



Original: English

**No. ICC-01/12-01/18
Date: 10 February 2021**

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

**Public redacted version of ‘Decision on Defence request for reconsideration, or
leave to appeal, “Decision on Defence request in relation to P-0626”’**

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

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Detention Section

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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 22 January 2021, the Defence filed a request seeking, relevantly, for the Chamber to adjourn the testimony of [REDACTED] until the Chamber has issued its first decision under Article 69(7) of the Statute; and to 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 (the ‘Consolidated Defence Request’).¹
2. On 25 January 2021, the Defence sent an email objecting to the Prosecution’s scheduling of the testimony of witness P-0626 (the ‘25 January Defence Email’).²
3. On 26 January 2021, the Chamber issued an email decision which stated, relevantly, that: (i) there was no need at present to adjourn the hearing of P-0626 or [REDACTED] pending the Chamber’s resolution of forthcoming Article 69(7) matters; and (ii) since a report by the Panel of Experts regarding Mr Al Hassan’s fitness had only that same day been ordered to be made available to the Office of the Prosecutor (the ‘Prosecution’), that *inter partes* arguments based on this report were premature (the ‘Impugned Decision’).³
4. On 27 January 2021, the Defence filed a request for reconsideration, and in the alternative, leave to appeal the Impugned Decision (the ‘Request’).⁴ The Defence seeks reconsideration of the Impugned Decision on the basis that the Chamber failed to take into account all the considerations relevant to the Defence’s ability to prepare for testimony of P-0626 during the relevant period, including the

¹ Defence consolidated application regarding Article 69(7) procedural matters, ICC-01/12-01/18-1256-Conf.

² Email from the Defence, 25 January 2021, at 10:16.

³ Email from the Chamber, 26 January 2021, at 10:22.

⁴ Defence request for reconsideration, or leave to appeal, ‘Decision on Defence request in relation to P-0626’, ICC-01/12-01/18-1268-Conf (with five confidential Annexes, two confidential *ex parte* Annexes only available to the Defence, Prosecution and Registry, and two confidential *ex parte* Annexes only available to the Defence and Registry).

various constraints and pressures facing the Defence team over the judicial recess.⁵ Further, the Defence seeks leave to appeal the Impugned Decision on two issues: (i) that the Chamber fell into legal error by misunderstanding the nature of its obligations under Article 15 of the United Nations Convention Against Torture (the ‘First Issue’); and (ii) that the Chamber’s discretion miscarried in determining that consideration of the findings of the Panel of Experts relating to Mr Al Hassan’s fitness was premature (the ‘Second Issue’; together, the ‘Issues’).⁶ The Defence submits that both Issues arise from the Impugned Decision, would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and are issues for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁷

5. On 1 February 2021, the Prosecution responded to the Request, seeking that it be denied in its entirety (the ‘Response’).⁸ The Prosecution submits that the Request should be dismissed *in limine* as it has become moot due to the postponement of P-0626’s testimony until around 22 March 2021.⁹ In the alternative, the Prosecution submits that the request for reconsideration should be dismissed.¹⁰ In relation to the request for leave to appeal, the Prosecution submits that it should be dismissed as neither of the Issues constitute appealable issues, notably because they are predicated on a misreading or misunderstanding of the Impugned Decision or its underlying function, or merely disagree with or ignore the remedies it provides.¹¹ Further, the Prosecution submits that even assuming that the Issues are appealable, they should not be certified for appeal because they do not significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, and their immediate resolution by the Appeals Chamber would not materially advance the proceedings.¹²

⁵ Request, ICC-01/12-01/18-1268-Conf, paras 3, 6-12.

⁶ Request, ICC-01/12-01/18-1268-Conf, para. 14.

⁷ Request, ICC-01/12-01/18-1268-Conf, paras 14-26.

⁸ Prosecution response to Defence request for reconsideration, or leave to appeal, ‘Decision on Defence request in relation to P-0626’, ICC-01/12-01/18-1275-Conf.

⁹ Response, ICC-01/12-01/18-1275-Conf, paras 1, 7.

¹⁰ Response, ICC-01/12-01/18-1275-Conf, paras 2, 8-25.

¹¹ Response, ICC-01/12-01/18-1275-Conf, paras 3-5, 26-40.

¹² Response, ICC-01/12-01/18-1275-Conf, paras 3-5, 41-45.

II. Analysis

6. At the outset, the Chamber considers that the request for reconsideration is predicated on the understanding that P-0626 would have been called to testify first when hearings were scheduled to recommence on 8 February 2021. The Chamber considers that the issues raised have become moot since P-0626's testimony has now been postponed approximately six weeks, from 8 February to around 22 March 2021. This part of the Request is therefore dismissed *in limine*.
7. In relation to the request for leave to appeal, the Chamber incorporates by reference the applicable legal framework as set out in its previous decisions,¹³ and will examine whether the Defence has met the cumulative requirements under Article 82(1)(d) of the Statute in relation to the Issues.

A. First requirement: are the Issues 'appealable issues'?

1. The First Issue

8. The Chamber recalls that in the Impugned Decision it identified the first ground of the Defence's objection to the scheduling of P-0626 as follows: 'that the Chamber should adjourn the testimony of [REDACTED] until the Chamber has issued its first determination on Article 69(7) exclusion issues to avoid breaching the requirement in Article 15 of the Convention Against Torture'. The Chamber's determination on this ground was that there was no need at present to adjourn the hearing of P-0626 or [REDACTED] pending the Chamber's resolution of forthcoming Article 69(7) matters.
9. This determination was based on the following: (i) first that, as previously stated, the Chamber had as yet made no findings on the Defence's allegations of torture

¹³ 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).

and CIDT but rather took those findings at their highest for the purpose of the termination litigation, without prejudice to any future determinations by the Chamber on these matters;¹⁴ and (ii) second, because the Chamber had ‘competing information and arguments currently before it from the Prosecution and Defence on this subject’,¹⁵ had set a procedure and a timetable for resolution of these Article 69(7) matters,¹⁶ and was essentially awaiting the Defence’s consolidated application to exclude certain evidence on the basis of arguments of torture and CIDT (subject to resolution of the other matters raised in the Consolidated Defence Request).

10. In the Request, the Defence submits that the ‘cursory manner’ in which the Chamber resolved points regarding Article 15 of the Convention Against Torture ‘raises the issues as to whether the Chamber fell into legal error concerning its obligations [under that Article]’.¹⁷ It submits in particular that ‘the existence of “competing information and arguments” [concerning the Defence’s allegations of torture and CIDT [REDACTED]] does not dispel the existence of a *prima facie* case, nor does it inure the Chamber from the dangers of hearing tainted evidence in advance of an independent, effective and impartial investigation into the allegations of torture.’¹⁸
11. As noted by the Prosecution,¹⁹ the Defence has raised issues similar to the First Issue previously. In the Defence request for leave to appeal the Termination Decision, the Defence raised as a fourth issue whether the Chamber erred in its assessment that the future exclusion of evidence could remedy the prejudice and unfairness generated by the use of ‘tainted’ evidence, to reach adverse factual

¹⁴ Impugned Decision, citing to Decision on the Defence request to terminate the proceedings and related requests, 24 August 2020, ICC-01/12-01/18-1009-Conf (the ‘Termination Decision’), para. 80.

¹⁵ Impugned Decision, citing to *inter alia*, the ‘termination litigation filings’ and ‘most recently filings 1213, 1215, 1218, 1226 and 1256’.

¹⁶ Impugned Decision, citing to Decision on matters related to Defence challenges under Article 69(7) of the Statute, 6 November 2020, ICC-01/12-01/18-1150 (the ‘6 November Decision’) and Decision on Prosecution request for variation of Decision on matters related to Defence challenges under Article 69(7) of the Statute, 24 November 2020, ICC-01/12-01/18-1160 (the ‘24 November Decision’).

¹⁷ Request, ICC-01/12-01/18-1268-Conf, para. 16.

¹⁸ Request, ICC-01/12-01/18-1268-Conf, para. 16.

¹⁹ Response, ICC-01/12-01/18-1275-Conf, paras 31-32.

conclusions, throughout the investigation, pre-trial and trial stage.²⁰ Similarly, in the Defence request for leave to appeal the Chamber's decision on Defence's objections to the Prosecution's list of material for witness P-0620, the Defence raised as a second issue whether 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.²¹ The Chamber already decided on these arguments.²² Indeed in the Impugned Decision the Chamber noted that its conclusion was consistent with its approach taken to date.²³ The Chamber therefore considers that the Defence's arguments under the First Issue are merely a re-litigation of previously settled arguments and that the First Issue does not constitute an appealable issue for the purpose of Article 82(1)(d).

2. *The Second Issue*

12. The Chamber recalls that in the Impugned Decision, it identified the second ground of the Defence's objection as follows: 'that litigation on issues pertaining to [REDACTED] may impact Mr Al Hassan's ongoing fitness to stand trial or at least his rights to a fair trial and equality of arms'. The grounds of objection were identified by reference to the 25 January Defence Email and the Consolidated Defence Request. The Chamber's determination on this ground was that since 'the Panel of Experts' report' had only that day been ordered to be made available to the Prosecution, *inter partes* arguments based on this report were premature.
13. In the Request, the Defence refers to information from the Panel of Experts' report on Mr Al Hassan's fitness which it identifies as being relevant and submits that consideration of relevant information relating to Mr Al Hassan's fitness to stand trial when making the Impugned Decision was essential to the Chamber

²⁰ Defence request for leave to appeal the 'Decision on the Defence request to terminate the proceedings and related requests', 31 August 2020, ICC-01/12-01/18-1021-Conf, para. 1.

²¹ Defence request for leave to appeal the 'Decision on Defence's objections to the Prosecution's list of material for P-0620', 19 October 2020, ICC-01/12-01/18-1116-Conf, para. 4.

²² 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, para. 18 ; Decision on Defence request for leave to appeal the 'Decision on Defence's objections to the Prosecution's list of material for P-0620', 4 November 2020, ICC-01/12-01/18-1140, para. 16.

²³ Impugned Decision, citing 'in particular' to the 6 November Decision and the 24 November Decision, and emails from the Chamber 14 October 2020, at 18:52 and 6 November 2020, at 09:21.

exercising its ‘ongoing duty to maintain Mr. Al Hassan’s fitness to stand trial’.²⁴ The Defence submits that the Chamber’s discretion miscarried in determining that consideration of the findings of the Panel of Experts relating to Mr Al Hassan’s fitness was premature.²⁵

14. The Chamber considers that the Second Issue represents a misunderstanding of the Impugned Decision. Contrary to the Defence’s submissions, in the Impugned Decision the Chamber did not determine that consideration of the findings of the Panel of Experts’ relating to Mr Al Hassan’s fitness was premature, but rather stated that inter partes arguments based on the Panel’s report were premature. Indeed, at the time of the Impugned Decision, (i) according to the 25 January Defence Email itself, Defence submissions stemming from the Panel of Experts’ report had not yet been transmitted to the Prosecution but were to be transmitted ‘very soon’; (ii) the Prosecution had only that day been granted access to the Panel of Experts’ report; and (iii) there were no substantive arguments regarding the content of the Panel of Experts’ report in either the Consolidated Defence Request (where the report is not mentioned) or the 25 January Defence Email (which referred only to ‘potential litigation, including as may arise from the Panel of Experts’ Report’). As a result, the Second Issue simply does not arise from the Impugned Decision and is therefore not an appealable issue.

B. Second and third requirements: would the Issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and may immediate resolution by the Appeals Chamber materially advance the proceedings?

15. 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 considers 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 and expeditious conduct of the proceedings and the outcome of the trial, the Defence submits that the Impugned Decision substantially affects Mr Al Hassan’s statutory rights to adequate time and facilities and examination of witnesses, and his ability to

²⁴ Request, ICC-01/12-01/18-1268-Conf, paras 18-21.

²⁵ Request, ICC-01/12-01/18-1268-Conf, para. 21.

participate in the proceedings.²⁶ In particular, the Defence submits that once ‘unreliable and abusive evidence is heard before the Chamber, Mr. Al Hassan’s right to a fair trial will be irreversibly compromised’.²⁷ In relation to the First Issue, the Chamber has acknowledged before that it is in the interests of the parties and participants, Mr Al Hassan, and the Chamber, to have these Article 69(7) matters resolved in a consolidated manner.²⁸ It is for this reason that the Chamber has set a timetable and procedure for resolution of issues of alleged torture and CIDT as regards Article 69(7). However, this litigation is ongoing and therefore arguments regarding potential unfairness are speculative at this stage.

16. In relation to the Second Issue, the Request in addition fails to take into account that the Impugned Decision itself provided a remedy in relation to the issue of P-0626 – namely that should the Defence consider that specific measures should be taken to mitigate any adverse impact on Mr Al Hassan during the testimony of P-0626, it could make a concrete request to the Chamber at the appropriate time. In addition, the Chamber has also set a timetable for submissions on the Panel of Experts’ report, by 23 February 2021.
17. For these reasons too, the Chamber considers that referral of the Issues at this stage to the Appeals Chamber would be premature and would cause an unnecessary delay to the proceedings, rather than materially advance them.²⁹

²⁶ Request, ICC-01/12-01/18-1116-Conf, paras 22-25.

²⁷ Request, ICC-01/12-01/18-1116-Conf, para. 25.

²⁸ ICC-01/12-01/18-1140, para. 17.

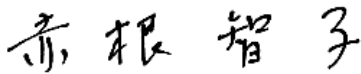
²⁹ *Contra* Request, ICC-01/12-01/18-1116-Conf, para. 26.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY
REJECTS** the Request.

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 10 February 2021

At The Hague, The Netherlands