

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/12-01/18

Date: 1 September 2020

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***

Confidential

**Decision on the Prosecution's request seeking dismissal of the Defence notice on
affirmative defences**

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 Articles 31 to 33, 64, 66, and 67(1) of the Rome Statute (the ‘Statute’) and Rules 79 and 80 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following decision.

I. Procedural history

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
2. On 28 February 2020, in accordance with the Chamber’s instructions,² observations on the conduct of proceedings were filed in which the parties *inter alia* set out their respective position on the procedure under Rules 79 and 80 of the Rules. The Defence submitted that ‘the clear language of Rule 79(3) would be defeated by judicial orders to advance specific details concerning defences, which have yet to be formulated’,³ while the Prosecution argued that the Defence should notify the names of the witnesses and any other evidence upon which it intends to rely in support of any defence it wishes to raise.⁴
3. During a status conference held on 30 June 2020, having been seized of a Prosecution request in that respect, the Single Judge indicated that the Chamber considered that the regulatory framework provides sufficient guidance on this issue and that, for the procedure provided under Rules 79 and 80 of the Rules, ‘the notification that is sufficiently in advance to enable the Prosecution to prepare adequately and to respond implies a notification prior to the

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

² Order setting deadline for observations on the conduct of proceedings, 28 January 2020, ICC-01/12-01/18-566. *See also*, transcript of status conference on 18 February 2020, ICC-01/12-01/18-T-011-Red-ENG, p. 63, lines 20 to p. 64, line 1; and email from the Chamber to the parties and participant on 20 February 2020 at 9:12.

³ Public redacted version of Defence observations on the conduct of proceedings, ICC-01/12-01/18-618-Red, para. 74.

⁴ Prosecution observations on the conduct of proceedings, ICC-01/12-01/18-615, para. 98

commencement of trial'.⁵ The Single Judge further clarified that she did not believe there was any more stringent deadline required at that point in time.

4. On 8 July 2020, when rendering its decision on a request for adjournment filed by the Defence, the Chamber declined to 'address the Prosecution's request to instruct the Defence to raise any defences pursuant to Articles 31, 32 and 33 of the Statute'.⁶ On this occasion, the Chamber reiterated its ruling of 30 June 2020, namely that the relevant statutory framework was clear and that Rules 79 and 80 of the Rules provide sufficient guidance on this issue.⁷
5. On 13 July 2020, the Defence filed its 'Notice of Affirmative Defences' (the 'Defence Notice').⁸ The Defence asserts affirmative defences of duress under Article 31(1)(d) of the Statute, mistake of fact or law, and superior orders, respectively pursuant to Articles 32 and 33 of the Statute. As further discussed below, the Defence also provides certain details as to how it intends to argue these defences at trial.
6. On 23 July 2020, the Prosecution filed a response to the Defence Notice,⁹ in which it submits that the Defence Notice is both untimely and incomplete. The Prosecution requests that: i) the Defence be ordered to specify the names of witnesses and any other evidence upon which it intends to rely to establish the purported grounds for excluding the accused's criminal responsibility; and ii) upon receipt of such full notice, it be afforded an opportunity to seize the Chamber with a request seeking specific remedies to respond to these defences and prepare its case accordingly (the 'Prosecution Request').¹⁰ For example, the Prosecution specifies that it could seek to be given a period of time to investigate these defences as well as the possibility to amend its list of witnesses and evidence.¹¹

⁵ Transcript of status conference on 3 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 32, lines 7-10.

⁶ Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Conf, para. 10.

⁷ Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Conf, para. 10.

⁸ ICC-01/12-01/18-951-Corr. The corrigendum was filed on 21 July 2020.

⁹ Prosecution's response to the Defence Notice of Affirmative Defences, ICC-01/12-01/18-970-Conf.

¹⁰ Prosecution Request, ICC-01/12-01/18-970-Conf, para. 23.

¹¹ Prosecution Request, ICC-01/12-01/18-970-Conf, para. 3.

II. Determination of the Chamber

7. As acknowledged by the Prosecution, and recalled above, the Chamber already provided its interpretation of the relevant provisions of the Rules. Indeed, the Single Judge clearly stated that the Chamber was of the view that ‘the notification that is sufficiently in advance to enable the Prosecution to prepare adequately and to respond implies a notification prior to the commencement of trial’.¹² The Chamber observes that the Prosecution Request merely repeats submissions already put before the Chamber and does not otherwise provide arguments in support of a reconsideration of this matter, which has already been adjudicated.
8. The Chamber further notes that, pursuant to Rule 79(3) of the Rules, a failure to provide notice shall not, in any event, limit the Defence’s right to raise a defence.
9. The Chamber therefore dismisses the Prosecution request for the Chamber to find the Defence’s Notice untimely and will now proceed to assess the second prong of the Prosecution Request, including whether further evidence under Rule 79(4) should be requested at this stage.
10. The Chamber first notes that, for its prospective affirmative defence of duress under Article 31(1)(d), the Defence Notice notably provides that duress: i) would have been caused by ‘the presence of Al Qaeda in the North of Mali’; and ii) would have come ‘from a continuing threat of imminent death and imminent threat of serious bodily harm against Mr. Al Hassan and against his immediate family members’.¹³ In this regard, the Defence also specifically indicates that it ‘intends to question all witnesses on these issues barring Prosecution witnesses testifying exclusively on technical issues not related to the content of the charges’.¹⁴

¹² Transcript of status conference on 3 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 32, lines 7-10 (emphasis added).

¹³ Defence Notice, ICC-01/12-01/18-951-Corr, paras 4(a) and (b)

¹⁴ Defence Notice, ICC-01/12-01/18-951-Corr, para. 5.

11. With regard to the Defence's notice of its intention to raise issues under Article 32, including that Mr Al Hassan lacks the necessary element of knowledge and intent for the crimes charged, the Chamber observes that the Defence lists eight specific circumstances which, in its submission, will be of relevance to that assessment.¹⁵ It is clear from the language retained in the Defence Notice to which count each of these circumstances relate.
12. Finally, the Chamber notes that, in providing notice of its intention to raise issues of superior orders arising from Article 33 of the Statute, the Defence already indicates that the accused 'was under a legal obligation to obey the orders of the Emir of the Islamic Police/Hesbah, the Presidency, the Shura Council, and the Islamic Tribunal'.¹⁶
13. In view of the foregoing, the Chamber is satisfied of the level of details contained in the Defence Notice, notably for its prospective defence under Article 31(1)(d) of the Statute and the witnesses concerned. Accordingly, and having had particular regard to the scope and content of the charges against the accused, the Chamber considers that it is not required, at this early stage of the trial proceedings, to instruct the Defence to provide further indications, details, or to effect the additional disclosure sought in the Prosecution Request pursuant to Rule 79(4) of the Rules.
14. Finally, the Chamber finds that the remedies that the Prosecution refers to remain available, notably pursuant to Rule 79(2) of the Rules, and instructs that, should it become apparent during the course of the Prosecution's presentation of evidence that its list of witnesses or evidence needs to be amended, it should revert back to the Chamber with a motivated and detailed request to that effect.

¹⁵ Defence Notice, ICC-01/12-01/18-951-Corr, para. 7.

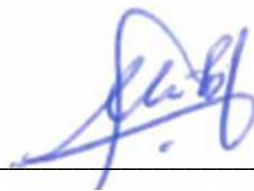
¹⁶ Defence Notice, ICC-01/12-01/18-951-Corr, para. 8(a).

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY


REJECTS the Prosecution Request, without prejudice; and

INSTRUCTS the Prosecution to file a public redacted version of the Prosecution Request within two weeks of notification of the present decision.

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