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No. ICC-01/12-01/18

Date: 21 August 2024

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

**Decision on the Defence request for reconsideration of the Second 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 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 Nigel Verrill	Detention Section
Victims Participation and Reparations Section	Other

TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 64, 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 ‘Decision on the Defence request for reconsideration of the Second decision on Defence requests for the introduction of sentencing evidence’.

I. Procedural history

1. On 22 July 2024, the Defence filed a request to introduce, as additional sentencing evidence: (i) a statement of Mr Al Hassan (‘Mr Al Hassan’s Statement’) and associated exhibits (the ‘Associated Exhibits’) pursuant to Rule 68(2)(b) of the Rules; together with (ii) other related documents (the ‘Related Documents’) pursuant to Article 69(2) of the Statute (the ‘Original Request’).¹
2. On 8 August 2024, the Chamber issued a decision rejecting the Original Request but deciding to nevertheless recognise Mr Al Hassan’s Statement (together with some sketches which were one of the Associated Exhibits), as an unsworn statement pursuant to Article 67(1)(h) of the Statute (the ‘Impugned Decision’).²
3. On 14 August 2024, the Defence requested reconsideration of the Impugned Decision (the ‘Request’)³ on the basis that: (i) the Chamber ‘committed a clear error of legal reasoning in finding there exist[ed] 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 (ii) the 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’.⁴ In seeking the reconsideration, the Defence requests admission of Mr

¹ 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).

² Second decision on Defence requests for the introduction of sentencing evidence, ICC-01/12-01/18-2633.

³ Request for Reconsideration of the Second decision on Defence requests for the introduction of sentencing evidence, ICC-01/12-01/18-2635-Conf (public redacted version filed simultaneously, ICC-01/12-01/18-2635-Red).

⁴ Request, ICC-01/12-01/18-2635-Red, para. 2. *See also generally* paras 4-34.

Al Hassan's Statement, the Associated Exhibits and the Related Documents as evidence, or in the alternative, admission of two of the Related Documents as evidence.⁵

4. On 19 August 2024, the Prosecution responded to the Request (the 'Response'), submitting that it should be rejected.⁶ The Prosecution submits that: (i) the Defence has failed to present any clear error of reasoning or injustice in the Second Decision; and (ii) the Defence should have sought leave to appeal.⁷

II. Analysis

5. The Chamber recalls that it has the power to exceptionally reconsider its decisions if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.⁸ New facts and arguments arising since the decision was rendered may be relevant to this assessment.⁹ A request for reconsideration, being an exceptional remedy, cannot be used as an attempt to re-litigate points which have already been made before the Chamber.¹⁰
6. In the Impugned Decision the Chamber found that Rule 68(2)(b) of the Rules did not apply to Mr Al Hassan's Statement by virtue of the fact that he was not a 'witness' for the purposes of this provision.¹¹ The Chamber consequently rejected the Original Request on the basis that Rule 68(2)(b) of the Rules was not an appropriate legal basis for the submission of the Mr Al Hassan's Statement and the Associated Exhibits and that there was a procedural bar to the introduction of the material through that provision.¹² As for the Related Documents, the Chamber noted that they had been presented as material which was 'related to' Mr Al

⁵ Request, ICC-01/12-01/18-2635-Conf, para. 35.

⁶ Prosecution response to the "Request for Reconsideration of the Second decision on Defence requests for the introduction of sentencing evidence, ICC-01/12-01/18-2635-Conf", ICC-01/12-01/18-2637-Conf.

⁷ Response, ICC-01/12-01/18-2637-Conf, paras 7, 14, 17.

⁸ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', 9 April 2020, ICC-01/12-01/18-734, para. 11.

⁹ ICC-01/12-01/18-734, para. 11.

¹⁰ Decision on Defence request for reconsideration of Decision on requests related to the submission into evidence of Mr Al Hassan's statements, 23 November 2022, ICC-01/12-01/18-2414, para. 7.

¹¹ Impugned Decision, ICC-01/12-01/18-2633, para. 16.

¹² Impugned Decision, ICC-01/12-01/18-2633, para. 16.

Hassan's Statement.¹³ As a consequence, the Chamber did not consider it necessary to authorise introduction of this material in light of its decision to treat Mr Al Hassan's Statement as an unsworn statement pursuant to Article 67(1)(h) of the Statute and not as evidence.¹⁴

7. The Chamber considers that the Defence has failed to indicate any clear error of legal reasoning in the Impugned Decision.¹⁵ The case law cited in the Impugned Decision is clear in holding Rule 68 of the Rules inapplicable as a legal basis for introducing a statement from an accused person.¹⁶ In arguing the contrary the Defence notably mischaracterises the *Bemba et al.* jurisprudence by submitting that Trial Chamber VII in that case 'found that Rule 68 did not prevent or erect any procedural bar to the admission of the statement'.¹⁷ Rather, there Trial Chamber VII dismissed a defence argument that a statement of the accused was only admissible under Rule 68 of the Rules, finding that on its plain language Rule 68 did not apply.¹⁸ To the extent that the Defence relies on case law in *Katanga and Ngudjolo*¹⁹ not cited in the Impugned Decision, the Chamber notes that this jurisprudence does not support the Defence's contentions regarding the applicability of Rule 68 to Mr Al Hassan's Statements.²⁰

¹³ Impugned Decision, ICC-01/12-01/18-2633, para. 20.

¹⁴ Impugned Decision, ICC-01/12-01/18-2633, para. 20.

¹⁵ See Request, ICC-01/12-01/18-2635-Conf, paras 4-29. Notably, the Defence submits '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' (Request, ICC-01/12-01/18-2635-Red, para. 4).

¹⁶ Impugned Decision, ICC-01/12-01/18-2633, para. 16.

¹⁷ Request, ICC-01/12-01/18-2635-Red, para. 11.

¹⁸ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, 30 October 2015, ICC-01/05-01/13-1432, paras 4, 22 ('by its plain language, Rule 68 of the Rules only applies to the prior recorded testimony of a witness. Mr Arido is an accused in this case - he is not a witness. Thus, as the Arido Statements are not the prior recorded testimony of a witness, Rule 68 of the Rules does not apply').

¹⁹ Request, ICC-01/12-01/18-2635-Red, para. 9.

²⁰ As noted by the Prosecution, in the decision cited Trial Chamber II was assessing Prosecution bar table motions, including under Articles 55, 64, 67, 69 of the Statute, and Rules 63, 64, and 68 of the Rules and considered whether the prior, out-of-court statement of one co-accused containing accusations against the other could be admitted when this might compel one co-accused to be examined by, or on behalf of

8. Additionally, in relation to the Defence's argument that there was a clear error on the part of the Chamber not to admit the relevant materials under Article 69(4) of the Statute, the Chamber observes that Article 69(4) of the Statute was not invoked at all in the Original Request. In any event, the Chamber's reasoning in the Impugned Decision to treat Mr Al Hassan's Statement as an unsworn statement pursuant to Article 67(1)(h) of the Statute was that this was appropriate in light of the nature, content and purpose of Mr Al Hassan's Statement, in particular in that it was *addressed to the Chamber for the purposes of the current sentencing procedure*.²¹ In this respect the Chamber notes that the present circumstances are factually distinguishable from the jurisprudence cited by the Defence which concerned prior, out of court statements made by an accused person governed by different provisions of the Court's legal framework.²² No clear error of legal reasoning has accordingly been demonstrated in this respect by the Defence.
9. Further, the Chamber considers that the Defence has failed to establish that reconsideration is required to prevent an injustice.²³ Contrary to the Defence submission that the Chamber's reasoning 'prevent[s] the Defence from substantiating critical elements related to the mitigation and proportionality of Mr Al Hassan's sentence',²⁴ in the Impugned Decision the Chamber noted that the unsworn statement under Article 67(1)(h) of the Statute, while not constituting evidence, may still be taken into account by the Chamber.²⁵ In making submissions

the other. Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, paras 52-65. See also Response, ICC-01/12-01/18-2637-Conf, para. 10.

²¹ Impugned Decision, ICC-01/12-01/18-2633, para. 18.

²² See notably Request, ICC-01/12-01/18-2635-Red, paras 11, 13, citing to Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, 30 October 2015, ICC-01/05-01/13-1432, where Trial Chamber VII considered the admissibility of statements made by one of the accused persons to French authorities before he was surrendered to the ICC. Further, the Chamber notes that in the *Katanga and Ngudjolo* decision cited by the Defence, Trial Chamber II considered the admissibility of statements made by Mr Katanga and by Mr Ngudjolo to DRC judicial authorities which predated the issuance of arrests warrants against them by the ICC (Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635).

²³ Request, ICC-01/12-01/18-2635-Red, paras 30-34.

²⁴ Request, ICC-01/12-01/18-2635-Red, para. 7.

²⁵ Impugned Decision, ICC-01/12-01/18-2633, para. 17.

on the ‘procedural lacuna’²⁶ purportedly arising as a result of the reasoning in the Impugned Decision, the Defence ignores the fact that an accused person has the option of providing oral testimony preceded by a solemn undertaking and subject to questioning, as clearly established in the Court’s jurisprudence.²⁷

10. The Chamber accordingly rejects the Request, finding that the Defence has failed to present persuasive arguments as to why the exceptional remedy of reconsideration is warranted.
11. Without prejudice to the conclusion above, the Chamber notes that one of the documents mentioned in the Defence’s Request, a letter from national authorities dated September 2021 (the ‘Letter’),²⁸ is quite distinct from the remainder of the Related Documents which were sought to be introduced in the Original Request. While not meeting the threshold for reconsideration for the reasons set out above, the Chamber in its discretion decides to nevertheless reconsider the introduction of this item into evidence and notes that no procedural bar exists to such introduction. The Chamber accordingly allows the introduction of the Letter into evidence, without prejudice to the Chamber’s eventual consideration of the relevance and probative value of this document, and the weight to be afforded to it, if any.

²⁶ See Request, ICC-01/12-01/18-2635-Red, para. 34. See also para. 19.

²⁷ See e.g. Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Unsworn Statement by the Accused, 1 November 2013, ICC-01/05-01/08-2860, para. 8; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Directions on the Conduct of the proceedings, 3 September 2015, ICC-02/11-01/15-205, para. 26; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request to modify the schedule for the first two evidentiary blocks, 19 May 2017, ICC-01/04-02/06-1914, paras 15, 18; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on further matters related to the testimony of Mr Ntaganda, 8 June 2017, ICC-01/04-02/06-1945, para. 24.

²⁸ MLI-D28-0007-0671. See Request, ICC-01/12-01/18-2635-Conf, paras 25-26.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

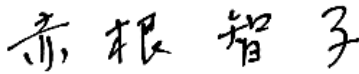
REJECTS the Request; and

RECOGNISES the submission into evidence of the item listed in footnote 28 above.

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, 21 August 2024

At The Hague, The Netherlands