



**Original: English**

**No. ICC-01/12-01/18  
Date: 26 January 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**

**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:**

**The Office of the Prosecutor**

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James Stewart

**Counsel for the Defence**

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**Legal Representatives of Victims**

Seydou Doumbia  
Mayombo Kassongo  
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**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**

**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 64(7) and 67(1) of the Rome Statute (the ‘Statute’) and Rule 140 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Fourth decision on matters related to the conduct of proceedings’.

## **I. Procedural history**

1. On 6 May 2020, the Chamber issued its ‘Decision on the conduct of proceedings’.<sup>1</sup> In its Annex A, the Chamber handed down the ‘Directions on the Conduct of Proceedings’ pursuant to Rule 140 of the Rules.<sup>2</sup>
2. On 19 August 2020, the Chamber rendered its ‘Supplemental decision on matters related to the conduct of proceedings’.<sup>3</sup>
3. On 4 September 2020, the Chamber rendered its ‘Third decision on matters related to the conduct of proceedings’.<sup>4</sup>
4. On 18 November 2020, the Chamber rendered its ‘Decision on the Defence request for orders concerning the conduct of proceedings’, in which it rejected the Defence request for additional directions on the conduct of proceedings.<sup>5</sup>

## **II. Directions**

### **A. Use of witness statement during examination**

5. The Chamber recalls that paragraph 52 of Directions on the Conduct of Proceedings provides the following:

Counsel questioning a witness shall refrain from paraphrasing the witness’ statement or testimony in the courtroom or from unnecessarily requesting the witness to reiterate such testimony. Where necessary for the

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<sup>1</sup> Decision on the conduct of proceedings, ICC-01/12-01/18-789 (with Annex A and confidential Annexes B and C).

<sup>2</sup> ICC-01/12-01/18-789-AnxA.

<sup>3</sup> ICC-01/12-01/18-1004.

<sup>4</sup> ICC-01/12-01/18-1040.

<sup>5</sup> Decision on the Defence request for orders concerning the conduct of proceedings, 18 November 2020, ICC-01/12-01/18-1156.

understanding of a question, counsel shall quote the directly relevant passage from the statement or transcript and indicate the exact page numbers, paragraph numbers, and/or relevant lines.

6. The Chamber further recalls that in its email decision of 16 November 2020,<sup>6</sup> in the context of issues which arose about the way in which the statement of P-0065 was used by the Defence during cross examination, the Chamber reminded counsel of the obligations under this paragraph, noting that '[t]he witness should be given the opportunity to respond to the question in a general sense based on memory'.<sup>7</sup> The Chamber also emphasised that in order to have a complete record, when referring to a passage of the witness's prior written statement with the witness, counsel must quote the relevant paragraph in full. The Chamber further noted that the party calling the witness had the opportunity to draw out other parts of the prior recorded testimony in re-examination, as necessary.
7. Notwithstanding the direction in paragraph 52 of the Directions on the Conduct of Proceedings and the abovementioned reminder by way of email, the Chamber observes that on various occasions during the first block of witnesses, these instructions were either misunderstood or simply ignored and disregarded by counsel.<sup>8</sup>
8. Therefore, the Chamber considers it necessary to issue the following direction in addition to the direction in paragraph 52 of the Directions on the Conduct of Proceedings:
9. Counsel questioning a witness shall refrain from putting parts of the witness's statement to the witness without having established a foundation to do so, namely to either refresh the witness's memory, or to confront the witness with contradictions between the prior testimony and the in court testimony in

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<sup>6</sup> Email from the Chamber, 16 November 2020, at 09:49.

<sup>7</sup> Email from the Chamber, 16 November 2020, at 09:49; see also Transcript of hearing on 19 November 2020, ICC-01/12-01/18-T-049-CONF-ENG, p. 57, lines 15 to 23.

<sup>8</sup> See e.g. Transcript of hearing on 10 November 2020, ICC-01/12-01/18-T-044-CONF-ENG, p. 61, line 19 to p. 62, line 7; Transcript of hearing on 17 November 2020, ICC-01/12-01/18-T-047-CONF-ENG ET, p. 25, lines 13 to 24, p 65, lines 8 to 17; Transcript of hearing on 19 November 2020, ICC-01/12-01/18-T-049-CONF-ENG, p. 21, lines 15 to 23, and page 70, lines 3 to 22; Transcript of hearing on 26 November 2020, ICC-01/12-01/18-T-052-CONF-ENG, p. 39, lines 9 to 13; Transcript of hearing on 8 December 2020, ICC-01/12-01/18-T-059-CONF-ENG, p. 21, line 2 to p. 22, line 15, and page 30, line 21 to page 31, line 16.

accordance with paragraph 51 of the Directions on the Conduct of Proceedings. The principle is that before using the statement, the witness must be given the opportunity to respond to a question(s) on the relevant point based on memory. If the statement is subsequently used for the purposes outlined above, it must be used fairly which means that the witness must be read at least the full paragraph invoked.

## **B. Public dissemination of videos and photographs**

10. The Chamber observes that throughout the first block, various videos and photographs have been used with witnesses during their testimony. Some were broadcasted to the public and some were not.<sup>9</sup> In view of the principle of the publicity of proceedings, the Chamber directs the parties and participants to give increased attention to opportunities to broadcast such items to the public.
11. Accordingly, when submitting the list of materials intended to be used during questioning pursuant to paragraphs 57 and 61 of the Directions on the Conduct of Proceedings, the parties and participants are instructed to indicate, for each video and photograph, the expected level of confidentiality of the item (public or confidential) in relation to the specific witness and his/her expected testimony<sup>10</sup> In respect of items assessed as being confidential, the relevant party or participant should keep under review before and during the testimony whether the item can be broadcasted publicly during the testimony. If yes, the relevant party or participant is to instruct the Court Officer at the relevant moment during testimony to broadcast the item publicly. If not, the party or participant should be prepared to indicate to the Chamber during testimony the reasons why a certain item may not be broadcast to the public, if asked.

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<sup>9</sup> The Chamber recalls that it issued specific directions that certain material be displayed confidentially and not broadcast to the public in the context of a particular testimony Transcript of hearing on 4 November 2020, ICC-01/12-01/18-T-040-CONF-ENG, p. 3, line 15 to p. 4, line 13.

<sup>10</sup> The Chamber notes that the Defence is already including this information in its lists of material for all items.

### C. The use of private and/or closed sessions

12. Having regard to the manner of questioning regarding the first block of Prosecution witnesses, the Chamber considers it necessary to reiterate its previous directions on the use of private and/or closed sessions.
13. The Chamber recalls that the use of private/closed sessions must remain an exception to the principle of the publicity of the proceedings and general information related to the witness must be elicited in public session. The parties and participants may seek to enter into a private/closed session solely when identifying information would otherwise be revealed to the public, and ‘identifying information’ in this context should be construed narrowly.<sup>11</sup> Furthermore, the examining party shall immediately request moving back to open session when the reasons that motivated the use of private or closed session are no longer present.<sup>12</sup>
14. In order to give full effect to these directions and avoid the unnecessary use of private and/or closed sessions, the Chamber has also instructed the parties and participants to group identifying questions and put those questions to the witness at the beginning or end of each session.<sup>13</sup> Apart from these limited sets of questions, parties and participants must endeavour to carry out their questioning in public session by, for example, avoiding references to the individual or his or her family by name, unless there is demonstrable relevance in doing so, and instead using initials or other non-identifying expressions. Counsel should also endeavour to reduce the time spent in private session by restricting the exploration of personal information and circumstances of a witness to that which is strictly

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<sup>11</sup> Second decision on in-court protective measures, 24 September 2020, ICC-01/12-01/18-1067-Conf-Exp (confidential *ex parte*, available only to VWU and the Prosecution; a confidential redacted version was filed on the same day, ICC-01/12-01/18-1067-Conf-Red; a public redacted version was filed on 5 January 2021, ICC-01/12-01/18-1067-Red2), paras 36-37; Third decision on in-court protective measures, 19 October 2020, ICC-01/12-01/18-1113-Conf-Exp (confidential *ex parte*, available only to VWU and the Prosecution; a confidential redacted version was filed on the same day, ICC-01/12-01/18-1113-Conf-Red, a public redacted version was filed on 5 January 2021, ICC-01/12-01/18-1113-Red2), para. 36. *See also* Email from the Chamber to the parties and participants, 16 September 2020 at 13:32.

<sup>12</sup> Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 83.

<sup>13</sup> *See* Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 84; Transcript of hearing, 11 November 2020, ICC-01/12-01/18-T-045-ENG, p. 48, lines 17 to 22; Transcript of hearing, 17 November 2020, ICC-01/12-01/18-T-047-ENG, p. 4, lines 13 to 21.

necessary and demonstrably relevant to the issues in the case or the credibility of the witness.

15. Compliance with the aforementioned directions by the Chamber is not optional. In all future hearings involving witnesses with in-court protective measures, the parties and participants should take all available steps to fully comply with these directions and ensure that identifying questions are grouped and asked at the beginning or end of each session. Where necessary, the Chamber will not hesitate to intervene and instruct the questioning party to provide a specific explanation as to why the response to the particular question might be identifying. In such circumstances, the parties should be prepared to provide a clear and well-founded explanation, beyond a mere indication that the answer *may* be identifying.
16. Should the parties and participants disregard the aforementioned directions, the Chamber will take appropriate action pursuant to Articles 64(2) and 64(6)(f) of the Statute,<sup>14</sup> which may include resort to Article 71(1) of the Statute and other relevant statutory provisions as may be appropriate.<sup>15</sup>

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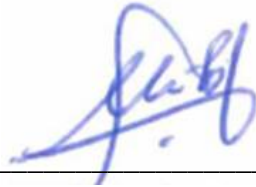
<sup>14</sup> See Pre-Trial Chamber I, *Situation on the registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”, 15 November 2018, ICC-01/13-68, para. 103.

<sup>15</sup> See in particular Rule 171 of the Rules and Regulation 29 of the Regulations of the Court.

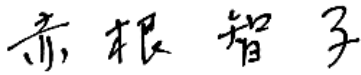
**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**ADOPTS** the aforementioned fourth set of directions on 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 26 January 2021

At The Hague, The Netherlands