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**International
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Court**

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Date: **14 August 2024**

TRIAL CHAMBER X

Before: Judge Kimberly Prost, Presiding
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 Redacted

**Request for Reconsideration of the Second decision on Defence requests for the
introduction of sentencing evidence**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Defence for Mr Al Hassan respectfully requests the Trial Chamber to reconsider its ‘Second decision on Defence requests for the introduction of sentencing evidence’ (‘the Second Sentencing Decision’).
2. The grounds for reconsideration are the following:
 - The Trial Chamber committed a clear error of legal reasoning in finding there exists a procedural bar to the admission of Mr Al Hassan’s statement and associated exhibits as evidence for the purposes of sentencing, occasioning significant prejudice; and
 - The Trial Chamber committed a clear error of legal reasoning in excluding several associated exhibits and all related exhibits tendered through Article 69(4) of the Statute, occasioning significant prejudice.
3. The Defence has filed this application confidentially due to the citation of the contents of a confidential exhibit. A public redacted version will be filed contemporaneously.

II. SUBMISSIONS

1. **The Trial Chamber made a clear error of legal reasoning in finding that there exists a procedural bar to the submission of Mr Al Hassan’s 2024 statement as ‘evidence’ for the purposes of the sentencing hearing**
4. There are two alternative bases for concluding that the Trial Chamber committed a clear error of legal reasoning. **First**, the Chamber erred in finding that Rule 68(2) can never apply to the statement of an accused who has elected to provide sworn evidence as a witness under Rule 68. **Second**, the Chamber erred by finding that the inapplicability of Rule 68 in and of itself created a procedural bar to the submission of Mr Al Hassan’s 2024 statement as evidence for the purposes of the sentencing hearing.
5. Each base independently fulfils the criteria for reconsideration. Reconsideration is appropriate where a “clear error of reasoning has been demonstrated or if it is necessary [...] to prevent an injustice.”¹ It is a recognised remedial mechanism to avert an

¹ *Ntaganda*, Decision on the Defence request for reconsideration, [ICC-01/04-02/06-611](#), 27 May 2015, para. 12; *Ntaganda*, Decision on Defence request seeking reconsideration of the ‘Decision on the Prosecution request

injustice and to ensure that an accused is not irretrievably prejudiced by an error that will seriously affect the course of proceedings, such as through a party's failure to present an argument or fact;² existence of an issue, fact or argument that only arises or becomes apparent after a decision is rendered;³ or where confusion or ambiguity that may have arisen from the submissions by the parties⁴ led to "manifestly unsound and unsatisfactory consequences."⁵

6. In line with the above, it is only necessary for the Defence to demonstrate that either the Trial Chamber committed a clear error of reasoning **OR** that reconsideration is required to avert a manifestly unsound result or injustice.⁶
7. Both prongs are fulfilled. The Trial Chamber found that Rule 68 does not apply to a statement from an accused. Rule 68 is a provision, which establishes procedural requirements above and beyond Article 69(4). The position that the tendering party need not comply with the procedural requirements of Rule 68 does not prevent a party from endeavoring to do so, particularly where the use of Rule 68(2) will occasion nor or less prejudice to other parties than submission through Article 69(4). Nor does this position preclude the admission of the evidence if the requirements of Article 69(4) are

for redactions', [ICC-01/04-02/06-605](#), 21 May 2015, para. 7 ("[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.")

² *Lubanga*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, [ICC-01/04-01/06-2705](#), 30 March 2011, para. 10 (recognising the possibility of reconsideration in a situation where the defence had "made a straightforward mistake about something that at the relevant time was 'known' by everyone concerned.")

³ *Bemba et al.*, Decision on Defence Request for Reconsideration of or Leave to Appeal 'Decision on "Defence Request for Disclosure and Judicial Assistance"', [ICC-01/05-01/13-1282](#), 22 September 2015, para. 8; *Ruto et al.*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, [ICC-01/09-01/11-1813](#), 10 February 2015, para.19 ("[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment"); *Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, [ICC-01/09-02/11-863](#), 26 November 2013, para.11 ("[t]he Chamber finds support, as was also done by Trial Chamber I, in the relevant jurisprudence of the International Criminal Tribunals for the former Yugoslavia ('ICTY') and Rwanda ('ICTR') whose statutory provisions are equally silent as to the power of reconsideration, that those circumstances can include 'new facts or new arguments'"); [ICC-01/04-02/06-483](#), para. 13 ("[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment"); *Prlić et al.*, IT-04-74-A, [Decision on Motions for Reconsideration, 5 September 2014](#), p. 4; *Stanišić & Župljanin*, [IT-08-91-T](#), Decision Denying Joint Defence Motion for Reconsideration or Certification of the Decision of 18 April 2012 and Allowing the Defence to Reply to the Prosecution Response to the Joint Defence Final Submissions on the CHS, 10 May 2012.

⁴ *Ntaganda*, Prosecution's motion for reconsideration of a discrete portion of the Decision on the updated documents containing the charges or in the alternative, application for leave to appeal, [ICC-01/04-02/06-460](#), 16 February 2015, para. 2; *Ntaganda*, Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal, [ICC-01/04-02/06-519](#), 18 March 2015, paras. 8- 9.

⁵ *Ntaganda*, Prosecution's motion for reconsideration of a discrete portion of the Decision on the updated documents containing the charges or in the alternative, application for leave to appeal, [ICC-01/04-02/06-460](#), 16 February 2015, para. 2.

⁶ [ICC-01/12-01/18-734](#), para. 11.

otherwise met. The Chamber committed a clear error of reasoning by finding otherwise. Unless reversed, this reasoning will also prevent the Defence from substantiating critical elements related to the mitigation and proportionality of Mr Al Hassan's sentence.

1.1 The Trial Chamber committed a clear error of legal reasoning in finding that Rule 68(2)(b) can never apply to an accused who elects to provide a witness statement outside the framework of Rule 112

8. As concerns the first aspect, the Trial Chamber's ruling is predicated on case law that is factually and legally distinguishable from the Defence application. Indeed, the rationale underpinning those decisions does not lead to the exclusion of Mr Al Hassan's statement as evidence. This case law must also be considered in light of the weight of ICC and ICL jurisprudence concerning the evidence of an accused who elects to provide evidence as a witness.
9. It is important to note from the outset that the first version of Rule 68 specified that prior statements from a witness could not be submitted into evidence unless either the witness provided their consent or the defence had an opportunity to examine the witness when the prior recording was first made.⁷ Against this backdrop, *Katanga & Ngudjolo* was the first ICC case to address the issue as to the relationship between the testimony of an accused and Rule 68. In that case, Trial Chamber II confirmed that the statements of an accused taken by domestic authorities were "testimonial".⁸ It does not appear that the statements were collected in accordance with the procedures set out in Rule 112 of the Rules of Procedure and Evidence.
10. That Chamber further found that, unless expressly excluded, statutory provisions and rules concerning witnesses similarly apply to an accused who has provided evidence.⁹

⁷ Rule 68: When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that: (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or (b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

⁸ [ICC-01/04-01/07-2635](#), para. 53, finding that the right under Article 67(1)(e) to examine witnesses extends to a right to examine an accused who provides evidence.

⁹ [ICC-01/04-01/07-2635](#), para. 52.

The Chamber found that insofar as Mr Ngudjolo had voluntarily participated in the interview, Rule 68 did not bar its admission *vis-à-vis* Mr Ngudjolo.¹⁰ However, the statement could not be admitted *vis-à-vis* Mr Katanga, given the requirement of prior examination by the Defence and Mr Ngudjolo's inability to be compelled to be subjected to cross-examination.¹¹ Trial Chamber II thus applied Rule 68 to the manner in which it ruled in the admission of Mr Ngudjolo's prior statement.

11. In *Bemba et al*, the Prosecution sought to admit statements taken from an accused under circumstances where that accused opposed their admission on the grounds that the procedural requirements of Rule 68 were not satisfied.¹² The Trial Chamber focused on whether an accused could invoke Rule 68 to retrospectively block the admission of a statement that had been voluntarily given. From this angle, the Chamber found that Mr Arido was not interviewed as a witness, but rather as a suspect under Article 55. Since the procedural requirements of Article 55, along with the general requirements of Article 69, had been met, the interview records were admissible.¹³ The Trial Chamber thus found that Rule 68 did not prevent or erect any procedural bar to the admission of the statement.
12. In *Gicheru*, the Prosecution sought to apply the *Bemba* precedent on the grounds that the interview had been conducted pursuant to Rule 112 and the accused was not a witness (not that the accused could not be a witness).¹⁴
13. Although the *Bemba et al* Trial Chamber cited ICTY case law in support of its approach, the case law in question turned on the specific treatment and classification of Prosecution interview transcripts. The ICTY Appeals Chamber found that in circumstances where the Prosecution was not seeking to rely on the accused as a witness, it was not necessary for the Prosecution to comply with the requirements of Rule 92 and its various sub-provisions.¹⁵ While noting that the Rules provided "scant guidance" for the matter before them,¹⁶ the Appeals Chamber concluded that in circumstances where an interview record had been prepared in accordance with Rules

¹⁰ [ICC-01/04-01/07-2635](#), paras. 52-53.

¹¹ [ICC-01/04-01/07-2635](#), paras. 52-53.

¹² [ICC-01/05-01/13-1432](#), para. 20.

¹³ [ICC-01/05-01/13-1432](#), para. 22.

¹⁴ [ICC-01/09-01/20-261-Red](#), para. 22.

¹⁵ *Prlic*, [Decision against Appeals Admitting Jadranka Prlic's Transcripts into Evidence](#), paras 37-38.

¹⁶ *Prlic*, [Decision against Appeals Admitting Jadranka Prlic's Transcripts into Evidence](#), para.49.

42 and 43 of the Rules of Procedure and Evidence, which concern Prosecution interviews of suspects, the protections set out in Rule 92 served no purpose and were superseded by the enhanced requirements for Rules 42 and 43.¹⁷ Importantly, the Appeals Chamber did not conclude that an accused could not be a witness or that witness rules could never apply to an accused.

14. Similarly, in *Kvočka*, the Appeals Chamber explained that while some rules applicable to witnesses might apply to an accused, all such rules cannot be applied mechanically without considering the specific circumstances of and protections applicable to an accused.¹⁸ The Appeals Chamber did not conclude that an accused could never be treated as a witness, but rather than an accused could not be treated as a witness “for all purposes.”¹⁹ If specific provisions exist that govern collection of evidence of an accused by the Prosecutor, those rules will apply. Similarly, if there are specific rights and entitlements that apply to a suspect or accused, these rules will apply: “An accused who chooses to testify as a witness is not to be treated *qua* witness but as an accused testifying *qua* witness.”²⁰
15. An earlier *Halilovic* Appellate ruling also recognized that the procedures of Rule 92bis (the equivalent of ICC Rule 68) were not inapposite to the introduction of a statement from an accused, in circumstances where the statement was made voluntarily, with knowledge that it could be used in the proceedings.²¹
16. The above decisions concerning the admission of Prosecution interview records can be reconciled with the *Katanga* precedent, since the latter concerned a statement which was not taken in accordance with Rule 112. In essence, Rule 68 does not categorically bar the admission of interview records collected pursuant to Rule 112, but, rather, can apply in relation to statements of an accused that were not compiled pursuant to Rule 112 or a specific alternative statutory provision. This is consistent with the principle that when an accused elects to provide evidence, s/he is subject to the rules concerning witnesses, unless such rules are excluded or superseded by a specific provision relating

¹⁷ *Prlic*, [Decision against Appeals Admitting Jadranka Prlic’s Transcripts into Evidence](#), paras 44-45.

¹⁸ *Kvočka*, [Appeals Judgment](#), paras. 125-127.

¹⁹ *Kvočka*, [Appeals Judgment](#), paras. 125-127.

²⁰ *Kvočka*, [Appeals Judgment](#), para. 125.

²¹ *Halilovic*, [Decision On Interlocutory Appeal Concerning Admission Of Record Of Interview Of The Accused From The Bar Table](#) para. 46 See also para. 32.

to the accused.²² Irrespective as to whether Rule 112 or Rule 68 are invoked, the essential requirements are that the accused provides the evidence in a voluntary and reliable manner, consenting to its use as sworn evidence in ICC proceedings.

17. In the present case, Mr Al Hassan has elected to provide sworn written evidence as a witness in the sentencing phase. Since Rule 112 only applies to the Prosecution, it is inapplicable in the present situation, and neither regulates this situation nor provides a suitable vehicle for admission. Notably, the Defence has no obligation to comply with the requirements set out in either Rule 111 or 112.²³

18. Mr Al Hassan's 2024 statement is also testimonial in that it has been prepared for use in litigation. Mr Al Hassan's statement concerns discrete issues relating to sentencing, including his experiences at the DGSE in Bamako and the manner in which these experiences impacted his detention at the ICC. This Trial Chamber has previously found that evidence on such points cannot be treated in the same manner as Mr Al Hassan's account concerning the charged events in 2012,²⁴ implying that more procedural leniency applies to the former. In a subsequent decision, this Chamber underscored that **first**, the purpose of the criteria set out in Rule 68(2) "is to protect the accused's rights to confront and examine in court a person making direct allegations against him or her," and **second**, while Rule 68(2) constitutes an exception to the requirement of oral testimony, "trial chambers must also be careful not to apply this concept in a manner that may defeat the objective of Rule 68 of the Rules or that may inhibit written testimony that is limited to contextual elements of crimes or background information."²⁵

19. Contrary to its above position, the Trial Chamber's current approach to Mr Al Hassan's statement defeats the purpose of Rule 68, that is, to provide a basis for admission for testimonial evidence addressing background information. It also leads to a procedural lacuna and inequality between the Prosecution and the Defence in that whereas the Prosecution can utilise the procedures of Rule 112 when introducing a statement from an accused who had not elected to give evidence, the Defence cannot invoke the procedural avenue and related safeguards set out in Rule 68 when an accused elects to

²² [ICC-01/04-02/06-1945](#), para. 14.

²³ ICC-01/12-01/18-2228-Conf, paras. 11-12.

²⁴ [ICC-01/12-01/18-2206](#), para. 16.

²⁵ [ICC-01/12-01/18-2241](#), para. 8.

give evidence *qua* witness.

1.2 Even if Rule 68 cannot be used to introduce Mr Al Hassan's 2024 statement, there is no procedural bar to its admission through Article 69(4).

20. The Trial Chamber committed a clear error of legal reasoning by concluding that because Rule 68 is inapplicable to the statements of an accused, Mr Al Hassan's statement is barred from admission. The opposite conclusion should have followed. The statement and materials would only have been barred if Rule 68 was indeed applicable to the materials, but the materials failed to satisfy the requirements, thus resulting in exclusion. This is not the case where the rule itself does not apply. Further, even if Rule 68(2) is not the default or appropriate vehicle for admission, the materials clearly meet the criteria for submission through Article 69(4).

21. Rule 68 is *lex specialis* to Articles 69(2) and (4) of the Statute in the sense that it sets out an additional layer of enhanced requirements that must be satisfied before a testimonial statement can be introduced into evidence. This is made clear by the *chapeau* of Rule 68(1), which specifies that:

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraphs 2 and 4 allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony [...].

If Rule 68 applies, but its criteria are not fulfilled, then it is not possible to have recourse to more general powers of admission.²⁶ If, however, Rule 68 does not apply – for example, if the evidence is not testimonial – then the submission is regulated through the general requirements of relevance and reliability set out in Article 69(4).²⁷

22. Since Articles 69(2) and (4) apply in conjunction with Rule 68, Defence arguments concerning the submission of Mr Al Hassan's statement through Rule 68 necessarily included and encompassed the requisite criteria of Article 69(4). Given the low bar that applies to the submission of evidence through Article 69(4), it was a manifest error of law for the Trial Chamber to exclude the statements as evidence after having found that

²⁶ [ICC-01/04-02/06-1029](#), para. 46.

²⁷ [ICC-01/12-01/18-2124-Red](#), para. 14.

Rule 68 did not govern the situation.

2. The Trial Chamber committed a clear error of legal reasoning in excluding several related exhibits tendered through Article 69(4) of the Statute

23. After determining that Mr Al Hassan's 2024 statement could only be received as an unsworn statement and not a Rule 68 statement or 'evidence,' the Trial Chamber then excluded all associated and related exhibits.²⁸ In respect of the latter, the Trial Chamber made no assessment of relevance or reliability, as required by Article 69(4) of the Statute, and departing from the low bar for submission established in its Decision on the Conduct of the Proceedings. The Trial Chamber consequently rejected a range of documentary items, all of which relate directly to issues to be addressed at sentencing.

24. Given that the exclusion of these exhibits is a direct consequence of the Chamber's holding that Mr Al Hassan's statement could not be admitted as evidence, a reversal of this holding should similarly result in a reversal of the exclusion of the exhibits.

25. In the alternative, and for the purpose of the current application, the Defence additionally seeks reconsideration as concerns the Trial Chamber's decision to exclude the following items:

- The [Redacted];²⁹ and
- Correspondence with the Registry concerning the use of handcuffs and attachments depicting different types of handcuffs used in connection with Mr Al Hassan's transfer to and from the premises of the ICC.³⁰

26. The first item relates directly to the calculation of credit pursuant to Article 78(2). [Redacted].³¹ [Redacted].³² The document is also reliable in that it was stamped and signed by the authority in question and accompanied by an official letterhead.

27. No procedural or technical bar was identified in relation to its submission pursuant to

²⁸ [ICC-01/12-01/18-2633](#), para. 20.

²⁹ MLI-D28-0007-0671

³⁰ MLI-D28-0007-0574; MLI-D28-0007-0576; MLI-D28-0007-0682; MLI-D28-0007-0582; MLI-D28- 0007-0583; MLI-D28-0007-0584.

³¹ [Redacted]

³² [Redacted]

the submission system of evidence applied by this Trial Chamber.³³ The fact that the Trial Chamber rejected the related Rule 68 application does not create a bar to relevance or submission. The Defence application articulated the relevance of this letter to the application of Article 78(2),³⁴ which specifies that the Trial Chamber may, in its discretion, credit time served in connection with the same conduct as the ICC case. This letter continued to be relevant to sentencing notwithstanding the Trial Chamber's decision to reject the admission of Mr Al Hassan's statement. In a prior decision concerning P-0130, Trial Chamber X found that the exclusion of P-0130's Rule 68 statement did not preclude the admission of associated exhibits pursuant to Article 69(4) of the Statute.³⁵ There is no basis to deviate from this precedent to the detriment of the accused.

28. For the same reasons, the Trial Chamber committed a manifest error of law in rejecting documentary evidence concerning the handcuffs used at the DGSE and at the ICC. Though the Defence has demonstrated the relationship between the documents and Mr Al Hassan's statement, their submission did not turn on the submission of the statement. Mr Al Hassan did not author the correspondence to and from the Registry: His evidence was not required to authenticate it. The trial record contains independent corroboration as concerns the type of handcuffs used at the DGSE.³⁶

29. The Defence application articulated a separate and independent basis for relevance tied to arguments, which were accepted in the First Decision on the Submission of Sentencing Evidence ('First Sentencing Decision'). Specifically, in both applications, the Defence argued that the Trial Chamber's assessment of Mr Al Hassan's personal circumstances and what constitutes a proportionate sentence should be informed by particular aspects of his detention experience.³⁷ In the First Sentencing Decision, the Trial Chamber found that no procedural bars existed as concerns the submission of such evidence and that any further consideration of relevance or weight should be taken in

³³ [ICC-01/12-01/18-2629](#), paras. 12-13.

³⁴ ICC-01/12-01/18-2614-Conf, para. 29. See also fn 79.

³⁵ ICC-01/12-01/18-2124-Conf, para. 14: "Turning to the Associated Material, while they cannot be introduced together with the Statement under Rule 68(2)(b) of the Rules, the Chamber finds it appropriate to recognise their submission into evidence nonetheless pursuant to the approach it adopted. 26 The Chamber notes that the Associated Material is comprised of nine videos contained in an annex to the statement and their transcripts and translations, a document annexed to the Statement and its translation as well as a photograph".

³⁶ D-0006: T-206 (Conf), p. 14 lines 9-24; MLI-D28-0006-9230.

³⁷ ICC-01/12-01/18-2614-Conf, paras. 26-27, 32; ICC-01/12-01/18-2611-Conf, paras. 6-12.

connection with the Sentencing Decision.³⁸ The Chamber's legal reasoning in the Second Sentencing Decision is manifestly erroneous due to the absence of any basis for distinguishing between the items that were submitted in the First Sentencing Decision as compared to those which were rejected *in limine* in the Second Sentencing Decision.

3. Reconsideration is required to prevent a manifestly unsound result

30. The Chamber's decision to treat Mr Al Hassan's sworn evidence as an unsworn statement will generate manifest prejudice as concerns the ability of the Defence to raise relevant Rule 145 arguments in its sentencing submissions.

31. Throughout the course of this case, the Trial Chamber has afforded little or no weight to Defence expert reports concerning Mr Al Hassan's mental state due to the absence of an independent evidential foundation from Mr Al Hassan himself.³⁹ Given this finding, the Defence sought to introduce Mr Al Hassan's statements as evidence in order to create a foundation for argument and expert opinion as concerns Mr Al Hassan's state of mind while detained at the ICC. The Trial Chamber's decision impedes the Defence from satisfying the evidential threshold for doing so. Indeed, as illustrated by its rejection of all associated and related exhibits, it appears as if the Trial Chamber considers that in the absence of sworn evidence from Mr Al Hassan, the Defence cannot introduce evidence or argument concerning Mr Al Hassan's subjective experience of detention and specific conditions or restraints that applied in detention. The Second Sentencing Decision was transmitted to the parties mere minutes after the Defence submitted its application to introduce an expert report from Dr Brock Chisolm, which cited Mr Al Hassan's statements, in order to satisfy the Trial Chamber's prior rulings.⁴⁰ Unless reconsidered and reversed, the Second Sentencing Decision will generate manifest prejudice as concerns Mr Al Hassan's ability to seek either mitigation (to the standard of balance of probabilities) or a proportionate sentence based on his personal circumstances.

32. A further injustice arises from the manner in which the Trial Chamber reached its

³⁸ [ICC-01/12-01/18-2629](#), para 35.

³⁹ ICC-01/12-01/18-1475-Conf, para. 70; Trial Judgment, para 303.

⁴⁰ Given the specific purpose of sentencing and in line with ICTY precedents, which have accepted psychological reports in the absence of a sworn declaration from the accused, it is submitted that the Chamber's treatment of Mr Al Hassan's statement should not negatively affect the admission of Dr Chisolm's report: *Rasic*, [Appeals Judgment](#), para. 31.

determination, without first affording the Defence a right to be heard on this specific issue. The Trial Chamber had previously admitted the statements of Mr Al Hassan, citing Article 56 of the Statute as a legal basis for admission.⁴¹ Article 56 is directly related to Rule 68 in that it creates a vehicle that allows the Prosecution to introduce testimonial evidence, even if the requirements of the latter are not fulfilled. This linkage is supported by the express wording of Rule 68(1), which is prefaced by the phrase “[w]hen the Pre-Trial Chamber has not taken measures under article 56”. The Prosecution cited Article 56 in connection with the admission of Mr Al Hassan’s statement, arguing that as a result of its application, the Prosecution was not required to satisfy the requirements of Rule 68.⁴² The tenor of this argument was thus that Rule 68 would have applied had the Prosecution not followed Article 56 procedures.

33. When viewed in light of inconsistent ICC case law concerning the applicability of Rule 68 to an accused’s statements⁴³ and the very short time afforded to the Defence to finalise Mr Al Hassan’s statements and introduce the related application, the Defence acted reasonably in seeking to comply with the enhanced requirements of Rule 68. Even if this was mistaken, it occasioned no prejudice to the Prosecution. It is manifestly unreasonable to render an adverse ruling due to Defence efforts to comply with past precedents in this case.

34. Finally, unless reconsidered, the Trial Chamber’s reasoning will result in a procedural lacuna and asymmetry that operates to the detriment of an accused who wishes to introduce evidence by choice through their Counsel rather than through the Prosecution.

III. RELIEF SOUGHT

35. For the reasons set out above, the Defence for Mr Al Hassan respectfully requests the

⁴¹ ICC-01/12-01/18-1475-Conf, paras.2 (referring to the materials as the ‘Article 56 evidence), 23 (referring to evidence preserved under Article 56 and submitted through Article 69(without specifying sub-article)). The Decision also focussed on whether there was a basis for exclusion under Article 69(7) or (4) rather than the legal avenue for admission per se. See also ICC-01/12-01/18- 1218-Conf-Exp

⁴² ICC-01/12-01/18-1218-Conf-Exp fn. 20: “Evidence preserved under article 56 constitute an exception to rule 68 for the introduction of previously recorded testimonial evidence. This is also apparent from rule 68(1): “When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may [...] allow the introduction of previously recorded audio or video testimony of a witness [...] provided [...] that the requirement of one or more of the following sub-rules are met.”. See also footnote 21: “Rule 68 of the Rules does not apply to evidence collected under Article 56 of the Statute. See rule 68(1).”

⁴³ See [ICC-01/04-01/07-2635](#).

Trial Chamber to:

- **RECONSIDER** the Second Sentencing Decision; and
- **ADMIT** Mr Al Hassan's 2024 statement and related exhibits as evidence; or in the alternative,
- **ADMIT** the items identified at paragraph 23 of this Request into evidence.



Melinda Taylor
Lead Counsel for Mr Al Hassan

Dated this 14th day of August 2024
At The Hague, The Netherlands