

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **23 March 2020**

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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

Public redacted version of ‘Defence request for reconsideration, or in the alternative, leave to appeal the “Decision on witness preparation and familiarisation” (ICC-01/12-01/18-666)’

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

Fatou Bensouda

James Stewart

Counsel for the Defence

Melinda Taylor

Marie-Hélène Proulx

Thomas Paul Hannis

Legal Representatives of the Victims

Seydou Doumbia

Mayombo Kassongo

Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**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

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. The Defence for Mr. Al Hassan does not contest the Trial Chamber's discretion to adopt witness preparation within the Rome Statute legal framework. The Defence is, nonetheless, concerned that given the particular factual matrix of this case, the protocol for witness preparation contains insufficient safeguards to ensure the defendant's right to a fair, impartial and expeditious trial. The Defence therefore seeks reconsideration, or in the alternative, leave to appeal as concerns two discrete issues arising from the 'Decision on Decision on witness preparation and familiarisation' ('the Decision').¹
2. *Firstly*, the Trial Chamber has afforded the Prosecution *carte blanche* to conduct witness preparation with all of its witnesses at the seat of the Court (or *in situ*, for video link witnesses), immediately before their respective testimonies, and imposed a cut-off point of 24 hours between the cessation of the preparation session, and the commencement of the witness's testimony. The Chamber has also authorized the Prosecution to show and discuss new exhibits with its witnesses, which means that these preparation sessions are likely to generate new, previously undisclosed testimonial information. Bearing in mind the security situation in Mali, and the mission protocols in place, it will be impossible for the Defence to conduct any inquiries in relation to this new information, during this extremely short window. There will also be insufficient time for the Defence to ask to meet the witness in question to question them, before the commencement of the witness's testimony. Although the Chamber has indicated that it will not necessarily allow the Prosecution to introduce new information, the burden of litigating such issues appears to fall squarely on the Defence. The cumulative impact of these factors is not compatible with the defendant's right to adequate time and resources to prepare his Defence.
3. This therefore raises the *First Issue*, as to whether, by declining to implement advance oversight as concern the timing of witness preparation for individual witnesses, the Protocol fails to safeguard fundamental fair trial rights in an adequate manner.

¹ ICC-01/12-01/18-666.

4. *Secondly*, although the Chamber affirmed that the Prosecution's disclosure obligations continue to apply to preparation sessions, the Chamber appears to have determined that the video-recordings are exempted from disclosure, unless the Defence is able to demonstrate a particular basis for disclosure. This places the onus of requesting disclosure on the Defence, and further deprives the Defence of the best evidence as concerns the actual language used by the witnesses, and the extent to which this language was formulated in response to particularly phrased questions. Since the recordings constitute a 'record', their exemption is also not consistent with ICC case law concerning the scope of Rule 76, and the obligation on the part of the Prosecution to record and disclose the recordings of witnesses, falling under Rule 112.
5. This therefore raises the *Second Issue*, as concerns whether the Prosecution has an obligation to disclose all records generated by the preparation session that concern the witness's knowledge of the case. Even if the 'video' element of the recording has the distinct purpose of ensuring the integrity of the proceedings, the 'audio' element should continue to be disclosed, at the very least, for witnesses falling under Rule 112, in addition to any other non-visual records, so that the Defence has the means to verify the original language used by the witness.

II. Submissions

Request for Reconsideration

6. The Chamber possesses the inherent power to reconsider its decisions, on an exceptional basis, if the decision in question:
 - Is based on a clear error of reasoning;²
 - Is manifestly unsound or unsatisfactory, or would lead to an injustice;³ or
 - New or previously unavailable information requires the Chamber to reconsider its previous ruling.⁴

² ICC-02/04-01/15-1259, para. 12.

³ ICC-01/04-02/06-519, pp. 6-7, para. 12; ICC-01/04-02/06-1049-Red, para. 12; ICC-01/04-02/06-1282, pp. 6-7, para. 12. See also ICC-02/04-01/15-468, para. 4; ICC-01/05-01/13-1282, para. 8, ICC-01/05-01/13-1552, para. 6, ICC-01/05-01/13-1854, paras. 75-76.

⁴ ICC-01/05-01/08-1691-Red, para. 17; ICC-02/04-01/15-1259, para. 12.

The First Issue is impacted by new circumstances that affect the defendant's right to adequate time and facilities to prepare for trial (and trial witnesses), and which will lead to a manifestly unsound result

7. The issue as to whether it is appropriate to conduct witness preparation is separate from the issue as to whether it is appropriate to conduct witness preparation for all witnesses at the seat of the Court and/or on the eve of their testimony. The Chamber's reasoning concerning the latter issue centered on the following reasoning:⁵

the Chamber acknowledges that minimising the time for which a witness is required to be present in The Hague is desirable for their own safety. However, the Chamber is of the view that in the particular circumstances of this case, there are more significant challenges related to meeting and interviewing witnesses in the field. In the Chamber's view, the use of the witness preparation will assist in reducing the various interactions with them in the field and that is particularly important given the security situation.

8. While this consideration might hold true for some witnesses, it does not necessarily apply to all witnesses, particularly those who are either based outside of Mali, or, have been interviewed by the Prosecution in the immediate lead up to the trial. This consideration also did not give sufficient weight to the difficulties faced by the Defence in coping with ongoing disclosures, after the start of the trial, and the extent to which these difficulties will be exacerbated by recent developments related to the Coronavirus (COVID-19). The Prosecution, LRV and VPRS have already foreshadowed that the related restrictions will impact on pending investigations and missions in a significant manner. This impact will be exponentially more severe for the Defence, as:

- a. The Defence lacks the same degree of institutional support and resources as the Prosecution (i.e. the Prosecution has multiple investigators, whereas the Defence has one resource person);
- b. Defence investigations have never left the starting block: the pandemic has occurred at the very point where the Defence was starting to receive the identities of Prosecution witnesses; and
- c. Defence witnesses and sources are based in Mauritania and the North of Mali, rather than Bamako. The security measures in the North are far more

⁵ Decision, para. 14.

restrictive. This, in turn, means that Defence investigations require more time to prepare, and obtain the necessary security approvals.

9. Concretely, this means that it will be impossible for the Defence to complete its investigations concerning Prosecution witnesses before the commencement of the trial; a significant amount of analysis and investigation will necessarily be shifted to the trial proceedings themselves. Defence resources at trial will be severely stretched; the Defence will lack the capacity and resilience to review, seek instructions, and react to preparation notes and logs, disclosed 24 hours or less before the start of testimony, for every Prosecution witness. If these notes point to the centrality of issues, that the Defence did not have sufficient time to investigate at a prior juncture, the Defence will also be compelled to undertake last minute investigations in an extremely volatile security environment. The attendant risks **are far greater** than those which would relate to the planned preparation of witnesses in advance of the trial.
10. Although the Chamber indicates that it will continue to exercise judicial control over the evidence introduced by witnesses, this control is reactive, and highly dependent on the Defence raising objections “prior to or during the course of a witness’s testimony.”⁶ Rather than specifying that the Prosecution, as the calling party, must formally request and justify why firstly, certain witnesses should be prepared in The Hague, and secondly, the materials should be disclosed and introduced after the commencement of the trial, the Decision places the onus on the Defence to object, even though the Defence will be ill-equipped, and thus unable to meet this burden.
11. The cumulative impact of these factors produces a result, which is manifestly incompatible with Mr. Al Hassan’s right to adequate time and facilities to prepare for each witness. The Prosecution has had several years to investigate and prepare its case, whereas the short window of opportunity for the Defence to do so has now been drastically narrowed by COVID-19. It is therefore unfair and unbalanced to place the burden of objection on the Defence, rather than placing the burden of seeking permission on the Prosecution.

⁶ Decision, para. 28.

12. Article 64(2) requires the Trial Chamber to ensure that the trial is fair and expeditious, and conducted with full respect for the rights of the accused. Article 64(3)(c) elucidates that this entails providing “for disclosure of documents or information not previously disclosed, sufficient in advance of the commencement of the trial to enable adequate preparation for trial”. The Trial Chamber’s discretion to adopt trial procedures, such as witness preparation, is subject to these obligations. The particular circumstances of this case, and the restrictions imposed as a result of COVID-19, have increased the need for the Chamber to oversee the implementation of witness preparation, in order to ensure that it is conducted with full respect for the rights of the accused. In concrete terms, this can only be achieved if, rather than giving the Prosecution a generic right to conduct preparation at the seat of the Court/immediately prior to the witness’s testimony, the Protocol for Witness Preparation is amended to specify that, in advance of the trial, the Prosecution should be required to submit witness specific applications, setting out the arguments as to:

- a. Why preparation at the seat of the Court is necessary and appropriate, by reference to the specific circumstances of the witnesses; and
- b. The specific safeguards and measures that are in place to ensure that preparation of the witness in question will not undermine the defendant’s right to notice, or adequate time and facilities to prepare his defence.

13. This system will better promote the fair and expeditious resolution of disclosure issues, and notice, before the start of the trial. It will also allow the Defence to organize and prioritise its investigations by reference to the Chamber’s decision on the above requests. Restricting preparation at the seat of the Court to those witnesses, where it is both necessary and proportionate to do so, will also lessen the strain on both Defence resources, and those of Registry and field services, impacted by urgent investigative requests emanating from the Defence.

The Second Issue is affected by a clear error of reasoning, and would lead to an injustice/manifestly unsound result

14. It is possible that the Defence has misunderstood the Decision, and that by emphasising the continued applicability of the Prosecution’s disclosure obligations, the Chamber anticipated that for witnesses falling under Rule 112, the Prosecutor would disclose the audio element of all recordings, of a testimonial nature, concerning

such witnesses. If that is the case, then the Defence withdraws its request for reconsideration and request for leave to appeal as concerns the Second Issue. If that is not the case, then the Decision is affected by a clear error of reasoning and would lead to manifestly unsound and unfair consequences as concerns the conduct of the proceedings.

15. The purpose of the preparation sessions is to allow the witness to “refresh his or her memory, to clarify any issues, and to understand generally what he or she will be questioned about.”⁷ The content of such sessions directly concerns the witness’s knowledge of the case, and thus falls within the scope of the Prosecution’s Rule 76 disclosure obligations. Rule 76 requires the Prosecution to disclose “copies of any prior statements” made by Prosecution witnesses. This broad obligation encompasses all information of concerning the witness’s knowledge of the case,⁸ irrespective of the format of this information,⁹ the timing of such statements, or, the existence of prior statements. It therefore includes “the audio or video-record of the questioning of a person in accordance with rule 112 of the Rules of Procedure and Evidence and the transcript thereof”.¹⁰ The exception to this obligation is strictly circumscribed to the scenarios set out in Rule 76(4) concerning the protection of victims and witnesses, and confidential information. Resource issues are not a valid justification for non-compliance with this obligation.¹¹ Once it is determined that information from a particular document or record falls within the scope of Rule 76, then it is this document or record that must be disclosed.¹² The format of the information should also comply with the requirements of either Rule 111 (in which case, it should be signed) or Rule 112 (in which case, it should be recorded).¹³ If witnesses are likely to be traumatized by the requirement of signing a record, the procedure under Rule 112 should be followed.¹⁴

⁷ Decision, para. 15.

⁸ [ICC-01/04-02/06-1330](#), para. 1.

⁹ [ICC-02/05-03/09-295](#), para. 23.

¹⁰ [ICC-02/05-03/09-295](#), para. 23.

¹¹ [ICC-02/05-03/09-295](#), para. 29.

¹² [ICC-02/04-01/15-1335](#), paras. 5-6, citing [ICC-01/04-01/06-3031](#), para. 12; [ICC-01/09-01/11-886](#), para 8; [ICC-01/05-01/13-1632](#), para. 20.

¹³ [ICC-02/05-03/09-295](#), para. 26.

¹⁴ [ICC-02/05-03/09-295](#), paras. 26: “The Appeals Chamber notes that rule 112, sub-rules 1 (a) and 2 provide that where questioning is not audio- or videorecorded as would normally be required, the procedure in rule 111 shall be followed. In the view of the Appeals Chamber, these provisions indicate that rules 111 and 112 set out

16. The Decision did not address or distinguish these legal principles. And, although the Chamber affirmed that the Prosecution's disclosure obligations would extend to such sessions, the Chamber appears to have restricted the scope of this obligation to the "disclosure note and log", with the expectation that these would "contain all information that falls within the Prosecution's disclosure obligations."¹⁵ The note and log would only contain all disclosable information if the note is, in fact, a recording, or a signed statement. Anything less deprives the Defence of information falling under Rule 76.
17. Preparation notes/logs are not signed or read back to witnesses. Given the very short window within which they must be prepared, there is an extremely high risk that they will inadvertently miss crucial details, nuances, and inflections. Indeed, throughout the pre-confirmation phase, the Prosecution routinely omitted key exculpatory and contextual details from its summaries and investigators' notes.¹⁶ Such omissions are not necessarily intentional: the Prosecution simply lacks the ability to appreciate the full of array of possible issues and details that might be relevant to the Defence. There is also a risk that the notes/log might be based on translation/transcription errors: in the absence of a recording, the Defence cannot verify the original language used by the witness. The witness will also be providing the most up to date and relevant information during these sessions. It is therefore crucial that the Defence can, to the extent possible, base its cross-examination preparation on this account, and safely assume that the account reliably reflects the witness's account/language. Otherwise, there is a risk of unnecessary litigation and confusion, in the event that the witness contests the accuracy of the contents of the notes.
18. For this very reason, the Appeals Chamber has underscored that the "complete audio- or video-record of the questioning of a person will provide the fullest and most accurate account of the questioned person's statements. Any additional written record could, at most, only duplicate the statements contained in this audio- or video-record

two alternative procedures for the recording of questioning. Furthermore, the Appeals Chamber observes that rule 112 (4) provides for audio- or video-recording where this could assist in reducing any subsequent traumatization of victims of sexual or gender violence, children or persons with disabilities in providing their evidence. The Appeals Chamber considers that requiring such individuals to review and to sign an additional written record setting out the content of their statements might result in their re-traumatization and thus defeat the purpose of this sub-rule."

¹⁵ Decision, para. 45.

¹⁶ [REDACTED]

and would most likely contain less information”.¹⁷ The disclosure of notes, in lieu of recordings, is therefore not consistent with the Appeals Chamber’s finding, in connection with witnesses that fall under Rule 112, that there is a positive obligation to “create the best possible record of that person’s statements”.¹⁸

19. The ‘purpose’ of the recording is also not a relevant factor as concerns the scope and content of Rule 76,¹⁹ in particular, as concerns Rule 112 witnesses, where there is an independent obligation to create such a recording, for the purposes of disclosure.

20. Witness protection is also not a valid reason for withholding the recordings in their entirety.

- *Firstly*, in court protective measure should be litigated in an *inter partes* manner,²⁰ and any relevant information obtained on this point should be disclosed to the Defence.
- *Secondly*, the VWU has the primary responsibility for ensuring witnesses’ safety and security for the duration of their testimony, and the Prosecution has the possibility to contact its witnesses, post-testimony, to address any long-term protective issues.
- *Thirdly*, non-disclosure for the protection or security reasons requires prior judicial authorization, conducted on a case-by-case basis.²¹ The burden of justifying non-disclosure also falls on the Prosecution, and should never be reversed.²² The Chamber must also “bear in mind that the defence is at a disadvantage in being able to make a case given its inability to access the withheld information.”²³
- *Fourthly*, the Trial Chamber has confirmed that the Prosecution should not conduct ‘new investigations’ during these sessions.²⁴ It would therefore be inappropriate for the Prosecution to use these sessions as a vehicle for questioning the witnesses about allegations of intimidation or interference (particularly in light of the impact of such a line of questioning on the witness’s willingness to respond to Defence questions put to them during cross-examination).

¹⁷ [ICC-02/05-03/09-295](#), para. 27.

¹⁸ [ICC-02/05-03/09-295](#), para. 26.

¹⁹ “the mandatory video-recording of the preparation sessions was included by Trial Chamber V in its relevant protocol as a guarantee against misconduct, and not for disclosure purposes”: Decision, para. 46.

²⁰ Rule 87 (2)(a) of the RPE.

²¹ [ICC-01/04-01/07-521](#), para. 35.

²² ICC-02/11-01/15-915-Red, para. 1.

²³ ICC-02/11-01/15-915-Red, para. 1.

²⁴ Decision, para. 25.

- *Fifthly*, even if it were necessary to address sensitive issues during these sessions, the Prosecution has the means to organise the session in such a way that these issues could be addressed in a discrete manner, allowing for the remainder of the recording to be disclosed intact.
- *Sixthly*, even if the routine disclosure of *video* recordings might create a security risk for witnesses, this does not justify the non-disclosure of the *audio* component of these recordings.

21. It follows from the above, that the manner in which the Trial Chamber resolved the Second Issue cannot be reconciled with Rules 76, 111, and 112, and appellate precedents. It is also likely to prejudice Defence preparation and generate unnecessary litigation and testimonial confusion during the proceedings. It is therefore based on a clear error of reasoning, and/or would produce manifestly unsound consequences as concerns the fair and expeditious conduct of the proceedings.

The First Issue affects the fair and expeditious conduct of the proceedings, and an immediate appellate decision would materially advance the proceedings

22. The First Issue raises the core point as to whether, allowing the Prosecution to routinely conduct preparation sessions, immediately before the witnesses' testimony, is compatible with key legal provisions and rights of the accused, including:

- *Firstly*, Rule 76, which specifies that testimonial information from witnesses should be "disclosed sufficiently in advance to enable the adequate preparation of the defence";
- *Secondly*, Article 64, which obliges the Trial Chamber to "provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial"; and
- *Thirdly*, Article 67(1)(a), (b) and (e), concerning Mr. Al Hassan's right to timely notice of the Prosecution case, his right to adequate time and facilities to prepare his defence, and his right to examine witnesses against him, and in so doing, to present evidence that might be relevant to their testimony.

23. The Decision defers objections and litigation on issues of notice, and the impact of late disclosures, to the point of the witness's testimony. As demonstrated by the practical experience of the *ad hoc* Tribunals, this will lead to suspensions, while such issues are litigated; adjournments, if more time is required; and witness recalls, in

case the Defence has insufficient time to prepare its cross-examination.²⁵ Even if some aspect of witness preparation might enhance the efficiency of proceedings, its routine use, in The Hague, as concerns each and every witness will have a significant impact on the expeditious conduct of the proceedings as a whole.

24. The First Issue will affect the timing of witness preparation for every witness in this case; an incorrect resolution of this issue will thus taint irreversibly the proceedings as a whole. An immediate appellate resolution of the First Issue is therefore necessary to ensure “that the proceedings follow the right course”,²⁶ by pre-empting the consequences of a systematic approach, that will have significant ramifications as concerns crucial fair trial rights.²⁷

The Second Issue affects the fair and expeditious conduct of the proceedings, and an immediate appellate decision would materially advance the proceedings

25. The second issue curtails the scope of the Prosecution’s disclosure obligations as concerns records that would otherwise fall under Rule 76. The Prosecution’s Rule 76 disclosure obligations are an integral aspect of the defendant’s right to fair trial.²⁸

rule 76 (1) of the Rules serves the purpose of facilitating the accused’s effective exercise of his or her right to examine the witnesses against him or her, which is guaranteed by article 67 (1) (b) of the Statute (the right to have adequate facilities for the preparation of the defence) and article 67 (1) (e) (the right to examine, or have examined, the witnesses against him or her).

26. For this reason, Trial Chamber VI found that “how a statement is understood for the purposes of Rule 76 would significantly affect the fair and expeditious conduct of proceedings,”²⁹ and further, that the question as to whether information falls under Rule 76 may impact the defendant’s right to receive this information in a language

²⁵ [Manual on International Criminal Defence ADC-ICTY Developed Practices](#), p. 102; ICTY [Manual on Developed Practices](#), p. 83 (para. 22); *Prosecutor v. Vidoje Blagojevic Dragan Jokic*, Case No. IT-02-60-T, [Decision on Prosecution’s Unopposed Motion for Two Day Continuance for the Testimony of Momir Nikolic](#) (TC), 16 September 2003, p.1; *Prosecutor v. Rwamakuba*, [Decision on the Defence Motion Regarding Will-Say Statements](#), 14 July 2005, Case No. ICTR-98-44C-T, para. 6; *Prosecutor v. Milutinović et al.*, T. 1435 (10 August 2006); T:2674-2675 (31 August 2006); T: 5791 (2 November 2006).

²⁶ [ICC-01/04-168](#), para. 15.

²⁷ [ICC-01/04-168](#), para. 19.

²⁸ ICC-01/04-02/06-1330, para. 26.

²⁹ ICC-01/04-02/06-1039, para. 18.

that he fully understands.³⁰ The Defence would like to clarify that it is not requesting the Prosecution to translate such recordings in Arabic. Rather, whereas preparation notes will be disclosed in English or French, there is a significant likelihood that the recordings will be conducted, at least partly, in French, Arabic, Songhai or Tamasheq. The non-disclosure of the recordings will thus negatively impact Mr. Al Hassan's right to participate effectively in cross-examination preparation.

27. The Second Issue, and related scope of the Prosecutor's disclosure obligations, will also come into play as concerns every witness who falls under Rule 112; an incorrect resolution of this issue would therefore taint the entirety of the trial process, in an irreversible manner. An immediate decision of the Appeals Chamber would therefore materially advance the proceedings by eliminating uncertainties, and ensuring that the trial proceeds in accordance with the correct legal principles.³¹

III. Relief Sought

28. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Honourable Trial Chamber to:

Reconsider its Decision, by clarifying, or amending the Protocol, to provide that:

Firstly, Prosecution must submit witness specific applications, setting out the arguments as to:

- a. Why preparation at the seat of the Court is necessary and appropriate, by reference to the specific circumstances of the witnesses; and
- b. The specific safeguards and measures that are in place to ensure that the preparation of the witness in question will not undermine the defendant's right to notice, or adequate time and facilities to prepare his defence.

³⁰ ICC-01/04-02/06-1039, para. 19.

³¹ ICC-01/04-02/06-1039, para. 19: "The Chamber also considers that immediate resolution by the Appeals Chamber may materially advance the proceedings. The Chamber notes the fundamental importance of Rule 76 disclosure to all trial proceedings before the Court, and considers that certainty on this matter, through appellate review, is appropriate".

Secondly, that the terms of the Protocol are without prejudice to the Prosecution's obligation to disclose audio-recordings, in particular, as concerns witnesses falling under Rule 112.

29. In the alternative, the Defence requests the Trial Chamber to grant leave to appeal as concerns:

The First Issue, as to whether, by declining to implement advance oversight as concern the timing of witness preparation for individual witnesses, the Protocol fails to safeguard fundamental fair trial rights in an adequate manner; and

The Second issue, as concerns whether the Prosecution has an obligation to disclose all records generated by the preparation session that concern the witness's knowledge of the case, including, in particular, the audio component of witnesses, who fall under Rule 112.



Melinda Taylor
Lead Counsel for Mr. Al Hassan



Marie-Hélène Proulx
Associate Counsel for Mr. Al Hassan



Thomas Paul Hannis
Associate Counsel for Mr. Al Hassan

Dated this 23rd Day of March 2020
At The Hague, The Netherlands