



**Original: English**

**No. ICC-01/12-01/18  
Date: 4 November 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**

**Public redacted version of ‘Decision on Defence request for remedy concerning  
P-0065’s witness preparation log’**

Decision 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 Victims**

Seydou Doumbia  
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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*

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**REGISTRY**

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**Registrar**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**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 the following decision.

1. On 29 October 2020, the Defence requested the Chamber to (i) order the Prosecution to disclose a ‘sufficient’ version of P-0065’s Witness Preparation Log (the ‘Log’) as soon as practicable and no later than 48 hours before the start of cross-examination; and (ii) grant it one full day to prepare its cross-examination following the Prosecution or LRVs examination (the ‘Request’).<sup>1</sup>
2. The Defence submits that (i) the Log shows that the Office of the Prosecutor (the ‘Prosecution’) used its preparation sessions with P-0065 to obtain new evidence and selectively re-interview him on the eve of testimony;<sup>2</sup> (ii) the Prosecution provided material previously unseen by P-0065 relating to issues for which insufficient notice has been given;<sup>3</sup> and (iii) the Log does not provide sufficient information to fully understand the bases for, or the circumstances under which P-0065 made, additional comments, clarifications and substantial amendments to his previous statements.<sup>4</sup> The Defence also objects to late provision of the Log.<sup>5</sup> The Defence submits that the prejudice arising from these issues is further compounded by late disclosure of evidence and lifting of redactions.<sup>6</sup> It also submits that the requested adjournment is necessary to translate the new material into Arabic for Mr Al Hassan.<sup>7</sup> The Request is stated to be without prejudice to the Defence’s right to object to certain lines of questioning or to seek further time to prepare during the course of P-0065’s testimony.<sup>8</sup>

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<sup>1</sup> Defence request for a remedy concerning P-0065’s preparation log, ICC-01/12-01/18-1133-Conf, (with confidential Annexes A and B), paras 36, 38-39, 41.

<sup>2</sup> Request, ICC-01/12-01/18-1133-Conf, paras 14-21.

<sup>3</sup> Request, ICC-01/12-01/18-1133-Conf, para. 22.

<sup>4</sup> Request, ICC-01/12-01/18-1133-Conf, paras 23-29.

<sup>5</sup> Request, ICC-01/12-01/18-1133-Conf, para. 34.

<sup>6</sup> Request, ICC-01/12-01/18-1133-Conf, paras 31-32.

<sup>7</sup> Request, ICC-01/12-01/18-1133-Conf, para. 35.

<sup>8</sup> Request, ICC-01/12-01/18-1133-Conf, para. 40.

3. On 2 November 2020, in accordance with the deadline set by the Chamber,<sup>9</sup> the Prosecution responded to the Request, submitting that it be dismissed (the ‘Response’).<sup>10</sup> The Prosecution submits<sup>11</sup> that, *inter alia*, the Defence’s claims are unfounded, the Log is not deficient and the session was conducted in conformity with the Decision on witness preparation and familiarisation (the ‘Protocol Decision’)<sup>12</sup> and the ‘Witness preparation protocol (the ‘Protocol’).<sup>13</sup>
4. At the outset, the Chamber recalls that the witness preparation log must be provided ‘promptly’ to the non-calling party.<sup>14</sup> In this instance, the Log was provided to the Defence at 17:44 on 26 October, four days after the end of the preparation session.<sup>15</sup> Noting that the Log concerns four days of witness preparation<sup>16</sup> and comprises 25 pages of substance, and that P-0065’s testimony was in fact due to start at 09:30 on 27 October, the Chamber considers that the Prosecution failed to provide the Log promptly and cautions that in the future witness preparation logs must be provided earlier. Noting the subsequent adjournments to P-0065’s testimony however, the Chamber considers that in the instant case no relief is necessary to remedy the delayed provision of the Log on the part of the Prosecution. Nevertheless, the Prosecution is reminded to strictly comply with its timing obligation under the Protocol going forward.
5. Next, the Chamber notes that part of the Defence’s objections concern the Prosecution presenting P-0065 with new materials and eliciting comments.<sup>17</sup> This notably includes a number of videos, two photographs and 11 emails not mentioned in the witness’s statements (the ‘Items’),<sup>18</sup> a card related to another witness [REDACTED] (the ‘Card’) which was shown to elicit information

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<sup>9</sup> Email from the Chamber, 29 October 2020, at 10:57.

<sup>10</sup> Prosecution response to Defence’s request for a remedy concerning MLI-OTP-P-0065’s preparation log, ICC-01/12-01/18-1135-Conf.

<sup>11</sup> Response, ICC-01/12-01/18-1135-Conf, paras 1, 3.

<sup>12</sup> [ICC-01/12-01/18-666](#).

<sup>13</sup> [ICC-01/12-01/18-666-Anx](#).

<sup>14</sup> [Protocol](#), ICC-01/12-01/18-666-Anx, para. 15.

<sup>15</sup> Request, ICC-01/12-01/18-1133-Conf, paras 1, 34. The session concluded at 13:20 on 22 October 2020: Log, p. 25.

<sup>16</sup> Log, pp 1, 4, 7, 17.

<sup>17</sup> Request, ICC-01/12-01/18-1133-Conf, para. 21 and generally 14-20.

<sup>18</sup> Request, ICC-01/12-01/18-1133-Conf, para. 16. Four of the videos mentioned in footnote 9 of the Request are dealt with separately in this decision as the Videos.

about P-0065's relationship to this individual,<sup>19</sup> and four videos not mentioned in the witness's statements, which were shown for the purpose of identification of Mr Al Hassan (the 'Videos') (together, the 'Additional Material').<sup>20</sup> The Defence also objects to the fact that questions were put to P-0065, including for the purposes of identifications.<sup>21</sup>

6. In relation to these objections, the Chamber recalls that the Protocol foresees and permits the Prosecution to show exhibits to the witness, 'regardless of whether or not the witness has previously seen them, and ask him or her to comment on them for the purpose of ascertaining whether the witness can usefully comment on them during testimony'.<sup>22</sup> However, in adopting this provision of the Protocol, the Chamber emphasised that this 'does not create a right for the Prosecution to conduct last-minute investigations or seek to obtain completely new evidence from witnesses immediately prior to their testimony'.<sup>23</sup> The Chamber recalled that to respect this principle, materials which the witness had not previously seen may be presented only if they were disclosed to the Defence, appear on the Prosecution's amended list of evidence, and where they 'relate to a known issue for which adequate notice was provided'.<sup>24</sup>
7. As stated in the Protocol Decision, the Chamber also expects that 'the disclosure of entirely new information on the eve of a witness's testimony [...] will be rare' and refers to the Prosecution's duty of diligence in this regard.<sup>25</sup> The Protocol Decision provides that should the questioning of a witness on certain topics be considered prejudicial because of insufficient notice provided to the accused, objections to certain lines of questioning or motions seeking further

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<sup>19</sup> Request, ICC-01/12-01/18-1133-Conf, paras 17-18.

<sup>20</sup> Request, ICC-01/12-01/18-1133-Conf, para. 22.

<sup>21</sup> Request, ICC-01/12-01/18-1133-Conf, paras 19-20.

<sup>22</sup> [Protocol](#), ICC-01/12-01/18-666-Anx, para. 24.

<sup>23</sup> [Protocol Decision](#), ICC-01/12-01/18-666, para. 25.

<sup>24</sup> [Protocol Decision](#), ICC-01/12-01/18-666, para. 26.

<sup>25</sup> [Protocol Decision](#), ICC-01/12-01/18-666, para. 27.

time to prepare may be formulated by the Defence prior to or during the course of a witness's testimony.<sup>26</sup>

8. In the instant case, the Chamber does not consider that showing the Additional Material to the witness triggers one of these foreshadowed remedies. The Chamber observes that, according to the Log, the majority of the four days of preparation were spent reviewing the witness's statements and materials referred to therein<sup>27</sup> and review of the Additional Material began only part way through the final day.<sup>28</sup> The Items are not new – they were [REDACTED],<sup>29</sup> and were for the most part included as exhibits to be shown to P-0065 in the list filed in April 2020,<sup>30</sup> and included on the Prosecution's list of material for this witness of 20 October.<sup>31</sup> In relation to Videos, the Chamber does not consider the limited questions asked on or information generated from showing these to P-0065 to have given rise to significant prejudice.<sup>32</sup> The same conclusion applies to the instances where P-0065 was asked questions including as to identifications.<sup>33</sup> In fact, the Chamber notes that such an objection was raised during the examination-in-chief, but was overruled by the Chamber noting the manner in which the item in question was going to be put to the witness (*i.e.* for identification purposes).<sup>34</sup> In relation to the Card, the Chamber observes that there is already some evidence on the record demonstrating that P-0065 and this witness knew each other<sup>35</sup> and that the connection between these two witnesses was known to the Defence at least since April 2020, when it was notified of the Prosecution's list of witnesses and corresponding summaries.<sup>36</sup> Further, contrary to the Defence submission that the Log is 'wholly deficient' on this

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<sup>26</sup> [Protocol Decision](#), ICC-01/12-01/18-666, para. 28.

<sup>27</sup> See Log, pp 1-19.

<sup>28</sup> See Log, p. 19.

<sup>29</sup> See Log, pp 19, 24.

<sup>30</sup> ICC-01/12-01/18-740-Conf-AnxB, pp 250-268.

<sup>31</sup> With one exception, MLI-OTP-0018-0382, on which the witness made no comment: Log, p. 20. Email from the Prosecution, 20 October 2020, at 18:33.

<sup>32</sup> See Log, pp 23-24.

<sup>33</sup> See e.g. Log, pp 8, 10.

<sup>34</sup> See Transcript of hearing 2 November 2020, ICC-01/12-01/18-T-038-CONF-ENG ET, p.20, line 15 to p. 21, line 9

<sup>35</sup> MLI-OTP-0020-0019-R04 at 0077 and 0082. See also Response, ICC-01/12-01/18-1135-Conf, n. 26.

<sup>36</sup> ICC-01/12-01/18-740-Conf-AnxB, p. 242.

point,<sup>37</sup> the Log records the information which P-0065 provided, understandably not *verbatim*, but in a comprehensive manner.<sup>38</sup>

9. In any event, even to the extent new information arose from these matters, the Chamber notes that the Defence has *de facto* gained quite some additional time to prepare with for this witness arising from a last minute adjournment of his testimony and extended reduction in sitting hours, the latter coming into effect only after the Request was filed. In all the circumstances, the Chamber considers the Defence's request for an additional day to prepare not warranted.
10. Finally, the Chamber notes the Defence allegation that the Log fails to adequately provide records of questions put to P-0065 in the course of the sessions,<sup>39</sup> and provides insufficient detail to determine whether or to what extent P-0065's amendments, additions and comments were influenced by the circumstances of the session.<sup>40</sup> The Chamber considers these assertions to be unfounded. The Chamber recalls that one of the purposes of witness preparation is for the witness to review his/her statements and identify whether corrections or clarifications are necessary in advance of their upcoming testimony.<sup>41</sup> The Chamber has previously noted that this process contributes to the efficiency of the questioning in court and therefore to the expeditiousness of the witness's subsequent testimony.<sup>42</sup> In this respect, the Chamber notes that the Log contains details of the clarifications, changes, corrections and new information that P-0065 provided. As noted by the Prosecution,<sup>43</sup> the questions put to the witness are mostly self-evident from the text of the Log itself. Nothing in the Log suggests to the Chamber that P-0065's amendments, additions and comments were influenced by the circumstances of the session and therefore the Chamber considers an update of the Log, as requested, to be unwarranted.

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<sup>37</sup> Request, ICC-01/12-01/18-1133-Conf, para. 17.

<sup>38</sup> See Log, p. 15.

<sup>39</sup> Request, ICC-01/12-01/18-1133-Conf, para. 25.

<sup>40</sup> Request, ICC-01/12-01/18-1133-Conf, para. 27.

<sup>41</sup> [Protocol Decision](#), ICC-01/12-01/18-666, para. 50.

<sup>42</sup> [Protocol Decision](#), ICC-01/12-01/18-666, para. 50.

<sup>43</sup> Response, ICC-01/12-01/18-1135-Conf, para. 11.

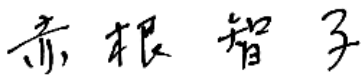
**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request.

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 4 November 2020

At The Hague, The Netherlands