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TRIAL CHAMBER X

Before:

**Judge Kimberly Prost, Presiding Judge
Judge Tomoko Akane
Judge Keebong Paek**

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
THE PROSECUTOR v. *AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD***

Public

First decision on Defence requests for the introduction of sentencing evidence

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

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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, 67, 69, 76 and 78 of the Rome Statute (the ‘Statute’) and Rules 63-64, 68(2) and 145 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘First decision on Defence requests for the introduction of sentencing evidence’.

I. Procedural history

1. Following the delivery of the trial judgment in this case on 26 June 2024 (the ‘Trial Judgment’),¹ the Chamber set deadlines notably for the filing of requests for further evidence relevant to the Chamber’s decision on sentence pursuant to Article 76 of the Statute (the ‘Sentencing decision’).²
2. On 8 July 2024, the Defence confirmed that it did not intend to file any requests to present additional *viva voce* evidence.³
3. On 18 July 2024, the Single judge granted a Defence request to dispense with certain certification requirements under Rule 68(2)(b) of the Rules, deciding that declarations of the witnesses whose prior recorded testimony would 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.⁴

¹ Trial Judgment, 26 June 2024, ICC-01/12-01/18-2594-Conf (with three public annexes and two separate and partly dissenting opinions notified on the same day, Separate and Partly Dissenting Opinion of Judge Tomoko Akane, ICC-01/12-01/18-2594-OPI, Separate and Partly Dissenting Opinion of Judge Kimberly Prost, ICC-01/12-01/18-2594-OPI2 and one separate and partly dissenting opinion notified on 28 June 2024, Opinion individuelle et partiellement dissidente du Juge Antoine Kesia-Mbe Mindua, ICC-01/12-01/18-2594-OPI3; a public redacted version of the Trial Judgment was notified on 26 June 2024, ICC-01/12-01/18-2594-Red).

² See Decision on the sentencing procedure, 28 June 2024, ICC-01/12-01/18-2595; Second decision on the sentencing procedure, 9 July 2024, ICC-01/12-01/18-2600; Third decision on the sentencing procedure, 23 July 2024, ICC-01/12-01/18-2618 (with Separate opinion of Judge Kimberly Prost, ICC-01/12-01/18-2618-OPI). See also email from the Single Judge, 17 July 2024, at 09:57, giving the parties and participants advanced notice that the Chamber would set the respective deadlines for submission of any request to submit non-oral evidence and relevant responses to 22 and 25 July 2024.

³ Email from the Defence, 8 July 2024, at 17:59.

⁴ Decision on Defence request to dispense with certain certification requirements under Rule 68(2)(b)(ii) of the Rules, ICC-01/12-01/18-2610.

4. On 22 and 23 July 2024, in accordance with the deadlines set by the Chamber as noted above, and relevant extensions granted by Single Judge,⁵ the Defence filed requests to introduce the following additional sentencing evidence:
 - a. the prior recorded testimony of six individuals through Rule 68(2)(b) of the Rules: D-0801 and D-0803⁶ (the ‘D-0801 and D-0803 Request’), D-0807⁷ (the ‘D-0807 Request’), D-0808⁸ (the ‘D-0808 Request’), D-0809⁹ (the ‘D-0809 Request’) and Mohamedou Ould Slahi¹⁰ (the ‘Ould Slahi Request’);
 - b. 19 items of documentary evidence (the ‘Documentary Evidence Request’);¹¹ and
 - c. a sworn statement from Mr Al Hassan together with associated exhibits and other related documents (the ‘Al Hassan Request’).¹²
5. Also on 22 July 2024, the Single Judge granted a Defence request to extend the deadline for filing a Rule 68(2)(b) request in relation to an expert report (the ‘Expert Request’).¹³
6. No requests for additional sentencing evidence were filed by the Office of the Prosecutor (the ‘Prosecution’) or the Legal Representatives of Victims.

⁵ In relation to D-0808, *see* email from the Single Judge, 22 July 2024, at 15:08. In relation to D-0807 *see* email from the Single Judge, 24 July 2024, at 13:57.

⁶ Defence Request to submit Rule 68(2)(b) Statements of D-0801 and D-0803, 22 July 2024, ICC-01/12-01/18-2612-Conf (with confidential annexes A, B and C).

⁷ Defence Request to submit Rule 68(2)(b) statement from D-0807 as additional evidence on sentencing, 23 July 2024, ICC-01/12-01/18-2616-Conf (with confidential Annex A). *See also* email from the Defence, 23 July 2024, at 17:43, circulating a signed version of D-0807’s statement (MLI-D28-0007-0855-R01) and corresponding transcript (MLI-D28-0007-0860-R01).

⁸ Defence Request to submit Rule 68(2)(b) statement and associated exhibits of D-0808, 23 July 2024, ICC-01/12-01/18-2617-Conf (with confidential annexes A, B and C).

⁹ Defence Request to submit additional evidence on sentencing through Rule 68(2)(b) – D-0809, 22 July 2024, ICC-01/12-01/18-2615-Conf (with confidential Annex A).

¹⁰ Defence Request to admit the statement of Mohamedou Ould Slahi pursuant to Rule 68(2)(b) for the Purposes of Sentencing, 22 July 2024, ICC-01/12-01/18-2613 (with public Annex A).

¹¹ Defence request for the admission of additional documentary evidence on sentencing, 22 July 2024, ICC-01/12-01/18-2611-Conf (with confidential Annex A).

¹² Request to Admit Mr Al Hassan’s Sworn Statement, Associated Exhibits and Other Relevant Documents, 22 July 2024, ICC-01/12-01/18-2614-Conf (with confidential Annexes A, B, C and D).

¹³ Email from the Single Judge, 22 July 2024, at 15:08.

7. On 24 July 2024, the Single Judge partially granted a request from the Prosecution for an extension of the deadline to respond to the Al Hassan Request, setting the new deadline at 6 August 2024.¹⁴
8. On 24 and 25 July 2024, the Prosecution filed its responses to the other abovementioned Defence requests (respectively, the ‘D-0801 and D-0803 Response’,¹⁵ the ‘D-0807 Response’,¹⁶ the ‘D-0808 Response’,¹⁷ the ‘D-0809 Response’,¹⁸ the ‘Ould Slahi Response’¹⁹ and the ‘Documentary Evidence Response’²⁰).
9. On 25 and 26 July 2024, the Defence requested, by email, leave to reply to certain issues raised in the D-0807 Response and D-0808 Response²¹ and the D-0803 Response and D-0809 Response²² respectively (together, the ‘Requests for Leave to Reply’). The Prosecution responded to the Requests for Leave to Reply on the same days respectively, also by email.²³

II. Analysis

10. This decision deals with the Defence requests related to D-0801, D-0803, D-0807 D-0808, D-0809, Mohamedou Ould Slahi and the Documentary Evidence Request. Further decisions will be issued in due course on the Al Hassan Request and on the Expert Request, once filed.

¹⁴ Email from the Single Judge, 24 July 2024, at 14:22.

¹⁵ Prosecution response to “Defence Request to submit Rule 68(2)(b) Statements of D-0801 and D-0803”, 25 July 2024, ICC-01/12-01/18-2626-Conf.

¹⁶ Réponse de l’Accusation à la Requête de la Défense intitulée « Defence Request to submit Rule 68(2)(b) statement from D-0807 as additional evidence on sentencing. », 24 July 2024, ICC-01/12-01/18-2620-Conf.

¹⁷ Réponse de l’Accusation à la Requête de la Défense intitulée « Defence Request to submit Rule 68(2)(b) statement and associated exhibits of D-0808 », 24 July 2024, ICC-01/12-01/18-2619-Conf.

¹⁸ Prosecution response to “Defence Request to admit the statement of D-0809 pursuant to Rule 68(2)(b) for the Purposes of Sentencing”, 25 July 2024, ICC-01/12-01/18-2624-Conf.

¹⁹ Prosecution response to “Defence Request to admit the statement of Mohamedou Ould Slahi pursuant to Rule 68(2)(b) for the Purposes of Sentencing”, 24 July 2024, ICC-01/12-01/18-2622.

²⁰ Prosecution response to Defence request for admission of additional evidence on sentencing, 24 July 2024, ICC-01/12-01/18-2621-Conf.

²¹ Email from the Defence, 25 July 2024, at 11:06.

²² Email from the Defence, 26 July 2024, at 09:28.

²³ Email from the Prosecution, 25 July 2024, at 12:03; email from the Prosecution, 26 July 2024, at 10:27.

11. As a preliminary matter, the Chamber considers that it would not be further assisted by further submissions identified by the Defence in the Requests for Leave to Reply and accordingly rejects those two requests.
12. At the outset, the Chamber recalls its approach to the submission of evidence at trial whereby, ‘the Chamber [would] not issue rulings on admissibility for each item of evidence during the course of proceedings. Rather, the Chamber [would] recognise the submission of items of evidence without a prior ruling on relevance and/or admissibility and [would] consider its relevance and probative value as part of the Chamber’s holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused’.²⁴ At the same time, the Chamber recalls that it maintained discretion to make some discrete determinations on the admissibility of specific evidence as warranted.²⁵
13. The Chamber applies this approach to the sentencing procedure and the present Defence requests. This means that for the purpose of the present decision, the Chamber will, in principle and barring particular circumstances, limit itself to considering whether any procedural bar to the submission of the requested evidence exists. Substantive considerations concerning the relevance and the probative value of evidence submitted, as well as the weight if any, to be accorded to that evidence, will instead be conducted as part of the Chamber’s holistic assessment of all evidence submitted when rendering the Sentencing decision.

A. Requests for introduction of prior recorded testimony through Rule 68(2)(b) of the Rules

14. According to Rule 68(2)(b) of the Rules the Chamber may allow the introduction of the previously recorded testimony of a witness who is not present before the Chamber when that prior recorded testimony: (i) goes to proof of a matter other than the ‘acts and conduct’ of the accused;²⁶ and relevant for present purposes, (ii) is accompanied by a declaration by the testifying person that the contents of the

²⁴ See Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, para. 29.

²⁵ ICC-01/12-01/18-789-AnxA, para. 31.

²⁶ See Rule 68(2)(b) of the Rules.

prior recorded testimony are true and correct to the best of that person's knowledge and belief.²⁷

15. The Chamber refers to its prior decisions setting out the relevant legal framework on Rule 68(2)(b) of the Rules²⁸ and recalls in particular that the decision of whether to introduce a prior recorded testimony pursuant to Rule 68(2)(b) of the Rules is a discretionary one, and the entire purpose of this provision is to identify situations where it is not necessary to examine witnesses, while preserving fair and expeditious proceedings.²⁹ The Chamber further recalls that Rule 68(2)(b)(i) provides a non-exhaustive list of factors that the Chamber shall bear in mind in the exercise of such discretion.³⁰

1. *The D-0801, D-0803, D-0807, D-0808 and D-0809 Requests*

16. As noted above, the Defence seeks the introduction of the prior recorded testimony of the following witnesses through Rule 68(2)(b) of the Rules: D-0801,³¹ D-0803,³² D-0807,³³ D-0808³⁴ and D-0809.³⁵

²⁷ See Rule 68(2)(b)(ii) of the Rules. Rule 68(2)(b)(iii) of the Rules goes on to provide that these accompanying declarations must be witnessed by a person authorised by the Chamber or in accordance with the law and procedure of a State. As noted above, on 18 July 2024 the Single Judge dispensed with the requirement that the Registry witness these declarations for the purposes of the sentencing procedure in this case (see ICC-01/12-01/18-2610).

²⁸ See e.g. Public redacted version of the Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules, 29 October 2020, ICC-01/12-01/18-1111-Red.

²⁹ ICC-01/12-01/18-1111-Red, para. 7.

³⁰ Rule 68(2)(b)(i) provides that in determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question - relates to issues that are not materially in dispute; - is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; - relates to background information; - is such that the interests of justice are best served by its introduction; and - has sufficient indicia of reliability.

³¹ D-0801's statement MLI-D28-0007-0630-R01 and identity documents, MLI-D28-0007-0681-R01 and MLI-D28-0007-0667-R01 (see ICC-01/12-01/18-2612-Conf-AnxA; ICC-01/12-01/18-2612-Conf-AnxB).

³² D-0803's statement, MLI-D28-0007-0610-R01 (see ICC-01/12-01/18-2612-Conf-AnxC).

³³ D-0807's statement, MLI-D28-0007-0855-R01 and related transcript, MLI-D28-0007-0860-R01 (see email from the Defence, 23 July 2024, at 17:43 circulating a signed version of D-0807's statement (MLI-D28-0007-0855-R01) and related transcript (MLI-D28-0007-0860-R01). See also ICC-01/12-01/18-2616-Conf-AnxA).

³⁴ D-0808's statement, MLI-D28-0008-0006-R01 and related photograph MLI-D28-0007-0854 (see ICC-01/12-01/18-2617-Conf-AnxA; ICC-01/12-01/18-2617-Conf-AnxB).

³⁵ D-0809's statement, MLI-D28-0007-0849-R01 and identity document, MLI-D28-0007-0847-R01 (see ICC-01/12-01/18-2615-Conf-AnxA).

17. D-0801 and D-0803 are female witnesses who know Mr Al Hassan and provide evidence relating notably to his character and conduct before and after the events of the charges.³⁶ The Defence submits that their evidence is notably relevant to Mr Al Hassan's character and conduct post-2012 to assist the Chamber in determinations under Rules 145(1)(b) and 145(2)(a) of the Rules for the purposes of sentencing.³⁷ The Prosecution does not object to the introduction of D-0801's prior recorded testimony although submits that the evidence should be afforded very little weight, if any.³⁸ The Prosecution objects to the introduction of D-0803's prior recorded testimony notably on the basis that it relates to issues that are materially in dispute³⁹ and submits that the testimony should be heard *viva voce* or introduced partially, and that if introduced, her testimony should be afforded very little weight, if any.⁴⁰

18. D-0807 is a male witness who also knows Mr Al Hassan, although last saw him some years before the period of the charges and provides evidence relating to Mr Al Hassan's character and relations with his community.⁴¹ The Defence submits that his evidence is notably relevant to Mr Al Hassan's character, individual and personal circumstances and conduct post-2012 to assist the Chamber in determinations under Rules 145(1)(b) and 145(2)(a) of the Rules.⁴² The Prosecution objects to the introduction of D-0807's prior recorded testimony notably on the basis that it relates to Mr Al Hassan's acts and conduct, going to the *mens rea* of Mr Al Hassan,⁴³ and submits that the D-0807 Request should be rejected or the

³⁶ See D-0801 and D-0803 Request, ICC-01/12-01/18-2612-Conf, paras 11, 14-20, 21-27.

³⁷ D-0801 and D-0803 Request, ICC-01/12-01/18-2612-Conf, paras 11, 17, 26.

³⁸ D-0801 and D-0803 Response, ICC-01/12-01/18-2626-Conf, paras 1-3, 6-14, 30.

³⁹ D-0801 and D-0803 Response, ICC-01/12-01/18-2626-Conf, paras 15-21, referring to generalised fear of the Malian army or the alleged lack of financial means to relocate in reference to D-0803's statement MLI-D28-0007-0610-R01, at 0621, line 18 to 0623, line 4.

⁴⁰ D-0801 and D-0803 Response, ICC-01/12-01/18-2626-Conf, paras 1-4, 15-30.

⁴¹ D-0807 Request, ICC-01/12-01/18-2616-Conf, paras 17-22.

⁴² D-0807 Request, ICC-01/12-01/18-2616-Conf, paras 2, 14, 22-23.

⁴³ D-0807 Response, ICC-01/12-01/18-2620-Conf, paras 2, 5-8, describing D-0807's evidence as circumstantial evidence in relation to Mr Al Hassan's position on music, other religions and presence at a wedding which touches upon the *mens rea* of Mr Al Hassan for his conviction for persecution on religious grounds.

witness heard *viva voce*.⁴⁴ The Prosecution further submits that the evidence has little or no relevance to sentencing in any event.⁴⁵

19. D-0808 is a male witness who was living in Timbuktu during the period of the charges and notably testifies to having been arrested, detained, sentenced by the Islamic Court and publicly flogged in Timbuktu during that period.⁴⁶ The Defence submits that his evidence notably informs the Chamber of the extent of the harm he suffered and his views concerning punishment.⁴⁷ The Prosecution objects to the introduction of D-0808's prior recorded testimony notably on the basis that it relates to matters already adjudicated in the Trial Judgment and thus indirectly to Mr Al Hassan's acts and conduct,⁴⁸ and submits that the D-0808 Request should be rejected or the witness heard *viva voce*.⁴⁹ The Prosecution further submits that the evidence is speculative and irrelevant in any event.⁵⁰

20. D-0809 is a male witness who provides evidence notably related to views of the population of Timbuktu towards Mr Al Hassan.⁵¹ The Defence submits that his evidence is relevant to the views of the Timbuktu population towards Mr Al Hassan's punishment, the positive prospects of Mr Al Hassan's integration into his community and the impact this would have on peace and reconciliation in Timbuktu.⁵² The Prosecution does not object to the introduction of D-0809's prior recorded testimony although submits that the evidence should be afforded very little weight, if any.⁵³

21. The Chamber considers that there exists no procedural bar to the introduction of the prior recorded testimony of D-0801, D-0803, D-0807, D-0808 and D-0809 through

⁴⁴ D-0807 Response, ICC-01/12-01/18-2620-Conf, paras 2, 15.

⁴⁵ D-0807 Response, ICC-01/12-01/18-2620-Conf, paras 9-10.

⁴⁶ D-0808 Request, ICC-01/12-01/18-2617-Conf, paras 6-15, 21.

⁴⁷ D-0808 Request, ICC-01/12-01/18-2617-Conf, paras 3, 21.

⁴⁸ D-0808 Response, ICC-01/12-01/18-2619-Conf, paras 2, 5-16, noting that it seems to be alleged that D-0808's evidence relates to the incident discussed in paras 761-764 of the Trial Judgment and/or the incident discussed in paras 1028-1029 of the Trial Judgment.

⁴⁹ D-0808 Response, ICC-01/12-01/18-2619-Conf, paras 2, 24.

⁵⁰ D-0808 Response, ICC-01/12-01/18-2619-Conf, paras 3, 21-23.

⁵¹ D-0809 Request, ICC-01/12-01/18-2615-Conf, paras 11, 13-19.

⁵² D-0809 Request, ICC-01/12-01/18-2615-Conf, paras 2, 11.

⁵³ D-0809 Response, ICC-01/12-01/18-2624-Conf, paras 1-5, 7-31.

Rule 68(2)(b) of the Rules. While some of the concerned testimony provides information concerning Mr Al Hassan, none of them goes to prove his ‘acts and conduct’ within the meaning of Rule 68(2)(b) of the Rules – namely, as previously clarified by the Chamber, the ‘personal actions and omissions of the accused as opposed to the acts and conduct of other persons which could be attributed to the accused by reason of the mode of liability charged’.⁵⁴

22. In this regard, in relation to D-0807, the Chamber does not consider D-0807’s evidence goes to Mr Al Hassan’s acts and conduct in the sense of his *mens rea*,⁵⁵ such to prevent submission of the evidence through Rule 68(2)(b) of the Rules at this stage, particularly noting that D-0807’s evidence relates to his knowledge of Mr Al Hassan in a time period well before the period of the charges. In relation to D-0808, the Chamber notes the Prosecution’s argument that submission of the witness’s statement would amount to a re-litigation of facts already adjudicated in the Trial Judgment, and indirectly relates to Mr Al Hassan’s acts and conduct.⁵⁶ Importantly, the Chamber recalls that the sentencing phase is not the proper forum to re-litigate issues and facts already ruled on by the Chamber in the Trial Judgment and that such challenges may instead be heard by the Appeals Chamber pursuant to Article 81(1) of the Statute.⁵⁷ Nevertheless, for present purposes, the Chamber does not consider that that D-0808’s statement relates to the acts and conduct of Mr Al Hassan such to prevent submission of the testimony at this stage pursuant to Rule 68(2)(b) of the Rules, noting that indeed, as alluded to by the Prosecution,⁵⁸ there

⁵⁴ See Public redacted version of Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 11 August 2021, ICC-01/12-01/18-1588-Red, para. 9.

⁵⁵ See D-0807 Response, ICC-01/12-01/18-2620-Conf, paras 2, 5-8, describing D-0807’s evidence as circumstantial evidence in relation to Mr Al Hassan’s position on music, other religions and presence at a wedding which touches upon the *mens rea* of Mr Al Hassan for his conviction for persecution on religious grounds.

⁵⁶ D-0808 Response, ICC-01/12-01/18-2619-Conf, paras 2, 5-16.

⁵⁷ See Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Sentencing judgment, 7 November 2019, ICC-01/04-02/06-2442, para. 11, footnote 32; Trial Chamber VII, *The Prosecutor v. Bemba Gombo et al.*, Decision on Requests for Variation of Deadlines in the Sentencing Calendar, 2 November 2016, ICC-01/05-01/13-2001, para. 13; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing, 4 May 2016, ICC-01/05-01/08-3384, para. 21.

⁵⁸ D-0808 Response, ICC-01/12-01/18-2619-Conf, paras 5-16.

is uncertainty as to whether the witness's evidence relates to a specific incident described in the Trial Judgment.⁵⁹

23. The Chamber notes that as required under Rule 68(2)(b)(ii) of the Rules, each prior recorded testimony 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, either signed in the cases of D-0807,⁶⁰ D-0808,⁶¹ and D-0809⁶² or in the cases of D-0801 and D-0803, taken remotely with transcripts of the read through of the witness's statements being submitted,⁶³ similar to procedures used at trial.⁶⁴
24. In relation to identity documents related to the witness statements, the Chamber notes the submissions made by the Prosecution⁶⁵ and directs the Defence to do the following as soon as practicable:
- a. disclose translations of D-0801's identity documents⁶⁶ in a working language of the Court;

⁵⁹ Notably, elements of the witness's evidence do not accord with either incident described in the Trial Judgment, ICC-01/12-01/18-2594-Conf, paras 761-764 (Case of the two young men flogged around 8 July 2012) or paras 1028-1029 (Judgment of Mohamed Ben el-Gaw and el-Goumaa).

⁶⁰ D-0807's statement, MLI-D28-0007-0855-R01, at 0859. *See also* MLI-D28-0007-0860-R01.

⁶¹ D-0808's statement, MLI-D28-0008-0006-R01, at 0011.

⁶² D-0809's statement, MLI-D28-0007-0849-R01, at 0853.

⁶³ *See* D-0801's statement, MLI-D28-0007-0630-R01 and D-0803's statement, MLI-D28-0007-0610-R01 (*contra* D-0801 and D-0803 Response, ICC-01/12-01/18-2626-Conf, paras 4, 12-14, 22-23). *See also* D-0801 and D-0803 Request, ICC-01/12-01/18-2612-Conf, paras 12, 37. The Chamber takes no issue with the redaction of the details of the interpreter (*contra* D-0801 and D-0803 Response, ICC-01/12-01/18-2626-Conf, paras 14, 23).

⁶⁴ *See similarly 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.

⁶⁵ *See notably* D-0801 and D-0803 Response, ICC-01/12-01/18-2626-Conf, paras 12-14, 22-23; D-0807 Response, ICC-01/12-01/18-2620-Conf, paras 11-14; D-0808 Response, ICC-01/12-01/18-2619-Conf, paras 17-20.

⁶⁶ D-0801's identity documents, MLI-D28-0007-0681-R01 and MLI-D28-0007-0667-R01.

- b. lift redactions to the photographs on D-0801's identity documents,⁶⁷ and the reference numbers of D-0803's,⁶⁸ D-0807's,⁶⁹ D-0808's⁷⁰ and D-0809's⁷¹ identity documents; and
- c. disclose copies of D-0803's,⁷² D-0807's⁷³ and D-0808's⁷⁴ identity cards, with no redactions applied to photographs of the witnesses, together with translations as necessary.

25. Finally, the Chamber considers, for the purpose of the present determination of whether a procedural bar exists to the submission of this material, that the material sought to be submitted is appropriate for submission through Rule 68(2)(b) of the Rules, notably on the basis that it does not relate to matters materially in dispute,⁷⁵ is purportedly of a cumulative or corroborative nature of evidence already on the record,⁷⁶ relates to background information relevant for sentencing purposes, has sufficient indicia of reliability at this stage⁷⁷ and is such that the interests of justice are best served by the introduction of the testimony pursuant to Rule 68(2)(b) of the Rules, particularly noting that the introduction of the evidence in this manner will facilitate the expeditious conduct of the proceedings.

26. Finally, while taking note of the parties' arguments in relation to the relevance and probative value of this material and the weight, if any, to be afforded to it, the Chamber sees no reason to exceptionally consider these submissions at this point in time and defers consideration of these submissions to its Sentencing decision, as necessary.

⁶⁷ D-0801's identity documents, MLI-D28-0007-0681-R01 and MLI-D28-0007-0667-R01.

⁶⁸ See D-0803's statement MLI-D28-0007-0610-R01, at 0612, line 4.

⁶⁹ See D-0807's statement MLI-D28-0007-0855-R01, at 0855; MLI-D28-0007-0860-R01, at 0861, line 19.

⁷⁰ See D-0808's statement MLI-D28-0008-0006-R01, at 0006.

⁷¹ See D-0809's identity document MLI-D28-0007-0847-R01.

⁷² See D-0803's statement MLI-D28-0007-0610-R01, at 0612, line 4.

⁷³ See D-0807 Request, ICC-01/12-01/18-2616-Conf, para. 26.

⁷⁴ See D-0808 Request, ICC-01/12-01/18-2617-Conf, para. 17.

⁷⁵ *Contra* D-0801 and D-0803 Response, ICC-01/12-01/18-2626-Conf, paras 15-21. See also para. 22 above.

⁷⁶ In this regard see *e.g.* Trial Judgment, ICC-01/12-01/18-2594-Conf, para. 1059, footnote 3620, paras 1070, 1087, 1092.

⁷⁷ See paras 23-24 above.

27. Accordingly, and without prejudice to its eventual consideration of the relevance and probative value of this material, and the weight, if any, to be afforded to it, the Chamber decides to allow the introduction of the prior recorded testimony of D-0801, D-0803, D-0807, D-0808 and D-0809 pursuant to Rule 68(2)(b) of the Rules.

2. *The Ould Slahi Request*

28. As noted above, the Defence seeks the introduction through Rule 68(2)(b) of the Rules the prior recorded testimony of Mohamedou Ould Slahi.⁷⁸ According to his statement this witness is a Mauritanian national who was formerly a prisoner at Guantanamo Bay, held without charge for 14 years before his release in 2016 and was notably subjected to torture while in detention.⁷⁹ The Defence submits that his evidence would assist the Chamber in its determination on Mr Al Hassan's sentence 'by speaking to the power of faith and forgiveness, and the need for compassion and reconciliation after prolonged detention' and that the testimony contextualises the 'circumstances of the convicted person' envisaged under Rule 145(1)(b) of the Rules.⁸⁰ The Prosecution submits that the Defence's request should be rejected notably on the basis that the evidence is irrelevant for sentencing in the present case.⁸¹ The Prosecution submits that if the Chamber nevertheless decides to introduce the evidence, very little weight should be accorded to it, if any.⁸²

29. As noted above, the Chamber recalls that while generally deferring considerations of relevance, probative value and weight to its Sentencing decision, the Chamber maintains discretion to make discrete determinations on the admissibility of specific evidence as warranted.⁸³ Considering the content of Mr Ould Slahi's statement and the submissions of the parties, the Chamber considers there to be good reason to consider at this juncture the *prima facie* relevance of this evidence to the Chamber's determinations in the context of sentencing.

⁷⁸ Mr Ould Slahi's statement, MLI-D28-0007-0546-R01 (see ICC-01/12-01/18-2613-AnxA).

⁷⁹ Ould Slahi Request, ICC-01/12-01/18-2613, paras 2-3.

⁸⁰ Ould Slahi Request, ICC-01/12-01/18-2613, para. 1.

⁸¹ Ould Slahi Response, ICC-01/12-01/18-2622, paras 1, 3-6, 9-20.

⁸² Ould Slahi Response, ICC-01/12-01/18-2622, paras 8, 21.

⁸³ See para. 12 above.

30. As presented by the Defence, the purported relevance of Mr Ould Slahi's evidence to Mr Al Hassan's sentencing is essentially based on conclusions that can be drawn by the Chamber on the basis of analogy between the two individuals. In this regard, the Defence notably submits that Mr Ould Slahi's statement 'contextualises' Mr Al Hassan's circumstances envisaged under Rule 145(1)(b) of the Rules,⁸⁴ provides a 'unique perspective of someone with a similar cultural background as Mr Al Hassan',⁸⁵ and that the 'equivalences between Mr Ould Slahi's experience and Mr Al Hassan's own will assist the Chamber in contextualising the latter, which, in turn, will aid its determination on sentence'.⁸⁶
31. While it is true, as submitted by the Defence, that mitigating factors in sentencing need not relate to the crimes of which the person has been convicted and are not limited by the scope of the charges, or the findings in the Trial Judgment,⁸⁷ the Chamber recalls that they do need to relate directly to the convicted person themselves.⁸⁸ The Chamber notes that Mr Ould Slahi knows neither Mr Al Hassan nor the details of his case,⁸⁹ comes from a similar but not the same cultural background as Mr Al Hassan and was detained in a very specific context of Guantanamo Bay for a period of 14 years. Considering that limited conclusions if any can be drawn for sentencing on the basis of an analogy between these individuals, the Chamber finds simply too remote and speculative the purported relevance of Mr Ould Slahi's evidence to Mr Al Hassan's personal circumstances.
32. The Chamber finds distinguishable the evidence in the *Ongwen* case cited by the Defence in support of the Ould Slahi Request, where Trial Chamber IX granted a request to introduce Rule 68(2)(b) evidence of a 'traditional Acholi Chief' who 'lived through the war in Northern Uganda and understands the problems caused by the war [...] [and] the culture of the Acholi people and personally went through the

⁸⁴ Ould Slahi Request, ICC-01/12-01/18-2613, para. 1.

⁸⁵ Ould Slahi Request, ICC-01/12-01/18-2613, para. 3.

⁸⁶ Ould Slahi Request, ICC-01/12-01/18-2613, para. 17.

⁸⁷ Ould Slahi Request, ICC-01/12-01/18-2613, para. 9.

⁸⁸ See Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Sentencing judgment, 7 November 2019, ICC-01/04-02/06-2442 (with one public annex), para. 24; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on Sentence pursuant to Article 76 of the Statute, 22 March 2017, ICC-01/05-01/13-2123-Corr (with one public annex), para. 24.

⁸⁹ Ould Slahi Request, ICC-01/12-01/18-2613, para. 14.

ritual of Mato Oput'.⁹⁰ This evidence, while unspecific to Mr Ongwen personally, did centre more generally on the Acholi people and their culture, which was directly relevant to Mr Ongwen,⁹¹ unlike Mr Ould Slahi whose context is quite distinct from Mr Al Hassan's.

33. The Chamber fails to see how Mr Ould Slahi's evidence, which is very specific to his own experience and context, can in any way '[speak] to Mr Al Hassan's own experiences'⁹² or provide 'insight into Mr Al Hassan's individual circumstances' to 'inform the Chamber's assessment of mitigating factors within the meaning of Rule 145(1)(b) and lead to a more just determination on sentence', as submitted by the Defence.⁹³ While his testimony may, as the Defence submits, '[demonstrate] the possibility of forgiveness',⁹⁴ in Mr Ould Slahi's case, the Chamber finds the purported connection to Mr Al Hassan to be abstract and insufficiently proximate to be sufficiently relevant at this stage for sentencing. The Chamber accordingly rejects the Ould Slahi Request.

B. The Documentary Evidence Request

34. As noted above, the Defence seeks submission into evidence of 19 items of documentary evidence.⁹⁵ The documents relate to two categories, namely: (i) documents concerning the imposition of temporary COVID-19 measures within the ICC Detention Centre; and (ii) documents concerning delays and restrictions imposed on Mr Al Hassan's family visit during the COVID-19 pandemic, and following a resumption of social visits.⁹⁶ The Defence submits that the documents

⁹⁰ Ould Slahi Request, ICC-01/12-01/18-2613, paras 13-14, citing *The Prosecutor v. Dominic Ongwen*, Second Public Redacted Version of "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence", filed on 26 February 2021, ICC-02/04-01/15-1783-Red2, 25 March 2021 (with one public annex), para. 28; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence', 19 March 2021, ICC-02/04-01/15-1801, para. 8(ii), p. 15 (referring to witness D-0163).

⁹¹ ICC-02/04-01/15-1801, 19 March 2021, paras 8(ii), p. 15; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Public Redacted version of Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red, para. 28, footnote 54, citing the statement of this witness D-0163 in reference to defence evidence which discussed the applicability of traditional justice mechanisms to the case of Dominic Ongwen.

⁹² Ould Slahi Request, ICC-01/12-01/18-2613, para. 29.

⁹³ Ould Slahi Request, ICC-01/12-01/18-2613, para. 29.

⁹⁴ Ould Slahi Request, ICC-01/12-01/18-2613, para. 15.

⁹⁵ See ERNs listed in ICC-01/12-01/18-2611-Conf-AnxA.

⁹⁶ Documentary Evidence Request, ICC-01/12-01/18-2611-Conf, para. 6.

are relevant to the Chamber's determination on sentence, being relevant to Mr Al Hassan's detention conditions during the COVID-19 pandemic and thus to his individual or personal circumstances within the meaning of Article 78(1) of the Statute and Rule 145(1)(b) of the Rules.⁹⁷ The Prosecution opposes the request to introduce these documents, submitting that none are relevant to individual or personal circumstances or mitigating circumstances.⁹⁸ The Prosecution submits that if the Chamber nevertheless decides to introduce them, very little weight should be accorded to them, if any.⁹⁹

35. The Chamber considers that there are no procedural bars to the submission of the 19 documents into evidence at this stage. The Chamber sees no reason to exceptionally consider the Prosecution's submissions on relevance at this point in time and defers consideration of these submissions to the Sentencing decision, as necessary, in accordance with the approach outlined above.

36. The Chamber accordingly decides to allow introduction of the 19 documents into evidence. As indicated above, this determination is without prejudice to the Chamber's eventual consideration of the relevance and probative value of these documents, and the weight, if any, to be afforded to them.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Requests for Leave to Reply;

DIRECTS the Defence to comply with the steps identified in paragraph 24 above;

RECOGNISES the submission into evidence of the items listed in footnotes 31-35 and 95 above; and

REJECTS the Ould Slahi Request.

⁹⁷ Documentary Evidence Request, ICC-01/12-01/18-2611-Conf, para. 7.

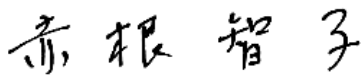
⁹⁸ Documentary Evidence Response, ICC-01/12-01/18-2621-Conf, paras 4, 6-11, 13-23, 28-39.

⁹⁹ Documentary Evidence Response, ICC-01/12-01/18-2621-Conf, paras 5, 24-27, 40.

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



Judge Kimberly Prost
Presiding Judge



Judge Tomoko Akane



Judge Keebong Paek

Dated this Wednesday, 31 July 2024

At The Hague, The Netherlands