

**Cour
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**International
Criminal
Court**

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15 December 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***

Public

**With confidential, *EX PARTE*, Annex A
Available only to the Prosecution and the Defence**

**Public redacted version of the “Prosecution request for disclosure by the Defence”,
3 July 2020, ICC-01/12-01/18-929-Conf**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Prosecution hereby requests the Chamber to order, pursuant to rule 79(4) of the Rules, disclosure by the Defence of material related to the reports of four Defence consultants, Dr Porterfield, Dr Cohen, Dr Crosby and Mr Sangaré (“Requested Material”), which are extensively relied upon in the “Defence Request to terminate the proceedings” (“Termination Request”),¹ namely:

- Notes of contact, including on the first contact and any subsequent communications and meetings with the Defence;
- Mission letters/emails and any subsequent written or verbal instructions sent by the Defence;
- All the documents and other material provided to the Defence consultants for the purpose of their reports;
- All drafts of Defence consultants’ reports sent to the Defence and any comments made by the Defence on those drafts;
- Any relevant consultations between Defence consultants;
- Information on the remunerations provided to each consultant;
- *Curriculum Vitae* of Dr Porterfield and Mr Sangaré;; and
- With respect to Mr Sangaré, any letter or email sent to persons interviewed as well as information on the context and circumstances of those interviews, including the names of persons present, the date and duration.²

2. The Termination Request largely hinges upon the Defence consultants’ reports, which the Defence proffers as “expert” reports. The disclosure of the Requested Material is not only necessary but also essential for the Prosecution’s experts to

¹ ICC-01/12-01/18-885-Conf-Exp. A confidential redacted version was notified on the same day: ICC-01/12-01/18-885-Conf-Red. The corrected version of the Termination Request (ICC-01/12-01/18-885-Conf-Exp-Corr) was notified on 25 June 2020.

² The details regarding the requested material related to the four consultants are contained in emails attached as Annex A.

assess the Defence's reports, and for the Prosecution to properly respond to serious allegations contained in the Termination Request, including alleged collusion or acquiescence by the Prosecution in alleged torture or ill-treatment of the Accused, and an alleged contamination of the evidence in the case against him before the Court. This material will help the Prosecution to provide relevant comments and submissions to support the Chamber in its own determination of the truth.

3. [REDACTED]
[REDACTED]³ further increases the importance of obtaining all relevant material.
4. To date, despite the various Prosecution's requests, the Defence has only made partial disclosure of material underlying the reports of the Defence consultants and/or relevant to their expertise: in its response to one of the Prosecution's requests for disclosure of material related to one of the consultants, the Defence expressed its view that it had no obligation to provide the material requested by the Prosecution.⁴
5. A disclosure order by the Chamber is therefore necessary to enable the Prosecution to properly respond to the Defence's allegations and for the fair and expeditious conduct of the proceedings.

Confidentiality

6. This request and accompanying annex are currently classified as confidential, pursuant to regulation 23bis(1) and (2) of the Regulations of the Court ("Regulations") as they contain *inter alia* information relating to confidential *inter parte* communications, and relate to the confidential Termination Request.

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Background

7. On 20 May 2020 and 22 May 2020, the Defence disclosed via email to the Prosecution Dr Cohen's report⁵ and Dr Porterfield's report⁶, respectively.
8. On 16 June 2020, the Prosecution requested the Defence for disclosure of material related to Dr Porterfield's report⁷ and Dr Cohen's first report⁸, including mission letters/emails, all the material provided to them and the remuneration provided.
9. On 17 June 2020, the Termination Request as originally filed was notified⁹ (despite the deadline for the filing being 16 June 2020)¹⁰ and a courtesy copy sent on the same day¹¹.
10. On 17 June 2020, the Defence disclosed to the Prosecution 64 items, including Mr Sangaré's report¹², Dr Crosby's report,¹³ the additional report by Dr Cohen,¹⁴ and some items underlying Dr Crosby's report and Dr Cohen's additional report.¹⁵
11. On 25 June 2020, the Prosecution filed an urgent request to strike Annex B of the Termination Request and request for an extension of the page and time limits to respond to the Termination Request ("Prosecution filing of 25 June 2020").¹⁶
12. On 26 June 2020, the Prosecution requested the Defence to disclose material related to Mr Sangaré's report.¹⁷

⁵ [REDACTED], disclosed in Pre-Trial Rule 78 D28 package 02 on 20 May 2020. See ICC-01/12-01/18-868 [REDACTED].

⁶ [REDACTED], disclosed in Pre-Trial Rule 78 D28 package 03 on 22 May 2020. See ICC-01/12-01/18-869 [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ Termination Request.

¹⁰ ICC-01/12-01/18-833.

¹¹ [REDACTED].

¹² [REDACTED], disclosed in Pre-Trial Rule 78 D28 package 04 on 17 June 2020.

¹³ [REDACTED], disclosed in Pre-Trial Rule 78 D28 package 04 on 17 June 2020.

¹⁴ [REDACTED], disclosed in Pre-Trial Rule 78 D28 package 04 on 17 June 2020.

¹⁵ See e.g. [REDACTED] disclosed in Pre-Trial Rule 78 D28 package 04 on 17 June 2020, [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

13. On 29 June 2020, the Defence responded to the Prosecution email regarding Mr Sangaré, rejecting the Prosecution request for material related to his report.¹⁸
14. On 29 June 2020, the Prosecution requested the Defence to disclose material related to Dr Crosby's report.¹⁹ Shortly thereafter, the Defence disclosed one, but not all, of the items requested.²⁰
15. On 1 July 2020, the Prosecution requested the Defence to disclose material related to the additional report of Dr Cohen.²¹
16. On 1 July 2020, the Defence responded to the Prosecution filing of 25 June 2020.²²

Submissions

17. The Prosecution needs full and adequate Defence disclosure to respond to the very serious allegations made in the Termination Request, in particular: (i) alleged collusion by the Prosecution in alleged torture, cruel, inhumane and/or degrading treatment of the Accused and other witnesses interviewed by the Prosecution while detained by Malian authorities; (b) alleged lack of voluntariness or informed consent in the interview process of the Prosecution; and (c) alleged tainting of the evidentiary record through alleged torture evidence.
18. In support of these allegations, the Defence extensively relies upon the reports by the following four Defence consultants:²³
 - Dr Porterfield - a psychologist, who conducted an evaluation of the Accused in person from [REDACTED], spoke on the phone to

¹⁸ [REDACTED]

¹⁹ [REDACTED]

²⁰ [REDACTED], disclosed in Pre-Trial Rule 78 D28 package 05 on 29 June 2020. [REDACTED]

²² [REDACTED]

²³ See e.g. Termination Request, para. 16-17, 31, 33, 42, 48, 70, 72, 82, 84, 86-87 (Dr Cohen), para. 17, 19, 34, 37-40, 45, 51, 106 (Dr Porterfield), para. 42, 59, 73, 84, 107 (Dr Crosby) and fn. 60, 63, 65 (Mr Sangaré).

the Accused on six occasions from [REDACTED], and [REDACTED]
[REDACTED].²⁴

- Dr Cohen - a forensic physician, who conducted a physical examination of the Accused in [REDACTED] and made physical findings [REDACTED]
[REDACTED].²⁵
- Dr Crosby - a physician, who reviewed some transcripts of interviews with detained individuals and who concluded that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].²⁶ and
- Mr Sangaré - a Malian lawyer, who produced a report on issues related to, *inter alia*, the legality of detention and interrogation by the *Sécurité d'état* under Malian law²⁷ and interviewed Defence witnesses [REDACTED]
[REDACTED].²⁸

19. As indicated in the [REDACTED],²⁹ the Prosecution intends to instruct its own experts to provide their opinion on the issues raised by the Defence consultants' reports, including their own independent expert assessment of relevant evidence relied upon by the Defence consultants. However, it is impossible for the Prosecution experts to properly comment on the Defence consultants' reports, or the Prosecution to properly assess these reports or their expertise, without full disclosure of the Requested Material.

²⁴ Dr Porterfield's report of 22 May 2020, [REDACTED].

²⁵ Termination Request, para. 16-17.

²⁶ Dr Crosby's report, [REDACTED]; Termination Request, para. 42.

²⁷ Mr Sangaré's report, [REDACTED].

²⁸ [REDACTED]
[REDACTED]
[REDACTED].

20.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁰

21. This claim is unfounded. The fact that the Prosecution has more, additional disclosure obligations does not mean that the Defence has no obligations to provide adequate disclosure of information relating to the witnesses whom it relies upon in support of its Termination Request.

22. First, the case law of this Court as well as of *ad hoc* tribunals confirms that “‘sources used in support of any expert witness statement must be clearly indicated and easily accessible to the other party upon request’ as this is necessary for the proper evaluation of the expert evidence and the ability to test or challenge the probative value of such evidence”.³¹ For example, in the *Ongwen* case, the Single Judge of Trial Chamber IX found that the fair and expeditious conduct of the proceedings requires the Defence to disclose clinical notes taken by Defence experts as requested by the Prosecution.³² In this context, the Single Judge referred to rule 79(4) of the Rules,³³ which provides the Chamber with broad

³⁰

[REDACTED]

³¹ ICC-02/04-01/15-709, para. 12, citing ICTY, Trial Chamber, *Prosecutor v. Galić*, Decision on the expert witness statements submitted by the Defence, IT-98-29-T, 27 January 2003, p. 6. See also e.g. ICTY, *Prosecutor v. Gotovina*, Decision on disclosure of expert materials, IT-06-90-T, 27 August 2009, para. 10 (‘[t]he sources and methodology used in support of any proposed expert opinion must be clearly indicated and accessible. If such transparency is lacking, this will seriously affect the parties’ and the Chamber’s possibility to test or challenge the factual basis and the methodology on which the expert witness reached his or her conclusions, and thereby affect their possibility to assess the probative value of the proposed expert report’); ICTY, *Prosecutor v. Dragomir Milošević*, Decision on admission of expert report of Robert Donia, IT-98-29/1-T, 15 February 2007, para. 8; ICTY, *Prosecutor v. Radovan Karadžić*, Decision on Prosecution motion to exclude the expert report of Kosta Čavoški, IT-98-S/18-T, 5 April 2013, para. 22; STL, *Prosecutor v. Ayyash*, Decision on Sabra’s seventh motion for disclosure –experts, STL-11-01/PT/PTJ, 24 May 2013, para. 6.

³² ICC-02/04-01/15-709, para. 18.

³³ ICC-02/04-01/15-709, para. 18.

powers to order disclosure of “any other evidence” than that relating to the defences regulated under rule 79(1)(a) and (b) of the Rules.³⁴

23. Second, the Defence has disclosure obligations arising from its own burden of proof to establish a sound basis for its request to terminate the proceedings. While the Defence fails to specify a clear legal basis in the Termination Request itself, it did indicate in its earlier filings that the request is based on an alleged abuse of process.³⁵ The Court’s case law is clear that should an accused seek a termination of proceedings on the ground of alleged abuse of process, the Defence bears the evidentiary burden to establish on “a balance of probabilities” the facts and other relevant matters upon which the application rests.³⁶ In the Termination Request, the Defence itself conceded that there needs to be a “founded” complaint that the Prosecution evidence was obtained directly or indirectly through torture, or that torture occurred when he was in its custody.³⁷
24. The Termination Request relies principally and extensively upon the conclusions and assessments made by the Defence consultants. In order for the Prosecution to properly assess the Defence consultants’ reports and if appropriate, challenge their expertise and/or the probative value of their reports, the Prosecution requires all relevant information and material, such as their CVs, letters of instruction, underlying materials/sources relied upon, draft reports and notes of contacts (see Annex A).³⁸ Without access to such material, it would be impossible for the Prosecution to effectively respond and assist the Chamber in its determination of the Defence Termination Request. In particular, it is crucial for the proper assessment of these reports to know to what extent the Defence was

³⁴ ICC-01/04-01/06-1235-Corr-Anx1, para. 35.

³⁵ ICC-01/12-01/18-827, para. 4 and 13.

³⁶ ICC-01/05-01/08-802, para. 201, in which Trial Chamber III found that: “the compelling logic of the situation is that should an accused challenge the admissibility of the case under Article 19(2)(a) of the Statute or argue that its continuation amounts to an abuse of the process of the Court, it falls to him to establish the facts and other relevant matters that are said to support the argument. In both situations, the accused is arguing that the proposed trial before the ICC should not occur and the suggested terminal result is, therefore, the same.” See para. 203 regarding the standard of proof.

³⁷ Termination Request, para. 6-8.

³⁸ [REDACTED]

involved in directing its consultants in their mandate and whether or not its instructions and comments, if any, impacted their findings.

25. T [REDACTED]
[REDACTED].³⁹

The Prosecution notes that given the different standards applicable, the Accused's [REDACTED] is a distinct issue that could be adjudicated by the Chamber, including with the assistance of a court-appointed expert pursuant to [REDACTED] before and independently of the Defence Termination Request. In any event, given the Defence's reliance on the reports of Dr Porterfield and Dr Crosby in support of this recent argument, the full disclosure of relevant material is even more important.

26. There is of course a possibility for the Prosecution to elicit relevant information directly from the Defence consultants by seeking to interview them, or by cross-examining them at an evidentiary hearing if convened as requested by the Defence.⁴⁰ However, such steps would be less efficient: (i) they would not allow the Prosecution experts to produce their reports assessing the Defence reports and providing their own independent assessments, or the Prosecution to properly prepare and assess the information in order to provide a full and timely response to the Termination Request; and (ii) they would require breaks and adjournments in the possible testimony of said consultants, causing delay in the entire process of adjudication of the Termination Request. The fair and expeditious conduct of the proceedings requires the Defence to disclose the Requested Material, and in advance of the Prosecution's response to the Termination Request.

³⁹ [REDACTED].

⁴⁰ Termination Request, para. 8, requesting the Chamber to "convene a public evidentiary hearing, to allow for testimony from Drs. Porterfield, Cohen and Crosby, and Me. Sangaré, and the introduction and authentication of their expert reports, which are cited in [the Termination Request]".

Relief requested

27. The Prosecution requests the Chamber to issue an order for immediate disclosure of all the material pending disclosure among the Requested Material as detailed in the emails in Annex A.



Fatou Bensouda
Prosecutor

Dated this 3rd day of July 2020

At The Hague, The Netherlands.