



Original: English

**No. ICC-01/12-01/18
Date: 9 June 2020**

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 the Prosecution's request for reconsideration regarding the
presentation of opening statements**

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

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Legal Representatives of Victims

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Legal Representatives of Applicants

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**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

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REGISTRY

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Counsel Support Section

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**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*, issues this ‘Decision on the Prosecution’s request for reconsideration regarding the presentation of opening statements’.

I. Procedural history and submissions

1. On 6 May 2020, the Chamber issued its ‘Decision on the conduct of proceedings’ (the ‘Decision’),¹ indicating *inter alia* that ‘the opening statements shall be presented entirely in public session’ and instructing the parties and participants to prepare accordingly.² The Prosecution was granted four hours to present its opening statements.³
2. On 20 May 2020, the Prosecution requested reconsideration of the Decision in relation to the presentation of opening arguments to be executed exclusively in open session (the ‘Request’),⁴ ‘so as to allow the Prosecution to use an interactive platform containing sensitive confidential material’.⁵
3. In particular, the Prosecution submits that the platform incorporates confidential photographs and video footages showing the accused on crime scenes, and that due to the uniqueness of the video material included in the platform, playing it in public sessions could allow for the identification of the witnesses who provided that material and would put them at risk.⁶ The Prosecution therefore requests to be granted the opportunity to go into private or closed sessions for parts of its opening statement where it uses the platform, expected to last an hour and 15 minutes.⁷

¹ ICC-01/12-01/18-789 (with one public Annex A containing the directions on conduct of proceedings and two confidential Annexes B and C).

² [Decision](#), ICC-01/12-01/18-789-AnxA, para. 17.

³ [Decision](#), ICC-01/12-01/18-789-AnxA, para. 14.

⁴ Request for reconsideration of “Decision on conduct of the proceedings” (ICC-01/12-01-18-789) in relation to the presentation of opening arguments to be executed exclusively in open session, ICC-01/12-01/18-822-Conf.

⁵ Request, ICC-01/12-01/18-822-Conf, para. 2.

⁶ Request, ICC-01/12-01/18-822-Conf, paras 8-12.

⁷ Request, ICC-01/12-01/18-822-Conf, para. 14.

4. No responses to the Request were filed.

II. Analysis

5. The Chamber recalls that it has the power to reconsider its decisions upon request of the parties or *proprio motu*, particularly in light of Articles 64(2) and 67 of the Statute. Nevertheless, reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.⁸
6. The Chamber will now analyse whether the Request fulfils the requirements for reconsideration detailed above.
7. At the outset, the Chamber notes that the Prosecution is not alleging that the Chamber made a clear error of reasoning in taking the aforesaid decision. Accordingly, the Chamber will only analyse the second element of the reconsideration test, namely whether reconsideration is necessary to prevent an injustice, bearing in mind any new facts and arguments.
8. In this regard, the Chamber notes that the Prosecution's use of the interactive platform during its opening statements may amount to a new circumstance, since it was not brought to the attention of the Chamber in the context of the Prosecution's submissions related to the conduct of proceedings. However, in fact, the Prosecution is not arguing that the use of this platform is a novel fact or new circumstance unknown to the Prosecution at the time of its submissions. To the contrary, and as noted below, the Prosecution confirms that this has been known and has been worked on by the Prosecution for a long time.
9. The Chamber further notes the Prosecution's argument that playing the interactive platform in private or closed session is necessary to prevent an injustice, arguing that the platform is the product of long and intensive work

⁸ [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, para. 11.

meant to allow seeing confidential materials of key importance in context.⁹ However, the Request fails to consider the impact of playing the platform in private or closed session vis-à-vis the general principle of publicity of trial proceedings and the right of the accused to a public hearing pursuant to Article 67(1) of the Statute.¹⁰

10. In particular, the opening statements are the part of the trial where the parties orally explain their respective cases to the Chamber.¹¹ As such, the opening statements are essential for the public to have an overview of, and understand, how the parties intend to present their evidence, noting that the Prosecution's Trial Brief is confidential at this stage. As a consequence, unnecessary and/or disproportionate limitations to holding the opening statements in open session may negatively impact the right of the accused to a fair trial and public hearing in accordance with Article 67 of the Statute.
11. Moreover, the consequences identified by the Prosecution of not playing the interactive platform in open session during the opening statement do not appear unsurmountable. As stated by the Prosecution, the parts of the platform that can be used in public could be identified and played in open session.¹²
12. Accordingly, the Prosecution has not demonstrated that the exceptional remedy of reconsideration would be justified in order to hold part of the opening statements in private or closed session. The Chamber considers that the interactive platform containing confidential material prepared by the Prosecution does not warrant reconsideration of the Decision to hold the opening statements in public. The Prosecution has failed to present persuasive arguments that the exceptional avenue of reconsideration is necessary to prevent an injustice. Moreover, noting that the possibility remains for the projection of the confidential elements of the interactive platform during an open session by broadcasting them only within the courtroom but not to the public, the

⁹ Request, ICC-01/12-01/18-822-Conf, paras 10, 13.

¹⁰ Request, ICC-01/12-01/18-822-Conf, para. 12.

¹¹ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on opening and closing statements](#), 22 May 2008, ICC-01/04-01/06-1346.

¹² Request, ICC-01/12-01/18-822-Conf, para. 15.

Prosecution may use the platform in open session in a way which is not identifying for protected witnesses. To the extent that broadcasting the platform only within the courtroom will significantly reduce the value of the audio track for the public, the Prosecution is requested to use the platform at the very end of the proceedings in order that the public can be advised and disruption can be minimized.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request in its entirety;

and

REMINDS the Prosecution of its obligation to file a public redacted version of the Request.¹³

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, 9 June 2020
At The Hague, The Netherlands

¹³ [Decision](#), ICC-01/12-01/18-789-AnxA, para. 85.