

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. **ICC-01/12-01/18**
Date: **3 February 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 Regulation 35(2) and Rule 68(2)(b) Request’

To be notified in accordance with Regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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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***Amicus Curiae***REGISTRY**

Registrar

Peter Lewis

Counsel Support Section

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Victims and Witnesses Unit

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Detention Section**Victims Participation and Reparations
Section****Other**

Registry Legal Office

TRIAL CHAMBER X of the International Criminal Court (the ‘ICC’), 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’), Rule 68 (2)(b) of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on “Defence Regulation 35(2) and Rule 68(2)(b) Request”’.

1. On 17 October 2022, the Chamber authorised the introduction into evidence of the prior recorded testimony of D-0146 pursuant to Rule 68(2)(b) of the Rules.¹
2. On 16 December 2022, the Chamber issued a decision, *inter alia*, rejecting the Defence’s request for the introduction into evidence of the prior recorded testimony of D-0146 pursuant to Rule 68(2)(c) of the Rules (the ‘D-0146 Decision’).²
3. On 16 January 2023, the Defence filed a request seeking, *inter alia*, reconsideration of the D-0146 Decision or, in the alternative, leave to file an affidavit (the ‘Reconsideration Request’).³
4. On 30 January 2023, the Chamber rejected the Reconsideration Request (the ‘Reconsideration Decision’).⁴
5. On 3 February 2023, the Defence sought clarification from the Chamber as to whether it can proceed with the certification of the affidavit while the decision is pending (the ‘Request for Clarification’).⁵

¹ Decision on the introduction into evidence of the prior recorded testimony of D-0146, D-0524, D-0627 and D-0628 pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-2378.

² Decision on the Defence’s request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18-2445-Conf-Exp.

³ Defence Rule 68(2)(c) application for Witnesses D-0008, D-0146, D-0611 and D-0627, ICC-01/12-01/18-2452-Conf-Exp.

⁴ Decision on the introduction into evidence of the prior recorded testimony of D-0008, D-0611 and D-0627 pursuant to Rule 68(2)(c) of the Rules and the Defence’s request for reconsideration of the decision rejecting the introduction into evidence of D-0146’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18-2461-Conf.

⁵ Email dated 3 February 2023 at 10:26.

6. On the same date, the Defence filed a request pursuant to Regulation 35(2) of the Regulations and Rule 68(2)(b) of the Rules requesting the introduction into evidence of an affidavit created by a Defence team member concerning evidence obtained from D-0146 (the 'Request').⁶ The Defence also seeks leave to introduce the prior recorded testimony of D-0146, which it previously sought to introduce pursuant to Rule 68(2)(b) of the Rules, as associated exhibits to the affidavit.⁷
7. Noting the urgency of the matter, the Chamber considers it appropriate to exceptionally issue the present decision without receiving responses.
8. The Chamber recalls that in the Reconsideration Decision, it explicitly rejected the Defence's request for 'leave pursuant to Regulation 35(2) to tender a chain of custody affidavit from the Defence concerning the circumstances in which the exhibits [relating to D-0146] were collected and the chain of custody form created.' This means that, based on this finding, any subsequent request under Regulation 35(2) of the Regulations to submit an affidavit from the Defence regarding the evidence of D-0146 should have been sufficiently motivated in accordance with the established requirements for reconsidering a decision.⁸ In the present case, the Defence has nevertheless failed to demonstrate that the exceptional remedy of reconsideration is warranted based on either a clear error of reasoning or to prevent an injustice. Accordingly, the Request is rejected.

⁶ Defence Regulation 35(2) and Rule 68(2)(b) Request, ICC-01/12-01/18-2463-Conf.

⁷ Request, ICC-01/12-01/18-2463-Conf, para. 1.

⁸ See Reconsideration Decision, ICC-01/12-01/18-2461-Conf, para. 20.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

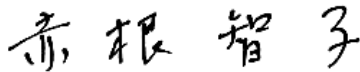
DECLARES the Request for Clarification moot.

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 Friday, 3 February 2023

At The Hague, The Netherlands