

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

Date: **23 July 2020**

Date of submission:

16 December 2020

TRIAL CHAMBER X

Before: Judge Kimberly Prost, Single Judge

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
*THE PROSECUTOR V. AL HASSAN AG ABDOUL AZIZ AG MOHAMED
AG MAHMOUD***

Public

**Public redacted version of “Prosecution’s request for leave to reply to the Defence response to the Prosecution disclosure request, ICC-01/12-01/18-929-Conf”,
23 July 2020, ICC-01/12-01/18-969-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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I. Introduction

1. Pursuant to regulation 24(5) of the Regulations of the Court (“Regulations”), the Prosecution requests leave to reply to the Defence Response (“Defence Response”)¹ to the Prosecution request for disclosure of material related to the reports of four Defence consultants (“Prosecution Request”), which are extensively relied upon in the Defence Request to terminate the proceedings (“Termination Request”).²
2. Following the filing of the Prosecution Request on 5 July 2020, the Defence belatedly, and in a piecemeal fashion, disclosed part of the requested material on 15, 17, 20 and 22 July 2020.³ Contrary to the Defence claim that all the critical information underpinning the Termination Request was disclosed contemporaneously with the filing of that Request,⁴ a total of 168 newly disclosed items include some key material, such as dozens of medical files related to the Accused obtained from the ICC Detention Centre and provided to Dr Porterfield and Dr Cohen, the letters of instruction for Dr Porterfield⁵ and Dr Crosby,⁶ Dr Porterfield’s *curriculum vitae* (CV)⁷ and two versions of Mr Sangaré’s CV.⁸
3. The Defence now argues that all disclosable material sought in the Prosecution Request, which is in the possession of the Defence, has been disclosed to the Prosecution.⁹ This claim, however, is based on a series of mischaracterisations of facts and an erroneous interpretation of the scope of its disclosure obligations. The

¹ ICC-01/12-01/18-965-Conf.

² ICC-01/12-01/18-929-Conf.

³ Trial Rule 78 D28 package 06 disclosed on 15 July 2020; Trial Rule 78 D28 package 07 disclosed on 17 July 2020 (at 21:46, or more than 6 hours after they filed the Defence Response at 15:30). Two more packages, Trial Rule 78 D28 package 08 and Trial Rule 78 D28 package 09 were disclosed after the filing of the Defence Response, on 20 and 22 July 2020, respectively.

⁴ Defence Request, para. 5.

⁵ Instruction letter to Dr Porterfield dated 23 September 2019, [REDACTED]; Second instruction letter to Dr Porterfield dated 20 January 2020, [REDACTED].

⁶ Instruction letter to Dr Crosby dated 25 April 2020, [REDACTED]; Second instruction letter to Dr Crosby dated 1 May 2020, [REDACTED].

⁷ Dr Porterfield’s CV, [REDACTED].

⁸ Mr Sangaré’s CV, [REDACTED]; updated CV, [REDACTED].

⁹ Defence Request, para. 4.

Prosecution accordingly seeks to file a limited and focused reply in relation to eight issues as specified below.

4. All the proposed issues could not reasonably have been anticipated by the Prosecution at the time of the filing of its Prosecution Request. A reply in relation to the Proposed Issues would also greatly assist the Chamber in its resolution of the Prosecution Request by clarifying the facts and law related to disclosure by the Defence.

II. Confidentiality

5. Under regulation 23*bis*(2) of the Regulations of the Court (“Regulations”), the Prosecution files this application as confidential since it refers to filings of the same classification. A public redacted version will be submitted in due course.

III. Submissions

6. Regulation 24(5) of the Regulations provides that (1) participants may only reply to a response with the leave of the Chamber and (2) unless otherwise permitted by the Chamber, a reply shall be limited to new issues raised in the response which the replying party could not reasonably have anticipated. A Chamber may also grant a request for leave to reply if a reply would otherwise be necessary for the adjudication of the matter under consideration.¹⁰

7. The Defence Response mischaracterises aspects of the Prosecution request and of the material sought to be disclosed. If leave is granted, the Prosecution will correct such mischaracterisations as regards the following eight points:

A. The Defence claim that the Prosecution request for disclosure of the notes of contact, including the first contact and any subsequent communications and meeting with the Defence is overbroad and can be raised during the

¹⁰ ICC-01/04-02/06-1813, para. 8.

evidentiary hearing requested by the Defence;¹¹

- B. The Defence contention that there was no formal letter of instruction to Dr Cohen;¹²
- C. The Defence's claim that the letter of instruction dated 4 March 2020 to Mr Sangaré and material provided to him by the Defence cannot be disclosed as these contain information identifying Defence witnesses and innocent third parties;¹³
- D. The Defence allegation that "Dr Crosby's report sets out all the documents provided to her for the purpose of her report";¹⁴
- E. The Defence contention that the following materials are not subject to disclosure as they were not relied upon or addressed by Dr Porterfield in her report, their content was reproduced in her report, and/or they contain private information of AL HASSAN: "further chronology of detention of Mr. Al Hassan", "the transcription of Dr Porterfield's notes", "the consent form signed by Mr. Al Hassan", "the photographs of Mr. Al Hassan's scars", "the overview of the detention conditions" and "a memorandum prepared by the Defence" regarding detention conditions and evidence related to other witnesses;¹⁵
- F. The Defence claim that drafts of Defence experts' reports sent to them and any comments the Defence made on these drafts constitute "internal work product";¹⁶
- G. The Defence claim that the issue regarding details of interviews conducted

¹¹ Defence Response, para. 8-10.

¹² Defence Response, para. 12; See, for example, the instruction email to Dr Cohen and Dr Porterfield, [REDACTED], referring to an "initial request for your expertise" and "an additional letter of instruction."

Defence Response, para. 14, 20.

¹⁴ Defence Response, para. 16.

¹⁵ Defence Response, para. 16.

¹⁶ Defence Response, para. 21-22.

by Mr Sangaré is moot,¹⁷ even though the mother tongue of the interviews remains unspecified;¹⁸ and

H. The Defence omission to provide the name and CV of persons who served as an interpreter during the examination of AL HASSAN by Drs Porterfield and Cohen.¹⁹

8. Should leave be granted, the Prosecution will provide important clarifications and corrections derived from the record of the case, including from documents disclosed by the Defence. In the Prosecution views, these submissions providing an accurate record for the matter under consideration will assist the Chamber in its assessment and disposition of the Prosecution Request.

VI. Requested Relief

9. For the foregoing reasons, the Prosecution requests that the Single Judge grant it leave to reply to the Defence Response, addressing the above issues.



Fatou Bensouda, Prosecutor

Dated this 23rd of July 2020

At The Hague, The Netherlands

¹⁷ Defence Response, para. 28.

¹⁸ Prosecution Request, Annex A, 26 June 2020 Prosecution email to the Defence regarding Mr Sangaré's report.

¹⁹ Prosecution Request, Annex A, 16 June 2020 Prosecution emails to the Defence regarding Ms Porterfield's and Ms Cohen's reports.