

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/12-01/18

Date: 2 May 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 reconsideration or leave to appeal 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, 67 and 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following ‘Decision on Defence request for reconsideration or leave to appeal the “Decision on Defence request to defer the closure of its presentation of evidence”’.

I. Procedural history

1. On 3 February 2023, the Chamber issued a decision rejecting a Defence request¹ to either defer the formal closure of its case or, in the alternative, confirm the closure of its case without prejudice to its ability to submit a Regulation 35(2) application to admit a certification obtained after the date of the closure of the Defence case.² On 3 March 2023, the Chamber issued the reasons for its decision³ (the email decision and the reasons are together hereinafter the ‘Impugned Decision’).
2. On 13 March 2023, the Defence filed a request for reconsideration or leave to appeal the Impugned Decision (the ‘Request’).⁴ The Defence seeks reconsideration of the Impugned Decision on the grounds that: (i) ‘[t]he 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’;⁵ and (ii) ‘[t]he outcome of the [Impugned] 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’.⁶

¹ Email dated 3 February 2023 at 17:04 (the ‘3 February Request’).

² Email dated 3 February 2023 at 18:40.

³ Reasons for the Decision on Defence request to defer the closure of its presentation of evidence, 3 March 2023, ICC-01/12-01/18-2474-Conf-Exp.

⁴ Defence request for reconsideration or leave to appeal, 13 March 2023, ICC-01/12-01/18-2478-Conf-Exp.

⁵ Request, ICC-01/12-01/18-2478-Conf-Exp, para. 2.

⁶ Request, ICC-01/12-01/18-2478-Conf-Exp, para. 2.

3. In the alternative, the Defence seeks leave to appeal the Impugned Decision with respect to the following issue: ‘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’ (the ‘Issue’).⁷
4. On 17 March 2023, the Office of the Prosecutor (the ‘Prosecution’) responded to the Request (the ‘Response’),⁸ opposing the Request in its entirety. The Prosecution submits that the Defence ‘fails to show any clear error in the Chamber’s findings or reasoning’ that would require the Chamber to exceptionally reconsider the Impugned Decision.⁹ As for the request for leave to appeal, the Prosecution submits that the Issue does not meet the criteria of Article 82(1)(d) of the Statute, does not significantly affect the fair and expeditious conduct of the proceedings and, lastly, that an immediate resolution by the Appeals Chamber would not materially advance the proceedings.¹⁰

II. Analysis

5. The Chamber incorporates by reference its previous findings relating to requests of reconsideration¹¹ and for leave to appeal.¹²

A. Request for reconsideration

1. First ground

6. As regards the first ground for reconsideration invoked by the Defence, the Defence alleges four underlying errors of law relating to the Chamber’s interpretation and application of Regulation 35(2) of the Regulations of the Court (the ‘Regulations’) in the Impugned Decision.¹³

⁷ Request, ICC-01/12-01/18-2478-Conf-Exp, para. 3.

⁸ Prosecution response to the “Defence request for reconsideration or leave to appeal, ICC-01/12-01/18-2478-Conf-Exp, 13 March 2023”, 17 March 2023, ICC-01/12-01/18-2480-Conf.

⁹ Response, ICC-01/12-01/18-2480-Conf, para. 5.

¹⁰ Response, ICC-01/12-01/18-2480-Conf, paras 20-23.

¹¹ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, ICC-01/12-01/18-734 (the ‘9 April 2020 Decision’); Decision on Defence request for reconsideration of Decision on requests related to the submission into evidence of Mr Al Hassan’s statements, 23 November 2022, ICC-01/12-01/18-2414.

¹² 9 April 2020 Decision, ICC-01/12-01/18-734.

¹³ Request, ICC-01/12-01/18-2478-Conf-Exp, paras 37-38.

7. First, the Defence argues that ‘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’.¹⁴ The Chamber considers such an argument to be a misinterpretation of the Impugned Decision. Contrary to the Defence’s submission, the Impugned Decision did not find that Regulation 35(2) of the Regulations does not apply to applications filed after the conclusion of a party’s presentation of evidence. Rather, the Chamber found that it 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’.¹⁵ In reaching such conclusion, the Chamber particularly recalled its finding regarding D-0219’s Rule 68(2)(b) application that the introduction of the prior recorded testimony was authorised ‘subject to the receipt of the certified declaration’.¹⁶ Contrary to what argued by the Defence, the certification process is not a mere procedural act, but rather it is a necessary precondition for the formal introduction of the prior recorded testimony into the case record pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’). That is also evident from the wording of Rule 68(2)(b)(ii) of the Rules.¹⁷ Consequently, introducing such declaration requires the party’s case to be open.¹⁸ Noting the closure of the Defence’s case, the Chamber established that, in exceptional circumstances, a party’s case may be re-opened, by referring to the previous jurisprudence of the Court.¹⁹ Therefore, not only did the Chamber not reach the conclusion proposed by the Defence regarding the alleged error, but it also indicated the possibility of re-opening the case, if exceptional circumstances require so. For these reasons, the Chamber deems the alleged error a misinterpretation of the Chamber’s finding and does not warrant reconsideration.

¹⁴ Request, ICC-01/12-01/18-2478-Conf-Exp, para. 39.

¹⁵ Impugned Decision, ICC-01/12-01/18-2474-Conf-Exp, para. 29 [emphasis added].

¹⁶ Impugned Decision, ICC-01/12-01/18-2474-Conf-Exp, para. 29, *citing* 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, 21 September 2022, ICC-01/12-01/18-2343 (the ‘D-0219 Decision’).

¹⁷ Rules of Procedure and Evidence, Rule 68(2)(b)(ii): ‘Prior recorded testimony falling under sub-rule (b) *may only be introduced* if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person’s knowledge and belief’ [emphasis added].

¹⁸ Impugned Decision, ICC-01/12-01/18-2474-Conf-Exp, para. 28.

¹⁹ Impugned Decision, ICC-01/12-01/18-2474-Conf-Exp, para. 29.

8. Second, the Defence argues that the Chamber erroneously 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.²⁰ The Chamber recalls that, in its prior decision granting an extension of time to obtain D-0219's accompanying declaration, the Chamber strongly emphasised that 3 February 2023 was 'the final date on which the Defence may submit the declaration and no further extension [would] be granted'.²¹ The extension had been granted by the Chamber, notwithstanding the repercussions on the deadlines, based on the Defence's submission that it appeared feasible to complete this process by 3 February 2023, which, in the Defence's view constituted a 'negligible extension'.²² In these specific circumstances, particularly as the prior extension was based on the Defence's assurance that the extension sought was for a negligible period of time, it was incumbent on the Chamber to assess anew whether a further extension would be conducive to the fairness and expeditiousness of the proceedings. The Defence's reference to other extensions granted by the Chamber to the Prosecution is unhelpful as the situations cited are not comparable to that concerning D-0219, as set out above. For these reasons, the Chamber finds that the second alleged error is unmeritorious.
9. Third, the Defence submits that the Chamber erred by relying on the importance of the Defence evidence to assess whether an extension was warranted.²³ It also submits that 'this criterion falls outside the scope of Regulation 35(2)'.²⁴ As indicated in the Impugned Decision, resolution of the issue at hand required the Chamber 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'.²⁵ Accordingly, the Chamber turned to the substance of D-0219's

²⁰ Request, ICC-01/12-01/18-2478-Conf-Exp, para. 43.

²¹ Decision on Defence request for extension of time, 23 January 2023, ICC-01/12-01/18-2455, para. 16.

²² Decision on Defence request for extension of time, 23 January 2023, ICC-01/12-01/18-2455, para. 15; Defence Request for extension of time, 18 January 2023, ICC-01/12-01/18-2453-Conf-Exp, para. 19.

²³ Request, ICC-01/12-01/18-2478-Conf-Exp, para. 52.

²⁴ Request, ICC-01/12-01/18-2478-Conf-Exp, para. 54.

²⁵ Impugned Decision, ICC-01/12-01/18-2474-Conf-Exp, para. 20.

evidence as part of its assessment of the potential impact on the fairness and expeditiousness of the proceedings, which is in line with its powers under Article 64(2) of the Statute.²⁶ Therefore, this alleged error also consists of a disagreement with the Impugned Decision and does not warrant the exceptional remedy of reconsideration.

10. Finally, the Defence argues that the Chamber erred in rejecting the request to defer the formal closing of its case by assessing the likeliness of a future Rule 68(2)(c) application being granted.²⁷ Here also, the Defence overlooks a crucial aspect of the Impugned Decision, namely the assessment of fairness and expeditiousness of the proceedings. The Chamber's assessment of the likeliness of a future Rule 68(2)(c) application falls within the confines of Article 64(2) of the Statute. Therefore, this alleged error also consists of a mere disagreement with the Impugned Decision's outcome and not a manifest error of reasoning.
11. Accordingly, the first ground does not warrant reconsideration.

2. Second ground

12. As regards the second ground for reconsideration invoked by the Defence, the Defence submits that the 'outcome of the [Impugned] 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'.²⁸ In support of its contention, the Defence points to the Chamber's allegedly erroneous assessment of the weight of D-0219's evidence²⁹ and the time allocated to the Defence to obtain certification.³⁰
13. The Chamber considers this ground to be a mere repetition of the Defence's arguments in the 3 February Request. First, regarding the substance of D-0219's

²⁶ Impugned Decision, ICC-01/12-01/18-2474-Conf-Exp, paras 20, 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.'

²⁷ Request, ICC-01/12-01/18-2478-Conf-Exp, paras 57-58.

²⁸ Request, ICC-01/12-01/18-2478-Conf-Exp, para. 2.

²⁹ Request, ICC-01/12-01/18-2478-Conf-Exp, paras 60-62.

³⁰ Request, ICC-01/12-01/18-2478-Conf-Exp, para. 66.

evidence, the Chamber correctly pointed to its previous finding that the evidence ‘mainly relates to background information and/or issues that are not materially in dispute’.³¹ Therefore, as this point has already been made and the Chamber has already assessed it, reconsideration is not warranted. Similarly, the second point regarding allocation of time has already been made before the Chamber and adjudicated.³² Accordingly, the second ground is an attempt to re-litigate points which have been already made before the Chamber. As no injustice arises from the Impugned Decision, the second ground also does not warrant reconsideration.

B. Request for leave to appeal

14. Alternatively, the Defence seeks leave to appeal 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’.³³ The Defence argues that ‘an immediate decision of the Appeals Chamber is necessary to address the potential implications and prejudice’ stemming from the Issue.³⁴
15. The Chamber considers the Request to be unmeritorious. Contrary to the Defence’s submission, it was not deprived of any remedy concerning the obtainment of D-0219’s certification before the closure of its case, as already noted above.³⁵ In fact, the Chamber expressly noted in the Impugned Decision that ‘for a party to request submission of additional evidence after the closure of its presentation of evidence, said party must request leave to exceptionally re-open its case’.³⁶ As follows, the Chamber considers the Issue not to be an appealable issue.

³¹ Impugned Decision, ICC-01/12-01/18-2474-Conf-Exp, para. 25, *citing* D-0219 Decision, ICC-01/12-01/18-2343, para. 16.

³² *See* 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, 16 December 2022, ICC-01/12-01/18-2445-Conf-Exp; Decision on Defence request for extension of time, 23 January 2023, ICC-01/12-01/18-2455.

³³ Request, ICC-01/12-01/18-2478-Conf-Exp, para. 68.

³⁴ Request, ICC-01/12-01/18-2478-Conf-Exp, para. 71.

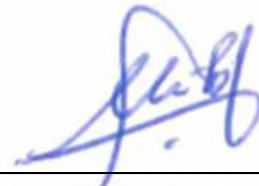
³⁵ *See* paragraphs 8 and 13 of this Decision.

³⁶ Impugned Decision, ICC-01/12-01/18-2474-Conf-Exp, para. 29.


16. Furthermore, noting the current stage of the proceedings,³⁷ the Chamber is also not convinced of the Defence's arguments that an immediate resolution of the Issue by the Appeals Chamber would materially advance the proceedings.
17. Considering the above, it is unnecessary to address the other cumulative requirements under Article 82(1)(d) of the Statute and the Request is accordingly rejected.

**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 Tuesday, 2 May 2023
At The Hague, The Netherlands

³⁷ The Chamber notes the recent scheduling of the closing statements. *See* Order scheduling the closing statements, 16 March 2023, ICC-01/12-01/18-2479.