

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**

Date: **09 July 2020**

Date of submission: **14
August 2020**

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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

Public redacted version of “Defence notice of its intention to raise unfitness to stand trial and request for a status conference”

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Fatou Bensouda
James Stewart

Counsel for the Defence

Melinda Taylor
Nicoletta Montefusco

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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

I. Introduction

1. The Defence for Mr. Al Hassan herewith:
 - a. Files formal notice of its intention to raise the defence that Mr. Al Hassan is not fit to stand trial;
 - b. Requests an urgent status conference in the present case, and that it be conducted prior to the commencement of trial, which is currently scheduled for Tuesday, 14 July 2020, in order to discuss the calendar for addressing this issue.
2. This urgent Request is made pursuant to Regulations 30 and 54(m) and (p) of the Regulations of Court, to address the Defence's forthcoming proposed joint instruction by the parties of an expert psychiatric examiner in accordance with Rule 135 of the Rules of Procedure and Evidence ('RPE'), entitled "Medical examination of the accused." Examination pursuant to Rule 135 of the RPE, is requested in relation to this formal advancement by the Defence of an intention to advance a positive defence excluding criminal responsibility under Article 67(1) of the Statute, based on Mr. Al Hassan's lack of fitness to stand trial, at this time.
3. Rule 135 of the RPE foresees that, "the Trial Chamber may, for the purpose of discharging its obligations under article 64, para. 8(a), or for any other reasons, or at the request of a party, order a medical psychiatric or psychological examination of the accused, under the conditions set forth in rule 113" (emphasis added).
4. Fitness to stand trial is assessed under Article 67(1) of the Rome Statute, based on a number of relevant capacities fundamental to the meaningful exercise of the rights enumerated therein, including the ability to understand the conduct of the proceedings; to instruct counsel; to understand the consequences of the proceedings; and to make a statement in one's defence.
5. Having, only yesterday, been permitted an in-person visit between Counsel and Mr. Al Hassan, and following a more than three hour in person discussion in his required language, Arabic, Counsel was able to receive his accord to agree to the disclosure of medical records to the Prosecution, as well as to proceed with an additional evaluation as concerns his current mental and physical state, and understanding of the impending

trial. Counsel's visit was followed up by a psychological interview ("pre-assessment to determine whether fitness to stand trial must be evaluated") with the Defence's consultant Dr. Kate Porterfield.

II. Submissions

6. First, the Defence wishes to clearly state that it does not seek by this motion to relitigate points (a) and (d) of the Decision on Defence Adjournment Request issued on 8 July 2020,¹ and explicitly informs the Chamber that it intends to file the appropriate request for leave to appeal per the applicable rules and regulations.
7. Second, the Defence provides formal notice of its position that the submissions set out in the Defence Termination Request as concerns Mr. Al Hassan's fitness to testify in his Defence constitute a positive defence, and formal challenge as concerns his fitness to stand trial.²
8. Third, the Defence states that prior to meeting with the Accused in person—only yesterday—Mr. Al Hassan was unable to move forward in terms of seeing possible consequences and outcomes of the procedure and therefore could not and did not provide instructions to the Defence on key, fundamental and crucial points of his Defence that could have permitted the Defence to credibly expand the scope of fitness pleadings, beyond what had been discussed with Mr. Al Hassan in person, and evaluated in person, prior to the outbreak of the COVID-19 pandemic.
9. Although there may be "issues that counsel can deal with and receive instructions upon, despite the inability to physically meet with Mr. Al Hassan,"³ this was not one such issue. A further fitness determination has clear implications for Mr. Al Hassan as concerns further examination, and further disclosure of his records. The Defence had reached an impasse on these issues through telephone consultations, and was not, until Counsel met him in person, in a position to assess whether his current circumstances were such as to warrant proceeding with steps that cause him clear anxiety, and are triggering of past trauma. On 22 May 2020, the Defence disclosed Dr. Porterfield's report, which observed that in April and May 2020, Mr. Al Hassan had conveyed to

¹ ICC-01/12-01/18-940-Conf.

² ICC-01/12-01/18-885-Conf-Corr ('Defence Termination Request'), para. 105.

³ Transcript of status conference on 30 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, pg. 11, lines 5-8.

her that he had reached a point where he had indicated that he was unwilling to continue discussing specific experiences with medical professionals.⁴ As such, the Defence Termination Request was based on information collected primarily from Mr. Al Hassan during in person evaluations conducted in July/August 2019 and January 2020. The Defence also sought Mr. Al Hassan's interim release, in March 2020,⁵ as a means of addressing his trauma, and avoiding the negative consequences of the COVID-19 confinement regime. When this was rejected, the Defence then submitted its Defence Termination Request, as soon as it was able to do so, bearing in mind the need for experts to review the BSQ extracts disclosed by the Defence, and other logistical issues.⁶ The fitness aspects of the Request were necessarily circumscribed to the information that the Defence had available to it, at the time of submission. At the same time, in the absence of a holistic in person overview as to Mr. Al Hassan's current mental state, the Defence also attempted to address his requirements, as best it could, based on information gleaned in a piecemeal manner from its telephone interactions with him. The Defence were aware that "Mr. Al Hassan is not okay",⁷ but did not have the means to assess the full extent and implications of his current position.

10. That Mr. Al Hassan is or is not fit to stand trial at this time is a critical issue which necessitates a professional opinion; this is not an issue that the Defence can advance in the absence of medical evidence. Until the Defence met with Mr. Al Hassan, the Defence was also faced with a Catch-22 in the sense that during verbal communications, Mr. Al Hassan expressed his unwillingness to be exposed to further scrutiny and evaluation on issues that were painful to him, and was not in a position to assess or visualize how such an outcome could affect his proceedings. The Defence, in turn, were not in a position to advise him as to whether there was a justiciable basis for him to proceed with such steps, beyond what had already been done, until it met him. During this meeting, Mr. Al Hassan expressed clear indicia of depression and hopelessness, which manifested themselves in a much more intense degree than previous interactions. In particular, although, after a detailed discussion, Mr. Al Hassan agreed to the disclosure of medical records, thus allowing the Defence to

⁴ MLI-D28-0002-0535 at 0607.

⁵ ICC-01/12-01/18-680-Conf.

⁶ ICC-01/12-01/18-827-Conf, para. 9. This included the fact that one medical expert was sick with Covid, in May 2020.

⁷ ICC-01/12-01/18-T-015-CONF-ENG, p. 39, line 4.

move forward with that aspect, he expressed severe fear as concerns the prospect of participating in proceedings. He repeatedly reiterated his respect for the Judges, but also described his ongoing experience as a form of slow death, and expressed concerns that he was losing his mind, and that he had been trying to cope, but found himself no longer able to do so

11. The Defence does not assert that Mr. Al Hassan's views are rational or legally founded. The Defence are also not medical professionals, and were not able to address or speak to his fears.
12. The Defence therefore requested Dr. Porterfield, at short notice, to speak to Mr. Al Hassan, with a view to identifying whether there were grounds to believe that a further medical evaluation was required, as to assess his current situation, and capacities.
13. Dr. Porterfield conducted an interview of Mr. Al Hassan yesterday evening by telephone—the most recent of a series of interactions with the Accused as outlined in her letter of 8 July 2020, which is attached—following which she clinically stated that he demonstrated “worsening symptomatology, as ... he received inadequate and then no therapeutic care for his PTSD.”⁸ She then outlines several clinical indicators that give rise to the genuinely founded demand for a complete and qualified assessment of his fitness to stand trial, at this time.
14. The relevant sections are set out below:

In my call with Mr. Al Hassan today, he demonstrated several indicators that his clinical condition is worsening. I will review the indicators of this below.

- Depression: Mr. Al Hassan presented with a severely depressed and dark mood, stating, “I cannot go on anymore.” He spoke at length about his hopelessness and his belief that his participation in his case does not matter. He denied that he would kill himself because of his religious beliefs, but he noted that he it does not matter whether he lives or dies.
- PTSD: Mr. Al Hassan demonstrated severe and worsening PTSD symptoms. The symptoms he has demonstrated over the course of the last year—nightmares, dissociation, hyperarousal, avoidance, negative thinking, and re-experiencing of traumatic memories—appear to have increased over the last month. He noted more frequent nightmares (three times per week, at least), as well as a sense that he cannot trust anyone.

⁸ Annex A.

- **Hypervigilance:** Hypervigilance is a symptom of PTSD and Mr. Al Hassan's hypervigilance appears to have worsened. With hypervigilance, a trauma survivor experiences an increase in their sense of impending threat or danger. This reaction—believed to be the result of nervous system dysregulation from the trauma—leads the person to feel that their environment is dangerous and that there are imminent threats to their safety. Mr. Al Hassan is demonstrating this symptom to a more severe degree than he has shown over the past year. Specifically, he is perceiving the court room to be a place where he will be endangered. This may seem like the kind of belief that any defendant would have about a court where he is facing criminal prosecution. But, the quality and content of Mr. Al Hassan's perceptions is different than that normal reaction. [REDACTED]. Mr. Al Hassan, in this statement, demonstrated that his reactions to the impending presence of the prosecutors in the courtroom with him are severely distressing. In Mr. Al Hassan's thinking, the prosecutors are reminders of his torture, because they interviewed him while he was being held in the DGSE where he was being tortured. This association—between the prosecutors and impending torture or even death—is not rational for Mr. Al Hassan. It is a biologically-based reaction to the impending presence of the prosecutors.
- **Memories of torture:** Mr. Al Hassan is experiencing worsening reminders of his torture. During our call, when I asked what he was thinking about his impending trial, he spoke in a pressured manner, recounting how images of torture are coming back to him, saying, "My hands were tied for four months, I couldn't pray or sleep...imagine someone doing all of this, [REDACTED] and putting you in this situation, the same person who has interrogated you. I told that person I was a victim of torture; there were marks on my body; they did not provide me with medical treatment or put me under the examination of a doctor." This response indicates that, as Mr. Al Hassan is brought closer to his trial, he is experiencing more memories of his torture. This is expectable in a person who has not received extensive treatment for his PTSD.
- **Medical care:** Mr. Al Hassan notes that he is not trusting of the medical personnel at Scheveningen Detention Unit because they have not addressed his psychological and physical needs. He noted that he feels they are not interested in helping him and they do not believe him. He stated that he does not trust the medical providers there because they have not provided him with treatment for his PTSD.
- **Lawyers:** Mr. Al Hassan stated that he will talk with his lawyers and let them work on his case, but that he cannot tolerate going to the courtroom where he will see the prosecutors and be reminded of torture. His position in relation to his lawyers could best be described as apathetic. He did not feel that he could accompany them to court and stated that he did not care what happened to him. This is a manifestation of depressive and avoidant thinking.

Given these indicators of serious mental health deterioration, I make the following recommendations:

1. Mr. Al Hassan is in need of psychological and psychiatric care for his PTSD and depressive conditions. His hopelessness, anxiety, perception of threat and danger and his chronic state of being thrust into reliving memories of his torture are impairing him significantly. His isolation over the past four months has clearly worsened his condition.
2. Mr. Al Hassan's capacity to contribute to his defense should be assessed by a clinician. His current stance—that the courtroom presents a life or death threat to him—is a symptom of his PTSD and must be further assessed. It is my clinical opinion that the link between the ICC prosecutors and his torture at DGSE has solidified and intensified over the course of the past year, with no treatment and minimal contact with family or trusted individuals.
3. An evaluation of Mr. Al Hassan is best completed in person and with adequate time to speak with him at length. He is hypervigilant and mistrustful—both of which are symptoms of having been tortured. A phone call with a clinician who he is unable to see or who cannot build rapport with him is likely to yield little information. Mr. Al Hassan is highly symptomatic, including with dissociation- a condition where people disconnect from their feelings and perceptions. To conduct a thorough and effective evaluation, the clinician must be able to adequately connect with Mr. Al Hassan, in spite of these impairing symptoms.

In conclusion, I have written on several occasions regarding my concerns about Mr. Al Hassan's serious and worsening mental illness. This letter serves as another such communication. Mr. Al Hassan is in danger of further deterioration and incapacitation if his clinical needs are not assessed and addressed.

15. The Defence underscores that Mr. Al Hassan is not attempting a ploy to remand trial; to the contrary, he is “**apathetic**” and “**does not care what happen[s] to him.**” Even if the Chamber is of the position that the Defence failed to act with sufficient diligence, this is not a finding that should operate to the detriment of Mr. Al Hassan's core rights, including his ability to effectively following the proceedings. Moreover, any putative finding that Mr. Al Hassan is ‘fit’ to stand trial, in principle, does not exclude the possibility that adjustment or measures will be required to ensure that such fitness is ensured and maintained throughout the process.
16. The Defence is taking steps to ensure that these issues can be brought to the Chamber and resolved in a timely and efficient manner. To that end, a Status Conference has been requested in order to address the modalities. Alternatively, if this is not feasible, the Defence will consult with the Prosecution on an *inter partes* basis, with a view to jointly instructing an expert that is able to travel to The Netherlands.

III. Relief sought

17. For the reasons set out above, the Defence for Mr. Al Hassan:

- a. Provides formal notice as concerns its challenge to Mr. Al Hassan's fitness to stand trial, based on grounds concerning his ability to following the proceedings, appreciate the consequences of the proceedings, and testify in his Defence; and
- b. Requests an urgent Status Conference for the purpose of addressing the modalities of these issues.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 09th Day of July 2020
At The Hague, The Netherlands