

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/12-01/18

Date: 24 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

**Decision on Defence Request for leave to appeal the Decision on ‘Defence
Regulation 35(2) and Rule 68(2)(b) Request’**

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 Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following ‘Decision on Defence Request for leave to appeal the Decision on “Defence Regulation 35(2) and Rule 68(2)(b) Request”’.

I. Procedural history

1. On 17 October 2022, the Chamber authorised the introduction into evidence of the prior recorded testimony of D-0146 pursuant to Rule 68(2)(b) of the Rules.¹
2. On 16 December 2022, the Chamber issued a decision, *inter alia*, rejecting the Defence’s request for the introduction into evidence of the prior recorded testimony of D-0146 pursuant to Rule 68(2)(c) of the Rules (the ‘D-0146 Decision’).²
3. On 16 January 2023, the Defence filed a request seeking, *inter alia*, reconsideration of the D-0146 Decision or, in the alternative, leave to file an affidavit (the ‘Reconsideration Request’).³
4. On 30 January 2023, the Chamber rejected the Reconsideration Request (the ‘Reconsideration Decision’).⁴
5. On 3 February 2023, the Defence filed a request pursuant to Regulation 35(2) of the Regulations and Rule 68(2)(b) of the Rules requesting the introduction into evidence of an affidavit created by a Defence team member concerning evidence obtained from D-0146 (the ‘3 February Request’).⁵ The Defence also sought

¹ Decision on the introduction into evidence of the prior recorded testimony of D-0146, D-0524, D-0627 and D-0628 pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-2378.

² 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.

³ Defence Rule 68(2)(c) application for Witnesses D-0008, D-0146, D-0611 and D-0627, ICC-01/12-01/18-2452-Conf-Exp.

⁴ Decision on the introduction into evidence of the prior recorded testimony of D-0008, D-0611 and D-0627 pursuant to Rule 68(2)(c) of the Rules and the Defence’s request for reconsideration of the decision rejecting the introduction into evidence of D-0146’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18-2461-Conf.

⁵ Defence Regulation 35(2) and Rule 68(2)(b) Request, ICC-01/12-01/18-2463-Conf.

clarification from the Chamber as to whether it could proceed with the certification of the affidavit while the decision was pending.⁶

6. On the same date, the Chamber rejected the 3 February Request (the ‘Impugned Decision’).⁷
7. On 13 February 2023, the Defence filed a Request for leave to appeal the Impugned Decision on the following two issues (the ‘Request’):⁸
 - ‘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’);
 - ‘Whether the Trial Chamber erred and abused its discretion by applying a more flexible approach to the resubmission [of] Prosecution Rule 68 witness applications compared to Defence Rule 68 applications’ (the ‘Second Issue’);
8. On 15 February 2023, the Office of the Prosecutor (the ‘Prosecution’) responded to the Request (the ‘Response’),⁹ arguing that no appealable issue arises from the Impugned Decision and, alternatively, that the two raised issues do not meet the remaining criteria of Article 82(1)(d) of the Statute.

II. Analysis

9. 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.¹⁰ It is recalled in particular, that the party requesting leave to

⁶ Email dated 3 February 2023 at 10:26.

⁷ Decision on ‘Defence Regulation 35(2) and Rule 68(2)(b) Request’, ICC-01/12-01/18-2464.

⁸ Request for leave to appeal Decision ICC-01/12-01/18-2464, ICC-01/12-01/18-2471-Corr (corrigendum filed on 15 February 2023).

⁹ Prosecution response to the Defence “Request for Request for leave to appeal Decision ICC-01/12-01/18-2464”, ICC-01/12-01/18-2472-Conf.

¹⁰ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, ICC-01/12-01/18-734.

appeal must identify an ‘appealable issue’. A mere disagreement or conflicting opinion is not an appealable issue.¹¹

10. Regarding the First Issue, the Defence contends that, in the Reconsideration Decision, the Chamber ‘did not appear to have rendered a decision on the merits of the Regulation 35 (2) request or the Rule 68 application’.¹² Consequently, the Defence submits that it was not put on notice that a further Regulation 35(2) request would need to satisfy the threshold for reconsideration.¹³
11. In the Chamber’s view, the essence of the Defence’s argument regarding the First Issue relies on the question of whether the Chamber’s ruling on the Reconsideration Decision constitutes a decision on the merits of the Reconsideration Request. Contrary to the Defence’s submissions, it is clear from the plain wording of the Reconsideration Decision that the Chamber specifically rejected the request for ‘leave pursuant to Regulation 35(2) to tender a chain of custody affidavit’ relating to D-0146.¹⁴
12. As the Chamber considers that the Reconsideration Decision consists of a determination on the merits of the Defence’s request to ‘tender the chain of custody affidavit’, the 3 February Request could only be contemplated as a request for reconsideration. In light of the Defence’s failure to demonstrate that the threshold for reconsideration was met, the request was correctly rejected in the Impugned Decision. Therefore, the Defence’s argument in the First Issue constitutes a misconstruction of the relevant decisions and a mere disagreement with the Chamber’s finding. As follows, the Chamber considers the First Issue not to be an appealable issue.

¹¹ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, ICC-01/12-01/18-734, para. 14, *citing* Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

¹² Request, ICC-01/12-01/18-2471-Corr, para. 4.

¹³ Request, ICC-01/12-01/18-2471-Corr, para. 4.

¹⁴ Reconsideration Decision, para. 24 *referring to* Defence Rule 68(2)(c) application for Witnesses D-0008, D-0146, D-0611 and D-0627, ICC-01/12-01/18-2452-Conf-Red, para. 38.

13. Regarding the Second Issue, the Defence argues that the Chamber has abused its discretion by applying different approaches towards the Defence application to introduce the affidavit as compared to its Decision on the Prosecution's Rule 68(2) request relating to P-0113 (the 'P-0113 Decision').¹⁵ The Chamber considers this contention to be unmeritorious as the Chamber's approach in each of decision is justified by the different situations arising from the respective requests.
14. As correctly submitted in the Response, in the P-0113 Decision, the Majority of the Chamber expressly rejected the Prosecution's request 'without prejudice to the Prosecution filing another application pursuant to Rule 68(2) of the Rules for this witness at a later stage, if considered necessary'.¹⁶ The decision to reject the request without prejudice was taken as, at that stage, the Majority preferred receiving P-0113's evidence *viva voce*, in light of the content and scope of P-0113's prior recorded testimony which went beyond 'background' information.¹⁷
15. The Impugned Decision was to the contrary preceded by the Reconsideration Decision, in which the Chamber rejected the request with prejudice.¹⁸ For the reasons already stated regarding the First Issue, if the Defence had considered necessary to file a renewed request on the same matter (as it later did in the 3 February Request), it would still have had to meet the criteria for reconsidering a decision. Therefore, the Chamber does not consider that a more flexible approach was taken in relation to the Prosecution's Rule 68 request for P-0113 as it differs in context from the 3 February Request. In this regard, the Second Issue represents a mere disagreement with the Chamber's findings and is ultimately an attempt to re-litigate the matter. Consequently, the Second Issue is not an appealable issue.

¹⁵ Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-1924.

¹⁶ Response, para. 7, *citing* Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-1402-Red2, para. 12 [emphasis added].

¹⁷ Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-1402-Red2, para. 12.

¹⁸ See paragraph 11 of this Decision.

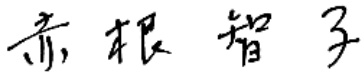
16. In light of the above, it is unnecessary to address the other cumulative requirements under Article 82(1)(d) of the Statute and the Request is rejected as the Chamber does not consider that the two issues raised by Defence are appealable issues arising from the Impugned Decision.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY
REJECTS** the Request.

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, 24 March 2023
At The Hague, The Netherlands