlying evidence or are mere disagreements with the Chamber's conclusions. As held by the Appeals Chamber, "merely a question over which there is disagreement or conflicting opinion" does not amount to an appealable issue under article 82(1)(d).[78]

34. Contrary to the Defence's argument,[79] the Chamber's conclusion to reject the Exclusion Request did not turn on a limited number of factual findings identified by the Defence. Instead,

[73] Application, para. 25.
[74] Application, para. 26.
[75] Application, para. 27; *Bemba et al.* AJ, para. 280.
[76] Application, paras. 28-33.
[77] Application, paras. 28.
[78] ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.
[79] Application, para. 28.

it is based on the cumulative assessment of a broad array of conclusions and findings concerning: a) the separation of the ICC interview process from national proceedings;[80] b) the role played by counsel who assisted Mr Al Hassan during the interviews;[81] c) the manner in which the Prosecution explained to Mr Al Hassan his rights and how he exercised those rights;[82] d) concrete steps taken by the Prosecution to reports regarding treatment and detention conditions;[83] and e) Mr Al Hassan's own account of his subjective experiences of the ICC interviews.[84] The Defence focuses on a few findings in isolation, but omits the larger context in which they were made.

35. The arguments of the Defence identified below, even taken by themselves, do not correctly reflect the Decision and therefore fail to identify an appealable issue arising from the Decision:

The Prosecution's avowals that it would intercede with national authorities

36. Contrary to the Defence's contention,[85] the Prosecution did not merely "try" to intercede with national authorities to improve Mr Al Hassan's detention or "initiate attempts" to that effect.[86] Instead, the Chamber correctly held that the Prosecution in fact "informed the Malian authorities of some of Mr Al Hassan's complaints and concerns". This intervention provided Mr Al Hassan "the occasion to raise his concerns in person [redacted]"[87] The Chamber concluded that these, and other steps taken by the Prosecution, "were reasonable in the circumstances, also bearing in mind the limited powers of the ICC Prosecution in its cooperation with public authorities at the national level"[88] The Defence's arguments to the contrary repeat previous submissions and are mere disagreements with the Decision.

The Chamber's alleged reliance on the Prosecution's perspective rather than Al Hassan's

37. A plain reading of the Decision does not support the Defence's allegations that the Chamber analysed interactions from the Prosecution's perspective rather than how Mr Al Hassan would have understood them. Instead, the Chamber assessed whether, on the basis of the facts before it, the Statements were given voluntarily and whether there is a "real risk that the evidence in question was obtained by means of torture or CIDT".[89] The four examples

[80] Decision, paras. 49-53.
[81] Decision, paras. 54-56.
[82] Decision, para. 57-64.
[83] Decision, paras. 65-69.
[84] Decision, para. 70.
[85] Application, paras. 28, 29.
[86] Application, paras. 28, 29.
[87] Decision, para. 67.
[88] Decision, para. 69.
[89] Decision, paras. 38, 45, 71.

adduced by the Defence mischaracterize the Decision and fail to raise an appealable issue arising from it:

- Contrary to the Defence's contention that the Chamber did not provide a reasoned opinion,[90] it relied on the fact that the Prosecution's records indicate that it did not receive any copies of statements taken from Mr Al Hassan by Malian authorities until after his transfer to the ICC.[91] The Defence's allegation that the Prosecution's language "clearly implied that they had access to the DGSE interview"[92] is speculative and unsupported. This does not show that the Chamber was required to elaborate further.[93]
- The Chamber further took note of the Prosecution's repeated statements that it had no control over his treatment and conditions of detention to assist Mr Al Hassan in his free decision on "whether or not to proceed with the Prosecution interviews".[94] The Chamber considered this factor, among other objective facts, to assess the voluntariness of the Statement.[95] Contrary to the Defence's argument,[96] the Chamber did not—and should not—have made any conclusion on the voluntariness of the Statement on the basis of one factor in isolation. The Defence's argument that "the Chamber was obliged to consider all alternative inferences that can be drawn from this exchange, and to do so from the perspective of Mr Al Hassan", does not accurately reflect the Chamber's approach to assessing the voluntariness of Mr Al Hasan's statements. It merely expresses a disagreement with the Decision.
- Similarly, the Chamber's conclusion that Mr Al Hassan provided his statements voluntarily was, among other factors, based on the objective considerations that the Prosecution informed Mr Al Hassan that he was being interviewed pursuant to article 55(2)[97] and that the Court would reject Mr Al Hassan's prior recorded evidence if the Prosecution had no right to meet with him.[98] The Defence inaccurately claims that the Chamber gave no weight to the impact of these statements on Mr Al Hassan's subjective perception.[99] Instead the Chamber considered these objective facts as part of its overall assessment on the voluntariness of the Statements.

[90] Application, para. 30, first bullet point.
[91] Decision, para. 63.
[92] Exclusion Request, para. 25.
[93] Decision, para. 63.
[94] Decision, para. 50.
[95] See also paras. 49-70; see in particular, paras. 52-53.
[96] Application, para. 30, second bullet point.
[97] Decision, para. 55.
[98] Decision, para. 53.
[99] Application, para. 30, third bullet point.

- Contrary to the Defence's contention,[100] the Chamber did not dismiss *en masse* the Defence submissions concerning the impact of torture and CIDT on Mr Al Hassan's physical and mental capacity. Instead it assessed the voluntariness of the Statements and whether there is a "real risk that the evidence in question was obtained by means of torture or CIDT"[101] on the basis on its cumulative assessment of numerous objective factors. The Defence arguments that the Chamber should not have considered factors such as the internal reliability of the evidence or the responsiveness of the interviewee, fail to appreciate the Chamber's holistic and objective approach to assessing the voluntariness of the Statements and therefore misrepresent the Decision.

The Chamber's approach to inferences

38. The Defence's allegation that the Chamber repeatedly drew inferences in favour of the Prosecution, notwithstanding the absence of any objective foundation, while giving no weight to Defence submissions, or rejecting them as "speculative",[102] is not borne out by the Decision. The Defence arguments to that effect are mere disagreements with the Decision and fail to identity an appealable issue arising from it.

39. The examples adduced by the Defence do not show anything to the contrary:

- The Defence misrepresents the Chamber's finding regarding the Prosecution's assurance to Mr Al Hassan that it would not proceed with the interview "if he had any injury because of ill-treatment or if he was sick". Contrary to the Defence's contention, the Chamber's finding is well supported by the record of the case.[103] In addition, the Prosecution's assurance was not "hollow", nor was it limited to physical injuries related to ill-treatment.[104] The alternative inferences that the Defence proposes to be drawn from the Prosecution's assurance merely show that it disagrees with the Chamber's findings, but the Defence fails to raise an appealable issues arising from the Decision.
- The Defence's argument that the Chamber incorrectly gave weight to the Prosecution's assurance to Mr Al Hassan in December 2017 that he had a right not to answer questions[105] misrepresents the Decision. The Defence omits to mention that the Chamber noted that Mr Al Hassan actually exercised this right and that the Prosecution respected Mr Al Hassan's wish not to talk about certain issues.[106] In addition, contrary

[100] Application, para. 30, fourth bullet point.
[101] Decision, paras. 38, 45, 71.
[102] Application, paras. 31-33.
[103] Decision, para. 53. *Contra*, Application, para. 32.
[104] *Contra*, Application, para. 32.
[105] Application, para. 32; Decision, para. 62.
[106] Decision, para. 62.

to the Defence's contention, the Chamber also held [redacted].[107]

40. The Defence further argues that the Chamber's approach to inferences is "impacted by its counter-factual description of the evidence and procedural history".[108] The examples adduced by the Defence do now show that this argument is supported by the Decision:

- When emphasising the steps taken by the Prosecution to intervene on Mr Al Hassan's behalf, the Chamber noted the dates of the Prosecution's interventions[109] and expressly rejected the Defence's submission that the Prosecution's interventions with the Malian authorities were too late.[110]
- In addition, while arguing that the Decision failed to acknowledge that the Prosecution did not ask Mr Al Hassan about the identity of the officials who allegedly mistreated him or what he was allegedly forced to say,[111] the Defence did not mention that the Chamber considered an array of steps that the Prosecution had taken in relation to reports regarding Mr Al Hassan's treatment and his conditions of detention. This included informing the Malian authorities of some of Mr Al Hassan's complaints and concerns;[112] ensuring that Mr Al Hassan himself had the occasion to rise such concerns in person [redacted];[113] systematically enquiring with Mr Al Hassan how he was feeling and whether he was ready to continue with the interviews;[114] and making interviews shorter when requested.[115]

41. For the reasons set out above, Issue 2.3 misstates the Decision and is therefore not an appealable issue arising from the Decision. It should be dismissed.

(f) Issue 3.1 is not an appealable issue arising from the Decision

42. Issue 3.1—whether the Chamber erred in law by failing to issue a reasoned assessment concerning the prejudicial impact of the admission of such statements as part of its Article 69(4) assessment[116]—does not arise from the Decision. The Defence fails to acknowledge that the

[107] Decision, footnote 170; *Contra*, Application, para. 32.
[108] Application, para. 33.
[109] Decision, 67, *see e.g*. dates specified in fn. 165. *Contra*, Application, para. 33.
[110] Decision, para. 69.
[111] Application, para. 33.
[112] Decision, para. 67.
[113] Decision, para. 67.
[114] Decision, para. 68.
[115] Decision, para. 68.
[116] Application, para. 34.

Chamber, in fact, provided reasons to support its conclusion that on a preliminary basis, the Statements "are sufficiently relevant and probative to outweigh any prejudicial effect that could be caused from their admission".[117] The Defence merely disagrees with the Chamber's reasoning, but fails to identify an appealable issue arising from the Decision.[118]

43. The Chamber first found that the Statements are relevant to the trial and have probative value, including that they were provided voluntarily.[119] It also held that the recording of the statements bears sufficient indicia of reliability. In this context, the Chamber then specifically rejected the Defence's submissions that the statements were so unreliable that they should be excluded or else a prejudice would arise.[120]

44. The Defence faults the Chamber for not sufficiently addressing its arguments that admitting the statements would undermine the integrity and fairness of the proceedings.[121] However, those submissions mostly consisted of abstract statements and failed to argue in concrete term how the prejudicial effect of the admission of the statements would outweigh their relevance and probative value. Having examined—and rejected throughout the Decision—the Defence's arguments regarding the propriety of the Prosecution's investigation, the reliability of the Statements and their probative value,[122] and having found that the reports of the Defence consultants[123] and the PoE Report,[124] were to be given very limited weight, there was no need to repeat those findings in the part of the Decision concluding that the statements are admissible under article 69(4) of the Statute. The Defence's arguments that the Chamber should have approached the matter differently are nothing but a mere disagreement with that approach.

45. For the reasons above, Issue 3.1 is not an appealable issue arising from the Decision. It should be dismissed.

[117] Decision, para. 73.
[118] Application, para. 34.
[119] Decision, para. 74-75.
[120] Decision, para. 75; rejecting Defence arguments in Exclusion Request, paras. 31-32.
[121] Application, para. 34, referring to Exclusion Request, para. 33.
[122] Decision, paras. 49-70.
[123] Decision, para. 48 ("The Chamber has accordingly afforded no weight in this decision to the consultants' analysis and conclusions in relation to Mr Al Hassan's interviews and has relied on its own holistic assessment of the material at hand."); para. 70 ("The Chamber does not consider that an evidentiary basis for Mr Al Hassan's subjective state of mind during his ICC interviews can be properly established through consultants and experts in this manner.").
[124] Decision, para. 70 ("Accordingly, the Chamber cannot rely on Mr Al Hassan's account in this respect as reported by the Defence consultants and the Chamber's Panel of Experts to make any findings with respect to his subjective state of mind at the relevant time or the impact of that on his ability to give a statement.")

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

46. Should the Trial Chamber decide not to dismiss the Application on the basis that it does not demonstrate appealable issues arising from the Decision, the Application should in any event be denied as the Issues fail to meet the remaining cumulative criteria under rule 82(1)(d) of the Statute. The proposed Issues do not significantly affect both the fair and expeditious conduct of proceedings or the outcome of the trial, nor do they require immediate resolution by the Appeals Chamber to materially advance the proceedings.

(a) The Defence fails to meet its burden to show on a case-by-case basis that the Issues meet the criteria for leave to appeal

47. A party seeking leave to appeal has the burden to demonstrate on a case-by-case basis that the Issues raised in its application meet the criteria for leave to appeal.

48. The Application should be dismissed because it fails to properly articulate—on an issue-by-issue basis—how *each* Issue satisfies the criteria under article 82(1)(d). The Defence argues generally that the six Issues meet the criteria for leave to appeal. However, it fails to show how a) each individual specific Issue affects those criteria; or b) each Issue affects all the criteria for leave to appeal under article 82(1)(d).[125] The Defence's cursory and general arguments are plainly insufficient to show how each of the six Issues raised in the Application individually meet the criteria for leave to appeal. Trial Chamber III in the *Bemba* case held that "[i]n […] circumstances [where] the Defence fails to provide reasons as to how *each* Issue satisfies the relevant criteria, the Chamber is entitled to dismiss [the request] *in limine*."[126] In fact, the Application should be rejected on that basis alone.

49. For leave to appeal to be granted, "a) the decision must involve an 'issue' that would significantly affect (i) *both* the 'fair' and 'expeditious' conduct of the proceedings; *or* (ii) the outcome of the trial; and b) in the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings."[127] The Defence fails to establish that the Issues meet these cumulative requirements.

[125] Application, para. 35.
[126] ICC-01/05-01/08-3382, para. 12 (emphasis added).
[127] *See e.g.* ICC-01/09-01/11-912, para. 16 (emphases in the original).

(b) The Issues do not affect the fair and expeditious conduct of the proceedings

50. While the Prosecution does not concede that they have any merit,[128] some of the Issues—in particular Issues 2.1, 2.2 and 2.3 that relate to "the manner in which the Chamber interpreted and applied the constituent elements of article 69(7)"[129] —may affect the fair conduct of the proceedings.

51. However, none of the six Issues cumulatively affect the fair and expeditious conduct of the proceedings. In particular, the Defence fails to show that the Issues delay the overall determination of responsibility.[130] This is primarily because the Statements have been admitted into evidence in written form. The Chamber can assess how much weight, if any, to give to those written statements as part of its final decision under article 74. Any argument that this may affect the expeditious conduct of the evidentiary phase of the trial would be speculative. In fact, the Defence has not made any argument to that effect.

52. However, the Defence argues that the Issues affect the expeditious conduct of the proceedings because they may affect litigation in any future article 69(7) challenges.[131] This argument too is entirely speculative, as the Defence has not identified any such future challenges. Following the Court's jurisprudence, an applicant cannot speculate in the abstract that a decision causes a prejudice to the rights of the accused in order to invoke that the fairness/expeditiousness of the proceedings are affected.[132] It does not suffice for an issue to have merely a hypothetical impact on the proceedings.[133] Nor is it sufficient to provide unsubstantiated arguments.[134] A purely general complaint does not suffice.[135] In addition, this argument appears to be limited to Issue 1.1. regarding the burden of proof for challenges under

[128] As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issue meets the criteria set out in the provision (ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52).
[129] Application, para. 2.
[130] Expeditious proceedings are intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003: "the Court's obligation to do justice expeditiously and effectively, as well as fairly." (para. 6); "we can only do justice that is expeditious, fair and efficient" (para. 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue "will significantly affect the efficient and expeditious conduct of the proceedings"; Jones and Powles, International Criminal Practice at para. 8.5.60.
[131] Application, para. 35.
[132] See ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6: ICC-01/09-02/11-211 para. 33 and 39: ICC-01/09-02/11-88, para. 25, see also paras. 23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.
[133] ICC-01/04-01/07-1958, para. 20. See also: ICC-02/04-01/05-367, para. 21-22
[134] ICC-01/09-01/11-1154, para 26.
[135] ICC-01/04-01/06-2463, para. 31.

article 69(7), but cannot possibly have any bearing on the other five Issues raised by the Defence.

(c) The Issues do not affect the outcome of the trial

53. The Defence has not demonstrated that the Issues affect the outcome of the trial. The Chamber need not consider this aspect any further. Notwithstanding, while the Chamber has admitted the Statements into evidence, it has yet to decide what weight, if any, to attribute to them as part of its final decision under article 74.[136] It does not suffice for an issue to have a hypothetical impact on the outcome of the trial, it must have a concrete impact.[137] At this stage any suggestion that the Issues concerning the admission of the Statements affect the outcome of the trial would be premature and speculative.

(d) An immediate resolution of the Issues by the Appeals Chamber would not materially advance the proceedings

54. The Application is premature as the Defence has additional avenues to pursue before resorting to the Appeals Chamber. In fact, the Decision refers to the Chamber's upcoming assessment of the weight, if any, to give the Statements.[138] Thus, resolution of the six Issues by the Appeals Chamber at this stage will not "move forward" the proceedings.[139] Instead, it could cause unnecessary delay to this ongoing trial if the Appeals Chamber were to grant a Defence request for suspensive effect of an appeal based on the Issues.

55. In addition, immediate resolution of the Issues by the Appeals Chamber is not required. If and when the Chamber bases its conclusions on the Statements as part of its final decision under article 74, the Defence retains the possibility to raise the Issues as part of an appeal pursuant to article 81. Relevantly, when rejecting leave to appeal on issues related to the application of article 69(7), Trial Chamber VII in *Bemba et al.* held as follows:[140]

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

[136] Decision, para. 75.
[137] ICC-01/04-01/07-1958, para. 20; ICC-01/09-02/11-406, paras. 42-43.
[138] Decision, para. 75.
[139] ICC-01/04-168, paras. 14-15, 18.
[140] ICC-01/05-01/13-1898, para. 17.

56. Finally, because any suggested impact on the fair and expeditious conduct of the proceedings or the outcome of the trial at this stage, is wholly speculative, it follows that an immediate resolution of the issue by the Appeals Chamber would not materially advance the proceedings.[141] The Trial Chamber in the *Ruto et al*. case specifically held that "[h]aving regard to the […] speculative nature of the Defence's arguments of prejudice", an immediate resolution of the Issue would not materially advance the proceedings.[142]

Conclusion

57. For the foregoing reasons, the Prosecution respectfully requests the Chamber to reject the Application.

Fatou Bensouda
Prosecutor

Dated this 28th day of May 2021
At The Hague, The Netherlands.

[141] ICC-01/04-01/06-2109, para. 22.
[142] ICC-01/09-01/11-1154, para 28.