



Original: English

**No. ICC-01/12-01/18
Date: 22 September 2021**

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

**Fifth decision on matters related to the conduct of proceedings: presentation of
evidence by the LRVs and Defence**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Karim A. A. Khan
James Stewart

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 31, 64(2), 66, 67, 68(3) and 69 of the Rome Statute (the ‘Statute’), Rules 78 to 80 and 140 of the Rules of Procedure and Evidence (the ‘Rules’), and Regulations 43 and 54 of the Regulations of the Court (the ‘Regulations’), issues the following decision.

1. The Chamber notes that at this stage, the Prosecution has completed the testimony of more than half of its *viva voce* witnesses and, barring exceptional circumstances, may be expected to complete its presentation of evidence in the first few weeks of 2022.¹ The Chamber therefore considers it appropriate to give certain directions as regards the end of the Prosecution case and any presentation of evidence by the legal representatives for victims (‘LRVs’) and the Defence. These directions are given in advance in order to facilitate the effective preparation of the LRVs and Defence.

A. Deadlines related to the Prosecution case

2. The Chamber has previously set out the procedure for the submission of evidence other than through a witness.² The Chamber hereby sets the deadline for the filing of any Prosecution requests for admission of evidence as part of the Prosecution case,³ other than through the remaining witnesses it intends to call, for **17 January 2022**.
3. Recalling that the Prosecution was initially instructed to file any Rule 68(2) applications by no later than the end of the year 2020,⁴ the Chamber considers it appropriate to set **1 December 2021** as the deadline for the Prosecution to submit any remaining request pursuant to Rule 68(2), as relevant.

¹ See Prosecution List of Witnesses, 15 April 2020, ICC-01/12-01/18-740-Conf-AnxA; Order of Prosecution Witnesses, 13 May 2020, ICC-01/12-01/18-805-Conf-AnxA; Prosecution Remaining Witnesses’ List, 1 July 2021, ICC-01/12-01/18-1561-Conf-AnxA; Further Updated Prosecution Remaining Witnesses’ List, 21 July 2021, ICC-01/12-01/18-1597-Conf-AnxA.

² Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA (the ‘Directions on the conduct of proceedings’), paras 77-78.

³ The Chamber notes that, if granted leave to do so, the Prosecution may present further evidence in rebuttal/response (*see* Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 18 (iv)).

⁴ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 80.

4. The Prosecution shall notify the conclusion of its evidence presentation by way of a formal notice filed in the case record (the ‘Prosecution Notice’). The Prosecution Notice must be filed promptly after the conclusion of the oral testimony of the Prosecution’s last witness.⁵

B. Presentation of evidence and/or views and concerns by the LRVs

5. The Chamber recalls that in the Directions on the conduct of proceedings, the LRVs were directed in paragraphs 24 and 93 respectively to ‘file any request for leave to present evidence no later than three days after the Prosecution concludes its presentation of evidence’⁶ and ‘to file any request for victims to [...] present their views and concerns in person’ by the same deadline.⁷
6. To facilitate the planning of the case, and in the interest of the fair and expeditious conduct of the proceedings, the Chamber considers it appropriate to amend the deadline in the aforementioned directions to **15 November 2021**. In relation to any such requests, the Chamber notes that relevant disclosure will be required by the LRVs within a timeframe which facilitates the fair and expeditious conduct of the case, including Defence preparations, and, in the event of such requests, the Chamber will establish the applicable procedure and deadlines to the extent not already regulated by paragraphs 24 and 93 of the Directions on the conduct of proceedings. The LRVs should, however, make any necessary preparations to facilitate expeditious disclosure in connection with any requests.

C. Presentation of evidence by the Defence

7. The Chamber recalls that the onus is on the Prosecution to prove the guilt of the accused, pursuant to Article 66(2) of the Statute. Conversely, the accused has the right to remain silent and not to be compelled to testify, and may elect not to present evidence, as foreseen in Article 67(1)(g) of the Statute. The Chamber further recalls that on 21 July 2020, the Defence filed its ‘Notice of Affirmative Defences’ in which it asserted the affirmative defence of duress pursuant to

⁵ This notice may be conditional on the resolution of any outstanding requests for the submission of evidence, either in writing or through the email submission procedure specified in the Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 34(ii)-(v).

⁶ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 24.

⁷ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 93.

Article 31(1)(d) of the Statute, in addition to mistake of fact or law, and superior orders pursuant to Articles 32 and 33 of the Statute.⁸

8. The Chamber notes that the disclosure obligations of the Defence and Prosecution differ significantly, because of the particular role the two parties have at trial. This said, the Defence must permit the Prosecution to inspect any books, documents, photographs and other tangible objects in their possession or control, which are intended for use by the Defence as evidence at trial.⁹ Furthermore, if the Defence does elect to present evidence, the Chamber recalls that it may set deadlines and request information on its presentation, including: a summary of the evidence the accused intends to rely on; the number and identity (including any pseudonyms) of the witnesses to be called; the estimated length of the questioning of witnesses; and disclosure of evidence.¹⁰
9. The Chamber previously indicated that towards the end of the presentation of evidence by the Prosecution, the Defence would be instructed to file a notice as to whether it intends to call evidence.¹¹ The Chamber hereby directs the Defence to file the aforementioned notice by **15 December 2021**. As previously indicated, in the context of the aforementioned notice, the Defence must also indicate whether the accused intends to exercise his right under Article 67(1)(h) of the Statute to make an unsworn oral or written statement.¹²
10. To facilitate the fair and expeditious planning of the case, and in the event that the aforementioned notice indicates that the Defence intends to call evidence, the Defence is further instructed to submit, **by the same deadline**, a preliminary list

⁸ Corrigendum to “Notice of Affirmative Defences”, 13 July 2020, ICC-01/12-01/18-951-Corr (corrigendum filed on 21 July 2020). *See also* Decision on the Prosecution’s request seeking dismissal of the Defence notice on affirmative defences, 1 September 2020, ICC-01/12-01/18-1027 (reclassified public on 17 September 2020).

⁹ Rule 78 of the Rules.

¹⁰ Rule 79(4) of the Rules; Regulation 54 of the Regulations. *See also* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Preliminary Directions for any LRV or Defence Evidence Presentation, 13 October 2017, ICC-02/04-01/15-1021, para. 2(iii), citing to, *inter alia*, Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Directions on Defence Presentation of Evidence, 3 November 2015, ICC-01/05-01/13-1450, para. 2(i) and citations therein. *See also* Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to preparations for the presentation of evidence by the Defence, 30 January 2017, ICC-01/04-02/06-1757, para. 6 and citations therein.

¹¹ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 25.

¹² Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 26. As previously noted, any such statement will not constitute evidence.

of witnesses and an estimate of how many hours of witness examination it will require. This provisional list should also indicate the type of witness to be called by the Defence (i.e. whether they are fact or opinion, expert, or insider witnesses); and the intended mode of testimony (i.e. whether *viva voce* or Rule 68 statements). This list is for informational purposes and may be changed up until the applicable deadline for the final list of witnesses. Subject to any subsequent order by the Chamber, redacting information in the preliminary list from the other participants may also be done if strictly necessary.

11. Within **4 weeks** of notification of the Prosecution Notice referred to in paragraph 4 above, the Defence must:
 - i. file its final lists of evidence and witnesses. The final list of witnesses should include the following information: (a) the witness code and identity (including dual status where applicable); (b) known kinship or other relationship to other witnesses; (c) the type of witness to be called (i.e. whether they are fact or opinion, expert, or insider witnesses); (d) the intended mode of testimony (i.e. whether *viva voce* or Rule 68 statements); (e) estimated length of questioning by the Defence; (f) expected relevance to the charges; and (g) expected protective measures to be sought, if any;¹³
 - ii. provide witness statements or summaries of the anticipated testimony for all witnesses. Noting that witness statements may not be available in all cases, the Defence is requested to prepare the summaries in a sufficiently detailed and comprehensive manner to enable the parties, participants and the Chamber to meaningfully prepare;
 - iii. provide an outline of the legal and factual issues that it intends to raise during the presentation of its evidence; and

¹³ As with the Prosecution case, the Chamber recalls that this information will assist in the preparation of the trial. However, as it consists of anticipations and estimates, the Defence is encouraged to regularly review its estimates and make the necessary subsequent adjustments during the course of its case. The summaries of the anticipated testimony are equally without prejudice to the evidence that might be produced in the course of the trial.

- iv. complete disclosure of all items it intends to use during its evidence presentation (to the extent not already disclosed). The Chamber takes note of the Defence disclosure already effected to date. The Chamber directs that further disclosure should take place on a rolling basis until the final disclosure deadline.
12. The Defence case shall commence **6 weeks** after final Defence disclosure is made in accordance with the deadline set out in the preceding paragraph.
13. In relation to the modalities of giving notice of the appearance of upcoming witnesses, the procedure in paragraph 10 of the Supplemental decision on matters related to the conduct of proceedings¹⁴ will remain applicable, *mutatis mutandis*, with the deadline for first Forthcoming Witnesses List being **30 days prior** to the start of the scheduled testimony of the first Defence witness. As to the order of witnesses, the Chamber recalls that in principle, the calling party is best placed to determine the order of appearance of its witnesses. The Chamber already notes at this stage that it will remain attentive to any difficulties the Defence may face during the course of its presentation of evidence in this regard, and, where necessary, retain a flexible approach to facilitate the Defence's preparations, including by accommodating (last minute) requests for changes in the order of witnesses and sitting in evidentiary blocks if necessary. That said, as it did during the presentation of evidence by the Prosecution, the Chamber may take measures when it considers this appropriate to ensure the efficient presentation of evidence and the fairness and expeditiousness of the proceedings.
14. The Chamber encourages the Defence to consider the use of Rules 68(2)(b) or 68(3) of the Rules where appropriate. The Chamber also encourages the Defence to make any applications for use of Rule 68(2)(b) or (c) as expeditiously as possible following the filing of its final list of witnesses. As with the Prosecution presentation of evidence, the Chamber may impose a final deadline for these Defence applications at a later stage. The Chamber also emphasises that while in principle requesting the use of Rule 68(2) or 68(3) of the Rules is at the discretion

¹⁴ 19 August 2020, ICC-01/12-01/18-1004.

of the calling party, the Chamber may intervene if it considers that evidence would be more appropriately presented through these mechanisms.¹⁵

15. In relation to prior recorded testimony under Rule 68(3) of the Rules, the procedure in paragraph 63 of the Directions on the conduct of proceedings¹⁶ will remain applicable, *mutatis mutandis*, with the deadline for the Defence being **30 days prior** to the start of the scheduled testimony of the relevant witness. Responses shall be filed within the prescribed time limit under Regulation 34(b) of the Regulations.
16. In relation to expert witnesses, the procedure in paragraph 67 of the Directions on the conduct of proceedings¹⁷ will remain applicable, *mutatis mutandis*, with the deadline for the Defence being **within 20 days** of the final Defence disclosure deadline.
17. In relation to in-court protective and special measures, the procedure in paragraph 76 of the Directions on the conduct of proceedings¹⁸ will remain applicable, *mutatis mutandis*, with the deadline for the Defence being **30 days prior** to the start of the scheduled testimony of the relevant witness.
18. The Chamber further directs the Defence and Victims and Witnesses Unit to engage actively with each other as early as possible in order to ensure full clarity and cooperation regarding necessary procedures for the making of any witness referrals, for the purposes of, *inter alia*, protection assessments, necessary travel arrangements and for the smooth scheduling of witness testimony.

¹⁵ See e.g. Public redacted version of Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules, 14 April 2021, ICC-01/12-01/18-1402-Red2 (original version notified on 26 March 2021; with one confidential redacted Annex, Public redacted version of ‘Partially dissenting opinion of Judge Kimberly Prost’).

¹⁶ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA.

¹⁷ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA.

¹⁸ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA.

D. General matters

19. Redactions to evidence may be applied in accordance with the Chamber's redaction protocol.¹⁹
20. The timelines and procedures set out in paragraphs 14-18, 20-21, 34-61, 63,²⁰ 65, 67-74,²¹ 76-79,²² and 81-92 of the Directions on the conduct of proceedings,²³ and any variations thereto,²⁴ will remain applicable, *mutatis mutandis*, to all participants when presenting their evidence, unless otherwise ordered.
21. In relation to paragraph 21 of the Directions on the conduct of proceedings, the Chamber notes the parties' efforts but considers that more progress can be made on the issue of agreed facts and evidence. The Chamber accordingly strongly reiterates its encouragement to the parties to consult on an ongoing basis to see whether they can agree on additional uncontested facts.²⁵
22. Finally, the Chamber recalls that its preference is to refrain from interfering with the parties' presentation of evidence unless there is a compelling reason to do so. This said, the Chamber emphasises that the parties are required to present their evidence in an efficient manner. As noted above, the Chamber may intervene if it considers that evidence would be more appropriately presented through Rule 68(2) or 68(3) of the Rules. The Chamber also recalls that it may also intervene, *inter alia*, to limit the time allotted for examination of witnesses, where warranted.²⁶ The Chamber also re-emphasises that the questioning of witnesses

¹⁹ Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546.

²⁰ As amended by this decision.

²¹ Paragraph 67 as amended by this decision.

²² Paragraph 76 as amended by this decision.

²³ ICC-01/12-01/18-789-AnxA. The 'commencement of the Defence case', as opposed to the 'commencement of trial' should be used to calculate the relevant deadlines for the Defence case (for example, '...no later than eight days prior to the commencement of the Defence case', at paragraph 16).

²⁴ See *inter alia*, Supplemental decision on matters related to the conduct of proceedings, 19 August 2020, ICC-01/12-01/18-1004; Third decision on matters related to the conduct of proceedings, 4 September 2020, ICC-01/12-01/18-1040; Fourth decision on matters related to the conduct of proceedings, 26 January 2021, ICC-01/12-01/18-1265.

²⁵ As previously noted, these agreements can relate to the case as a whole or the expected testimony of specific witnesses.

²⁶ See e.g., Public redacted version of the Decision on Prosecution's requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, 21 October 2020, ICC-01/12-01/18-987-Red (confidential version filed 5 August 2020), para. 60; Public redacted version of the Decision on Prosecution's proposed

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.²⁷ Thus, the Chamber strongly encourages the parties to focus proposed testimony on those topics of greatest relevance to the proceedings and on truly contentious issues, relating to the confirmed charges against the accused, in order to avoid the presentation of evidence that may be irrelevant to the Chamber's final determination of the case and to minimise cumulative evidence.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ADOPTS the aforementioned directions concerning the conduct of proceedings.

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 22 September 2021

At The Hague, The Netherlands

expert witnesses, 21 October 2020, ICC-01/12-01/18-989-Red (confidential version filed 5 August 2020), paras 61, 68, 74, 89, 96, 102, 112, 120.

²⁷ Transcript of hearing, 10 September 2021, T-131-CONF-ENG, page 96.