

Decision on the Confirmation of Charges in the Al Hassan case : Expert Commentary - Part I

Par:

[Amoulgam Azé Kerté](#)

[Cheick Bougadar Diakite](#)

[Gonzague Dupas](#)

[Julia Grignon](#)

[Moussa Bienvenu Haba](#)

[Fannie Lafontaine](#)

[Claire Magnoux](#)

[Catherine Savard](#)

[Érick Sullivan](#)

[Philippe Tremblay](#)

Langue Anglais

Le:

6 Juillet 2020

On 14 July 2020, the trial of Al Hassan Ag Abdul Aziz ['Al Hassan'] will begin before the International Criminal Court ['ICC'], marking a major step in the fight against impunity for international crimes committed in Mali. Al Hassan, a member of the coalition formed by the armed groups [Ansar Dine](#) and [Al-Qaeda in the Islamic Maghreb](#) ['AQIM'], will face charges of crimes against humanity and war crimes allegedly committed in the [Timbuktu](#) region between 1 April 2012 and 28 January 2013.

This analysis elaborated by the [Canadian Partnership for Interntional Justice](#) ['CPIJ'] highlights some of the most salient aspects of this important case a few days before the start of the trial, which begins on 14 July 2020.

The first post of this series of four discusses the admissibility of the case in the light of the hierarchical position of the accused and the gravity criteria.

Then, a [second post](#) will argue that the accuracy of the charges confirmed prevents the repetition of errors made by the Office of the Prosecutor ['OTP'] in the trial of Jean-Pierre Bemba, acquitted in 2018. Also, the confirmation of the charges of war crimes reveals a propre application of international humanitarian law.

The [third post](#) will touch upon the charges of crimes against humanity, before examining specifically the implications of the confirmation of the charge of crimes against humanity of gender-based persecution, which is a historical first.

This commentary will conclude with a [fourth and last post](#) which will critically analyze the respect of the rights of the accused.

1. A 'Small Fish' Prosecuted: the Prosecutor's Mistake?

The admissibility of the Al Hassan case was challenged by the defence, which argued that the case was not serious enough to warrant the Court's action ([Rome Statute of the International Criminal Court](#) ['[Rome Statute](#)'], article 17(1)(d)). To this end, it notably argued that Al Hassan was not a senior Islamic police officer but a 'small fish', a junior agent, an enforcer within the Ansar Dine/AQIM coalition (Al Hassan, [Defence Submissions for confirmation of charges](#), paras. 256-258).

Pre-Trial Chamber I agreed with the defence on this point as it found that Al Hassan was not a senior Islamic police officer, that he did not exercise authority over members of the Islamic police, and that his day-to-day work consisted mainly of managing administrative tasks and issues related to security patrols in the city of Timbuktu, and sometimes to the enforcement of the sanctions imposed by the Islamic court (Al Hassan, [Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#) ['DCC'], paras. 763-765).

However, the Chamber has argued that the lower or intermediate-level of an accused is irrelevant to the assessment of the gravity of a case. This analysis is carried out on a case-by-case basis, based on criteria that may include the nature of the crimes, their scale, their impact on the victims and the *modus operandi* used (Al Hassan, [Decision on the Admissibility Challenge raised by the Defence for Insufficient Gravity of the Case](#) [[‘Decision on the Admissibility Challenge’](#)] paras. 50, 57; Blé Goudé, [Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity](#), paras. 20-22). Moreover, in its [Decision on the Admissibility Challenge](#), the Chamber recalled that the Rome Statute does not exclude any category of authors from the exercise of the Court’s jurisdiction, which ‘could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court’ ([Decision on the Admissibility Challenge](#), para. 50; [Judgement on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’](#), para. 75). This decision, issued by the Pre-Trial Chamber I on 27 September 2019, was [upheld on appeal](#) on 19 February 2020. The exclusion of the accused’s rank as a factor in challenging the admissibility of a case, in the name of the fight against impunity, has been a consistent interpretation in the Court’s jurisprudence since 2006 (Situation in DRC, [Judgement on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’](#)). More than admissibility, Al-Hassan’s prosecution therefore directly questions the Prosecutor’s prosecution strategies.

It is important to note that prosecutions of lower- and intermediate-level perpetrators have proven useful in the past in enhancing the effectiveness of subsequent proceedings against senior executives. In fact, subject to a few exceptions, such as the [Kambanda](#) and [Plavšić](#) cases, the successes of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda in judging senior leaders were built on prosecutions of ‘small fishes’ during the first years of operation of these tribunals. Indeed, the evidence gathered and the judicial findings of certain facts considered to be public knowledge during these proceedings have been used in the trials of more senior leaders (see in particular the cases [Karadžić](#), [Mladić](#), [Stanišić](#), [Bagosora](#), [A. Bizimungu](#) and [Nyiramasuhuko](#)). On the other hand, the ICC’s initial focus on ‘those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organised the alleged crimes’ ([OTP, Prosecutorial Strategy 2009-2012](#), para. 19) has shown its limits in some emblematic prosecutions, such as those of [Jean-Pierre Bemba](#) and [Laurent Gbagbo](#). The OTP’s difficulty in proving the responsibility of these senior leaders for the crimes committed by their subordinates or supporters testifies to the importance of a pyramidal prosecution strategy, from the bottom up and not the other way around.

Since 2012, under Fatou Bensouda’s tenure, a gradual strategy has been enshrined ([Strategic Plan 2012-2015](#), p. 6), and constantly reaffirmed ([Strategic Plan 2016-2018](#), p. 16; [Strategic Plan 2019-2021](#), p. 22). In addition, the [Policy Paper on Case Selection and Prioritisation](#) (2016) has contributed to the diversification of the profiles of authors who may be prosecuted by notifying the OTP’s intention to target ‘lower level-perpetrators where their conduct has been particularly grave or notorious’ (p. 14). The same document states that the OTP will pay ‘particular attention to crimes that have been traditionally under-prosecuted,’ citing sexual and gender-based crimes, and recalling their particular gravity (p. 15). Moreover, they are also subject to a specific policy paper ([Policy Paper on Sexual and Gender-Based Crimes](#)) demonstrating the OTP’s strong interest in prosecuting them.

Thus, the prosecution of Al Hassan seems to be a perfect illustration of the Prosecutor’s strategic orientations. She seems to focus on the types of crimes prosecuted, as she prosecutes an author that is far from the top of the hierarchy, but whose alleged crimes are considered as priority by the OTP due to their particular gravity and their under-representation in prosecutions. A parallel with the Al Mahdi case, concerning the destruction of cultural and religious property, can be observed in this case.

Therefore, the prosecution of Al Hassan could be useful in the context of possible proceedings against highest officials, either before the Malian courts under the principle of complementarity or before the ICC, as well as in order to highlight certain international crimes with a view to raising awareness of their prosecution.

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The Partnership is funded by a 5-year grant from the Social Sciences and Humanities Research Council of Canada as well as cash and in-kind contributions from each of the partner organisations.



Social Sciences and Humanities
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