



**Original: English**

No. **ICC-01/12-01/18**  
Date of original: **28 July 2020**  
Date: **5 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 redacted version of**

**Decision on Defence request for reconsideration and leave to appeal the Decision  
on the Defence Adjournment Request**

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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**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*, issues this ‘Decision on Defence request for reconsideration and leave to appeal the Decision on the Defence Adjournment Request’.

## **I. Procedural history and submissions**

1. On 6 January 2020, the Chamber set the date for the commencement of trial at 14 July 2020, with the presentation of evidence to begin on 25 August 2020, and adopted a calendar leading up to this date.<sup>1</sup> Some extensions to deadlines set in this decision were later granted by the Chamber at the request of the Office of the Prosecutor (the ‘Prosecution’), including a postponement to the Prosecution’s final disclosure deadline from 14 April to 12 May 2020,<sup>2</sup> and the Prosecution’s submission of its Trial Brief from 14 to 30 April and then again to 18 May 2020.<sup>3</sup>
2. On 16 June 2020, the Defence filed a request to terminate the proceedings and seeking the immediate release of Mr Al Hassan (the ‘Termination Motion’).<sup>4</sup>

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<sup>1</sup> Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548.

<sup>2</sup> Decision on the Prosecution request for extension of deadlines relating to the disclosure of evidence and a postponement of the starting date for trial, 20 March 2020, ICC-01/12-01/18-677.

<sup>3</sup> Decision on Prosecution request for a variation of the time limit to file Trial Brief, 5 March 2020, ICC-01/12-01/18-629; Decision on the Prosecution request for a further extension of the time limit to file the Trial Brief, 23 April 2020, ICC-01/12-01/18-770.

<sup>4</sup> Defence Request to terminate the proceedings, ICC-01/12-01/18-885-Conf-Exp-Corr (confidential *ex parte*, available only to the Defence and Prosecution; with confidential Annexes A, B and G to I, confidential *ex parte* Annex C (available only to the Prosecution, Registry and Defence), and confidential *ex parte* Annexes D to F and J (available only to the Prosecution and Defence); a confidential redacted version of the main filing was notified simultaneously, ICC-01/12-01/18-885-Conf-Red; these filings were all notified on 17 June 2020; a corrigendum of the main filing was later notified on 25 June 2020; a public redacted version of the main filing was also later notified on 26 June 2020, ICC-01/12-01/18-885-Corr-Red but was subsequently reclassified as confidential following a request from the Prosecution and a new public redacted version was later notified on 17 July 2020, ICC-01/12-01/18-885-Corr-Red2; a corrected version of Annex B to the Termination Motion was also filed, in accordance with the decision of the Chamber). *See also* Decision on the Defence request for extension of the time limit and page limit for the filing of pre-trial motions, 29 May 2020, ICC-01/12-01/18-833 (reclassified public on 2 June 2020), granting a Defence request to postpone the deadline for filing of the Termination Motion to 16 June 2020, and partially granting a request for extension of page limit to 50 pages.

3. On 3 July 2020, the Defence filed a request seeking the adjournment of the start of the trial until 15 October 2020 ('Adjournment Request').<sup>5</sup>
4. On 6 July 2020, the Chamber issued its decision on a Prosecution request in relation to the Termination Motion, *inter alia*, setting a timeframe for responses and a reply to the Termination Motion.<sup>6</sup>
5. On 7 July 2020, the Prosecution filed its response to the Adjournment Request, not opposing, in principle, the Adjournment Request.<sup>7</sup>
6. On that same date, the legal representatives for victims (the 'LRVs') filed their responses to the Adjournment Request, expressing very generally their serious reservations as to the legal basis, pertinence and clarity of the Adjournment Request, but leaving the decision to the Chamber.<sup>8</sup>
7. On 8 July 2020, the Chamber rejected the Defence's Adjournment Request, confirming the trial schedule and thus the commencement of trial on 14 July 2020 (the 'Impugned Decision').<sup>9</sup>
8. On 9 July 2020, the Defence filed a notice of its intention to raise the issue of Mr Al Hassan's fitness to stand trial (the 'Defence Notice').<sup>10</sup>
9. On 10 July 2020, upon instruction of the Chamber, the Prosecution and the Registry filed observations to the Defence Notice.<sup>11</sup>

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<sup>5</sup> Defence adjournment request (with confidential *ex parte* Annex A available only to the Registry and Defence), ICC-01/12-01/18-927-Conf-Exp. A confidential redacted version was filed on that same date.

<sup>6</sup> Corrigendum of 'Decision on Prosecution requests concerning the Defence motion to terminate the proceedings', ICC-01/12-01/18-932-Conf-Corr (corrigendum issued on 8 July 2020).

<sup>7</sup> Réponse de l'Accusation à la requête de la Défense demandant un ajournement du procès, ICC-01/12-01/18-935-Conf.

<sup>8</sup> Réponse à la requête d'ajournement de la Défense (ICC-01/12-01/18-927-Conf-Red), 7 July 2020.

<sup>9</sup> Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Conf.

<sup>10</sup> Defence notice of its intention to raise unfitness to stand trial and request for a status conference, 9 July 2020, ICC-01/12-01/18-942-Conf.

<sup>11</sup> 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; Registry's Observations on the "Defence notice of its intention to raise unfitness to stand trial and request for a status conference" (ICC-01/12-01/18-942-Conf), ICC-01/12-01/18-945-Conf-Exp (ex parte available only to the Defence and the Registry). A confidential redacted version was filed on that same date.

10. On 13 July 2020, the Chamber issued its ‘Decision on the Defence notice on Mr Al Hassan’s unfitness to stand trial’ (the ‘Defence Notice Decision’), rejecting the Defence’s request to convene a status conference, bearing in mind, *inter alia*, the scheduled commencement of trial on 14 July 2020.<sup>12</sup>
11. On that same day, the Defence filed a request for reconsideration, and in the alternative, leave to appeal, the Impugned Decision (the ‘Request’).<sup>13</sup> The Defence seeks leave to appeal in relation to the following issues:
  - a. whether the Chamber erred, or abused its discretion, in finding that the time and opportunities to the Defence to conduct investigations were adequate and proportionate to the size and complexity of the case, and therefore failed to ensure equality of arms (‘First Issue’); and
  - b. whether the Chamber erred, or abused its discretion, by failing to take appropriate steps to ensure that Mr Al Hassan was in a position to effectively participate in proceedings, before the commencement of the trial (‘Second Issue’).<sup>14</sup>
12. On 14 July 2020, the trial against Mr Al Hassan commenced.<sup>15</sup>
13. At the start of the trial hearing, the Defence verbally raised a motion asserting its doubt of the accused’s fitness to stand trial and requesting the Chamber to order a qualified examination (the ‘Fitness Motion’). The Defence referred during the hearing to a written motion which was notified that same day at 14:18.<sup>16</sup> The Prosecution orally opposed the Fitness Motion.<sup>17</sup>

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<sup>12</sup> Decision on the Defence notice on Mr Al Hassan’s unfitness to stand trial, ICC-01/12-01/18-952-Conf.

<sup>13</sup> Defence request for reconsideration of the Decision on the Defence Adjournment Request, ICC-01/12-01/18-953-Conf-Exp (with confidential *ex parte* Annexes A and B and confidential Annex C). A confidential redacted version was filed on that same date.

<sup>14</sup> Request, ICC-01/12-01/18-953-Conf-Red, para. 1.

<sup>15</sup> Transcript of hearing of 14 July 2020, ICC-01/12-01/18-T-017-CONF-ENG.

<sup>16</sup> ICC-01/12-01/18-T-017-CONF-ENG, p. 23, line 2 to p. 25, line 17. *See also* Defence request regarding Mr. Al Hassan's fitness, ICC-01/12-01/18-956-Conf (with Confidential *ex parte* Annex A only available to the Registry and the Defence). *See* ICC-01/12-01/18-T-017-CONF-ENG, p. 23, line 2 to p. 25, line 17.

<sup>17</sup> ICC-01/12-01/18-T-017-CONF-ENG, p. 26, line 12 to p.27, line 21.

14. In the course of the same hearing, the Chamber rendered the following oral ruling, deciding, among other issues, to reject the request for reconsideration, with reasons to follow:

[...] En ce qui concerne la requête en reconsidération, la Chambre relève que cette requête a été notifiée hier à 17h53. Considérant, en outre, son objet et son contenu, elle n'a pas estimé nécessaire de recueillir les réponses du Bureau du Procureur et des représentants des victimes. La Chambre rejette la requête et rendra les motifs de sa décision en temps utile. En ce qui concerne la requête aux fins d'autorisation de faire appel, la Chambre en prend bien note et rendra sa décision en temps voulu, après avoir reçu les réponses des parties et participants.

En ce qui concerne, enfin, la requête orale de ce matin qui, je le rappelle, reprend en substance les arguments développés dans les écritures récemment déposées par [...] la Défense, la Chambre réitère les considérations qu'elle a développées dans la décision n°952, qui a été rendue hier, et les reprend à présent pour former son jugement.

Premièrement, la Chambre réitère, en reprenant la jurisprudence de la Chambre d'appel, que bien que la présente requête est particulièrement tardive, elle est déposée... elle est disposée à examiner le bien-fondé des arguments concernant l'existence des circonstances exceptionnelles justifiant le dépôt tardif d'une telle requête. Comme la Chambre l'a indiqué dans le paragraphe 26 de la décision 952, la Chambre ne voit pas pourquoi la Défense n'aurait pas pu introduire une requête à l'un stade antérieur.

Deuxièmement, la Chambre réitère que le dossier de l'affaire contient de nombreux exemples démontrant que le conseil de la Défense a pu recevoir des instructions spécifiques de M. Al Hassan sur un nombre important et varié de questions et en particulier sur son état de santé— je me réfère, ici, au paragraphe 27 de la décision de la décision 952.

Troisièmement, la Chambre considère que la requête qui fait implicitement référence à la règle 135 du Règlement de procédure et de preuve est maintenant tardive. Comme la [...] Chambre l'a indiqué au paragraphe 29 de la décision 952 et je cite la décision en anglais: *'Should the Chamber entertain the Defence request at this stage to discuss the present issue, the Defence would, in effect, be forcing the Chamber to postpone the commencement of trial. The Chamber reiterates in the strongest possible terms that this Chamber will not permit such tactics to be used in the present trial proceedings.'*

Fin de la citation. [...] Par ces raisons, et considérant les observations et les informations qui lui ont été présentées, la Chambre conclut qu'en état, il ne lui a pas été présenté d'informations suffisantes pour considérer que M. Al Hassan est inapte à être jugé. La Chambre déterminera elle-même si M. Al Hassan comprend effectivement la nature des charges. Néanmoins, la Chambre a la possibilité d'ordonner un examen médical, conformément à la règle 135 du Règlement. Par conséquent, elle enjoint le Greffe, en consultation avec les parties, de faire des recommandations avant le 24 juillet 2020 en ce qui concerne des experts qui pourraient effectuer cet examen. La Chambre enjoint également aux parties de présenter leurs observations [...] sur les recommandations du Greffe le 24 juillet 2020 au plus tard.<sup>18</sup>

15. On 17 July 2020, the Prosecution filed its response to the Request (the 'Response').<sup>19</sup>

<sup>18</sup> Transcript of hearing of 14 July 2020, ICC-01/12-01/18-T-017-CONF-FRA, p. 28, line 11 to p. 29, line 25. For an English version of the ruling, see Transcript of hearing of 14 July 2020, ICC-01/12-01/18-T-017-CONF-ENG, p. 30, line 25 to p. 32, line 28.

<sup>19</sup> Prosecution response to Defence request for leave to appeal the Decision on the Defence Adjournment Request (ICC-01/12-01/18-953-Conf-Red), ICC-01/12-01/18-964-Conf, paras 2-4.

16. On 23 July 2020, the Defence filed a request for leave to reply to the Prosecution's Response, seeking to reply on one issue, namely 'whether the Prosecution's arguments, as to whether the first and second issue arise from the Decision, focus improperly on the content and merits of the Decision, rather than the objective existence of "an identifiable subject or topic requiring a decision for its resolution"'.<sup>20</sup>
17. On 24 July 2020, the LRVs filed their response to the Request.<sup>21</sup>

## II. Analysis

### *i. Preliminary matters*

18. The Chamber considers that it would not be assisted by submissions on any of the issue identified in the Defence request for leave to reply and therefore rejects it in its entirety.
19. The Chamber also notes that the LRVs response was filed passed the deadline to reply to a request for leave to appeal. Accordingly, it has not considered their submissions.

### *ii. Introduction*

20. According to the oral ruling of 14 July 2020 quoted above, the Chamber will hereby give its reasons for rejecting the reconsideration motion contained in the Request. It will also examine whether the Defence has met the requirements under Article 82(1)(d) of the Rome Statute (the 'Statute') in relation to the First Issue and Second Issue identified above.
21. 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

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<sup>20</sup> Defence request for leave to reply to "Prosecution response to Defence request for leave to appeal the Decision on the Defence Adjournment Request (ICC-01/12-01/18-953- Conf-Red)" - ICC-01/12-01/18-964-Conf, ICC-01/12-01/18-971-Conf, para. 1.

<sup>21</sup> Réponse à la demande de la Défense d'interjeter appel de la Décision relative à la demande de la Défense sur l'ajournement du procès (ICC-01/12-01/18-953), ICC-01/12-01/18-975-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.<sup>22</sup>

22. The Chamber incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Statute, as set out in previous decisions.<sup>23</sup>

*iii. Request for reconsideration*

23. The Defence submits that the Chamber should reconsider the Impugned Decision on the basis of new or previously unavailable information in terms of Mr Al Hassan's fitness to stand trial. Referring to its Fitness Notice, the Defence submits that 'there is new and previously unavailable information' regarding Mr Al Hassan's fitness to stand trial.<sup>24</sup> The Defence submits that a medical examination is required and requests that the commencement of proceedings be adjourned in order to allow for these issues to be addressed.<sup>25</sup> The Defence therefore states that the new information on Mr Al Hassan's fitness to stand trial requires the Chamber to reconsider the Impugned Decision, noting particularly that 'the right to expeditious proceedings cannot take precedence, because the *sine qua non* of any proceedings is that the defendant must be in a position to exercise his right to effectively follow, and participate in such proceedings'.<sup>26</sup>
24. The Prosecution does not make any submissions in this regard, noting that the Chamber already dismissed this portion of the Request.<sup>27</sup>

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<sup>22</sup> 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; Decision on the Prosecution's request for reconsideration regarding the presentation of opening statements, 9 June 2020, ICC-01/12-01/18-867, para. 5.

<sup>23</sup> 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; Decision on Defence request for leave to appeal the Single Judge's 'Decision on Defence motion seeking disclosure of Prosecution's correspondence with national authorities', 8 May 2020, ICC-01/12-01/18-795-Conf; Decision on Defence request for leave to appeal the 'Decision on the conduct of proceedings', 28 May 2020, ICC-01/12-01/18-831.

<sup>24</sup> Request, ICC-01/12-01/18-953-Conf-Red, para. 8.

<sup>25</sup> Request, ICC-01/12-01/18-953-Conf-Red, para. 9(j).

<sup>26</sup> Request, ICC-01/12-01/18-953-Conf-Red, para. 10.

<sup>27</sup> Response, ICC-01/12-01/18-964-Conf, para. 2.

25. The Chamber notes that the Defence focuses its submissions on newly or previously unavailable information that requires reconsideration.
26. The Chamber notes that many of the arguments made by the Defence in the Request were already contained in the Defence Notice of 9 July 2020, which the Chamber ruled upon on 13 July 2020, as well as in the Defence Fitness Motion, ruled upon orally by the Chamber on 14 July 2020 in court. Bearing in mind this parallel litigation and similar and often indistinguishable allegations, the current Request cannot be analysed in a vacuum, but must take into consideration the concurrent motions filed by the Defence on the eve of the trial commencement.
27. As noted in the Impugned Decision, at that time the Chamber had not been seized of any request related to the fitness of the accused, despite the Defence's implicit submissions in this regard. Accordingly, in the Impugned Decision the Chamber decided that the 'prospect of a possible motion of this nature, not yet before it, cannot warrant the adjournment of trial.'<sup>28</sup>
28. Thus, in order to determine whether reconsideration is warranted, the Chamber needs to analyse whether the information or arguments presented by the Defence are new and would require the Chamber to exceptionally reconsider the Impugned Decision.
29. In particular, the Chamber notes that in its Defence Notice Decision rendered on 13 July 2020, and referred to in its oral ruling of 14 July 2020, it found that the Defence had 'failed to raise the issue of Mr Al Hassan's fitness to stand trial in a timely manner'.<sup>29</sup> The Chamber specifically referred to examples that demonstrated that in the period leading to the start of trial, the Defence was able to communicate with the accused, to receive instructions and to give him advice. In particular, the Chamber determined that it failed to see why the Defence could not have acted in relation to the accused's fitness at an earlier point.<sup>30</sup> The Chamber also decided that even considering Dr Kate Porterfield's report referred

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<sup>28</sup> Impugned Decision, ICC-01/12-01/18-940-Conf, para. 36.

<sup>29</sup> Defence Notice Decision, ICC-01/12-01/18-952-Conf, para. 29.

<sup>30</sup> Defence Notice Decision, ICC-01/12-01/18-952-Conf, para. 26.

to in the Defence Notice, it ‘ha[d] not been presented with sufficient information to conclude that Mr Al Hassan is unfit to stand trial’.<sup>31</sup>

30. The above considerations apply to the issue of reconsideration at hand. First, and although the Defence did not have the aforementioned information from Dr Kate Porterfield at the time it made its submissions in the context of the Impugned Decision, the Defence fails to demonstrate why it did not raise the issue of fitness of the accused in a timely manner, and specifically in the context of the Impugned Decision. Second, aside from the untimeliness, the nature and content of the information contained in the Request are insufficient to conclude that Mr Al Hassan is unfit to stand trial. Accordingly, the Chamber considers that the exceptional avenue of reconsideration and particularly the adjournment of the trial are not warranted.

*iv. The First Issue*

31. The Defence submits that the Impugned Decision appears to place too great an emphasis on issues of expedition, and fails to recognise fundamental issues concerning equality of arms. It specifically refers to the alleged significant imbalance in investigative opportunities between the Prosecution and the Defence and the absence of counter-balancing measures in form of disclosure or assistance from third parties. The Defence submits it has been unable to conduct crucial [REDACTED] that the Impugned Decision specifically envisages that no such investigations will occur before the start of testimonies on 25 August 2020. The Defence further submits it has been unable to investigate for reasons beyond its control. The Defence therefore argues that the Chamber’s determination that trial should commence before investigative solutions are implemented, constitutes an unreasonable exercise of the Chamber’s discretion.<sup>32</sup>
32. As regards the remaining criteria under Article 82(1)(d) of the Statute, the Defence submits that both the First Issue and the Second Issue will significantly affect the fair and expeditious conduct of proceedings, particularly the accused’s right to have adequate time and facilities for the preparation of the defence. The

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<sup>31</sup> Defence Notice Decision, ICC-01/12-01/18-952-Conf, para. 42.

<sup>32</sup> Request, ICC-01/12-01/18-953-Conf-Red, paras 14-23.

Defence submits that the likelihood that the Defence will be required to seek further adjournments to the trial to conduct investigations or to recall witnesses, will cause prejudice to the expeditious conduct of proceedings and increase the burden on all parties and participants.<sup>33</sup> It submits that both the First Issue and the Second Issue will have an impact on the outcome of the trial, by allowing the commencement of substantive hearings at a point where the accused's capacity to enter an informed plea and to instruct his lawyers and effectively follow proceedings is at issue. It submits this could lead to a mistrial.<sup>34</sup> The Defence further argues that an immediate resolution by the Appeals Chamber would materially advance the proceedings, given that the Defence will not be able to investigate prior to the testimony of the first block of witnesses and [REDACTED].<sup>35</sup>

33. The Prosecution submits that the First Issue is based on a misunderstanding and partial account of the Impugned Decision. In its view, the Defence mischaracterises the Impugned Decision, which in light of the current travel restrictions and COVID-19 measures, did not consider that adjournment would necessarily allow the Defence to conduct investigations, but instead would allow calling available evidence at this stage, allowing the Defence to carry out investigations at a later stage. The Prosecution argues that the Defence attempts to re-litigate arguments and fails to take into account the Chamber's specific findings on the Defence's ability to investigate.<sup>36</sup>
34. As regards the remaining criteria under Article 82(1)(d) of the Statute, and in particular for the First Issue, the Prosecution submits that the Impugned Decision was issued precisely in order to ensure the expeditious conduct of proceedings and that the Defence's submission that the 'stop-start' approach would prejudice expeditious conduct of proceedings and burden the parties, is mere speculation. The Prosecution also submits that the Impugned Decision took into consideration the Defence's ability to investigate prior to and during the COVID-19 situation,

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<sup>33</sup> Request, ICC-01/12-01/18-953-Conf-Red, paras 31-33.

<sup>34</sup> Request, ICC-01/12-01/18-953-Conf-Red, para. 34.

<sup>35</sup> Request, ICC-01/12-01/18-953-Conf-Red, paras 35-37.

<sup>36</sup> Response, ICC-01/12-01/18-964-Conf, paras 3, 7-14.

including by discussing such matters in *ex parte* status conferences, the nature of the evidence to be heard as of 25 August 2020, and finally, allowing the Defence to seek adjournments in the future.<sup>37</sup>

35. The Chamber considers that the First Issue misconstrues the Impugned Decision by taking into consideration only part of the Chamber's reasoning. Although the Chamber took into account the expeditious conduct of proceedings, it also kept in mind other factors, including the current travel restrictions and COVID-19 related measures, as well as the nature of the evidence of witnesses scheduled to be called first in trial, including the possibility of the Defence to conduct investigations prior to their testimonies.
36. Moreover, the Chamber disagrees with the Defence's submissions that the Chamber failed to consider the equality of arms. In particular the Chamber determined as follows in the Impugned Decision:

Instead, the Chamber is of the view that calling available evidence at this stage is the most efficient use of time [REDACTED]. At that stage the Defence may revert to the Chamber to request an adjournment, if necessary, or it may indeed be a natural point for a break in proceedings which will also accommodate such [REDACTED] investigations. Although the Chamber agrees that it is preferable to avoid recalling Prosecution witnesses at a later stage, the Chamber again emphasises its request for agreement on 10 witnesses where the likelihood of this is minimal. If in any event the need arises this is an alternative that could be available for witnesses to be determined on a case-by-case basis.<sup>38</sup>

37. Thus, in the Impugned Decision, and contrary to the Defence's submissions, the Chamber specifically recognised the possibility to allow the Defence to carry out investigations [REDACTED], balancing the need for expeditious conduct of proceedings and the accused's right to carry out necessary investigations. The Defence therefore simply disagrees with the Chamber's determination, and has failed to demonstrate an arbitrary or abusive use of discretion.
38. Accordingly, the First Issue is not appealable and does not meet the requirements of Article 82(1)(d) of the Statute.

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<sup>37</sup> Response, ICC-01/12-01/18-964-Conf, paras 24-28, 33.

<sup>38</sup> Impugned Decision, ICC-01/12-01/18-940-Conf, para. 30.

*v. The Second Issue*

39. The Defence submits that the Second Issue arises from the Impugned Decision as it relates to Mr Al Hassan's prolonged denial to in-person visits from his counsel (for 16 weeks after the start of the COVID-19 restrictions) and its link to fitness and treatment issues. The Defence also submits that the Chamber failed to acknowledge and address the link [REDACTED] (particularly the lack of family visits) [REDACTED].<sup>39</sup>
40. The Prosecution submits that the Second Issue is speculative and amounts to mere disagreement with the Impugned Decision. The Prosecution submits that the Defence fails to explain why the in-person visits were necessary, despite having video-link communication and having received specific instructions from the accused, including on sensitive medical and personal issues. The Prosecution states that the Defence fails to note that the Chamber found that physical meetings would take place on 8 July 2020; that is seven days before trial and seven weeks before the start of evidence. The Prosecution submits that the Defence argument that the Chamber found the lack of family visits irrelevant is a mere disagreement with a more nuanced finding from the Chamber. Referring to the Fitness Notice Decision, the Prosecution submits that the Chamber has already found that it has not been presented with sufficient information to conclude that Mr Al Hassan is unfit to stand trial. The Prosecution further refers to the oral ruling of 14 July 2020, where the Chamber instructed the Registry, in consultation with the parties, to make recommendations as regards experts who may carry out a medical assessment of the accused.<sup>40</sup>
41. As regards the remaining criteria under Article 82(1)(d) of the Statute, the Prosecution submits that Mr Al Hassan has not been prevented from communicating freely with his counsel. Further, as regards family visits, the Chamber remains seized and encouraged the use of videoconference to facilitate contact. Moreover, in relation to Mr Al Hassan's state of health, the Prosecution submits this is yet to be established and it would thus be premature to raise this

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<sup>39</sup> Request, ICC-01/12-01/18-953-Conf-Red, paras 24-30.

<sup>40</sup> Response, ICC-01/12-01/18-964-Conf, paras 3, 15-22.

in appeal. Lastly, the Prosecution notes that the accused was able to attend trial and understood the charges against him.<sup>41</sup>

42. The Chamber considers that the Second Issue is not an appealable issue, but a mere disagreement with the Chamber's conclusions in the Impugned Decision. The Second Issue, as formulated by the Defence, misconstrues the Chamber's findings, which firstly recognised that the Defence and Mr Al Hassan had been able to communicate and receive/give instructions and advice, despite the lack of in-person visits. Moreover, the Chamber did not disregard, as suggested by the Defence, the importance of family visits, but instead affirmed their importance and remained seized of the matter, albeit noting this alone did not warrant the adjournment of trial.<sup>42</sup>
43. The Second Issue is also repetitive of allegations made in relation to the request for reconsideration analysed above and reflects the Defence's disagreements with the abovementioned and related Chamber's decisions on the accused's fitness to stand trial. The Second Issue is thus an attempt to litigate anew or in parallel issues either settled by the Chamber or currently pending before the Chamber, including the Termination Motion and the Regulation 135 medical examination.
44. Accordingly, the Second Issue is not an appealable issue and does not meet the requirements of Article 82(1)(d) of the Statute.

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<sup>41</sup> Response, ICC-01/12-01/18-964-Conf, paras 29-31, 34-35.

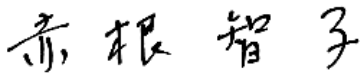
<sup>42</sup> Impugned Decision, ICC-01/12-01/18-940-Conf, paras 18-19.

**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, 28 July 2020  
At The Hague, The Netherlands