



Original: English

No. ICC-01/12-01/18

Date or original: 1 September 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 Rule 134(2) submissions

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

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 Article 64(6)(f) of the Rome Statute, issues the following ‘Decision on Defence Rule 134(2) submissions’.

A. 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.¹ Specifically, the Chamber ‘set a deadline for the filing of all motions which require resolution prior to the commencement of trial’.² The deadline, originally set at 1 June 2020, was later extended at the request of the Defence to 10 June 2020 for any challenges under Rule 134 of the Rules of Procedure and Evidence (the ‘Rules’), and to 16 June 2020 for one specific forthcoming pre-trial motion.³
2. On 10 June 2020, the Defence filed its Rules 134(1) observations.⁴
3. 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’).⁵

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

² Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548, para. 19.

³ 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.

⁴ Defence Rule 134(1) observations, ICC-01/12-01/18-870-Conf-Exp (available to the Defence and Registry only; a confidential redacted version was filed that same day and a public redacted version was filed on 15 July 2020).

⁵ Defence Request to terminate the proceedings, ICC-01/12-01/18-885-Conf-Exp (confidential *ex parte*, available only to the Defence and Prosecution; with ten confidential and confidential *ex parte* Annexes C; 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; corrigenda of the main filing were later notified on 25 June 2020, ICC-01/12-01/18-885-Conf-Exp-Corr and 24 August 2020, ICC-01/12-01/18-885-Conf-Red-Corr; public redacted versions of the main filing were also later notified and subsequently reclassified as confidential ; a final public redacted version was later notified on 29 July 2020, ICC-01/12-01/18-885-Corr-Red3; a corrected version of Annex B to the Termination Motion was also filed, in accordance with the decision of the Chamber)..

4. On 22 June 2020, the Office of the Prosecutor (the ‘Prosecution’),⁶ and the Registry⁷ filed their observations on the Defence Rule 134(1) observations.
5. On 25 June 2020, with the leave of the Chamber, the Defence filed its reply to the Registry’s observations on the Defence Rule 134(1) observations.⁸
6. On 3 July 2020, the Defence filed a request seeking the adjournment of the start of the trial until 15 October 2020 (‘Adjournment Request’).⁹
7. On 8 July 2020, the Chamber issued the ‘Decision on Defence Adjournment Request’, rejecting the Defence request to adjourn the proceedings, and thereby confirming that the trial would commence on 14 July 2020.¹⁰
8. On 9 July 2020, the Defence filed the ‘Defence notice of its intention to raise unfitness to stand trial and request for a status conference’ (the ‘Defence Notice’).¹¹
9. On 13 July 2020, the Chamber issued the ‘Decision on the Defence notice on Mr Al Hassan’s unfitness to stand trial’ (the ‘Defence Notice Decision’) in which it rejected the Defence Notice.¹²

⁶ Prosecution response to Defence rule 134(1) motion, ICC-01/12-01/18-892-Conf (a public redacted version was filed on 15 July 2020).

⁷ Registry’s Observations on the Defence Rule 134(1) Observations, ICC-01/12-01/18-891-Conf-Exp (with confidential *ex parte* Defence and Registry only annex).

⁸ Defence Reply to “Registry’s Observations on the Defence Rule 134(1) Observations (ICC-01/12-01/18-870-Conf-Exp)”, ICC-01/12-01/18-891-Conf-Exp, ICC-01/12-01/18-905-Conf-Exp (with confidential *ex parte* Annex A; the filing was reclassified as confidential on 26 June 2020). *See also* E-mail from the Registry to TCX Communications on 25 June 2020 at 17:15; E-mail from TCX Communications to the Defence on 26 June 2020 at 13:24 and E-mail from TCX Communications to the Registry on 26 June 2020 at 13:30.

⁹ Defence adjournment request, ICC-01/12-01/18-927-Conf-Exp (with confidential *ex parte* Annex A available only to the Registry and Defence; a confidential redacted version was filed on that same date).

¹⁰ Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Conf.

¹¹ Defence notice of its intention to raise unfitness to stand trial and request for a status conference, ICC-01/12-01/18-942-Conf.

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

10. On the same date, the Defence filed a request seeking reconsideration, or in the alternative leave to appeal, the Decision on Defence Adjournment Request.¹³
11. On 14 July 2020, the trial against Mr Al Hassan commenced.¹⁴ At the commencement of the hearing, the Presiding Judge, in accordance with Rule 134(2) of the Rules, asked the parties whether they wished to raise objections or make observations on the conduct of proceedings subsequent to the confirmation hearing, other than those they had already made and those that they were not able to raise before the aforesaid deadline set by the Chamber. The Presiding Judge reminded the parties that pursuant to this provision, ‘such objections may not be raised in the proceedings without leave of the Chamber’.¹⁵ Upon submissions from the Defence¹⁶ and the Prosecution,¹⁷ the Presiding Judge set the deadline for additional submissions to 10 August 2020.¹⁸
12. On 28 July 2020, the Chamber rendered its ‘Decision on Defence request for reconsideration and leave to appeal the Decision on the Defence Adjournment Request’.¹⁹
13. On 10 August 2020, the Defence filed submissions pursuant to Rule 134(2) of the Rules (the ‘Defence Rule 134(2) Submissions’), referring in particular to three main issues that in its view have led to unfairness in the proceedings, namely: (a) issues related to insufficient and inadequate opportunity to prepare the Defence case; (b) issues related to Mr Al Hassan’s health; and (c) issues of impartiality.²⁰

¹³ Defence request for reconsideration of the Decision on the Defence Adjournment Request, ICC-01/12-01/18-953-Conf-Exp (confidential *ex parte* available only to the Defence and Registry; a confidential redacted version was notified simultaneously, ICC-01/12-01/18-953-Conf-Red).

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

¹⁵ ICC-01/12-01/18-T-017-CONF-ENG, p. 41, lines 1-7.

¹⁶ ICC-01/12-01/18-T-017-CONF-ENG, p. 41, lines 14 to p. 42, line 3; p. 42, lines 19-25; p. 43, lines 1-4.

¹⁷ ICC-01/12-01/18-T-017-CONF-ENG, p. 41, line 9; p. 42, lines 13-15.

¹⁸ ICC-01/12-01/18-T-017-CONF-ENG, p. 43, lines 6-14.

¹⁹ ICC-01/12-01/18-983-Conf. The Defence’s request for reconsideration was rejected orally at the hearing on 14 July 2020, with written reasons placed on the record by way of this decision.

²⁰ Defence Submissions following Trial Chamber’s oral order of 14th of July, ICC-01/12-01/18-993-Conf (with confidential *ex parte* Annex B, available to the Prosecution and Defence only and Annex B available to the Registry and Defence only).

14. On 21 August 2020, the Prosecution filed its response (the ‘Response’), arguing that the Defence Rule 134(2) Submissions should be dismissed because they: (a) repeat arguments filed previously; (b) raise issues already settled by the Chamber or pending; and (c) fail to show that the Defence has been prejudiced such that this has impacted the accused’s right to a fair trial.²¹
15. On that same date, the Chamber rendered a decision appointing experts for the purpose of Rule 135 examination of the accused.²²
16. On 24 August 2020, the Chamber rendered a decision rejecting the Defence’s Termination Motion and related requests.²³

B. Analysis

17. At the outset the Chamber reiterates that pursuant to the directions provided by the Presiding Judge on 14 July 2020, the Chamber will not entertain any arguments or issues raised by the Defence that ‘come back to the same subject in [this] new written submission’.²⁴ As noted by the Presiding Judge, although the Chamber will not prevent the Defence from addressing new issues as they arise, it will not allow the Defence to raise problems or issues ‘already resolved in a previous decision of the Chamber and [or that] the Chamber is currently examining’.²⁵

(a) Insufficient and inadequate opportunity to prepare its case

18. The Chamber notes that in support of its first allegation, the Defence raises arguments relating to the composition of the Defence team at the pre-trial stage, including the former Defence counsel and resource person at the time, as well as

²¹ Prosecution’s Response to Defence Rule 134(2) Submissions, ICC-01/12-01/18-1007-Conf.

²² Decision appointing experts for the purpose of a medical examination pursuant to Rule 135 of the Rules of Procedure and Evidence, ICC-01/12-01/18-1006-Conf.

²³ Decision on the Defence request to terminate the proceedings and related requests, ICC-01/12-01/18-1009-Conf.

²⁴ ICC-01/12-01/18-T-017-CONF-ENG, p. 43, lines 6-14.

²⁵ ICC-01/12-01/18-T-017-CONF-ENG, p. 42, lines 7-9; p. 43, lines 6-14.

adjournments granted at the pre-trial stage.²⁶ As noted by the Prosecution,²⁷ Rule 134(2) of the Rules clearly states that submissions are limited to the conduct of proceedings since the confirmation hearings. Accordingly, issues arising in the context of the pre-trial proceedings and prior the composition of this Chamber are beyond its scope, and thus inadmissible. The Chamber has disregarded them accordingly.

19. As regards the proceedings before this Chamber, the Defence compiles and reiterates its previous submissions and its disagreement with the Chamber's approach, particularly in the Decision on Defence Adjournment Request. In essence, the Defence submits that the Chamber did not adjourn the trial scheduled for 14 July 2020, even though the Defence was unable to conduct investigations in Mali and Mauritania before that date,²⁸ the Pre-Trial Chamber had amended the charges after the initial deadline for full disclosure,²⁹ the Termination Motion was pending at the time,³⁰ there was late disclosure of key documents and information,³¹ the Defence faced difficulties as a result of COVID-19 measures,³² and the Prosecution and Legal representatives of victims did not object to the adjournment.³³ As noted by the Prosecution,³⁴ all of these factors were raised by the Defence one way or another and were considered by the Chamber in the Decision on the Defence Adjournment Request.³⁵ Furthermore, the Defence repeats other disclosure related arguments which have been adjudicated by the

²⁶ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 8-11.

²⁷ Response, ICC-01/12-01/18-1007-Conf, paras 13-16.

²⁸ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 13-14.

²⁹ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, para. 15.

³⁰ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 16-17.

³¹ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 18-19.

³² Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 20-21.

³³ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 22-25.

³⁴ Response, ICC-01/12-01/18-1007-Conf, paras 17-29.

³⁵ Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Conf, paras 20-31. *See also* Defence Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 21 (d), (e) and (g).

Chamber,³⁶ and also does not specify which ‘key disclosure issues’ have been left unresolved.³⁷

20. Although the Chamber will not reiterate its previous findings here, it is necessary to emphasise that the Chamber paid special attention to the specific issue of investigations of the Defence [REDACTED], which was addressed not only in the Decision on Defence Adjournment Request, but also in several decisions leading to the start of trial, as well as during several status conferences held with the Defence and the Registry.³⁸ Although this matter remains not fully resolved, the Chamber has unequivocally remained seized of it and has stated that ‘the Defence may revert to the Chamber to request an adjournment, if necessary’ in order to conduct investigations [REDACTED].³⁹ The Defence is thus not prevented from raising investigation matters or possible adjournments in the future trial. In fact, this has been anticipated by the Chamber. Accordingly, the issue of adjournment of the commencement of trial on 14 July 2020 will not be revisited or entertained by the Chamber any further. The above submissions of the Defence are therefore dismissed as they were fully entertained and adjudicated by the Chamber at the relevant time.

³⁶ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 3, 4, 18-91; Defence Rule 134(1) observations, ICC-01/12-01/18-870-Conf-Exp, paras 2, 3, 5(h), 25-30; Decision on a Defence motion seeking disclosure of Biographical and Security Questionnaires conducted by Prosecution investigators with detained individuals, 29 April 2020, ICC-01/12-01/18-777-Conf (with two confidential annexes; public redacted version filed 18 May 2020); Decision on Defence motion seeking disclosure of Prosecution’s correspondence with national authorities, 23 April 2020, ICC-01/12-01/18-768-Conf; 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 disclosure of material related to Mr Al Hassan’s arrest and detention in Mali, 5 June 2020, ICC-01/12-01/18-859-Conf; Decision on Defence request for reconsideration of the ‘Decision on Defence request for disclosure of material related to Mr Al Hassan’s arrest and detention in Mali’, 12 June 2020, ICC-01/12-01/18-879-Conf; Decision on Defence request for leave to appeal the ‘Decision on Defence request for disclosure of material related to Mr Al Hassan’s arrest and detention in Mali’, 24 June 2020, ICC-01/12-01/18-898-Conf.

³⁷ Response, ICC-01/12-01/18-1007-Conf, para. 26.

³⁸ Transcript of *ex parte* status conference of 30 June 2020, ICC-01/12-01/18-T-016-CONF-EXP-ENG; Transcript of *ex parte* status conference of 29 May 2020, ICC-01/12-01/18-T-014-CONF-EXP-ENG; Transcript of *ex parte* status conference of 18 February 2020, ICC-01/12-01/18-T-012-CONF-EXP-ENG, Transcript of *ex parte* status conference of 13 December 2020, ICC-01/12-01/18-T-010-CONF-EXP-ENG.

³⁹ Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Conf, para. 30. *See also* E-mail from Trial Chamber X Communications to the parties and participants on 14 July 2020 at 16:37.

(b) Mr Al Hassan's health

21. The Defence submits that issues related to Mr Al Hassan's mental health have been addressed arbitrarily and unfairly. The Chamber notes that the Defence refers to the impact on Mr Al Hassan's mental health of COVID-19 measures and detention-related conditions, including restrictions placed at the detention centre and the lack of family visits.⁴⁰ Similarly, these issues are not new and were raised by the Defence and decided upon by the Chamber in the Decision on the Defence Adjournment Request, particularly as regards the accused's ability to instruct counsel, understand the charges and enter a plea the first day of trial.⁴¹ The Chamber agrees with the Prosecution that the Defence repeated submissions arguing that a temporary delay was and remains necessary before the start of the evidence overlooks the Chamber's prior findings and falls short of pursuing a particular remedy.⁴²
22. As regards issues raised by the Defence on the ability of the accused to properly instruct the Defence and participate in trial in the long term,⁴³ the Chamber considers that these matters are unequivocally linked to the pending medical examination instructed by the Chamber pursuant to Rule 135 of the Rules.⁴⁴ Accordingly, this part of the Defence's allegations will not be entertained in the context of the present decision but involves matters that may be reviewed by the Chamber once it will have received the expected results of the medical examination. Similarly, other issues raised by the Defence in relation to Mr Al Hassan's medical condition, such as his status as a vulnerable individual at risk of re-traumatisation or harm,⁴⁵ will only be evaluated by the Chamber, to the

⁴⁰ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 26-27.

⁴¹ Decision on the Defence Adjournment Request, ICC-01/12-01/18-940-Conf, paras 11-19. *See also* Decision on the measures restricting Mr Al Hassan's contacts while in detention, ICC-01/12-01/18-871-Conf-Exp-Red2, paras 43, 54-55. *See also* Defence Adjournment Request, ICC-01/12-01/18-927-Conf-Red, paras 15, 33-36; Decision on the measures restricting Mr Al Hassan's contacts while in detention, ICC-01/12-01/18-871-Conf-Exp-Red2, paras 43, 54-55; Decision on the Defence request for interim release, 5 May 2020, ICC-01/12-01/18-786-Conf (public redacted version filed on 29 May 2020).

⁴² Response, ICC-01/12-01/18-1007-Conf, para. 34.

⁴³ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 28-31.

⁴⁴ Decision appointing experts for the purpose of a medical examination pursuant to Rule 135 of the Rules of Procedure and Evidence, ICC-01/12-01/18-1006-Conf.

⁴⁵ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 33-35.

extent that such conditions impact Mr Al Hassan's right to a fair trial, once it will have received the results of the pending medical examination.

23. The Chamber therefore considers that the Defence's submissions stating 'the Chamber has declined to recognise the linkage between issues concerning medical treatment, and Mr Al Hassan's ability to exercise his fair trial rights in a non-discriminatory manner',⁴⁶ which were made prior to the Chamber's decision instructing a medical report pursuant to Rule 135 of the Rules, are moot for the purpose of this decision. Accordingly, the Defence fails to raise any new issue in relation to Mr Al Hassan's health, but simply repeats those that either have already been adjudicated or are currently before the Chamber.

(c) Issues of impartiality

24. The Defence submits that the fact that the Chamber decided to start the trial with the Termination Motion and the issue of fitness of the accused pending, gives rise to an appearance of impartiality.⁴⁷ The Chamber considers that here again the Defence merely reiterates its disagreement with the Chamber's Decision on the Defence Adjournment Request, which addressed the relevant arguments,⁴⁸ as well as with the Chamber's findings in its decisions on the accused's fitness to stand trial.⁴⁹ Accordingly, the Chamber will not entertain these submissions any further.
25. The Defence further submits that the appearance of impartiality of the Chamber has been further compounded in the recent decision on Prosecution expert witnesses. It submits that in this decision the Chamber makes findings in relation to expert witnesses that testified in the *Al Mahdi case* that are 'tantamount to

⁴⁶ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, para. 32.

⁴⁷ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 36-44.

⁴⁸ Decision on the Defence Adjournment Request, ICC-01/12-01/18-940-Conf, paras 36, 42. *See also* Defence Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 4.

⁴⁹ Defence Notice Decision, ICC-01/12-01/18-952-Conf. *See also* Oral ruling of 14 July 2020 (Transcript of hearing, ICC-01/12-01/18-T-017-Red-ENG, p. 30, line 2 to p. 32, line 10); Defence request regarding Mr. Al Hassan's fitness, ICC-01/12-01/18-956-Conf; Transcript of hearing, ICC-01/12-01/18-T-017-Red-ENG, p. 26, line 12 to p. 27, line 21; Decision appointing experts for the purpose of a medical examination pursuant to Rule 135 of the Rules of Procedure and Evidence, ICC-01/12-01/18-1006-Conf.

allowing for a form of adjudicated facts'.⁵⁰ In respect of the implied appearance of impartiality of the Chamber as a result of the decision on the proposed Prosecution experts, and as argued by the Prosecution,⁵¹ the Defence overstates the nature and scope of the Chamber's findings in that decision, which is a preliminary ruling and does not decide on the ultimate admissibility of the proposed testimonies. Finally, as noted by the Prosecution,⁵² the Defence submissions in this regard are speculative and misinterpret the purpose and import of the Chamber's decision.

C. Conclusion

26. In light of the above, and contrary to the Defence allegations,⁵³ the Chamber finds there is no 'cumulative effect' that has rendered the entire trial proceedings unfair. Instead the Defence simply reuses and convolutes the above issues which are not new. The Chamber emphasises in the strongest possible terms that repetition of prior submissions does not make them more persuasive or stronger; neither do they weaken the Chamber's prior determinations.

⁵⁰ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 45-46. *Referring to* Decision on Prosecution's proposed expert witnesses, 5 August 2020, ICC-01/12-01/18-989-Conf.

⁵¹ Decision on Prosecution's proposed expert witnesses, 5 August 2020, ICC-01/12-01/18-989-Conf, para. 11.

⁵² Response, ICC-01/12-01/18-1007-Conf, paras 45-49.

⁵³ Defence Rules 134(2) Submissions, ICC-01/12-01/18-993-Conf, paras 6, 19, 21, 24. *See also* n. 3.

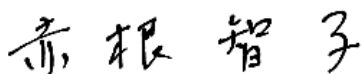
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DISMISSES the Defence Rule 134(2) Submissions in their entirety.

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, 1 September 2020

At The Hague, The Netherlands