



**Original: English**

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

**Date: 8 August 2024**

**TRIAL CHAMBER X**

**Before:**

**Judge Kimberly Prost, Presiding Judge  
Judge Tomoko Akane  
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**

**Second decision on Defence requests for the introduction of sentencing evidence**

**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, 69, 76 and 78 of the Rome Statute (the ‘Statute’) and Rules 63-64, 68(2) and 145 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Second decision on Defence requests for the introduction of sentencing evidence’.

## **I. Procedural history**

1. Following the delivery of the trial judgment in this case on 26 June 2024 (the ‘Trial Judgment’),<sup>1</sup> the Chamber set deadlines for, *inter alia*, the filing of requests for further evidence relevant to the Chamber’s decision on sentence pursuant to Article 76 of the Statute (the ‘Sentencing decision’).<sup>2</sup>
2. On 8 July 2024, in accordance with the relevant deadline, the Defence notified that it did not intend to file any requests to present additional *viva voce* sentencing evidence.<sup>3</sup>
3. In accordance with the deadlines set by the Chamber, the Defence filed several requests to introduce additional sentencing evidence including, relevant to the present decision, a request to introduce: (i) a statement of Mr Al Hassan and associated exhibits pursuant to Rule 68(2)(b) of the Rules; together with (ii) other related documents pursuant to Article 69(2) of the Statute (the ‘Al Hassan Request’).<sup>4</sup>

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<sup>1</sup> Trial Judgment, 26 June 2024, ICC-01/12-01/18-2594-Conf (with three public annexes and two separate and partly dissenting opinions notified on the same day, Separate and Partly Dissenting Opinion of Judge Tomoko Akane, ICC-01/12-01/18-2594-OPI, Separate and Partly Dissenting Opinion of Judge Kimberly Prost, ICC-01/12-01/18-2594-OPI2 and one separate and partly dissenting opinion notified on 28 June 2024, Opinion individuelle et partiellement dissidente du Juge Antoine Kesia-Mbe Mindua, ICC-01/12-01/18-2594-OPI3; a public redacted version of the Trial Judgment was notified on 26 June 2024, ICC-01/12-01/18-2594-Red).

<sup>2</sup> See Decision on the sentencing procedure, 28 June 2024, ICC-01/12-01/18-2595; Second decision on the sentencing procedure, 9 July 2024, ICC-01/12-01/18-2600; Third decision on the sentencing procedure, 23 July 2024, ICC-01/12-01/18-2618 (with Separate opinion of Judge Kimberly Prost, ICC-01/12-01/18-2618-OPI). See also email from the Single Judge, 17 July 2024, at 09:57, giving the parties and participants advanced notice that the Chamber would set the respective deadlines for submission of any request to submit non-oral evidence and relevant responses to 22 and 25 July 2024.

<sup>3</sup> Email from the Defence, 8 July 2024, at 17:59.

<sup>4</sup> Request to Admit Mr Al Hassan’s Sworn Statement, Associated Exhibits and Other Relevant Documents, 22 July 2024, ICC-01/12-01/18-2614-Conf (with confidential Annexes A, B, C and D).

4. On 24 July 2024, the Single Judge partially granted a request from the Prosecution for an extension of the deadline to respond to the Al Hassan Request, setting the new deadline at 6 August 2024.<sup>5</sup>
5. On 31 July 2024, the Chamber decided on other Defence requests to introduce additional sentencing evidence (the ‘First Decision’).<sup>6</sup>
6. On 2 August 2024, the Prosecution filed its response to the Al Hassan Request (the ‘Al Hassan Response’).<sup>7</sup> The Prosecution opposes the Al Hassan Request, submitting, *inter alia*, that (i) Rule 68(2)(b) of the Rules is not applicable to Mr Al Hassan’s statement and associated exhibits<sup>8</sup> and even if the rule is applicable *in arguendo*, the material does not meet the relevant criteria for introduction;<sup>9</sup> (ii) if Mr Al Hassan chooses to give an unsworn statement pursuant to Article 67(1)(h) of the Statute, it will not be admissible as evidence;<sup>10</sup> (iii) if, as in the present case, Mr Al Hassan seeks to have his testimony admitted then he must testify in person before the Chamber and be available for cross-examination,<sup>11</sup> (iv) even where the Chamber may use its discretionary power under Article 69(4) of the Statute to admit the evidence, the evidence does not meet the relevant criteria;<sup>12</sup> and (v) even if the Chamber allows the introduction of Mr Al Hassan’s statement and related materials into evidence, very little weight, if any, should be afforded to the material.<sup>13</sup>
7. On 2 August 2024, the Defence requested leave to reply to certain issues raised in the Al Hassan Response (the ‘Request for Leave to Reply’).<sup>14</sup> The Prosecution

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<sup>5</sup> Email from the Single Judge, 24 July 2024, at 14:22.

<sup>6</sup> First decision on Defence requests for the introduction of sentencing evidence, 31 July 2024, ICC-01/12-01/18-2629.

<sup>7</sup> Prosecution response to “Defence Request to Admit Mr Al Hassan’s Sworn Statement, Associated Exhibits and Other Relevant Documents”, ICC-01/12-01/18-2630-Conf (dated 1 August 2024 but notified on 2 August 2024).

<sup>8</sup> Al Hassan Response, ICC-01/12-01/18-2630-Conf, paras 2-3, 11-14.

<sup>9</sup> Al Hassan Response, ICC-01/12-01/18-2630-Conf, paras 4, 15-27.

<sup>10</sup> Al Hassan Response, ICC-01/12-01/18-2630-Conf, paras 2, 21

<sup>11</sup> Al Hassan Response, ICC-01/12-01/18-2630-Conf, paras 2-4, 6, 21-27, 74-78.

<sup>12</sup> Al Hassan Response, ICC-01/12-01/18-2630-Conf, paras 5-6, 28-73, 79-85.

<sup>13</sup> Al Hassan Response, ICC-01/12-01/18-2630-Conf, paras 7-8, 86.

<sup>14</sup> Email from the Defence, 2 August 2024, at 15:10.

responded to the Request for Leave to Reply on the same day, submitting that it should be rejected.<sup>15</sup>

8. On 6 August 2024, the Legal Representatives of Victims indicated that they had no specific observations on the Al Hassan Request, without prejudice to observations they will make in their submissions on the circumstances that the Defence intends to demonstrate on the basis of the evidence and the position of the victims in this regard.<sup>16</sup>

## **II. Preliminary matter – the Request for Leave to Reply**

9. As a preliminary matter, the Chamber considers that it would not be further assisted by further submissions identified by the Defence in the Request for Leave to Reply. The Chamber considers that none of the issues identified by the Defence are new issues that could not have been reasonably anticipated in the original Al Hassan Request.<sup>17</sup> In particular, the first issue which concerns the legal basis for the introduction of Mr Al Hassan's statement and associated exhibits is at the core of the Al Hassan Request and should have been reasonably anticipated by the Defence. The Chamber accordingly rejects the Request for Leave to Reply.

## **III. Analysis**

10. This decision deals with the Al Hassan Request. The Chamber applies the approach to requests for additional sentencing evidence set out in the First Decision.<sup>18</sup> This means that for the purpose of the present decision, the Chamber will, in principle and barring particular circumstances, limit itself to considering whether any

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<sup>15</sup> Email from the Prosecution, 2 August 2024, at 15:32.

<sup>16</sup> Email from the LRVs, 6 August 2024, at 11:01.

<sup>17</sup> The Defence sought leave to reply in respect of the following assertions in the Al Hassan Response: 'Mr Al Hassan's statements cannot be submitted through Rule 68(2) because he is an accused, not a witness (First Issue); Mr Al Hassan's reference to personal hardship as a consideration for his actions in 2012 should be characterized as acts and conduct or a contentious issue (Second Issue); Mr Al Hassan's description of his experiences, either at the DGSE or at the ICC detention unit, is disputed and thus cannot be admitted through Rule 68(2)(b) (Third Issue); The correspondence from the French Ministry of Interior is irrelevant to sentencing credit, under Article 78(2) of the Statute, because the actions of domestic authorities cannot be imputed to the ICC Prosecution (Fourth Issue)' (Email from the Defence, 2 August 2024, at 15:10).

<sup>18</sup> First Decision, ICC-01/12-01/18-2629, paras 12-13.

procedural bar to the submission of the requested evidence exists and defer substantive considerations concerning the relevance and the probative value of evidence submitted, as well as the weight if any, to be accorded to that evidence to the Sentencing decision, as necessary. At the same time, the Chamber maintains discretion to make discrete determinations on the admissibility of specific evidence, as warranted.<sup>19</sup>

*1. The nature and scope of the material sought to be introduced*

11. The Defence seeks to introduce the following items into evidence in the Al Hassan Request:<sup>20</sup> (i) pursuant to Rule 68(2)(b) of the Rules, a statement from Mr Al Hassan ('Mr Al Hassan's Statement')<sup>21</sup> and associated exhibits (the 'Associated Exhibits');<sup>22</sup> and (ii) other documents pursuant to Article 69(2) of the Statute (the 'Related Documents').<sup>23</sup>
12. The Chamber notes that Mr Al Hassan's Statement is a sworn statement,<sup>24</sup> based on interviews conducted with the Defence on 2 and 19 July 2024 and signed on 19 July 2024.<sup>25</sup> It is a detailed 18 page document which covers a range of topics including Mr Al Hassan's experience of his arrival and detention at the ICC,<sup>26</sup> matters related to his family,<sup>27</sup> his experiences during his arrest and detention in Mali,<sup>28</sup> and his current situation and plans for after his release.<sup>29</sup> According to the Al Hassan Request, Mr Al Hassan provides the statement notably to allow the Chamber to see Mr Al Hassan 'as the man he is today',<sup>30</sup> and 'understand what he experienced in

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<sup>19</sup> See First Decision, ICC-01/12-01/18-2629, paras 12.

<sup>20</sup> Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 6.

<sup>21</sup> Mr Al Hassan's statement, MLI-D28-0007-0638-R01. See Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 6(A); ICC-01/12-01/18-2614-Conf-AnxA.

<sup>22</sup> See Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 6(B).

<sup>23</sup> See Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 6(C).

<sup>24</sup> See Mr Al Hassan's statement, MLI-D28-0007-0638-R01, at 0655.

<sup>25</sup> See Mr Al Hassan's statement, MLI-D28-0007-0638-R01, at 0638.

<sup>26</sup> See Mr Al Hassan's statement, MLI-D28-0007-0638-R01, at 0640-0642, paras 10-22.

<sup>27</sup> See Mr Al Hassan's statement, MLI-D28-0007-0638-R01, at 0642-0643, paras 23-33.

<sup>28</sup> See Mr Al Hassan's statement, MLI-D28-0007-0638-R01, at 0644-0651, paras 34-45.

<sup>29</sup> See Mr Al Hassan's statement, MLI-D28-0007-0638-R01, at 0651-0654, paras 47-59.

<sup>30</sup> Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 1. See also Mr Al Hassan's statement, MLI-D28-0007-0638-R01, at 0639, paras 3, 6.

The Hague and in the courtroom’<sup>31</sup> and so that Mr Al Hassan can ‘address the Trial Chamber one last time’.<sup>32</sup> The Defence submits that Mr Al Hassan’s Statement ‘provides a critical window into Mr Al Hassan’s thought processes, and physical and psychological welfare, while held at the ICC Detention Centre’.<sup>33</sup> Having regard to the nature and content of the document, the Chamber considers that Mr Al Hassan’s Statement has been prepared contemporaneously for the purpose of the current sentencing proceedings.

13. The Associated Exhibits consist of material which the Defence submits is related to Mr Al Hassan’s Statement, namely: (i) transcripts of interviews with Mr Al Hassan arranged by the Defence over three days in 2019 (the ‘2019 interviews’),<sup>34</sup> totalling 338 pages,<sup>35</sup> which according to the Defence provides ‘a comprehensive account’ of Mr Al Hassan’s arrest and his subsequent treatment in detention in Mali,<sup>36</sup> and an ‘important foundational context as concerns how [Mr Al Hassan] subsequently experienced his detention and the proceedings at the ICC and the grounded basis for his fears and concerns for his family’, as well as ‘contextual information concerning [Mr Al Hassan’s] activities in the lead up to his arrest in 2017’;<sup>37</sup> (ii) exhibits shown to Mr Al Hassan during the 2019 interview<sup>38</sup> comprising around 30 pages of handwritten notes and drawings produced by Mr Al Hassan related to his arrest and detention in Mali and three maps and photographs;<sup>39</sup> (iii) 11 pages of

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<sup>31</sup> Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 1. *See also* Mr Al Hassan’s statement, MLI-D28-0007-0638-R01, at 0639, paras 3, 6.

<sup>32</sup> Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 1.

<sup>33</sup> Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 10.

<sup>34</sup> Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 11.

<sup>35</sup> MLI-D28-0007-0208; MLI-D28-0007-0333; MLI-D28-0007-0449.

<sup>36</sup> Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 11. *See also* paras 12-14.

<sup>37</sup> Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 13.

<sup>38</sup> *See* Al Hassan Request, ICC-01/12-01/18-2614-Conf, paras 15-17.

<sup>39</sup> MLI-D28-0007-0139; MLI-D28-0007-0158; MLI-D28-0007-0137; MLI-D28-0007-0170; MLI-D28-0007-0567; MLI-D28-0007-0569; MLI-D28-0007-0572; MLI-D28-0007-0561; MLI-D28-0007-0135.

sketches authored by Mr Al Hassan in 2019 and reviewed in 2024 (the ‘Sketches’)<sup>40</sup> and related ‘chain of custody documents’;<sup>41</sup> and (iv) associated translations.<sup>42</sup>

14. The Related Documents comprise: (i) an official letter from the French Ministry of Interior dated September 2021,<sup>43</sup> which the Defence submits is relevant to the issue of ‘[c]redit for time served in Mali, under Article 78(2) of the Statute’ in that it ‘confirms the linkage between Mr Al Hassan’s detention in Mali and the conduct underpinning the ICC charges’;<sup>44</sup> (ii) documents related to the conduct of the 2019 interviews;<sup>45</sup> and (iii) 16 pages of internal correspondence between the Defence and the Registry concerning the specific types of handcuffs used with Mr Al Hassan.<sup>46</sup>
15. The Defence submits that all of the abovementioned material is relevant to the following issues in the sentencing proceedings: ‘(i) Credit for time served in Mali, under Article 78(2) of the Statute; (ii) The circumstances under which Mr Al Hassan cooperated with the Prosecutor and consequences of such cooperation; (iii) Hardship experienced in detention, which is relevant to Rule 145; (iv) Mr Al Hassan’s rehabilitation needs, as a torture survivor; and (v) The positive prospects for Mr Al Hassan’s successful and peaceful reintegration into his community and his genuine willingness to seek the pardon of the victims he harmed in Timbuktu’.<sup>47</sup> As noted above,<sup>48</sup> the Prosecution opposes the Al Hassan request on various grounds and submits that the material has very little, if any, relevance and probative value for sentencing purposes.<sup>49</sup>

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<sup>40</sup> MLI-D28-0006-9220; MLI-D28-0006-9221; MLI-D28-0006-9222; MLI-D28-0006-9223; MLI-D28-0006-9224; MLI-D28-0006-9225; MLI-D28-0006-9226; MLI-D28-0006-9227; MLI-D28-0006-9228; MLI-D28-0006-9229; MLI-D28-0006-9230. *See* Al Hassan Request, ICC-01/12-01/18-2614-Conf, paras 18-23; ICC-01/12-01/18-2614-Conf-AnxB.

<sup>41</sup> MLI-D28-0006-9231; MLI-D28-0006-9232.

<sup>42</sup> *See* Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 6(B).

<sup>43</sup> MLI-D28-0007-0671.

<sup>44</sup> Al Hassan Request, ICC-01/12-01/18-2614-Conf, paras 28(i), 29. *See also* paras 24-25.

<sup>45</sup> CV of the interviewer: MLI-D28-0007-0607; internal correspondence with the Registry concerning the translation and transcription of the 2019 interviews: MLI-D28-0007-0678; MLI-D28-0007-0679; MLI-D28-0007-0680. *See* Al Hassan Request, ICC-01/12-01/18-2614-Conf, paras 6(C), 11, 24.

<sup>46</sup> MLI-D28-0007-0574; MLI-D28-0007-0576; MLI-D28-0007-0682; MLI-D28-0007-0582; MLI-D28-0007-0583; MLI-D28-0007-0584.

<sup>47</sup> *See* Al Hassan Request, ICC-01/12-01/18-2614-Conf, paras 28-36.

<sup>48</sup> *See* para. 6 above.

<sup>49</sup> *See notably* Al Hassan Response, ICC-01/12-01/18-2630-Conf, paras 30-73.



## 2. *Legal basis for introduction of the material*

16. The Chamber notes that the Defence relies on Rules 68(2)(b) of the Rules as the legal basis for introduction of Mr Al Hassan's Statement and the Associated Exhibits.<sup>50</sup> Rule 68(2)(b) of the Rules allows the introduction of the previously recorded testimony of a 'witness', subject to certain requirements. However, as observed by the Prosecution,<sup>51</sup> Rule 68(2)(b) of the Rules does not apply to Mr Al Hassan's Statement by virtue of the fact that he is not a 'witness' for the purposes of this provision.<sup>52</sup> Rule 68(2)(b) of the Rules is accordingly not an appropriate legal basis for the submission of the Mr Al Hassan's Statement and the Associated Exhibits and there is a procedural bar to the introduction of the material through that provision.
17. Nevertheless, the Chamber notes that in a scenario like the present where the defendant seeks to provide, in writing to the trial chamber during the course of their ICC proceedings, information of the kind contained in Mr Al Hassan's Statement, the defendant has the option to make an unsworn statement pursuant to Article 67(1)(h) of the Statute.<sup>53</sup> In this case the defendant is not subject to a solemn undertaking nor are they subject to questioning.<sup>54</sup> The unsworn statement under Article 67(1)(h) of the Statute does not constitute evidence although may be taken into account by the Chamber.<sup>55</sup>

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<sup>50</sup> Al Hassan Request, ICC-01/12-01/18-2614-Conf, para. 7.

<sup>51</sup> Al Hassan Response, ICC-01/12-01/18-2630-Conf, paras 3-4, 12-13.

<sup>52</sup> Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, 30 October 2015, ICC-01/05-01/13-1432, para. 22. *See also* Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on the Prosecution's First Request to Introduce Evidence Other than Through a Witness, 11 February 2022, ICC-01/09-01/20-282-Conf, para. 10.

<sup>53</sup> The Chamber notes that an unsworn statement under Article 67(1)(h) of the Statute can be oral or written.

<sup>54</sup> *See e.g.* Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Unsworn Statement by the Accused, 1 November 2013, ICC-01/05-01/08-2860, para. 8.

<sup>55</sup> Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Unsworn Statement by the Accused, 1 November 2013, ICC-01/05-01/08-2860, para. 8; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 19; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request to reconsider the Second order on closing statements, 27 August 2018, ICC-01/04-02/06-2312, para. 7. *See also* Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para.

18. The Chamber considers treating Mr Al Hassan's Statement as an unsworn statement pursuant to Article 67(1)(h) of the Statute to be appropriate in light of the nature, content and purpose of Mr Al Hassan's Statement, in particular in that it is addressed to the Chamber for the purposes of the current sentencing procedure.
19. The Chamber accordingly recognises Mr Al Hassan's Statement (namely, the 18 page statement dated 19 July 2024<sup>56</sup>), together with the 11 Sketches which are specifically referenced by Mr Al Hassan on pages 0646 to 0650 of the Statement and their associated translations,<sup>57</sup> as an unsworn statement made pursuant to Article 67(1)(h) of the Statute for the purposes of sentencing. As noted above, this does not constitute evidence although may be taken into account by the Chamber. While taking note of the parties' arguments in relation to the relevance of Mr Al Hassan's Statement and the weight, if any, to be afforded to it, the Chamber sees no reason to exceptionally consider these submissions at this point in time and defers consideration of these submissions to its Sentencing decision, as necessary.
20. In relation to the Related Documents which the Defence seeks to submit pursuant to Article 69 of the Statute, the Chamber notes that they have been presented as material which is 'related to' Mr Al Hassan's Statement. In light of its decision to treat Mr Al Hassan's Statement as an unsworn statement pursuant to Article 67(1)(h) of the Statute in accordance with paragraph 19 above and not as evidence, the Chamber does not consider it necessary to authorise introduction of this material.

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256, footnote 647; Trial Chamber II, *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant to article 74 of the Statute, 18 December 2012, ICC-01/04-02/12-3-tENG, para. 67. *See also* Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Requests to Present Unsworn Statements, 12 May 2016, ICC-01/05-01/13-1890, paras 8-9.

<sup>56</sup> MLI-D28-0007-0638-R01.

<sup>57</sup> MLI-D28-0006-9220 (translation MLI-D28-0007-0656); MLI-D28-0006-9221 (translation: MLI-D28-0007-0689); MLI-D28-0006-9222 (translation: MLI-D28-0007-0658); MLI-D28-0006-9223 (translation: MLI-D28-0007-0659); MLI-D28-0006-9224 (translation: MLI-D28-0007-0660); MLI-D28-0006-9225 (translation: MLI-D28-0007-0661); MLI-D28-0006-9226 (translation: MLI-D28-0007-0662); MLI-D28-0006-9227 (translation: MLI-D28-0007-0663); MLI-D28-0006-9228 (translation: MLI-D28-0007-0664); MLI-D28-0006-9229 (translation: MLI-D28-0007-0665); MLI-D28-0006-9230 (translation: MLI-D28-0007-0666). The Chamber notes that these are necessary to understand the comments contained in the tables on pages 0646 to 0650 of Mr Al Hassan's statement MLI-D28-0007-0638-R01.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Requests for Leave to Reply;

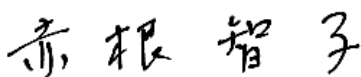
**REJECTS** the Al Hassan Request; and

**DECIDES** to recognise Mr Al Hassan's Statement as an unsworn statement pursuant to Article 67(1)(h) of the Statute in accordance with paragraph 19 above.

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



**Judge Kimberly Prost**  
**Presiding Judge**



**Judge Tomoko Akane**



**Judge Keebong Paek**

Dated this Thursday, 8 August 2024

At The Hague, The Netherlands