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No. ICC-01/12-01/18

Date: 2 March 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

**Decision on Defence request for reconsideration, or leave to appeal the ‘Fourth
decision on matters related to the conduct of proceedings’**

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

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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 64(8)(b) and 82(1)(d) of the Rome Statute (the ‘Statute’) and Rule 140(1) of the Rules of Procedure and Evidence, issues the following ‘Decision on Defence request for reconsideration, or leave to appeal the “Fourth decision on matters related to the conduct of proceedings”’.

I. Procedural history and submissions

1. On 26 January 2021, the Chamber rendered its ‘Fourth decision on matters related to the conduct of proceedings’ (the ‘Impugned Decision’).¹
2. On 1 February 2021, the Defence filed a request for the Chamber to either reconsider the Impugned Decision or, in the alternative, grant leave to appeal (the ‘Request’).² The Defence seeks reconsideration on the basis that: (i) the Impugned Decision was issued without conferring with the parties or otherwise affording the parties a right to be heard in relation to the finding that prior directives had not been complied with (the ‘First Ground’); (ii) the directions concerning the use of prior recorded testimony during examination fail to clearly demarcate the rules applicable to examination-in-chief as compared to cross-examination, and erroneously and impracticably conflate the notion of a ‘relevant passage’ with a ‘paragraph’ (the ‘Second Ground’); (iii) the directions concerning the use of private/closed sessions are manifestly unsound or unsatisfactory as it does not allow for the use of private/closed sessions other than for the purpose of complying with the protective measures decision and requires the Defence to disclose its lines of questioning in advance (the ‘Third Ground’); and (iv) the reference to sanctions is inconsistent with the Statute and may lead to prejudice by invalidly confining the scope of Defence arguments (the ‘Fourth Ground’). Alternatively, the Defence requests that leave to appeal with regard to the following three issues be granted: (i) whether, in formulating the directions concerning the use of prior testimony during examination, the Chamber erred in

¹ Fourth decision on matters related to the conduct of proceedings, ICC-01/12-01/18-1265.

² Defence request for reconsideration, or leave to appeal, ‘Fourth decision on matters related to the conduct of proceedings’, ICC-01/12-01/18-1274-Conf.

law in requiring the Defence to disclose its lines of argument in advance (the ‘First Issue’); (ii) whether, in formulating the directions concerning the use of private/closed sessions, the Chamber erred in law in failing to take into account exceptions to the publicity of proceedings other than for the purposes of witness protection (the ‘Second Issue’); and (iii) whether the Chamber erred in law in authorising the use of sanctions for the ‘disregard’ of directions (‘Third Issue’).

3. On 5 February 2021, the Office of the Prosecutor (the ‘Prosecution’) responded to the Request, seeking that it be denied in its entirety (the ‘Response’).³ The Prosecution submits that the request for reconsideration should be rejected as the Request fails to demonstrate a clear error of reasoning or that reconsideration is necessary to prevent an injustice. In particular, the Prosecution submits that: (i) there is no open-ended right for the parties to be heard on each and every matter; (ii) the Chamber’s directions on the use of prior testimony is clear and consistent; (iii) the Impugned Decision does not state that the identifying information should relate exclusively to witnesses and does not create a new disclosure obligation or a more stringent test as concerns the content of questions that can be posed to a witness; and (iv) the Impugned Decision neither identifies the standard nor the actual sanctions for disregarding the directions but merely reinforces the concept that compliance with the directions is not optional. As regards the alternative request for leave to appeal, the Prosecution submits that none of the issues constitute an appealable issue as they are premised on a misreading, misinterpretation, or disagreement with the Impugned Decision. Further, the Prosecution submits that none of the remaining cumulative requirements of Article 82(1)(d) of the Statute are fulfilled.

II. Analysis

A. Request for reconsideration

4. 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

³ Prosecution response to the Defence request for reconsideration, or leave to appeal, “Fourth decision on matters related to the conduct of the proceedings”, ICC-01/12-01/18-1290-Conf.

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.⁴

1. *First Ground*

5. The Defence submits that reconsideration should be granted for the reason that the Impugned Decision was issued without first affording the parties a right to be heard, and argues, as part of its First Ground, that the Chamber erred in issuing the Impugned Decision *sua sponte*.⁵ The Defence further submits that the Chamber should invite submissions from the parties as to the interpretation and scope of paragraphs 51 and 52 of the Chamber's Directions on the conduct of proceedings.⁶
6. The Chamber is of the view that the Defence fails to demonstrate that there exists a general obligation to confer with the parties prior to issuing directions on the conduct of proceedings and that a decision being issued without affording the parties the right to be heard is *per se* a basis for reconsideration.⁷
7. The Chamber recalls that Article 64 of the Statute vests a broad discretion on the Chamber to issue directions, be it orally in court or in written form, for the purpose of ensuring the fair and expeditious conduct of the proceedings. As noted by Trial Chamber IX in the *Ongwen* case, while the Chamber '*may take into account submission of the parties [on the conduct of the proceedings] [...] it reserves the right to give directions [on the conduct of the proceedings] in such a manner so as to comply with the principles of expeditiousness and fairness*',⁸ and

⁴ See 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.

⁵ Request, ICC-01/12-01/18-1274-Conf, paras 3, 12-19.

⁶ Request, ICC-01/12-01/18-1274-Conf, paras 3, 12-19. Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA.

⁷ In fact, the *Yekatom/Ngaïssona* Decision cited by the Defence clearly states that 'reconsideration is allowed as an exceptional measure which should *only* be undertaken when the conditions upon which the decision was grounded have changed, and it is necessary to prevent an injustice'. Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the 'Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters', 24 May 2019, ICC-01/14-01/18-206, para. 20 (emphasis added). See also Response, ICC-01/12-01/18-1290-Conf, paras 11-12.

⁸ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Order Scheduling First Status Conference and Other Matters, 4 May 2016, ICC-02/04-01/15-432, para. 4 (emphasis added).

although submissions on the conduct of proceedings *may* be filed, such submissions ‘would not be a prerequisite to issuing the [directions on the conduct of proceedings]’.⁹

8. Accordingly, while the Chamber has sought observations from the parties and participants prior to issuing its Directions on the conduct of proceedings,¹⁰ it retains a broad discretion in issuing new or supplementary directions on the conduct of proceedings as necessary, without first receiving specific submissions from the parties and participants. Accordingly, the Defence has failed to establish, in relation to the First Ground, that the exceptional remedy of reconsideration is warranted due to a clear error of reasoning or to prevent an injustice.

2. *Second Ground*

9. The Chamber notes that under the Second Ground, the Defence submits that the directions in the Impugned Decision on the use of witness statements invites confusion as concerns the scope of its application as it fail to distinguish between the use of such statements during examination in chief and cross examination and erroneously requires that the full paragraph, as opposed to ‘relevant passages’, must be read.¹¹
10. The Chamber is not convinced that reconsideration is warranted on this basis. While the Defence refers to decisions of other Chambers which requires the calling party to request permission to use prior statements and makes a general argument that the non-calling party should be given a greater latitude in using prior statements,¹² the Defence fails to substantiate how this constitutes a basis for reconsideration of the Impugned Decision.
11. Contrary to what the Defence suggests, the Impugned Decision in no way implies that prior statements may be used by the non-calling party only in circumstances

⁹ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 1 (n.2).

¹⁰ Order setting deadline for observations on the conduct of proceedings, 28 January 2020, ICC-01/12-01/18-566.

¹¹ Request, ICC-01/12-01/18-1274-Conf, paras 20-23.

¹² Request, ICC-01/12-01/18-1274-Conf, para. 21.

in which the calling party may use such statements.¹³ The directions in the Impugned Decision were included in order to give full effect to paragraph 52 of the Directions on the conduct of proceedings, which applies to both the calling party and the non-calling party.¹⁴ The Chamber also recalls that the Directions on the conduct of proceedings explicitly draws a distinction between the scope and mode of questioning during the examination in chief and cross examination,¹⁵ and stipulates that the ‘calling party or participant may *exceptionally* request permission to refresh a witness’ recollection using his/her previous statement where the witness is unable to independently recall a particular fact’.¹⁶

12. The Chamber is also of the view that the Defence fails to establish that reconsideration is required insofar as the Impugned Decision requires the party using the prior statement to read at least the full paragraph. The Defence avers that ‘the parties must be afforded the discretion to ascertain what constitutes a “relevant portion”’ and that requiring that the paragraph be read is ‘not fit for purpose in a range of different scenarios’.¹⁷ The Chamber does not consider that such a hypothetical argument warrants the exceptional remedy of reconsideration. As set out in the Impugned Decision, the Chamber emphasises that quoting the relevant paragraph in full is necessary in order to have a complete record and ensure fairness. Whether a particular prior statement is such that reading the paragraph is exceptionally impossible will be determined on a case-by-case basis.
13. Accordingly, the Chamber considers that in relation to the Second Ground the Defence has failed to demonstrate the existence of a clear error of reasoning or necessity to prevent injustice which warrants the exceptional remedy of reconsideration.

3. *Third Ground*

14. The Chamber recalls that in its Impugned Decision, the Chamber noted that ‘the use of private/closed sessions must remain an exception to the principle of

¹³ See also Email from the Chamber dated 16 November 2020, at 09:49.

¹⁴ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, para. 52.

¹⁵ See Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 41, 49-50.

¹⁶ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 45.

¹⁷ Request, ICC-01/12-01/18-1274-Conf, paras 20, 22-23.

publicity of the proceedings’ and that ‘general information related to the witness must be elicited in public session’.¹⁸ It is in this context that the Chamber directed the parties and participants to request private/closed sessions only when identifying information, and not non-identifying general information, would be revealed.¹⁹ Thus, contrary to the Defence submissions,²⁰ the Impugned Decision does not limit the use of private/closed sessions for other purposes, where strictly necessary. The Chamber recalls in this regard that the Directions on the conduct of proceedings specifically envisage that there may be other questions besides identifying ones which necessitate recourse to private/closed session.²¹

15. The Chamber is also unconvinced by the Defence’s argument that the directions in the Impugned Decision would give rise to an ‘impossible dilemma’ as concerns the duty to comply with the protective measures versus the duty to comply with the directions.²² The Chamber recalls in this regard that its Directions on the conduct of proceedings specifically calls on parties and participants to ensure that protective measures are not compromised.²³ The Impugned Decision does not in any way direct the parties or participants to disregard protective measures ordered, but rather emphasises that ‘identifying information’ of witnesses be construed narrowly, in accordance with the Chamber’s decisions on protective measures,²⁴ and reiterates that identifying questions should be grouped together. The Chamber also notes that the Defence appears to be merely repeating its previous submissions made via email in the context of related issues arising in court prior to the Impugned Decision being issued.²⁵
16. Further, the Defence’s argument that the Impugned Decision requires the Defence to ‘disclose its intended line of questioning and argument, in open session’ is equally unfounded.²⁶ The Chamber recalls that the Directions on the conduct of

¹⁸ Impugned Decision, ICC-01/12-01/18-1265, para. 13.

¹⁹ Impugned Decision, ICC-01/12-01/18-1265, para. 13.

²⁰ Request, ICC-01/12-01/18-1274-Conf, para. 26.

²¹ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 84.

²² Request, ICC-01/12-01/18-1274-Conf, para. 25.

²³ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 81.

²⁴ See Impugned Decision, ICC-01/12-01/18-1265, para. 13 (n. 11).

²⁵ Email from the Defence dated 18 November 2020, at 09:57.

²⁶ Request, ICC-01/12-01/18-1274-Conf, paras 25, 27.

proceedings already require requests for private/closed sessions to be made referring where possible to the topics that will be covered.²⁷ The Impugned Decision states that the Chamber may intervene and instruct the questioning party to ‘provide a specific explanation as to why the response *to the particular question* might be identifying’.²⁸ The language of the aforesaid directions clearly reflects the Chamber’s intention to intervene once a particular question has been posed in private or closed session, rather than requiring the counsel questioning the witness to provide an explanation *in open session*.

17. The Impugned Decision simply reinforces the concept that the use of private/closed sessions must remain an exception to the principle of publicity of the proceedings by clarifying that the Chamber retains its discretionary power to enquire with the parties on the necessity of using closed/private sessions for the question(s) put to the witness.²⁹ Moreover, as noted by the Prosecution,³⁰ the Impugned Decision merely requires the questioning party to explain why the response to the question might be identifying, and does not require the parties or participants to provide advance disclosure of their arguments.
18. The Chamber further notes that the Defence alleges that the Chamber fell into a legal error in relying upon ‘a distinction between questions directed to the merits of the case, as opposed to issues of credibility’.³¹ The Defence however merely misrepresents the Impugned Decision which does not draw such a distinction. In this regard, the Chamber notes that the Directions on the conduct of proceedings explicitly allows the non-calling party to pose questions pertaining to the credibility of the witness.³²
19. Accordingly, the Chamber considers that in relation to the Third Ground the Defence has failed to demonstrate the existence of a clear error of reasoning or

²⁷ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 82.

²⁸ Impugned Decision, ICC-01/12-01/18-1265, para. 15 (emphasis added).

²⁹ Impugned Decision, ICC-01/12-01/18-1265, para. 15.

³⁰ Response, ICC-01/12-01/18-1290-Conf, para. 37.

³¹ Request, ICC-01/12-01/18-1274-Conf, para. 27.

³² Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 41.

necessity to prevent injustice which warrants the exceptional remedy of reconsideration.

4. *Fourth Ground*

20. As regards the Fourth Ground, contrary to the Defence's assertions,³³ the Impugned Decision has not identified any standard for sanctions. Rather, the Impugned Decision merely notes in a general manner that the Chamber will 'take appropriate action' which '*may* include resort to Article 71(1) of the Statute and other relevant statutory provisions *as may be appropriate*'.³⁴
21. Accordingly, the Fourth Ground misinterprets the Impugned Decision and the Defence fails to demonstrate the existence of a clear error in reasoning or necessity to prevent injustice which warrants the exceptional remedy of reconsideration.
22. For the aforementioned reasons, the Defence request for reconsideration is rejected.

B. Request for leave to appeal

23. The Chamber will now turn to its examination of whether the Defence has met the requirements under Article 82(1)(d) of the Statute. The Chamber 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 set out in its previous decisions.³⁵ In particular, the Chamber recalls that as regards the possibility to grant leave to appeal pursuant to Article 82(1)(d) of the Statute, the following criteria shall be fulfilled: (a) the matter must be an 'appealable issue'; (b) the issue at hand is one that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (c) an immediate resolution by

³³ Request, ICC-01/12-01/18-1274-Conf, paras 17-18, 29-34.

³⁴ Impugned Decision, ICC-01/12-01/18-1265, para. 16 (emphasis added).

³⁵ See Decision on Defence request for reconsideration, or leave to appeal, 'Decision on Defence request in relation to P-0626', 1 February 2021, ICC-01/12-01/18-1295-Conf, para. 7.

the Appeals Chamber may materially advance the proceedings. A mere disagreement or conflicting opinion is not an appealable issue.³⁶

24. As explained above in relation to the request for reconsideration,³⁷ the Impugned Decision does not require the examining party to disclose its line of questioning or intended arguments in advance (First Issue). The Chamber also notes that the Defence simply repeats its arguments in relation to the Second Ground for reconsideration,³⁸ without providing any explanation as to how this relates to the First Issue. Accordingly, the Chamber considers that the First Issue misrepresents the Impugned Decision and expresses a mere disagreement with the Chamber's findings. The First Issue does not arise from the Impugned Decision and it is therefore not appealable.
25. Further, as analysed above in relation to the request for reconsideration,³⁹ the Impugned Decision neither limits the use of private/closed sessions to those required for the protection of witnesses (Second Issue) nor identifies any standard for the use of sanctions (Third Issue). Accordingly, the Chamber considers that the Second and Third Issues misrepresent the Impugned Decision and as such are not appealable issues arising from it.
26. For the aforementioned reasons, the Chamber finds that none of the issues identified by the Defence are appealable issues. Accordingly, it is unnecessary to address the remainder of the cumulative requirements of Article 82(1)(d) of the Statute.

³⁶ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', ICC-01/12-01/18-734, para. 14.

³⁷ See paragraph 17 above.

³⁸ Request, ICC-01/12-01/18-1274-Conf, para. 38.

³⁹ See paragraphs 14 and 20 above.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

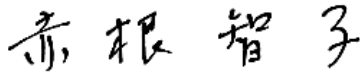
REJECTS the Request.

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 March 2021

At The Hague, The Netherlands