



**Original: English**

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

**Date: 28 May 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 leave to appeal the ‘Decision on the conduct of proceedings’**

**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**

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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*

**REGISTRY**

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**Registrar**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

Nigel Verrill

**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 this ‘Decision on Defence request for leave to appeal the ‘Decision on conduct of proceedings’.’.

## **I. Procedural history and submissions**

1. On 6 May 2020, the Chamber issued its ‘Decision on the conduct of proceedings’ (the ‘Impugned Decision’).<sup>1</sup> In Annex A of the Impugned Decision, the Chamber set out the directions on the conduct of proceedings.<sup>2</sup> In the Impugned Decision, the Chamber also issued a self-contained set of charges (Annex B containing the English version and Annex C containing the French version, both to be referred as ‘Self-contained set of charges’).<sup>3</sup>
2. On 12 May 2020, the Defence filed a request for leave to appeal<sup>4</sup> the Impugned Decision (the ‘Request’). Specifically, the Defence requests leave to appeal on the following five issues:
  - i. Whether the system of evidence, as set out in the Decision, is consistent with the internationally recognised right to be heard, and to receive a reasoned judgment, which includes the right to receive rulings concerning firstly, incriminating evidence that was relied upon to convict the defendant, and secondly, exculpatory evidence concerning the facts relied upon to convict the defendant, that was either not relied upon in the final judgment, or given very little weight (the ‘First Issue’);
  - ii. Whether the Trial Chamber abused its discretion, and/or reached an unreasonable outcome, by placing too much weight on the judicial

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<sup>1</sup> Decision on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789.

<sup>2</sup> Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA.

<sup>3</sup> ICC-01/12-01/18-789-AnxB and AnxC.

<sup>4</sup> Defence request for leave to appeal Trial Chamber X’s “Decision on the conduct of proceedings” (ICC-01/12-01/18-789), ICC-01/12-01/18-804-Conf. A public redacted version was filed on 13 May 2020.

aspects of evidence evaluation, including the time taken to issue evidentiary rulings, and failing to consider, or place sufficient weight on other relevant factors, including the role that timely evidentiary rulings play in expediting the proceedings and facilitating the rights of the parties (the ‘Second Issue’);

- iii. Whether Article 69(2) requires the Trial Chamber to make case by case determination as to whether the use of video-link technology, for specific witnesses, is consistent with the rights of the accused (the ‘Third Issue’);
  - iv. Whether, after the confirmation of the charges, and without following the procedure set out in Article 61(9), the Trial Chamber may change confirmed facts set out in the charges, in particular, without affording the defendant a prior opportunity to be heard as concerns their intention to do so (the ‘Fourth Issue’); and
  - v. Whether the Chamber correctly determined that the Prosecution can elicit testimony on aggravating factors during its cross-examination of Defence witnesses, in particular, in circumstances where the evidence concerns new issues, and the aggravating nature of this evidence was not previously notified to the Defence (the ‘Fifth Issue’).
3. As regards the First Issue, the Defence submits that under the ‘submission approach’ to evidence, it will not have a written record or reasoned opinion of the Chamber.<sup>5</sup> It also submits that the Chamber did not provide proper criteria or guidance as to when it will make discrete determinations on the admissibility of certain evidence.<sup>6</sup> The Defence further argues that the Appeals Chamber case law does not endorse the Chamber’s approach, which amounts to an abuse of discretion and is contrary to the accused’s right to be heard.<sup>7</sup>

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<sup>5</sup> Request, ICC-01/12-01/18-804-Red, para. 3.

<sup>6</sup> Request, ICC-01/12-01/18-804-Red, para. 4.

<sup>7</sup> Request, ICC-01/12-01/18-804-Red, paras 5-11.

4. Turning to the Second Issue, the Defence argues that the Impugned Decision failed to explain how the adopted system would save a significant amount of time or how the Chamber would place any weight on arguments brought up by the parties.<sup>8</sup> It argues that the Impugned Decision is unclear as to how the approach will reconcile with the adversarial features of the Statute, and other factors relevant to the present case.<sup>9</sup>
5. Concerning the Third Issue, the Defence submits that the Impugned Decision did not address the required case-by-case assessment when deciding on the use of video-link. It further argues that the Impugned Decision does not give the parties the right to challenge the use of video-link.<sup>10</sup>
6. In relation to the Fourth Issue, the Defence submits that the Chamber erred in changing the confirmed facts set out in the charges without eliciting the views of the parties.<sup>11</sup> It also submits that given the limited time frame to file the Request, it was unable to review the full Self-contained set of charges.<sup>12</sup> It specifically argues that footnotes 1 and 2 of this document, despite relating to only two incidents, have ‘far-reaching consequences as regards the nature and scope of the confirmation of charges, and the facts and circumstances which can be relied upon in the ultimate judgment’.<sup>13</sup>
7. As regards the Fifth Issue, the Defence contends that the Chamber did not make a distinction between the scope of cross-examination during the Prosecution case and the Defence case.<sup>14</sup> It argues that the Impugned Decision ‘opens the door to the possibility that the Prosecution could use cross-examination to elicit information on previously unidentified and unnotified incriminating aspects of its case’.<sup>15</sup>

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<sup>8</sup> Request, ICC-01/12-01/18-804-Red, paras 13-15.

<sup>9</sup> Request, ICC-01/12-01/18-804-Red, paras 16-19.

<sup>10</sup> Request, ICC-01/12-01/18-804-Red, paras 21-23.

<sup>11</sup> Request, ICC-01/12-01/18-804-Red, paras 25-26, 29.

<sup>12</sup> Request, ICC-01/12-01/18-804-Red, para. 28

<sup>13</sup> Request, ICC-01/12-01/18-804-Red, paras 28-29.

<sup>14</sup> Request, ICC-01/12-01/18-804-Red, para. 32.

<sup>15</sup> Request, ICC-01/12-01/18-804-Red, para. 33.

8. Lastly, the Defence submits that while the Third Issue and the Fifth Issue affect the fairness and expeditious conduct of proceedings,<sup>16</sup> the other issues not only impact significantly the fair and expeditious conduct of proceedings but also the outcome of the trial.<sup>17</sup> In its view, appellate intervention ‘would purge the process of errors and uncertainty’.<sup>18</sup>
9. On 18 May 2020, the Office of the Prosecutor (the ‘Prosecution’) filed its response, opposing the Request.<sup>19</sup> The Prosecution argues that the First Issue and the Second Issue are mere disagreements with the Chamber’s discretion and concern matters settled by the Appeals Chamber.<sup>20</sup> It further submits that the Third Issue raises an abstract or hypothetical issue and raises prematurely a speculated prejudice.<sup>21</sup> The Prosecution contends that the Fourth Issue misreads the Impugned Decision, in which the Chamber applied mere corrections to one name and one date and ‘by no means amount to amendment of the charges’.<sup>22</sup> As regards the Fifth Issue, it submits that the Defence misreads the Impugned Decision and is speculative about issues not even raised by the Impugned Decision.<sup>23</sup> Additionally, the Prosecution argues that none of the issues meet the remaining requirements under Article 82(1)(d) of the Statute.<sup>24</sup>

## II. Analysis

10. The Chamber incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Statute, as set out in previous decisions.<sup>25</sup> The Chamber will accordingly examine whether the

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<sup>16</sup> Request, ICC-01/12-01/18-804-Red, paras 42-45

<sup>17</sup> Request, ICC-01/12-01/18-804-Red, paras 35-41.

<sup>18</sup> Request, ICC-01/12-01/18-804-Red, para. 46.

<sup>19</sup> Prosecution’s response to the Defence request for leave to appeal Decision ICC-01/12-01/18-789, ICC-01/12-01/18-817-Conf (a public redacted version was filed on 22 May 2020).

<sup>20</sup> Response, ICC-01/12-01/18-817-Red, paras 5-8.

<sup>21</sup> Response, ICC-01/12-01/18-817-Red, paras 9-13.

<sup>22</sup> Response, ICC-01/12-01/18-817-Red, paras 14-17.

<sup>23</sup> Response, ICC-01/12-01/18-817-Red, paras 18-19.

<sup>24</sup> Response, ICC-01/12-01/18-817-Red, paras 21-24.

<sup>25</sup> 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; Decision on Defence request for leave to appeal the Single Judge’s ‘Decision on Defence motion seeking disclosure of Prosecution’s correspondence with national authorities’, 8 May 2020, ICC-01/12-01/18-795-Conf.

Defence has met the requirements under Article 82(1)(d) of the Statute in relation to each of the five issues identified above.

*a. The First Issue*

11. The Chamber is of the view that the Defence has not identified an appealable issue. First, the Defence reiterates its previous submissions in the context of the Impugned Decision, where it argued in favour of the system of ‘admission’ rather than ‘submission’ of evidence. Second, the Defence merely disagrees with the Impugned Decision and disregards the Appeals Chamber’s jurisprudence that allows for judicial discretion as to the timing of the Trial Chamber’s evaluation on the admissibility of evidence (in this case, to be done, as general rule, at the end of the trial). Third, the Defence misconstrues the Impugned Decision, which guarantees the rights of the accused to be heard and specifically to challenge evidence to be submitted on the record. Fourth, the First Issue is hypothetical and premature, as it refers to a theoretical breach of the right to receive a reasoned judgment, an allegation that can only be made once the Chamber will have delivered its judgment under Article 74 of the Statute.
12. Accordingly, the First Issue does not meet the requirements of Article 82(1)(d) of the Statute.

*b. The Second Issue*

13. The Second Issue, which is interrelated with the First Issue, is equally not an appealable issue. The Defence again reiterates its submissions already made in the context of the Impugned Decision. The Second Issue is also premature and misrepresents the Impugned Decision, which, contrary to what the Defence argues, provides that the Chamber may decide to rule on the admissibility of evidence upfront for certain categories of evidence, as necessary.<sup>26</sup> This is not an abuse of discretion, but a matter of principle that allows judges to decide which judicial aspect of the evidence should have more weight. Accordingly,

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<sup>26</sup> Impugned Decision, ICC-01/12-01/18-789-AnxA, paras 31 and 34(vii).

arguments raised by the Defence on factors that should have been considered, such as expeditiousness of proceedings and facilitating the rights of the parties are hypothetical and premature. In fact, such factors may still be taken into consideration in future litigation and judicial decisions on the submission of specific items of evidence, as foreshadowed in the Impugned Decision.

14. Accordingly, the Second Issue does not meet the requirements of Article 82(1)(d) of the Statute.

*c. The Third Issue*

15. The Chamber is of the view that the Third Issue is not an appealable issue. The Defence misconstrues the Impugned Decision, which affords deference to the calling party but always subject to judicial review.<sup>27</sup> Accordingly, the Chamber will consider each application in accordance with the discretion accorded under the statutory regime, more specifically Article 69(2) of the Statute. It will also bear in mind the rights of the accused, the particular circumstances of this case, including the well-being and safety of witnesses but also the current situation of restrictions on international travel and flights. Thus, the Defence's arguments as to the potential prejudice to the accused arising from inappropriate use of video-link are at this stage premature and speculative.

16. Accordingly, the Third Issue does not meet the requirements of Article 82(1)(d) of the Statute.

*d. The Fourth Issue*

17. The Chamber is of the view that this is an appealable issue arising from the Impugned Decision. Specifically, as submitted by the Defence,<sup>28</sup> the Chamber, corrected one name and one date in the Self-contained set of charges.<sup>29</sup> Nonetheless, as acknowledged by the Defence, these changes 'are confined to two incidents'.<sup>30</sup> Thus, the Chamber is of the view that none of the other

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<sup>27</sup> Impugned Decision, ICC-01/12-01/18-789-AnxA, para. 54.

<sup>28</sup> Request, ICC-01/12-01/18-804-Red, para. 28.

<sup>29</sup> Impugned Decision, ICC-01/12-01/18-789-Conf-AnxB, footnotes 1 and 2.

<sup>30</sup> Request, ICC-01/12-01/18-804-Red, para. 29.



requirements under Article 82(1)(d) are met, as this is a minor and discrete issue that would not significantly affect either the fairness of proceedings or the outcome of the trial. Specifically, the Chamber did not amend the list of incidents nor include facts which had not been confirmed.

18. That said, and independently of the criteria under Article 82(1)(d) of the Statute, the Chamber is of the view that reconsideration of these discrete corrections may be a more appropriate and effective avenue.<sup>31</sup> However, before making such a determination, the Chamber would benefit from further submissions from the parties and participants.
19. The Chamber acknowledges the Defence's arguments that the accused was not given the opportunity to make submissions on the two aforesaid corrections. Accordingly, the Chamber invites the parties to make submissions on the aforesaid corrections. The Chamber also notes the Defence's submission that in putting forward this very specific objection for the purpose of the present Request, it did not have time to review the complete Self-contained set of charges. As stated in the original decision, the Chamber prepared the Self-contained set of charges based on the confirmation decision *inter alia* 'to ensure the accused is fully aware of the charges against him and that there is a common understanding on the part of the parties, participants, and the Chamber as to the facts and circumstances of the charges prior to the start of trial'.<sup>32</sup> As the parties have now had an opportunity to fully review the Self-contained set of charges, the Chamber invites them to identify any other issue of concern with respect to the formulation of the charges within that document.
20. The Chamber reiterates that the Self-contained set of charges reflect fully the findings of the Pre-Trial Chamber. If the parties think otherwise, this is the time to identify and bring to the attention of the Chamber any such concern.

#### *e. The Fifth Issue*

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<sup>31</sup> The Chamber incorporates by reference the applicable legal framework for reconsideration, as set out in a previous decision: 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.

<sup>32</sup> Impugned Decision, ICC-01/12-01/18-789-AnxA, para. 8.

21. The Chamber considers that the Fifth Issue is premature and speculative and does not arise from the Impugned Decision. As acknowledged by the Defence,<sup>33</sup> any potential prejudice to the accused will have to be assessed in light of specific circumstances related to individual witnesses. Moreover, the alleged prejudice to the accused is speculative. During the trial the Defence will be allowed to raise objections in court as to the scope of cross examination of particular witnesses. The Chamber will then rule on any such objection on a case-by-case basis, bearing in mind, among other factors, any prejudice to the accused, including lack of notification.
22. Accordingly, the Fifth Issue does not meet the requirements of Article 82(1)(d) of the Statute.

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<sup>33</sup> Request, ICC-01/12-01/18-804-Red, para. 45.

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

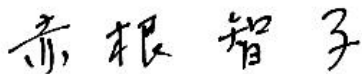
**REJECTS** the Request; and

**INVITES** the parties and participants to make submissions as provided in paragraphs 19 and 20 above, no later than 14 days after notification 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 Thursday, 28 May 2020

At The Hague, The Netherlands