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

**Date: 20 May 2021**

**Date of original: 17 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 Prosecution and Defence procedural requests related to 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**

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**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 Article 69(7) of the Rome Statute (the ‘Statute’), Rules 68(2)(b) and 68(3) of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’) issues the following decision.

### **I. Procedural history**

1. On 6 November 2020, the Chamber issued a decision, *inter alia*, instructing the parties to prepare written submissions on allegations regarding torture and cruel, inhuman and degrading treatment (‘CIDT’) and related Defence challenges under Article 69(7) of the Statute to contested items of evidence for witnesses P-0620 and P-0655 and setting a timetable for those submissions.<sup>1</sup>
2. On 24 November 2020, this procedure was amended following a request from the Prosecution which was unopposed by the Defence<sup>2</sup> (the ‘24 November 2020 Decision’).<sup>3</sup> Accordingly: (i) the Prosecution was to submit a request for introduction of the totality of the audio recordings of interviews of the accused and their transcripts and related material, together with any related requests for additions to the List of Evidence or Witnesses as soon as possible and no later than 31 December 2020; and (ii) the Defence was 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.<sup>4</sup> The decision was stated to be without prejudice to the Chamber’s determination on any future Prosecution requests for additions to the List of Evidence or Witnesses, and any Defence objections thereto.<sup>5</sup>

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<sup>1</sup> Decision on matters related to Defence challenges under Article 69(7) of the Statute, ICC-01/12-01/18-1150.

<sup>2</sup> The Defence’s position was without prejudice to future objections that might be made as concerns future Prosecution requests for additions to its List of Evidence and Witnesses: Email from the Defence, 20 November 2020, at 16:38.

<sup>3</sup> Decision on Prosecution request for variation of Decision on matters related to Defence challenges under Article 69(7) of the Statute, ICC-01/12-01/18-1160.

<sup>4</sup> 24 November 2020 Decision, ICC-01/12-01/18-1160, para. 10.

<sup>5</sup> 24 November 2020 Decision, ICC-01/12-01/18-1160, para. 11.

3. On 18 December 2020, the Prosecution filed a request (the ‘Request for Introduction’)<sup>6</sup> seeking introduction into evidence pursuant to Article 69 of the Statute of the totality of the evidence provided by Mr Al Hassan during his interviews with the Prosecution while he was detained in Mali in 2017 and 2018, preserved under Article 56 of the Statute (the ‘Interview Material’).<sup>7</sup>
4. On 18 and 23 December 2020, the Prosecution filed three requests related to the Request for Introduction: (i) a request to add medical forms to its List of Evidence pursuant to Regulation 35, and to submit them into evidence via the bar table (the ‘Medical Documents Request’);<sup>8</sup> (ii) a request pursuant to Regulation 35 to call P-0661 as an expert witness and to add P-0598 and P-0661’s prior recorded testimony and associated material to its List of Evidence, and to introduce this material into evidence pursuant to either Rule 68(2)(b) or Rule 68(3) (the ‘P-0598 and P-0661 Request’);<sup>9</sup> (iii) a request pursuant to Regulation 35 to add P-0165 – the [REDACTED] who conducted the interviews with Mr Al Hassan in Mali – to its List of Witnesses, to add P-0165’s prior recorded testimony and associated material to its List of Evidence, and to introduce that material into evidence pursuant to either Rule 68(2)(b) or Rule 68(3) (the ‘P-0165 Request’)<sup>10</sup> (together the ‘Related Evidentiary Requests’).

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<sup>6</sup> Prosecution request to introduce evidence preserved under article 56 of the Statute, ICC-01/12-01/18-1218-Conf-Exp (confidential *ex parte*, available only to Prosecution and Defence; with confidential *ex parte* Annexes A to C, only to Prosecution and Defence).

<sup>7</sup> This includes: (i) the audio recordings of the security assessments and the interviews of Mr Al Hassan and their transcripts; (ii) related materials signed or produced by Mr Al Hassan during the interviews; and (iii) documents commented on by Mr Al Hassan during his interviews that have not yet been submitted into evidence: *see* Request for Introduction, ICC-01/12-01/18-1218-Conf-Exp, para. 1; ICC-01/12-01/18-1218-Conf-Exp-AnxA; ICC-01/12-01/18-1218-Conf-Exp-AnxB; ICC-01/12-01/18-1218-Conf-Exp-AnxC.

<sup>8</sup> Prosecution’s first request for the admission of documentary evidence from the bar table, and regulation 35 request, 18 December 2020, ICC-01/12-01/18-1213-Conf (with confidential Annex A).

<sup>9</sup> Prosecution requests to add five items to its List of Evidence pursuant to regulation 35 of the Regulations of the Court and for the introduction of P-0598’s and P-0661’s prior recorded testimony and associated material into evidence pursuant to rule 68 of the Rules of Procedure and Evidence, 18 December 2020, ICC-01/12-01/18-1215-Conf (with confidential *ex parte* Annexes A and B, available only to the Prosecution and the Defence).

<sup>10</sup> Prosecution request to add P-0165 to its List of Witnesses and to add P-0165’s prior recorded testimony to its List of Evidence pursuant to regulation 35 of the Regulations, and request for the introduction of P-0165’s prior recorded testimony and associated material into evidence pursuant to rule 68 of the Rules of Procedure and Evidence, 23 December 2020, ICC-01/12-01/18-1226-Conf (with confidential Annex A).

5. On 21 and 22 January 2021, the Defence responded to each of the Related Evidentiary Requests, requesting that all be rejected (respectively, the ‘Response to the Medical Documents Request’,<sup>11</sup> the ‘Response to the P-0598 and P-0661 Request’,<sup>12</sup> and the ‘Response to the P-0165 Request’).<sup>13</sup>
6. On 22 January 2021, the Defence additionally requested the Chamber (the ‘Consolidated Defence Request’) to: (i) confirm that the Defence need not submit its Article 69(7) application until the Chamber has first ruled on the pending Related Evidentiary Requests, and the Defence has had adequate time to identify responsive evidence (‘First Request’); (ii) convene a *voir dire* evidentiary hearing for the purpose of hearing evidence related to the Article 69(7) application, to be held prior to the tendering or use of ‘*prima facie* torture-tainted materials’ – [REDACTED] (‘Second Request’); (iii) adjourn the testimony of [REDACTED] until the Chamber has issued its first Article 69(7) decision (‘Third Request’); and (iv) 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 (‘Fourth Request’).<sup>14</sup>
7. On 26 January 2021, in response to the Defence’s objection to the scheduling of witness P-0626, the Chamber issued an email decision stating, *inter alia*, that there was no need at present to adjourn the hearing of P-0626 [REDACTED] pending the Chamber’s resolution of forthcoming Article 69(7) matters (the ‘P-0626 Decision’).<sup>15</sup> The Chamber also noted that the Panel of Experts’ report on Mr Al Hassan’s fitness had only that same day been ordered to be made available

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<sup>11</sup> Defence Response to ‘Prosecution’s first request for the admission of documentary evidence from the bar table, and regulation 35 request’, 22 January 2021, ICC-01/12-01/18-1264-Conf.

<sup>12</sup> Defence response to ‘Prosecution requests to add five items to its List of Evidence pursuant to regulation 35 of the Regulations of the Court and for the introduction of P-0598’s and P-0661’s prior recorded testimony and associated material into evidence pursuant to rule 68’, 21 January 2021, ICC-01/12-01/18-1254-Conf.

<sup>13</sup> Defence response to ‘Prosecution request to add P-0165 to its List of Witnesses and to add P-0165’s prior recorded testimony to its List of Evidence pursuant to Regulation 35 of the Regulations, and request for the introduction of P-0165’s prior recorded testimony and associated material into evidence pursuant to rule 68 of the Rules of Procedure and Evidence’, 21 January 2021, ICC-01/12-01/18-1255-Conf (with confidential *ex parte* Annexes A and B available only to the Defence, Prosecution and Registry).

<sup>14</sup> Defence consolidated application regarding Article 69(7) procedural matters, ICC-01/12-01/18-1256-Conf.

<sup>15</sup> Email from the Chamber, 26 January 2021, at 10:22.

to the Prosecution and considered therefore that *inter partes* arguments based on this report were premature. The Chamber noted that it would issue its decision on the remainder of the relief requested in the Consolidated Defence Request in due course.<sup>16</sup>

8. On 3 February 2021, the Prosecution responded to the Consolidated Defence Request, submitting that it should be dismissed (the ‘Response to the Consolidated Defence Request’).<sup>17</sup> In relation to the parts of the request still pending, namely the requests for the Chamber to determine the Related Evidentiary Requests prior to submission of the Article 69(7) application, and to hold a *voir dire*, the Prosecution submits that both effectively amount to a request for reconsideration of the Chamber’s decisions setting out the procedure and timetable for resolution of the Article 69(7) matters, and that the Defence has failed to satisfy the test for reconsideration.<sup>18</sup>
9. On 4 February 2021, the Defence requested leave to reply to the Prosecution Response to the Consolidated Defence Request on the claim that the Consolidated Defence Request amounts to a request for reconsideration (the ‘Defence Request for Leave to Reply’).<sup>19</sup> On 8 February 2021, the Prosecution responded to the Defence Request for Leave to Reply, submitting that it should be dismissed.<sup>20</sup>

## II. Preliminary matters

10. The Chamber considers that it would not be materially assisted by further submissions on the issue identified in the Defence Request for Leave to Reply, and accordingly rejects this Request.

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<sup>16</sup> See also Decision on Defence request for reconsideration, or leave to appeal, ‘Decision on Defence request in relation to P-0626’, 10 February 2021, ICC-01/12-01/18-1295-Conf (public redacted version filed simultaneously).

<sup>17</sup> Prosecution response to Defence consolidated application regarding article 69(7) procedural matters, ICC-01/12-01/18-1281-Conf.

<sup>18</sup> Response to the Consolidated Defence Request, ICC-01/12-01/18-1281-Conf, paras 1-2, 16-24.

<sup>19</sup> Defence request for leave to reply to ‘Prosecution response to Defence consolidated application regarding article 69(7) procedural matters (ICC-01/12-01/18-1281-Conf)’, ICC-01/12-01/18-1282-Conf.

<sup>20</sup> Prosecution response to “Defence request for leave to reply to ‘Prosecution response to Defence consolidated application regarding article 69(7) procedural matters’”, ICC-01/12-01/18-1293-Conf.

11. The Chamber further notes that the Third Request and the Fourth Request in the Consolidated Defence Request have been addressed in the P-0626 Decision. They are not considered further for the purpose of this decision.

### **III. Submissions**

12. The Chamber will first recall the current submissions before it in some detail.

#### **A. The Medical Documents Request**

13. The Prosecution requests to add a six page item comprising three medical documents<sup>21</sup> to its List of Evidence pursuant to Regulation 35, and to submit this item into evidence via the bar table. The item consists of (i) a ‘Medical Clearance Fit on Arrival’ form and a ‘Medical Examination Form’ both dated 31 March 2018 and signed by a medical officer at the detention centre in the Hague; and a ‘Medical History’ form and ‘Medical Examination Form’ dated 31 March 2018 and signed by a medical doctor in Mali prior to Mr Al Hassan’s transfer. The item was disclosed by the Defence on 15 July 2020. The Prosecution submits that it relates to Mr Al Hassan’s physical and mental condition at the time of his transfer from the Malian authorities to the ICC Registry on 31 March 2018. The Prosecution submits that it is in the interests of justice to allow delayed addition of this item to the List of Evidence, and that its submission would assist the Chamber in its determination of the truth, including on the basis that it is relevant to the admissibility and probative value of the statements given by Mr Al Hassan to the Prosecution.<sup>22</sup> In addition, the Prosecution submits that although its submission is not required for this purpose, it may assist the Chamber in disposing of the Defence’s anticipated challenges under Article 69(7).<sup>23</sup>
14. The Defence submits that: (i) the Regulation 35 request is not justified, noting *inter alia* that the relevance of the item should have been apparent to the Prosecution at the point of its disclosure in July 2020;<sup>24</sup> (ii) the item must be

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<sup>21</sup> MLI-D28-0003-1334-R01.

<sup>22</sup> Medical Documents Request, ICC-01/12-01/18-1213-Conf, paras 2-4, 7-11, 15-26; ICC-01/12-01/18-1213-Conf-AnxA.

<sup>23</sup> Medical Documents Request, ICC-01/12-01/18-1213-Conf, para. 4.

<sup>24</sup> Response to the Medical Documents Request, ICC-01/12-01/18-1264-Conf, paras 3, 6-10.

examined within the context of all relevant evidence in the Article 69(7) litigation, and, *inter alia*, that the Prosecution is effectively cherry-picking records that support its case;<sup>25</sup> (iii) the Prosecution has failed to demonstrate the relevance of the item to the applicable standard;<sup>26</sup> and (iv) the Prosecution has failed to demonstrate that the item has any, or any significant, probative value – noting *inter alia* the terse, summary and general nature of the material, that there is no information demonstrating the medical officer’s independence or the methodology used for the examinations, and moreover that any value is significantly outweighed by the prejudice caused by the item’s submission.<sup>27</sup>

### **B. The P-0598 and P-0661 Request**

15. The Prosecution requests: (i) authorisation pursuant to Regulation 35 to call P-0661 as an expert witness and to add five items from P-0598 and P-0661’s prior recorded testimony and associated material to its List of Evidence;<sup>28</sup> and (ii) to introduce the prior recorded testimony of P-0598 and P-0661 and related material into evidence pursuant to either Rule 68(2)(b) or Rule 68(3) of the Rules.<sup>29</sup> The Prosecution recalls that these witnesses’ reports were prepared in the context of the termination litigation. It submits, *inter alia*, that P-0598’s and P-0661’s reports and associated material are relevant to the voluntary nature of Mr Al Hassan’s interviews and related material and the reliability of this evidence, and thus 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.<sup>30</sup> In addition, the Prosecution submits that although their submission is not required for this purpose, it may assist the Chamber in disposing of the Defence’s anticipated challenges under Article 69(7).<sup>31</sup>

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<sup>25</sup> Response to the Medical Documents Request, ICC-01/12-01/18-1264-Conf, paras 3, 11-14.

<sup>26</sup> Response to the Medical Documents Request, ICC-01/12-01/18-1264-Conf, paras 3, 11, 15-19.

<sup>27</sup> Response to the Medical Documents Request, ICC-01/12-01/18-1264-Conf, paras 2-3, 11, 20-29.

<sup>28</sup> P-0598’s mission letter MLI-OTP-0078-7602; P-0598’s report MLI-OTP-0078-7628-R01; P-0661’s mission letter MLI-OTP-0078-7585; P-0661’s report MLI-OTP-0078-7832-R01; P-0661’s CV MLI-OTP-0078-7807-R01. P-0598’s CV is already on the List of Evidence: MLI-OTP-0078-7643-R01.

<sup>29</sup> ICC-01/12-01/18-1215-Conf-Exp-AnxA and ICC-01/12-01/18-1215-Conf-Exp-AnxB sections I-II.

<sup>30</sup> P-0598 and P-0661 Request, ICC-01/12-01/18-1215-Conf, paras 44, 50.

<sup>31</sup> P-0598 and P-0661 Request, ICC-01/12-01/18-1215-Conf, paras 44, 50.

16. The Defence submits that: (i) the Prosecution fails to demonstrate good cause to justify its failure to call P-0661 as an expert witness<sup>32</sup> and include the material in its List of Evidence;<sup>33</sup> (ii) introducing the proposed testimony pursuant to Rule 68(2)(b)<sup>34</sup> or Rule 68(3)<sup>35</sup> would prejudice the Defence, fail to achieve expedition and render the trial unfair; and (iii) that instead, a *voir dire* hearing should be held concerning the qualifications and propriety of P-0598 and P-0661 in preparing their reports, and the content of their reports.<sup>36</sup>
17. In relation to Rule 68(2)(b) in particular, the Defence does not object to the associated material,<sup>37</sup> but objects to the submission of the reports as: (i) both fail to demonstrate ‘sufficient indicia of reliability’ given the indications of bias contained therein;<sup>38</sup> (ii) neither witness examined Mr Al Hassan in preparing their reports, and it is unclear what particular materials they relied upon;<sup>39</sup> (iii) P-0598 lacks the expertise necessary for his report;<sup>40</sup> (iv) P-0661’s report is based on incorrect assumptions which impacted his understanding of the conditions of Mr Al Hassan’s detention in Mali, and the relevance of these conditions to his mental health;<sup>41</sup> (v) both witness’s findings are inconsistent with accepted scientific practice;<sup>42</sup> and (vi) both reports pertain to issues which are materially in dispute, notably allegations of torture and CIDT at the *Sécurité d’État* and their continuing effect on Mr Al Hassan’s fitness to stand trial.<sup>43</sup> The Defence submits in particular that these issues render the reports less reliable and less probative and increase the risk of prejudice, and that it would be deprived of the opportunity to cross-

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<sup>32</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, paras 6-9.

<sup>33</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, paras 10-12.

<sup>34</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, paras 13-23.

<sup>35</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, paras 24-27.

<sup>36</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, paras 28-29.

<sup>37</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, para. 14.

<sup>38</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, paras 15-16.

<sup>39</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, paras 17-18.

<sup>40</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, para. 19.

<sup>41</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, para. 20.

<sup>42</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, para. 21.

<sup>43</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, para. 22.

examine the witnesses on these points.<sup>44</sup> Further, the Defence submits that Rule 68(2)(b) will not achieve expedition and will likely lead to greater litigation.<sup>45</sup>

18. In relation to Rule 68(3) in particular, the Defence submits that introduction of the reports, even maintaining the Defence's ability to cross-examine, would still be unfair and prejudicial since: (i) the core subject matter of the reports is materially in dispute and uncorroborated; (ii) the issues mentioned in the paragraph above still raise important doubts as concerns the reliability and probity of the reports, which render them inappropriate for introduction under Rule 68; and (iii) the goal of expedition will not be achieved, since the Defence will need to extensively cross-examine the witnesses.<sup>46</sup>

### C. The P-0165 Request

19. The Prosecution requests authorisation pursuant to Regulation 35 to add P-0165 to its List of Witnesses and to add P-0165's prior recorded testimony and associated material to its List of Evidence, and to introduce that prior recorded testimony and associated material into evidence pursuant to either Rule 68(2)(b) or Rule 68(3) of the Rules. The material comprises a six page declaration of P-0165 dated 21 December 2020<sup>47</sup> and associated material consisting of a two page investigation note drafted by P-0165 dated 31 July 2019,<sup>48</sup> and a three page investigation note drafted by an International Cooperation Advisor dated 1 May 2020.<sup>49</sup> The Prosecution submits, *inter alia*, that P-0165's prior recorded testimony and associated material are relevant to the Chamber's ultimate assessment of the weight and probative value to be accorded to Mr Al Hassan's prior recorded testimony.<sup>50</sup> In addition, the Prosecution submits that although their submission is not required for this purpose, it may assist the Chamber in disposing of the Defence's anticipated challenges under Article 69(7).<sup>51</sup>

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<sup>44</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, paras 16, 18-21, 23.

<sup>45</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, para. 23.

<sup>46</sup> Response to the P-0598 and P-0661 Request, ICC-01/12-01/18-1254-Conf, paras 24-27.

<sup>47</sup> See ICC-01/12-01/18-1226-Conf-AnxA: MLI-OTP-0080-1522.

<sup>48</sup> See ICC-01/12-01/18-1226-Conf-AnxA: MLI-OTP-0071-0286.

<sup>49</sup> See ICC-01/12-01/18-1226-Conf-AnxA: MLI-OTP-0078-1919.

<sup>50</sup> P-0165 Request, ICC-01/12-01/18-1226-Conf, para. 29.

<sup>51</sup> P-0165 Request, ICC-01/12-01/18-1226-Conf, para. 29.

20. The Defence submits that: (i) the Prosecution fails to demonstrate good cause to justify its failure to include P-0165 on its List of Witnesses or his evidence on the List of Evidence;<sup>52</sup> and (ii) the introduction pursuant to either Rule 68(2)(b)<sup>53</sup> or Rule 68(3)<sup>54</sup> would be wholly inappropriate.
21. In relation to Rule 68(2)(b) in particular, the Defence submits that: (i) the material is ‘impermissibly narrow in scope’ and the Defence would thus be deprived of the right to cross-examine P-0165 on matters outside the scope of the five points addressed in his declaration, but which the Defence says are relevant to the Chamber’s appreciation of the issues under Article 69(7), which are matters the Prosecution itself accepted the Defence could question the witness in relation to, namely ‘the voluntariness of the process of interview of Mr. Al Hassan, [REDACTED], with the Prosecution; and the conditions of detention Mr. Al Hassan, [REDACTED]’;<sup>55</sup> (ii) the testimony lacks sufficient indicia of reliability or *prima facie* probative value, namely because the format of the declaration raises concerns about whether this item represents P-0165’s own prior recorded testimony - noting *inter alia* the extensive use of footnotes to refer to other Prosecution evidence, the fact that the witness refers to himself in the third person and refers to the knowledge or impressions of the co-investigator, and fails to refer to basis of knowledge - and the Defence should have the opportunity to establish the witness’s personal knowledge of the matters discussed;<sup>56</sup> (iii) the declaration is essentially an attempt to adopt testimony contained in the various investigation notes (which are not drafted as sworn testimony but rather merely as litigation summaries), as that of a witness;<sup>57</sup> (iv) one of associated items was not drafted by P-0165 and the Prosecution has not established any personal knowledge by P-0165 of the contents of this item;<sup>58</sup> (v) introduction would deprive the Defence of an opportunity to question the witness on the modalities of the preparation of the declaration, noting that P-0165’s extensive reliance on

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<sup>52</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, paras 6-11.

<sup>53</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, paras 12-31.

<sup>54</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, paras 32-34.

<sup>55</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, paras 15-16. See also 17-19.

<sup>56</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, para. 20.

<sup>57</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, paras 21-22.

<sup>58</sup> MLI-OTP-0078-1919: Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, para. 23.

documents produced during a period when he was on leave raises questions about whether he in fact authored the declaration;<sup>59</sup> (vi) the practice of other international courts and tribunals has involved Prosecution investigators who are providing testimony on issues relevant to the protection of the accused's rights, to provide *viva voce* evidence;<sup>60</sup> and (vii) P-0165's testimony relates to issues which are materially in dispute, notably allegations of torture and CIDT at the *Sécurité d'État* and the voluntariness of Mr Al Hassan's statements in the context of such detention.<sup>61</sup>

22. In relation to Rule 68(3) in particular, the Defence submits that introduction of P-0165's declaration and associated material, even maintaining the Defence's ability to cross-examine, would still be inappropriate in light of the issues raised above which mean that the declaration lacks the *prima facie* probative value for acceptance under Rule 68(3).<sup>62</sup> Further, the Defence submits that introduction would not expedite proceedings, in light of the issues which would need to be covered during cross-examination.<sup>63</sup> The Defence submits instead that oral testimony or a full *voir dire* hearing are justified in the circumstances, and are necessary (but not sufficient), preconditions to the Chamber being in a position to fully consider the issues the subject of the Article 69(7) litigation.<sup>64</sup> The Defence also submits that it will need to cross-examine P-0165 on his personal knowledge of the matters discussed in his statement, matters falling outside the scope of declaration which are nevertheless relevant to the adjudication of the Article 69(7) challenges (including P-0165's personal knowledge of the conditions of detention [REDACTED]), the modalities of the preparation of the declaration, and any other matters pertaining to the declaration's reliability.<sup>65</sup>

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<sup>59</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, para. 24.

<sup>60</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, paras 25-28.

<sup>61</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, para. 29.

<sup>62</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, para. 33.

<sup>63</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, para. 34.

<sup>64</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, para. 30.

<sup>65</sup> Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf, para. 34. Conversely, the Prosecution argues that because of the limited scope of P-0165's prior recorded testimony, his cross examination should be strictly limited to issues pertaining to P-0165's prior recorded testimony and associated material, P-0165 Request, ICC-01/12-01/18-1226-Conf, para. 44.

#### D. The Consolidated Defence Request

23. In support of the First Request, the Defence submits that: (i) the Prosecution's submission of the separate and staggered Related Evidentiary Requests has unduly delayed proceedings and impacts on the Defence's ability to file a consolidated Article 69(7) application; (ii) the Defence has a clear interest in knowing the legal status of these evidentiary items before submitting its Article 69(7) application; and (iii) it has a right to challenge this extrinsic evidence and to adduce evidence in response.<sup>66</sup>
24. In support of the Second Request, the Defence submits, *inter alia*, that a discrete *voir dire* hearing would best promote a fair and expeditious resolution of exclusion issues in this case, by allowing the parties an opportunity to submit and challenge extrinsic evidence that pertains to the circumstances of the interviews.<sup>67</sup> The Defence also submits that this hearing should not be restricted to issues concerning Mr Al Hassan's statements but also include [REDACTED].<sup>68</sup>
25. The Prosecution submits that the pending parts of the Consolidated Defence Request should be dismissed as a request for reconsideration.<sup>69</sup> In relation to the *voir dire* hearing in particular, the Prosecution submits that while it is one possible approach to addressing these issues, the Defence submissions do not provide a basis for reconsideration. It submits in particular that what is relevant for the Chamber is the voluntary nature of Mr Al Hassan's interview, and that while matters related to [REDACTED] may have tangential relevance [REDACTED], the Defence can rely on disclosed material in this regard.<sup>70</sup> The Prosecution also requests the opportunity to make further submissions regarding the scope, content, procedure and timing for an evidentiary hearing.<sup>71</sup>

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<sup>66</sup> Consolidated Defence Request, ICC-01/12-01/18-1256-Conf, paras 5-8.

<sup>67</sup> Consolidated Defence Request, ICC-01/12-01/18-1256-Conf, para. 11. See also generally 9-10.

<sup>68</sup> Consolidated Defence Request, ICC-01/12-01/18-1256-Conf, para. 12.

<sup>69</sup> Response to the Consolidated Defence Request, ICC-01/12-01/18-1281-Conf, paras 1-2, 16-24.

<sup>70</sup> Response to the Consolidated Defence Request, ICC-01/12-01/18-1281-Conf, paras 25-27.

<sup>71</sup> Response to the Consolidated Defence Request, ICC-01/12-01/18-1281-Conf, para. 3.

#### IV. Analysis

26. The Chamber will first deal with the two remaining parts of the Consolidated Defence Request.
27. In relation to the First Request – for the Chamber to determine the Related Evidentiary Requests prior to the Defence submitting its Article 69(7) motion – the Chamber recalls that at the time of the 24 November 2020 Decision, it was expressly envisaged that the Prosecution would file the Request for Introduction of Mr Al Hassan’s interview material, and related evidentiary requests in relation to P-0661, P-0598 and P-0165.<sup>72</sup> Additionally, apart from the P-0165 Request material (amounting to a total of 11 pages), the remainder of the material which is the subject of the Related Evidentiary Requests was either already extensively referred to by the Prosecution in the context of the previous termination litigation (the P-0598 and P-0661 reports), or is itself a Defence document (the Medical Documents Request material).
28. Further, as expressly emphasised by the Prosecution,<sup>73</sup> formal submission of the Related Evidentiary Requests material is not required for the Chamber to determine the Defence’s anticipated Article 69(7) challenges, although the material may assist the Chamber for that purpose. Rather, the material sought to be submitted in the Related Evidentiary Requests is relevant to any eventual assessment by Chamber of the weight and probative value to be accorded to Mr Al Hassan’s Interview Material.<sup>74</sup>
29. The Chamber accordingly considers it unnecessary and premature to determine the Related Evidentiary Requests prior to the Defence submitting its Article 69(7) application. Consistent with the approach adopted in the termination litigation,<sup>75</sup> the Chamber considers that at this stage, for the purpose of the present Article

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<sup>72</sup> Prosecution urgent application under regulation 35 for a variation of the timelines on submissions related to article 69(7) of the Statute, 19 November 2020, ICC-01/12-01/18-1159-Conf, para. 4.

<sup>73</sup> Medical Documents Request, ICC-01/12-01/18-1213-Conf, para. 4; P-0165 Request, ICC-01/12-01/18-1226-Conf, para. 29; P-0598 and P-0661 Request, ICC-01/12-01/18-1215-Conf, paras 44, 50.

<sup>74</sup> Medical Documents Request, ICC-01/12-01/18-1213-Conf, para. 4; P-0165 Request, ICC-01/12-01/18-1226-Conf, para. 29; P-0598 and P-0661 Request, ICC-01/12-01/18-1215-Conf, paras 44, 50.

<sup>75</sup> Decision on the Defence request to terminate the proceedings and related requests, 24 August 2020, ICC-01/12-01/18-1009-Conf, para. 123.

69(7) litigation, the material which is the subject of the Related Evidentiary Requests constitutes supporting material in relation to a procedural motion, which does not need to meet the same admissibility criteria as evidence upon which the Chamber may base its trial judgment. The Chamber will take into account the Defence's responses to the Related Evidentiary Requests in determining the weight, if any, to be accorded to the subject materials in making its determinations under Article 69(7) of the Statute.

30. For the reasons expressed in paragraphs 27 and 27, the Chamber cannot accept the Defence's submission that the Prosecution's filing of the Related Evidentiary Requests has unduly delayed proceedings or impacted on the Defence's ability to file a consolidated Article 69(7) application.<sup>76</sup>
31. In addition, the Chamber notes that the direction in its 24 November 2020 Decision that the Defence's Article 69(7) motion be 'self-contained' simply means, as stated in that Decision, that the motion should not incorporate by reference extensive aspects of earlier submissions.<sup>77</sup> To the extent that the Defence wants to bring material in response to the Related Evidentiary Requests material, it is obviously free to bring supporting material with its Article 69(7) motion. To the extent that the Defence needs 'adequate time' to identify this responsive material, this should be limited noting the time for which the Defence has already been on notice of these matters.<sup>78</sup>
32. The Chamber therefore rejects the Defence's First Request and directs the Defence to file its Article 69(7) motion, if any, within two weeks of this decision.
33. Turning to the Second Request, the Chamber considers it premature at this stage to determine the necessity of a *voir dire* hearing before the Defence's Article 69(7) motion is filed, and the issues before the Chamber are properly framed. The Chamber therefore defers its determination on the Second Request.

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<sup>76</sup> Consolidated Defence Request, ICC-01/12-01/18-1256-Conf, para. 6.

<sup>77</sup> 24 November 2020 Decision, ICC-01/12-01/18-1160, para. 10.

<sup>78</sup> See e.g. Urgent request to vary a deadline for filing an application concerning Mr. Al Hassan's arrest, detention and interrogation in Mali, 31 May 2019, ICC-01/12-01/18-360; termination litigation filings and supporting material filed June-August 2020; and the Related Evidentiary Requests which were filed in December 2020.

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

**DEFERS** its determination of the Prosecution's Related Evidentiary Requests;

**REJECTS** the First Request in the Consolidated Defence Request;

**DIRECTS** the Defence to file its Article 69(7) motion, if any, within two weeks of this decision;

**DEFERS** its determination of the Second Request in the Consolidated Defence Request; and

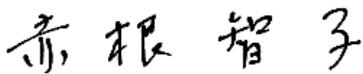
**REJECTS** all other requests.

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 17 February 2021

At The Hague, The Netherlands