



Original: English

**No. ICC-01/12-01/18
Date: 4 November 2020**

TRIAL CHAMBER X

**Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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

**Decision on Defence request for leave to appeal the ‘Decision on Defence’s
objections to the Prosecution’s list of material for P-0620’**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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James Stewart

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Legal Representatives of Victims

Seydou Doumbia
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

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

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following decision.

I. Procedural history and submissions

1. On 5 August 2020, the Chamber issued its ‘Decision on Prosecution’s proposed expert witnesses’ in which it relevantly found that P-0620 may be called to testify as an expert, and authorised the introduction of P-0620 and P-0621’s expert report and related material pursuant to Rule 68(3) of the Rules of Procedure and Evidence (the ‘Rules’ and the ‘5 August Decision’).¹
2. On 24 September 2020, pursuant to paragraph 57 of the Chamber’s ‘Directions on the conduct of proceedings’, the Office of the Prosecutor (the ‘Prosecution’) provided by email its list of material to be used with Witness P-0620 (‘List of Material’).²
3. On 7 October 2020, pursuant to paragraph 60 of the Directions on the conduct of proceedings, the Defence provided by email its objections to the List of Material, raising issues under Article 69(7) of the Statute (the ‘Defence Objections’).³
4. On 8 October 2020, the Chamber issued an email decision, authorising the use of the objected material with P-0620 (the ‘Impugned Decision’).⁴
5. On 19 October 2020, the Defence filed a request for leave to appeal the Impugned Decision (the ‘Request’).⁵ Specifically, the Defence requests leave to appeal on the following issues:⁶

¹ Decision on Prosecution’s proposed expert witnesses, ICC-01/12-01/18-989-Conf (a public redacted version was issued on 21 October 2020), paras 86, 89.

² Email from the Prosecution, 24 September 2020, at 23:18.

³ Email from the Defence, 7 October 2020, at 15:47.

⁴ Email from the Chamber, 8 October 2020, at 22:48.

⁵ Defence request for leave to appeal the ‘Decision on Defence’s objections to the Prosecution’s list of material for P-0620’, ICC-01/12-01/18-1116-Conf.

⁶ Request, ICC-01/12-01/18-1116-Conf, para. 4 (original emphasis).

- '[w]hether the Chamber erred in holding that its preliminary Rule 68(3) decision precluded it from being required to make a separate determination in respect of issues raised under paragraph 60 of Annex A of the Decision on the Conduct of Proceedings' (the 'First Issue'); and
- '[w]hether the Chamber erred in concluding that the prohibitions on the use of torture-tainted evidence only apply to the **admission** of evidence, as distinct from its **use**' (the 'Second Issue', together, the 'Issues').

6. In relation to the First Issue, the Defence submits that it arises out of the Impugned Decision and that its resolution was essential for the determination of the matters arising in the judicial causes under consideration.⁷ The Defence submits further that the First Issue arises from the manner in which the Chamber resolved the Objections in the Impugned Decision, and not from the 5 August Decision.⁸ In relation to the Second Issue, the Defence submits that the 'special nature of the prohibition on the use of torture-tainted evidence, and its implications [...] raise the issue as to whether the Chamber's obligation to exclude evidence that fulfils the criteria of Article 69(7), when read with its duty to ensure that a trial is fair and expeditious under Article 64(2), requires the Chamber to consider these issues at the stage of **use** of the evidence, rather than deferring consideration until the stage of **admission**'.⁹
7. The Defence submits that the Issues affect the fair and expeditious conduct of the proceedings, highlighting, *inter alia*, that (i) exclusion of evidence 'which has been obtained in the course of arbitrary detention, torture and cruel, inhuman and degrading treatment is essential to maintaining the fairness of the trial and the integrity of the Court';¹⁰ (ii) the legal questions raised by the Issues affect the testimony of past witnesses and will arise again with future witnesses. The Chamber will therefore likely be seized with related issues over the course of at least the next few months, and resolving these Issues now will best serve Mr Al Hassan's rights, as well as expedition and efficiency for all parties and

⁷ Request, ICC-01/12-01/18-1116-Conf, para. 8.

⁸ Request, ICC-01/12-01/18-1116-Conf, para. 15. See also 16-18.

⁹ Request, ICC-01/12-01/18-1116-Conf, para. 31 (original emphasis) and generally 20-32.

¹⁰ Request, ICC-01/12-01/18-1116-Conf, para. 33.

participants and the Chamber;¹¹ and (iii) resolution of the Issues will have a substantial impact on the outcome of the trial since the affected documents represent a significant part of the documentary evidence in this trial.¹² The Defence further submits that immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings, *inter alia* since the core of the Issues – the exclusion of evidence obtained through torture – is one which should not be left unresolved,¹³ and the issue regarding Rule 68(3) concerns procedural matters touching upon much of the Prosecution case.¹⁴

8. On 22 October 2020, the Prosecution responded to the Request, submitting that it should be dismissed (the ‘Response’).¹⁵ The Prosecution submits, *inter alia*, that (i) the Request should be dismissed *in limine* because it was filed out of time;¹⁶ and in any event (ii) the Issues do not arise from the Impugned Decision, primarily because the Request is ‘predicated on multiple misunderstandings of the limited scope of’ the Impugned Decision and effectively challenges prior decisions of the Chamber which are *res judicata*;¹⁷ (iii) the Issues fail to meet the remaining criteria under Article 82(1)(d) of the Statute, namely that they do not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial,¹⁸ nor do they require immediate resolution by the Appeals Chamber to materially advance the proceedings.¹⁹

II. Analysis

9. The Chamber will first consider the Prosecution’s submission that the Request should be dismissed *in limine* because it was filed out of time. The Prosecution notes that the Impugned Decision was issued by email and sent to the parties and participants on 8 October 2020 at 20:48. Relying on Rule 155(1) of the

¹¹ Request, ICC-01/12-01/18-1116-Conf, paras 34-38.

¹² Request, ICC-01/12-01/18-1116-Conf, para. 39.

¹³ Request, ICC-01/12-01/18-1116-Conf, paras 41-43.

¹⁴ Request, ICC-01/12-01/18-1116-Conf, para. 44.

¹⁵ Prosecution response to Defence request for leave to appeal the ‘Decision on Defence’s objections to the Prosecution’s list of material for P-0620’, ICC-01/12-01/18-1123-Conf.

¹⁶ Response, ICC-01/12-01/18-1123-Conf, paras 2, 8-10.

¹⁷ Response, ICC-01/12-01/18-1123-Conf, paras 5, 11-22

¹⁸ Response, ICC-01/12-01/18-1123-Conf, paras 6, 23-26.

¹⁹ Response, ICC-01/12-01/18-1123-Conf, paras 6, 23, 28-30.

Rules and Regulation 33(1) of the Regulations of the Court (the ‘Regulations’), the Prosecution calculates the deadline for filing the Request at 14 October.²⁰

10. In the Request the Defence explained its understanding of why the filing deadline was 19 October, relying on Regulation 33(3) of the Regulations which provides that unless otherwise ordered, decisions ‘received or filed after the filing time [of 4pm under Regulation 33(2)] shall be notified on the next working day of the Court’.²¹
11. The Chamber notes that Regulation 33(3) of the Regulations technically regulates the notification of documents by the Registry pursuant to Regulation 31(1) of the Regulations and Regulation 34 of the Regulations of the Registry. The Chamber hereby clarifies that it does not apply to email decisions of this Chamber. The deadline for filing the Defence’s Request was therefore technically 14 October. However, noting that this is the first decision of this Chamber which deals with this issue, and that the Prosecution itself recently sought clarification from the Chamber on response deadlines in relation to emails,²² the Chamber will nevertheless consider the merits of the Request.
12. The Chamber incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Statute, as set out in its previous decisions.²³ In particular, the Chamber recalls that as regards the possibility to grant leave to appeal pursuant to Article 82(1)(d) of the Statute, the following criteria shall be fulfilled: (a) the matter must be an ‘appealable issue’; (b) the issue at hand is one that would significantly affect the fair and

²⁰ Response, ICC-01/12-01/18-1123-Conf, para. 8.

²¹ Request, ICC-01/12-01/18-1116-Conf, para. 5.

²² Email from the Prosecution, 20 October 2020, at 13:33.

²³ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, ICC-01/12-01/18-734; Decision on Defence request for leave to appeal the ‘Decision on the conduct of proceedings’, 28 May 2020, ICC-01/12-01/18-831; Decision on Defence request for leave to appeal the ‘Decision on the conduct of proceedings’, 28 May 2020, ICC-01/12-01/18-831; Decision on Defence request for reconsideration and leave to appeal the Decision on the Defence Adjournment Request, 28 July 2020, ICC-01/12-01/18-983-Conf; Decision on Defence request for leave to appeal the ‘Decision on the Self-contained set of charges’, 14 August 2020, ICC-01/12-01/18-996; Decision on Defence request for leave to appeal the ‘Decision on the Defence request to terminate the proceedings and related requests’, 12 October 2020, ICC-01/12-01/18-1099-Conf (public redacted version filed 29 October 2020, ICC-01/12-01/18-1099-Red).

expeditious conduct of the proceedings or the outcome of the trial; and (c) an immediate resolution by the Appeals Chamber may materially advance the proceedings.

13. The Chamber will now turn to its examination of whether the Defence has met the requirements under Article 82(1)(d) of the Statute in relation to the Issues identified above.
14. The Chamber will first examine whether the Issues are ‘appealable issues’. In relation to First Issue the Chamber considers that the First Issue represents a misunderstanding or a misrepresentation of the Impugned Decision. The Defence submits that in the Impugned Decision the Chamber, *inter alia*: (i) ‘indicated that it considered that [the 5 August Decision] obviated the need to consider the Objections’;²⁴ (ii) ‘seems to suggest that it [did] not have to decide upon the issue of use arising from the Objections because the issue had already been determined previously’;²⁵ (iii) ‘suggests that a decision on the mode of evidence presentation (e.g. Rule 68(3)) is equivalent to a conclusion on whether the material can be used’;²⁶ (iv) ‘considered that it was precluded from hearing objections to the use of the Report, and related items, as evidence’.²⁷
15. The Chamber notes, however, that in the Impugned Decision the Chamber did none of these things. Rather, the Chamber: (i) recalled that it previously authorised the use of the report drafted by P-0620 and P-0621 while clarifying (with reference to the 5 August Decision) that ‘any authorisation to introduce the joint expert report and related material pursuant to this provision, is without prejudice to the Chamber’s eventual determination on the admissibility of the evidence analysed by the experts, including pursuant to Article 69(7) of the Statute’; (ii) reiterated its previous observation that the items analysed by P-0620 and P-0621 would be submitted through other witnesses; and (iii) noted (by reference to the Chamber’s decision on the Defence request to terminate these proceedings) that it had yet made no findings on allegations of torture or

²⁴ Request, ICC-01/12-01/18-1116-Conf, para. 8.

²⁵ Request, ICC-01/12-01/18-1116-Conf, para. 13.

²⁶ Request, ICC-01/12-01/18-1116-Conf, para. 14.

²⁷ Request, ICC-01/12-01/18-1116-Conf, para. 18.

cruel, inhuman or degrading treatment, while noting that Article 69(7) was one of the appropriate remedies for these allegations. Therefore, contrary to the Defence's submissions, it was for *all* of the abovementioned reasons that the Chamber then confirmed that the material in question may be used with P-0620. Read in its entirety therefore, and contrary to the Defence's submission,²⁸ the Impugned Decision does not indicate that the Chamber considered that the 5 August Decision somehow 'fettered' the Chamber's power and duty to rule on the Objections. The Chamber considers that the First Issue is not an 'appealable issue'.

16. In relation to the Second Issue, the Chamber's view is that it also mischaracterises the Impugned Decision and is based on a mistaken premise of evidence having the status of 'tainted'. As mentioned above, it was expressly noted in the Impugned Decision that the Chamber had as yet made no findings on allegations of torture or cruel, inhuman or degrading treatment, and that Article 69(7) was one of the appropriate remedies for these allegations. The Chamber's confirmation of use of material with P-0620 was expressly stated to be 'without prejudice to any eventual determination on admissibility pursuant to Article 69(7) of the Statute' which would be made 'at the appropriate time and in due course'. The Second Issue therefore simply does not arise from the Impugned Decision and is not an 'appealable issue'.
17. Given the Chamber's conclusions above, it is not strictly necessary to address the remainder of the cumulative criteria of Article 82(1)(d). However, the Chamber notes in any event that the Issues would not meet the remaining criteria of Article 82(1)(d). In arguing that the Issues affect the fair conduct of the proceedings, the Defence submits that the '[e]xclusion of evidence which has been obtained in the course of arbitrary detention, torture and cruel, inhuman and degrading treatment is essential to maintaining the fairness of the trial and the integrity of the Court'.²⁹ However, as noted by the Prosecution,³⁰ this argument is abstract and unrelated to the Impugned Decision which itself

²⁸ Request, ICC-01/12-01/18-1116-Conf, para. 18.

²⁹ Request, ICC-01/12-01/18-1116-Conf, para. 33.

³⁰ Response, ICC-01/12-01/18-1123-Conf, para. 24.

noted that the issue of exclusion would be dealt with in due course. The Chamber does agree with the Defence observation that questions related to the Issues have arisen with past witnesses, and will arise again with future witnesses, and that it is in the interests of the parties and participants, Mr Al Hassan, and the Chamber, to have these issues resolved in a consolidated manner. However, as was noted in the Impugned Decision, the Chamber intends to address matters raised under Article 69(7) of the Statute in due course. The Chamber is cognisant of these issues and intends to address them without delay. The Issues are therefore in any event premature and, as noted by the Prosecution,³¹ their referral to the Appeals Chamber at this stage would not materially advance but cause an unnecessary delay to the proceedings.

³¹ Response, ICC-01/12-01/18-1123-Conf, para. 30.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

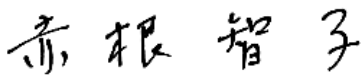
REJECTS the Request; and

DIRECTS the parties to file public versions of the Request and Response within 10 days of the filing of this decision.

Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated 4 November 2020

At The Hague, The Netherlands