

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/12-01/18

Date: 3 March 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 redacted version of

**Reasons for the Decision on Defence request to defer the closure of its
presentation of evidence**

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

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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 Articles 64 and 67 of the Rome Statute (the ‘Statute’), Rule 68(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Reasons for the Decision on Defence request to defer the closure of its presentation of evidence’.

I. Procedural history

1. On 29 August 2022, the Chamber issued its ‘Sixth decision on matters related to the conduct of proceedings: end of Defence case, potential rebuttal/rejoinder evidence, and closure of evidence’ (the ‘Sixth Directions’) in which it, *inter alia*, set deadlines concerning the remainder of the Defence’s presentation of evidence and the submission of final briefs.¹ The deadline for filing any remaining Rule 68(2) applications was set to 24 October 2022.² The Chamber also indicated that it expected to declare the submission of evidence closed immediately before or after the winter judicial recess.³
2. On 21 September 2022, the Chamber authorised, subject to the receipt of the certified declaration, the introduction into evidence of D-0219’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules (the ‘D-0219 Decision’).⁴
3. On 3 November 2022, the last *viva voce* witness called by the Defence concluded his testimony before the Chamber.⁵
4. On 10 November 2022, and in response to a request from the Defence to organise a meeting,⁶ the Single Judge convened a meeting with the Defence and the relevant Registry sections to discuss logistical issues concerning the taking of accompanying declarations of Rule 68(2)(b) witnesses pursuant to Rule

¹ ICC-01/12-01/18-2308.

² Sixth Directions, ICC-01/12-01/18-2308, para. 4.

³ Sixth Directions, ICC-01/12-01/18-2308, para. 9.

⁴ Decision on the introduction into evidence of the prior recorded testimony of D-0219 and D-0312 pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-2343, p. 9.

⁵ ICC-01/12-01/18-T-211-CONF-ENG.

⁶ Email dated 2 November 2022 at 17:26.

68(2)(b)(ii) of the Rules.⁷ In particular, the Single Judge recognised the need for flexibility regarding the process, including the use of remote facilities and noted that, in line with the objectives of Rule 68, any proposal on the taking of accompanying declarations must be reasonable, both in terms of the costs and the time involved in putting the arrangements in place the arrangements. The Single Judge also encouraged the Registry to provide logistical support to the Defence to the greatest extent possible, while mindful of resource limitations and the absolute necessity to ensure the security of Registry personnel. Specifically with respect to D-0219, the participants agreed that there were no major issues that that could be foreseen at that point in time and that the Rule 68(2)(b)(ii) declaration would be taken at [REDACTED]. The Single Judge finally instructed the Defence and the Registry to submit a joint proposal by Tuesday, 15 November 2022, including an anticipated time line.

5. On 15 November 2022, the Defence informed the Chamber and the Registry, on an *ex parte* basis, that D-0219 ‘would be available to complete the certification, [REDACTED]’.⁸
6. On 28 November 2022, the Single Judge issued an email decision setting deadlines leading up to the conclusion of the Defence’s presentation of evidence.⁹ Noting that the final deadline for the filing of Rule 68(2) requests was 24 October 2022 and mindful of the Defence’s proposals and updates following the *ex parte* meeting, the Single Judge decided that any request for the late introduction into evidence of prior recorded testimony should be submitted by 12 December 2022 at the latest and that any outstanding Rule 68(2)(b)(ii) declarations must be taken by 13 December 2022.
7. On 12 December 2022, the Defence filed a request seeking a further extension until 29 December 2022, on the condition that the Defence’s mission in December

⁷ See email dated 5 November 2022 at 12:59.

⁸ Email dated 15 November 2022 at 16:30.

⁹ Email dated 28 November 2022 at 16:25.

is approved, or 24 hours following the Defence resource person's return to Bamako for the filing of the Rule 68(2)(b) request concerning D-0231.¹⁰

8. On the same date, the Defence filed another request seeking an extension of time related to Rule 68(2)(b) certifications (the '12 December Request').¹¹ With respect to D-0219, the Defence indicated that it was exploring alternative arrangements, including a remote certification system, and that the video connection with the relevant location had been successfully tested.¹² The Defence submitted that '[t]he allocation of additional time would be both reasonable and proportionate in light of these issues and the likelihood that the Defence will be able to obtain certification within a reasonable period of time'.¹³
9. On 15 December 2022, the Single Judge convened another *ex parte* status conference with the Defence and the relevant sections of the Registry to discuss the remaining logistical issues related to the taking of the Rule 68(2)(b)(ii) declarations and possible ways forward.¹⁴ This included, *inter alia*, discussions concerning the remote certification of D-0219. Concerning this witness, the Defence indicated that it had tested the video connection at [REDACTED], which was stable, and that the witness had been informed of the actions that need to be taken during the certification process '...'.¹⁵
10. On 16 December 2022, in light of the Defence's needs and constraints, the Chamber issued a decision, *inter alia*, granting the 12 December Request and extending the deadline for the filing of all remaining accompanying declarations under Rule 68(2)(b)(ii) of the Rules to 23 January 2023 (the '16 December Decision').¹⁶

¹⁰ Application for an extension of time to file Defence Rule 68(2)(b) application for Witness D-0231, ICC-01/12-01/18-2441-Conf-Red, paras 1, 26-27.

¹¹ Defence request for an extension of time for the purpose of certification of the remaining Rule 68(2) witnesses, ICC-01/12-01/18-2440-Conf-Red.

¹² 12 December Request, ICC-01/12-01/18-2440-Conf-Red, para. 35.

¹³ 12 December Request, ICC-01/12-01/18-2440-Conf-Red, para. 36.

¹⁴ ICC-01/12-01/18-T-212-CONF-EXP-ENG.

¹⁵ ICC-01/12-01/18-T-212-CONF-EXP-ENG, pp. 18-19.

¹⁶ Decision on the Defence's request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18-2445-Conf-Exp.

11. On 6 January 2023, the Defence submitted a request for judicial review of the Registrar's decision concerning financial support to missions to areas outside of Timbuktu, planned for the purpose of obtaining Rule 68(2)(b)(ii) declarations.¹⁷ On 13 January 2023, the Chamber rejected this request, finding that the Registrar did not abuse his discretion in determining that no financial support will be provided to missions for which a negative security assessment was made.¹⁸
12. On 18 January 2023, the Defence filed another request seeking, *inter alia*, an extension of time for the filing of the accompanying declaration of D-0219 (the '18 January Request').¹⁹ With respect to this witness, the Defence submitted that the accompanying declaration could not be taken due to technical difficulties and that, while D-0219 would be travelling [REDACTED], 'an in-person certification could be organised on his return, which [would] likely be around the end of January 2023'.²⁰ The Defence added that '[a]lthough it is possible that the arrival of D-0219 might vary by a day or so on either side, it does appear feasible to complete this process by the beginning of February (i.e. 3 February 2023)'.²¹
13. On 23 January 2023, the Chamber granted the 18 January Request and instructed the Defence to file any outstanding Rule 68(2)(b)(ii) declarations, including, *inter alia*, for D-0219, as well as the notice of closure of its presentation of evidence by 3 February 2023 (the '23 January Decision').²² In this decision, the Chamber emphasised that 3 February 2023 would be 'the final date on which the Defence may submit the declaration and no further extension [would] be granted'.²³
14. On 3 February 2023, at 17:04, the Defence requested via email: (i) leave to defer the formal close of its case until after it has established contact with D-0219 or had sufficient time to submit a Rule 68(2)(c) application; or, in the alternative, (ii) confirmation that the closure of its case will be without prejudice to its ability

¹⁷ Email dated 6 January 2023 at 10:35.

¹⁸ Email dated 13 January 2023 at 22:23.

¹⁹ Defence Request for extension of time, ICC-01/12-01/18-2453-Conf-Exp.

²⁰ 18 January Request, ICC-01/12-01/18-2453-Conf-Exp, para. 16.

²¹ 18 January Request, ICC-01/12-01/18-2453-Conf-Exp, para. 19.

²² Decision on Defence request for extension of time, ICC-01/12-01/18-2455.

²³ 23 January Decision, ICC-01/12-01/18-2455, para. 16.

to submit a Regulation 35(2) application to admit a certification obtained after this date (the ‘Request’).²⁴

15. On the same date and at 17:29, the Defence provided via email and on an *ex parte* basis additional submissions to the Chamber explaining what the Defence understood to be the specific circumstances of the witness (the ‘*Ex Parte Submissions*’).²⁵ The Defence submitted that it appeared that there had been ‘[REDACTED]’ which would explain ‘why [D-0219] [had] not provided specific details concerning his whereabouts or schedule to the Defence or maintained contact with the Defence by phone [...]’.
16. On the same date, the Chamber issued an email decision rejecting the Request in its entirety and instructing the Defence to notify formal closure of its presentation of evidence by 6 February 2023 (the ‘Decision’).²⁶ The reasons for the Decision are set out below. Due to the urgency of the matter and the timing of the Request, the Chamber exceptionally issued the Decision without receiving responses from the Office of the Prosecutor (the ‘Prosecution’) and the LRVs.

II. Analysis

17. At the outset, the Chamber is compelled to address the timeliness of the Request. The Chamber recalls its previous finding that ‘in light of the principle of fairness and judicial economy, parties and participants should endeavour to file requests under Regulation 35 of the Regulations sufficiently in advance of the original time limit, so as to allow the Chamber to adjudicate on those requests before the lapse of the original time limit’.²⁷
18. As recalled above, the deadline for the Defence to file a formal notice indicating the closure of its presentation of evidence fell on 3 February 2023 at 16:00. Having considered the reasons cited in support of the Request, the Chamber

²⁴ Email dated 3 February 2023 at 17:04.

²⁵ Email dated 3 February 2023 at 17:29.

²⁶ Email dated 3 February 2023 at 18:40.

²⁷ Decision on the Prosecution’s witness order and variation of time limit for filing applications for in-court protective measures, 22 July 2020, ICC-01/12-01/18-968, para. 21. *See also* Décision portant sur la demande de prorogation de délai présentée par le Procureur, 13 May 2019, ICC-01/12-01/18-346, para. 17.

considers that the Defence should have submitted the Request at an earlier juncture, after it was certain that the accompanying declaration could not be filed by the deadline set by the Chamber. The Chamber finds that by, nonetheless, submitting the Request after the passing of the filing deadline under Regulation 33(2) of the Regulations, the Defence failed to act with the required diligence.

19. Given its untimeliness, the Request ought to have been dismissed on that ground alone. However, the Chamber has exceptionally considered the merits of the Request and concludes that the Request is without merit for the following reasons.
20. Under Article 64(2) of the Statute, Trial Chambers have the duty to ensure the fair and expeditious conduct of the trial proceedings. In its previous decision granting an extension of time, the Chamber recalled that ‘expeditiousness is also an independent and important value in the Statute to ensure the proper administration of justice and is therefore more than just a component of the fair trial rights of the accused’.²⁸ It is for this reason that under Article 64(2) of the Statute, Trial Chambers have the power to regulate the conduct of the parties and participants to ensure, *inter alia*, that such conduct does not cause undue delay to the proceedings.²⁹ Similarly, the Defence’s right to present evidence, as prescribed in Article 67(1)(e) of the Statute, is not unlimited; it is subject to judicial oversight to ensure that the trial is fair and expeditious.³⁰ Against this

²⁸ 23 January Decision, ICC-01/12-01/18-2455, para. 16 *citing* Decision on the Defence notice on Mr Al Hassan’s unfitness to stand trial, 13 July 2020, ICC-01/12-01/18-952-Conf (the ‘Fitness Decision’), para. 19; Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, 12 July 2010, ICC-01/04-01/07-2259 (OA10) (hereinafter: ‘*Katanga* OA10 Judgment’), paras 46-47. *See also* Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX’s ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’, 17 July 2019, ICC-02/04-01/15-1562 (OA10) (the ‘*Ongwen* OA10 Judgment’), para. 136.

²⁹ 23 January Decision, ICC-01/12-01/18-2455, para. 16 *citing* Fitness Decision, ICC-01/12-01/18-952-Conf, para. 19; *Ongwen* OA4 Judgment, ICC-02/04-01/15-1562, para. 137; *Katanga* OA10 Judgment, ICC-01/04-01/07-2259, para. 53.

³⁰ Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”, 15 December 2022, ICC-02/04-01/15-2022-Conf (A) (the ‘*Ongwen* Appeal Judgment’), para. 477 *citing* Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on the ‘Application for Leave to Appeal “Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses (ICC-01/05-01/13-1600)”’, 17 February 2016, ICC-01/05-01/13-1635, para. 10 (‘The rights of the defence, pursuant to Article 67(1)(e) of the Statute, to obtain the attendance and examination of witnesses is not unlimited. It is subject

background, the Chamber has to balance the relevant factors to assess whether granting a further extension for the purpose of obtaining the accompanying declaration of D-0219 would be conducive to the fairness and expeditiousness of the trial proceedings.

21. In the case at hand, the Chamber observes that more than three months have elapsed since the testimony of the last *viva voce* witness called by the Defence. Since then, the Chamber already granted several extensions of time and facilitated the process of obtaining Rule 68(2)(b)(ii) declarations, with the significant assistance of the Registry, by exercising judicial oversight to the extent necessary and appropriate. After granting several extensions of substantial duration,³¹ the Chamber indicated, in the 23 January Decision, that '[3 February 2023] [would be] [...] the final date on which the Defence may submit the declaration and no further extension [would] be granted' and that 'given the extensive latitude already granted for the completion of the taking of the outstanding Rule 68(2)(b)(ii) declarations, considerations on the fair and expeditious conduct of the trial guard against the Chamber entertaining further requests for extension of time'.³²
22. Moreover, and as emphasised above, the Defence has already benefited from several months following the testimony of the last *viva voce* witness for the purpose of resolving outstanding procedural issues, including the taking of D-0219's accompanying declaration. The several extensions granted have already resulted in moving the deadlines for the closing briefs and closing statements backward, beyond the Chamber's initial estimate. In these circumstances, a further open-ended extension solely for the purpose of obtaining the Rule 68(2)(b)(ii) declaration of one witness or filing a Rule 68(2)(c) request³³ would lead to unreasonable delays in the proceedings.

to judicial oversight to ensure that the trial is fair and expeditious and is conducted with full regard for the rights of the accused in accordance with Articles 64(2), 64(9), 67(1)(c) and 69(4) of the Statute.')

³¹ 16 December Decision, ICC-01/12-01/18-2445-Conf-Exp; 23 January 2023 Decision, ICC-01/12-01/18-2455.

³² 23 January Decision, ICC-01/12-01/18-2455, paras 16, 21.

³³ As the Defence avers that D-0219 is willing to provide his Rule 68(2)(b)(ii) declaration and as there are no indications that the witness cannot be reached with reasonable diligence, the Chamber also

23. In its Request, the Defence submits that '[D-0219] has repeatedly confirmed his willingness to conduct the certification process' and that the Defence 'has reason to believe that it will be able to establish contact and arrange this process in the coming days'. However, the Chamber observes that in support of its previous extension requests concerning D-0219, the Defence has similarly referred to the likelihood of obtaining D-0219's accompanying declaration.³⁴ Furthermore, while the Defence argues in the Request that it 'has not been able to establish any connection through message landline or other means [with D-0219]', it does not provide any further reason that would convince the Chamber on the likelihood that D-0219 will, this time, provide his accompanying declaration if another extension were to be granted.
24. In the *Ex Parte* Submissions, the Defence provides additional information, which, in its view, explains the Defence's inability to contact D-0219. The Chamber observes that these submissions appear to be assumptions on the Defence's part, and that it does not provide objective facts in support of these submissions. Further, the *Ex Parte* Submissions are silent on the possible time-line and falls short of providing information that would allow the Chamber to assess whether granting a further extension would be conducive to the fairness and expeditiousness of the trial proceedings. Having assessed all of the Defence's submissions, the Chamber is not satisfied that the Defence has provided sufficient information to allow the Chamber to conclude that D-0219 is likely to complete the certification procedure within a reasonable deadline if a further extension were to be granted.
25. Turning to the substance of D-0219's evidence, the Chamber notes that, in the D-0219 Decision, it found that this witness's evidence 'mainly relates to background information and/or issues that are not materially in dispute'.³⁵

considers unsubstantiated the need for an extension for the filing of a Rule 68(2)(c) request. The Chamber also recalls its previous determination that the inability to obtain a Rule 68(2)(b)(ii) declaration cannot in and of itself be sufficient to demonstrate unavailability and justify the conversion of Rule 68(2)(b) witnesses into Rule 68(2)(c) witnesses. *See* 16 December Decision, ICC-01/12-01/18-2445-Conf-Exp, para. 24.

³⁴ 12 December Request, ICC-01/12-01/18-2440-Conf-Red, para. 36.

³⁵ D-0219 Decision, ICC-01/12-01/18-2343, para. 16.

Neither does the Defence assert that this witness is essential for its case. Indeed, the Defence itself averred that D-0219's evidence does not relate to charged incidents and that '[h]is account is not unique but instead concerns circumstances and background information which have been or will be described and discussed by many other equally informed witnesses.'³⁶ Accordingly, the Chamber considers that any potential prejudice to the fairness of the proceedings as a result of the inability to submit D-0219's evidence is minimal.

26. In light of the above reasons, and taking into account all of the relevant circumstances and interests, the Chamber finds that granting the Request would cause an undue delay to the proceedings that would be 'inimical to the proper administration of justice' in the present case.³⁷ Accordingly, the Chamber rejects the Defence's request to defer closure of its presentation of evidence for the purpose of obtaining D-0219's Rule 68(2)(b)(ii) declaration.
27. The Chamber will now turn to the Defence's alternative request seeking 'confirmation that the closure of its case will be without prejudice to its ability to submit a Regulation 35(2) application to admit a certification'.
28. The Chamber recalls that the Defence's Rule 68(2)(b) application concerning D-0219 was authorised 'subject to the receipt of the certified declaration' and as such the formal introduction of prior recorded testimony of D-0219 only occurs when said declaration is filed on the case record.³⁸ Consequently, the Chamber considers that the Defence's request to submit an accompanying declaration at a later stage would be tantamount to introducing additional evidence after the conclusion of its presentation of evidence.
29. Accordingly, the Chamber is unable to accept that the introduction of an accompanying declaration after the closure of a party's presentation of evidence can be authorised solely on the basis of Regulation 35(2) of the Regulations. To the contrary, for a party to request submission of additional evidence after the

³⁶ Defence Rule 68(2)(b) applications for Witnesses D-0219 and D-0312, 2 September 2022, ICC-01/12-01/18-2328-Conf, para. 15.

³⁷ *Ongwen* OA4 Judgment, ICC-02/04-01/15-1562 (OA4), para. 137; *Katanga* OA10 Judgment, ICC-01/04-01/07-2259, para. 45.

³⁸ D-0219 Decision, ICC-01/12-01/18-2343.

closure of its presentation of evidence, said party must request leave to exceptionally re-open its case. In this regard, the Chamber notes that previous Chambers have determined that re-opening a party's case in order to permit the presentation of additional evidence will be granted only if 'warranted by truly exceptional circumstances'.³⁹

30. Finally, the Chamber considers that a redacted version of the *Ex Parte* Submissions should be provided to the Prosecution and the LRVs. The Defence is accordingly instructed to circulate a confidential redacted version forthwith.

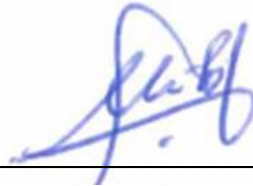
³⁹ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Declaration of the closure of the submission of evidence, 12 December 2019, ICC-02/04-01/15-1699, para. 5; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Second Redacted version of Decision on 'Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169' (ICC-01/05-01/08-3138-Conf-Red) and 'Defence Urgent Submissions on the 5 August Letter (ICC-01/05-01/08-3139-Conf)' of 2 October 2014, 11 December 2014, ICC-01/05-01/08-3154-Red2, para. 25.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

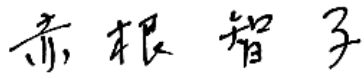
ADOPTS the aforementioned reasons for the Decision on Defence request to defer the closure of its presentation of evidence; and

INSTRUCTS the Defence to provide a confidential redacted version of the *Ex Parte* Submissions.

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 Friday, 3 March 2023
At The Hague, The Netherlands