

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No: **ICC-01/12-01/18**

Date: **11 July 2024**

TRIAL CHAMBER X

Before:

**Judge Tomoko Akane
Judge Kimberly Prost
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 redacted

**Request to dispense with certain certification requirements under Rule 68(2)(b)(ii) of the
Rules of Evidence and Procedure**

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:****The Office of the Prosecutor**

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I. INTRODUCTION

1. The Defence for Mr Al Hassan Ag Abdoul Aziz (“Defence”) files this application to dispense with the requirement to have a member of the Registry to witness accompanying declarations with any prior recorded testimony, pursuant to Rule 68(2)(b)(ii) and (iii) of the Rules of Evidence and Procedure (“Rules”) for the purposes of sentencing.
2. Although the parties continue to await for new deadlines in relation to the sentencing procedure,¹ the Decision on the sentencing procedure (“Decision”) indicated that at the time of filing any request for additional written testimonial evidence, the parties were required to also submit “any proposed arrangement for the obtention of accompanying declaration(s) under Article 68(2)(b)(ii) of the Statute”² (*sic*). In the absence of any indication that this direction dispenses with the requirement to have the Registry witness the accompanying declaration, the Defence is of the understanding that this will remain.
3. In past cases, the Trial Chamber has considered applications of this nature without having been characterised as a request for reconsideration.³ On the basis that the parties were not heard prior to the Decision being adopted by the Chamber, the Defence files this application as a request to amend the sentencing procedure therein. However, in the alternative, the Defence considers that the threshold for reconsideration of the Decision has been met, due to new facts arising including the ongoing logistical issues faced by the Defence in contacting relevant witnesses for sentencing as set out below.

II. CLASSIFICATION

4. Pursuant to regulation 23bis(1) of the Regulations of the Court, the Defence files this application Confidential *ex parte* on the basis that it contains sensitive information

¹ *Al Hassan*, Second decision on the sentencing procedure, [ICC-01/12-01/18-2600](#), 9 July 2024.

² *Al Hassan*, Decision on sentencing procedure, [ICC-01/12-01/18-2595](#), 28 June 2024, para. 3(b).

³ See *Ntaganda*, Public redacted version of “Prosecution’s request to submit additional evidence on sentencing”, 29 July 2019, ICC-01/04-02/06-2368-Conf, [ICC-01/04-02/06-2368-Red](#), 17 September 2019, paras 33-34 and *Ntaganda*, Public Redacted version of ‘Preliminary ruling on prior recorded testimony pursuant to Rule 68(2)(b) in relation to sentencing’, [ICC-01/04-02/06-2385-Red](#), 23 August 2019, paras 9-10. See further *Bemba et al.*, Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, [ICC-01/05-01/13-2025](#), 11 November 2016, paras 5-7 (considered *proprio motu*).

regarding ongoing Defence investigations and potential witnesses. It will file a public redacted version in due course.

III. APPLICABLE LAW

5. Rule 68(2)(b)(ii) of the Rules requires that:

Prior recorded testimony falling under sub-rule (b) may only be introduced if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief. Accompanying declarations may not contain any new information and must be made reasonably close in time to when the prior recorded testimony is being submitted.

6. Pursuant to Rule 68(2)(b)(iii) of the Rules, the accompanying declaration "must be witnessed by a person authorized to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State."

7. This notwithstanding, the Trial Chamber in *Bemba et al.* held that it was not necessary for the parties to meet procedural pre-requisites of Rule 68 to submit post-conviction witness statements in writing for sentencing.⁴ This was on the basis the Statute "foresees that the Chamber may take into account non-evidentiary submissions for sentencing purposes" pursuant to Article 76(1), with the result that procedural pre-requisites under Rule 68 "are not a procedural bar for sentencing in the same way they are at trial".⁵ Further, the Chamber referred to statutes of other international tribunals, which allowed Chambers to consider "any relevant information", not just evidence, in the determination of a sentence.⁶

8. This reasoning was also relied upon by the Trial Chamber in *Ntaganda*, which also dispensed with the requirement for the parties to have a member of the Registry witness

⁴ *Bemba et al.*, Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, [ICC-01/05-01/13-2025](#), 11 November 2016, paras 6-7.

⁵ *Bemba et al.*, Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, [ICC-01/05-01/13-2025](#), 11 November 2016, paras 6-7.

⁶ *Bemba et al.*, Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, [ICC-01/05-01/13-2025](#), 11 November 2016, paras 7.

the declarations accompanying the prior recorded testimony under Rule 68(2)(b) for the purposes of sentencing.⁷

IV. SUBMISSIONS

9. The Defence considers that the procedure undertaken by previous Trial Chambers as above, is appropriate for the current phase of the proceedings and the specific circumstances of this case. As the jurisprudence suggests that the Chamber may take a broader approach in considering relevant evidence and submissions at a sentencing stage, Rule 68 procedural requirements should not act as a procedural bar for a Chamber to consider such evidence.
10. Additionally, the Defence envisages that its ability to obtain the relevant Registry certifications required under Rule 68(2)(b)(ii) will be curtailed due to the general security situation and a poor network connection in Northern Mali. These challenges appeared to have been recognised by the Single Judge, who suspended the timeframes for any request to submit non-oral evidence due to the “difficulties faced” by the parties and participants.⁸ The Defence does not believe that these challenges will ease in the near future and may adversely impact the expeditiousness of the sentencing procedure.
11. In the past, the Defence has faced difficulties obtaining relevant declarations in a timely manner due to the above issues.⁹ These logistical issues continue to this day and remain outside the Defence’s control. The Defence continues to experience connection issues with witnesses due to unreliable Internet connection, requiring multiple phone calls or phone calls outside of business hours when the connection has improved. [REDACTED] the connection disconnects regularly suggesting it would not be sufficiently stable to support a video call by Webex or Zoom. It does not appear possible to organise missions for either the Defence team or Registry to go to these places to meet these witnesses or do in-person

⁷ *Ntaganda*, Public Redacted version of ‘Preliminary ruling on prior recorded testimony pursuant to Rule 68(2)(b) in relation to sentencing’, [ICC-01/04-02/06-2385-Red](#), 23 August 2019, para. 10.

⁸ Email, TCX Communications, “Single Judge decision on pending requests related to the sentencing procedure”, 3 July 2024, 11:46.

⁹ [REDACTED]. *See further Al Hassan*, 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-01246 pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18-2445-Red, 16 December 2022, paras 12-18.

certifications.¹⁰ In addition, the Defence's ability to regularly contact witnesses is hampered by the worsening security situation, causing witnesses to move [REDACTED].

12. The feasibility of obtaining certifications at all remains problematic. Despite the Chamber previously recognising that [REDACTED],¹¹ the above issues remain pertinent. MINUSMA has now fully withdrawn from Northern Mali,¹² [REDACTED].¹³ [REDACTED].¹⁴
13. The Defence envisages that determination of a new site for in-person certifications would need to take place, as well as significant discussions with the Registry to ascertain their ability to assist with such certifications. In the Defence's experience, this will likely be a time-consuming process which may unnecessarily lengthen the sentencing proceedings. The Defence notes that the Chamber has previously allowed the introduction of Rule 68(2)(b) statements without the accompanying declarations, on the exceptional basis that it was completely unfeasible to do so.¹⁵
14. On the basis that previous Trial Chambers have dispensed with the need to comply with a requirement of Rule 68(2)(b)(ii) at sentencing given the particular stage of the proceedings, and in light of the foreshadowed difficulties to obtain arrange for the Registry to witness the accompanying declarations, there is good cause to remove this requirement under Rule

¹⁰ The Defence notes that the most recent Joint Threat Assessment Group recommendation advised that, in respect of Mali, "[m]issions to all other regions [other than Bamako and the regions of Sikasso, Kayes, Koulikoro and Segou] are suspended until further notice." See Email, Aimee Makie, "Security & Safety Announcements and Information -Joint Threat Assessment Group (JTAG) Recommendations 06 June 2024", 13 June 2024.

¹¹ [REDACTED].

¹² See UN Peacekeeping, "[Closure of MINUSMA bases in Ber and Goundam, Timbuktu region](#)", 17 August 2023; UN Press, "[Security Council Terminates Mandate of United Nations Multidimensional Integrated Stabilization Mission in Mali, Unanimously Adopting Resolution 2690 \(2023\)](#)", 30 June 2023.

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ See *Al Hassan*, Decision on the introduction into evidence of the prior recorded testimony of D0008, 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, 30 January 2023, paras 9-12.

68(2)(b)(ii) for the purposes of sentencing. This course of conduct will assist in expediting the sentencing procedure.

15. The Defence otherwise confirms that it continues to finalise additional testimonial evidence it may seek to rely upon for sentencing, in anticipation of the new sentencing deadlines to be set. The Defence confirms that any prior recorded statement sought to be introduced will be under declaration confirming the witness' identity; has been signed and given voluntarily; has been given under declaration of honour and conscience that the statements are accurate; and will be internally consistent and coherent. The Defence will expand on the process in its eventual request to present additional evidence under Rule 68(2)(b).

V. RELIEF SOUGHT

16. For the reasons aforementioned, the Defence respectfully requests that the Trial Chamber:

ORDER that the Defence need not be required to have a member of the Registry witness the accompanying declarations with any prior recorded testimony, pursuant to Rule 68(2)(b)(ii) of the Rules, with respect to the prior recorded testimony sought to be introduced through Rule 68(2) for sentencing purposes.



Melinda Taylor
Lead Counsel for Mr Al Hassan

Respectfully submitted this 11th day of July 2024
At The Hague, The Netherlands