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No. ICC-01/12-01/18

Date: 18 July 2024

TRIAL CHAMBER X

Before: Judge Kimberly Prost, Single Judge

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 request to dispense with certain certification requirements
under Rule 68(2)(b)(ii) of the Rules**

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

The Office of the Prosecutor Karim A. A. Khan Nazhat Shameem Khan Mame Mandiaye Niang	Counsel for the Defence Melinda Taylor
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	<i>Amicus Curiae</i>

REGISTRY

Registrar Osvaldo Zavala Giler	Counsel Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

Judge Kimberly Prost, acting as Single Judge of Trial Chamber X (the ‘Single Judge’ and the ‘Chamber’) 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 and 67 of the Rome Statute (the ‘Statute’) and Rule 68(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on Defence request to dispense with certain certification requirements under Rule 68(2)(b)(ii) of the Rules’.

1. On 11 July 2024, the Defence filed a request asking the Chamber to dispense with certain certification requirements under Rule 68(2)(b)(ii) of the Rules with respect to prior recorded testimony sought to be introduced through Rule 68(2)(b) for the purposes of sentencing; specifically, the requirement to have a member of the Registry witness the declarations accompanying such prior recorded testimony pursuant to Rule 68(2)(b)(ii) and (iii) of the Rules (the ‘Request’).¹ In support, the Defence submits that its ability to obtain the required Registry certifications in a timely manner will likely be curtailed due to the general security situation and poor network connectivity in Northern Mali.²
2. On 15 July 2024, the LRVs indicated that they had no comments on the Request.³
3. On 16 July 2024, pursuant to the deadline set by the Single Judge,⁴ the Prosecution filed its response to the Request (the ‘Prosecution Response’).⁵ The Prosecution indicates that in principle it is not opposed, at the sentencing stage and on a case-by-case basis, to the simplification of the certification procedure as provided for in Rule 68(2)(b) of the Rules, but argues that the Registry’s observations are necessary and that the Defence must provide a series of

¹ Request to dispense with certain certification requirements under Rule 68(2)(b)(ii) of the Rules of Evidence and Procedure, ICC-01/12-01/18-2602-Conf-Exp (confidential *ex parte*, available only to the Registry; a public redacted version was notified simultaneously ICC-01/12-01/18-2602-Red).

² Request, ICC-01/12-01/18-2602-Conf-Exp, paras 10-

³ Email from the LRVs, 15 July 2024, at 17:57.

⁴ Email from the Single Judge, 11 July 2024, at 16:49.

⁵ Réponse de l’Accusation à la Requête de la Défense intitulée : « Request to dispense with certain certification requirements under Rule 68(2)(b)(ii) of the Rules of Evidence and Procedure », ICC-01/12-01/18-2609.

clarifications on the need for the relief sought and the procedure it intends to implement.⁶

4. The Single Judge recalls that the current directions on sentencing procedure relevantly require the parties by 22 July 2024⁷ to submit, for written testimonial evidence, a copy of the prior recorded testimony sought to be introduced under Rule 68(2) of the Rules with the corresponding request and ‘proposed arrangement for the obtention of accompanying declaration(s) under [Rule] 68(2)(b)(ii) of the Statute’.⁸
5. The Single Judge also recalls that pursuant to Rule 68(2)(b)(ii) of the Rules, prior recorded testimony under Rule 68(2)(b) may only be introduced if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person’s knowledge and belief. Under Rule 68(2)(b)(iii) of the Rules, this accompanying declaration must be witnessed by a person authorised to witness such a declaration by the Chamber or in accordance with the law and procedure of a State.⁹
6. The Single Judge notes that, as it submits, the Defence has faced difficulties during the trial obtaining required declarations under Rule 68(2)(b) of the Rules in a timely manner due to the security situation in Northern Mali and poor network connectivity.¹⁰ The Chamber is mindful of the Defence’s submissions that these challenges persist, compounded by recent events in Northern Mali including the withdrawal of MINUSMA, and may adversely impact the expeditiousness of the sentencing proceedings.¹¹ While the Single Judge notes

⁶ Prosecution Response, ICC-01/12-01/18-2609, paras 2, 17.

⁷ Email from the Single Judge, 17 July 2024, at 09:57.

⁸ Decision on the sentencing procedure, 28 June 2024, ICC-01/12-01/18-2595, para. 3(b).

⁹ The Rule provides that the person witnessing the declaration must verify in writing the date and place of the declaration, and that the person making the declaration: - is the person identified in the prior recorded testimony; - assures that he or she is making the declaration voluntarily and without undue influence; - states that the contents of the prior recorded testimony are, to the best of that person’s knowledge and belief, true and correct; and - was informed that if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony.

¹⁰ Request, ICC-01/12-01/18-2602-Conf-Exp, paras 10-14.

¹¹ Request, ICC-01/12-01/18-2602-Conf-Exp, paras 10-14.

that much of the details of these challenges are redacted from the Prosecution,¹² she is satisfied on the basis of the information provided that the Defence has shown that the issues represent concrete challenges in obtaining the required certifications in the present instance. The Single Judge further notes that these issues are outside the Defence's control. In relation to the Prosecution's submissions on the lack of clarity as to the Defence's methodology for taking the statements concerned,¹³ the Single Judge recalls that related issues were regulated at trial.¹⁴ Additionally, the Defence confirms that prior recorded testimony sought to be introduced under Rule 68(2)(b) of the Rules will notably be 'under declaration confirming the witness' identity; has been signed and given voluntarily; has been given under declaration of honour and conscience that the statements are accurate', and indicates that it will expand on the process in its Rule 68(2)(b) requests which are due to be submitted next week.¹⁵

7. The Single Judge is mindful of the practical difficulties envisaged by the Defence in having a member of the Registry witness the declarations accompanying prior recorded testimony under Rule 68(2)(b) of the Rules, the present stage of the proceedings, and the necessity of ensuring the efficient conduct of the sentencing procedure. The Single Judge notes in this regard that past chambers of the Court have dispensed with certain procedural pre-requisites of Rule 68 for the purposes of sentencing evidence, including the requirement that a member of the Registry witness accompanying declarations under Rule 68(2)(b)(iii) of the Rules.¹⁶ Accordingly, the Single Judge decides that the declarations of the witnesses

¹² Request, ICC-01/12-01/18-2602-Conf-Exp, paras 11-12; Prosecution Response, ICC-01/12-01/18-2609, paras 3-6.

¹³ Prosecution Response, ICC-01/12-01/18-2609, paras 3-6.

¹⁴ See e.g. Decision on the Defence's request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules, 16 December 2022, ICC-01/12-01/18-2445-Conf-Exp (confidential *ex parte*, available only to the Defence and the Registry; public redacted version notified on the same day, ICC-01/12-01/18-2445-Red), paras 12-16. See also email from the Chamber, 31 March 2022, at 16:25 (*ex parte* only available to the Defence and the Registry, a copy of which was sent to all parties and participants on 7 July 2022, at 12:34).

¹⁵ Request, ICC-01/12-01/18-2602-Red, para. 15.

¹⁶ See Trial Chamber VI, *The Prosecutor v. Ntaganda*, Public Redacted version of 'Preliminary ruling on prior recorded testimony pursuant to Rule 68(2)(b) in relation to sentencing', 23 August 2019, ICC-01/04-02/06-2385-Red, para. 10; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, 11 November 2016, ICC-01/05-01/13-2025, paras 6-7.

whose prior recorded testimony will be submitted pursuant to Rule 68(2)(b) of the Rules for the purposes of sentencing need not be witnessed by a member of the Registry.

8. In light of the discussion above and also taking into account the impending deadline for submission of the Rule 68(2)(b) requests, the Single Judge did not consider it necessary to receive, as suggested by the Prosecution,¹⁷ submissions from the Registry on the issues raised in the Request, including the possibility of missions or in person certifications.
9. In relation to the remaining Prosecution submissions, including that it should be ensured that Rule 68(2)(b) statements submitted by the Defence are relevant to the sentencing process and tend to prove something other than the acts and conduct of Mr Al Hassan, the Single Judge notes that these are matters to be assessed on receipt of the Rule 68(2)(b) applications themselves. The weight to be accorded to any eventual Rule 68(2)(b) evidence is also evidently a matter to be considered by the Chamber at a later stage.

FOR THE ABOVE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request.

Done in both English and French, the English version being authoritative.



Judge Kimberly Prost, Single Judge

Dated this Thursday, 18 July 2024

At The Hague, The Netherlands

¹⁷ Prosecution Response, ICC-01/12-01/18-2609, paras 7-9.