

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No: **ICC-01/12-01/18**
Date: **13 February 2023**

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

Request for Request for leave to appeal Decision ICC-01/12-01/18-2464

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:

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I. INTRODUCTION

1. The Defence respectfully seeks leave to appeal the ‘Decision on ‘Defence Regulation 35(2) and Rule 68(2)(b) Request’(‘the Decision’),¹ in relation to the following issues (‘the Two Issues’):
 - Whether the Decision was based on a manifest error of reasoning, being that it was necessary for the Defence to satisfy the threshold of reconsideration, rather than the criteria under Regulation 35(2) of the Regulations of the Court (‘the First Issue’); and
 - Whether the Trial Chamber erred and abused its discretion by applying a more flexible approach to the resubmission Prosecution Rule 68 witness applications as compared to Defence Rule 68 applications (‘the Second Issue’).

II. SUBMISSIONS

The Two Issues arise from the Decision

2. When the Trial Chamber rendered its initial decision on the Defence request to tender an affidavit from a team member, in lieu of the submission of evidence from D-0146, the Chamber ruled that:²

Considering that no such form is presently available to the Chamber, it is impossible to assess whether the introduction into evidence of the said affidavit should be authorised or whether the requirements under Regulation 35 of the Regulations are met.

3. In this decision, the Chamber further referenced a clarification, which had been provided by the Chamber four days after the Defence deadline for the D-146 application, that any such affidavit would need to fulfil the requirements of Rule 68(2).³ The Chamber did not refer to the reasons which had provoked the Defence request for clarification, namely, the valid concern on the part of the Defence to

¹ ICC-01/12-01/18-2464.

² ICC-01/12-01/18-2461-Red, para. 24.

³ ICC-01/12-01/18-2461-Red, para. 24.

avoid infringing the provision of the Code of Conduct, which specifies that Counsel may not act as a witness in the case.

4. Since the Chamber stated that it was ‘impossible’ to render a decision on the request in the absence of a concrete Rule 68 application, the Chamber did not appear to have rendered a decision on the merits of the Regulation 35 (2) request or the Rule 68 application. The Defence was therefore not put on notice that any future resubmission of the Regulation 35(2) request would need to satisfy the threshold of ‘reconsideration’.
5. Typically, ICC Chambers have not required the parties to submit a substantiated Regulation 35(2) application until they have actually obtained the evidence in question.⁴ For example, in the context of Rule 68, when seized of a Regulation 35(2) request concerning the admission of a Rule 68 statement, Trial Chamber I indicated that it would defer its ruling on Regulation 35(2) until it has received a substantiated application with the statement in question.⁵
6. ICC case law has also consistently confirmed that the threshold of reconsideration does not need to be satisfied in order to trigger the application of Regulation 35(2). The Chamber is simply obliged to consider, based on the facts and circumstances before the Chamber at the time of the application, whether the requesting party has demonstrated that the criteria under Regulation 35 are satisfied,⁶ that is either good cause, or the existence of circumstances outside of the party’s control. ICC case law has also confirmed that the parties cannot be expected to appeal or seek reconsideration of a decision, in the absence of a reasoned opinion.⁷
7. In light of this case law and the absence of a substantive ruling on the merits, the issue arises as to whether the Chamber committed a manifest error of reasoning by rejecting the Defence request on the grounds that the threshold for reconsideration was not satisfied. This is the First Issue, for which the Defence seeks leave to appeal.
8. A further related issue arises in light of the disparity in treatment as concerns the Defence application as compared to the approach, which the Chamber applied to

⁴ ICC-01/05-01/13-1191, para. 11

⁵ ICC-02/05-01/20-545-Red, para. 8.

⁶ ICC-01/12-01/18-558, para. 6; see also ICC-01/09-01/11-1813, para. 10; ICC-02/04-01/15-1811 (in which the Appeals Chamber granted the ‘second’ request for an extension of time, based on good cause – the Appeals Chamber did not consider it necessary to consider the alternative prong of reconsideration); ICC-01/04-02/06-2426, para.8.

⁷ ICC-01/04-01/07-1497, para. 8; ICC-02/11-01/15-1263 p. 8; See also ICC-01/04-01/06-773, para. 20, linking the existence of an *effective* right to appeal to the existence of a reasoned opinion.

the Prosecution. Specifically, in relation to P-0113, the Chamber expressly found that it was not necessary for the Prosecution to satisfy the threshold of reconsideration for the second Rule 68 application:⁸

the persistent unwillingness of P-0113 to testify¹⁰ constitutes a sufficient basis for the Prosecution to submit anew an application pursuant to Rule 68(2)(b) of the Rules. Accordingly, the Chamber sees no merit in the Defence argument that the Second Request constitutes a request for reconsideration of the First Decision, for which the Prosecution has failed to establish the requisite standard.

9. Given this disparity in approach, the Defence seeks leave to appeal in relation to the Second Issue, which is whether the Trial Chamber erred and abused its discretion by applying a more flexible approach to the resubmission Prosecution Rule 68 witness applications as compared to Defence Rule 68 applications.

The issues significantly affect the fairness and expeditiousness of the proceedings

10. As a result of the manner in which the Chamber addressed the application (the First Issue), the Chamber excluded key considerations related to the fairness of the proceedings. In particular, the Chamber made no assessment of the impact of this decision on the right of the Defence to have adequate time and facilities to prepare and present its case. Nor did the Chamber consider whether the rejection of the application was a proportionate outcome given the very limited nature of the affidavit: that is, it was confined to describing the circumstances under which certain evidence items had been collected and identifying these items by reference to the chain of custody forms (which had photographs of the items). As was clear from the application, the Defence was not tendering the associated exhibits for the truth of their contents, but to establish the items that were collected on this date, the person from whom they were collected and to corroborate the presence of the team member during the evidence collection process.⁹

⁸ ICC-01/12-01/18-1924, para. 9.

⁹ See Rule 68 application para. 9, which the Defence stated that the application and associated exhibits were being tendered to establish the chain of custody of items that had been tendered to the Chamber.

11. The Statute and Rules require the Chamber to assist the Defence to resolve any structural or extrinsic issues that may impact on its ability to present its case.¹⁰ This includes providing counter-balancing measures where the Defence lacks the means to secure evidence or obtain the attendance of witnesses.¹¹ The Defence was unable to secure the certification of D-0146 due to his unwillingness to travel to neighbouring countries. This is a factor that falls outside the control of the Defence. The Defence was also unable to request any form of compulsory measures give that D-0146 resides in a non-State party. This is also a factor that falls outside the control of the Defence. The Defence therefore proposed submitting a sworn affidavit, in order to counterbalance the difficulties it had experienced in attempting to obtain a certification from D-0146.
12. The Chamber did not issue a reasoned opinion on these factors due to the fact that the Chamber's resolved the application exclusively by reference to the threshold for reconsideration, rather than Regulation 35 or the interests of justice (or Article 64(6)(d)). The First Issue therefore significantly affects the fairness of the proceedings.
13. As concerns the Second Issue, the ECHR has found the principle of equality of arms may be infringed in circumstances where the judicial authorities examine evidence from the Prosecution, while refusing to examine the Defence evidence submitted in comparable circumstances.¹²
14. The Two Issues also directly concern the expeditiousness of the proceedings and the manner in which the Chamber balanced the right to expeditious proceedings with the defendant's right to adequate time and facilities to prepare its case and the defendant's right to call and introduce evidence under the same terms and conditions as the Prosecution. Given the advance nature of the Prosecution's preparation for its final brief and very confined nature of the affidavit (which was submitted solely to demonstrate chain of custody), the allocation of additional days for the resolution of the application would not have required the allocation of more time to the Prosecution.

¹⁰ Article 64(2), Statute; See also *Prosecutor v Tadic*, [Appeals Judgment](#), para. 52.

¹¹ ICC-01/04-01/06-1486, para. 48.

¹² ECHR: *Borisova v. Bulgaria*, [56891/00](#), pars. 47-48; *Topić v. Croatia*, [51355/10](#), para. 48

An immediate decision by the Appeals Chamber would materially advance the proceedings

15. The items, which were provided by D-0146 to the Defence, have been submitted into evidence from the bar. Since the Chamber has not issued an item-by-item assessment of reliability, probative value and weight in advance of its judgment, the Defence is not in a position to assess whether the absence of the chain of custody forms will negatively impact the weight that the Chamber allocates to these items. Since the Chamber has closed the submission of evidence, the Defence will also have no opportunity to remedy this before the submission of final briefs and the close of the case.
16. An immediately decision by the Appeals Chamber will therefore serve to preserve the fairness of the proceedings by protecting the process from the risk of potential error, prejudicing the Defence.

III. RELIEF SOUGHT

17. For the reasons set out above, the Defence for Mr Al Hassan respectfully requests the Trial Chamber to grant leave to appeal in relation to the Two Issues identified above.



Melinda Taylor
Lead Counsel for Mr. Al Hassan

Respectfully submitted this 13 February 2023,
At The Hague, The Netherlands