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**International
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TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
Judge Tomoko Akane
Judge Kimberly Prost

SITUATION IN THE REPUBLIC OF MALI

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

Public

**Public redacted version of “Defence response to ‘Demande en reconsideration de la
décision ICC-01/12-01/18-992 rejetant la qualité de victime participante à
a/45535/18’”**

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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**Unrepresented Applicants
(Participation/Reparation)**

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I. Introduction

1. In January 2014, an application form concerning participation as a victim to the Registrar was submitted to the Victims Participations and Reparation Section in relation to Victim a/25038/14 ('the applicant') ('2014 victim application').¹
2. On 9 November 2018, the same individual, now designated as Victim a/45535/18, submitted a further form for participation as a victim to the Registrar ('2018 victim application').² After the confirmation of charges hearings, the Prosecution contacted the applicant and obtained his testimony as Witness P-0641 in the proceedings.
3. On 1 May 2020, Pre-Trial Chamber I issued its 'Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf' ('Amendment Decision').³ The criminal facts relating to, *inter alia*, P-0641 were added to Count 13.⁴
4. On 29 June 2020, the Registry filed its 'Registry's Third Assessment Report on Victim Applications for Participation in Trial Proceedings.'⁵ In the Report, the Registry classified under 'Group B' applications for victim status which in the opinion of the Registry fell outside the scope of the charges, which included the applicant's 2018 application.⁶
5. On 10 August 2020, Trial Chamber X issued its 'Third decision on the admission of victims to participate in trial proceedings'⁷ ('Decision'). The Decision, *inter alia*, rejected the request for victim status for the Group B applicants,⁸ stating: 'In particular, the Chamber notes that the facts recounted by these applicants have been assessed as falling outside the territorial and/or temporal scope of the case.'⁹

¹ [REDACTED]

² ICC-01/12-01/18-1310-Conf, para 1.

³ ICC-01/12-01/18-767-Corr.

⁴ ICC-01/12-01/18-767-Corr, para 197. See, more recently: ICC-01/12-01/18-923-Conf-AnxA, para 19(e).

⁵ ICC-01/12-01/18-910.

⁶ ICC-01/12-01/18-910, paras 1 and 4.

⁷ ICC-01/12-01/18-992.

⁸ ICC-01/12-01/18-992, para 12; ICC-01/12-01/18-992-AnxB, p. 1.

⁹ ICC-01/12-01/18-992, para 12.

6. On 26 January 2021, Trial Chamber X issued its ‘Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the rules’¹⁰ which referred to the applicant as a ‘dual status witness’.¹¹
7. On 8 February 2021, the Prosecution sought the Chamber’s confirmation of the applicant’s status.¹² On 9 February 2021, the Chamber confirmed that the applicant was not a participating victim.¹³
8. On 19 February 2021, the Legal Representatives for Victims (‘LRV’) filed their ‘Demande en reconsideration de la décision ICC-01/12-01/18-992 rejetant la qualité de victime participante à a/45535/18’ (‘Request’).¹⁴
9. On 8 March 2021, the Chamber authorised the Defence to file its response to the Request before 16:00 on 8 March 2021.
10. The Defence submits that the Request should be rejected, as it does not satisfy the threshold for reconsideration.

II. Confidentiality

11. Pursuant to Regulation 23*bis*(2) of the Regulations of Court, this response has been filed confidentially as it responds to a filing of the same classification.

III. Submissions

12. As the LRV identify,¹⁵ ‘[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or it if it necessary to do so to prevent an injustice.’¹⁶
13. The LRV have failed to identify such exceptional grounds. In the Request, the LRV state that injustice was occasioned by the appraisal of his application form alone,

¹⁰ ICC-01/12-01/18-1267-Conf.

¹¹ ICC-01/12-01/18-1267-Conf, para 46.

¹² Email from the Prosecution dated 8 February 2021 at 16:25.

¹³ Email from the Chamber dated 9 February 2021 at 09:48.

¹⁴ ICC-01/12-01/18-1310-Conf.

¹⁵ ICC-01/12-01/18-1310-Conf, para 12.

¹⁶ [ICC-01/04-02/06-519](#), para 12 and the references contained therein at fn. 31.

rather than taken cumulatively with his witness statement and the Chamber's findings in the Amendment Decision.¹⁷

14. This not only does not constitute exceptional grounds for reconsideration; it is inconsistent with the practice and procedure of this Court.
15. Rule 89(1) of the Rules of Procedure and Evidence sets out a framework whereby individuals apply for victim status by way of a written application which is appraised by the Registry and Chamber:

In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

16. On 24 May 2018, Pre-Trial Chamber I established a clear procedure for victim participation ('PTC Procedure') whereby, *inter alia*:
 - a. the Registry categorises applicants for victim status into: Group A (applicants who clearly qualify as victims); Group B (applicants for whom the Registry could not make a clear determination for any reason) and Group C (applicants for whom the Registry could not make a clear determination for any reason); and
 - b. the Chamber individually assesses the Group C applications (by reference to the parties), and ratifies the Registry's assessment of the Group A and Group B applications barring a 'clear and material error'.¹⁸

¹⁷ ICC-01/12-01/18-1310-Conf, paras 13-15, [REDACTED]

¹⁸ ICC-01/12-01/18-37-tENG, paras 59(i), 59(ix).

17. On 12 March 2020, Trial Chamber X decided to continue the PTC Procedure, including that the Chamber would continue to ratify the Registry's determination of Group B applications.¹⁹
18. The LRV seek, in their Request, that the Chamber appraise the applicant's victim status by reference to not only the application, but also the witness statement provided to the Prosecution and the Chamber's previous conclusions in the Amendment Decision.²⁰ This proposed method is inconsistent with the procedure adopted in this case since May 2018, whereby the Chamber does not make individual assessments of Group B applications, or overrule the Registry's findings. The proposed method would also affect the impartiality of the Chamber, as it would require the Chamber to make determinations concerning the veracity and reliability of the applicant's witness statement before the witness testifies.
19. This inconsistency with the established procedure is inappropriate, not just because it introduces arbitrariness and uncertainty into the process but also because it confuses and conflates two different issues: *first*, the procedural status of a person as a victim for the purposes of the proceedings in accordance with clearly outlined principles and procedures; and *second*, the Chamber's duty and role to consider and make findings on substantive issues of proof. The LRV are requesting the Chamber to rely on Prosecution evidence in the specific context of this victim application, which would make the Prosecution essentially a party to this application.
20. The proposed approach, furthermore, is arbitrary in relation to the material which the LRV submits should be the subject of the Chamber's consideration of the applicant's victim status. As indicated above, the applicant has filed two victim applications:
- a. the 2014 victim application, which has not been disclosed to the Defence; and
 - b. the 2018 victim application, which has been disclosed to the Defence.²¹
21. The 2014 victim application was filed in the *Prosecutor v. Al Mahdi* case. The Defence has sought access to this application. The materiality of this application is

¹⁹ ICC-01/12-01/18-661, paras 17-24.

²⁰ ICC-01/12-01/18-1310-Conf, para 16.

²¹ [REDACTED].

made clear by the decision of the Single Judge of Trial Chamber VIII in 28 February 2020 to order disclosure to the Prosecution of ‘unredacted reparations applications (together with any supporting documents and information regarding application status) of any Prosecution witnesses in the *Al Hassan* case’.²² It was later clarified that the Prosecution in this case considered that this order included rejected applications:²³

Having said that, I think that we could go close to the interpretation of Chamber VIII to propose the following system. To give VPRS the list of our witnesses, such that VPRS can verify whether among those victims -- among those witnesses, whether there were applications that were rejected, applications for reparations, or whether they obtained something within the reparations process or will be obtaining something in the coming time. I think that's one way of clarifying matters, and to have a very clear table which shows this precisely.

22. It was therefore understood from the above that the Defence has the right to receive applications forms submitted in the *Al Mahdi* case that concern Prosecution witnesses, even if the application was rejected. This is because it is the information in the application form that is relevant to Defence preparation, and not necessarily the attendant status that such information triggers.
23. In circumstances where the LRV request that the Chamber go beyond the 2018 victim application in considering whether the applicant should be granted victim status, it would be inappropriate not to consider the 2014 victim application given that this application represents the accounts of events provided by the applicant closest to the events in question, and may contain inconsistencies or other information relevant to the Chamber’s appraisal. Alternatively, if the Chamber is of the position that the application should be determined solely by reference to information submitted by the applicant in this case, then this approach would also preclude the Chamber’s reliance on P-0641’s witness statement.

²² [ICC-01/12-01/15-350](#), para 5.

²³ ICC-01/12-01/18-T-011-CONF-ENG, p. 13, line 25 to p. 14, line 6.

24. Furthermore, the Chamber established, in March 2020 (some 11 months prior to the filing of the Request), a ‘cut-off’ date for victim applications.²⁴ The Chamber ultimately determined, in light of the lengthy confirmation phase and the impact of ongoing applications on the parties, that it was appropriate that victim applications be considered, and reviewed, prior to the commencement of trial.²⁵

The Chamber has considered the reasons on the one hand in favour of no cut-off date, including the difficulties arising from the security environment, as outlined by the Registry. On the other, the Chamber has weighed the already long confirmation phase of this case, where the PTC Procedure was set almost two years ago, and the potential impact that no-cut-off date would have on the time and resources of both the Chamber and the parties, in reviewing applications throughout the trial. Although sensitive to the Registry’s proposal, ultimately, the Chamber considers that the setting of a deadline for the transmission of victim applications before the commencement of the trial strikes the best balance between the expeditiousness and fairness of the proceedings and the interests of the victims. The Chamber also notes that this reflects the practice outlined in the Chambers Practice Manual.

The Chamber accordingly sets the following deadlines for the final transmission of applications: (a) Group C to the Chamber and the parties no later than 45 days before the trial commencement date; and (b) Groups A and B to the Chamber no later than 15 days before the trial commencement date. The Registry’s final corresponding reports must be notified within the same time limits.

25. This decision put the LRV on notice of the importance of timeliness in relation to the consideration of victim applications. The LRV, therefore, should have ensured that any requests like the present one should have filed in a timely and expeditious manner, rather than seven months into the trial and six months after the applicant’s victim application was rejected.

²⁴ ICC-01/12-01/18-661, paras 27-29.

²⁵ ICC-01/12-01/18-661, paras 28-29.

26. In the premises of the above, the Request is without basis, as:

- a. the Request has not identified any error of reasoning by the Chamber, as the Chamber has simply followed its established process considering victim applications; and
- b. rejection of the Request will not lead to injustice, because, as indicated above, granting the Request would engender far greater prejudice, as the LRV seek that the Chamber adopt a role inconsistent, and inappropriate, with its established procedure, and rely on arbitrarily selected material.

IV. Relief sought

27. The Defence respectfully requests that Trial Chamber X **REJECT** the Request.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 8th Day of March 2021
At The Hague, The Netherlands