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**International  
Criminal  
Court**



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

Date: **12 May 2020**

**TRIAL CHAMBER X**

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

**SITUATION IN THE REPUBLIC OF MALI**

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

**Public**

**Public redacted version of ‘Defence request for leave to appeal Trial Chamber X’s  
“Decision on the conduct of proceedings” (ICC-01/12-01/18-789)’**

**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:**

**The Office of the Prosecutor**

Fatou Bensouda

James Stewart

**Counsel for the Defence**

Melinda Taylor

Marie-Hélène Proulx

Thomas Hannis

**Legal Representatives of the Victims**

Seydou Doumbia

Mayombo Kassongo

Fidel Luvengika Nsita

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

**Registrar**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

Nigel Verrill

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

## **I. Introduction**

1. The Defence for Mr. Al Hassan respectfully seeks leave to appeal the Decision on the Conduct of the Proceedings ('the Decision'),<sup>1</sup> in relation to the following five issues ('the Five Issues'):
  - a. Whether the system of evidence, as set out in the Decision, is consistent with the internationally recognized right to be heard, and to receive a reasoned judgment, which includes the right to receive rulings concerning firstly, incriminating evidence that was relied upon to convict the defendant, and secondly, exculpatory evidence concerning the facts relied upon to convict the defendant, that was either not relied upon in the final judgment, or given very little weight ('the First Issue');
  - b. Whether the Trial Chamber abused its discretion, and/or reached an unreasonable outcome, by placing too much weight on the judicial aspects of evidence evaluation, including the time taken to issue evidentiary rulings, and failing to consider, or place sufficient weight on other relevant factors, including the role that timely evidentiary rulings play in expediting the proceedings and facilitating the rights of the parties ('the Second Issue');
  - c. Whether Article 69(2) requires the Trial Chamber to make case by case determination as to whether the use of video-link technology, for specific witnesses, is consistent with the rights of the accused ('the Third Issue');
  - d. Whether, after the confirmation of the charges, and without following the procedure set out in Article 61(9), the Trial Chamber may change confirmed facts set out in the charges, in particular, without affording the defendant a prior opportunity to be heard as concerns their intention to do so ('the Fourth Issue'); and
  - e. Whether the Chamber correctly determined that the Prosecution can elicit testimony on aggravating factors during its cross-examination of Defence witnesses, in particular, in circumstances where the evidence concerns new

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<sup>1</sup> ICC-01/12-01/18-789.

issues, and the aggravating nature of this evidence was not previously notified to the Defence ('the Fifth Issue').

## II. Submissions

### *The Five Issues arise from the Decision*

#### The First Issue

2. After noting that Article 69(4) affords the Chamber the discretion to “choose between the submission approach and the admission approach”,<sup>2</sup> the Chamber determined that it “will not make individualised rulings on the admissibility of evidence but will rather assess the relevance, probative value and potential prejudice of the evidence (the ‘standard evidentiary criteria’) in its judgment pursuant to Article 74 of the Statute”.<sup>3</sup>
3. The result of this decision is that the parties will not necessarily have a written record, or reasoned opinion as concerns the Chamber’s consideration and ultimate adjudication of such matters, even if the item in question has a bearing on the defendant’s innocence or guilt.
4. The Chamber further recognized that its exercise of discretion, under the Statute, “needs to be balanced with the need for a fair and expeditious trial under Article 64(2) of the Statute”; for that reason, the Chamber indicated that “it may still be necessary to make some discrete determinations on the admissibility of specific evidence or categories of evidence”.<sup>4</sup> The Chamber did not, however, provide any criteria or guidance as concerns the type of challenges that would be likely to trigger such a ruling.
5. The Chamber relied heavily on the *Bemba et al.* Appeals Judgment to justify its approach. This judgment, which was issued in the context of an Article 70 case that lasted just over 8 months, focused primarily on the question as to whether the Statute required the Chamber, as a matter of law, to make determinations as to the

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<sup>2</sup> ICC-01/12-01/18-789-AnxA, para. 27.

<sup>3</sup> ICC-01/12-01/18-789-AnxA, para. 27.

<sup>4</sup> ICC-01/12-01/18-789-AnxA, para. 31

‘admissibility’ of each item of evidence tendered by the parties.<sup>5</sup> In terms of the compatibility of this finding with the requirements for a reasoned judgment, the Appeals Chamber noted that:<sup>6</sup>

Rule 64 (2) of the Rules only stipulates that “[a] Chamber shall give reasons for any rulings it makes on evidentiary matters”, but does not concern when and under what circumstances any such ruling may or shall be rendered by a trial chamber. The Appeals Chamber is equally not persuaded by the argument that an accused’s right to a reasoned determination on the charges against him or her, as enshrined in article 74 (5) of the Statute, is violated as such when a trial chamber decides not to exercise its discretion to render rulings on the relevance and/or admissibility of evidence.

[...]

The Appeals Chamber agrees that, in that context, a trial chamber must indeed explain with sufficient clarity the basis for its determination. However, when a trial chamber, in its decision under article 74 of the Statute, fails to explain sufficiently why it considers an item of evidence – whether documentary or testimonial – to be relevant and with sufficient probative value to be relied upon for its factual analysis (or vice versa) despite issues raised at trial in that regard, what is at issue is the trial chamber’s compliance with its duty under article 74 (5) of the Statute to provide “a full and reasoned statement of [its] findings on the evidence and conclusion” in support of its decision on the guilt or innocence of the accused. In other words, the safeguard of an accused’s right to a reasoned determination on the charges against him or her does not lie in the fact that a trial chamber exercises its discretion to rule on the relevance or admissibility of documentary evidence or rather considers its relevance and probative value as part of the evaluation of the guilt or innocence of the accused.

6. Accordingly, far from endorsing the Trial Chamber’s approach to Article 74, the Appeals Chamber reached the opposite conclusion, that is, that Article 74 safeguards the rights of the accused by imposing a duty on the Chamber to issue a full and reasoned statement on evidential findings that were determinative to the defendant’s innocence or guilt. The extent of this duty, within the context of an Article 5 case, is further elaborated in the later *Bemba* appeal judgment, and by internationally recognized human rights law. Specifically, in the *Bemba* appeals judgment, the Majority found Article 74 must be interpreted and applied in a manner, which is consistent with the internationally recognized right to a reasoned judgment; consequently, “[i]t must be clear from the trial chamber’s decision which facts it

<sup>5</sup> [ICC-01/05-01/13-2275-Red](#), para. 576.

<sup>6</sup> [ICC-01/05-01/13-2275-Red](#), paras. 596-597.

found to have been established beyond reasonable doubt and how it assessed the evidence to reach these factual findings.”<sup>7</sup>

7. Accordingly, although the Appeals Chamber noted that the Chamber has “a degree of discretion as to what to address and what not to address in its reasoning”,<sup>8</sup> this discretion is necessarily impacted by the potential importance of the evidential item in question. As further elaborated by the Appeals Chamber, “if particular items of evidence that are, on their face, relevant to the factual finding are not addressed in the reasoning, the Appeals Chamber will have to determine whether they were of such importance that they should have been addressed”.<sup>9</sup> Conversely, “[i]f a trial chamber’s reasoning in relation to a given factual finding does not conform with the principles set out in the preceding paragraphs, this may amount to a procedural error, as the trial chamber’s conviction would, in respect of that particular finding, not comply with the requirement in article 74 (5) of the Statute”.<sup>10</sup>
8. It follows that it would amount to an abuse of discretion for the Chamber to issue factual findings, without providing a clear record as to the manner in which it considered items of evidence that are objectively relevant to such a finding. The extent to which the Chamber has adhered to this obligation will, in turn, depend on whether the Chamber issued prior evidentiary rulings, which clarify how the Chamber assessed the evidence, in order to reach its ultimate finding that certain facts were, or were not, established to the standard of beyond reasonable doubt. For example, if the Chamber has issued prior evidentiary rulings, setting out its findings as concerns the relevance and probative value of individual items of evidence, a statement in the judgment that it reached a certain factual conclusion, after considering the evidence as a whole, can be understood, by reference to such findings. In contrast, in the absence of such rulings, the same finding will leave the parties entirely in the dark as concerns the specific items that were deemed relevant to this fact (including exculpatory evidence), the manner in which their weight was assessed, and the extent to which the Chamber considered issues of prejudice concerning particular items of evidence. This

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<sup>7</sup> [ICC-01/05-01/08-3636-Red](#), para. 52.

<sup>8</sup> [ICC-01/05-01/08-3636-Red](#), para. 54.

<sup>9</sup> [ICC-01/05-01/08-3636-Red](#), para. 54.

<sup>10</sup> [ICC-01/05-01/08-3636-Red](#), para. 55.

is particularly the case in an Article 5 case, where the ‘evidence as a whole’ can span thousands of items.

9. The discretion to employ the ‘submission’ system is thus tempered by the duty to ensure that there is an objective record in the case file as concerns the Chamber’s considerations regarding evidentiary items that are relevant, and objectively important to the factual finding in question. In line with the right to be heard, this record must address any “specific, pertinent and important point made by the accused” as concerns any alleged flaws in this body of evidence, and any exculpatory evidence that it is capable of refuting or qualifying the finding in question.<sup>11</sup>
10. Given the obligation to interpret and apply the Statute in a manner, which is consistent with internationally recognized human rights law, it is pertinent that the ECHR has also affirmed that the existence of evidential rulings concerning the relevance, probative value, and prejudicial effect of evidence go to the heart of the presumption of innocence, and the right to a fair and impartial trial. For this reason, the ECHR has emphasized:
  - Firstly, that the defendant must be given an effective opportunity to be heard, and to challenge the authenticity and prejudicial impact of individual items of evidence, that are likely to be determinative of the Chamber’s decision;<sup>12</sup> and

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<sup>11</sup> *Zhang v Ukraine*, [6970/15](#), paras. 74-75, and 60-61 (below):

60. Furthermore, according to the Court’s well-established case-law, the right to a fair trial cannot be seen as effective unless the requests and observations of the parties are truly “heard”, that is to say, properly examined by the tribunal (see *Carmel Saliba v. Malta*, no. 24221/13, § 65, 29 November 2016, and the cases cited therein).

61. Lastly, according to the Court’s established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *Moreira Ferreira v. Portugal* (no. 2) [GC], no. 19867/12, § 84, 11 July 2017). In examining the fairness of criminal proceedings, the Court has held in particular that by ignoring a specific, pertinent and important point made by the accused, the domestic courts fall short of their obligations under Article 6 § 1 of the Convention (see *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 280, 21 April 2011).

See also *Boldea v. Romania*, App. No. [19997/02](#), paras. 28-35; [ICC-01/05-01/08-3636-Red](#), paras. 172-175.

<sup>12</sup> See ‘[Guide on Article 6 of the European Convention on Human Rights: criminal limb](#)’, paras. 200-201:

200. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being

- Secondly, discretionary powers on issues that affect the enjoyment of a fair trial right are subject to first, the general principle that the law must provide clear and predictable guidance as to the circumstances in which the Chamber will exercise that discretion, and second, the requirement that the degree of discretion must not render undermine effectiveness of the fair trial right (including the right to challenge the Court's reliance on evidence that was obtained in a manner that violated a specific fair trial right).<sup>13</sup>

11. In contrast to the above, the Decision affords no clarity as to the particular circumstances in which the Trial Chamber will issue a ruling in relation to specific challenges to the admissibility of evidence, or, provide reasons in the judgment itself. The Decision merely states that the Chamber 'may' issue rulings on unspecified admissibility issues, and that it 'may' address issues in the judgment itself. The level of discretion is thus described in unfettered terms.
12. The First Issue therefore arises from the Decision, namely, the issue as to whether the system of evidence, as set out in the Conduct of the Proceedings, is consistent with the internationally recognized right to be heard, and to receive a reasoned judgment, which includes the right to receive rulings concerning firstly, incriminating evidence that was relied upon to convict the defendant, and secondly, exculpatory evidence concerning the facts relied upon to convict the defendant, that was either not relied upon in the final judgment, or given very little weight.

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*unreliable, the need for supporting evidence is correspondingly weaker (Bykov v. Russia [GC], § 89; Jalloh v. Germany [GC], § 96). In this connection, the Court also attaches weight to whether the evidence in question was or was not decisive for the outcome of the criminal proceedings (Gäfgen v. Germany [GC], § 164).*

*201. As to the examination of the nature of the alleged unlawfulness in question, the above test has been applied in cases concerning complaints that evidence obtained in breach of the defence rights has been used in the proceedings. This concerns, for instance, the use of evidence obtained through an identification parade (Laska and Lika v. Albania), an improper taking of samples from a suspect for a forensic analysis (Horvatić v. Croatia), exertion of pressure on a co-accused (Erkapić v. Croatia; Dominka v. Slovakia (dec.)), use of planted evidence against an accused (Layijov v. Azerbaijan, § 64; Sakit Zahidov v. Azerbaijan, §§ 46-49; Kobiashvili v. Georgia, §§ 56-58), unfair use of other incriminating witness and material evidence against an accused (Ilgar Mammadov v. Azerbaijan (no. 2)); use of self-incriminating statements in the proceedings (Belugin v. Russia\*, § 68-80); and use of expert evidence in the proceedings (Erduran and Em Export Dış Tic A.Ş. v. Turkey, §§ 107-112; see also Avagyan v. Armenia, § 41).*

<sup>13</sup> *Ibrahim v United Kingdom*, [50541/08](#), [50571/08](#), [50573/08](#) and [40351/09](#), para. 310.



## **The Second Issue**

13. Article 64(3)(a) provides that upon assignment of a case for trial, the Trial Chamber shall confer with the parties, and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. In line with this provision, and *per* the instruction of the Single Judge, the Prosecution, the Defence and the LRV engaged in discussions concerning the appropriate procedures for this case, and it emerged that both the Defence and the LRV supported the adoption of the ‘admission’ system for evidence,<sup>14</sup> while the Prosecution took no specific position, setting out what it considered to be advantages arising from either system.<sup>15</sup> The Defence also cited the particular features of this case, and argued that the ‘admission’ system would best promote the expeditiousness of the proceedings.<sup>16</sup>
14. In issuing its ruling, the Chamber noted that it had taken these observations “into consideration, but did not see the need to systematically discuss the parties’ proposals or submissions”.<sup>17</sup> As concerns the rationale for adopting the ‘submission system’, the Chamber referred to the following considerations:<sup>18</sup>

the Chamber will be able to more accurately assess relevance and probative value with all the evidence submitted and all the submitted evidence will be subjected to a uniform treatment; (ii) a significant amount of time will be saved; (iii) there is no reason for the Chamber to screen itself from considering materials inappropriately; and (iv) there is no reason to assume that professional judges would consider irrelevant or unduly prejudicial materials, noting in particular the requirement of a reasoned judgment.

15. The Trial Chamber did not explain the basis for its conclusion that the ‘submission system’ saves a “significant amount of time”. And, while focusing on the advantages that accrue to the Chamber, the Decision does not address or give any weight to the further implications for the parties. For example, in referencing the time that that will

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<sup>14</sup> ICC-01/12-01/18-618-Red, paras. 31-40; ICC-01/12-01/18- 619, para. 7.

<sup>15</sup> ICC-01/12-01/18-615, paras. 52-63.

<sup>16</sup> ICC-01/12-01/18-618-Red, para. 39: “The issuance of regular rulings concerning the admission of tendered evidence would thus promote clarity and streamline the evidential issues in play. This, in turn, would serve to focus, and delimit the later cases that will be brought by the LRV and the Defence. If the Defence is aware that certain items have been admitted into evidence, it can rely on them without making additional or duplicative arguments as concerns admissibility. Conversely, if items have been excluded, the Defence need not call evidence to counter these items. The parties would also be better placed to seek interlocutory appellate relief in a timely manner, in the event of a dispute as concerns the applicable legal standard to the admission of particular types of evidence. This would avoid the possibility that the Appeals Chamber must quash the verdict or order a re-trial, due to errors concerning the legal standard applied to evidence.”

<sup>17</sup> ICC-01/12-01/18-789, para. 5.

<sup>18</sup> ICC-01/12-01/18-789-AnxA, para. 30.

purportedly be saved, the Chamber did not place any weight on arguments that from a party perspective, the lack of certainty in the ‘submission system’ generates more work, more litigation, and further impedes the parties from making informed choices as concerns the efficient and effective use of resources.<sup>19</sup>

16. Similarly, although the Chamber extolled the benefits of being able to make an ‘holistic’ assessment of the evidence based on the record as a whole, the Chamber nonetheless maintains the strict deadlines for opposing the ‘admissibility’ of evidence, as set out in Rule 64(1), even though when doing so, the responding party will have no certainty as to whether the Chamber will issue a ruling on such arguments (which it ‘may’ do), or merely consider such matters in the judgment itself. The Decision does not clarify whether the parties will have a general opportunity to adduce subsequent observations as concerns the relevance and probative value of evidence, based on an holistic assessment of the evidence (that is, even if the criterion of ‘exceptionality’, set out in Rule 64(1) is not met). If the parties do not have such a right, then it is unclear as to how the Chamber will balance its holistic consideration and assessment of the relevance and probative value of evidence, with its duty, under Article 74(2), to base the judgment on “evidence submitted and discussed before it at trial”. In sum, the Decision is unclear as to how particular judge-driven aspects of the ‘submission system’ will be reconciled with specific adversarial features of the Statute and Rules, and the defendant’s overarching right to be heard as regards particular considerations concerning the relevance and probative value of evidence, that are likely to influence the Trial Chamber’s resolution of the charges.
17. In line with the Decision’s focus of the implications of this system as concerns the judicial management of the trial, the Decision avers that since the judges are professional, “there is no reason for the Chamber to screen itself from considering materials inappropriately”.<sup>20</sup> The Decision did not, however, address the need to screen irrelevant or prejudicial materials from witnesses, who are not professional judges, and whose testimony might be improperly impacted by exposure to materials, which should have been excluded from the record. The wording of risk of Article 69(4) specifically envisages that issues of insurmountable prejudice can arise under a range of scenarios that fall outside the mandatory exclusionary provisions of Article

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<sup>19</sup> ICC-01/12-01/18-618-Red, paras. 39-40.

<sup>20</sup> ICC-01/12-01/18-789-AnxA, para. 30.

69(7). But, as things stand, it is unclear as to whether, in exercising the Chamber's discretion as to whether to issue up-front admissibility rulings, the Chamber will place any weight on the specific need to screen irrelevant or prejudicial materials from witnesses.

18. The Decision also did not refer to the impact of a lack of evidentiary rulings in light of the specific features of this case, including:
  - a. The significant amount of documentary evidence, and the role that evidentiary rulings play in 'decluttering the case file';<sup>21</sup> and
  - b. The fact that the Defence indicated that in order to shorten or avoid the need for a Defence case, it may seek to file a 'no case to answer' motion.
19. In terms of the latter aspect, the Chamber is well-placed, at the end of the Prosecution case, to evaluate Prosecution evidence in an holistic manner, and to issue rulings that would place the LRV and the Defence in good stead to make informed decisions as concerns the evidence which should be relied upon during their respective cases. Evidentiary rulings concerning the *prima facie* relevance and probative weight of evidence also play a key role in allowing the Defence to appreciate whether there is a sufficient basis to continue the trial in relation to all or some of the charges. Although there is no right to file a 'no case to answer' application, the Chamber must nonetheless make a determination as to whether it would be appropriate to allow the Defence to do so, taking into account the particular features of the case before it.<sup>22</sup> This may include where there is likely to be a projected net saving of time by allowing for such a challenge. Since the Trial Chamber has not yet ruled on this question, its assessment, as to the net time savings generated by the 'submission system' should have considered the implications for other time-saving mechanisms (such as a 'no case to answer application').

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<sup>21</sup> [ICC-01/05-01/08-3636-Anx3](#), para. 314: "With no evidential ruling made at the time of tendering the evidence, the evidential record can get highly cluttered, making trials longer. And, out of abundance of caution, the opposing party is pressured to conduct his or her case, by seeking to submit contrary evidence to rebut the clutter, which the Trial Chamber did not weed out by making exclusionary rulings. That only leads to more clutter, making the trial even longer. It is possible that highly efficient judges can still remain on top of the process, though the risk remains high that such may not uniformly be the case. But, even the highly efficient judge will be assisted along the path of greater efficiency if the record of the case is not cluttered with evidence that could have been excluded at the point of introduction."

<sup>22</sup> [ICC-01/04-02/06-2026](#), paras. 44, 54.

20. A request for leave to appeal concerns an ‘issue’ and not the merits of an ‘issue’. It therefore clear from the above that the Second Issue arises from the Decision, that is, whether the TC abused its discretion, and/or reached an unreasonable outcome, by placing too much weight on the judicial aspects of evidence evaluation, including the time taken to issue evidentiary rulings, and failing to consider, or place sufficient weight on other relevant factors, including the role that timely evidentiary rulings play in expediting the proceedings and facilitating the rights of the parties.

### **The Third Issue**

21. Article 69(2) of the Statute provides that the Chamber “may” permit witnesses to give testimony by video or audio link, provided that such measures are not “prejudicial to or inconsistent with the rights of the accused”. This wording was considered by the Appeals Chamber in the *Bemba* case, where the Chamber found that the reference to the rights of the accused in the second sentence operate as a strict caveat to any discretionary decision to deviate from the general requirement concerning “in-court personal testimony.”<sup>23</sup> This requires a case by case assessment, taking into account the particular features of the witness testimony in question,<sup>24</sup> and the proposed venue for conducting the video-link.<sup>25</sup> For this reason, in past cases, the use of video-link testimony was contingent on the calling party filing a motivated request.
22. The Decision does not address these provisions: instead, the Chamber ruled as follows:<sup>26</sup>

Noting the insignificant differences between in-court and video-link testimony, no request to hear a witness via video-link is necessary; it suffices that the calling party or participant clearly provides notice of the prospective use of video-link in its list of witnesses, or any subsequent update thereof. The deference afforded to the parties, and LRVs as applicable, in this regard is always subject to the Chamber’s obligation to ensure a fair and expeditious trial.

<sup>23</sup> [ICC-01/05-01/08-1386](#), para. 77.

<sup>24</sup> For example, in the *Bemba et al.* case, the Prosecution informed the Chamber that “[g]iven the nature of these proceedings and that a number of the Prosecution’s witnesses are adverse, having the witnesses physically present in the courtroom is the method most conducive to eliciting the truth”: ICC-01/05-01/13-1219.

<sup>25</sup> Rule 67(3) specifies that the Chamber must ensure that the venue chosen by the Registry is conducive to the giving of truthful and open testimony, and the safety, physical and psychological well-being, dignity and privacy of the witness.

<sup>26</sup> ICC-01/12-01/18-789-AnxA, para. 54.

23. The Decision does not, therefore envisage that the responding party will have any right to challenge the use of video-link testimony, nor does the Decision facilitate the ability of the responding party to do so, given that the calling party is not required to submit any particulars as concerns the modalities of the video-link venue. If the responding party were to attempt to file such a challenge, the Decision further suggests that burden might fall on the responding party to displace the “deference afforded to the parties, and LRVs as applicable”.<sup>27</sup>
24. The Third Issue therefore arises from the Decision, namely, whether Article 69(2) requires the Trial Chamber to make case by case determination as to whether the use of video-link technology, for specific witnesses, is consistent with the rights of the accused.

#### **The Fourth Issue**

25. On 30 January 2020, the Prosecution requested the Pre-Trial Chamber to ‘correct’ the charges, based on evidence that had been in the Prosecution’s possession at the time of the confirmation hearing (that is, statements from the defendant, and an English translation of a judgment).<sup>28</sup> The Pre-Trial Chamber rejected this request *in limine*, that is, before the Defence had an opportunity to be heard as concerns the evidential and legal foundation of the Prosecution’s requests.<sup>29</sup> Since the Chamber did not render a substantive decision on these requests, the Chamber’s remarks concerning the possibility of addressing these matters at trial, were *obiter dicta*, and not findings that were capable of constituting an appealable issue, within the meaning of Article 82(1)(d).
26. The Prosecution did not raise this issue subsequently with the Trial Chamber, nor did either the Prosecution or the Trial Chamber elicit the views of the Defence as to whether the Defence might agree to certain changes that had been proposed by the Prosecution, or oppose the evidential foundation and accuracy of others.
27. In the Decision, the Trial Chamber found that Part 9 of the DCC, in itself, was insufficiently clear and comprehensive to satisfy the requirements of Regulation 52.

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<sup>27</sup> ICC-01/12-01/18-789-AnxA, para. 54.

<sup>28</sup> ICC-01/12-01/18-568-Red, paras. 10, 13-14.

<sup>29</sup> ICC-01/12-01/18-608-Red, para. 44.

The Chamber therefore decided to “to draw out the ‘facts and circumstances’ of the charges, as it considers appropriate, from the decision of the Pre-Trial Chamber in its totality, while respecting the Pre-Trial Chamber’s findings as to the scope of the charges”.<sup>30</sup>

28. Given the very short time frame available to exercise the right to submit an application, under Article 82(1)(d), the Defence has had insufficient time to cross-reference the charges, set out in Annex B, with the facts and circumstances set out in the DCC, which were confirmed by the Pre-Trial Chamber. It is, however, apparent that the Trial Chamber corrected/changed specific facts that had been confirmed by the Pre-Trial Chamber. Thus, at footnotes 1 and 2 of Annex B, the Trial Chamber set out the following findings:

- The Chamber has taken note of the Prosecution Request for corrections and amendments concerning the Confirmation Decision dated 30 January 2020 and filed before the Pre-Trial Chamber on 31 January 2020 (ICC-01/12-01/18-568-Conf) and has decided to correct the date of the arrest of [REDACTED] by the Islamic Police throughout the present document.
- The Chamber has taken note of the Prosecution Request for corrections and amendments concerning the Confirmation Decision dated 30 January 2020 and filed before the Pre-Trial Chamber on 31 January 2020 (ICC-01/12-01/18-568-Conf) and has decided to correct the name of this person;

29. Although these findings were confined to two incidents, the Chamber’s approach has far-reaching consequences as regards the nature and scope of the confirmation charges, and the facts and circumstances which can be relied upon in the ultimate judgment, under Article 74. In particular, insofar as the Chamber suggests that it can convict the defendant on the basis of material facts, that derive from its appreciation of the ‘evidence’ rather than the content of the confirmed charges, the Decision blurs the distinction between ‘facts’ and ‘evidence’ and further appears to reopen the appellate ruling in *Lubanga*, that the scope of *iura novit curia* at the ICC is confined to the clear text of Regulation 55 of the Regulations of the Court: the Judges do not possess the power to supplement or amend the confirmed facts and circumstances of the charges, particularly in a manner that would be detrimental to the defendant. The Decision is also premised on the understanding that the Chamber can take such steps, without affording any prior notice, or effective opportunity to be heard to the Defence.

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<sup>30</sup> ICC-01/12-01/18-789-AnxA, para. 9.

30. The Fourth Issue therefore arises from the Decision, namely, whether, after the confirmation of the charges, and without following the procedure set out in Article 61(9), the Trial Chamber may change confirmed facts set out in the charges, in particular, without affording the defendant with a prior opportunity to be heard as concerns their intention to do so.

### **The Fifth Issue**

31. In its determination concerning the scope of cross-examination, the Chamber found that:<sup>31</sup>

Cross-examination is not limited to issues raised during the questioning by the calling party. Indeed, the Chamber will allow inquiry into additional matters. During cross-examination, the non-calling party may, for example, seek to ask questions related to the credibility of a witness, the reliability of the evidence presented, as well as mitigating and/or aggravating circumstances.

32. In reaching this conclusion, the Chamber did not make any distinction between the scope of cross-examination during the Prosecution phase, as compared to the scope, during the Defence case, nor did it otherwise impose any caveats as concerns the circumstances in which such evidence could be elicited during the Defence case.<sup>32</sup> Nor did the Chamber address Defence arguments that:<sup>33</sup>

The Prosecution should, in general, present all evidence in support of its case during its case-in-chief. Accordingly, in principle, the Prosecution cross-examination of Defence witnesses should be confined to issues directed towards impeaching Defence witnesses, or corroborating existing elements of its case: it should not address new allegations or matters that were not raised in its case-in-chief

33. Aggravating factors, as set out in Rule 145(2)(b), may relate to the elements of the offences, and the defendant's knowledge and intent. The Prosecution was also not required to set out its theory concerning such factors in its Trial Brief. The Decision thus opens the door to the possibility that the Prosecution could use cross-examination to elicit information on previously unidentified and unnotified incriminating aspects of its case.

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<sup>31</sup> ICC-01/12-01/18-789-AnxA, para. 41.

<sup>32</sup> Cf [ICC-01/04-02/06-1997](#), para. 15.

<sup>33</sup> ICC-01/12-01/18-618-Red, para. 28.

34. The Fifth Issue therefore arises from the Decision, namely, whether the Chamber correctly determined that the Prosecution can elicit testimony on aggravating factors during its cross-examination of Defence witnesses, in particular, in circumstances where the evidence concerns new issues, and the aggravating nature of this evidence was not previously notified to the Defence.

*The First, Second, and Fourth Issues impact significantly on the fair and expeditious conduct of the proceedings, and the outcome of the trial*

35. The system for evidentiary rulings, and the manner in which the Chamber exercises its discretion as concerns its consideration of evidence, directly impact on a range of fundamental fair trial rights, including:
- a. The presumption of innocence, and the right to impartial proceedings;
  - b. The right to be heard, and to be afforded an effective opportunity to comment on matters that might influence the Chamber's evaluation of evidence;
  - c. The right to a reasoned judgment; and
  - d. The right to silence, and the privilege against self-incrimination.
36. As found by Pre-Trial Chamber II, the notion of 'fairness' under Article 82(1)(d) turns on the notion that the parties must "be granted a genuine opportunity to present their case and to be apprised of and comment on the observations and evidence submitted to the Court that might influence its decision".<sup>34</sup> The system for evaluation of evidence goes to the heart of this issue, insofar as it regulates and restricts the extent to which the parties will have an meaningful opportunity to influence either the Trial Chamber's holistic evaluation of evidence, or, on appeal, the Appeals Chamber's assessment of an unclear evidentiary record.
37. Moreover, by citing the significant amount of time that would be saved through the submission system, the Chamber also recognized that the First and Second Issues impact significantly on the expeditious conduct of the proceedings. Apart from the issue of time-saving from a judicial perspective, the system also triggers substantial consequences as concerns the efficient preparation of the parties. The lack of advance

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<sup>34</sup> [ICC-02/04-01/15-64](#), para. 24.



evidentiary rulings will also prolong the evidential phase of the proceedings, as the parties will lack guidance as to the Chamber's position on the authenticity or reliability of key items of evidence. The absence of *prima facie* findings concerning the probative weight of evidence will also impel the parties to call or submit a range of evidence in corroboration.

38. To the extent that the First and Second Issues are directly linked to the right to a reasoned judgment, they also affect the outcome of the trial. The Appeals Chamber has confirmed, in this regard, the degree of reasoning in the judgment concerning the Chamber's appreciation of the evidence can affect the validity of the judgment itself, and lead to either a new trial, or an appeal *de novo*.<sup>35</sup>
39. The manner in which the Chamber resolved the Fifth Issue also has fundamental ramifications for fair trial rights, including, in particular, the right to be informed promptly of the nature, cause and content of the charges. Indeed, whereas both the Pre-Trial Chamber and the Trial Chamber rely on a decision from the *Katanga* case in support of the Trial Chamber's implied power to modify the charges based on the Chamber's 'appreciation' of the evidence,<sup>36</sup> Trial Chamber II in fact underscored the importance of crystallising the specific facts and circumstances of the charges, at the earliest juncture possible (that is, the pre-trial phase), in order to avoid the prejudice that would accrue to the defendant, if the Prosecution or Chamber were to mold the charges in order to react to the manner in which the evidence unfolds at trial.<sup>37</sup> Although Trial Chamber II referred to the 'pre-trial phase', Trial Chamber II confirmed elsewhere that it understood this phrase to relate to the 'pre-confirmation phase'.<sup>38</sup> The Appeals Chamber also affirmed that firstly, the Rome Statute system does not allow the Chamber to rely on the evidence to clarify, or make changes to the

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<sup>35</sup> [ICC-01/05-01/08-3636-Red](#), para. 56.

<sup>36</sup> The Trial Chamber cited the Pre-Trial Chamber's Decision (ICC-01/12-01/18-608-Red, para 46), which in turn, cited 'Décision Katanga et Ngudjolo, par. 21'.

<sup>37</sup> [ICC-01/04-01/07-1547-tENG](#), para. 23: "it is incumbent upon the Prosecutor to present, during the pre-trial phase, all of the facts and circumstances relating to his case. To hold otherwise would be to call into question the very purpose of a pre-trial phase, at the close of which the charges are fixed and settled. Such a solution would, moreover, render useless the months of work devoted by the Pre-Trial Chamber to preparing the case for trial and, to a large extent, would make it pointless even to hold a confirmation hearing where evidence is presented, and at the close of which the trial is supposed to commence. As the ad hoc international criminal tribunals have stressed, the Prosecutor "is expected to know [his] case before it goes to trial. It is not acceptable for the Prosecut[or] to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.""

<sup>38</sup> [ICC-01/04-01/07-1497](#), para. 28.

supplement or amend the facts and circumstances confirmed by the Pre-Trial Chamber,<sup>39</sup> and secondly, procedures giving the defendant notice, and opportunity to be heard as concerns any modification to the charges, must be complied with in order to ensure compliance with principles of fair trial, as set out in internationally recognized human rights law.<sup>40</sup> A system, which allows the Chamber to modify confirmed facts, based on its ‘appreciation’ of the evidence, without affording prior notice to the defendant, or an opportunity to be heard, necessarily affects these principles of fair trial.

40. Changes to the scope and content of the confirmed charges affect notice,<sup>41</sup> which in turn, impacts on the defendant’s right to adequate time and facilities to prepare his defence, in relation to these confirmed charges.<sup>42</sup> Trial Chamber I specifically recognized in this regard that the issue, as to whether the Chamber may change or amend the facts in the charges, “is likely to have consequences as regards the evidence which it is considered necessary to put before the Chamber, as well as the time needed for future preparation by, and the resources of, the parties and participants.”<sup>43</sup> The Trial Chamber therefore found that the issue impacted significantly on the expeditious conduct of the proceedings.

<sup>39</sup> [ICC-01/04-01/06-2205](#), para. 1.

<sup>40</sup> [ICC-01/04-01/06-2205](#), para. 98.

<sup>41</sup> See [ICC-01/04-01/06-2074](#), fn. 34: “For example, Javier Llobet Rodríguez has explained that a lack of correlation between charges and judgement is a violation of the principle of due process of law; and that the charges brought by the public prosecution (and, where applicable, any widening of the charges) represent the factual boundaries for the judgment (Proceso Penal Comentado, San Jose, CR, 1998, p. 727; commenting on Article 365 of the Costa Rican Code of Criminal Procedure which provides that “The judgement may not deem as proven other facts or circumstances than those described in the charges [...] or, if applicable, in any amendment to the charges, except when they favour the accused”). Julio Maier has similarly explained that “The right to a fair hearing [...] would be rendered meaningless if it wasn’t mandated that the judgment can only refer to the facts and circumstances contained in the charges, which have been notified to the accused, and therefore, to those elements of the charges in relation to which he or she has had the opportunity to be heard; this implies barring the judgment to extend to facts or circumstances not contained in the process, what guarantees the right to a hearing (ne est iudex ultra petita).” (Derecho Procesal Penal, Buenos Aires, 1996, p. 568). Swiss law similarly considers the Akkusationsprinzip, and the closely related Immutabilitätsprinzip, to be issues of due process of law. Under the Immutabilitätsprinzip, the prosecution fixes the Verfahrens- (topic of procedure) and Urteilsthema (topic of judgment); and for the protection of the accused this must stay the same throughout the process (Hauser/Schweri/Hartmann, Schweizerisches Strafprozessrecht, Basel, 2005, pp. 225, 228). Even where the national systems or commentaries contemplate a judgment on facts that have been widened, the question of whether the facts can be expanded in this manner and at this stage of the proceedings goes to the merits and can only be decided by the Appeals Chamber. The issue undeniably impacts on fairness.”

<sup>42</sup> [ICC-01/04-01/06-2074](#), para. 23: “But with the Majority’s Decision, the parties and participants may not yet know the factual parameters of the case. Such uncertainty impacts on their ability to effectively prepare for the rest of the trial.”

<sup>43</sup> [ICC-01/04-01/06-2107](#), para. 29.

41. The Fifth Issue also necessarily impacts on the outcome of the trial, as it affects the scope and content of the charges, and thus the ‘facts’ that might be relied upon by the Trial Chamber to convict the defendant.

*The Third Issue affects the fair and expeditious conduct of the proceedings*

42. The full ramifications concerning the use of video-link technology in criminal proceedings have yet to be properly assessed and evaluated as concerns the potential impact that it might have on outcomes, and the defendant’s right to a fair trial. It is, nonetheless, already apparent that this technology can impact on the ability of the parties to conduct effective cross-examination (since there is a greater risk of disruption, and time-lags). Studies also appear to suggest that the impact of video-link testimony may depend on the type of witness, and the manner in which it is used.<sup>44</sup> In any case, this uncertainty speaks to the need to retain strict judicial control as concerns the suitability of this testimonial format, in light of the testimony of the witness, and the location and modalities of the proposed video-link. By eliminating the need to file applications to hear witnesses by video-link, the Decision significantly reduces the scope for litigation and consideration of these issues. Equality of arms issues are also likely to arise if the use of video-link technology is applied in an inconsistent manner, due to the absence of a careful case by case consideration of such matters.<sup>45</sup>
43. A case by case application procedure ensures that issues concerning the quality, reliability, and propriety of the use of video-link testimony are ventilated in advance of the witness’s testimony. In contrast, by approving such applications on a generic and wholesale basis, the Decision deprives the responding party of any opportunity to be heard in advance as concerns the proposed modalities and venue as concerns specific witnesses. This places the onus on the responding party to submit specific challenges as and when it is clear that video-link testimony cannot be reconciled with specific fair trial rights. The expeditious conduct of the proceeding will thus be impacted significantly by the litigation and delays that will be generated through such

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<sup>44</sup> See <https://theconversation.com/courts-are-moving-to-video-during-coronavirus-but-research-shows-its-hard-to-get-a-fair-trial-remotely-134386>

<sup>45</sup> *Prosecutor v. Kanyarukiga*, ‘[Decision on the Prosecution’s Appeal Against the Decision on Referral under Rule 11 bis](#)’, para. 33.

specific challenges to the sufficiency and quality of testimony adduced through video-link testimony: concretely, there will be significant disruptions to the witness's testimony and, in the event the modalities of testimony are deficient, it will be necessary to reschedule and re-call the witness, thus prolonging the trial.

*The Fifth Issue affects the fair and expeditious conduct of the proceedings*

44. The scope of Prosecution cross-examination during the Defence case is directly linked to issues of notice, and the defendant's right to silence. Specifically, when the Defence makes a positive decision as to whether to present a positive case and call certain witnesses, it does so on the basis of its understanding as to the particular contours and content of the Prosecution case. The ability of the Defence to make informed decisions on such matters is, however, undermined in circumstances where the Prosecution elects to introduce substantive allegations through the backdoor of cross-examination. The impact on the fairness of the proceedings is further reflected by the ICTY Appeals Chamber's finding that the rule that the Prosecution should present its evidence/case during the Prosecution case "stems from the rights of the accused under Article 21(4)(b) and (e) of the Statute pursuant to which "when evidence is tendered by the Prosecution there must be a fair opportunity for the accused to challenge it"". <sup>46</sup>
45. The Fifth Issue also has multiple ramifications as concerns the expeditious conduct of the proceedings. It will extend the required time for daily hearings of any potential future Defence case and create conditions for trial and appellate litigation which will further delay the final resolution of the case. During daily proceedings, if the Prosecution were to present aggravating circumstances in cross-examination, the Defence will *prima facie* need to re-question the witness. This will extend the daily hearings of any possible Defence case. It may also necessitate the Defence requesting to present further evidence or witnesses. In turn, this will require the Defence to conduct further investigations, which will delay the conclusion of the case. Failure to resolve the issue now will introduce the likelihood of further trial and appellate litigation because the issue touches upon the scope of criminal culpability which goes

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<sup>46</sup> *Prosecutor v. Prlic et al.*, '[Decision on the Interlocutory Appeal against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-examination of Defence Witnesses](#)', 26 February 2009, para. 23

to the core of a criminal trial. This potential further litigation will in turn also extend the length of proceedings. In the absence of any certainty as to the scope of the judgment on acquittal or conviction, the notion that this could save time is also wholly illusory, as the trial will expand to a range of issues that might ultimately be moot, due to the defendant's acquittal, or the dismissal of certain charges.

*An immediate decision by the Appeals Chamber would materially advance the proceedings*

46. All Five Issues concern procedural mechanisms that might be deployed regularly throughout the trial process. Any errors in the manner in which the Chamber has resolved these Issues will rupture the very fairness of the trial process, and potentially necessitate a re-trial. Appellate intervention would purge the process of errors and uncertainty: if the Appeals Chamber affirms the correctness of the Trial Chamber's approach, the trial will proceed along the correct procedural path. Conversely, if the Appeals Chamber reverses these findings, the Appeals Chamber will have avoided the prospect of a mistrial or a fundamental error that might have otherwise required a corrective remedy on appeal.

### **III. Relief sought**

47. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Honourable Trial Chamber to grant leave to appeal in relation to the Five Issues identified above.



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Melinda Taylor  
Lead Counsel for Mr. Al Hassan



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Marie-Hélène Proulx  
Associate Counsel for Mr. Al Hassan



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Thomas Hannis  
Associate Counsel for Mr. Al Hassan

Dated this 12<sup>th</sup> Day of May 2020  
At The Hague, The Netherlands