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**International
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17 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 the “Prosecution’s response to “Defence notice of its intention to raise unfitness to stand trial and request for a status conference””,
ICC-01/12-01/18-943-Conf, 10 July 2020**

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

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I. Introduction

1. The Defence notice,¹ where the Defence (1) “provides formal notice as concerns its challenge to Mr. Al Hassan’s fitness to stand trial”; (2) apparently requests that Trial Chamber X (“Chamber”) order the “medical psychiatric or psychological” examination of the Accused;² and (3) “[r]equests an urgent status conference for the purpose of addressing the modalities of these issues”³ (“Defence Notice and Request” or “Notice”), should be dismissed.
2. Rather than providing notice, the Defence should file its challenge to the Accused’s fitness to stand trial as it has been directed to do. The Defence Notice should be dismissed on this basis.
3. Alternatively, if the Chamber decides to entertain the Defence Notice, it should dismiss it as late, coming as it does on the eve of the trial. The request for a status conference before trial begins, “in order to discuss the calendar for addressing” the Accused’s fitness for trial,⁴ is neither practical nor necessary. Unless the Registry’s report on the physical and mental health conditions of Mr Al Hassan indicates the need for an adjournment, trial should commence as scheduled on 14 July 2020. Once the Defence has filed its anticipated challenge to the Accused’s fitness to stand trial, or alternatively on the basis of the Registry’s report, the Chamber can decide on the need to appoint one or more experts to assess the Accused before the presentation of evidence begins.

II. Confidentiality

4. Under regulation 23bis(2) of the Regulations, the Prosecution files this application as confidential since it responds to a filing of the same classification. This classification may change in accordance with any change in that filing’s classification.

III. Submissions

5. As a preliminary matter, lack of fitness to stand trial is not a “defence”. At various points of its Notice, the Defence refers to its intention “to raise the defence that Mr. Al

¹ ICC-01/12-01/18-942-Conf (“Defence Notice”).

² See Defence Notice, para. 2-3. Cf. Defence Notice, para. 1, 17.

³ Defence Notice, para. 17.

⁴ Defence Notice, para. 1.

Hassan is not fit to stand trial”,⁵ “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*.”⁶ Lack of fitness to stand trial is not a defence excluding the Accused’s criminal responsibility: whatever condition may affect the accused’s ability to stand trial now, if there is one, it cannot apply retroactively, and will therefore be irrelevant vis-à-vis his conduct at the time of the commission of the crimes.⁷ Providing “notice” of the “intention” to allege lack of fitness to stand trial is neither necessary nor appropriate.

6. The Chamber has indicated that [REDACTED]
[REDACTED].⁸ It has also indicated that [REDACTED]
[REDACTED].⁹ Instead of filing its challenge to the Accused’s fitness to stand trial, the Defence has filed notice of its intention to do so.¹⁰ A party which sees the need to make a particular filing should do so, as it is unhelpful to file a “notice of intention”, and this practice should be discouraged.¹¹ The Defence Notice should be dismissed on this basis alone.

7. Alternatively, should the Chamber decide to entertain the Defence Notice, it should nevertheless dismiss it as late. The Prosecution will address the lateness of the Defence Notice, and the requests for a status conference before trial begins and for a medical examination of the Accused in the following paragraphs.

8. The Defence Notice is filed on the eve of the trial, when the Defence could have filed it much earlier.

9. In its Decision on Adjournment, the Chamber found that [REDACTED]
[REDACTED]
[REDACTED]¹²

10. The Defence argues that prior to meeting the Accused in person on 8 July 2020, the Accused “could not and did not provide instructions [...] that could have permitted the

⁵ Defence Notice, para. 1(a).

⁶ Defence Notice, para. 2 (emphasis added).

⁷ See Article 31 of the Rome Statute. *See also* Articles 32 and 33.

⁸ [REDACTED].
⁹ [REDACTED].

¹⁰ Defence Notice, para. 1-2.

¹¹ See ICC-02/11-01/15-131, para. 5 (in the context of requests for leave to reply).

¹² [REDACTED], citing ICC-01/12-01/18-885-Conf-Red, para. 15, 27.

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.”¹³ However, the Defence fails to substantiate this assertion:

-) While the Defence relies on Dr Porterfield’s report for the proposition that “in April and May 2020, Mr. Al Hassan had conveyed to her that he had reached a point where he had indicated that he was unwilling to continue discussing specific experiences with medical professionals”,¹⁴ the report makes clear [REDACTED]
[REDACTED].¹⁵ This would have not prevented the Defence from getting instructions on disclosure of medical records to the Prosecution and on conducting an additional evaluation concerning the Accused’s current medical and physical state.¹⁶
-) The report also makes clear that even on these issues, Dr Porterfield did succeed to speak to the Accused on six occasions for one hour each from April 2020 to May 2020, while it does not indicate at which of these phone calls [REDACTED]
[REDACTED].¹⁷
-) Furthermore, the Defence was able to have Dr Porterfield conduct a psychological interview of the Accused’s current mental and physical state¹⁸ on 8 July 2020, on short notice, for approximately 75 minutes,¹⁹ after the Defence had already spent more than three hours discussing with him.²⁰
-) Finally, the Defence contention that it was unable to assess “the *full* extent and implications of his current position” absent a “holistic in person overview as to Mr. Al Hassan’s current mental state”,²¹ does not further advance its justification for filing the Defence Notice at this late stage. The Defence claims that it was aware that “Mr. Al Hassan is not okay” but did not have the means to assess the full extent and

¹³ Defence Notice, para. 8, 12-13.

¹⁴ Defence Notice, para. 9, citing MLI-D28-0002-0535 at 0607.

¹⁵ MLI-D28-0002-0535 at 0607. *See also* Defence Notice, Defence Notice, ICC-01/12-01/18-942-Conf-AnxA (“Annex A”), p.2 [REDACTED]

Defence Notice, para. 5.

¹⁷ MLI-D28-0002-0535 at 0535-0536.

¹⁸ Defence Notice, para. 5.

¹⁹ Defence Notice, ICC-01/12-01/18-942-Conf-AnxA (“Annex A”), p. 2. The Prosecution notes that Dr Porterfield refers to a letter to the Defence dated 6 April 2020, to which the Prosecution does not have access, but which in the Prosecution’s submission is covered by its pending disclosure request (ICC-01/12-01/18-929-Conf).

²⁰ Defence Notice, para. 5.

²¹ Defence Notice, para. 9 (emphasis added).

implications of his current position.²² However if the Defence was indeed aware of issues with his current mental state through its telephone consultations with him, it could have asked for a medical examination pursuant to rule 135 at an earlier point with a view to deciding whether to raise a fitness issue.

11. In the Notice, the Defence requests an urgent status conference “and that it be conducted prior to the commencement of trial [...] in order to discuss the calendar for addressing this issue”,²³ in particular “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.”²⁴ Although the Defence states that examination under rule 135 is requested based on Mr. Al Hassan’s lack of fitness to stand trial, at this time”,²⁵ the Defence does not make this part of the requested relief.

12. Nevertheless, the Prosecution understands the Defence to be requesting the Chamber to order a medical examination of the Accused, and addresses this request as well.

13. While the Defence indicated that it does not seek to re-litigate the Chamber’s decision denying its request for adjournment of trial,²⁶ its request that said status conference take place before trial would nevertheless likely have this effect. With one working day left before the scheduled beginning of trial, conducting a status conference before the start of trial is not realistic, and the Defence request to hold one is neither practical nor necessary. The Defence appears to recognise this when it contends that if holding a status conference 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.”²⁷

14. As for the Defence request for the medical examination of the Accused, the Chamber has found that “any issue related to the accused’s fitness to stand trial and/or to enter a plea, must be raised [...] in a manner and timing that would allow the Chamber to analyse the merits without forcing an adjournment.”²⁸

15. The Chamber has requested the Registry to submit a report on the physical and mental

²² Defence Notice, para. 9,

²³ Defence Notice, para. 1 (b).

²⁴ Defence Notice, para. 2.

²⁵ Defence Notice, para. 2.

²⁶ Defence Notice, citing “points (a) and (b)” of the Decision on Adjournment.

²⁷ Defence Notice, para. 16.

²⁸ Decision on Adjournment, para. 36.

health conditions of the Accused.²⁹ Unless the Registry report points to a need for adjourning the start of trial scheduled for 14 July 2020, the trial should begin as scheduled and if necessary, the Chamber can enter a plea on the Accused's behalf, having read the charges to him and having satisfied itself that the Accused understands the nature of the charges, and having given him the opportunity to enter a plea.³⁰ In this connection, the Chamber has noted in a different context that "during the confirmation hearing on 8 July 2019, the accused confirmed he knew and understood the charges",³¹ and that "the proceedings surrounding the confirmation of the original charges and those related to the amendments, especially the litigation of the Defence, demonstrate clearly the ability of the accused to understand the nature of the charges against him and thus to enter a plea."³²

16. The Defence contends that "[e]ven 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".³³

17. However, there is no prejudice to the Accused in adopting this approach. Once the Defence has filed its anticipated challenge to the Accused's fitness to stand trial, or alternatively, on the basis of the Registry's report, the Chamber can decide on the need to appoint one or more experts to assess the Accused before the presentation of evidence begins. In *Ongwen*, Trial Chamber IX adopted a similar course of action. Faced with a request by the Defence in that case to halt the trial opening in order to conduct a psychiatric and/or psychological examination of the accused to ensure he understood the nature of the charges and more broadly that he was fit for trial, the Trial Chamber satisfied itself that the accused understood the nature of the charges brought against him by taking into account, *inter alia*, accused's answers to the questions posed to him in the course of the hearing.³⁴ While the Defence argues that its notice regarding challenge to the Accused's fitness to stand trial "is based on grounds concerning his ability to follow the proceedings, appreciate the

²⁹ E-mail on behalf of the Single Judge of Trial Chamber X dated 9 July 2020 at 16.19.

³⁰ See Article 64(8)(a) of the Rome Statute ("At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.")

³¹ Decision on Adjournment Request, para. 34.

³² Decision on Adjournment Request, para. 35.

³³ Defence Notice, para. 15.

³⁴ See *Prosecutor v. Ongwen*, 'Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen', ICC-02/04-01/15-637-Red, 16 December 2016 ("*Ongwen* Decision"), para. 3 (citing oral decision).

consequences of the proceedings, and testify in his Defence”,³⁵ the reasoning in the *Ongwen* Decision would apply by analogy. In deciding on this course of action, Trial Chamber IX took into consideration that it had not been provided with the expert report that constituted the basis for the request and therefore at that moment the information was insufficient to conclude that the accused in that case might be unfit to stand trial.³⁶

18. A similar reasoning would apply here. The Defence in this case has filed in support of its request a letter from “the Defence’s consultant”³⁷ Dr. Porterfield, where she updates the Defence on the conversation she had with the Accused and shares her clinical impressions regarding his functioning, as well as recommendations for his treatment.³⁸ These recommendations include that his “capacity to contribute to his defence *should be assessed by a clinician*.”³⁹

19. Finally, in *Ongwen*, despite denying the request to stop the trial opening pending the examination of the accused to determine fitness for trial, the Chamber stated that it “may order a psychological and psychiatric examination with a view to assessing Mr Ongwen’s continued fitness to stand trial” and asked the Registry to provide experts’ recommendations and allowed the parties to make submissions on them.⁴⁰

20. Nevertheless, as the *Ongwen* case illustrates, contrary to the Defence contention,⁴¹ a medical determination is not necessarily a precondition for a fitness to stand trial finding. “[T]he question of whether an accused is unfit to stand trial does not concern, in and of itself, whether he or she has particular medical conditions, but whether the accused is able to exercise effectively his fair trial rights in the proceedings against him irrespective of the existence of any such medical condition.” For this reason, “when the Chamber is satisfied, in light of the available information and consideration of all relevant circumstances, that the accused is able to meaningfully exercise his or her fair trial rights, an inquiry on whether the person suffers from any particular medical condition is unnecessary for the Chamber to

³⁵ Defence Notice, para. 17(a).

³⁶ *Ongwen* Decision, para. 3.

³⁷ Defence Notice, para. 5.

³⁸ Annex A, p. 2.

³⁹ Annex A, p. 4. see also p. 4 (“An evaluation of Mr. Al Hassan is best completed in person and with adequate time to speak with him at length [...] A phone call with a clinician who is unable to see or who cannot build rapport with him is likely to yield little information.”)

⁴⁰ *Ongwen* Decision, para. 3.

⁴¹ See Defence Notice, para. 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”) (emphasis in the original). See also p. 8, citing Dr Porterfield (“Mr. Al Hassan’s capacity to contribute to his defense should be assessed by a clinician”).

discharge its obligations to ensure that the accused is fit to stand trial.”⁴² Thus in that case, even once it had received the expert report relied upon by the Defence, the Chamber eventually declined to order a psychological and/or psychiatric examination of Mr Ongwen under rule 135 of the Rules with a view to ascertaining his continued fitness to stand trial.⁴³

21. Therefore, unless the Registry report brings up information unknown to the Prosecution that would establish a clear need for adjourning the start of trial scheduled for 14 July 2020, the trial should begin as scheduled.

VI. Requested Relief

22. For the foregoing reasons, the Defence Notice and Request should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 10th day of July 2020

At The Hague, The Netherlands

⁴² *Ongwen* Decision, para. 13.

⁴³ *Ongwen* Decision, para. 12, 14-17, 25 (having received Defence experts report, Trial Chamber IX nevertheless found unwarranted to order examination of accused under Rule 135 of the Rules).