



Original: English

**No. ICC-01/12-01/18
Date: 22 September 2020**

TRIAL CHAMBER X

**Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane, Judge
Judge Kimberly Prost, Judge**

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 ‘Decision on Associate Counsel’s request for
withdrawal’**

Decision 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 Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

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

Registrar

Peter Lewis

Counsel Support Section

Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber X (the ‘Chamber’) of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Article 64 (2) of the Rome Statute (‘Statute’) and Regulation 78(1) of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on Associate Counsel’s request for withdrawal’.

1. On 7 July 2020, the Chamber was notified of Ms Nicoletta Montefusco’s appointment as Associate Counsel for Mr Al Hassan.¹
2. On 18 September 2020, the Chamber heard the testimony of Prosecution witness P-0193. Ms Montefusco appeared on behalf of Mr Al Hassan. Although the cross-examination was scheduled to start that same day, it was adjourned until Monday 21 September 2020 due to Mr Al Hassan not feeling well.²
3. Also on 18 September 2020, Ms Montefusco filed a request, seeking the Chamber’s authorisation under Regulation 78(1) of the Regulations to withdraw from the position of Associate Counsel as of 21 September 2020 (the ‘Request’).³ The Request was made without the consent of the Defence Lead Counsel (the “Lead Counsel”) or the accused.⁴
4. On 21 September 2020, the testimony of P-0193 resumed. Ms Montefusco was not present in the courtroom and Lead Counsel informed the Chamber that:

[t]he Defence is fully aware that Ms Montefusco requires the authorisation of the Chamber to withdraw, but having filed that request, it is my position that the Defence would not have confidence in Ms Montefusco conducting an examination with the full instructions of the client and that is why Mr Rowse is conducting this cross-examination, based on the instructions of the Defence.⁵

5. Upon the instruction of the Chamber,⁶ Ms Montefusco appeared in Court and indicated [REDACTED].⁷ Lead Counsel confirmed in court that [REDACTED].⁸

¹ Notification of the Appointment of Ms Nicoletta Montefusco as Associate Counsel for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-934.

² Transcript of hearing of 18 September 2020, ICC-01/12-01/18-T-026-CONF-ENG ET, p. 2 and p. 25.

³ Request for withdrawal, ICC-01/12-01/15-1054.

⁴ Request, ICC-01/12-01/18-1054, para. 2.

⁵ Transcript of hearing of 21 September 2020, ICC-01/12-01/18-T-027-CONF-ENG ET, p. 3.

⁶ Transcript of hearing of 21 September 2020, ICC-01/12-01/18-T-027-CONF-ENG ET, pp. 3-4.

⁷ Transcript of hearing of 21 September 2020, ICC-01/12-01/18-T-027-CONF-ENG ET, p. 5.

6. Later on that same date, Lead Counsel sent an email to the Chamber indicating that neither Lead Counsel nor the accused oppose the Request, that an alternative counsel had been identified and that his/her appointment was pending with the Registry's Counsel Support Section.⁹
7. The Chamber notes the positions expressed in court and by email by Ms Montefusco and by Lead Counsel respectively and considers that in these circumstances it is not feasible for Ms Montefusco to continue to represent the accused. Additionally, the Chamber has regard to the fact that Lead Counsel continues to represent the accused, she is not opposed to the Request and Mr Al Hassan has now been informed of Ms Montefusco's proposed withdrawal and he does not oppose it either.¹⁰ Importantly the Chamber has also taken into account that an alternative associate counsel has been identified which is essential for the continuity and efficiency of the proceedings. Accordingly, while it is regrettable this issue has arisen now in the midst of trial, the Chamber considers that no undue prejudice would arise by granting the Request given the combined circumstances.
8. As acknowledged in the Request,¹¹ the Chamber reminds Ms Montefusco that she remains bound by her obligations under articles 8, 15 and 17-18 of the Code of Professional Conduct for Counsel as well as any provisions of the Statute and the Rules of Procedure and Evidence relating to confidentiality.
9. The Chamber notes however that Ms Montefusco is the fourth associate counsel to withdraw from the case since March 2020.¹² The Request was submitted without the consent of the accused or Lead Counsel and sought that withdrawal be granted within one working day, despite the fact that Ms Montefusco was representing the accused in court on the date of submission of the Request.

⁸ Transcript of hearing of 21 September 2020, ICC-01/12-01/18-T-027-CONF-ENG ET, p. 6.

⁹ Email from the Defence to Trial Chamber X Communications at 15:42.

¹⁰ Request, ICC-01/12-01/18-1054 and Transcript of hearing of 21 September 2020, ICC-01/12-01/18-T-027-CONF-ENG ET during which the accused was present. *See also* Email sent by Defence Lead Counsel to Trial Chamber X Communications 21 September 2020, at 15:42.

¹¹ Request, ICC-01/12-01/18-1054, para. 3.

¹² Decision on Associate Counsel's Request to Withdraw, 6 March 2020, ICC-01/12-01/18-637; Decision on Associate Counsel's Request to Withdraw, 5 June 2020, ICC-01/12-01/18-830; Decision on Ms Marie-Hélène Proulx's request for withdrawal, 2 July 2020, ICC-01/12-01-18-920.

10. While the Request and preceding similar requests have had no adverse impact on the proceedings so far, the Chamber is increasingly concerned by these repeated unusual changes of associate counsel, and their potential impact on the trial, noting that the presentation of evidence has now started and witnesses are scheduled to testify continuously in the coming months.
11. Pursuant to Article 64(2) of the Statute, the Chambers considers that it falls within its responsibilities to anticipate and address any issues that may impact the fair and expeditious conduct of the proceedings, including matters concerning the rights of the accused and his legal representation.
12. Therefore, in light in particular of the recurring withdrawals of associate counsel, the Chamber finds it appropriate to make inquiries as to whether the accused has any concerns as to the adequacy of his representation that he wishes to convey to the Chamber. Considering that the Chamber finds it inappropriate to communicate directly with the accused at this stage, the Chamber directs the Registrar to appoint, as soon as feasible, an independent counsel whose sole mandate is to engage with Mr Al Hassan with a view of establishing whether he wishes to raise any issue related to his legal representation. Independent counsel should be a senior and disinterested counsel, authorized to appear before the ICC, with considerable experience of actual litigation before international criminal courts and tribunals.
13. Should any issue be identified by the independent counsel, he or she shall report to the Trial Chamber, on an *ex parte* basis, within 15 days from his or her appointment. The Registry is instructed to provide all necessary assistance to appointed independent counsel, including by allowing independent counsel to physically visit Mr Al Hassan at the Detention Centre, if required.

FOR THESE REASONS, THE CHAMBER HEREBY

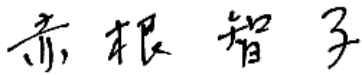
GRANTS the Request, in accordance with paragraph 7; and

DIRECTS the Registrar to appoint an independent counsel as soon as feasible.

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, 22 September 2020

At The Hague, The Netherlands