



**Original: English**

**No. ICC-01/12-01/18  
Date: 6 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 matters related to Defence challenges under Article 69(7) of the  
Statute**

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

**The Office of the Prosecutor**

Fatou Bensouda  
James Stewart

**Counsel for the Defence**

Melinda Taylor  
Kirsty Sutherland

**Legal Representatives of Victims**

Seydou Doumbia  
Mayombo Kassongo  
Fidel Luvengika Nsita

**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**

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**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 Articles 64(2) and 69(7) of the Rome Statute (the ‘Statute’) issues the following decision.

### **I. Background and procedural history**

1. On 6 May 2020, the Chamber adopted the ‘Directions on the conduct of proceedings’.<sup>1</sup>
2. On 24 August 2020, the Chamber issued a decision rejecting a Defence request to terminate this case (the ‘Termination Motion’)<sup>2</sup> and a number of related requests (the ‘Termination Decision’).<sup>3</sup> In this decision, the Chamber, *inter alia*, made no determinations on the Defence’s allegations of torture and cruel, inhuman and degrading treatment but rather took those allegations at their highest.<sup>4</sup> It was noted that this approach was without prejudice to any future determinations by the Chamber on these matters.<sup>5</sup> The Chamber also stated in this decision that Article 69(7) of the Statute presented one of the appropriate statutory mechanisms to adjudicate the issues raised by the Termination Motion.<sup>6</sup> On 12 October 2020 the Chamber rejected a Defence request for leave to appeal the Termination Decision.<sup>7</sup>

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<sup>1</sup> [Annex A](#) to the [Decision on the conduct of proceedings](#), 6 May 2020, ICC-01/12-01/18-789, ICC-01/12-01/18-789-AnxA.

<sup>2</sup> Defence Request to terminate the proceedings, 16 June 2020, ICC-01/12-01/18-885-Conf-Exp (confidential *ex parte*, available only to the Defence and Prosecution; with ten confidential and confidential *ex parte* Annexes; a confidential redacted version of the main filing was notified simultaneously, ICC-01/12-01/18-885-Conf-Red; these filings were all notified on 17 June 2020; corrigenda of the main filing were later notified on 25 June 2020, ICC-01/12-01/18-885-Conf-Exp-Corr and 24 August 2020, ICC-01/12-01/18-885-Conf-Red-Corr; public redacted versions of the main filing were also later notified and subsequently reclassified as confidential; a final public redacted version was later notified on 29 July 2020, ICC-01/12-01/18-885-Corr-Red3; a corrected version of Annex B was also filed, in accordance with the decision of the Chamber).

<sup>3</sup> Decision on the Defence request to terminate the proceedings and related requests, ICC-01/12-01/18-1009-Conf (a public redacted version was issued on 29 October 2020, [ICC-01/12-01/18-1009-Red](#)).

<sup>4</sup> Termination Decision, [ICC-01/12-01/18-1009-Red](#), para. 80.

<sup>5</sup> Termination Decision, [ICC-01/12-01/18-1009-Red](#), para. 80.

<sup>6</sup> Termination Decision, [ICC-01/12-01/18-1009-Red](#), para. 121.

<sup>7</sup> 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 (a public redacted version was issued on 29 October 2020, [ICC-01/12-01/18-1099-Red](#)).

3. On 7, 12 and 13 October 2020, the Defence respectively objected by email to a number of items proposed to be used by the Office of the Prosecutor (the ‘Prosecution’) with witnesses P-0620,<sup>8</sup> P-0653<sup>9</sup> and P-0655<sup>10</sup> raising issues under Article 69(7) of the Statute, some of which related to the allegations made in the Termination Motion.
4. On 8, 13 and 14 October 2020, the Chamber respectively authorised the use of the objected material during the examinations of P-0620,<sup>11</sup> P-0653<sup>12</sup> and P-0655,<sup>13</sup> noting in each case that this was without prejudice to any eventual determination by the Chamber on admissibility pursuant to Article 69(7) of the Statute, which would be made at the appropriate time and in due course.
5. On 15, 19 and 21 October 2020, following the respective testimony of P-0620,<sup>14</sup> P-0653<sup>15</sup> and P-0655,<sup>16</sup> the Defence objected by email to the Prosecution’s submission of various items through the witnesses, also requesting, *inter alia*, the Chamber to exclude certain items and/or raising issues under Article 69(7), on three grounds namely (i) self-incrimination; (ii) privacy; and/or (iii) torture and cruel, inhuman and degrading treatment (‘CIDT’). The Prosecution responded to these objections by email respectively on 16,<sup>17</sup> 21<sup>18</sup> and 22<sup>19</sup> October 2020.
6. On 6 November 2020, the Chamber issued its decisions on the submission of items for P-0620 and P-0621,<sup>20</sup> and P-0653 and P-0655,<sup>21</sup> (the ‘Submission

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<sup>8</sup> Email from the Defence, 7 October 2020, at 15:47.

<sup>9</sup> Email from the Defence, 12 October 2020, 14:54.

<sup>10</sup> Email from the Defence, 13 October 2020, 15:35.

<sup>11</sup> Email from the Chamber to the parties and participants, 8 October 2020, at 22:48. A Defence request for leave to appeal this decision was rejected by the Chamber, *see* 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.

<sup>12</sup> Email from the Chamber to the parties and participants, 13 October 2020, at 11:50.

<sup>13</sup> Email from the Chamber to the parties and participants, 14 October 2020, at 14:53.

<sup>14</sup> Email from the Defence, 15 October 2020, at 15:39.

<sup>15</sup> Email from the Defence, 19 October 2020, at 13:50.

<sup>16</sup> Email from the Defence, 21 October 2020, at 15:03.

<sup>17</sup> Email from the Prosecution, 16 October 2020, 18:24. *See also* further exchanges between the parties: Email from the Defence, 19 October 2020, at 13:24 and email from the Prosecution, 20 October 2020, at 13:26.

<sup>18</sup> Email from the Prosecution, 21 October 2020, at 14:43.

<sup>19</sup> Email from the Prosecution 22 October 2020, at 15:20.

<sup>20</sup> Email from the Chamber, 6 November 2020, at 09:21.

Decisions’), accepting for submission some of the objected items, but noting that the submission and admission of evidence must be distinguished and that the Chamber would render a ruling on the admissibility of the expert reports in due course. The Chamber noted that it may request further submissions from the parties and participants if deemed necessary for its determination.

## II. Analysis

### A. Procedure for the Article 69(7) Challenges

7. As noted above, the Defence has raised challenges under Article 69(7) of the Statute in relation to items submitted through P-0620, P-0653 and P-0655 on the grounds of: (i) self-incrimination; (ii) privacy; and/or (iii) torture and CIDT, the latter being related to the allegations made in the Termination Motion (the ‘Article 69(7) Challenges’).
8. The Chamber recalls that pursuant to the Directions on the conduct of proceedings, although generally deferring its assessment of admissibility of evidence to its Article 74 judgment, the Chamber will rule upfront on certain issues related to the admissibility of evidence, including the potential application of exclusionary rules.<sup>22</sup> As noted in the Submission Decisions, in light of the objections of the Defence and in accordance with these Directions, the Chamber will rule on the admissibility of the contested items at this stage of the proceedings.
9. The Chamber considers that it already has on the record sufficient submissions from the parties on the Article 69(7) Challenges based on the grounds of self-incrimination and privacy in order to proceed to make its determination, which will follow in due course.
10. With respect to the Article 69(7) Challenges based on allegations of torture and CIDT, the Prosecution has suggested that if the Chamber is minded to consider these at this juncture, then the parties be required to address such substantive

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<sup>21</sup> Email from the Chamber, 6 November 2020, at 15:56

<sup>22</sup> [Directions on the conduct of proceedings](#), ICC-01/12-01/18-789-AnxA, paras 32 and 34 (vii).

issues by appropriate written filings.<sup>23</sup> In this respect, the Chamber notes that it has received a number of submissions from the parties which touch upon these issues in the context of detailed written filings in the Termination Motion litigation and the abovementioned emails on the use and submission of items. In relation to the former, however, the Chamber notes that the primary focus of those filings was on the termination of the proceedings rather than the exclusion of evidence and that the Defence did not specifically address the exclusion of evidence under Article 69(7) given its position that this remedy was not appropriate for the allegations.<sup>24</sup>

11. Accordingly, and in the interests of clarity and the fair and expeditious conduct of these proceedings, the Chamber considers it appropriate to receive detailed and complete written submissions on the allegations regarding torture and CIDT and the related challenge under Article 69(7) of the Statute to the contested items for P-0620 and P-0655. The parties are hereby directed as follows:
  - i. Defence to file submissions addressing the allegations regarding torture and CIDT and the related challenge under Article 69(7) to the contested items for P-0620 and P-0655 by **24 November 2020**;
  - ii. Prosecution to file submissions in response by **8 December 2020**; and
  - iii. Defence to file any reply by **22 December 2020**.
12. The Legal Representatives of Victims may file a response by the response deadline set for the Prosecution.
13. The Chamber notes that the Defence's objections to the expert reports of P-0620 and P-0655 (and P-0653) relate primarily to the underlying material relied on by the experts in their reports. Those underlying items are not yet submitted into evidence. Nevertheless, the Chamber will consider the Defence's objections to those underlying materials in its forthcoming decision on the Article 69(7)

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<sup>23</sup> Email from the Prosecution, 16 October 2020, at 18:24; Email from the Prosecution, 22 October 2020, at 15:20.

<sup>24</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Red-Corr, paras 103-108.

Challenges. Furthermore, the Chamber's determination will address the specific objected items but will evidently set the relevant principles for similar material. The parties are instructed to bear both of these points in mind when preparing their submissions.

**B. Observations on and procedure for any future challenges under Article 69(7)**

14. Finally, the Chamber notes that the Defence's abovementioned email submissions on the use and submission of items repeat (by way of virtual cut and paste) issues under Article 69(7), and that such submissions were also repeated in the context of the Defence's request for leave to appeal the Chamber's authorisation of use of items with P-0620.<sup>25</sup> By way of general guidance, the Chamber reminds that parties' submissions, whether filings or email, should be concise and to the point and not unnecessarily repetitive. Issues related to use of items should be confined thereto and issues related to submission and admissibility of items should be confined thereto. To the extent these issues overlap, submissions should still not be unnecessarily repetitive.
15. The Chamber further considers it to be in the interests of clarity and the fair and expeditious conduct of these proceedings to set a procedure for future challenges raised under Article 69(7), if any, going forward. This, in particular to avoid important and lengthy submissions on substantive matters being made by email. The following procedure shall therefore apply: (i) a party seeking exclusion of a particular item or items under Article 69(7) of the Statute must provide notice of this in its email pursuant to paragraph 34(iii) of the Directions on the conduct of proceedings; (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.<sup>26</sup>

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<sup>25</sup> See 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.

<sup>26</sup> The procedure set out in this paragraph applies, *mutatis mutandis*, to paragraph 78 of the Directions on the conduct of proceedings and responses to applications made pursuant to paragraph 79 of the Directions on the conduct of proceedings.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

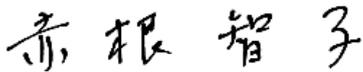
**SETS** the deadlines for submissions in accordance with paragraph 11; and

**ADOPTS** the procedure set out in paragraph 15 in respect of future challenges raised under Article 69(7) of the Statute, if any.

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 6 November 2020

At The Hague, The Netherlands