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No. ICC-01/12-01/18
Date: **30 January 2023**

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 the ‘Decision on the
introduction into evidence of the prior recorded testimony of D-0246 pursuant to
Rule 68(2)(b) of the Rules’**

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(1) and 69(2) of the Rome Statute (the ‘Statute’) and Rule 68(1) and (2)(b) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on Defence request for reconsideration of the “Decision on the introduction into evidence of the prior recorded testimony of D-0246 pursuant to Rule 68(2)(b) of the Rules”’.

I. Procedural history

1. On 16 December 2022, the Chamber issued its decision authorising the introduction into evidence of the prior recorded testimony of D-0246 (the ‘Statement’) pursuant to Rule 68(2)(b) of the Rules (the ‘Impugned Decision’).¹ The Chamber determined that discrete parts of the Statement go to the acts and conduct of the accused and therefore should be excluded.
2. On 28 December 2022, the Defence filed a request for reconsideration of the Impugned Decision (the ‘Request’).² The Defence’s submissions are twofold: (i) it firstly submits that the exclusion of paragraphs 16, 18, 23, 29, 30 and 31 of the Statement should be reconsidered as they do not go to the acts and conduct of the accused; (ii) alternatively, the Defence submits that even if certain references in the aforementioned paragraphs go to the acts and conduct of the accused, the Chamber erred in excluding these paragraphs in their entirety.
3. On 12 January 2023, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Request.³ The Prosecution submits that the Request should be

¹ Decision on the introduction into evidence of the prior recorded testimony of D-0246 pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-2444.

² Defence Request for Reconsideration of the Trial Chamber Decision on the introduction into evidence of the prior recorded testimony of D-246 pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-2450-Conf.

³ Réponse de l’Accusation à la « Defence Request for Reconsideration of the Trial Chamber Decision on the introduction into evidence of the prior recorded testimony of D-0246 pursuant to Rule 68(2)(b) of the Rules », ICC-01/12-01/18-2451-Conf.

rejected in its entirety as the Defence failed to demonstrate that reconsideration is warranted.

II. Analysis

4. 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.⁴ New facts and arguments arising since the decision was rendered may be relevant to this assessment.⁵ 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.⁶
5. At the outset, the Chamber notes that in the Impugned Decision, the Chamber explained that, contrary to the Prosecution's submissions, certain paragraphs of the Statement, including paragraph 23, do not go to the acts and conduct of the accused.⁷ This notwithstanding, paragraph 13 of the Impugned Decision erroneously lists paragraph 23 of the Statement as one of the paragraphs that must be excluded. The Chamber will issue a corrigendum in due course, rectifying this typographical error. As the Chamber accepts that reference to paragraph 23 of the Statement was erroneous, it does not consider it necessary to address the related submissions.
6. In the first prong of the Request, the Defence argues that the Chamber erred and contravened the previous jurisprudence of the Court and its 'Decision on the introduction into evidence of D-0511, D-0539, and D-0553's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules' (the 'D-0511 Decision'),⁸ under

⁴ 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.

⁵ 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.

⁶ 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.

⁷ Impugned Decision, para. 12 and n. 15.

⁸ 9 June 2022, ICC-01/12-01/18-2241.

which ‘general, character and background evidence’ was found to be outside the scope of acts and conduct of the accused.⁹

7. The Chamber considers this to be an erroneous characterisation of its previous determination as well as of the law. In the relevant part of the D-0511 Decision, the Chamber firstly noted that the ‘the Statements [of D-0511, D-0539 and D-0553] mainly relate to background information, events occurring before and after the period of the charges, and/or general knowledge and impressions of Mr Al Hassan’.¹⁰ Separately, the Chamber also added that ‘while the Statements refer to the accused, no parts thereof, notably those identified in the Response, consist of acts and conduct’.¹¹ While the Chamber did indeed find that references to Mr Al Hassan in the prior recorded testimony of D-0511 fell outside the scope of ‘acts and conduct of the accused’, it did not reach said finding on the basis that ‘general, character and background evidence’ never constitute acts and conduct of the accused.
8. The assessment of whether certain evidence go to the acts and conduct of accused must be conducted in light of the charges against the accused¹² and the relevant factors as a whole. Depending on the specific circumstances, the fact that part of an evidence relates to background, character or general information may be of relevance in said assessment. However, the Chamber rejects the categorical approach advanced by the Defence wherein any ‘general, character and background evidence’ automatically falls outside the scope of acts and conduct of the accused. Indeed, it has been consistent in this Chamber’s determinations that ‘character evidence’ and ‘evidence going to the acts and conduct of the accused’ are not mutually exclusive.¹³

⁹ Request, ICC-01/12-01/18-2450-Conf, para. 17.

¹⁰ D-0511 Decision, ICC-01/12-01/18-2241, para. 9.

¹¹ D-0511 Decision, ICC-01/12-01/18-2241, para. 9.

¹² Judgment on the appeal of the Prosecution against Trial Chamber X’s “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules”, 13 May 2022, ICC-01/12-01/18-2222 (the ‘*Al Hassan* OA4 Judgment’), para. 54.

¹³ Impugned Decision, ICC-01/12-01/18-2444, para. 10; Decision on the introduction into evidence of the prior recorded testimony of D-0544, D-0611, D-0093 and D-0240 pursuant to Rule 68(2)(b) and (3) of the Rules, 22 July 2022, ICC-01/12-01/18-2288 (the ‘D-0544 Decision’), para. 9 *referring to* ICTY,

9. The Chamber also recalls that a prior recorded testimony going to the acts and conduct of the accused may not be introduced into evidence irrespective of whether it is repetitive or corroborative of other evidence.¹⁴ As such, the Chamber finds unmeritorious the Defence's submissions seeking reconsideration on the basis that the relevant parts of the Statement are covered by the testimony of other witnesses.¹⁵
10. Further, the Defence appears to disagree with the definition of the acts and conduct of the accused adopted by the Chamber, suggesting that it only concerns 'material facts underpinning the charges'.¹⁶ Citing the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (the 'ICTY') in the *Prlić et al.* case, the Defence further argues that only those acts 'compris[ing] elements essential for a conviction' fall within the definition of acts and conduct of the accused.¹⁷ The Chamber observes that this line of argument appears to be based on a misreading of the *Prlić et al.* decision which, in the relevant part cited by the Defence, does not discuss the definition of the acts and conduct of the accused, but instead addresses the principle that 'untested evidence relating to the acts and conduct of the accused [...] must be corroborated by other evidence in order to form [...] a basis for a conviction of an accused'.¹⁸ It is in this context that the ICTY Appeals Chamber found that the 'scope of the rule that sufficient corroboration is necessary' must 'be expanded to cover evidence beyond that relating to the acts and conduct of the accused *stricto sensu*' to cover any 'critical element' of the Prosecution's case.¹⁹ In the present case, the Chamber considers that the definition adopted in the Impugned Decision is consistent both with its previous determination and jurisprudence of this Court

Trial Chamber II, *The Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Decision partially granting Stojan Župljanin's motion for admission of evidence pursuant to Rule 92 *bis*, 21 July 2011, para. 26.

¹⁴ Impugned Decision, ICC-01/12-01/18-2444, para. 9; D-0544 Decision, ICC-01/12-01/18-2288, para. 9.

¹⁵ Request, ICC-01/12-01/18-2450-Conf, paras 9-10, 17.

¹⁶ Request, ICC-01/12-01/18-2450-Conf, para. 16.

¹⁷ Request, ICC-01/12-01/18-2450-Conf, para. 14. In other parts of the Request, the Defence also makes reference to 'either the critical elements of the Prosecution's case or Mr Al Hassan's actions specific to any of the charged incidents'. Request, ICC-01/12-01/18-2450-Conf, para. 17.

¹⁸ ICTY, Appeals Chamber, *The Prosecutor v. Jadranko Prlić et al.*, Decision on Appeals against Decision admitting transcript of Jadranko Prlić's questioning into evidence, 23 November 2007, IT-04-74-AR73.6 (the '*Prlić* Decision'), paras 57-59.

¹⁹ *Prlić* Decision, IT-04-74-AR73.6, para. 59.

and cannot therefore discern any basis to depart from said definition with respect to D-0246.

11. The Chamber will now turn to the second prong of the Request. In the Impugned Decision, it rejected the Prosecution's submissions that the entire section of D-0246's prior recorded testimony must be excluded, and, instead, excluded discrete paragraphs discussing the acts and conduct of the accused. The Defence challenges the exclusion of these paragraphs in their entirety and submits that the specific references to Mr Al Hassan can be detached from the rest without any distortive effect on the overall narrative of the witness's evidence.²⁰
12. The Chamber considers that the extent to which exclusion is warranted and the appropriateness of partial admission needs be carefully considered on a case-by-case basis, taking into account the circumstances specific to each prior recorded testimony. Indeed, as indicated by the Appeals Chamber, 'the ultimate decision as to the appropriateness of admitting only parts of a statement is discretionary and depends upon the circumstances before the Chamber'.²¹ Depending on the evidence in question, it may well be that the only part warranting exclusion is the accused's name while, in other situations, a more extensive exclusion may be necessary in order to comply with the mandatory requirement under the provision.
13. In challenging the Impugned Decision, the Defence refers to paragraph 16 of the Statement and submits that the entire paragraph should be admitted with only the words 'comme Al Hassan' and the last sentence of the paragraph being excluded.²² The Chamber finds this approach unacceptable as it would, in effect, change the meaning originally given to the paragraph by D-0246 in order to convert a passage specifically addressing the accused to one that concerns 'the Touareg community in general'.²³ Accordingly, the Chamber considers that the approach adopted in the Impugned Decision does not warrant reconsideration.

²⁰ Request, ICC-01/12-01/18-2450-Conf, para. 20.

²¹ *Al Hassan* OA4 Judgment, ICC-01/12-01/18-2222, para. 51.

²² Request, ICC-01/12-01/18-2450-Conf, para. 21.

²³ Request, ICC-01/12-01/18-2450-Conf, para. 21.

14. On the basis of the aforementioned findings, the Chamber is of the view that the Defence failed to demonstrate that the exceptional remedy of reconsideration is necessary. The Request is accordingly rejected.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY
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 Monday, 30 January 2023

At The Hague, The Netherlands