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**No. ICC-01/12-01/18
Date: 22 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

Third 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 ‘Third 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 to introduce further evidence relevant to the Chamber’s decision on sentence pursuant to Article 76 of the Statute (the ‘Sentencing decision’).²
2. 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.³
3. On 22 and 23 July 2024, the Defence filed several requests to introduce additional sentencing evidence.⁴
4. On 31 July 2024, the Chamber decided on some of the Defence requests to introduce additional sentencing evidence (the ‘First Decision’).⁵ In this decision the Chamber relevantly authorised the introduction of the prior recorded testimony of witnesses

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 Single Judge, 22 July 2024, at 15:08.

⁴ See First decision on Defence requests for the introduction of sentencing evidence, 31 July 2024, ICC-01/12-01/18-2629, para. 4.

⁵ First decision on Defence requests for the introduction of sentencing evidence, 31 July 2024, ICC-01/12-01/18-2629.

D-0801, D-0803, D-0807, D-0808 and D-0809 pursuant to Rule 68(2)(b) of the Rules.⁶

5. On 8 August 2024, the Chamber decided on a Defence request to introduce additional sentencing evidence related to a written statement of Mr Al Hassan (the ‘Second Decision’).⁷
6. On 8 August 2024, in accordance with an extension granted by the Single Judge,⁸ the Defence requested the introduction of a report of Dr Brock Chisholm dated 6 August 2024 and associated exhibits through Rule 68(2)(b) of the Rules (the ‘Request’).⁹
7. On 15 August 2024, in accordance with the deadline set by the Single Judge,¹⁰ the Prosecution filed its response to the Request (the ‘Response’).¹¹ The Prosecution opposes the Request primarily on the basis that the report and associated exhibits have extremely limited, if any, relevance for sentencing purposes.¹² It submits that if the Chamber is minded to introduce the material into evidence, very little, if any, weight should be attributed to it.¹³
8. On 16 August 2024, the Defence requested leave to reply to an issue raised in the Response, namely whether, for the purposes of sentencing, the Prosecution may rely on selected extracts of the report of the panel of experts - previously appointed by the Chamber to conduct a medical examination of Mr Al Hassan pursuant to Rule 135 of the Rules and assess his ongoing fitness to stand trial (the ‘Panel of Experts’) - without either having submitted the report into evidence in its entirety, or submitting a Regulation 35 request to belatedly add the Panel of Experts to its list

⁶ First Decision, ICC-01/12-01/18-2629, para. 27.

⁷ Second decision on Defence requests for the introduction of sentencing evidence, ICC-01/12-01/18-2633. *See also* Decision on the Defence request for reconsideration of the Second decision on Defence requests for the introduction of sentencing evidence, 21 August 2024, ICC-01/12-01/18-2638.

⁸ Email from the Single Judge, 22 July 2024, at 15:08.

⁹ Application to submit expert report and related materials of Dr Brock Chisholm, ICC-01/12-01/18-2634-Conf (with confidential Annex A).

¹⁰ Email from the Single Judge, 22 July 2024, at 15:08.

¹¹ Prosecution response to Defence Application to submit expert report and related materials of Dr Brock Chisholm under rule 68(2)(b), ICC-01/12-01/18-2636-Conf.

¹² Response, ICC-01/12-01/18-2636-Conf, paras 1-2.

¹³ Response, ICC-01/12-01/18-2636-Conf, para. 2.

of witnesses (the ‘Request for Leave to Reply’).¹⁴ The Prosecution responded to the Request for Leave to Reply on the same day, submitting that it should be rejected.¹⁵

II. Analysis

9. This decision deals with the Request and some outstanding matters related to the First Decision.
10. As a preliminary matter, the Chamber considers that it would not be further assisted by submissions identified by the Defence in the Request for Leave to Reply and accordingly rejects that request. Nevertheless, the Chamber notes that the parties are free to continue to refer in their submissions to the report of the Panel of Experts (the ‘Panel Report’) without the report needing to be formally submitted into evidence.
11. The Chamber applies the same approach to requests for additional sentencing evidence as set out in the First Decision.¹⁶ 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 and defer 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 to the Sentencing decision, as necessary. At the same time, the Chamber maintains discretion to make discrete determinations on the admissibility of specific evidence as warranted.¹⁷
12. The Chamber also incorporates its interpretation of the relevant legal framework related to Rule 68(2)(b) of the Rules as set out in the First Decision.¹⁸

¹⁴ Email from the Defence, 16 August 2024, at 15:37 *referring to* Public Redacted Version of “Annex to Registry Transmission of the Report of the Experts”, 9 December 2020, ICC-01/12-01/18-1197-Anx-Red.

¹⁵ Email from the Prosecution, 16 August 2024, at 16:04.

¹⁶ First Decision, ICC-01/12-01/18-2629, paras 12-13.

¹⁷ See First Decision, ICC-01/12-01/18-2629, para. 12.

¹⁸ See First Decision, ICC-01/12-01/18-2629, paras 14-15.

1. *The Request*

13. The Defence seeks to introduce the following items into evidence pursuant to Rule 68(2)(b) of the Rules,¹⁹ a report of Dr Chisholm dated 6 August 2024 (the ‘Report’);²⁰ and associated exhibits comprising: (i) Dr Chisholm’s curriculum vitae²¹ and passport;²² (ii) instructions from the Defence, namely email instructions dated 23 July 2024²³ and a letter of instruction dated 21 February 2024²⁴ and an annex of materials provided;²⁵ (iii) a report of Dr Brock Chisholm dated 23 February 2021;²⁶ and (iv) publications relied upon for methodology (the ‘Exhibits’).²⁷

14. The Defence submits that Dr Chisholm is a clinical psychologist and ‘recognised expert on trauma and trauma symptomology arising from experiences occurring in a detention environment’²⁸ and that he is ‘well-placed to assess and provide an expert opinion in relation to whether Mr Al Hassan experienced any trauma symptomology during his detention at the ICC Detention Unit and whether such symptomology aggravated or heightened the severity and intensity of detention restrictions experienced by Mr Al Hassan’.²⁹ It submits that Mr Al Hassan’s ‘experience significantly exceeds the degree of deprivation generally associated with pre-trial detention’³⁰ and that Mr Al Hassan experienced additional hardship and suffering in detention because of his personal circumstances due to ‘underlying symptomology’ and ‘underlying vulnerabilities’.³¹

¹⁹ Request, ICC-01/12-01/18-2634-Conf, para. 1.

²⁰ Report, MLI-D28-0007-0884. *See also* ICC-01/12-01/18-2634-Conf-AnxA.

²¹ MLI-D28-0007-0869.

²² MLI-D28-0007-0868.

²³ MLI-D28-0007-0918.

²⁴ MLI-D28-0003-2298.

²⁵ MLI-D28-0007-0910.

²⁶ MLI-D28-0003-2272 (this item appears to be incorrectly referred to in footnote 7 of the Request as MLI-D28-0003-2297).

²⁷ MLI-D28-0007-0964; MLI-D28-0007-0954 (this item appears to be incorrectly referred to in footnote 8 of the Request as MLI-D28-0007-0953); MLI-D28-0007-0977; MLI-D28-0007-0920.

²⁸ Request, ICC-01/12-01/18-2634-Conf, paras 2, 6-7.

²⁹ Request, ICC-01/12-01/18-2634-Conf, para. 2.

³⁰ Request, ICC-01/12-01/18-2634-Conf, para. 3.

³¹ Request, ICC-01/12-01/18-2634-Conf, paras 16-17, 31-32.

15. As noted above, the Prosecution opposes the Request primarily on the basis that the report and associated exhibits have extremely limited, if any, relevance for sentencing purposes.³² In this regard, it notably submits that Mr Al Hassan's alleged mental health is not relevant for sentencing purposes and that according to the jurisprudence poor health is mitigating only in extreme and exceptional circumstances which are not established in this case.³³ It also argues that Mr Al Hassan's family situation does not amount to a mitigating factor or circumstances of relevance for sentencing purposes, and that COVID restrictions are not relevant as mitigating circumstances for sentencing.³⁴ In addition, the Prosecution submits that it would be inappropriate for the report and associated exhibits to be introduced into evidence pursuant to Rule 68 of the Rules without any opportunity to cross examine Dr Chisholm on the basis that Dr Chisholm 'has not acted in a truly independent, neutral manner'.³⁵ It also notably submits that the report and associated exhibits relate to matters materially in dispute and uncorroborated matters, highlighting that, in their view, the Defence seeks to relitigate the admission of Mr Al Hassan's statement as evidence,³⁶ and the findings of the Panel of Experts.³⁷ It submits that if the Chamber is nevertheless minded to introduce the report and associated exhibits into evidence, very little, if any, weight should be attributed to them.³⁸

16. 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. Considering the content of the Request and the submissions of the parties, the Chamber considers there to be good reason to consider at this

³² Response, ICC-01/12-01/18-2636-Conf, paras 1-2, 10-52. *See also* paras 73-76.

³³ Response, ICC-01/12-01/18-2636-Conf, para. 22, footnote 18 *referring to* Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence", 15 December 2022, ICC-02/04-01/15-2023, para. 265.

³⁴ Response, ICC-01/12-01/18-2636-Conf, paras 40-52.

³⁵ Response, ICC-01/12-01/18-2636-Conf, paras 4-5, 53-60.

³⁶ Response, ICC-01/12-01/18-2636-Conf, para. 3.

³⁷ Response, ICC-01/12-01/18-2636-Conf, paras 3, 6, 61-72.

³⁸ Response, ICC-01/12-01/18-2636-Conf, para. 2.

juncture the *prima facie* relevance of this evidence to the Chamber's determinations in the context of sentencing.

17. The Chamber notes that for the purpose of the Report Dr Chisholm was asked to provide an opinion on 'any symptomology[/ies] [...] that are relevant to the manner in which [Mr Al Hassan] experiences his conditions of detention and/or the trial proceedings' and 'particular events, which occurred since [Mr Al Hassan's] arrival at the Hague, which may have produced either separate symptomologies or which may have impacted existing symptomologies', and for each case, 'the impact on the manner in which [Mr Al Hassan] experienced his conditions of detention and/or the trial proceedings'.³⁹ According to the Defence, the Report is relevant to the factors set out in Rule 145 of the Rules in that it will assist the Chamber to assess 'the extent to which Mr Al Hassan has already experienced an extremely intense degree of punishment, due to trauma symptomology'.⁴⁰
18. The Chamber recalls that according to the jurisprudence of this Court the health of the convicted person at the time of sentencing need not automatically be taken into account in mitigation of a sentence; poor health should not automatically be seen as a mitigating circumstance and it is only in extreme and exceptional cases that a very serious health condition, or perhaps terminal disease, may have to be taken into account as a mitigating circumstance.⁴¹ The management of the convicted person's health is primarily a matter for the enforcement of the imposed sentence, rather than a factor bearing upon the determination of its length.⁴²

³⁹ Report, MLI-D28-0007-0884, at 0888-0889.

⁴⁰ Request, ICC-01/12-01/18-2634-Conf, para. 3.

⁴¹ See Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Sentence, 6 May 2021, ICC-02/04-01/15-1819-Conf (public redacted version notified on the same day, ICC-02/04-01/15-1819-Red), para. 103 and references cited in footnote 194. See also Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence", 15 December 2022, ICC-02/04-01/15-2023, paras 264-266 and generally 199, 203, 263-271. See also Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Sentence pursuant to Article 76 of the Statute, 22 March 2017, ICC-01/05-01/13-2123-Corr, para. 187 and reference cited in footnote 306.

⁴² ICC-02/04-01/15-1819-Red, para. 103. See also ICC-02/04-01/15-2023, paras 264-266.

19. To the extent that the Defence submits that the Report and Exhibits will assist the Chamber to ‘evaluate Mr Al Hassan’s state of mind, at relevant points during his detention at the ICC’,⁴³ the Chamber observes that, in the context of the Request, Mr Al Hassan’s state of mind in detention is not relevant *per se* for the Chamber’s sentencing determinations save within the specific context set out in jurisprudence noted above.
20. The Chamber notes that according to the Report Mr Al Hassan has experienced a range of symptoms (ranging from severe to mild) and difficulties during the period of his detention.⁴⁴ Notwithstanding, nothing in the Report or Exhibits indicates to the Chamber that the high threshold for taking the poor health of a convicted person into account in mitigation of sentence - limited to ‘extreme and exceptional’ cases - has been reached in the present case, such that the Report (and Exhibits) would be relevant for the Chamber’s sentencing determinations. Notably in this regard, Dr Chisholm opines that Mr Al Hassan previously met criteria for post-traumatic stress disorder (hereinafter: ‘PTSD’)⁴⁵ but observes that the severity of this had generally improved over time in the ICC Detention Centre and following treatment.⁴⁶ While Dr Chisholm notes that Mr Al Hassan’s mental health had declined over concerns for his family’s safety, Dr Chisholm’s view is that this has also significantly improved.⁴⁷ The Chamber additionally recalls that, contrary to some of the views expressed by Dr Chisholm, the Panel of Experts (three independent experts appointed by the Chamber) concluded, as a whole, in December 2020, that Mr Al Hassan did not suffer from PTSD, depressive disorder or any other recognised psychiatric condition.⁴⁸ While the Panel Report was prepared for the purpose of

⁴³ Request, ICC-01/12-01/18-2634-Conf, para. 5.

⁴⁴ See Report, MLI-D28-0007-0884, at 0895-0904 paras 41-46, 51-96. *See also generally* 0888, paras 7-10, 0890-0904, paras 13-96.

⁴⁵ Report, MLI-D28-0007-0884, at 0896-0897, paras 51-56. *See also* Report, MLI-D28-0007-0884, at 0888, para. 7, 0891-0892, paras 23-24, 0894, paras 34-37, 0901-0904, paras 81-96.

⁴⁶ Report, MLI-D28-0007-0884, at 0897, para. 58, 0901, para. 81. *See also* Report, MLI-D28-0007-0884, at 0898, para. 62.

⁴⁷ Report, MLI-D28-0007-0884, at 0897, para. 58

⁴⁸ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras, 164-201, 234, 322. *See also* Decision on Mr Al Hassan’s ongoing fitness to stand trial, 10 May 2021, ICC-01/12-01/18-1467 (‘Fitness Decision’), para. 74 and footnote 136 and the observations therein. The Chamber also recalls that it previously directed the Registry to take into account the Panel of Experts’ various recommendations as regards use of

determining Mr Al Hassan's ongoing fitness to stand trial rather than for sentencing, the Chamber considers these conclusions pertinent in the context of the present decision. Other observations in the Report (some related to the PTSD) around the impact of COVID-19 restrictions on Mr Al Hassan during the period of this detention and difficulties related to his family⁴⁹ similarly do not, in the Chamber's view, rise to the threshold of 'extreme and exceptional' established in the Court's jurisprudence.

21. The Chamber accordingly finds the Report and Exhibits to be insufficiently relevant to warrant introduction for sentencing purposes through Rule 68(2)(b) of the Rules and rejects the Request.

2. Outstanding matters related to the First Decision

22. The Chamber recalls that it directed the Defence to make certain additional disclosures in order to complete the record in respect of requests granted in the First Decision. The Chamber notes the further disclosures made by the Defence of:⁵⁰ (i) lesser redacted versions of D-0801's identity documents,⁵¹ D-0803's statement,⁵² D-0807's statement,⁵³ D-0808's statement⁵⁴ and D-0809's identity document;⁵⁵ (ii) copies of D-0803's,⁵⁶ D-0807's⁵⁷ and D-0808's⁵⁸ identity cards; and (iii) translations of D-0801's identity documents.⁵⁹ The Chamber authorises the introduction of these additional items into evidence, noting that they are updated

handcuffs, family visits, treatment options and activities in the Detention Centre (Fitness Decision, ICC-01/12-01/18-1467, para. 85).

⁴⁹ Report, MLI-D28-0007-0884, at 0893, para. 27, 0895-0898, paras 42-45, 58-61, 0902-0904, paras 87-96.

⁵⁰ See email from the Defence, 6 August 2024, at 11:39.

⁵¹ D-0801's identity documents, MLI-D28-0007-0681-R02 and MLI-D28-0007-0881-R01 (the Chamber notes that MLI-D28-0007-0881-R01 is clearer and lesser redacted version of the previously submitted version of D-0801's identity document MLI-D28-0007-0667-R01).

⁵² D-0803's statement MLI-D28-0007-0610-R02.

⁵³ D-0807's statement MLI-D28-0007-0855-R02.

⁵⁴ D-0808's statement MLI-D28-0008-0006-R02.

⁵⁵ D-0809's identity document MLI-D28-0007-0847.

⁵⁶ D-0803's identity document MLI-D28-0007-0688-R01.

⁵⁷ D-0807's identity document MLI-D28-0007-0866-R02.

⁵⁸ D-0808's identity document MLI-D28-0007-0867.

⁵⁹ MLI-D28-0007-0882-R01; MLI-D28-0007-0883-R01.

versions of, or material related to, the prior recorded testimony already authorised for introduction pursuant to Rule 68(2)(b) of the Rules in the First Decision.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Reply;

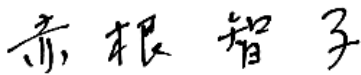
REJECTS the Request; and

RECOGNISES the submission into evidence of the items listed in footnotes 51-59, 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 Thursday, 22 August 2024

At The Hague, The Netherlands