

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/12-01/18
Date: 23 November 2022**

TRIAL CHAMBER X

**Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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

**Decision on Defence request for reconsideration of Decision on requests related
to the submission into evidence of Mr Al Hassan's statements**

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 and 69(7) of the Rome Statute (the ‘Statute’), issues the following ‘Decision on Defence request for reconsideration of Decision on requests related to the submission into evidence of Mr Al Hassan’s statements’.

1. On 17 May 2021, the Chamber issued its ‘Decision on requests related to the submission into evidence of Mr Al Hassan’s statements’ (the ‘Impugned Decision’).¹
2. On 24 June 2021, the Chamber rejected the Defence’s request for leave to appeal the Impugned Decision.²
3. On 3 November 2022, the Defence filed a request seeking reconsideration of the Impugned Decision (the ‘Request’).³ The Defence submits that since the issuance of the Impugned Decision, the Chamber has received new facts and arguments that demonstrate the existence of a real risk that the information obtained from Mr Al Hassan was facilitated by a breach of internationally recognised human rights, and further, that its reliability was irremediably undermined as a result. In particular, the Defence submits that new information demonstrates cumulative factors which vitiated Mr Al Hassan’s ability to make informed voluntary decisions and rational choices in the process leading up to the gathering of the material introduced via the Impugned Decision.
4. On 10 November 2022, the Chamber issued its decision on Defence bar table motions, recognising the formal submission of items, including those the Defence purports as being of relevance to the Request.⁴

¹ ICC-01/12-01/18-1475-Conf.

² Decision on Defence requests for leave to appeal two decisions related to the submission into evidence of Mr Al Hassan’s statements, ICC-01/12-01/18-1542.

³ Defence request for reconsideration of ‘Decision on requests related to the submission into evidence of Mr Al Hassan’s statements’, ICC-01/12-01/18-1475-Conf, ICC-01/12-01/18-2403-Conf.

⁴ Decision on the Defence requests for the admission of evidence from the bar table, ICC-01/12-01/18-2407.

5. On 11 November 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its response opposing the Request (the ‘Response’).⁵ The Prosecution submits, *inter alia*, that a large part of the new facts and circumstances the Defence raises in fact mirrors what the Defence previously relied upon in the litigation leading up to the issuance of the Impugned Decision. The Prosecution also raises several arguments challenging the reliability of the evidence the Defence cites in support of the Request.
6. On 14 November 2022, the Defence filed a request for leave to reply to the Request (the ‘Leave to Reply Request’).⁶ The Prosecution responded on the same date, requesting that it be rejected.⁷ The Chamber considers that the present matter can be properly adjudicated without further submissions from the Defence and accordingly rejects the Leave to Reply Request.
7. 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 Nonetheless, 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.⁹
8. As a preliminary point, the Chamber notes the Prosecution’s submissions that the prior recorded testimony of D-0627 and D-0628 have not been formally submitted into evidence at this stage, given that the certified declarations have not been filed.¹⁰ While the Chamber is indeed yet to receive the accompanying

⁵ Prosecution response to the “Defence request for reconsideration of ‘Decision on requests related to the submission into evidence of Mr Al Hassan’s statements’, ICC-01/12-01/18-1475-Conf”, ICC-01/12-01/18-2408-Conf.

⁶ Defence request for leave to reply to “Prosecution response to the “Defence request for reconsideration of ‘Decision on requests related to the submission into evidence of Mr Al Hassan’s statements’, ICC-01/12-01/18-1475-Conf”, ICC-01/12-01/18-2409-Conf.

⁷ Email of 14 November 2022 at 15:08.

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 (the ‘Decision of 9 April 2020’), para. 11.

⁹ Trial Chamber I, *The Prosecutor vs. Ali Muhammad Ali Abd-Al-Rahman*, Decision on Defence request for reconsideration of “Decision on Defence submissions on cooperation with Sudan”, 29 March 2022, ICC-02/05-01/20-650-Red, para. 10 *citing* Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Decision on Mr Ntaganda’s request for reconsideration of the decision on time and page extensions, 1 October 2019, ICC-01/04-02/06-2426, para. 6.

¹⁰ Response, ICC-01/12-01/18-2408-Conf, para. 11.

declarations for these witnesses, the Chamber considers that this does not *per se* bar the Defence from relying on the prior recorded testimony of the two witnesses for the purpose of the present Request. The Chamber has accordingly not excluded this evidence when considering the Request.

9. The Chamber recalls that, in the Impugned Decision, it noted that Article 69(7) of the Statute requires a causal link between the violation and the gathering of evidence and the Chamber must assess whether the evidence in question was gathered, or its gathering was facilitated, by a breach of the Statute or internationally recognised human rights.¹¹ Further noting that it is not alleged that the Prosecution has breached the Statute or internationally recognised human rights, the Chamber specified that the exclusionary rule warrants an assessment focused on the investigative activities of the Prosecution which generated the particular evidence.¹² The central issue in the enquiry pursuant to Article 69(7) of the Statute was thus *what measures, if any, the Prosecution put in place to ensure that any possible violations arising from the surrounding context and circumstances did not impact on, or facilitate, the evidence gathering process.*¹³ Having considered the totality of the circumstances, the Chamber considered that the measures put in place by the Prosecution were sufficient to conclude that the gathering of the evidence in question was not facilitated by a breach of the Statute or internationally recognised human rights.
10. The Chamber is not persuaded that the Request provides a justification for the Chamber to exceptionally reconsider the aforementioned findings. The Chamber observes that much of the evidence described as new in the Request appears to be a mere reiteration of arguments the Defence previously advanced in the litigation leading up to the Impugned Decision. Moreover, none of the arguments raised in the Request undermine the Chamber's aforementioned findings in the Impugned Decision, which were based on its own holistic assessment of the available material.¹⁴

¹¹ Impugned Decision, ICC-01/12-01/18-1475-Conf, paras 40-41.

¹² Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 42.

¹³ Impugned Decision, ICC-01/12-01/18-1475-Conf, paras 42-45 (emphasis added).

¹⁴ Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 48.

11. With respect to the Defence experts D-0020 and D-0025, the Chamber recalls its findings in the Impugned Decision that ‘what is at issue is a factual determination as to the circumstances surrounding the gathering of the evidence and in this respect the consultant opinions do not assist the Chamber’.¹⁵ The Chamber is of the view that this finding stands and equally applies to the evidence of D-0502.
12. With respect to D-0006, D-0627, and D-0628 as well as the ‘DGSE witnesses’, the Chamber emphasises that, as recalled above, in the present instant, Article 69(7) of the Statute required an assessment focused on the investigative activities of the Prosecution. In the absence of allegations that the Prosecution itself breached the Statute or internationally recognised human rights, the inquiry in the Impugned Decision focused on the measures taken by the Prosecution, rather than on the general conditions which detainees, including Mr Al Hassan, were allegedly subject to. Thus, the Chamber is unconvinced that the evidence of D-0006, D-0627, D-0628, D-0002, D-0003, D-0004 and D-0008 on the alleged detention conditions at the DGSE have any bearing on the Chamber’s analysis in the Impugned Decision or conclusions reached therein.
13. Accordingly, the Chamber finds that the Request fails to demonstrate that reconsideration of the Impugned Decision is warranted.
14. The Chamber does consider that the evidence cited in the Request may be of relevance in assessing the probative value and weight of the evidence introduced via the Impugned Decision. However, in line with its general approach to evidence and as indicated in the Impugned Decision, the Chamber will consider them at a later stage whilst conducting its ultimate assessment of all submitted evidence.¹⁶

¹⁵ Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 48.

¹⁶ Impugned Decision, ICC-01/12-01/18-1475-Conf, para. 75.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Leave to Reply Request; and

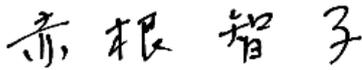
REJECTS the Request.

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



Judge Antoine Kesia-Mbe Mindua

Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated this Wednesday, 23 November 2022

At The Hague, The Netherlands