

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **14 March 2023**

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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 the Defence request for reconsideration or leave to appeal,
ICC-01/12-01/18-2478-Conf-Exp, 13 March 2023**

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 for Mr Al Hassan seeks reconsideration or in the alternative, leave to appeal, as concerns the Chamber's decision refusing to grant the Defence additional time to obtain the certification of D-0219 ('the Decision').¹
2. The Defence seeks reconsideration on the grounds that:
 - The Chamber committed manifest errors of law in finding that the Defence had no right to invoke Regulation 35(2) to request an extension of time related to new and unforeseen events that fell outside the control of the Defence;
 - The outcome of the Decision led to a manifest miscarriage of justice by preventing the Defence from relying on highly relevant and probative evidence when the Defence did not possess the means to secure alternative evidence or relief.
3. The Defence further seeks leave to appeal in relation to the issue as to whether the Chamber's approach to Regulation 35(2) deprived the Defence of an effective remedy as concerns its right to adequate time and facilities to present its case.

II. Level of Confidentiality

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Defence files this application as confidential *ex parte*, because it contains sensitive information regarding a Defence witness and refers to confidential documents. The Defence will file a public redacted version in due course.

III. Submissions

5. Notwithstanding the complex security situation in Mali, the limitations to investigations caused by the Corona virus, the size of this case, the length of Prosecution investigations, and the length of confirmation proceedings, the Chamber granted the Al Hassan Defence less time than any other ICC Defence to prepare its case.
6. Throughout the course of the Defence case, the Chamber repeatedly emphasized that the Defence was required to deploy its time and resources to ensuring continuity of the proceedings to avoid any unnecessary delays Defence teams do not benefit from the specialized assistance of witness contacts units, external relations unit, or bilateral

¹ Although the Chamber issued the Decision by email on 3 February 2023, the reasons for the Decision were not issued until 3 March 2023. In line with ICC precedent, the deadline for seeking leave to appeal does not start until the Chamber issues the reasoned opinion for their Decision: ICC-01/04-01/07-1497, para. 8; ICC-02/11-01/15-1263 p. 8; *see* ICC-01/04-01/06-773, para. 20, linking the existence of an *effective* right to appeal to the existence of a reasoned opinion.

assistance from State parties, which has placed a considerable strain on the Defence to undertake all required activities within the timeframes imposed by the Chamber.

Procedural Timeline

7. On 29 August 2022, the Chamber ordered the Defence to introduce all of its written evidence through the bar by 24 October 2022, with any supplementary items not tendered through a witness within one week after the completion of the last Defence witness's testimony.² The Chamber also ordered the last Rule 68 applications to be submitted by 24 October 2022. Accordingly, Defence resources were entirely deployed to meeting these deadlines throughout September and October.
8. Following the completion of the last Defence witness, the Defence requested to convene a meeting with the Single Judge and Registry sections to discuss the modalities for witness certification. The Defence also raised potential solutions, including video-link certifications.
9. During the 10 November 2022 meeting, the Single Judge directed the Defence to liaise with the Registry to organize in person certifications at the UN base in Timbuktu, an ICC field office in Bamako, or other surrounding countries. The Registry confirmed that the Defence would be responsible for organizing and funding the logistics of the certification process. For witnesses who were able to travel to Bamako, logistics entailed arranging flights for witnesses to travel from Timbuktu to Bamako, hotel reservations, and conference room reservations with internet access for interpretation and for witnesses to have their statements and related exhibits in advance. For witnesses outside Timbuktu, the Defence engaged in resource-intensive discussions and litigation with the Registry concerning the modalities for establishing contact with witnesses who lived in areas without a reliable telephone network. Before commencing such activities, the Defence also formulated and submitted a detailed legal aid request to obtain necessary funds for these activities. This was submitted on 15 November and approved on 24 November 2022.³

Attempts at in-person certification in [REDACTED]

² ICC-01/12-01/18-230

³ CSS email of 24 November 2022, 15:30.

10. Following the Single Judge's directive that the Defence should pursue the option of in-person certification in either Timbuktu (MINUSMA) or the Bamako ICC office,⁴ the Defence tried to organize the certification in [REDACTED] for D-0219, [REDACTED]. It became evident that the proposal of travelling to [REDACTED] presented particular difficulties in light of D-0219's security profile, [REDACTED].⁵ On 5 December 2022, the Defence requested the Registry to conduct a protection assessment of D-0219 [REDACTED]. [REDACTED],⁶ [REDACTED].⁷ Although D-0219 indicated he was willing to perform the certification if and when he was in [REDACTED], he was unable to provide a specific date due to [REDACTED].
11. On 6 December 2022, the Defence further requested an assessment on the feasibility of conducting an in-person certification [REDACTED].⁸ [REDACTED],⁹ [REDACTED].
12. The Defence followed up on 7 December 2022. Later that day, at 17:58, the Registry informed the Defence that the decision concerning the modalities of the certification would not be made by VWS but by the Registry Legal Officer (RLO), and that it would have to be cleared by the RLO and the Trial Chamber. On 7 December, the RLO clarified that certification could be done remotely or in person at a location that was security vetted by the Registry security section. Such locations were understood by the Defence to be at either UN premises or ICC field office.
13. On 8 December 2022, the Defence requested the RLO to investigate the feasibility of conducting the certification in [REDACTED]. Throughout the course of the morning of 9 December, the Defence furnished further information and details concerning the modalities of the proposed mission to assist with their feasibility evaluation. At 13:29, the Registry security office indicated that he would have to liaise with the host state (i.e., Mali) and MINUSMA in order to evaluate the feasibility. At 14:35, the RLO advised that it would not be possible to confirm by 13 December or the next week whether such a mission would be feasible.

⁴ In an email decision dated 16 November 2022, the Single Judge rejected a Defence request to consider a location other than MINUSMA in Timbuktu.

⁵ During the pre-Defence stage, the Defence had been informed by VWS that it was not necessary to complete WIFFs or Security forms for Rule 68 witnesses or to introduce them to the VWS

⁶ [REDACTED]

⁷ [REDACTED]

⁸ Email of 6 December 2022, 10.21.

⁹ [REDACTED]

14. On 14 December 2022, the Registry informed the Defence that:¹⁰

[REDACTED]:

The outcome of the assessment indicates that the local context entails projected risks varying on a range from Low to High levels. Two projected risks still remain at High level despite all prevention and mitigation measures implemented. This is also in line with the UN Security Risk Management for [REDACTED].

Considering the necessity of legal certification of the witness statement in [REDACTED] area, the ICC Security assessment is that this activity should take place at the MINUSMA compound in [REDACTED] only or alternate certification options should be explored, such as a remote process.

15. Given the security issues above, Registry's feasibility assessment had the practical effect of excluding an in-person certification in [REDACTED]. However, on 9 December 2022, the Defence had inquired as to whether remote certifications could take place at a secure location with internet, other than the UN base, with respect to another witness. On 12 December, the Registry advised that:¹¹

The use of another "secure location with internet" to conduct the remote certification is another option that can be considered. In this respect, we refer to our previous communications with the Defence Team, whereby we have indicated that it is for the calling party to make the necessary arrangements to secure such location and to guarantee that all technical requirements are met.

Attempts at remote certification

16. Following this confirmation, the Defence immediately contacted D-0219 to ascertain whether a remote certification [REDACTED] would be feasible. The Defence learned that the network at [REDACTED] allowed the Defence to establish a video connection *via* Signal. The Defence could not test the network with Webex, as Webex does not allow the Defence to generate links. Only the Registry can provide the link.

17. On 13 December 2022, the Defence requested the RLO to assist the Defence to conduct a remote certification with D-0219 in [REDACTED]. The Defence received a response on 14 December that the Registry could assist with a remote certification on 9 January 2023.

18. In light of connection issues the Defence experienced in Timbuktu with Webex (which resulted in the unsuccessful completion of a separate certification), the Defence requested the Registry to use 'Jitsi'¹² to conduct the remote certification. This tool, which has the same security level as Webex, allowed for recorded video-conferencing

¹⁰ Email CSS, 14 December 2022, 19:16.

¹¹ Email RLO, 12 December 2022, 09:36

¹² <https://jitsi.org/>

to take place without any software download and allows a lower bandwidth to facilitate connection in locations with poor internet connection.¹³ Throughout this case, the Defence has submitted information concerning poor and sporadic network conditions in the North of Mali, which the Defence has experienced on numerous occasions.¹⁴

19. On 30 December 2022, the Defence followed up on its proposal to use Jitsi and asked if it was necessary to consult with the Chamber.
20. On 3 January 2023, the Defence informed the RLO about D-0219's availability for the certification on 9 January and proposed two possible time slots (12:00 and 18:00).¹⁵ On the same day, the Registry indicated that it would update the Defence on 6 January 2023 as concerns the Defence proposal to use Jitsi.
21. On 6 January 2023, the RLO advised the Defence that it was not possible to use any form of video conferencing other than Webex.¹⁶ Unlike Timbuktu, where a Defence

¹³ Email of 22 December 2022:

Dear Registry legal office, Dear VWS,

We would like to explore the possibility of using the following encrypted platform in case the bandwidth in Tb2 is insufficiently strong to allow for a proper Webex connection during the Jan certification procedures, which are being conducted in locations other than MINUSMA.

<https://meet.jit.si/>

Jitsi is encrypted end to end. It generates links with random names that ensure that no one guesses purpose of the meeting. It allows for recording of meetings. The video is stored and saved locally at the organiser's end as a VLC file. It's possible to enter the meetings without installing or downloading any software. It works on ICC computers (I have tried on mine). It's possible to generate meeting links without having an account. It also has a tool that allows you to reduce the bandwidth that is being used by any of the participants in case the internet connection is poor. We were able to establish a connection to Timbuktu this afternoon with someone just using a phone and 3G.

This tool is used by NGOs and activists so is considered to be very secure and safe. The security features are explained here: <https://jitsi.org/security/>

Thank you in advance for considering this option. If it is a matter of amending the protocol, please let us know if we need to obtain the authorisation of the Chamber.

¹⁴ For example, in Timbuktu, during the initial testing, the Defence was able to establish stable connection at two locations. On another date, while attempting to complete a certification at midday, the Defence was unable to activate the Webex link at any of these locations.

¹⁵ Email from Defence to RLO dated 3 January 2023 at 12:20.

¹⁶ Dear Melinda,

Further to your message below, we would like to inform that the alternative tool proposed by the Defence Team has been considered and assessed by the relevant Registry stakeholders, notably from a security perspective.

It was concluded that the tools that the Court already has in place should continue to be used for the purpose of the rule 68(2)(b) certifications, i.e. WebEx. This recommendation is based on the fact that the Registry have already assessed the tools we use, and implemented the necessary security configurations and settings to achieve

resource person was able to take care of the technical issues, the Defence does not have a footprint in [REDACTED] to assist with such matters. The Defence also could not send its other resource person to assist with these issues given the Registry's refusal to grant travel to [REDACTED] for security reasons, as indicated in the feasibility assessment of 14 December 2022 and at the December Status Conference.¹⁷

22. On 9 January 2023, the witness appeared at the agreed time. The first Webex link generated by the Registry produced an error message. The Defence sent the error message to the Registry and requested the Registry to generate a new link. The Defence did not receive the new link, as the ICC email system for the Defence suffered connectivity issues for the entirety of the afternoon of 9 January 2023 through to the morning of 10 January 2023.
23. As the Defence had not received a link, the Defence proposed the RLO to use alternative internet systems (*i.e.*, Jitsi) for the certification. The Registry reiterated to the Defence that Webex was the only system allowed for the certification of witness statements. The RLO further informed the Defence that they will not be available at 18.00, as originally proposed by the Defence. The certification was therefore cancelled.
24. On 10 January 2023 at 15:07, the RLO confirmed that they had only just received the Defence email. In light of the technical problems suffered on 9 January, the Defence requested the RLO to send another Webex link to test on 11 January 2023. The Defence further informed the RLO that the witness would be leaving [REDACTED] at the end of that week, and that the Defence would miss the Trial Chamber's deadline should the certification did not take place before then.¹⁸ The Defence confirmed the witness's availability for 11 January at 12:00.
25. The Defence was informed by the Registry at that time that it could utilize Zoom and could conduct a test with a link generated by the Registry. Following a successful test, the Registry would then schedule the certification. Neither the Defence nor the witness

an acceptable level of security (confidentiality) for the purposes outlined. The tools in use are also integrated into the wider systems of authentication and (where appropriate) data transmission and storage.

The Registry acknowledge that there will always be other tools available, but with limited resources to assess these tools and to design appropriate security measures, it is preferable to use the tools that we already have, *i.e.* WebEx.

¹⁷ ICC-01/12-01/18-T-212-CONF-EXP-ENG, p. 19 lns. 18-20 (*'[t]here is a security concern however with respect to [REDACTED]. The security and safety section have made an assessment which it turned out to be that it is not recommended for anyone to travel to that location.'*)

¹⁸ Email from Defence to RLO dated 10 January at 16:53.

were given any instructions as which steps needed to be taken to operationalize the link on a mobile device which had not used Zoom before.

26. On 11 January 2023, Witness D-0219 was available for the certification. Despite prolonged efforts by the Defence going into the evening, it was not possible to operationalize the link. The Defence was informed that the link should be accessible without downloading any additional software. A Defence team member, who was shadowing the process on a similar device to the witness, was also unable to operationalize the link.
27. After discussions with IT concerning the reasons why the link sent on 11 January would not work, the Defence was informed that it was in fact necessary to download the Zoom app, due to the device that was being used in [REDACTED]. The Defence then tried throughout the course of 12 January to operationalize the link. In the meantime, the witness tried to download the app from the meeting link. After several hours passed with no success, the Defence requested the RLO to conduct the certification via Jitsi or Signal with the help of a video recording device, as a back-up plan. The RLO nonetheless continued to maintain that the only internet systems allowed to be used by the Court are Webex and Zoom.¹⁹
28. The Defence again liaised with IT who advised that the process could be expedited by downloading the Zoom from the Google Play Store rather than via the Zoom link. The Zoom application was then downloaded in 30 minutes. There were, however, further difficulties with ensuring that the appropriate modifications were made to allow Zoom to access the camera and audio settings on the device. With the assistance of the IT department, the Defence completed a successful Zoom test on 12 January at 18:48 and requested an additional test and certification for 13 January. The Defence confirmed the witness's availability on 13 January at 12.00 for the certification and 11.30 for an advance test.²⁰
29. The IT officer assisting the Defence advised the RLO that the test was successful and that the link should be issued several hours in advance of the certification to allow for sufficient time to address issues concerning audio and visual access.²¹ Notwithstanding

¹⁹ Email from RLO to Defence dated 12 January at 12.55, and at 16.38.

²⁰ Email from Defence to RLO dated 13 January at 8:38.

²¹ Email from IT office, 19:03:

Dear Melinda [REDACTED],

I am happy to confirm that after quite some effort on all our parts, a successful test was completed using Zoom to meet with your remote client.

this advice, the link was not issued until 11.58am on 13 January. The witness was present and available for the certification at this time. Since there had been no advance testing on the day, it was not possible to operationalize the link within the allotted time – the connection allowed for an audio feed but not a visual feed. The IT officer who had assisted to resolve these issues the day before was also not available to assist on this occasion. The Defence requested to reschedule the certification for later that afternoon to allow for sufficient time to operationalize an audio and visual feed, but the RLO indicated that there was no one available to assist in issuing a link. The RLO also indicated that it was also not possible for the Defence to issue a link from their account.

30. Given the inability to complete the certification process by remote means, the Defence inquired with the witness about the possibility of in-person certification. The witness confirmed that he would be travelling from that evening onwards but expected to be in [REDACTED] at the end of January. [REDACTED].²² [REDACTED],²³ [REDACTED].
31. On 17 January 2023, the Defence indicated to the RLO that the witness indicated that he would return [REDACTED], and that as such, an in-person certification could be organized on his return, which was likely to be around the end of January 2023.
32. On 18 January, the Defence sought a brief extension of time, by the beginning of February (i.e., 3 February 2023). This constitutes a negligible extension beyond the 23 January deadline. The Requested was granted the extension until 3 February.
33. The week before the expected rendezvous, the Defence was not able to establish contact with the witness. It was the understanding of the Defence that this was because the witness was travelling in areas with low or no internet connectivity (which is common for areas in Northern Mali outside the cities). [REDACTED].²⁴ [REDACTED].²⁵ [REDACTED].²⁶ [REDACTED]. [REDACTED].²⁷ [REDACTED].²⁸

I am confident that now the client's phone has been correctly configured to use Zoom, it will be possible to re-establish further Zoom meetings without any complication.

I have advised RLO of the success of the test, and have also indicated that it would be beneficial to conduct a further test tomorrow (Friday) before the official meeting time. To facilitate this, I have suggested that the meeting ID and password could be released as early as possible.

[...]

²² [REDACTED]

²³ [REDACTED].

²⁴ [REDACTED]

²⁵ [REDACTED]

²⁶ [REDACTED]

²⁷ [REDACTED]

²⁸ [REDACTED]

34. Due to the above [REDACTED] developments, [REDACTED], D-0219 was clearly unable to travel to [REDACTED]. [REDACTED]. These developments could not have been predicted by the Defence nor could the rapid escalation have been foreseen at the time that the Defence submitted its earlier request for additional time. [REDACTED]. [REDACTED].²⁹ [REDACTED]. In the absence of concrete information concerning the activities and availability of the witness, the Defence was unable to formulate a specific request for relief or an alternative date, prior to the expiration of the deadline on 3 February. As a result of the Registry's refusal to allow for in person certification at the [REDACTED] office or to allow for any technical platform other than zoom or Webex, the Defence lacked the means to propose a concrete mechanism for obtaining the certification by a specific date, particularly as it had not had the opportunity of speaking to D-0219.
35. The Defence informed the Trial Chamber via email on 3 February 2023 that due to [REDACTED], witness D-0219 had not been contactable or available for the certification of his statement within the timeline planned.³⁰ The Defence requested 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. Alternatively, the Defence sought confirmation that the closure of its case would be without prejudice to its ability to submit a Regulation 35(2) application to admit a certification obtained after this date. The Trial Chamber issued on the same date an email decision rejecting the Defence request in its entirety and instructing to notify the formal closure of its presentation of evidence by 6 February. On 3 March (one month later), the Trial Chamber issued the Reasons for its decision.
36. On 3 February, in the context of another witness, the RLO clarified that it would not assist with a certification unless instructed by the Chamber to do so.³¹ The Defence therefore has no means to achieve the certification of a witness unless the Chamber approves the process. In practice, this means that absent prior judicial intervention, the Defence lacks the means to submit an application to reopen the case to admit a completed certification.

²⁹ [REDACTED]

³⁰ Emails from Defence to Trial Chamber dated 3 February at 17.04 and 17.29.

³¹ Email RLO, 2 February 2023, 18: 39. This email was forwarded to the Chamber on 3 February at 10:25am.

The Chamber committed manifest errors in law in finding that the Defence could not invoke Regulation 35(2) after the expiration of the deadline to either submit the certification or a Regulation 68(2)(b)(ii) application

37. In its reasons, the Chamber explained that it had rejected the Defence request for four main reasons:
- First, the “Chamber [was] 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”;³²
 - Second, as a result of this finding, the Chamber issued a substantive ruling based exclusively on the information before it;³³
 - Third, the Chamber rejected the Defence request to defer the closure of the case due to considerations of expeditiousness and its conclusion that “any potential prejudice to the fairness of the proceedings as a result of the inability to submit D-0219’s evidence is minimal”;³⁴ and
 - Fourth, the Chamber found that since D-0219 was willing to provide a declaration, Rule 68(2)(c) could not be invoked.
38. These findings are predicated on four manifest and inter-linked errors of law, concerning the manner in which the Chamber interpreted and applied Regulation 35(2).
39. **In terms of the first error**, the decisions cited by the Chamber do not support the proposition that Regulation 35(2) does not apply to the applications filed after the close of a party’s case. The *Ongwen* decision does not address the applicability of Regulation 35(2); it also envisaged that evidence could be admitted in exceptional circumstances (which is the same test that applies to Regulation 35(2)).³⁵ The *Bemba* decision also does not support the Chamber’s conclusion: since the issue arose from the disclosure of exculpatory information from the Prosecution to the Defence and the Chamber’s decision to recall a Prosecution witness as a Chamber’s witness, Regulation 35(2) was inapposite and was not therefore addressed by the Chamber.³⁶ Notably, in an earlier decision, the *Bemba* Trial Chamber used Regulation 35(2) to assess a Prosecution

³² Reasons, para. 29.

³³ Reasons, para. 24.

³⁴ Reasons, para. 25

³⁵ ICC-02/04-01/15-1699, para. 5 : “This does not signify that a request to re-open the evidence will automatically be rejected. However, the Presiding Judge emphasises that any such request will only be granted if it is warranted by truly exceptional circumstances.”

³⁶ ICC-01/05-01/08-3154-Red2

request to submit evidence after the deadline for filing evidential applications had expired.³⁷ Similarly, in a later decision, the same Chamber found that the threshold to reopen the Defence case was ‘good cause’³⁸ (the same test that applies to the first prong of Regulation 35). In *Bemba et al*, Trial Chamber VII adjudicated a request to admit new evidential items after the close of evidence, by reference to Regulation 35.³⁹

40. In contrast to the above decisions, the issue before this Chamber concerned the completion of a procedural act rather than the introduction of new, substantive evidence which was not on the party’s list of evidence. In *Ntaganda*, the Trial Chamber found that where the application concerned evidence that had already been substantively discussed during the trial proceedings, it was not necessary to reopen the case.⁴⁰
41. Given that first, there are no ICC decisions which expressly state that Regulation 35(2) did not apply, and second, prior decisions had either applied the Regulation 35(2) criteria or Regulation 35(2) itself, it was a manifest legal error for the Chamber to conclude that the Defence could not resort to Regulation 35(2) after the close of the Defence case. This is especially so given that D-0219’s statement and evidence had been disclosed, substantively discussed and provisionally admitted through Rule 68(2)(b) during the trial proceedings.
42. Even if Regulation 35(2) does not provide an exclusive basis to introduce the certification after the close of evidence, the Trial Chamber’s email of 3 February 2023 rejected any application of Regulation 35(2). This unequivocal ruling deprived the Defence of any mechanism to seek relief following the closure of the Defence case.
43. **The second error** stems from the Chamber’s erroneous conclusion that Regulation 35(2) was not applicable after the close of the Defence case. The Chamber consequently required the Defence to submit a concrete and justified application for more time before the expiration of the deadline, even though the Defence did not have the information and details at hand to do so. This approach ran roughshod over the plain terms of Regulation 35(2) and contradicted the manner in which the Chamber had

³⁷ ICC-01/05-01/08-3029, paras. 16-17.

³⁸ ICC-01/05-01/08-3186-Red, para. 18.

³⁹ ICC-01/05-01/13-1928: “Trial Chamber VII (‘Chamber’) of the International Criminal Court (‘Court’ or ‘ICC’), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 64, 67(1) and 69 of the Rome Statute (‘Statute’) and Regulation 35 of the Regulations of the Court (‘Regulations’), issues the following ‘Decision on Request in Response to Two Austrian Decisions’”.

⁴⁰ ICC-01/04-02/06-2288, para. 6: “At the outset, noting that the Items were used during the presentation of evidence, the Chamber considers that the Request does not amount to a request to re-open the presentation of evidence involving the submission of ‘fresh’ evidence.”.

applied Regulation 35(2) in the context of similar Prosecution applications. The practical effect of this error was that the Chamber applied a standard that the Defence had no means to satisfy.

44. Regulation 35(2) of the Regulations of the Court provides that:

After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.

45. This wording envisages that the parties can invoke the provision after the expiration of a deadline. In circumstances where the parties are not able to seek concrete relief before the expiration of a deadline, ICC case law has consistently found that it is not necessary for the parties to file a hypothetical request in advance of the deadline, in order to preserve their ability to file a subsequent Regulation 35(2) request, once they are in a position to seek concrete relief.⁴¹
46. The Trial Chamber applied this approach in an October 2020 decision, which considered a Prosecution request to add multiple items to the Prosecution list several months after the expiration of the deadline. While the Chamber noted that the Prosecution had provided absolutely no explanation as to why it was not in a position to submit the application prior to the expiration of the deadline, the Chamber still admitted the items.⁴² The Chamber also found that in circumstances where the Prosecution was not yet in a position to provide “all the requisite and complete information” in support of its application, it would have been “premature to consider any request under Regulation 35 at this stage, as framed.” The Chamber therefore indicated that the Prosecution could “return back to the Chamber on this matter at the appropriate time, if necessary.”⁴³
47. The Trial Chamber adopted the same approach to Regulation 35(2), in relation to a different Prosecution application to add additional items to its list, several months after the expiration of the deadline for filing its list of evidence.⁴⁴ Even though the Prosecution waited several weeks to file its application, the Chamber rejected

⁴¹ ICC-01/05-01/13-1191, para. 11.

⁴² ICC-01/12-01/18-988-Red, para. 15, see also para. 8: “the Chamber notes that for a number of items requested to be added late to the Prosecution’s Final List of Evidence, no explanation is given for the failure to include them within the original deadline, or the Prosecution indicates that they were not added within the deadline due to an oversight”.

⁴³ ICC-01/12-01/18-988-Red, para. 11.

⁴⁴ ICC-01/12-01/18-1671.

arguments that the Prosecution had not acted diligently, finding that it was acceptable for the Prosecution to wait until after the summer recess to submit the application, once it was in a position to submit a concrete application.⁴⁵ The Chamber viewed the application through the lens of Regulation 35(2), and did not impose any additional criteria (i.e. it did not require the Prosecution to demonstrate that the evidence was necessary for the presentation of its case).

48. Similarly, in a later decision concerning the Prosecution, the Chamber once again affirmed that it was acceptable for the Prosecution to file the Regulation 35(2) application after it had obtained the information or evidence in question:⁴⁶ the Chamber made no assessment as to whether the Prosecution could or should have obtained the information at an earlier point in time.
49. 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 until it has received a substantiated application with the statement in question.⁴⁷
50. The principles of certainty and equality of arms dictate that the Trial Chamber should apply the same approach to Regulation 35(2) to Defence applications, as it applied to Prosecution applications. The Chamber repeatedly found that the Prosecution was entitled to wait until it was in receipt of concrete evidence or information, before submitting a Regulation 35(2) application, and that no adverse inferences concerning diligence could be drawn from the Prosecution's decision to do so.
51. This approach should have been applied to the Defence. At the time of the expiration of the 3 February deadline, the Defence was not in a position to submit a concrete application for relief. The Defence had not been able to establish contact with the witness with a view to submitting a specific proposal. The witness was unavailable due to functions that were directly associated with his [REDACTED] and the situation of extreme insecurity in the North of Mali: factors that other ICC Chambers have treated as 'exceptional'.⁴⁸ The ability of the Defence to formulate a concrete proposal was also contingent on matters beyond its control – including the willingness of the Registry to

⁴⁵ ICC-01/12-01/18-1671, para. 5.

⁴⁶ ICC-01/12-01/18-2096, para. 7:” the Chamber notes that the corrections sought are needed for it to appropriately understand and assess P-0590’s testimony and thus finds that it was necessary and in the interest of justice for the Prosecution to seek and await these updates prior to requesting the introduction into evidence of the Material”

⁴⁷ ICC-02/05-01/20-545-Red, para. 8.

⁴⁸ Trial Chamber V(a): ICC-01/09-01/11-1186, paras. 60, 63, 69 (recognising the difficulty of someone of high office making themselves available for video-links with the ICC)).

assist with resolving the practical and technical issues of certification. The second sentence of Regulation 35(2) was designed for such situations. It was therefore both premature and prejudicial for the Chamber to reject a future Regulation 35(2) out of hand, while judging the merits of the matter by reference to the arguments before it.

52. **The third error** concerns the criteria used by the Chamber to assess whether there were grounds to grant the Defence additional time: that is, the Chamber's reliance on the importance of the Defence evidence. In the context of Regulation 35(2) applications, the Chambers have only taken into account the relevance of the evidence in question if the criteria under Regulation 35(2) were not fulfilled, and it was necessary to make a determination as to whether it would be in the interests of justice to admit the evidence, notwithstanding the parties failure to comply with Regulation 35(2).⁴⁹ The fact that evidence is largely background evidence and overlaps with other evidence militates in favour of its admission, as less prejudice would be generated to the opposing party.⁵⁰
53. In the context of the Prosecution case, the Chamber took into account similar considerations when assessing Prosecution applications to admit evidence after the expiration of a deadline. For example, in connection with the aforementioned Rule 68 decision concerning P-0590, in assessing whether it was in the interests of justice to admit the evidence after the deadline, the Chamber found that in light of the 'technical' nature of the information, no prejudice would arise.⁵¹
54. In the current situation, rather than assessing whether granting the request would be likely to generate prejudice to the Prosecution, the Chamber made a substantive assessment of the relevance of the evidence to the Defence case. This approach was detrimental to the Defence. Since this criterion falls outside the scope of Regulation 35(2), the Defence adduced no arguments on this point. Indeed, the very fact that the Chamber recognized that there was some prejudice (albeit of a minimal nature) should have impelled the Chamber to consider whether rejecting a future Regulation 35(2) application out of hand was a necessary and proportionate response.

⁴⁹ ICC-01/04-02/06-1733, para. 8.

⁵⁰ ICC-01/04-02/06-1733, para. 18: "In these circumstances, noting also the nature of the testimony which is largely factual and related to background information which would be accessible through other sources, and, in respect of names and documents potentially presented when registering at school, partly overlaps with the evidence that was disclosed in relation to Witness P-0932, the Chamber is of the view that the late addition of P-0551 to the Prosecution's witness list would have only a limited impact on the Defence's preparation, and can be further remedied by ensuring appropriate conditions for the admission of P-0551's testimony"

⁵¹ ICC-01/12-01/18-2096, para. 7.

55. If the Chamber had properly focused on prejudice to the Prosecution, it would have found that there was none, as D-0219 had confirmed that he had no changes to make to his statement and the certification itself was of a technical nature. Its submission into evidence would give rise to no additional evidential arguments nor would it change the factual matrix of the case.
56. Similarly, if the Chamber had allowed the Defence to file a future Regulation 35(2) application, considerations of expeditiousness would have been moot. There would have been no delay as the deadlines for the final brief schedule would have started to run. The introduction of the certification (as and when it was obtained) would have had no impact on this schedule. Indeed, the solution proposed by the Defence (to close the case without prejudice to the future submission of a Regulation 35(2) application) would have preserved both the fair and expeditious conduct of the proceedings.
57. As concerns the **fourth manifest legal error**, in a sparsely reasoned footnote, the Chamber argued that:⁵²

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 considers unsubstantiated the need for an extension for the filing of a Rule 68(2)(c) request.

58. Rather than basing its decision on the question as to whether there was good cause to grant the Defence more time to file an application, the Chamber assessed the likely outcome of such an application. This approach is not consistent with the criteria set out in Regulation 35 (2) and indeed, renders the very purpose of Regulation 35(2) moot. It also deprived the Defence of the right to be heard on a core substantive issue – both in connection with the request for more time and in connection with the outcome of the prospective Rule 68(2)(c) filing.⁵³ Rendering a decision on the merits of such an application, in the absence of actual submissions, also contravened the Chamber's duty of impartiality and the right to adversarial hearings. The Chamber has already defined its position in relation to such a matter, making it impossible for the Defence to reopen its case with a view to introducing elements that would be relevant to such an application.
59. The Chamber also committed a manifest error of law as concerns its approach to Rule 68(2)(c). The question of availability is not based solely on the witness's willingness,

⁵² Reasons, fn. 33.

⁵³ See Prosecutor v. Jelisić. Appeals Judgment, 5 July 2001, paras. 25-28.

but takes account as well, the question as to whether it is technically possible to obtain a declaration in a manner that is consistent with the witness's security and confidentiality. This stems from the plain wording of Rule 68(2)(c), which refers to "obstacles that cannot be overcome with reasonable diligence". This wording is independent of the fact that the witness is willing to testify since the 'obstacles' can be intrinsic (sickness) or extrinsic (security/remote location). The fact that the substance of D-0219's evidence had already satisfied the criteria of Rule 68(2)(b) and D-0219 had confirmed that he had no additions or corrections to make also should have militated in favour of a more flexible approach as concerns submitting the evidence through Rule 68(2)(c). In any case, since the witness was not manifestly available to perform the certification in areas identified by the Registry (i.e., [REDACTED]), it was a manifest error of law for the Chamber to rule on the issue without the benefit of substantive submissions from the Defence.

The outcome of the Defence led to a manifest miscarriage of justice -by preventing the Defence from relying on relevant evidence at a time when the Defence did not possess the means to secure alternative evidence or relief.

60. As noted above, the Chamber acknowledged that the exclusion of D-0219's evidence would occasion some prejudice, although it described the degree of prejudice as 'minimal'. This assessment fails to give sufficient weight to D-0219's [REDACTED] or to give effect to the Chamber's duty to assist the Defence to exercise its right to call relevant evidence.
61. In the Defence Rule 68 application, the Defence argued that:⁵⁴

[REDACTED].

62. D-0219 [REDACTED]. Since the Defence case closed, it was impossible for the Defence to replace this evidence or to mitigate the prejudice caused from its exclusion. While the Chamber refers to
63. By focusing solely on the inability of the Defence to obtain the certification within a specific period of time, the Chamber failed to exercise its overarching duty to take steps to ensure that the Defence was in a position to present its case in a manner that respected the adversarial process.

⁵⁴ ICC-01/12-01/18-2328-Conf, para. 12.

64. [REDACTED]. Within the time frame allocated by the Chamber, the Registry were unable themselves to devise any solutions. Respectfully, the Chamber's focus on the failure to obtain a remote Webex/Zoom certification in [REDACTED] or in person certification in [REDACTED] misses the point. The Defence was forced to pursue imperfect options, under significant constraints in a limited time period, because it was not provided the necessary assistance to pursue options that would have been more likely to yield a successful result. The Defence acted diligently in both pursuing these imperfect options and trying to convince the Registry to agree to alternative options. The Defence should not be penalised or incur any prejudice for failing to clear a bar that was set too high for its capacities.
65. The text of Rule 68(2)(b)(iii) sets out substantive requirements but no technical requirements as concerns either the physical location or the technical means to facilitate remote connections. The ICTY, which adopted Rule 92bis as the forerunner to Rule 68(2), conducted rule 92 bis certifications at hotels, businesses, and homes.⁵⁵ Although the Registry might generally 'use' Webex or Zoom, given that various sections of the Court (including VWS) use signal and WhatsApp to communicate with sensitive witnesses, it is arbitrary to impose these platforms as a requirement in circumstances where other platforms are more likely to render a successful result. Conversely, if the Chamber is of the position that certain locations or platforms constitute essential requirements, then a witness must be considered to be unavailable if these options cannot be operationalized with reasonable diligence.
66. The Chamber's assessment of the time allocated to the Defence to obtain the certification was also based on a manifestly incorrect calculation. The Defence did not have the advantage of 'several months' in which to obtain D-0219's certification. The Registry did not confirm its willingness to use remote certifications in [REDACTED] office until 12 December. There were no RLOs available for certification purposes until 9 January. D-0219 made himself available each day during the week starting 9 January, to no avail, for reasons beyond his control and beyond the control of the Defence. Less than a month elapsed between the time when the Defence could first use this option with D-0219 and the final deadline imposed by the Chamber. During this brief period, the Defence was not given the necessary assistance and technical advice to resolve

⁵⁵ See attestation 06755378, taking place at witness's home; attestation 02156517, taking place at the witness's place of work; attestation 06755507, taking place at witness's work office.

issues concerning the operationalization of certification links, in a timely manner. The Defence was provided inaccurate information (i.e., that it was not necessary to download any software) or was not provided instructions tailored to the specific requirements of individuals, with low computer literacy in areas with weak and sporadic internet. The [REDACTED] option was proposed because the RLO was unable to issue a link later on the 13 January, before the planned travel of D-0219. This option was, in turn, frustrated by [REDACTED] developments that fell outside the control of the Defence.

67. Given this backdrop, in the context of a trial that involved an 18 month confirmation process, a 9 1/2 month pre-trial process (during which multiple amendments to the charges were granted), and a 19 month Prosecution case (as compared to an 8 month Defence case), it was manifestly unreasonable and unsound for the Chamber to rely on considerations of expeditiousness to deny the Defence any further opportunity to obtain D-0219's certification (with the assistance of the Registry) or to submit a Rule 68(2)(c) application.

Request for leave to appeal

68. The issue as to whether the Chamber's approach to Regulation 35(2) deprived the Defence of an effective remedy as concerns its right to adequate time and facilities to present its case, arises from the Decision.
69. As set out above, as a result of the Chamber's interpretation of the applicability of Regulation 35(2) to applications post-dating the close of the Defence case, the Defence had no remedy as concerns its inability to obtain D-0219's declaration by the close of its case. The practical consequence was that both D-0219's statement and the associated exhibits were excluded from the record, at a time when the Defence lacked the means to identify alternative evidence on these issues.
70. The Chamber recognized the existence of some prejudice. Since D-0219's statement [REDACTED], its exclusion will necessarily effect the ability of the Defence to substantiate arguments that concern the charges in this case. The manner in which the Chamber resolved the issue will impact on the outcome of the trial.
71. Given that the Defence lacks any other means to address this prejudice, an immediate decision of the Appeals Chamber is necessary to address the potential implications and prejudice stemming from an erroneous approach to the issue in question.

IV. Relief Sought

72. The Defence for Mr Al Hassan hereby respectfully seeks:

- The Chamber reconsider the Decision and allow the Defence to file a Regulation 35(2) application with respect to the certification of witness D-0219; or
- In the alternative, grant the Defence leave to appeal the Decision.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 14th Day of March 2023,
At The Hague, The Netherlands