



**Original: English**

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

**Date: 22 July 2022**

**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**

**Order on the scheduling of Defence witnesses**

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

Karim A. A. Khan  
 Nazhat Shameem Khan  
 Mame Mandiaye Niang

**Counsel for the Defence**

Melinda Taylor

**Legal Representatives of Victims**

Seydou Doumbia  
 Mayombo Kassongo  
 Fidel Luvengika Nsita

**Legal Representatives of Applicants****Unrepresented Victims****Unrepresented Applicants for  
Participation/Reparations****The Office of Public Counsel for Victims****The Office of Public Counsel for the  
Defence****States Representatives***Amicus Curiae***REGISTRY**

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**Registrar**

Peter Lewis

**Counsel Support Section****Victims and Witnesses Unit**

Nigel Verrill

**Detention Section****Victims Participation and Reparations  
Section****Other**

**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 64(2) of the Rome Statute (the ‘Statute’) and Rule 140 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Order on the scheduling of Defence witnesses’.

**A. Directions following receipt of Defence Witness Schedule**

1. The Chamber recalls its overarching duty to ensure the fair and expeditious conduct of the proceedings. The Chamber considers it part of its duty to make full use of the allotted court schedule and to avoid gaps in the hearings, particularly as several trials are proceeding concurrently.<sup>1</sup> To this end, the parties and participants must cooperate fully to ensure that any gaps and last minute cancellations in the hearing schedule are kept to the bare minimum. Further, the Chamber also recalls its previous directions that the parties are required to present their evidence in an efficient manner and that the Chamber may also intervene, *inter alia*, to limit the time allotted for examination of witnesses, where warranted.<sup>2</sup> Against this background, the Chamber considers it necessary to provide some further directions following receipt of the Defence witness schedule filed on 20 July 2022 (the ‘Defence Witness Schedule’).<sup>3</sup>

*1. Alternative witnesses*

2. In order to avoid unnecessary gaps in the hearings, the Defence must be prepared to start with the subsequent witness immediately after the conclusion of a witness’s testimony regardless of the proposed dates specified in the Defence Witness Schedule. To this end, the Chamber considers it appropriate to instruct that the Defence, in close consultation with the VWU, identify, in its monthly

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<sup>1</sup> See email dated 20 June 2022 at 11:54; email dated 8 April 2022 at 15:17. The Chamber recalls that it had instructed the calling party throughout the proceedings to streamline the questioning of witnesses and avoid unnecessary gaps. See email dated 14 October 2021 at 18:21.

<sup>2</sup> Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence, ICC-01/12-01/18-1756 (the ‘Fifth Directions’), para. 22.

<sup>3</sup> Defence filing of tentative witness schedule, ICC-01/12-01/18-2286-Conf (with confidential *ex parte* Annex A (available only to the Defence and VWU) and confidential Annex B; corrigendum filed on 21 July 2022 replacing Annex B with a confidential redacted version of Annex A).

witness list, alternative witnesses to ensure that no unnecessary gaps are created by last minute cancellations or early conclusion of a witness's testimony.

## 2. *Time estimates*

3. While the Chamber appreciates that a certain level of flexibility is warranted in questioning witnesses, it notes with concern the significant discrepancies between the questioning time originally estimated by the Defence and the time actually used in court, in particular concerning the two last witnesses. Notably, while the Defence estimated that it needed 8 hours to examine D-0211, only two and a half hours were used in court, resulting in several hearing dates being vacated at the last minute.
4. On 5 July 2022, the Chamber urged the Defence to reassess its time estimates with a view to presenting as accurate an estimate as possible for each remaining witness.<sup>4</sup> On 20 July 2022 the Defence provided estimates which remain essentially unchanged compared to the initial ones.<sup>5</sup> The Chamber also finds that the estimates still appear disproportionately high for a large number of the remaining witnesses given the Defence's description of the evidence it seeks to elicit from the witnesses.
5. Accordingly, the Chamber instructs the Defence to reconsider its time estimates with a view to providing a more accurate estimate and conversion of hearing hours into days. The Chamber also notes the Prosecution's previous indication that for the questioning of full *viva voce* witnesses, it will require half the time used by the Defence.<sup>6</sup> The Chamber encourages the Prosecution to provide, where possible, a more accurate estimate on a case-by-case and *inter partes* basis, to ensure that the court calendar is not erroneously scheduled.<sup>7</sup>
6. The Chamber acknowledges again the need to retain a certain level of flexibility and is amenable to receiving discrete requests for extension of time in court,

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<sup>4</sup> Email dated 5 July 2022 at 19:24, noting that the updated version of the Defence list of witnesses was yet to be provided.

<sup>5</sup> ICC-01/12-01/18-2286-Conf -Red-AnxA.

<sup>6</sup> Email dated 25 April 2022 at 22:29.

<sup>7</sup> With respect to Rule 68(3) witnesses, the Chamber welcomes the practice of providing its estimated questioning time in the response, and encourages the Prosecution to continue doing so.

which the Chamber will assess discretionarily, on a case-by-case basis, particularly in light of the topics covered and any logistical constraints.

7. In any case, the Chamber finds it appropriate to re-emphasise that the questioning of witnesses must be conducted with a view to assisting the Chamber in its essential function of determining the truth with respect to the allegations levelled against the accused.<sup>8</sup> Thus, bearing in mind the current stage of the proceedings, the Chamber strongly encourages the parties, in light of the available evidence already submitted, to focus on the topics of greatest relevance to the proceedings and on truly contentious issues in order to avoid the presentation of evidence that may be irrelevant to the Chamber's final determination of the case and to minimise overly-cumulative evidence.<sup>9</sup> The revision of the questioning time by both parties and the actual questioning of witnesses must also be conducted bearing these principles in mind.

### 3. *Revised witness schedule*

8. For the above reasons, the Chamber instructs the Defence to file a revised tentative witness schedule by Friday, 5 August 2022, revising its estimates as well as, if necessary, the order of witnesses, to reflect all the instructions given in the present order.<sup>10</sup>
9. With respect to D-0093, and noting the comments made in the *ex parte* version of the Defence Witness Schedule, the Chamber considers it appropriate for the Defence to first verify the witness's availability before scheduling the witness in the witness list, especially if this witness is to appear in the middle of the schedule. The Chamber further recalls that, should the Defence wish to adduce further evidence from P-0547, it must file a written request prior to scheduling her in the

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<sup>8</sup> Fifth Directions, ICC-01/12-01/18-1756, para. 22.

<sup>9</sup> Fifth Directions, ICC-01/12-01/18-1756, para. 22. The Prosecution was also instructed to 'consider the evidence of each upcoming witness and ensure it is streamlined and focused on those matters which are unique to the witness or on which there is limited evidence' and to 'avoid repetitive evidence on more general matters and should ensure that the unique and key parts of the evidence are addressed first, even if this does not follow a chronological order.' Email dated 3 November 2021 at 14:51.

<sup>10</sup> The Chamber considers it appropriate to also receive the monthly witness list for September 2022 on the same date.

witness list.<sup>11</sup> Finally, the Chamber specifies that even if P-0111 is to testify towards the end of September,<sup>12</sup> the Defence must ensure that there are no gaps in the hearings and schedule additional witnesses prior to his testimony as necessary to achieve this.

### **B. Filing of Defence witness list and compliance with orders**

10. The Chamber recalls that while it had previously instructed the Defence to file an updated version of its List of Witnesses by 4 July 2022,<sup>13</sup> the Defence failed to provide the list by the time limit.<sup>14</sup> In a footnote contained in the Rule 68 request filed after the passing of the time limit, the Defence stated that ‘it is not in a position and needs additional time to provide an updated version of its List of Witnesses.’<sup>15</sup>
11. The Chamber reminds the parties and participants that orders of the Chamber are binding and shall be implemented, without exception, unless modified.<sup>16</sup> Indeed, under Article 64(2) of the Statute, it is for the trial chamber to regulate the conduct of the proceedings to ensure that the trial is fair and expeditious, and the parties’ leeway in deciding how to conduct their case cannot override the authority of the trial chamber.<sup>17</sup>
12. Accordingly, should the parties or participants consider it impossible to comply with any orders, it is incumbent on them to resort to the appropriate remedies, including Regulation 35 of the Regulations of the Court, instead of disregarding said order and notifying the reasons for non-compliance *post facto*. The Chamber

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<sup>11</sup> See email dated 31 March 2022 at 7:51.

<sup>12</sup> See email dated 18 July 2022 at 16:02.

<sup>13</sup> Decision on the introduction into evidence of D-0511, D-0539, and D-0553’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-2241, para. 21.

<sup>14</sup> See also email dated 5 July 2022 at 19:24 noting that the list is yet to be provided.

<sup>15</sup> Defence Rule 68(2)(b) and Rule 68(3) applications, ICC-01/12-01/18-2276-Conf, para. 4 (n. 5.)

<sup>16</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, 13 October 2010, ICC-01/04-01/06-2582, paras 48, 50, 53.

<sup>17</sup> 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” 15 July 2010, ICC-01/04-01/07-2259, paras 53, 77.

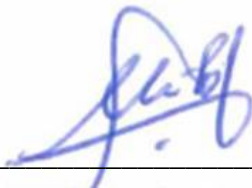
notes that the Defence had previously been warned that the Chamber's orders must be fully respected,<sup>18</sup> and regrets that the Defence again disregarded an order of the Chamber in this instance. The Defence is hereby warned again of its obligation to comply with binding orders of the Chamber and instructed to act with diligence in the future.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

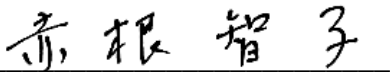
**PROVIDES** the aforementioned directions concerning the scheduling of witnesses;  
and

**INSTRUCTS** the Defence to file a revised witness schedule by Friday, 5 August 2022.

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, 22 July 2022

At The Hague, The Netherlands

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<sup>18</sup> Email decision dated 16 December 2021 at 15:25, ICC-01/12-01/18-2137-Conf-Anx41.