

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/12-01/18**

Date: **15 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 “Prosecution response to Defence request for leave to appeal oral decision of 10 September 2021 concerning the conduct of cross-examination by the Defence” (ICC-01/12-01/18-1762-Conf, filed on 24 September 2021)**

**Source:** Office of the Prosecutor

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court*****to:****The Office of the Prosecutor**Mr Karim A. A. Khan QC  
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Ms Alka Pradhan**Legal Representatives of the Victims**Mr Seydou Doumbia  
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Mr Fidel Luvengika Nsita**Unrepresented Victims****Legal Representatives of the Applicants****Unrepresented Applicants****The Office of Public Counsel for Victims****The Office of Public Counsel for the Defence****States Representatives****Amicus Curiae****REGISTRY**

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**Detention Section****Victims Participation and Reparations Other  
Section**

## I. Introduction

1. Trial Chamber X (“Chamber”) should dismiss the Defence’s request for leave to appeal<sup>1</sup> the Chamber’s oral decision concerning the conduct of cross-examination by the Defence.<sup>2</sup> All the Defence’s four proposed issues either misread and mischaracterise the Decision, or contest matters that did not arise from the Decision, and are thus not appealable under article 82(1)(d) of the Statute.<sup>3</sup> Even *arguendo*, none of the proposed issues meets the rest of article 82(1)(d) cumulative criteria. They do not significantly affect the fair and expeditious conduct of the proceedings and their immediate resolution by the Appeals Chamber would not materially advance the proceedings.

## II. Confidentiality

2. Pursuant to regulation 23bis(2) of the Regulations of the Court (“Regulations”), this response is filed confidentially because the Request was filed with this classification. A public redacted version will be filed in due course.

## III. Submissions

### A. The Request does not raise any appealable issue.

#### **First Issue: Whether the Chamber erred in law by restricting the Defence’s ability to question witnesses concerning payments and assistance received from the Prosecution**

3. This proposed issue misunderstands the Decision as preventing the Defence from seeking to challenge the credibility of Prosecution witnesses during cross-examination on the basis of, among others, payments made to them by the Prosecution,<sup>4</sup> and as raising the evidentiary threshold to be met before such questions may be asked.<sup>5</sup>

4. Yet, the Decision merely reminded the Defence that the relevance and basis for its questions must be clear to the Chamber when the Defence (and indeed the Prosecution) is questioning witnesses. This has nothing to do with restricting or preventing the Defence from

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<sup>1</sup> ICC-01/12-01/18-1735-Conf (“Request”).

<sup>2</sup> ICC-01/12-01/18-T-131-Conf-Eng, p. 96, l. 9-25, p. 97, l. 1-25, p. 98, l. 1-25, p. 99, l. 1-16 (open session) (“Decision”).

<sup>3</sup> ICC-01/04-01/10-487, paras. 32-33; ICC-01/05-01/13-1278, para. 9.

<sup>4</sup> *Contra* Request, para. 8-13.

<sup>5</sup> Request, para. 9.

asking any questions, or raising any threshold. It is simply a call upon the Defence to conduct questioning in a proper way by ensuring that the relevance of any questions is clear.

5. Indeed, to ensure that this is observed, the Decision directed the Defence to be prepared to provide “a specific response identifying the nexus to the issues in the case or the credibility” if the Chamber has any doubts about the relevance of any specific question.<sup>6</sup> Far from preventing the Defence from examining Prosecution witnesses regarding financial assistance they may have obtained, the Decision specifically acknowledged that such assistance may be relevant,<sup>7</sup> but - in line with ensuring that the relevance of any question to a witness is clear - added that questioning about such financial assistance to any witness is dependent on the context and the nature of the testimony being assessed.<sup>8</sup>

6. Nor did the Decision<sup>9</sup> adopt a higher materiality test.<sup>10</sup> To the contrary, it simply reminded - in line with paragraph 41 of the Directions on the Conduct of Proceedings (which is also based on rule 140(2)(b) of the Rules)<sup>11</sup> - that the relevance of the Defence’s questions must be “clearly apparent” to the Chamber.<sup>12</sup>

7. In conclusion, since the first proposed issue is based on a misunderstanding and mischaracterisation of the Decision, it does not identify an appealable issue under article 81(2)(d) of the Statute. It should not be certified for appeal.

**Second Issue: Whether the Chamber erred in law by restricting the Defence’s right to conduct investigations through cross-examination**

8. The Defence’s further claim that the Decision elevates the materiality standard to one that is “clearly relevant to the Chamber” and which unnecessarily confines the scope of the Defence’s questioning<sup>13</sup> similarly misreads the Decision.

9. As submitted above, the Decision simply reminded that the relevance and basis of

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<sup>6</sup> Decision, p. 97, l. 17-19.

<sup>7</sup> Decision, p. 98, l. 2-4.

<sup>8</sup> Decision, p. 98, l. 5-6.

<sup>9</sup> Request, para. 9.

<sup>10</sup> *Contra* Request, para. 9

<sup>11</sup> ICC-01/12-01/18-789-AnxA (“Directions”), para. 41.

<sup>12</sup> Decision, p. 98, l. 10.

<sup>13</sup> Request, para. 17-18.

Defence questioning should be “clearly apparent to the Chamber”.<sup>14</sup>

10. Nor did the Decision restrict the right of the Defence to pursue investigative lines of questioning during cross-examination, when it required not only that the relevance of any such questions should always be apparent to the Chamber,<sup>15</sup> but also that in order to protect witnesses, both the Defence and the Prosecution should “abstain from putting questions of a strictly private nature” and should “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.”<sup>16</sup> Characterising the Decision’s emphasis on relevance when questioning witnesses and protecting witnesses as restricting the Defence’s right to conduct investigation through cross-examination, clearly misreads the Decision’s clear tenor.

11. Moreover, the Defence assertion based on P-0603’s recent testimony that its “ability to investigate and effectively examine in this case has been substantially prejudiced by factors including (...) the repeated eliciting by the Prosecution of new evidence in preparation sessions and on the stand,”<sup>17</sup> not only falls outside the scope of the Decision (and thus not an appealable issue), but is also highly misleading. The Prosecution does not elicit new evidence during preparation sessions and on the stand, and indeed did not do so regarding P-0603. The preparation log for P-0603 readily shows that any information she provided that was not contained in her statement was spontaneously provided by her. The Prosecution merely sought clarification of such information when she spontaneously provided it.<sup>18</sup>

12. The portion of P-0603’s testimony the Defence cites to support its contention that new evidence is elicited on the stand consists of the Prosecution’s questioning of P-0603 as to how she knows Adama, and [REDACTED]

[REDACTED]<sup>19</sup> While [REDACTED] were redacted from P-0603’s statement, [REDACTED] was not redacted.<sup>20</sup> It therefore amounts to mischaracterisation to refer to this questioning as eliciting

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<sup>14</sup> Decision, p. 98, l. 10.

<sup>15</sup> Decision, p. 97, l. 3-10.

<sup>16</sup> Decision, p. 98, l. 10-14.

<sup>17</sup> Request, para. 18.

<sup>18</sup> See, e.g., [REDACTED]

<sup>19</sup> Request, para. 18, citing ICC-01/12-01/18-T-126-Conf-Eng, p. 9, l. 20-22 (open session).

<sup>20</sup> [REDACTED]

new evidence on the stand. In any event, the Prosecution committed to not relying on this information and to disclose a lesser redacted version of P-0603's statement.<sup>21</sup>

13. Based on the above, the second proposed issue simply misreads the Decision or raises matters that do not arise from it. It thus does not identify an appealable issue, and should not be certified for appeal.

**Third Issue: Whether the Chamber erred in law by requiring the Defence to adduce evidence as a pre-condition for putting questions to a witness**

14. The Defence misconstrues the Decision as requiring the Defence to support its questioning of Prosecution witnesses in cross-examination on the basis of disclosed evidence.<sup>22</sup>

15. Nowhere in the Decision does the Chamber impose such a requirement on the Defence. The Decision simply informed the Defence that if the Chamber questions the relevance of a specific question, "it will of course expect from the Defence a specific response identifying the nexus to the issues in the case or the credibility."<sup>23</sup> Requiring the Defence to elucidate relevance of any question is not equivalent to demanding the Defence disclose any evidence underpinning any question. Nor is there any basis for the numerous Defence arguments concerning purported ramifications for the defendant's right of silence, the confidentiality of Defence sources, the protection of potential Defence witnesses and the capacity of the Defence to complete its investigations in advance of cross-examination.<sup>24</sup>

16. Since the third proposed issue mischaracterises the Decision, it does not identify any appealable issue. It should not be certified for appeal.

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

17. The fourth proposed issue - seeking to appeal an alleged breach of the Defence's right to be heard prior to the issuance of the Decision - similarly misrepresents not only the nature, but also context under which the Decision was issued. Not only was the Decision based on, or a

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<sup>21</sup> ICC-01/12-01/18-T-126-Conf-Eng, p. 26, l. 12-17, p. 28, l. 16-23 (open session); the lesser redacted version of the statement, [REDACTED] where all redactions in paragraph 47 have been lifted, was promptly disclosed on 6 September 2021.

<sup>22</sup> Request, para. 20, 25-26.

<sup>23</sup> Decision, p. 97, l. 17-19.

<sup>24</sup> Request, para. 20.

reminder of what is contained in paragraph 41 of the Directions on the Conduct of Proceedings in this case, but it also sought to correct the breaches of these same Directions by the Defence.

18. Indeed, in issuing the Decision, the Chamber noted that it issued the Decision only after the Defence ignored repeated directives from the Chamber to make the relevance of its questions apparent to the Chamber. The Chamber recalled that it “on many an occasion, asked to understand the relevance of certain issues addressed in recent cross-examinations but to no avail.”<sup>25</sup> The Chamber further noted that it had “asked Defence counsel to put a stop to some lines of questioning and move on to matters of interest in the case” but its “directives have been repetitively” ignored.<sup>26</sup> The Chamber thus did not need the parties’ submissions in these circumstances. In fact, the fourth issue represents a mere disagreement with the Chamber’s directives and the manner in which they were issued. It does not constitute an “appealable issue” arising from the Decision.

**B. The Request fails to meet the cumulative criteria under article 82(1)(d) of the ICC Statute.**

19. Even assuming *arguendo*, that any of the four above proposed questions identifies an appealable issue, the Request should still be denied because it does not to show that the proposed issues affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, or that an immediate resolution of these issues by the Appeals Chamber will materially advance the proceedings.

20. As shown above, the Decision neither deviates from relevant statutory and procedural texts, including rule 140(2)(b) of the Rules and paragraph 41 of the Directions, nor does it violate any Defence rights in conducting its cross-examinations.

21. In any event, through the Decision, and its emphasis that the Defence (and indeed the Prosecution) properly question witnesses, the Chamber is simply discharging its duty under article 64(2) of the Statute to ensure that the trial is fair and expeditious, as well as its duty under article 68(1) of the Statute to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Requiring the Parties to focus on relevant questions will facilitate a fair and expeditious conduct of the proceedings. Appellate

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<sup>25</sup> Decision, p. 97, l. 9-10.

<sup>26</sup> Decision, p. 97, l. 11-13.

intervention will only delay rather than materially advance the proceedings.

#### **IV. Conclusion**

22. For the reasons set out above, the Defence's Request should be denied.

A handwritten signature in black ink, appearing to be 'K.A.K.', with a horizontal line underneath it.

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Karim A. A. Khan QC, Prosecutor

Dated this 15 October 2021

At The Hague, The Netherlands