

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**
Date: **21 January 2021**
Date of submission: **30**
March 2021

TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

**Public redacted version of “Defence consolidated application regarding Article 69(7)
procedural matters”**

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
Kirsty Sutherland

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 Trial Chamber's decisions concerning Article 69(7) applications¹ appear to be geared towards avoiding unnecessarily repetitious litigation concerning the same legal and factual issues. The specific nature of Article 69(7) applications in this case also militates in favour of an approach, which protects the integrity of the trial proceedings from tainted evidence in a comprehensive and expeditious manner, particularly given the extent to which the parties have argued these matters across multiple lines of litigation.
2. Notwithstanding the Trial Chamber's directions, the Prosecution has filed not one but four separate and staggered evidentiary applications seeking to admit evidentiary items considered by the Prosecution to be relevant to the outcome of the future Article 69(7) application.² The Prosecution's *modus operandi* has generated multiple strands of litigation, unduly delays proceedings and impacts on the Defence's ability to file a consolidated Article 69(7) application. To resolve these matters in a fair and expeditious manner, the Defence proposes to examine all relevant evidentiary matters arising from Article 69(7) applications in a *voir dire* hearing, to be held prior to the tendering or use of *prima facie* torture-tainted materials – [REDACTED].
3. With the Trial Chamber's objectives in mind, the Defence for Mr. Al Hassan respectfully requests the Trial Chamber to adopt further directions concerning the conduct of the Article 69(7) applications, and to:
 - a. Confirm that the Defence need not submit its Article 69(7) application until the Trial Chamber has first ruled on pending Regulation 35(2) and Rule 68 applications submitted by the Prosecution, and the Defence has had adequate time to identify responsive evidence;
 - b. Convene an evidentiary hearing for the purpose of hearing evidence related to the Article 69(7) applications;

¹ ICC-01/12-01/18-1150; ICC-01/12-01/18-1160.

² ICC-01/12-01/18-1218-Conf-Exp; ICC-01/12-01/18-1215-Conf; ICC-01/12-01/18-1226-Conf; ICC-01/12-01/18-1213-Conf.

- c. Adjourn the testimony of [REDACTED] until it has issued its first Article 69(7) Decision; and
- d. Take steps to ensure that Mr. Al Hassan's right to effectively participate in the trial proceedings is not adversely affected and undermined by parallel Article 69(7) litigation.

II. Confidentiality

- 4. Pursuant to Regulation 23*bis*(2) of the Regulations, this response has been filed confidentially as it refers to filings and decisions of the same classification.

III. Submissions

- 5. Rather than filing a consolidated and complete application as concerns its request to admit Mr. Al Hassan's statements into evidence, the Prosecution submitted:
 - a. An application to introduce Mr. Al Hassan's statements, on 18 December 2020 ('Admission Application');³
 - b. A regulation 35 application to add five items to its list of evidence, and to introduce the prior recorded testimony of [REDACTED] and [REDACTED] through Rule 68, on 18 December 2020;⁴
 - c. A regulation 35 application to add [REDACTED] to its list of witnesses, and his prior recorded testimony to its list of evidence, on 23 December 2020;⁵ and
 - d. A regulation 35 application to add additional items to its list of evidence, and to introduce them through the bar.⁶
- 6. The submission of separate and staggered evidentiary applications has impacted on the ability of the Defence to file a consolidated Article 69(7) application. The Prosecution has indicated in these filings that they consider the evidentiary items discussed therein to be relevant to the outcome of the future Article 69(7) application.

³ ICC-01/12-01/18-1218-Conf-Exp.

⁴ ICC-01/12-01/18-1215-Conf; ICC-01/12-01/18-1215-Conf-Exp-AnxA; ICC-01/12-01/18-1215-Conf-Exp-AnxB.

⁵ ICC-01/12-01/18-1226-Conf, ICC-01/12-01/18-1226-Conf-AnxA.

⁶ ICC-01/12-01/18-1213-Conf.

7. The Defence thus has a clear interest in knowing the legal status of these evidentiary items before it submits its Article 69(7) application. At the same time, the Prosecution's reliance on extrinsic evidence to support its Admission Application engenders a corresponding right for the Defence to challenge this extrinsic evidence, and to adduce its own evidence (written and oral) in response. This is consistent with the Appeals Chamber's findings that: first, pursuant to Rule 64(1), if new issues or information concerning the admissibility of evidence are introduced by the Prosecution, then the Defence has a corollary right to submit a new challenge to admission, based on these new factors, and second, this rule must also be construed broadly to protect the right of the non-tendering party to introduce supplemental responses, in case the tendering party introduces new argument or evidence to cure the deficiencies in its initial applications.⁷
8. In principle, in the event that any of the Regulation 35 applications are granted, the Defence could raise additional issues, or supplement its Article 69(7) application, based on the matters arising from these items of evidence. Similarly, if [REDACTED], [REDACTED] or [REDACTED] give *vive voce* evidence, then this would also trigger the right of the Defence to adduce its own expert and fact testimony on such matters. In general, it would fall to the Defence to introduce such evidence during the Defence case. Thus, in *Bemba et al.*, the Defence were permitted to introduce *viva voce* and Rule 68 witnesses on issues concerning the legality of the collection of evidence, which had been submitted during the Prosecution case. The Trial Chamber then set the deadline for filing Article 69(7) applications, after the close of the Defence case.⁸
9. While this approach is permissible, it invites the possibility of protracted litigation on these issues throughout the trial process. In contrast, convening a discrete voir dire hearing for this purpose would ensure a fair, full, and expeditious resolution to these matters. Although '*voir dire*' hearings are primarily a common law tool, they have been employed at international courts and tribunals, in particular, in connection with issues concerning the admission of statements from the defendant.

⁷ [ICC-02/11-01/15-995](#), para 56.

⁸ [ICC-01/05-01/13-T-42-Red2-ENG](#), p. 43.

10. *Voir dire* hearings were convened in *Gbagbo* and *Bemba et al*, to hear arguments concerning the qualifications of Prosecution experts, before the commencement of their testimony.⁹ The Defence counter-expert was permitted to attend. In *Ruto*, the Chamber held a *voir dire* hearing, which entailed hearing arguments and evidence from both sides, as concerns the ability of witnesses to testify.¹⁰ The ICTR and ICTY have found that while there is no obligation to convene a *voir dire* hearing, it may be appropriate to do so, if it would assist to achieve a fair resolution of the admission of evidence.¹¹ Concrete examples of its application include cases where the Chamber considered it appropriate to hear expert evidence that related to the admission of contested items of evidence,¹² Chambers have also adopted analogous procedures, which allowed the parties to call and cross-examine witnesses, whose testimony was linked to the voluntariness of the statements in question.¹³ The Appeals Chamber further noted that the use of this procedure allows for a focused approach to be taken to the scope of questioning: “[i]t would ensure in general that arguments and evidence led be confined to the issue in dispute and not extend to discussion of the facts of the case itself”.¹⁴ At the SCSL, in *Sesay*, when seized of an application as concerns whether the defendant had provided a free and informed waiver of the right to silence, the Trial Chamber noted that although it was not obliged to convene such a hearing, it was appropriate to do so, in circumstances where it was not possible to rule on the issues by reference to the transcripts of the interviews alone.¹⁵ The STL has also convened *voir dire* hearings to determine preliminary evidential issues.¹⁶

11. In line with these precedents, a *voir dire* hearing would best promote a fair and expeditious resolution to exclusion issues in this case, by allowing the parties an

⁹ [ICC-02/11-01/15-1263-AnxA](#), para 36 and fn. 116 summarising the process; [ICC-01/05-01/13-T-16-Red2-ENG](#), pgs. 51-52.

¹⁰ [ICC-01/09-01/11-1943-Red](#), para 10.

¹¹ ICTR, *Prosecutor v. Ntahobali*, [Decision on "Appeal Of Accused Arsene Shalom Ntahobali Against The Decision On Kanyabashi's Oral Motion To Cross-Examine Ntahobali Using Ntahobali's Statements To Prosecution Investigators In July 1997"](#), para 12; ICTY, *Prosecutor v. Halilovic*, [Decision on Interlocutory Appeal Concerning Admission of Record of Interview from the Accused from the Bar Table](#), paras 34-46, 54; ICTR, *Prosecutor v. Muvunyi*, [Decision on the Prosecutor's Motion for Admission of Testimony of Expert Witness - Rule 92bis of the Rules](#), para 27.

¹² *Prosecutor v. Karemera*, ["Decision on Voir Dire of Kim Hughes"](#), 7 January 2010, pp. 3-4.

¹³ ICTR, *Prosecutor v. Nchamihigo*, [Decision on the Prosecutor's Application to Admit into Evidence the Transcript of the Accused's Interview as a Suspect and the Defence's Request to Hold a Voir Dire](#), para 9.

¹⁴ ICTY, *Prosecutor v. Delalic et al.*, [Appeals Judgment](#), para 541.

¹⁵ SCSL, *Prosecutor v. Sesay*, [Ruling on Voir Dire – Written Reasons](#), 2 November 2007, paras 18-19.

¹⁶ STL, *Prosecutor v. Ayyash et al*, [Decision Allowing Mr Gary Platt \(Witness Prh147\) To Give Expert Opinion Evidence](#), para 3.

appropriate opportunity to submit and challenge extrinsic evidence that pertains to the circumstances of these interviews.

12. At the same time, the scope of this hearing should not be restricted to issues concerning the statements of Mr. Al Hassan. In its Termination Request, the Defence adduced a substantial body of evidence and argument concerning the allegations [REDACTED].¹⁷ [REDACTED].¹⁸ It would not serve judicial economy to hear evidence and testimony on these issues separately. It would also prejudice the Defence to do so, as evidence [REDACTED] is relevant to the admission of Mr. Al Hassan's statements. In the event [REDACTED], the Defence should not be required to hermetically seal off questions [REDACTED], which touch on matters concerning Mr. Al Hassan's conditions of detention and the extent to which the Prosecution investigators were aware of the impact of these conditions on Mr. Al Hassan's psychological and physical welfare, and ability to provide informed consent.

13. It would also be contrary to the protective purposes of Article 15 of the UNCAT to [REDACTED], until these matters are first adjudicated. Although the Prosecution has not yet applied [REDACTED], the Article 15 exclusionary rule is engaged through the *use* of materials that were purportedly obtained in circumstances which fall foul of this provision. The ECCC has thus found that the prohibition extends to the use of tainted materials for the purposes of putting questions to witnesses, unless the purpose was to establish the existence of the torture that produced the evidence.¹⁹ This ban on questioning logically applies to [REDACTED].

14. This broader prohibition has ramifications that go beyond the admission of Mr. Al Hassan's statements, as it impacts, *inter alia*, on:

- a. The use of Mr. Al Hassan's statements to confront, or formulate questions to other alleged members of Ansar Dine [REDACTED]; and
- b. [REDACTED].

¹⁷ See e.g. ICC-01/12-01/18-885-Conf-Exp-Corr, paras 20-25, 65-89 (and evidence cited therein).

¹⁸ [REDACTED]: ICC-01/12-01/18-885-Conf-Exp-Corr.

¹⁹ "[C]onfessions obtained contrary to the provisions of the Convention Against Torture cannot be used as evidence or for the basis for questioning. Therefore, the Chamber will remind the parties that it will permit no questions on the content of the confession nor will it use such information in its verdict": ECCC, [Case 002](#), para 21

15. As underscored by the ECCC, the improper use of such materials [REDACTED] cannot be cured at the judgment stage, since:²⁰

Such a proposal runs contrary to the plain language of Article 15, which provides that torture-tainted evidence "shall not be invoked as evidence in any proceedings." The language of the Article is not limited to the judgement phase but applies with equal force to the presentation of evidence and the questioning of witnesses during the trial. Furthermore, if the Chamber were to allow the parties to invoke possibly torture-tainted evidence throughout this trial, the damage to the integrity of the proceedings will have been done. Removing from consideration, torture-tainted evidence at the judgement phase cannot remedy that damage. For the parties and the public will have seen the product of torture relied on for its truth, normalising the acquisition and invocation of that evidence at trial and diverting the Chamber's inquiry into the ascertainment of the truth.

16. This prohibition speaks to the importance of litigating these issues in a holistic and comprehensive manner, separately, rather than in parallel to trial proceedings. It is foreseeable that litigation on issues pertaining to the DGSE (whether through written filings or oral testimony) will trigger traumatic memories for Mr. Al Hassan, as he will be compelled to remember, and thus relive what he experienced. The Trial Chamber has recognized that it has a positive duty to ensure Mr. Al Hassan's ongoing fitness to stand trial.²¹ Mr. Al Hassan's fitness, and ability to participate effectively, will be compromised if he is compelled to attempt to participate in the evidential debate concerning the charges, while simultaneously reviewing 'triggering' evidence and filings related to his experiences in the DGSE. Even if the degree of anguish does not render Mr. Al Hassan formally unfit, it would be inconsistent with his right to a fair trial, and the right to equality of arms to proceed under conditions that substantially disadvantage the Defence as concerns its ability to obtain instructions from Mr. Al Hassan in relation to matters concerning the charges, while tortured related litigation is ongoing.

²⁰ [Case 002](#), para 41.

²¹ ICC-01/12-01/18-1006-Conf, para 18.

IV. Relief sought

17. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Trial Chamber to:

- a. Confirm that the Defence need not submit its Article 69(7) application until the Trial Chamber has first ruled on pending Regulation 35(2) and Rule 68 applications submitted by the Prosecution, and the Defence has had adequate time to identify responsive evidence;
- b. Convene an evidentiary hearing for the purpose of hearing evidence related to the Article 69(7) applications;
- c. Adjourn the testimony of [REDACTED] until it has issued its first Article 69(7) Decision; and
- d. Take steps to ensure that Mr. Al Hassan's right to effectively participate in the trial proceedings is not adversely affected and undermined by parallel Article 69(7) litigation.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 21st Day of January 2021
At The Hague, The Netherlands