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No. ICC-01/12-01/18

Date: 24 June 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

**Decision on Defence requests for leave to appeal two decisions related to the
submission into evidence of Mr Al Hassan's statements**

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

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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 17 May 2021, the Chamber issued the ‘Decision on requests related to the submission into evidence of Mr Al Hassan’s statements’ (the ‘First Impugned Decision’),¹ in which it, notably: (i) rejected a Defence request to exclude Mr Al Hassan’s ICC interviews under Article 69(7) of the Statute; and (ii) granted a request by the Office of the Prosecutor (‘the Prosecution’) to admit Mr Al Hassan’s statements into evidence.
2. On 24 May 2021, the Defence filed a request for leave to appeal the First Impugned Decision (the ‘First Defence Request’).² Specifically, the Defence requests leave to appeal on the following six issues:³
 - ‘whether the Chamber erred in law in finding that the burden for demonstrating that the Article 69(7) criteria are fulfilled falls on the Defence’ (‘Issue 1.1’);
 - ‘whether the Chamber abused its discretion by deciding not to convene a *voir dire* hearing’ (‘Issue 1.2’);
 - ‘whether the Chamber erred in law and abused its discretion by relying on irrelevant considerations and failing to rely on relevant considerations as concerns the causal nexus between violations and the means used to collect evidence’ (‘Issue 2.1’);
 - ‘whether the Chamber’s conclusion that the causal nexus was not satisfied was legally incorrect and manifestly unreasonable’ (‘Issue 2.2’);
 - ‘whether the Chamber erred in law and misappreciated the facts set out in the evidential record through its conclusion that the Prosecution took sufficient steps

¹ ICC-01/12-01/18-1475-Conf (a public redacted version was issued on 20 May 2021, ICC-01/12-01/18-1475-Red).

² Defence request for leave to appeal ‘Decision on requests related to the submission into evidence of Mr Al Hassan’s statements’, ICC-01/12-01/18-1498-Conf (corrigendum filed on 25 May 2021, ICC-01/12-01/18-1498-Conf-Corr; a public redacted version was filed on 27 May, ICC-01/12-01/18-1498-Corr-Red).

³ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, n. 2.

to ensure the reliability of the evidence collected while Mr Al Hassan was detained at the DGSE’ (‘Issue 2.3’); and

- ‘whether the Chamber erred in law by failing to issue a reasoned assessment concerning the prejudicial impact of the admission of such statements as part of its Article 69(4) assessment’ (‘Issue 3.1’).

3. The Defence submits that each of these issues is an appealable issue which arises from the First Impugned Decision. For Issue 1.1, the Defence submits that there are two interrelated errors arising: first, the general burden that applies to Article 69(7) applications and, second, the manner in which the Chamber construed the legal and evidential requirements of the ‘real risk of torture’ test.⁴ It further submits that the Chamber’s legal approach to the burden of proof affected the manner in which it resolved the Defence’s request and the ultimate outcome.⁵ In relation to Issue 1.2, the Defence submits, *inter alia*, that discretionary decisions must be exercised in a manner that is consistent with the Chamber’s obligation to ensure the overall fairness of the trial, which includes ‘the Defence’s right to have an effective opportunity to challenge the submission of evidence’, and consistent with Mr Al Hassan’s right to an ‘independent and effective investigation into his claims’.⁶
4. In relation to Issue 2.1, the Defence submits that the Chamber wrongly took into account some factors in its construction of Article 69(7) of the Statute (in its reference to the ‘practical realities’ *in situ* and its focus on State cooperation), and failed to take into account relevant factors (the nature of the violations and the alleged specific nature or gravity of the violation).⁷ In relation to Issue 2.2, the Defence submits that the Chamber failed to consider whether the Prosecution’s ability to obtain evidence was facilitated by violations of Mr Al Hassan’s rights.⁸ The Defence submits, *inter alia*, that even if the Chamber disagreed that the impact was sufficient to invalidate the voluntary and reliable nature of the interviews, it was still obliged in law to find that the *chapeau* element of Article

⁴ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, paras 3-8.

⁵ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 9.

⁶ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 10.

⁷ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, paras 11-15.

⁸ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, paras 16-25.

69(7) of the Statute had been satisfied, and to go on to consider the rest of the Article 69(7) test.⁹ In relation to the Issue 2.3, the Defence submits that the Chamber's analysis and interpretation of the interactions between Mr Al Hassan and the Prosecution turned on erroneous legal and evidential approaches.¹⁰ In relation to the Issue 3.1, the Defence submits that the Chamber was obliged to consider and provide a reasoned opinion on Defence submissions concerning the prejudice to a fair trial that would arise through the introduction of Mr Al Hassan's statements into the record, including by reference to the findings of the Chamber's Panel of Experts.¹¹

5. Finally, the Defence submits that the issues affect the fair and expeditious conduct of the proceedings and the outcome of the trial, and that an immediate decision by the Appeals Chamber is required to materially advance the proceedings.¹² The Defence submits, *inter alia*, that if the Chamber has erred in the manner in which it resolved the issues, then the record of this case will have been 'irrevocably stained' and any judgment flawed.¹³ It submits that these are not issues which can be effectively resolved on final appeal.¹⁴
6. On 28 May 2021, the Prosecution filed its response, opposing the First Defence Request (the 'First Prosecution Response').¹⁵ It first argues that none of the issues are appealable issues arising from the First Impugned Decision within the meaning of Article 82(1)(d),¹⁶ submitting, *inter alia*, that the First Defence Request is based on multiple misunderstandings of the Chamber's findings and conclusions, and that many of the Defence's arguments consist of mere disagreements with the First Impugned Decision.¹⁷ The Prosecution further

⁹ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, paras 25-26.

¹⁰ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, paras 28-33.

¹¹ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 34.

¹² First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 35.

¹³ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 35.

¹⁴ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 35.

¹⁵ Prosecution response to Defence request for leave to appeal the "Decision on requests related to the submission into evidence of Mr Al Hassan's statements", ICC-01/12-01/18-1502-Conf (a public redacted version was filed on 4 June 2021, ICC-01/12-01/18-1502-Red).

¹⁶ First Prosecution Response, ICC-01/12-01/18-1502-Conf, paras 3, 12, 18, 27, 37 and generally 6-37.

¹⁷ First Prosecution Response, ICC-01/12-01/18-1502-Conf, paras 2, 5-45.

submits that, in any event, the issues fail to meet the remaining criteria under Article 82(1)(d) of the Statute.¹⁸

7. On 2 June 2021, the Defence requested leave to reply to the Prosecution Response on three issues (the ‘Defence Request for Leave to Reply’).¹⁹
8. On 8 June 2021, the Chamber issued the ‘Second decision on requests related to the submission into evidence of Mr Al Hassan’s statements’ (the ‘Second Impugned Decision’),²⁰ in which it notably rejected Defence requests under Article 69(7) of the Statute in relation to the expert reports of P-0620, P-0653 and P-0655 and some of the material related to Mr Al Hassan’s statements, and authorised the submission into evidence of material related to Mr Al Hassan’s statements.
9. On 14 June 2021 the Defence filed a request for leave to appeal the Second Impugned Decision (the ‘Second Defence Request’).²¹ Specifically, the Defence requests leave to appeal on the following two issues:²²
 - ‘Whether, when collecting information from a vulnerable detained suspect, the effective application of the protective rights under Article 55 requires that the suspect be put on notice that information or material collected outside the confines of suspect interviews, or where the nature of the interview or investigative activity has changed since the warning was provided, can be used for the purpose of incrimination’ (the ‘Frist Issue’); and
 - ‘Whether the Chamber erred in finding that taking visual, audio, and written samples without the Defendant’s consent does not trigger self-incrimination and privacy protections’ (the ‘Second Issue’).

¹⁸ First Prosecution Response, ICC-01/12-01/18-1502-Conf, paras 3, 46-56.

¹⁹ Defence Request for Leave to Reply to ‘Prosecution Response to Defence Request for Leave to Appeal the “Decision on requests related to the submission into evidence of Mr Al Hassan’s statements”’, ICC-01/12-01/18-1505-Conf. The Defence seeks reclassification of this request (Email from the Defence, 9 June 2021, at 15:10).

²⁰ ICC-01/12-01/18-1508.

²¹ Defence request for leave to appeal the “Second decision on requests related to the submission into evidence of Mr Al Hassan’s statements”, ICC-01/12-01/18-1513-Conf (a public redacted version was filed on 21 June 2021, ICC-01/12-01/18-1513-Red).

²² Second Defence Request, ICC-01/12-01/18-1513-Conf, para. 2.

10. The Defence submits that both issues arise from the Second Impugned Decision,²³ and, in relation to the First Issue, that its resolution is essential for the determination of the matters arising in the judicial causes under consideration.²⁴ In relation to the fairness and expeditiousness of proceedings, the Defence submits, *inter alia*, that the prompt determination of the issues will clarify the evidential bases on which the trial may continue.²⁵ In relation to the material advancement of the proceedings, the Defence refers to the importance of issues concerning the fairness of the trial proceedings and the extent of the protections afforded by Article 55 of the Statute.²⁶
11. On 18 June 2021, the Prosecution filed its response, opposing the Second Defence Request (the ‘Second Prosecution Response’).²⁷ It first argues that neither of the issues are appealable issues arising from the Second Impugned Decision within the meaning of Article 82(1)(d), submitting, *inter alia*, that the Defence misconstrues the Second Impugned Decision and the issues are predicated on incorrect assumptions as to what the Chamber found.²⁸ The Prosecution further submits that, in any event, the issues fail to meet the remaining criteria under Article 82(1)(d) of the Statute.²⁹

II. Analysis

12. At the outset, the Chamber considers that it would not be assisted by further submissions on any of the issues identified in the Defence Request for Leave to Reply, and it therefore rejects this request.
13. 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 previous decisions.³⁰ In particular, the Chamber recalls that as regards the

²³ Second Defence Request, ICC-01/12-01/18-1513-Conf, paras 5-32.

²⁴ Second Defence Request, ICC-01/12-01/18-1513-Conf, para. 5.

²⁵ Second Defence Request, ICC-01/12-01/18-1513-Conf, paras 33-37.

²⁶ Second Defence Request, ICC-01/12-01/18-1513-Conf, para. 38.

²⁷ Prosecution response to “Defence request for leave to appeal the ‘Second decision on requests related to the submission into evidence of Mr Al Hassan’s statements’”, ICC-01/12-01/18-1516-Conf.

²⁸ Second Prosecution Response, ICC-01/12-01/18-1516-Conf, paras 2, 5-20.

²⁹ Second Prosecution Response, ICC-01/12-01/18-1516-Conf, paras 3, 21-31.

³⁰ 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.

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 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.

A. Are the issues identified ‘appealable issues’?

1. First Defence Request

14. In its formulation of Issue 1.1, the Defence erroneously assumes that since the Chamber did not follow or accept the Defence’s arguments, the First Impugned Decision failed to provide a full and reasoned consideration of issues raised by the Defence in relation to the burden of proof,³¹ adopted the ‘real risk’ test without consideration of issues raised by the Defence,³² and provided no guidance as to what the ‘real risk’ threshold entailed as a matter of evidentiary proof.³³ The Chamber recalls that in the First Impugned Decision it explained the basis for its finding that the burden for an Article 69(7) motion was on the moving party³⁴ and similarly set out its basis for adopting the ‘real risk’ threshold.³⁵ The Chamber also clearly explained the basis on which it made its determinations,³⁶ and engaged in an extensive analysis before reaching its conclusion that the Defence had not shown a real risk that the evidence in question was obtained by means of torture or CIDT.³⁷ The Chamber also clearly set out its approach in relation to various categories of supporting material,³⁸ including explaining why it gave no weight to certain Defence reports.³⁹ The Chamber accordingly considers that the Defence merely expresses its disagreement with the Chamber’s conclusions regarding the burden and standard of proof. For these reasons, the Chamber considers that Issue 1.1 is not an ‘appealable issue’.

³¹ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 4. *See also* para. 8.

³² First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, paras 5-6.

³³ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 7.

³⁴ First Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 37, n. 68.

³⁵ First Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 38.

³⁶ First Impugned Decision, ICC-01/12-01/18-1475-Conf, paras 39-45.

³⁷ First Impugned Decision, ICC-01/12-01/18-1475-Conf, paras 49-71.

³⁸ First Impugned Decision, ICC-01/12-01/18-1475-Conf, paras 46-48.

³⁹ First Impugned Decision, ICC-01/12-01/18-1475-Conf, paras. 48.

15. In relation to Issue 1.2, the Chamber notes that none of the evidence proposed by the Defence for the ‘*voir dire*’ evidentiary hearing had any significant bearing on the First Impugned Decision. The Chamber did not refer at all in the First Impugned Decision to the reports of Prosecution witnesses P-0661 or P-0598; it chose not to rely on the evidence of Defence consultants based on issues with their reports;⁴⁰ and it relied only in an extremely limited manner on P-0165’s statement.⁴¹ In addition, contrary to the Defence’s submission that it was prevented from adducing certain evidence,⁴² the Chamber notes that the Defence did refer in its request to written material of this nature,⁴³ and that the Chamber did not consider it necessary to refer to this evidence in the First Impugned Decision. For these reasons, Issue 1.2 constitutes the Defence’s mere disagreement with a discretionary decision of the Chamber, and is not an ‘appealable issue’.
16. In relation to Issue 2.1, the Chamber considers that first it is based on a misrepresentation of the First Impugned Decision and takes out of context the Chamber’s reference to ‘the practical realities which surround evidence gathering with respect to alleged atrocity crime[s]’.⁴⁴ In its construction of Article 69(7) of the Statute, the Chamber rather noted that ‘the *chapeau* requirement of Article 69(7) [was] narrowly framed and [did] not call for findings as to whether there ha[d] been a breach of the Statute or internationally recognised human rights *writ large*, but rather in the specific context of evidence gathering’.⁴⁵ The Chamber found that therefore, ‘the first determination for the Chamber [was] whether it ha[d] been shown that the evidence in question was gathered, or its gathering was facilitated by, such a breach or violation’.⁴⁶ The Chamber considered that this approach was consistent with the Appeals Chamber findings regarding the two consecutive inquiries for an Article 69(7) analysis.⁴⁷ The Chamber went on,

⁴⁰ First Impugned Decision, ICC-01/12-01/18-1475-Red, para. 48.

⁴¹ First Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 47, ns 92-94, 165.

⁴² First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 10.

⁴³ Article 69(7) Application, 8 March 2021, ICC-01/12-01/18-1346-Conf (the ‘Exclusion Request’), paras 12-13.

⁴⁴ First Impugned Decision, ICC-01/12-01/18-1475-Red, para. 42.

⁴⁵ First Impugned Decision, ICC-01/12-01/18-1475-Red, para. 41.

⁴⁶ First Impugned Decision, ICC-01/12-01/18-1475-Red, para. 41.

⁴⁷ First Impugned Decision, ICC-01/12-01/18-1475-Red, para. 41.

finding that, in the present case since it was not disputed that the evidence sought to be admitted was gathered directly by the ICC Prosecution, ‘the exclusionary rule under the Statute warrant[ed] an assessment focused on the investigative activities of the ICC Prosecution which generated this particular evidence’.⁴⁸ The Chamber considered that ‘[s]uch an analysis may include consideration of the general context in which the evidence was gathered and interaction with, or influence of other authorities, but only insofar as those factors are relevant to the gathering of the specific evidence in this case by the ICC Prosecution’.⁴⁹ It is only at this stage of its analysis that the Chamber noted that its construction of Article 69(7) was consistent with the plain language of the provision *and* with the aforementioned ‘practical realities’.⁵⁰ The Defence’s suggestion that the Chamber’s interpretation is ‘simply a more elaborate construction of the notion that “the ends justify the means”’⁵¹ is a misrepresentation of the reasoning of the Chamber.

17. Second, the Defence’s submission that the Chamber failed ‘to calibrate the nexus’ to the specific type of alleged violations overlooks the fact that in its analysis of the causal nexus, the Chamber had regard to many issues related to the alleged violations. This included, *inter alia*, the degree of subject matter overlap between the ICC and national interviews,⁵² the ongoing separation between the DGSE and Mr Al Hassan’s interviews in terms of space and personnel,⁵³ the impact of Mr Al Hassan’s reports about his conditions,⁵⁴ whether there were indications that Mr Al Hassan was unable to actively assert himself during the interviews as alleged by the Defence, due to torture/CIDT,⁵⁵ whether Mr Al Hassan was compelled by the ICC Prosecution to adhere to a ‘script’ as a result of torture and CIDT,⁵⁶ and whether - given the temporal overlap between allegedly abusive conditions and the ICC interviews - there were indications that Mr Al Hassan

⁴⁸ First Impugned Decision, ICC-01/12-01/18-1475-Red, para. 42.

⁴⁹ First Impugned Decision, ICC-01/12-01/18-1475-Red, para. 42.

⁵⁰ First Impugned Decision, ICC-01/12-01/18-1475-Red, para. 42.

⁵¹ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 14.

⁵² First Impugned Decision, ICC-01/12-01/18-1475-Red, para. 51.

⁵³ First Impugned Decision, ICC-01/12-01/18-1475-Red, para. 51.

⁵⁴ First Impugned Decision, ICC-01/12-01/18-1475-Red, paras 52, 65-69.

⁵⁵ First Impugned Decision, ICC-01/12-01/18-1475-Red, paras 58, 63.

⁵⁶ First Impugned Decision, ICC-01/12-01/18-1475-Red, paras 58, 63.

could not regulate his responses, assert his rights or make informed and unconstrained choices.⁵⁷ The Chamber considers accordingly that Issue 2.1 is not an ‘appealable issue’.

18. In relation to Issue 2.2, the Chamber considers that, in large part, it represents a mere disagreement by the Defence with the Chamber’s conclusion that the *chapeau* of Article 69(7) was not satisfied. First, although the Defence correctly notes that the Chamber did not make a ‘threshold determination’ on whether there had been a breach of the Statute or internationally recognised human rights,⁵⁸ the submissions overlook that for the purpose of the *chapeau* requirement, the Chamber conducted an extensive analysis on the evidence gathering process,⁵⁹ including Defence arguments that Mr Al Hassan could not regulate his responses or assert his rights during the ICC interviews,⁶⁰ and that the Prosecution could and should have done more to discharge its duty towards Mr Al Hassan in the circumstances.⁶¹ Second, the Chamber observes that many of the Defence submissions under Issue 2.2, in particular about the analogies which should be drawn from previous cases of this Court,⁶² go to the merits of the issue which it seeks leave to appeal, rather than addressing its fulfilment of the criteria under Article 82(1)(d).
19. Furthermore, the Chamber considers that some of the Defence’s arguments under Issue 2.2 misrepresent the First Impugned Decision. The Defence submissions are, in part, premised on the assumption that Mr Al Hassan’s detention was arbitrary and illegal.⁶³ The Chamber made no such findings in the First Impugned Decision and the Defence also misrepresents the Prosecution position in stating that the Prosecution ‘also did not contest Defence submissions that Mr Al Hassan was the victim of prolonged arbitrary detention’.⁶⁴ The Chamber notes further

⁵⁷ First Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 64.

⁵⁸ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 27.

⁵⁹ First Impugned Decision, ICC-01/12-01/18-1475-Conf, paras 49-70.

⁶⁰ First Impugned Decision, ICC-01/12-01/18-1475-Conf, paras 49-64.

⁶¹ First Impugned Decision, ICC-01/12-01/18-1475-Conf, paras 65-70.

⁶² First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, paras 20-22. *See also* paras 23-25.

⁶³ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 18.

⁶⁴ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 18. *See* First Prosecution Response, ICC-01/12-01/18-1502-Conf, para. 22; Prosecution response to Defence Article 69(7) Application, 26 March 2021, ICC-01/12-01/18-1401-Conf, para. 28.

that some Defence arguments under this Issue are a re-litigation of submissions from the original request,⁶⁵ and others go to arguments which the Chamber rejected in the termination litigation.⁶⁶ These latter issues do not arise from the First Impugned Decision and further represent an improper attempt to re-litigate previously settled matters. For all these reasons, the Chamber does not consider that Issue 2.2 is an ‘appealable issue’.

20. In relation to Issue 2.3, the Chamber recalls that it explained in detail its interpretation of various exchanges between Mr Al Hassan and the ICC Prosecution during the interviews.⁶⁷ It also clearly explained in the First Impugned Decision its reasoning for not affording any weight to Mr Al Hassan’s account of his subjective experiences of the ICC interviews.⁶⁸ The Chamber accordingly considers that the Defence submissions under Issue 2.3 largely represent a mere disagreement with the Chamber’s approach to and assessment of the evidence, and re-litigate the Defence’s arguments from its original request, including as to the interpretation which should be given to certain exchanges between Mr Al Hassan and the Prosecution.
21. In this regard, the Chamber observes in particular that many of the Defence arguments on this Issue misrepresent the Chamber’s findings or represent a partial reading thereof. The Defence submission, for example, that the Chamber ‘dismissed *en masse* Defence submissions concerning the impact of torture and prolonged incommunicado detention [...] by reference to specific sections of the transcripts which, in the Chamber’s view, reflected his ability to provide clear

⁶⁵ See e.g. First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 24, ‘the Prosecution’s ongoing reliance on the DGSE to secure Mr Al Hassan’s presence at interviews constituted a separate violation of Mr Al Hassan’s rights under UNCAT, particularly since the Prosecution knew that he was brought to the interview while hooded (a form of torture/CIDT), and that each night, he was refouled to “deplorable” conditions’ vs. Exclusion Request, ICC-01/12-01/18-1346-Conf, paras 7, 15-16, 22.

⁶⁶ See e.g. First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 23, ‘in the case of torture, a blind eye from a prosecuting authority is no different than a wink or nod of encouragement’ vs. Decision on the Defence request to terminate the proceedings and related requests, 24 August 2020, ICC-01/12-01/18-1009-Conf, para. 100 ‘the Chamber considers that the Prosecution’s conduct cannot in any way be said to amount to collusion in the alleged actions of the national authorities, or indeed any acquiescence, complicity or concerted action’.

⁶⁷ First Impugned Decision, ICC-01/12-01/18-1475-Conf, paras 49-69.

⁶⁸ First Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 70.

and detailed answers’,⁶⁹ ignores the fact that the Chamber’s analysis in this part of the First Impugned Decision took into account many other factors, including active clarifications and corrections made by the accused throughout his interviews, and his active assertion of the right to silence and privilege against self-incrimination.⁷⁰ The Defence’s submission that the Chamber ‘did not consider or provide a reasoned opinion’ as concerns Defence submissions on implied references to DGSE records,⁷¹ similarly overlooks that the Chamber considered this matter as part of a holistic assessment of the Defence argument that Mr Al Hassan was compelled by the ICC Prosecution to adhere to a ‘script’ as a result of torture and CIDT.⁷² Further, for instance, the Defence submission that ‘the Chamber emphasised steps taken by the Prosecution to intervene on Mr Al Hassan’s behalf, while omitting the crucial detail that these steps only occurred at the very end of the interview process’,⁷³ ignores the Chamber’s express findings that steps were taken in response to complaints in ‘later interviews’,⁷⁴ and that other steps were taken ‘albeit after Mr Al Hassan’s transfer to the ICC’.⁷⁵ For the above reasons, the Chamber does not consider that Issue 2.3 is an ‘appealable issue’.

22. In relation to Issue 3.1, the Chamber recalls that in the First Impugned Decision it assessed and found without basis the Defence’s submission that the Mr Al Hassan’s statements were so unreliable that they should be excluded or else a prejudice would arise.⁷⁶ While not expressly considered in the First Impugned Decision, the Panel of Experts’ findings on Mr Al Hassan’s fitness to stand trial were considered by the Chamber in the context of a separate decision, issued shortly before the First Impugned Decision, in which the Chamber found that Mr

⁶⁹ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 30, citing to First Impugned Decision, ICC-01/12-01/18-1475-Conf, paras 58-59.

⁷⁰ First Impugned Decision, ICC-01/12-01/18-1475-Conf, paras 58-64.

⁷¹ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 30, citing to First Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 63.

⁷² First Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 63, ‘Considering the matters set out above as a whole [...]’.

⁷³ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 33.

⁷⁴ First Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 67.

⁷⁵ First Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 67.

⁷⁶ First Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 75.

Al Hassan could continue to exercise his fair trial rights.⁷⁷ The Chamber did not consider it necessary to further address those issues in the First Impugned Decision. The Chamber does not consider Issue 3.1 to be an ‘appealable issue’.

2. *Second Defence Request*

23. Although not entirely clear, it appears that under the First Issue the Defence contests only the Chamber’s findings on the item generated during Mr Al Hassan’s Biographic Security Questionnaire (‘BSQ’).⁷⁸ In the Second Impugned Decision, the Chamber made a threshold finding that the right against self-incrimination did not apply to any of the contested handwriting samples.⁷⁹ The Chamber then went on to analyse why, in any event, there was no violation for the purpose of Article 69(7) of the Statute, having regard to a number of factors.⁸⁰ In contesting the Chamber’s threshold finding, the Defence simply repeats its submissions from the original request including reliance on ICTY case law. This is a mere disagreement with the Chamber’s conclusions. The rest of the First Issue is based on a misconstruction of the Chamber’s findings. The submissions – in particular the argument that Chamber ‘did not address the fact that Mr Al Hassan was *not* warned about the privilege against self-incrimination’ in respect of the relevant item⁸¹ - ignores the Chamber’s aforementioned threshold finding.
24. In addition, the premise of the First Issue – that Mr Al Hassan was a ‘vulnerable detained suspect’, and the argument that ‘the impact of Mr Al Hassan’s arbitrary detention was also relevant to whether the investigative actions were acceptable’ ignores the Chamber’s express finding that Defence objections based on allegations of torture and CIDT were moot as a result of the First Impugned Decision.⁸² The First Issue is not an ‘appealable issue’.
25. The Second Issue – in particular the argument that the Chamber did not consider that consent was relevant to the protection of the privilege against self-

⁷⁷ Decision on Mr Al Hassan’s ongoing fitness to stand trial, 10 May 2021, ICC-01/12-01/18-1467.

⁷⁸ MLI-OTP-0056-0421. Second Defence Request, ICC-01/12-01/18-1513-Conf, para. 8.

⁷⁹ Second Impugned Decision, ICC-01/12-01/18-1508, para. 26.

⁸⁰ Second Impugned Decision, ICC-01/12-01/18-1508, para. 26.

⁸¹ MLI-OTP-0056-0421. Second Defence Request, ICC-01/12-01/18-1513-Conf, para. 8.

⁸² Second Impugned Decision, ICC-01/12-01/18-1508, para. 12.

incrimination or infringement of the right to privacy⁸³ – is a mere disagreement with the Chamber’s conclusions and repetition of Defence submissions from the original requests. Further, the Defence again erroneously assumes that since the Chamber did not accept the Defence’s arguments, the Second Impugned Decision failed to provide a full and reasoned consideration of issues raised by the Defence. The Second Issue is not an ‘appealable issue’.

B. Would the issues identified significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial? May immediate resolution by the Appeals Chamber materially advance the proceedings?

26. Given the Chamber’s conclusions above, it is not strictly necessary to address the remainder of the cumulative criteria of Article 82(1)(d). The Chamber, however, makes the following brief remarks, in particular in relation to the First Defence Request. At the outset, the Chamber notes that it has admitted Mr Al Hassan’s statements into evidence but has yet to decide what weight, if any, to attribute to them as part of its final judgment.⁸⁴ Accordingly, the Chamber agrees with the Prosecution⁸⁵ that the Defence arguments that the issues affect the outcome of the trial in this respect are premature and speculative at this stage. In addition, to the extent that the Defence refers to the impact of the admission of Mr Al Hassan’s statements on the fairness and modalities ‘of almost all future testimonial evidence in this case’ and ‘all pending and future applications for exclusion under Article 69(7)’,⁸⁶ the Chamber finds these arguments hypothetical and speculative. Finally, as noted by the Prosecution,⁸⁷ the Defence retains the possibility to raise the issues as part of an appeal pursuant to Article 81 at the end of the trial, and therefore on the basis of this Chamber’s holistic evaluation of the evidence submitted in trial pursuant to Article 74 of the Statute. The Chamber is unpersuaded, for the reasons set out above, that resolution of the issues by the Appeals Chamber at this stage may materially advance the proceedings.

⁸³ Second Defence Request, ICC-01/12-01/18-1513-Conf, paras 16-32.

⁸⁴ See First Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 29.

⁸⁵ First Prosecution Response, ICC-01/12-01/18-1502-Conf, para. 53.

⁸⁶ First Defence Request, ICC-01/12-01/18-1498-Conf-Corr, para. 35.

⁸⁷ First Prosecution Response, ICC-01/12-01/18-1502-Conf, paras 54-56.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the First Defence Request and the Second Defence Request; and

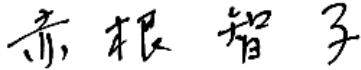
ORDERS the Registry to reclassify to public the Defence Request for Leave to Reply (ICC-01/12-01/18-1505-Conf).

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 24 June 2021

At The Hague, The Netherlands