



Original: English

**No. ICC-01/12-01/18
Date: 12 October 2021**

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 of, or leave to appeal, the
‘Fifth decision on matters related to the conduct of proceedings:
presentation of evidence by the LRVs and Defence’**

To be notified in accordance with Regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

Karim A. A. Khan
James Stewart

Counsel for the Defence

Melinda Taylor

Legal Representatives of Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

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*****REGISTRY****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*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following decision.

I. Procedural history and submissions

1. On 22 September 2021, the Chamber issued the ‘Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence’ (the ‘Scheduling Decision’),¹ in which it issued certain directions as regards the end of the case of the Office of the Prosecutor (the ‘Prosecution’) and any presentation of evidence by the legal representatives for victims (the ‘LRVs’) and the Defence. Relevantly, the Decision requires the Defence to: (i) provide notice of whether it intends to present evidence and, if yes, a preliminary list of witnesses, by 15 December 2021;² (ii) provide its final list of witnesses and evidence, witness statements or summaries, an outline of legal and factual issues it intends to raise, and to complete disclosure, within four weeks of notification of the closure of the Prosecution case;³ and (iii) commence its case six weeks thereafter.⁴
2. On 28 September 2021, the Defence filed a request for reconsideration of, or leave to appeal, the Scheduling Decision (the ‘Request’).⁵ In relation to the request for reconsideration, the Defence submits that the Scheduling Decision is based on a clear error of reasoning and that it is manifestly unsound occasioning manifestly unsatisfactory consequences including violation of Mr Al Hassan’s fair trial rights under Articles 64(2) and 67(1)(b) and (e) of the Statute. In support, the Defence submits that the Scheduling Decision fails to take account of various impediments to Defence investigations including the COVID-19 pandemic, disclosure delays, a ‘shifting’ of the Prosecution case and a heavy trial schedule.⁶

¹ ICC-01/12-01/18-1756.

² Scheduling Decision, ICC-01/12-01/18-1756, paras 9-10.

³ Scheduling Decision, ICC-01/12-01/18-1756, para. 11.

⁴ Scheduling Decision, ICC-01/12-01/18-1756, para. 12.

⁵ Defence request for reconsideration of, or leave to appeal, ‘Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence’, ICC-01/12-01/18-1778-Conf.

⁶ Request, ICC-01/12-01/18-1778-Conf, paras 9-27.

The Defence requests at least three months, from the conclusion of the LRVs' case, before being required to indicate its list of witnesses if any.⁷ In the alternative the Defence seeks leave to appeal on the following two issues, and submits that they significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that an immediate resolution by the Appeals Chamber would materially advance the proceedings: (i) whether the Chamber erred in failing to consider the extraordinary circumstances which have acutely impeded the Defence's ability to conduct investigations and prepare its case during the pandemic; and (ii) whether the Scheduling Decision accords with the Court's obligation to uphold and protect the equality of arms by ensuring, *inter alia*, that Mr Al Hassan is afforded adequate time and facilities to prepare his defence, and to seek to obtain the attendance of witnesses on his behalf under the same conditions as the Prosecution.⁸

3. On 4 October 2021, the Prosecution filed its response to the Request, seeking that it be rejected.⁹ The Prosecution submits that the requirements for reconsideration are not met,¹⁰ and that the request for leave to appeal represents merely a disagreement with the Scheduling Decision.¹¹

II. Analysis

4. The Chamber recalls that it has the power to exceptionally reconsider its decisions if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.¹² New facts and arguments arising since the decision was rendered may be relevant to this assessment.¹³ The Chamber also incorporates by

⁷ Request, ICC-01/12-01/18-1778-Conf, para. 28, p. 15.

⁸ Request, ICC-01/12-01/18-1778-Conf, paras 6, 29-35.

⁹ Réponse de l'Accusation à la "Defence request for reconsideration of, or leave to appeal, 'Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence'", ICC-01/12-01/18-1799-Conf.

¹⁰ Response, ICC-01/12-01/18-1799-Conf, paras 8-17.

¹¹ Response, ICC-01/12-01/18-1799-Conf, paras 18-22.

¹² Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', 9 April 2020, ICC-01/12-01/18-734, para. 11.

¹³ ICC-01/12-01/18-734, para. 11.

reference the legal framework applicable to the assessment of requests for leave to appeal pursuant to Article 82(1)(d) of the Statute.¹⁴

A. The request for reconsideration

5. At the outset, the Chamber notes that no new facts or arguments are raised in the Request, rather the issues raised are ones which have already been extensively canvassed by the Defence¹⁵ and of which the Chamber was cognisant when it calibrated the timetable in the Scheduling Decision. The Chamber will consider in this light whether the Defence has demonstrated a clear error of reasoning in the Scheduling Decision, or has shown that its reconsideration is necessary to prevent an injustice.
6. The Chamber notes that the core aspects of the Scheduling Decision objected to by the Defence are: (i) the requirement to provide a preliminary list of witnesses, if any, by 15 December 2021; and (ii) what the Defence terms the ‘strident post-Prosecution Notice schedule’ which in essence requires the Defence to start its case 10 weeks after notice of closure of the Prosecution’s case.
7. Turning to the first aspect, the Chamber recalls that the Defence has been on notice since the issuance of the first directions on the conduct of the proceedings that it would be instructed towards the end of the Prosecution case to file a notice of whether it intends to call evidence.¹⁶ The Defence has been kept abreast of the progress of the Prosecution case notably through receipt of the Prosecution’s monthly witness lists, as well as other overall updates to the Prosecution witness list.¹⁷ Recalling further that the preliminary list of witnesses is for informational purposes only and may be changed up until the applicable deadline for the final

¹⁴ ICC-01/12-01/18-734, para. 12.

¹⁵ See e.g., Defence adjournment request, ICC-01/12-01/18-927-Conf-Exp (confidential redacted version filed on the same day); Defence Rule 134(1) observations, ICC-01/12-01/18-870-Conf-Exp (available to the Defence and Registry only; confidential redacted version filed on the same day and public redacted version filed on 15 July 2020). See also Decision on Defence Rule 134(2) submissions, 1 September 2020, ICC-01/12-01/18-1029-Conf (public redacted version filed on 5 January 2021).

¹⁶ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, para. 25.

¹⁷ See Prosecution Remaining Witnesses’ List, 1 July 2021, ICC-01/12-01/18-1561-Conf-AnxA; Further Updated Prosecution Remaining Witnesses’ List, 21 July 2021, ICC-01/12-01/18-1597-Conf-AnxA.

list of Defence witnesses¹⁸ (a fact not mentioned in the Request), the Chamber fails to see how the Defence is prejudiced by the 15 December 2021 deadline.

8. Turning to the second aspect, which concerns the remainder of the timetable in general, the Chamber considers that many of the Defence submissions in support of reconsideration are inapposite.
9. The Defence submissions on the ‘shifting’ nature of the case against Mr Al Hassan, ‘substantive post-confirmation modifications’ and undermining of the Defence’s right to notice¹⁹ are misplaced. The charges against Mr Al Hassan were confirmed on 30 September 2019 and amended in part on 23 April 2020. Notice of possible re-characterisation pursuant to Regulation 55 of the Regulations of the Court has been provided when it appeared to the Chamber that such legal re-characterisation may be possible in this case, after assessing on each occasion whether providing notice does not unduly prejudice the rights of the accused.²⁰ Moreover, the vast majority of Prosecution disclosure was completed in April and May 2020, and subsequent additions to the Prosecution list of evidence have not been overly significant and have been controlled on each occasion by the Chamber through an assessment taking into account any prejudice to the Defence.²¹ The Defence submissions that delayed disclosure and the ‘maintenance of witness anonymity even at this late stage’ has impeded the Defence’s ability to conduct analyses and investigations²² are overstated.

¹⁸ Scheduling Decision, ICC-01/12-01/18-1756, para. 10.

¹⁹ Request, ICC-01/12-01/18-1778-Conf, para. 20.

²⁰ Second Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court, 20 September 2021, ICC-01/12-01/18-1739-Conf (public redacted version issued the same day); Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court, 17 December 2020, ICC-01/12-01/18-1211-Conf (public redacted version issued on 25 June 2021).

²¹ See *e.g.*, Decision on the Prosecution requests pursuant to Regulation 35 regarding P-0660 and P-0661 and to add 12 items to its Final List of Evidence, 5 August 2020, ICC-01/12-01/18-988-Conf (public redacted version issued on 21 October 2020), in particular paras 5, 15, 22, 25, 28; Email from the Chamber 1 September 2020, at 10:28; Email from the Chamber 21 September 2020, at 13:20; Email from the Chamber 22 September 2020, at 13:23; Email from the Chamber 27 October 2020, at 13:24; Public redacted version of Decision on the introduction of evidence of witness P-0643, 19 April 2021 ICC-01/12-01/18-1409-Red (original version issued 12 April 2021), para. 11; Email from the Chamber 20 May 2021, at 13:31; Decision on Prosecution request under Regulation 35 and application under Rule 68(2)(b) of the Rules concerning the introduction into evidence of the prior recorded testimony of P-0204 and P-0630, 30 August 2021, ICC-01/12-01/18-1671 (reclassified public on 2 September 2021), para. 5; Email from the Chamber 30 August 2021, at 10:18.

²² Request, ICC-01/12-01/18-1778-Conf, para. 17.

Potential prejudice to the Defence arising from the delayed disclosure of four witness's identities has been thoroughly assessed and mitigated through measures imposed by the Chamber.²³

10. The Chamber also finds unhelpful the Defence comparisons with the schedules set in other cases of the Court,²⁴ and the submissions referring in the abstract to extensions of time granted to corresponding deadlines set in the context of the start of the Prosecution case.²⁵ The assessment of what is appropriate depends entirely on the relevant concrete circumstances in each particular instance.
11. The Chamber notes the Defence assertion that it has been almost completely precluded from conducting meaningful investigations, for reasons including the COVID-19 pandemic. The Chamber is fully mindful of the impact of the ongoing challenges related to the COVID-19 pandemic, as well as the existence of other challenges facing the Defence in conducting its investigations. However, the Chamber considers the Defence submissions in this respect to be somewhat abstract and also overstated. Rather, the case record indicates that the Defence has in fact been able to conduct investigative activities this and last year.²⁶

²³ See Decision on the Prosecution request for delayed disclosure of the identities of Witnesses P-0538, P-0542, P-0553, P-0570, P-0574, and P-0603, 15 April 2020, ICC-01/12-01/18-741-Conf-Exp (confidential, *ex parte*, only available to the Prosecution and the VWU; confidential redacted version issued on the same day; public redacted version issued on 27 May 2020), in particular paras 46-47, 58; Second Decision on the Prosecution request for delayed disclosure of the identities of Witnesses P-0542, P-0570, and P-0603, 8 May 2020, ICC-01/12-01/18-794-Conf-Exp (confidential, *ex parte*, only available to the Prosecution and the VWU; confidential redacted version issued on the same day; public redacted version issued on 27 May 2020), in particular paras 18-19, 25-26; Decision on the Prosecution request for reconsideration of the Decision on the delayed disclosure of the identity of Witness P-0603, 13 July 2020, ICC-01/12-01/18-948-Conf-Exp (confidential, *ex parte*, only available to the Prosecution and the VWU; confidential redacted version issued on the same day; public redacted version issued on 12 January 2021), in particular paras 20-21. See also Decision on Prosecution request concerning the scheduling of Witness P-0603 and related matters on the conduct of proceedings, 25 February 2021, ICC-01/12-01/18-1320-Conf, (public redacted version issued on 24 March 2021), in particular paras 17-26.

²⁴ Request, ICC-01/12-01/18-1778-Conf, para. 13.

²⁵ Request, ICC-01/12-01/18-1778-Conf, paras 14-17.

²⁶ See e.g. Defence Request to terminate the proceedings, 25 June 2020, ICC-01/12-01/18-885-Conf-Exp-Corr (original version notified 17 June 2020; confidential and public redacted versions also notified, ICC-01/12-01/18-885-Conf-Red-Corr and ICC-01/12-01/18-885-Corr-Red3), paras 21-23, 25; Defence Request for an adjournment of P-0065's testimony and a one-week recess prior to his testimony, 14 September 2020, ICC-01/12-01/18-1046-Conf-Exp, para. 17; Article 69(7) Application, 8 March 2021, ICC-01/12-01/18-1346-Conf (public redacted version notified on 30 March 2021, ICC-01/12-01/18-1346-Red2), para. 13 and n. 164 citing to MLI-D28-0003-2049-R01. See also e.g. Defence Response to 'Prosecution's request to maintain suspension of Defence resource person/investigator and other measures', 13 November 2020, ICC-01/12-01/18-1154-Conf-Exp (confidential *ex parte*, available only to the Prosecution, Defence and VWU), para. 39; Email from the Defence 20 January 2021, at 17:31.

Furthermore, the Chamber recalls that it already flagged in the Scheduling Decision that it would remain attentive to any difficulties the Defence may face during the course of its presentation of evidence as regards the order of witnesses, and, where necessary, retain a flexible approach to facilitate the Defence's preparations.²⁷

12. Further, the Chamber finds hypothetical the Defence's assertion that its preparation would be further burdened as a result of the LRVs case,²⁸ in absence of any indication yet as to whether the LRVs intend to present evidence or views or concerns, or the scope of any such presentation if authorised.
13. The Chamber considers at this stage of the trial, and in light of all of the above, the Defence has clear knowledge of the core of the Prosecution case, and will have had adequate time to plan its case by the closure of the Prosecution's case. In all the circumstances, the Chamber considers that the timetable set in the Scheduling Decision allows for sufficient time for the Defence to finalise its list of witnesses, complete its disclosure, and comply with the other requirements. The Chamber further notes that, in exceptional circumstances and with good cause, the Defence may request to modify its list of witnesses and evidence after the presentation of the Defence case has begun.
14. For these reasons, the Chamber considers that the Defence has not demonstrated a clear error of reasoning in the Scheduling Decision, or shown that its reconsideration is necessary to prevent an injustice. The threshold for the exceptional remedy of reconsideration is therefore not met.

B. The request for leave to appeal

15. In light of the analysis above, the Chamber considers that the Defence merely expresses its disagreement with the timetable imposed in the Scheduling Decision. As such, the issues identified by the Defence do not constitute 'appealable issues'. It is accordingly unnecessary for the Chamber to address the remainder of the cumulative requirements of Article 82(1)(d) of the Statute.

²⁷ Scheduling Decision, ICC-01/12-01/18-1756, para. 13

²⁸ Request, ICC-01/12-01/18-1778-Conf, para. 3.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

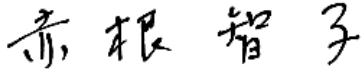
ORDERS the Defence and the Prosecution to respectively file public redacted versions of the Request and Response within two weeks of issuance of the present decision.

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 12 October 2021

At The Hague, The Netherlands