

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: **ICC-01/12-01/18**

Date: **12 August 2020**

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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

Prosecution's motion to strike portions of Defence filing ICC-01/12-01/18-991-Conf

Source: Office of the Prosecutor

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Court to:

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I. Introduction

1. The Prosecution respectfully requests that Trial Chamber X ("Chamber") strike from the record selected portions of Part D¹ (henceforth, "Impugned Section") of the Defence Reply² to the Prosecution Response³ to the Defence Request to terminate proceedings against the Accused.⁴ The Chamber should strike the Impugned Section because it is not limited to addressing "new issues raised in the response which the Defence could not reasonably have anticipated", in violation of the Chamber's Decision authorising the Reply⁵ and of regulation 24(5) of the Regulations of the Court ("Regulations").

II. Confidentiality

2. Under regulation 23*bis*(2) of the Regulations, the Prosecution files this application as confidential since it refers to filings of the same classification. The Prosecution will file a public redacted version in due course subject to the reclassification of these filings.

III. Submissions

3. The Prosecution requests that the Impugned Section be struck from the record,⁶ as being in violation of the Chamber's Decision and regulation 24(5) of the Regulations. The Chamber has previously decided not to consider portions of a Defence filing which did not comply with the Regulations.⁷

4. When the Chamber authorised the Defence Reply to the Prosecution Response

¹ Starting at the second sentence of para. 19 (starting at "But, even if this carve out is set aside [...]") up to and including para. 25 ("Impugned Section").

² ICC-01/12-01/18-991-Conf ("Reply").

³ ICC-01/12-01/18-982-Conf-Exp-Corr ("Response").

⁴ ICC-01/12-01/18-885-Conf-Exp-Corr ("Request").

⁵ ICC-01/12-01/18-932-Conf-Corr ("Decision"), para. 25.

⁶ See regulation 29 of the Regulations: "In the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice."

⁷ See *e.g.* Decision, paras. 16-17 (deciding not to consider an annex violating a provision of the Regulations).

to the Request, it emphasised that “in accordance with Regulation 24(5) of the Regulations, any reply shall be limited to new issues raised in the response which the Defence could not reasonably have anticipated.”⁸ Nevertheless the Impugned Section is in violation of this Decision and the relevant regulation.

5. Rather than addressing new issues raised in the Response which the Defence could not reasonably have anticipated, the Impugned Section of the Reply supplements the Defence submissions in the Request.

6. In its Request, the Defence argued the Prosecution’s alleged collusion or complicity in the Accused’s alleged torture and ill-treatment in Mali, based on allegations of *inter alia* knowledge of alleged violations, acquiescence, or failure to prevent, and referring to certain authorities for its arguments that the Prosecution’s alleged conduct should be qualified as collusion or complicity, such as reports from a UN Special Rapporteur and from the UK Joint Committee on Human Rights among other domestic authorities.⁹

7. In the Impugned Section of the Reply, the Defence supplements its previous submissions on the same issue, arguing that “[t]he Prosecution’s conduct engages the responsibility of the ICC, as it satisfies the threshold for perpetration, collusion or complicity, under the Statute, rules of international law applying to international organisations and domestic practice”, and refers *inter alia* to “standards of individual criminal responsibility [...] [w]ithin the ICC’s legal framework”,¹⁰ “organizational responsibility” under *inter alia* the Draft Articles of Responsibility for International Organizations”,¹¹ a positive obligation as applied *inter alia* in ECHR and ICCPR cases,¹² and “the framework of inter-State mutual legal assistance” as reflected *inter*

⁸ Decision, para. 25.

⁹ See e.g.: Request, part 1.2 (“The Prosecution’s positive obligation to avoid complicity in torture and CIDT”), para. 9-14; para. 28, 31, 65-66, 71, 108.

¹⁰ Reply, para. 19.

¹¹ Reply, para. 20-21.

¹² Reply, para. 22.

alia in several domestic cases.¹³

8. The Impugned Section is not responsive to new issues raised by the Prosecution in its response, which it could not have anticipated. Instead, it merely bolsters and/or supplements the Defence submissions in the Request on the issue of the Prosecution's alleged collusion or complicity in the Accused's alleged torture and ill-treatment in Mali, in particular by referring to further authorities for its arguments that the Prosecution's alleged conduct should be qualified as collusion or complicity.¹⁴ As described above, the Defence already addressed this issue in its Request, including in a section dedicated to "the definition of complicity",¹⁵ and it was incumbent on the Defence to make its arguments fully, including by citing all of the legal sources upon which it relied. It cannot therefore be maintained that the issue of the Prosecution's alleged collusion or complicity is a new issue or one that could not have been reasonably anticipated. Bolstering or supplementing its submissions in the Impugned Section goes beyond the scope authorized by the Chamber.

9. The Impugned Section therefore violates the Chamber's Decision and regulation 24(5) of the Regulations, justifying striking it from the record.

IV. Requested Relief

10. For the foregoing reasons, the Prosecution requests that the Chamber strike the Impugned Section from the record.

¹³ Reply, para. 23-25. In para. 23-24 of the Impugned Section (dealing with collusion or complicity), the Defence refers to Response, paras. 76-93 (in the context of the voluntary nature of interview) and to *Marzook*, cited in Response, fn. 185 (in the context of the voluntary nature of interview).

¹⁴ The Defence in the Reply also relies on two authorities found in the Request (*El Masri* and A/HRC/13/42) but it would appear they are relied on for different propositions (*compare* Request, para. 12, fns. 20-21 (*El Masri*) and fn. 37 (A/HRC/13/42) with Reply, fn. 131 (*El Masri*) and fn. 133 (A/HRC/13/42).

¹⁵ Request, para. 4, referring to part 1.2 of the Request ("The Prosecution's positive obligation to avoid complicity in torture and CIDT"), para. 9-14.



Fatou Bensouda, Prosecutor

Dated this 12th day of August 2020

At The Hague, The Netherlands