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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 “Prosecution response to Defence consolidated
application regarding article 69(7) procedural matters”,
3 February 2021, ICC-01/12-01/18-1281-Conf**

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I. Introduction

1. The Defence for Mr Al Hassan’s “Defence consolidated application regarding Article 69(7) procedural matters” (“Request”) should be dismissed.¹ In the Request, the Defence seeks that the Chamber:

- (i) confirm that the Defence may submit its article 69(7) application after the Chamber has first ruled on the Prosecution’s pending regulation 35(2) and rule 68 applications, and the Defence has had adequate time to identify responsive evidence (“Timing Request”);² and
- (ii) convene an evidentiary hearing for the purpose of hearing evidence related to the article 69(7) applications (“Evidentiary Hearing Request”).³

2. Both Requests effectively amount to a request for reconsideration of the Chamber’s Decisions setting out the procedure and timetable for resolution of these article 69(7) matters (together, “Decisions on article 69(7) Procedure”).⁴ The Defence fails to demonstrate a clear error of reasoning or that reconsideration is necessary to prevent an injustice. The Defence also fails to substantiate any new facts and arguments that may be relevant to this assessment.

3. Should the Chamber nevertheless be minded to grant the Timing Request and the Evidentiary Hearing Request, the Prosecution respectfully requests the opportunity to make further submissions regarding the scope, content, procedure and timing for an evidentiary hearing.

¹ ICC-01/12-01/18-1256-Conf (“Request”).

² Request, para. 17(a). *See also* para. 3(a).

³ Request, para. 17(b). *See also* para. 3(b).

⁴ [ICC-01/12-01/18-1150](#) (“First Decision”) and [ICC-01/12-01/18-1160](#) (“Second Decision”) (together, “Decisions of article 69(7) Procedure”). [REDACTED]

II. Confidentiality

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“Regulations”), this response is filed confidentially because it responds to a Request and makes reference to decisions and other filings of the same classification.

III. Procedural history

5. On 6 May 2020, the Chamber adopted the “Directions on the conduct of proceedings”, where it found that “while in general it will defer to the judgment assessments of the evidence on the basis of standard evidentiary criteria, it may still be necessary to make some discrete determinations on the admissibility of specific evidence or categories of evidence.”⁵ The Chamber observed that “[r]ule 64(1) of the Rules requires the parties and participants to raise issues as to admissibility of evidence, including on any of the standard evidentiary criteria, at the time when the evidence is submitted to the Chamber or immediately after such an issue becomes known.”⁶ It recalled that “[r]ule 63(3) of the Rules mandates that rulings on admissibility shall be made by the Chamber when an application is made by a party or the Chamber by its own motion under Article 69(7) of the Statute.”⁷ It found that “[t]he Chamber will rule on these issues, as appropriate, in the course of the trial or at the end of the proceedings.”⁸

6. On 6 November 2020, the Chamber issued the first of its Decisions on article 69(7) Procedure. In its “Decision on matters related to Defence challenges under Article 69(7) of the Statute” (“First Decision”), it found that in light of Defence challenges under article 69(7) of the Statute regarding certain items submitted through certain witnesses, it would rule on the admissibility of these contested items

⁵ [ICC-01/12-01/18-789-AnxA](#), para. 31.

⁶ [ICC-01/12-01/18-789-AnxA](#), para. 31.

⁷ [ICC-01/12-01/18-789-AnxA](#), para. 32. *See also* para. 34.

⁸ [ICC-01/12-01/18-789-AnxA](#), para. 32 (noting also that the Chamber will take a similar approach to other procedural requirements, including those arising under *inter alia* rule 68 (prior recorded testimony of a witness)).

at this stage of the proceedings.⁹ To this end, it directed the parties and participants to file submissions on the allegations regarding torture and CIDT and the related challenge under article 69(7) of the Statute to these contested items.¹⁰ At the same time, the Chamber instructed the parties to bear in mind when preparing their submissions that although the actual underlying material, which was the focus of the Defence's objections had not yet been submitted into evidence, the Chamber would nevertheless consider the objections to this material in its forthcoming decision, and set the principles in relation to similar material.¹¹ In this First Decision, the Chamber also set a procedure for future challenges raised under article 69(7), if any, going forward: (i) a party seeking exclusion of a particular item or items under article 69(7) must provide notice of this; (ii) the party should then promptly file formal written submissions setting out the basis for this challenge; and (iii) the other parties and participants should then respond to that filing in the normal course.¹²

7. On 24 November 2020, the Chamber issued its "Decision on Prosecution request for variation of Decision on matters related to Defence challenges under Article 69(7) of the Statute" ("Second Decision"). The Chamber noted that the Prosecution proposed an alternative procedure, whereby: (i) the Prosecution would first request the introduction of the totality of the audio recordings of interviews of the accused, their transcripts and related material and seek leave for additions to the Prosecution's List of Evidence and Witnesses; and, (ii) then, the Defence may make any challenge on the basis of article 69(7) of the Statute.¹³ The Chamber found that "while formulated as a request for variation of timelines under Regulation 35 of the Regulations, the Prosecution Request is in effect a request for reconsideration of the Decision and will be considered according to the principles applicable to the latter."¹⁴

⁹ [ICC-01/12-01/18-1150](#), para. 8.

¹⁰ [ICC-01/12-01/18-1150](#), para. 11-12.

¹¹ [ICC-01/12-01/18-1150](#), para. 13.

¹² [ICC-01/12-01/18-1150](#), para. 15.

¹³ [ICC-01/12-01/18-1150](#), para. 4.

¹⁴ [ICC-01/12-01/18-1160](#), para. 7.

8. The Chamber accepted the Prosecution's unopposed approach and its submissions that the proposed procedure would: (i) allow for a more comprehensive and consolidated approach to the admissibility of the totality of the record of the Accused's interview and related material; and, (ii) would be in the interests of clarity and the fair and expeditious conduct of the proceedings.¹⁵

9. As a result, the Chamber set a schedule for the Prosecution to file its request for the introduction of the totality of the audio-recordings of interviews of the Accused, their transcripts and related material and any related requests for additions to its List of Evidence or Witnesses, as soon as possible and no later than 31 December 2020.¹⁶ It determined that "[t]he Defence is to file any motion based on Article 69(7) of the Statute in respect of the Request for Introduction and responses to any requests for additions to the List of Evidence and Witnesses **promptly thereafter**."¹⁷

10. On 18 December 2020, the Prosecution filed the "Prosecution request to introduce evidence preserved under article 56 of the Statute" ("Request for Introduction").¹⁸

11. Between 17 December 2020 and 23 December 2020, the Prosecution also filed the following requests (together, "Related Requests"):

- "Prosecution request to add [REDACTED] to its List of Witnesses and to add [REDACTED]'s prior recorded testimony to its List of Evidence pursuant to regulation 35 of the Regulations, and request for the introduction of [REDACTED]'s prior recorded testimony and associated material into evidence pursuant to rule 68 of the Rules of Procedure and Evidence";¹⁹
- "Prosecution requests to add five items to its List of Evidence pursuant to

¹⁵ [ICC-01/12-01/18-1160](#), para. 9.

¹⁶ [ICC-01/12-01/18-1160](#), para. 10.

¹⁷ [ICC-01/12-01/18-1160](#), para. 10 (emphasis in original).

¹⁸ ICC-01/12-01/18-1218-Conf-Exp.

¹⁹ ICC-01/12-01/18-1226-Conf.

regulation 35 of the Regulations of the Court and for the introduction of [REDACTED] [REDACTED]s and [REDACTED]s prior recorded testimony and associated material into evidence pursuant to rule 68 of the Rules of Procedure and Evidence”;²⁰ and

- “Prosecution’s first request for the admission of documentary evidence from the bar table, and regulation 35 request.”²¹

12. On 22 January 2021, the Request was notified.

13. By e-mail message dated [REDACTED],²² the Chamber issued a decision on the Defence’s objection to [REDACTED] [REDACTED]. In the Decision [REDACTED] the Chamber also decided on part of the Defence Request,²³ in particular its request that the Chamber “[a]djourne the testimony of [REDACTED] until it had issued its first Article 69(7) Decision”.²⁴

14. With respect to the Defence argument 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),²⁵ the Chamber considered “there to be no need at present to adjourn the hearing [REDACTED] [REDACTED] pending its resolution of forthcoming Article 69(7) matters.” The Chamber based this decision on the following: (i) first, because “as previously stated, the Chamber has as yet made no findings on the Defence’s allegations of torture 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

²⁰ ICC-01/12-01/18-1215-Conf.

²¹ ICC-01/12-01/18-1213-Conf.

²² Email of Trial Chamber X, [REDACTED].

²³ [REDACTED].

²⁴ Request, para. 17(c).

²⁵ See e.g. Request, para. 13-16, 17(c).

Chamber on these matters;”²⁶ (ii) second, because the Chamber has competing information and arguments currently before it from the Prosecution and Defence on this subject,²⁷ has set a procedure and a timetable for resolution of these article 69(7) matters,²⁸ and “is essentially awaiting the Defence’s consolidated application to exclude certain evidence of the basis of arguments of torture and CIDT (subject to resolution of the other matters raised in [the Request]).” The Chamber found that its conclusion is consistent with its approach taken to date.²⁹ The Chamber indicated that it would issue its decision on the remainder of the relief requested in the Request in due course.³⁰

15. In the Decision [REDACTED], the Chamber also decided upon the Defence argument in the Request 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.³¹ It noted that the Panel of Experts’ report was only ordered to be made available to the Prosecution on 26 January 2021, and considered therefore that *inter partes* arguments based on this report were premature. [REDACTED]

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ See e.g. Request, para. 16, 17(d).

³² [REDACTED].

VI. Submissions

16. The Defence is seeking that the Chamber:

- (i) confirm that the Defence may submit its article 69(7) application after the Chamber has first ruled on the Prosecution's pending regulation 35(2) and rule 68 applications, and the Defence has had adequate time to identify responsive evidence ("Timing Request");³⁴ and
- (ii) convene an evidentiary hearing for the purpose of hearing evidence related to the article 69(7) applications ("Evidentiary Hearing Request").³⁵

17. Both Requests effectively amount to a request for reconsideration of the Chamber's Decisions on article 69(7) Procedure, setting out the procedure and timetable for resolution of these article 69(7) matters. In particular, in the Second Decision, the Chamber set out a schedule for the Prosecution to file its request for introduction of the totality of the audio recordings of interviews of the accused, their transcripts and related material and any related requests for additions to its List of Evidence or Witnesses.³⁶ It determined that "[t]he Defence is to file any motion based on Article 69(7) of the Statute in respect of the Request for Introduction and responses to any requests for additions to the List of Evidence and Witnesses **promptly thereafter.**"³⁷ The procedure set out in the Second Decision, is consistent with the Directions on the Conduct of Proceedings which provides that rule 64(1) of the Rules requires the parties and participants to raise issues as to admissibility of

³³ [REDACTED]

³⁴ Request, para. 17(a). *See also* para. 3(a).

³⁵ Request, para. 17(b). *See also* para. 3(b).

³⁶ [ICC-01/12-01/18-1160](#), para. 10.

³⁷ [ICC-01/12-01/18-1160](#), para. 10 (emphasis in original).

evidence, at the time when the evidence is submitted to the Chamber or immediately after such an issue becomes known.³⁸ As a result, the Chamber “expects to receive written submissions from the parties on the issue of exclusion of evidence allegedly tainted by torture and CIDT under Article 69(7) of the Statute in early 2021.”³⁹ As previously noted by the Chamber, “[t]he Chamber is cognisant of these [matters raised under Article 69(7) of the Statute] and intends to address them without delay.”⁴⁰

18. In requesting a variation of this procedure, the Defence seeks reconsideration of Decisions on article 69(7) Procedure. However, the Defence makes no submissions in this respect and fails to show that the test for reconsideration is met. The Defence fails to substantiate that these Decisions contain a clear error of reasoning or that their reconsideration is necessary to prevent an injustice.⁴¹

19. The Defence also fails to substantiate any new facts and arguments that may be relevant to the assessment regarding whether the test for reconsideration has been met.⁴²

20. There are no new relevant facts and arguments in the Defence submissions in support of its Timing Request. The Prosecution expressly anticipated filing its Request for Introduction, and Related Requests regarding evidence of a testimonial nature.⁴³ In its Second Decision, the Chamber took into consideration that the

³⁸ [ICC-01/12-01/18-789-AnxA](#), para. 31.

³⁹ [ICC-01/12-01/18-1177](#), para. 2. *See also* [ICC-01/12-01/18-1228](#), para. 3.

⁴⁰ [ICC-01/12-01/18-1140](#), para. 17.

⁴¹ [ICC-01/12-01/18-1150](#), para. 7 (reconsideration test).

⁴² *See* [ICC-01/12-01/18-1150](#), para. 7 (reconsideration test).

⁴³ ICC-01/12-01/18-1218-Conf-Exp; ICC-01/12-01/18-1226-Conf and ICC-01/12-01/18-1215-Conf. *See* ICC-01/12-01/18-1159-Conf, para. 4 [REDACTED]

Prosecution would be filing these.⁴⁴ While the Prosecution did not expressly anticipate filing the “Prosecution’s first request for the admission of documentary evidence from the bar table, and regulation 35 request”,⁴⁵ the Defence fails to substantiate that the number of individual Related Requests unduly delays proceedings.⁴⁶

21. The Defence maintains that these filings have “impacted on the ability of the Defence to file a consolidated Article 69(7) application”,⁴⁷ but fails to explain why this is the case.

22. The Defence also argues that it “has a clear interest in knowing the legal status of these evidentiary items before it submits its Article 69(7) application”,⁴⁸ but once more does not explain why, beyond stating that the Prosecution indicated in the Related Requests that it considers this evidence relevant to the Defence article 69(7) application.⁴⁹ In this respect, the Defence also omits pertinent information. The Prosecution has indicated that the evidence sought to be submitted in the Related Requests is relevant to the Chamber’s assessment of the weight and probative value to be accorded to the Accused’s interview and is being submitted for that purpose, while it may also assist in deciding the Defence article 69(7) challenge to the

⁴⁴ See [ICC-01/12-01/18-1160](#), para. 4 (referring to ICC-01/12-01/18-1159-Conf, para. 4), 10 (“orders the Prosecution to file its Request for Introduction and any related requests for additions to its List of Evidence or Witnesses [...] The Defence is to file any motion based on Article 69(7) of the Statute in respect of the Request for Introduction and responses to any requests for additions to the List of Evidence and Witnesses”). See further [ICC-01/12-01/18-1160](#), para. 11 (“This decision is without prejudice to the Chamber’s determination on any future Prosecution requests for additions to the Prosecution List of Evidence or Witnesses, and any Defence objections thereto.”)

⁴⁵ ICC-01/12-01/18-1213-Conf.

⁴⁶ See Request, para. 2 (“the Prosecution has filed not one but four separate and staggered evidentiary applications”), 5 (“Rather than filing a consolidated and complete application as concerns its request to admit Mr Al Hassan’s statement into evidence”).

⁴⁷ Request, para. 6. See also para. 2.

⁴⁸ Request, para. 7.

⁴⁹ See Request, para. 6.

admissibility of such interview.⁵⁰

23. Given that the Defence has yet to file its article 69(7) application, the Prosecution is unable to further respond to these arguments without additional explanation.

24. In any event, as envisaged in the Second Decision,⁵¹ the Defence has had the opportunity to respond to the Related Requests and has done so, challenging not only the justification underlying the regulation 35 requests for addition to the List of Witnesses and/ or List of Evidence, but also the relevance and probative value of the evidence sought to be submitted and the prejudice to the Defence of its submission through the modalities envisaged in the Related Requests (rule 68(2)(b), rule 68(3), bar table).⁵² Contrary to the Defence claim that the Related Requests impacted its ability to file a consolidated article 69(7) application,⁵³ to the extent that the Defence needs to address this proposed evidence further in the context of its article 69(7) application, the Defence can do so, without falling foul of the Second Decision's provision that "[a]ny such Defence motion should be self-contained and should not incorporate by reference extensive aspects of earlier submissions."⁵⁴ In addition,

⁵⁰ See ICC-01/12-01/18-1215-Conf, para. 44 (arguing that the evidence sought to be submitted is relevant to the voluntary nature of Mr AL HASSAN's interviews and related material and the reliability of this evidence. Thus, they are relevant to the Chamber's ultimate assessment of the weight and probative value to be accorded to Mr AL HASSAN's interviews and related material. In addition, although their submission is not required for this purpose, they may assist the Chamber in disposing of the Defence's upcoming challenges under article 69(7) to the admissibility of Mr AL HASSAN's prior recorded testimony and associated material), 50, 56 (arguing that the evidence is submitted to bolster the probative value of Mr AL HASSAN's interviews and related material and the weight that the Chamber may accord to this evidence [...]) In addition, [REDACTED] prior recorded testimony relates to an upcoming procedural Defence motion seeking the exclusion of Mr Al Hassan's prior recorded testimony under article 69(7)), 59; ICC-01/12-01/18-1226-Conf, para. 18, fn. 37; para. 21, 29, 33, 35, 44; ICC-01/12-01/18-1213-Conf, para. 3, 4, 17-19, 26.

⁵¹ See [ICC-01/12-01/18-1160](#), para. 10.

⁵² See e.g. ICC-01/12-01/18-1254-Conf, para. 6-12 (regarding regulation 35 requests), 13-23 [REDACTED], 26 [REDACTED]; ICC-01/12-01/18-1255-Conf, para. 6-11 (regarding regulation 35 requests), 12-31 (regarding the reliability of the prior recorded testimony and the prejudice to the Defence of its submission under rule 69(2)(b)), 33 (reiterating arguments regarding the reliability of the prior recorded testimony for its submission under rule 68(3)); ICC-01/12-01/18-1264-Conf, para. 6-10 (regarding regulation 35 request), 15-29 (regarding relevance, probative value and prejudice to the Defence of submission through the bar table).

⁵³ Request, para. 6.

⁵⁴ [ICC-01/12-01/18-1160](#), para. 10.

contrary to the Defence claim,⁵⁵ the Defence can make these additional arguments in its article 69(7) application irrespective of the “legal status of these evidentiary items.” In the event that the Chamber grants the Related Requests and submission of evidence therein, the Defence retains the possibility to submit contradictory evidence when presenting its case.⁵⁶

25. In support of its Request for Evidentiary Hearing, the Defence submits that a *voir dire* hearing, “would best promote a fair and expeditious resolution to exclusion issues in this case, by allowing the parties an appropriate opportunity to submit and challenge extrinsic evidence that pertains to the circumstances of these interviews.”⁵⁷ While a *voir dire* hearing amounts to one possible approach to addressing these issues, the Defence submissions do not provide the basis to reconsider the Decisions on article 69(7) Procedure.

26. Should the Chamber nevertheless be minded to grant the Timing Request and the Evidentiary Hearing Request, the Prosecution respectfully requests the opportunity to make further submissions regarding the scope, content, procedure and timing for an evidentiary hearing.

27. Without prejudice to these further submissions, the Defence is incorrect to maintain that the scope of any evidentiary hearing should encompass “a substantial body of evidence and argument [REDACTED]

[REDACTED]
[REDACTED].”⁵⁸ The Request for Introduction is limited to the audio recordings of interview of the accused, transcripts and related material, and what is relevant is the voluntary nature of his interview with the Prosecution. [REDACTED]
[REDACTED]

⁵⁵ Request, para. 7.

⁵⁶ See Request, para. 9 (“In general, it would fall to the Defence to introduce such evidence during the Defence case.”)

⁵⁷ Request, para. 11. See also para. 9.

⁵⁸ Request, para. 12.

[REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED].⁵⁹ It would not
 prejudice the Defence to hear this evidence separately,⁶⁰ [REDACTED]
 [REDACTED]
 [REDACTED],⁶¹ as the Defence itself recognises.

V. Requested Relief

28. For the reasons set out above, the Chamber should dismiss the Defence Request.



Fatou Bensouda, Prosecutor

Dated this 3rd of February 2021

At The Hague, The Netherlands

⁵⁹ [REDACTED]

⁶⁰ *Contra* Request, para. 12.

⁶¹ Request, para. 13.