



Original: English

No. ICC-01/12-01/18

Date: 9 April 2020

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 and, in the alternative, leave to
appeal the ‘Decision on witness preparation and familiarisation’**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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**Unrepresented Applicants for
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States Representatives

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REGISTRY

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**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, issues this ‘Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’.

I. Procedural history and submissions

1. On 17 March 2020, the Chamber issued its ‘Decision on witness preparation and familiarisation’ (the ‘Impugned Decision’), adopting a ‘Witness preparation protocol (the ‘Protocol’).¹
2. On 23 March 2020, the Defence requested reconsideration or, in the alternative, leave to appeal on the following two issues (together, the ‘Issues’) arising from the Impugned Decision (the ‘Request’):²

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 (‘First Issue’).³

Whether the Prosecution has an obligation to disclose all records generated by the preparation session that concerns the witness’s knowledge of the case, including, in particular, the audio component of witnesses, who fall under Rule 112 (‘Second Issue’).⁴

3. As regards the reconsideration of the First Issue, the Defence contends that the Chamber has granted a ‘*carte blanche* to conduct witness preparation’.⁵ Specifically on the reconsideration, the Defence submits that the current COVID-19 circumstances make it impossible for it to complete investigations before the start of trial and consequently, the approach taken by the Impugned Decision is incompatible with Mr Al Hassan’s fair trial rights.⁶ The Defence

¹ ICC-01/12-01/18-666 with one public annex containing the Protocol.

² Defence request for reconsideration, or in the alternative, leave to appeal the “Decision on witness preparation and familiarisation” (ICC-01/12-01/18-666), ICC-01/12-01/18-678-Conf (a public redacted version was filed that same day, ICC-01/12-01/18-678-Red).

³ Request, ICC-01/12-01/18-678-Red, paras 3, 29.

⁴ Request, ICC-01/12-01/18-678-Red, paras 5, 29.

⁵ Request, ICC-01/12-01/18-678-Red, para. 2.

⁶ Request, ICC-01/12-01/18-678-Red, paras 9-11.

therefore requests that the Chamber amends the Protocol to specify that, in advance of the trial, the Prosecution should submit witness-specific applications as to why witness preparation is necessary and appropriate (with specific safeguards and measures to ensure the rights of the accused), and limiting the preparation to the seat of the Court only.⁷

4. Concerning the reconsideration of the Second Issue, the Defence argues that the Chamber appears to have exempted video recordings from the preparation sessions from disclosure, placing the onus on the Defence to demonstrate the basis for disclosure. It argues this is inconsistent with Rule 76 of the Rules of Procedure and Evidence (the ‘Rules’) and obligations under Rule 112 of the Rules. It argues that at least for suspect witnesses, video or at least audio recording should be disclosed.⁸ The Defence submits that the decision ‘is affected by a clear error of reasoning and would lead to an injustice/manifestly unsound result’.⁹ It submits that material arising from preparation sessions should be treated as ‘copies of any prior statements’ under Rule 76 of the Rules. For suspect witnesses, the Defence submits that these should be treated as audio or video-record and transcript of the questioning under Rule 112 of the Rules. In its view, anything less (including the logs foreseen in the Impugned Decision) is insufficient and unjustified.¹⁰ The Defence therefore requests that the Protocol is amended/clarified, specifying that the Protocol is without prejudice to the disclosure obligations of audio-recordings under Rule 112 of the Rules.¹¹
5. Concerning the request for leave to appeal on the First Issue, the Defence argues that the ‘routine use’ of witness preparation, leading to late disclosure and litigation (with subsequent adjournments, witness recalls and insufficient time to prepare) affects the expeditious conduct of the proceedings as a whole. Since the decision relates to every witness in the case, and will ‘taint irreversibly the

⁷ Request, ICC-01/12-01/18-678-Red, paras 12-13, 28.

⁸ Request, ICC-01/12-01/18-678-Red, paras 4-5. The Defence submits that if the Chamber anticipated that for Rule 112 witnesses disclosure obligations were applicable, then it withdraws its request for reconsideration/appeal on the Second Issue (para. 14).

⁹ Request, ICC-01/12-01/18-678-Red, para. 21.

¹⁰ Request, ICC-01/12-01/18-678-Red, paras 15-20.

¹¹ Request, ICC-01/12-01/18-678-Red, para. 28.

proceedings as a whole’, the Defence is of the view that appellate resolution is necessary.¹²

6. Concerning the request for leave to appeal on the Second Issue, the Defence submits that how a statement is understood under Rule 76 of the Rules and the question as to whether information falls under this provision may impact the accused’s right to receive information in a language he fully understands. It submits that the Impugned Decision could taint the entirety of the trial process in an irreversible manner and an immediate resolution by the Appeals Chamber is thus warranted to ensure ‘that the trial proceeds in accordance with the correct legal principles’.¹³
7. On 27 March 2020, the Office of the Prosecutor (the ‘Prosecution’) filed its response, opposing the Request (the ‘Response’).¹⁴
8. As regards reconsideration of the First Issue, the Prosecution contends that the Defence fails to show how the potential limitations on its general investigative activities arising from the COVID-19 pandemic is a new circumstance that justifies reconsideration of the witness preparation protocol. Instead, it merely reiterates arguments already presented and analysed by the Chamber in the Impugned Decision.¹⁵ The Prosecution further submits that the Defence mixes up its investigations prior to trial with investigations during trial, particularly since witness preparation does not necessarily trigger investigations, as it is not an investigative process.¹⁶ In the view of the Prosecution, the Impugned Decision already contains remedies in case disclosure and investigative steps would be needed as a result of witness preparation.¹⁷ Moreover, the Prosecution argues that one does not know how the situation with COVID-19 will be during trial and when witness preparation will take place.¹⁸ The Prosecution also submits that the Defence overlooks that the security situation is one of the

¹² Request, ICC-01/12-01/18-678-Red, paras 22-24.

¹³ Request, ICC-01/12-01/18-678-Red, paras 25-27.

¹⁴ Prosecution response to Defence request for reconsideration, or in the alternative, leave to appeal the “Decision on witness preparation and familiarisation”, ICC-01/12-01/18-687-Conf.

¹⁵ Response, ICC-01/12-01/18-687-Conf, paras 8-9.

¹⁶ Response, ICC-01/12-01/18-687-Conf, paras 10-11.

¹⁷ Response, ICC-01/12-01/18-687-Conf, para. 12.

¹⁸ Response, ICC-01/12-01/18-687-Conf, para. 13.

several factors considered by the Chamber in the impugned decision, along with other factors, such as the number of Rule 68(3) witnesses expected to testify in the trial.¹⁹

9. As regards reconsideration of the Second Issue, the Prosecution contends that the Defence does not show a clear error of reasoning and wrongly relies on Rule 76 of the Rules, as witness preparation is not an investigation and in fact the Chamber emphasised this in the Impugned Decision.²⁰ In the view of the Prosecution, the logs foreseen in the Impugned Decision are sufficient and the Defence erroneously cites the Appeals Chamber jurisprudence, which does not lay down a general disclosure obligation but a potential disclosure obligation to be decided case-by-case, something already foreseen by the Chamber in the Impugned Decision.²¹
10. As regards the request for leave to appeal, the Prosecution submits that neither of the two proposed Issues are appealable under Article 82(1)(d) of the Rome Statute (the ‘Statute), but simply a misreading or misunderstanding and disagreement with the Impugned Decision that ignores the remedies provided therein.²² Additionally, the Prosecution submits that the Request does not meet the two remaining cumulative requirements under Article 82(1)(d) of the Rome Statute.²³

II. Analysis

11. At the outset, the Chamber notes that the Statute does not provide guidance on reconsideration of judicial decisions. However, as conceded by the parties, the Chamber has the power to reconsider its decisions upon request of the parties or *proprio motu*, particularly in light of Articles 64(2) and 67 of the Statute. Trial chambers have nevertheless determined that reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it

¹⁹ Response, ICC-01/12-01/18-687-Conf, paras 14-15.

²⁰ Response, ICC-01/12-01/18-687-Conf, paras 17-18.

²¹ Response, ICC-01/12-01/18-687-Conf, paras 19-25.

²² Response, ICC-01/12-01/18-687-Conf, paras 27-31.

²³ Response, ICC-01/12-01/18-687-Conf, paras 34-41.

is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.²⁴

12. As regards the possibility to grant leave to appeal pursuant to Article 82(1)(d) of the Statute, the following criteria shall be fulfilled:

- a. the matter must be an ‘appealable issue’;
- b. the issue at hand is one that would significantly affect:
 - i. the fair and expeditious conduct of the proceedings, or
 - ii. the outcome of the trial; and
- c. an immediate resolution by the Appeals Chamber may materially advance the proceedings.

13. The Chamber considers that in order for a request for leave to appeal to be granted, it should identify specific ‘issues’ which were dealt with in the Impugned Decision.²⁵ In this regard, Appeals Chamber has determined:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.²⁶

14. Hence, a mere disagreement or conflicting opinion is not an appealable issue.²⁷ General arguments challenging the entirety of the Chamber’s reasoning are also insufficient, as the definition of an appealable issue requires that parties

²⁴ See *inter alia* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468, para. 4; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Defence Request for Reconsideration of or Leave to Appeal ‘Decision on “Defence Request for Disclosure and Judicial Assistance”’, 24 September 2015, ICC-01/05-01/13-1282, para. 8; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on the Prosecution’s request for reconsideration or, in the alternative, leave to appeal, 18 March 2015, ICC-01/04-02/06-519, para. 12; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 2 April 2011, ICC-01/04-01/06-2705, para. 18 (the Chamber may reconsider past decisions when they are ‘manifestly unsound and their consequences are manifestly unsatisfactory’); Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, para. 19.

²⁵ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 (hereinafter: ‘DRC 2006 Appeals Judgment’), para. 9.

²⁶ DRC 2006 Appeals Judgment, ICC-01/04-168, para. 9.

²⁷ DRC 2006 Appeals Judgment, ICC-01/04-168, para. 9.

articulate discrete issues for Appeals Chamber resolution.²⁸ Allegations that the issue for which leave to appeal is sought is of general interest or that it may potentially arise in future proceedings,²⁹ or that an appeal may be legitimate or even necessary at some future stage,³⁰ are equally inadequate to meet the criteria under Article 82(1)(d) of the Statute. The party seeking leave to appeal shall also demonstrate that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

15. The Chamber will now analyse whether the Issues identified in the Request fulfil the requirements for reconsideration and/or leave to appeal detailed above.

i. Request for reconsideration

16. As regards the First Issue, the Defence submits that given the current COVID-19 circumstances, the Protocol is incompatible with Mr Al Hassan's fair trial rights as it is highly dependent on Defence motions that the Defence submits, it will be ill-equipped to prepare.
17. The Chamber is of the view that this argument is general and imprecise. As already noted in the Impugned Decision, witness preparation does not, as averred by the Defence, necessarily create last-minute litigation for every single witness, but instead such litigation is expected to be 'rare'.³¹ In fact this same

²⁸ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2015, ICC-02/04-01/15-529 (hereinafter: 'Ongwen LtA Decision'), para. 6; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013, ICC-01/09-01/11-596, para. 11; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on three applications for leave to appeal, 29 November 2012, ICC-02/11-01/11-307, para. 70.

²⁹ ICC-02/04-01/15-529, para. 8; See also Pre-Trial Chamber II, *Situation in Uganda*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), para. 21; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, para. 11; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the prosecution and defence applications for leave to appeal the 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 26 January 2011, ICC-01/05-01/08-1169 (hereinafter: 'Bemba LtA Decision'), para. 25.

³⁰ Ongwen LtA Decision, ICC-02/04-01/15-529, para. 8; Bemba LtA Decision, ICC-01/05-01/08-1169, para. 25.

³¹ Impugned Decision, ICC-01/12-01/18-666, para. 27.

argument was already made by the Defence in the context of the Impugned Decision, where it stated that the Protocol would lead to ‘increased and routine litigation’.³² Contrary to what the Defence again argues in its Request, the Protocol puts in place a system to prevent unnecessary litigation during trial and instead to ‘facilitate the focused, efficient and effective questioning of the witness during the proceedings’.³³ The Protocol also bears in mind the ‘Prosecution’s duty of diligence’.³⁴ Moreover, the amendments to the Protocol sought by the Defence would possibly entail multiple motions by the Prosecution, which would inevitably require time and resources from the Defence. Accordingly, even if reconsideration were warranted, the proposed solution of the Defence could possibly cause more, instead of less, litigation.

18. The Chamber further notes that the Defence makes general allegations against what it submits is the ‘blanket approach’ of the Impugned Decision, that ‘taints’ the entire trial proceedings. This is a clear misrepresentation of the nature of the Impugned Decision, which took into consideration the various types of witnesses expected to testify in trial and the need to guarantee fair trial rights throughout their testimonies. In particular, the Impugned Decision considered why witness preparation was adequate for dual status witnesses, Rule 68(3) witnesses, vulnerable witnesses, suspect witnesses and video-link witnesses, among others. All of these case-specific considerations continue to apply and are ever more applicable in the current COVID-19 scenario, which will require focused and efficient proceedings. For example, the Impugned Decision particularly took into account the need to reduce the amount of time in the field, a consideration that has become very relevant given the travel restrictions attached to COVID-19.
19. The Chamber further notes that many of the circumstances raised by the Defence as amounting to new circumstances warranting reconsideration were already exposed in detail in the Defence’s prior submissions in the context of the impugned decision and are therefore not new. Notably, the Impugned

³² Impugned Decision, ICC-01/12-01/18-666, para. 23, footnote 23.

³³ Impugned Decision, ICC-01/12-01/18-666, para. 11; Protocol, para. 1.

³⁴ Impugned Decision, ICC-01/12-01/18-666, para. 27.

Decision entertained and rejected a Defence request for preparation to be allowed on a case-by-case basis.³⁵ The present Request is a further attempt to re-litigate the same matter.

20. Accordingly, the Defence has not demonstrated that the exceptional remedy of reconsideration would be justified in order to limit witness preparation to the seat of the Court or to require that the Prosecution submits witness-specific applications to conduct preparation sessions. The Chamber considers that the recent change in the overall circumstances as a result of the COVID-19 pandemic does not warrant reconsideration of the procedure on witness preparation adopted by the Chamber in the Impugned Decision and the Protocol. More precisely, the Defence has failed to demonstrate how the First issue affects the accused's right to adequate time and facilities to prepare for trial and will lead to a manifestly unsound result.³⁶
21. Turning to the reconsideration of the Second Issue, the Defence merely repeats its previous submissions in the context of the Impugned Decision.³⁷ As noted above, the category of suspect witnesses was carefully examined by the Chamber in the Impugned Decision and disclosure obligations were also examined and decided upon. In the Impugned Decision the Chamber introduced safeguards to guarantee adequate disclosure to the Defence in relation to this and other categories of witnesses. Contrary to what the Defence suggests, the Impugned Decision adopted safeguards that do not place an undue burden on the Defence. First, because, as noted in the Impugned Decision, the Chamber expects disclosure of entirely new information on the eve of testimony (including for suspect witnesses) will be rare. Second, in these expected limited cases, the safeguards in place may be activated by the Defence but above all will be activated *proprio motu*, if deemed necessary, by the Chamber. Accordingly, and although the Defence submits that the Second Issue is affected by a clear error of reasoning and would lead to an injustice and manifestly

³⁵ Impugned Decision, ICC-01/12-01/18-666, para. 35.

³⁶ Request, ICC-01/12-01/18-678-Red, p. 5.

³⁷ Impugned Decision, ICC-01/12-01/18-666, paras 23, 31-32, footnotes, 23, 28-29.

unsound result,³⁸ it fails to specify how the Chamber's reasoning was flawed. The Defence also fails to present persuasive arguments that the exceptional avenue of reconsideration is necessary to prevent an injustice.³⁹

ii. Request for leave to appeal

22. As regards the alternative request for leave to appeal, the Chamber will examine whether the Defence has met the requirements under Article 82(1)(d) of the Statute.
23. The Chamber is of the view that the Defence has not identified appealable issues in its Request. In its formulation of both Issues, and as noted above, the Defence merely reiterates the submissions already made before the Chamber in the context of the Impugned Decision. Although some arguments are now rephrased in the context of the COVID-19 situation, they remain essentially the same and solely reflect the Defence's disagreement with the approach taken by the Chamber in the Impugned Decision and the Protocol.
24. As regards the First Issue, the Chamber is of the view that it is not a discrete issue that could be subject to appellate review. To the contrary, it is a general and vague allegation and clearly insufficient to meet the criteria set out by the Appeals Chamber described above. A general allegation that 'the Protocol fails to safeguard fundamental fair trial rights in an adequate manner'⁴⁰ is insufficiently discrete and thus not identifiable.
25. The Chamber further agrees with the Prosecution⁴¹ that in formulating the First Issue the Defence misunderstands witness preparation, which is not an investigation, and convolutes the impact of COVID-19 upon the Defence's current investigations and future conduct in relation to witness preparation. The First Issue misrepresents the Impugned Decision, which addressed all the

³⁸ Request, ICC-01/12-01/18-678-Red, p. 7.

³⁹ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Motion for Reconsideration of or Leave to Appeal the Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence, 6 September 2019, ICC-02/04-01/15-1589, para. 13.

⁴⁰ Request, ICC-01/12-01/18-678-Red, paras 3, 29.

⁴¹ Response, ICC-01/12-01/18-687-Conf, paras 29-30.

challenges and concerns raised by the Defence and implemented safeguards to protect the rights of the accused. The Defence further distorts the Impugned Decision, suggesting that the Chamber ignored particularities of this case. To the contrary, as noted above, the Chamber considered the specific circumstances of the case, including the different categories of witnesses expected to testify at trial and how witness preparation would apply to them.

26. In relation to the Second Issue, the Defence also fails to identify an appealable issue. The Defence again makes a general allegation that merely repeats its previous submission in the context of the Impugned Decision and expresses its disagreement with the Chamber's reasoning. Although the Defence refers specifically to suspect witnesses ('in particular, the audio component of witnesses who fall under Rule 112'), the Second Issue attempts to litigate once again the Defence's demand to equate the witness preparation session to an interview during investigation. Thus, the Second Issue is based on a misconception of the Impugned Decision, which did not exempt the Prosecution from its disclosure obligations, or the Chamber from its obligation to protect the rights of the accused, but decided that this should be determined on a case-by-case basis.
27. Additionally, the Defence did not demonstrate how any of the other criteria under Article 82(1)(d) of the Statute are met. The Chamber agrees with the Prosecution,⁴² that the Defence ignores the role of the Impugned Decision in promoting the fair and expeditious conduct of the proceedings. The Chamber also considers that arguments made by the Defence as regards possible delays are at this stage speculative and were, in any event, fully considered by the Chamber in rendering the Impugned Decision. Accordingly, the Defence has failed to demonstrate how the two Issues could affect the fair or expeditious conduct of proceedings, particularly since the Chamber, in the Impugned Decision, already addressed all the challenges and concerns raised by the Defence and discussed at length and in detail a number of safeguards in place to protect the rights of the accused. In particular, as noted above, the Chamber did

⁴² Response, ICC-01/12-01/18-687-Conf, paras 34-36.

not impose the onus on the Defence, but adopted a system in which the Chamber, *proprio motu*, will also safeguard the rights of the accused and the integrity and the fairness of proceedings in general.

28. Accordingly, as appealable issues have not been identified and the Defence has not properly addressed whether appellate review is warranted at this stage to advance the proceedings, its request for leave to appeal does not meet the requirements of Article 82(1)(d) of the Statute.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

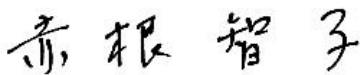
REJECTS the Request in its entirety; and

ORDERS the Prosecution to file a public redacted version of the Response ICC-01/12-01/18-687-Conf no later than five days after notification of this decision.

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 9 April 2020

At The Hague, The Netherlands