



Original: English

No. **ICC-01/12-01/18**
Date of original: **18 October 2022**
Date: 7 November 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 redacted version of

**Decision on ‘Defence request for reconsideration, or leave to appeal, of the
Decision on Defence request for an extension of time with respect to the witness
schedule’**

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**

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 Articles 67 and 82(1)(d) of the Rome Statute (the ‘Statute’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues the following decision.

I. Procedural history and submissions

1. On 30 September 2022, the Chamber rendered an email decision (the ‘Impugned Decision’)¹ in which it notably granted a Defence request for an extension of time with respect to the witness schedule and issued instructions on the modality of testimony for its remaining witnesses.
2. On 10 October 2022, the Defence filed a request for reconsideration of, or in the alternative leave to appeal, the Impugned Decision (the ‘Request’).²
3. The Defence argues that a partial reconsideration of the Impugned Decision on the matter of D-0147’s testimony is warranted ‘to avoid frustrating Mr Al Hassan’s right to fair trial’.³ In this respect, the Defence identifies what it submits are: (i) an erroneous factual conclusion, *i.e.* that D-0147 frustrated concrete plans to testify [REDACTED]; and (ii) manifestly irrelevant considerations, *i.e.* D-0147’s position towards the ICC.⁴ The Defence further argues that the Impugned Decision is manifestly unreasonable, notably since no measurable risks were identified with respect to the calling of three – as opposed to two – witnesses via audio-video link [REDACTED]⁵ and the Chamber did not take into consideration the right of the Defence to present its case in full and to have adequate time and facilities to do so.⁶ Concerning D-0231, the Defence seeks reconsideration of the Impugned Decision on the basis that the deadline imposed by the Chamber is

¹ Email decision at 15:29, *ex parte*, Defence and VWS only (*see also* ICC-01/12-01/18-2371-Conf-Exp-AnxA). A confidential redacted version of this decision was sent via email on the same day at 16:27.

² Defence request for reconsideration, or leave to appeal, of the Decision on Defence request for an extension of time with respect to the witness schedule, ICC-01/12-01/18-2371-Conf-Exp, with seven *ex parte* annexes, Defence and VWS only. A confidential redacted version of the Request was filed on 11 October 2022, ICC-01/12-01/18-2371-Conf-Red.

³ Request, ICC-01/12-01/18-2371-Conf-Red, para. 3.

⁴ Request, ICC-01/12-01/18-2371-Conf-Exp, paras 4, 22-23.

⁵ Request, ICC-01/12-01/18-2371-Conf-Red, para. 4.

⁶ Request, ICC-01/12-01/18-2371-Conf-Red, paras 24-25.

‘manifestly unreasonable and incompatible with the right of the Defence to adequate time and resources’.⁷

4. In the alternative, the Defence seeks leave to appeal the Impugned Decision in respect of the following issue:

whether the Chamber manifestly abused its discretion in giving/putting unreasonable weight on/to factors that should not have exceeded/trumped Mr Al Hassan’s right to a fair trial and adequate time and facilities to present its case.⁸

5. On 11 October 2022, the Single Judge shortened the time limit for any response to this Request to 13 October 2022 and invited VWS to submit any complementary observations by that same deadline.⁹
6. Also on 11 October 2022, the Prosecution sent an email informing that it deferred to the Chamber with respect to the Request.¹⁰
7. The Chamber notes that no complementary observations were provided by VWS.

II. Analysis

8. The Chamber recalls that it has the power to exceptionally reconsider its decisions if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.¹¹ The Chamber also incorporates by reference the legal framework applicable to the assessment of requests for leave to appeal pursuant to Article 82(1)(d) of the Statute.¹²
9. From the outset, and with respect of the error of fact alleged by the Defence,¹³ the Chamber has no reason to put into question the submission of VWS that D-0147 ‘frustrated planning arrangements’ nor the explanations provided by the

⁷ Request, ICC-01/12-01/18-2371-Conf-Exp, para. 5. *See also*, paras 19, 27-30.

⁸ Request, ICC-01/12-01/18-2371-Conf-Red, paras 6, 34.

⁹ Email decision sent at 9:57.

¹⁰ Email sent at 16:28.

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 ‘Decision of 9 April 2020’), para. 11.

¹² Decision of 9 April 2020, ICC-01/12-01/18-734, para. 12; Decision on Defence request for leave to appeal the ‘Decision on Mr Al Hassan’s ongoing fitness to stand trial’, 28 May 2021, ICC-01/12-01/18-1503, para. 7.

¹³ Request, ICC-01/12-01/18-2371-Conf-Red, para. 22

witness as initially reported by both VWS and the Defence. In this respect, the Chamber finds that the Request fails to demonstrate that the Impugned Decision relied upon erroneous or irrelevant considerations. Furthermore, the fact that some of the relevant details have not been disclosed to the Defence does not – in itself – warrant a reconsideration of the Chamber’s determination.

10. The Chamber agrees with the Defence that the Impugned Decision is a ‘decision of management’ and that it ruled on a number of matters related to the end of the Defence’s presentation of evidence, notably a Defence request for an extension of time to provide its witness schedule for the months of October and November 2022 and options under consideration for the setting of audio-video links from various locations. In this regard, the Chamber notes the Defence submissions that the Chamber ‘failed to properly exercise its discretion when it failed to consider that D-0147 consistently indicated his unwillingness to travel [REDACTED] for political, security and professional reasons’ and that it ‘failed to take into consideration the seriousness of the justification provided by D-0147’.¹⁴ The Defence essentially avers that the Chamber failed to properly take into consideration factors related to and impacting the witness’s security, safety and well-being. The Chamber observes that the Impugned Decision relies upon and weighs considerations as presented and summarised by the Defence itself in its initial request,¹⁵ as complemented by VWS’s observations. As such, the Chamber finds that these submissions, which constitute the core of the Request, amount to mere disagreements with the outcome reached in the Impugned Decision and, in a way, attempt to re-litigate the issue decided therein.
11. Further, the Chamber notes that the Request argues the Impugned Decision did not take into consideration the right of the Defence to present its case in full and, in submitting that the issues were resolved in a manifestly unreasonable manner, points to the Chamber’s silence regarding the prejudice occasioned through the absence of D-0147’s *viva voce* testimony.¹⁶ The Chamber considers that such

¹⁴ Request, ICC-01/12-01/18-2371-Conf-Exp, paras 23, 38-40. *See also*, paras 9-18 and Annexes B-G to the Request.

¹⁵ *See* email from the Defence sent on 21 September 2022 at 17:31, listing the reasons provided by the four relevant witnesses concerning why they were not in a position to travel [REDACTED].

¹⁶ Request, ICC-01/12-01/18-2371-Conf-Red, paras 7, 24, 42, 51.

submissions misrepresent the nature and scope of the Impugned Decision, which, balancing the various interests at stake, extended the time limit for the Defence to schedule D-0147's appearance following certain modalities.

12. In sum, the Chamber considers that the Defence's submissions concerning D-0147 neither warrant the exceptional remedy of reconsideration, nor does the identified issue constitute an 'appealable issue' within the meaning of Article 82(1)(d) of the Statute. It is accordingly unnecessary to address the remainder of the cumulative requirements of Article 82(1)(d) of the Statute and this part of the Request is dismissed.
13. Finally, with respect to D-0231, the Chamber is of the view that the Defence's request is more appropriately entertained under the framework of Regulation 35 of the Regulations, which regulates applications to vary time limits prescribed in the Regulations or ordered by the Chamber. The Chamber notes that the Defence has provided additional reasons which, in its view, warrant an extension of the deadline of 12 October 2022 set for the Defence to revert back confirming D-0231's willingness and availability to testify as well as provide the dates of his testimony. Particularly, the Chamber notes that the Defence informs it did not 'have means to communicate with the witness within the delay provided by the Chamber', ¹⁷ specifying that it cannot communicate with D-0231 [REDACTED]. ¹⁸ The Chamber considers that the above constitute cogent reasons outside the Defence's control which warrant an extension of the time limit set. The Chamber is however also forced to note that all information in its possession tends to indicate that even an extended deadline is unlikely to be sufficient to allow the Defence to present D-0231's evidence in court in the near future. ¹⁹ Nonetheless, the Chamber grants this part of the request and agrees to provide the Defence with an ultimate opportunity to seek and confirm D-0231's availability to testify during the remaining sitting schedule. The Chamber finds it appropriate to set to 25 October the deadline for the Defence to report back on this issue.

¹⁷ Request, ICC-01/12-01/18-2371-Conf-Red, para. 30.

¹⁸ Request, ICC-01/12-01/18-2371-Conf-Red, para. 19.

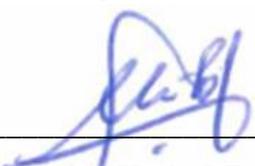
¹⁹ See notably Request, ICC-01/12-01/18-2371-Conf-Exp, paras 28-29.

THE CHAMBER HEREBY

REJECTS the Request, in parts; and

SETS to 25 October 2022 the ultimate deadline for the Defence to inform: (i) if D-0231 is willing to testify on the basis of standard arrangements in place, [REDACTED]; and, only if this has been established, (ii) when his testimony can be planned in the remaining sitting schedule.

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, 18 October 2022

At The Hague, The Netherlands