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No. ICC-01/12-01/18

Date: 28 May 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

**Decision on Defence request for leave to appeal the ‘Decision on Mr Al Hassan’s
ongoing fitness to stand trial’**

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 Victims

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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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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 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following ‘Decision on Defence request for leave to appeal the “Decision on Mr Al Hassan’s ongoing fitness to stand trial”’.

I. Procedural history and submissions

1. On 21 August 2020, the Chamber issued its ‘Decision appointing experts for the purpose of a medical examination pursuant to Rule 135 of the Rules of Procedure and Evidence’ (the ‘Appointment Decision’), appointing a panel of three experts (the ‘Panel’) for the purpose of receiving expert opinion to assist its determination on Mr Al Hassan’s ongoing fitness to stand trial.¹
2. On 9 December 2020, the Registry filed the report of the Panel (the ‘Panel Report’) on the record.²
3. On 10 May 2021, and having considered the observations received from the parties and participants, the Chamber issued its ‘Decision on Mr Al Hassan’s ongoing fitness to stand trial’ (the ‘Impugned Decision’).³
4. On 17 May 2021, the Defence filed a request seeking leave to appeal the Impugned Decision (the ‘Request’) as regards the following three issues: (i) whether the procedure employed for instructing the Panel of Experts, receiving observations and adjudicating the observations was consistent with the requirements of open, impartial and adversarial proceedings (the ‘First Issue’); (ii) whether the Chamber erred in law and fact by finding that Mr Al Hassan is

¹ 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 (a public redacted version was issued on 24 March 2021).

² ICC-01/12-01/18-1197-Conf-Exp-Anx (filed as confidential *ex parte* Registry and Defence only; reclassified as confidential *ex parte* Defence, Registry and Chamber only on 19 January 2021; reclassified as confidential on 26 January 2021; public redacted version filed on 23 March 2021). *See also* Annex to the Registry Transmission of “Review of additional documents submitted to the Panel of Experts in relation to the MEDICAL EXAMINATION pursuant to Rule 135 of the Rules of Procedure and Evidence in the case of Mr. AL HASSAN Ag Abdoul Aziz Ag, 27 January 2021, ICC-01/12-01/18-1269-Conf-Anx (public redacted version filed on 12 May 2021; the ‘Supplementary Report’).

³ Decision on Mr Al Hassan’s ongoing fitness to stand trial, ICC-01/12-01/18-1467.

and will remain fit to instruct his Counsel and plead in his Defence, under the current trial arrangements (the ‘Second Issue’); and (iii) whether the Chamber abused its discretion by failing to implement any adjustments to the trial proceedings for the purpose of facilitating Mr Al Hassan’s right to participate in an effective manner, consistent with the principle of equality of arms (the ‘Third Issue’).⁴ The Defence submits that the three issues arise from the Impugned Decision and significantly impact upon the fairness and expeditiousness of the proceedings, and that an immediate resolution by the Appeals Chamber would materially advance the proceedings.⁵

5. On 21 May 2021, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Request (the ‘Response’).⁶ The Prosecution submits that none of the issues identified are appealable issues and that the issues fail to meet the remainder of the cumulative requirements of Article 82(1)(d) of the Statute.

II. Analysis

6. The Chamber incorporates by reference the legal framework applicable to the assessment of requests for leave to appeal pursuant to Article 82(1)(d) of the Statute.⁷
7. At the outset, the Chamber observes that a large part of the arguments raised by the Defence are repetitive and constitute an attempt to re-litigate matters previously settled by the Chamber. The Chamber strongly discourages such practices and emphasises that a mere disagreement or conflicting opinion does not qualify as an ‘appealable issue’.⁸

⁴ Defence request for leave to appeal ‘Decision on Mr Al Hassan’s ongoing fitness to stand trial’, ICC-01/12-01/18-1476-Conf (with three confidential annexes and one confidential *ex parte* annex available to the Defence and Registry only)

⁵ Request, ICC-01/12-01/18-1476-Conf, paras 4-16.

⁶ Prosecution response to Defence request for leave to appeal “Decision on Mr Al Hassan’s ongoing fitness to stand trial”, ICC-01/12-01/18-1495-Conf.

⁷ 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. 12.

⁸ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, ICC-01/12-01/18-734, paras 13-14.

A. The First Issue

8. The Chamber notes that under the First Issue, the Defence challenges the procedure employed for instructing the Panel, receiving observations and adjudicating the observations.⁹
9. The Chamber observes that the Defence raises a number of alleged procedural errors in the process of having the Panel examine Mr Al Hassan. In particular, the Defence submits that: (i) the manner in which records were provided to the Panel lacked transparency and resulted in the Panel conducting its evaluation without the benefit of having access to all the records; (ii) the Detention Centre Medical Officer advised the Panel not to conduct in-person evaluations, resulting in Professor Mezey conducting her evaluation by telephone and without evaluating Mr Al Hassan's countenance; and (iii) the Defence was not provided with an avenue to correct errors that impacted the Panel's findings.¹⁰ The Chamber recalls that in order for a request for leave to appeal to be granted, the party seeking such leave must identify specific issues *arising from* the Impugned Decision, i.e., issues which were dealt with in the Impugned Decision.¹¹ Thus, while the party seeking to appeal a decision may raise procedural issues leading up to the impugned decision, it is obliged, not only to set out the alleged procedural error, but also to indicate with sufficient precision how these alleged errors arise from the Impugned Decision. As regards the case at hand, the Chamber agrees with the Prosecution¹² that the procedural errors alleged by the Defence do not arise from the Impugned Decision.
10. As regards the provision of medical records, the Chamber reiterates that all records relevant to the Panel's mandate were provided to the Panel,¹³ and notes that the Defence itself concedes that the Panel's belief that it received a partial

⁹ Request, ICC-01/12-01/18-1476-Conf, para. 2.

¹⁰ Request, ICC-01/12-01/18-1476-Conf, para. 5.

¹¹ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', ICC-01/12-01/18-734, para. 13.

¹² Response, ICC-01/12-01/18-1495-Conf, paras 5-8.

¹³ Impugned Decision, ICC-01/12-01/18-1467, para. 63.

record is ‘mistaken’.¹⁴ Following the provision of the additional documents, the Panel confirmed that its conclusions in the Panel Report stand,¹⁵ and the Chamber accordingly does not consider that these allegations constitute an issue arising from the Impugned Decision.

11. As regards Professor Mezey’s remote evaluation, the Chamber notes that, contrary to the arguments of the Defence, the Panel explicitly stated that Mr Al Hassan was examined by different means due to the different approaches and professional backgrounds of the members of the Panel, as well as bearing in mind that recommendations for measures to ensure the accused’s mental health would need to take account of COVID-19 related restrictions.¹⁶ Consequently, the Chamber considers the Defence arguments as being a misrepresentation of the facts and accordingly not an issue arising from the Impugned Decision.
12. Further, contrary to its submissions, the Defence was provided with an opportunity to address any alleged errors in the Panel Report.¹⁷ The Defence submissions on this point were not considered in the Impugned Decision due to the Defence’s non-compliance with the Regulations of the Court and not, as averred by the Defence, as a result of the procedure employed for the examination of Mr Al Hassan.¹⁸
13. The Defence also submits, as part of the First Issue, that it was never informed by the Registry that its submissions on the hearing modalities¹⁹ were not considered by the Chamber in August 2020 and that this impacted the fairness and efficacy of the process.²⁰ The Chamber considers that whether the Defence was deprived of ‘its right to receive a reasoned ruling’ or ‘the opportunity to file

¹⁴ Request, ICC-01/12-01/18-1476-Conf, para. 5(b). *See also* Response, ICC-01/12-01/18-1495-Conf, para. 10.

¹⁵ Supplementary Report, ICC-01/12-01/18-1269-Anx-Red.

¹⁶ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 29-30. *See also* Registry Report on Timeline for the Completion of the Medical Examination by the Experts Appointed for the Purposes of Rule 135 of the Rules of Procedure and Evidence, 22 October 2020, ICC-01/12-01/18-1124-Conf, para. 19 (‘[t]he Experts indicated that the reason for these two different approaches (remotely and in-person) result from the different nature of psychological and psychiatric assessments’).

¹⁷ Email from the Chamber to the parties and participants, 5 January 2021, at 10:38.

¹⁸ Impugned Decision, ICC-01/12-01/18-1467, paras 36-38.

¹⁹ ICC-01/12-01/18-1316-Conf-AnxF.

²⁰ Request, ICC-01/12-01/18-1476-Conf, para. 5(a).

submissions as a separate application’ do not arise from the Impugned Decision. Moreover, the argument that the Defence was deprived of the opportunity to file these submissions as part of its observations on fitness appear to be in contradiction with its previous position that the purpose of appending the email in question to its observations ‘is not to supplement the Defence’s submissions on this issue but rather to preserve for the record the Defence’s submissions as they were provided in August 2020’.²¹

14. The Chamber observes that the Defence makes further arguments under the First Issue without demonstrating the link to the issue as defined by the Defence. In particular, the Defence raises two arguments in support of its contention that the fair and adversarial nature of the process was impacted: that the Chamber erroneously appointed two experts who were appearing in other ongoing proceedings as a Prosecution expert, while failing to make a determination as to the suitability of Dr Chisholm; and that the Chamber erroneously disregarded key Defence submissions holding that the Defence was not entitled to appoint an expert in submitting observations. The Chamber notes that by raising the first set of arguments, the Defence is effectively challenging the determination of the Chamber in the Appointment Decision.²² Thus, these matters simply do not arise from the Impugned Decision. The argument of the Defence regarding Dr Chisholm is merely a disagreement with the Chamber’s determination in the Impugned Decision and its decision of 18 February 2021.²³
15. Finally, the Defence submits that the Chamber’s reliance on trial filings that were not addressed by the Panel - including the Defence Article 69(7) Reply - is tantamount to a deprivation of its right to be heard and contrary to the right to a reasoned opinion. The Chamber is of the view that the Defence has failed to

²¹ Defence response to ‘Prosecution’s request to strike out four annexes to the Defence Observations on Report of Panel of Experts (ICC-01/12-01/18-1316-Conf) and to obtain access to ex parte annexes thereto’, ICC-01/12-01/18-1383-Conf, para. 14.

²² See Appointment Decision, ICC-01/12-01/18-1006-Red, para. 26 (‘the Chamber, in principle, does not consider that experts who have been involved in other proceedings before the Court should be excluded. Excluding such experts is not only unnecessary but would also unduly narrow the scope of experts that may be appointed by the Chamber. It would also be illogical, considering that the Registry maintains a list of experts that may be appointed in multiple judicial proceedings before this Court.’)

²³ Impugned Decision, ICC-01/12-01/18-1467, paras 29-35; Email from the Chamber to the parties and participants, 18 February 2021, at 16:29.

substantiate how this relates to the First Issue. In any event, the Chamber recalls that the decision on the accused fitness is a legal and not a scientific determination and that it is ultimately the Chamber's mandate to make such a determination.²⁴ The Chamber further recalls that, when deciding if an accused is fit to stand trial, it must take into account 'all the relevant circumstances of each individual case'.²⁵ Accordingly, the Chamber may take into account the medical opinion expressed by appointed experts as well as any other relevant information available before it.²⁶ Similarly, the fact that the Panel was not provided with these filings has no bearing on the Chamber's determination on the accused's fitness, as it is for the Chamber, and not the Panel, to consider these aspects in relation to the accused's fitness.²⁷

16. For these reasons, the First Issue is not an appealable issue arising from the Impugned Decision.

B. Second Issue

17. The Defence makes a two-fold argument under the Second Issue: (i) that the Chamber erred in fact, based on a partial reading of the Panel Report, by finding that the Panel did not diagnose Mr Al Hassan with Post-Traumatic Stress Disorder (PTSD) and found that Mr Al Hassan was fit to testify on his own defence; and (ii) that the Chamber erred in law by effectively eliminating the requirement that in order to be fit to stand trial, the accused must be able to review the evidence and instruct his counsel.
18. The Chamber considers that the Second Issue is not an appealable issue arising from the Impugned Decision. In respect of the alleged factual error, the Chamber observes that the Impugned Decision refers to the Panel Report's unequivocal finding that the accused 'is not clinically depressed and he is not

²⁴ Impugned Decision, ICC-01/12-01/18-1467, para. 68.

²⁵ Impugned Decision, ICC-01/12-01/18-1467, para. 72.

²⁶ Impugned Decision, ICC_01/12-01/18-1467, n. 107; Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Red, para. 14; Decision on the Defence notice on Mr Al Hassan's unfitness to stand trial, ICC-01/12-01/18-952-Red, paras 27, 37-39.

²⁷ Email from the Chamber to the parties and participants, 30 October 2020, at 10:25, ICC-01/12-01/18-1403-Conf-Anx30, p. 2.

suffering from a Posttraumatic Stress Disorder’,²⁸ and that the Defence itself conceded that the Panel has not reached a positive conclusion as regards many of the PTSD criteria.²⁹ In effect, the Defence is merely expressing its disagreement with the Panel’s professional opinion, by repeating its arguments contained in its previous observations.³⁰ In doing so, and as rightly noted by the Prosecution,³¹ the Defence also disregards the fact that the Panel’s observations on the accused’s symptoms of anxiety and distress were duly taken into account by the Chamber in the Impugned Decision.³² The Chamber also reiterates that the subject matter of the Impugned Decision was not whether the accused suffers from a particular medical condition but rather whether he was able to exercise his fair trial rights.³³ The Defence further misrepresents the findings of the Panel, suggesting that the Panel ‘made no finding that Mr Al Hassan was fit to testify in his defence’.³⁴ To the contrary, and as noted in the Impugned Decision,³⁵ the Panel Report clearly indicates that ‘[i]n order to be fit to plead, a Defendant must [...] give evidence in his or her own defence. [...] According to the aforementioned narrow criteria [Mr Al Hassan] is fit to plead.’³⁶

19. The Chamber is also unpersuaded by the submissions of the Defence that the Chamber eliminated the requirement that in order to be fit to stand trial, the accused must be able to review the evidence and instruct his counsel. To the contrary, the Chamber made a separate and explicit assessment of the accused’s ability to understand the evidence and instruct his counsel, on the basis of the Panel Report, in reaching the ultimate conclusion that the accused remains fit.³⁷ The Chamber agrees with the Prosecution that the arguments of the Defence on this point are merely a mischaracterisation of the Impugned Decision.³⁸ Thus, the Chamber considers that the Second Issue is not an appealable issue arising

²⁸ Impugned Decision, ICC-01/12-01/18-1467, para. 74; Panel Report, ICC-01/12-01/18-1197-Red, para. 234.

²⁹ Defence Observations on Report of Panel of Expert, ICC-01/12-01/18-1316-Red, para. 13.

³⁰ Defence Observations on Report of Panel of Expert, ICC-01/12-01/18-1316-Red, paras 9-14

³¹ Response, ICC-01/12-01/18-1495-Conf, paras 25.

³² See Impugned Decision, ICC-01/12-01/18-1467, para. 74 (n. 136).

³³ Impugned Decision, ICC-01/12-01/18-1467, para. 73.

³⁴ Request, ICC-01/12-01/18-1476-Conf, para. 9.

³⁵ Impugned Decision, ICC-01/12-01/18-1467, para. 78.

³⁶ Panel Report, ICC-01/12-01/18-1197-Red, paras 284-285.

³⁷ Impugned Decision, ICC-01/12-01/18-1467, paras 75-76.

³⁸ Response, ICC-01/12-01/18-1495-Conf, paras 13-15.

from the Impugned Decision but is rather a mischaracterisation and misrepresentation thereof.

C. Third Issue

20. In respect of the Third Issue, the Defence submits that the Chamber ‘abused its discretion by failing to implement any adjustments to the trial proceedings’.³⁹ The Defence contends that by finding that certain issues remain within the remit of the Registry, the Chamber failed to take sufficient account of the direct nexus between the trial schedule and the ability of the Registry to implement measures recommended by the Panel.⁴⁰ In particular, the Defence submits that both family visits and treatment would require adjustments to the current trial schedule.⁴¹
21. The Chamber considers that the Third Issue is not an appealable issue arising from the Impugned Decision. The Chamber reiterates that it will ‘continue considering on a case-by-case basis whether there is a need for an adjournment outside of natural points of breaks in the hearings’.⁴² The Defence submissions that future family visits or potential treatments warrant a different approach is speculative and merely a disagreement with the Impugned Decision.
22. For the aforementioned reasons, the Chamber finds that none of the issues identified by the Defence are appealable issues. Accordingly, it is unnecessary to address the remainder of the cumulative requirements of Article 82(1)(d) of the Statute.

³⁹ Request, ICC-01/12-01/18-1476-Conf, para. 2.

⁴⁰ Request, ICC-01/12-01/18-1476-Conf, para. 14.

⁴¹ Request, ICC-01/12-01/18-1476-Conf, para. 14.

⁴² Impugned Decision, ICC-01/12-01/18-1467, para. 84.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request;

INSTRUCTS the Defence to file a public redacted version of the Request (ICC-01/12-01/18-1476-Conf) within ten days of notification of the present decision;

RECLASSIFIES the Response (ICC-01/12-01/18-1495-Conf) as public; and

RECLASSIFIES Annex D to the Request (ICC-01/12-01/18-1476-Conf-Exp-AnxD) as confidential.

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 Friday, 28 May 2021

At The Hague, The Netherlands