

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 25 November 2020

TRIAL CHAMBER X

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

SITUATION IN MALI

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

Public Document

**Request pursuant to Rule 103 of the Rules of Procedure and Evidence for leave to
submit observations as amicus curiae**

Source: Fair Trials

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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Legal Representatives of the Victims

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

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Fair Trials requests permission to make submissions as an *amicus curiae* in accordance with rule 103 of the Rules of Procedure and Evidence, and Trial Chamber X's 6 November 2020 "Decision on matters related to Defence challenges under Article 69(7) of the Statute." As detailed below, Fair Trials requests permission to submit a brief in support of neither party but for the purpose of offering its expertise and interest in the law and procedures relating to the use of material believed to be tainted by connection to torture or cruel, inhuman or degrading treatment. Fair Trials works worldwide to promote respect for the right to a fair trial in accordance with internationally recognized standards of justice. This expertise will provide the Judges with useful information regarding the issue at hand, namely, possibly tainted evidence and the exclusionary rule. Therefore, Fair Trials believes that its submission will assist this Chamber in its deliberation related to challenges under Article 69(7) of the Rome Statute. Moreover, as will be described, Fair Trials contribution is especially relevant given its expertise on the right to a fair trial, the exclusionary rule and the use of torture, and in view of the potentially significant ramifications this Chamber's decision on Article 69(7) may have for the jurisprudence of this honourable Court.

II. SUMMARY OF PROPOSED SUBMISSIONS

2. If granted leave, Fair Trials will attempt to assist this Chamber with its expertise on three main issues: 1) comparative overview of application of the exclusionary rule in jurisdictions around the world; 2) the different rationales for exclusion of evidence tainted by torture or cruel, inhuman and degrading treatment (CIDT); 3) exclusionary rule in the Rome Statute and the discretionary power of judges.

3. Fair Trials will provide an independent and research-based comparative overview of the current state and jurisprudence of the exclusionary rule in different jurisdictions around the world, and its implementation in cases where acts of torture or cruel, inhuman and degrading treatments are alleged. International law prohibits reliance on evidence obtained by means of torture or CIDT. The exclusionary rule plays a key role in the legal architecture underpinning the prohibition of torture.
4. In domestic systems the exclusion of tainted evidence is justified under different rationales: *i)* to avoid the lack or doubt of reliability of the respective evidence; *ii)* to serve the purpose of deterrence and prevention; *iii)* to vindicate individual rights, including the right to a fair trial; and particularly important for this honourable Court *iv)* to safeguard the integrity of the proceedings and the rule of law.
5. The prohibition of torture is an internationally recognized human right, and such prohibition is absolute and admits no derogations, in both, conventional and customary international law.¹ For this reason, evidence obtained through torture must be, in all cases, inadmissible regardless of the attributability of the alleged acts of torture or CIDT, whether that is national authorities, or members of the Office of the Prosecutor of the ICC. In this sense, Fair Trials will provide this honourable Court with external expertise on the exclusionary rule under international law and its application in jurisdictions around the world, that will, hopefully, aid this Chamber in deciding on the issue at hand.
6. The Pre-Trial Chamber in the Lubanga case clarified the principle governing the exclusionary rule at the ICC affirming that “[...] *article 69(7) of the ICC Statute rejects the notion that evidence procured in violation of internationally recognised human rights should be automatically excluded. Consequently, the judges have the*

¹ Article 2 UNCAT; Article 5 UDHR; Article 7 ICCPR; Article 5(2) ACHR; Article 3 ECHR.

discretion to seek an appropriate balance between the Statute's fundamental values in each concrete case."² Accordingly, the development of the exclusionary regime of the ICC, lies in the hands of its Judges.

7. Fair Trials believes that this honourable Chamber is placed in a unique and privileged position to decide upon the jurisprudential development of the international evidentiary regime, particularly in respect to the international implementation of the exclusionary rule and its key role in the legal architecture underpinning the international prohibition of torture. For this reason, Fair Trials would be honoured to offer its expertise to help inform the decision of this Chamber.

III. EXPERTISE IN SUBJECT-MATTER

8. Fair Trials works worldwide to promote respect for the right to a fair trial according to internationally recognized standards of justice. Fair Trials pursues its mission in three main ways: by helping people exercise their rights through the provision of information and engagement in strategic casework; by fighting the underlying causes of unfair trials; and by building an international network of fair trial defenders. This work has enabled Fair Trials to develop and apply a body of research and practical expertise in the criminal justice systems of a wide range of domestic and international jurisdictions.
9. Fair Trials has carried out a comprehensive research³ on the exclusionary rule under international law and its application in jurisdictions around the world. International law prohibits reliance on 'torture evidence' because *i)* it is involuntary, inherently unreliable and violates right to a fair trial; *ii)* to rely on

² Prosecutor v. Lubanga (Decision on the confirmation of charges), ICC (Pre-Trial Chamber), decision of 29 January 2007, para 84.

³ Tainted by torture. Examining the use of Torture evidence, a report by Fair Trials and Redress, May 2018.

such evidence undermines the rights of the torture victim; *iii*) it indirectly legitimizes torture and in so doing taints the justice system and *iv*) prohibiting reliance on the fruits of torture acts as a form of deterrence and prevention. This prohibition in principle extends to cruel, inhuman and degrading treatment and should cover derivative evidence. Almost all jurisdictions have some form of exclusionary rule applicable to ‘torture evidence’ although its scope and modalities of application differ. Therefore, our research shows that clear guidance by global courts such as this honourable Court is essential.

10. More specifically, Fair Trials work in Europe involves research on exclusion of evidence obtained through a violation of key defence rights and procedural guarantees. This research also covers the existence and application of exclusionary rule to evidence obtained by torture and other forms of CIDT. Fair Trials work aims to identify the shortcomings and best practices in framing and application of exclusionary rule in several European countries and improve its application in regional and national courts through advocacy, awareness rising and building capacity of defence lawyers. Fair Trials together with REDRESS has also recently intervened as a third party in the case of *Sentsov and Kolchenko v. Russia*⁴ before the European Court of Human Rights on exclusion of evidence obtained by torture.

11. Fair Trials work in Latin America is focused on torture prevention, the prevention of coerced confessions, and the waiver of fair trial rights to, among other things, prevent the admission of torture evidence in the region. Fair Trials work aims to support the implementation of laws prohibiting the admission of evidence obtained under torture or other CIDT. The organization does this by mobilizing and building the capacity of defence lawyers, activists, and judges

⁴ *Sentsov and Kolchenko v. Russia*, App. No. 29627/16, European Court of Human Rights, Communicated on 16 November 2019.

in the region, to effectively challenge the admission of torture evidence, and in the case of judges, to effectively exclude tainted evidence.

IV. CONCLUSION

12. As a result of the significant implications that the decision of this Chamber in the present case may have for the jurisprudence of the law of evidence of the ICC, it is pivotal for civil society organizations, such as Fair Trials, to inform this Chamber, in our capacity as global experts who promote and monitor the right to a fair trial worldwide.

13. For the above-mentioned reasons Fair Trials requests leave to make the proposed submissions as *amicus curiae*.

14. Should this honourable Chamber be mindful to grant this motion for leave, Fair Trials would be in a position to present its submission by 9 December, so as to not cause or contribute to any delay to the proceedings.



Laure Baudrihay-Gerard, Legal Director (Europe)
on behalf of
Fair Trials

Dated this 25 November 2020

At Brussels, Belgium