

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **15 March 2021**

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28 May 2021

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**

PUBLIC

With Confidential Annex A

Public redacted version “Defence response to ‘Prosecution’s request to strike out four annexes to the Defence Observations on Report of Panel of Experts (ICC-01/12-01/18-1316-Conf) and to obtain access to ex parte annexes thereto”

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

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

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(Participation/Reparation)**

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I. Introduction

1. On 23 February 2021, the Defence filed its ‘Defence Observations on Report of Panel of Experts’¹ (‘Defence Observations’).
2. On 3 March 2021, the Prosecution filed its ‘Prosecution’s request to strike out four annexes to the Defence Observations on Report of Panel of Experts (ICC-01/12-01/18-1316-Conf) and to obtain access to ex parte annexes thereto’² (‘Request’).
3. By the Request, the Prosecution requested that the Chamber:
 - a. strike from the record the letter of instruction³ and full report of Dr Brock Chisholm,⁴ as well as any observations of the Defence relying upon the report of Dr Chisholm in the body of the Defence Observations;
 - b. strike from the record Annexes D and F, on the basis that they contain arguments akin to additional submissions; and
 - c. grant the Prosecution accesses to all annexes related to the Defence Observations, and in particular Annexes E, G, H, I, J and K.
4. On 4 March 2021, the Single Judge reclassified Annexes G, H, I and J as confidential.⁵ On 5 March 2021, the Single Judge, in response to a Defence request, reclassified Annex K as confidential,⁶ and the Defence disclosed a confidential redacted version of Annex E.⁷
5. The Defence opposes the Request on the basis that:
 - a. striking out of Dr. Chisholm’s expert report, associated letter of instruction and observations of the Defence relying on Dr. Chisholm’s report would be inappropriate, and contrary to the principle of equality of arms;

¹ ICC-01/12-01/18-1316-Conf.

² ICC-01/12-01/18-1333-Conf.

³ ICC-01/12-01/18-1316-Conf-AnxA.

⁴ ICC-01/12-01/18-1316-Conf-AnxB.

⁵ Annex A, p. 2.

⁶ Annex A, p. 1.

⁷ ICC-01/12-01/18-1316-Conf-Exp-AnxE.

- b. striking out of Annexes D and F would be inappropriate, as these documents, contrary to the Prosecution's submissions, do not contain substantive submissions or analysis; and
- c. the request regarding reclassification is now moot, following the reclassification and redisclosure of Annexes E, G, H, I, J and K.

II. Confidentiality

- 6. Pursuant to Regulation 23bis(2) of the Regulations of the Court, this response has been filed confidentially as it responds to a filing of the same classification.

III. Submissions

The request to strike out Annexes A and B, and the parts of the Defence Observations which rely on Annex B, is inappropriate, and contrary to the principle of equality of arms

- 7. In the Request, the Prosecution seeks to strike out the letter of instruction to Dr. Chisholm, Dr. Chisholm's report and all parts of the Defence Observations which rely on Dr. Chisholm's report.⁸ In doing so, the Prosecution confuse and conflate multiple rulings of the Chamber as concerns experts in order to deprive the Defence of an opportunity to address critical issues concerning Mr. Al Hassan's fitness.
- 8. *First*, the Prosecution, in preparing its response⁹ to the Defence termination request,¹⁰ instructed two experts, Dr. [REDACTED] and Dr. [REDACTED]. These experts' findings were annexed to the response,¹¹ and heavily referred to, and relied upon, in the Prosecution's response.¹² The Prosecution was able to obtain testimony from Dr. [REDACTED] specifically in relation to issues of fitness.¹³ The Prosecution now seeks the submission of Dr. [REDACTED]'s report in relation to these issues.¹⁴ The

⁸ ICC-01/12-01/18-1333-Conf, paras 7-16.

⁹ ICC-01/12-01/18-982-Conf-Exp-Corr.

¹⁰ ICC-01/12-01/18-885-Conf-Corr.

¹¹ ICC-01/12-01/18-982-Conf-AnxA; ICC-01/12-01/18-982-Conf-AnxB.

¹² See e.g. ICC-01/12-01/18-982-Conf-Exp-Corr, paras 82, 87, 104, 107-109, 113, 134, 156, 158-165, fn171, 186, 237, 249-254, 262-263, 308, 369, 371-373, 380-385, 390.

¹³ See e.g. findings of [REDACTED]

¹⁴ ICC-01/12-01/18-1215-Conf.

Defence was not able to instruct experts on the specific issue of fitness and modalities of trial participation, as the testimony of Drs. Porterfield, Crosby and Cohen focused on the specific allegations of torture and cruel, inhuman and degrading treatment against Mr. Al Hassan [REDACTED]. To deny the Defence an opportunity to obtain an expert's opinion on current issues of fitness, in circumstances where the Prosecution was able to do so, would be contrary to the fundamental principle of equality of arms.

9. *Second*, Dr. Chisholm's report and the findings contained therein are linked to not only to the litigation regarding the Report of the Panel of Experts, but also the Article 69(7) Application. The Panel of Experts drew a link in their Report between the use of the evidence affected by the Defence Termination Request and Article 69(7) Application, and Mr. Al Hassan's fitness.¹⁵ The Defence, in turn, relied on Dr. Chisholm's report in connection with its Article 69(7) Application. It would be artificial in these circumstances to exclude Dr. Chisholm's report given the linkage between these issues.
10. *Third*, Regulation 103(4) of the Regulations of the Court specifies that "[a] detained person may be visited by and consult with a doctor of his or her own choice, subject to the relevant details and restrictions set out in the Regulations of the Registry". In line with the principle of informed consent, any treatment plan or response would need to be undertaken in consultation with Mr. Al Hassan. It was therefore in the interests of efficiency and consistent with Mr. Al Hassan's rights, to obtain an independent opinion, based on the Report of the Panel of Experts, as concerns possible treatment solutions and responses.
11. In summary, the striking out of Dr. Chisholm's report, the associated mission letter and the submissions of the Defence relying on the report would be artificial, and highly prejudicial to the Defence's ability to litigate these important issues.

¹⁵ ICC-01/12-01/18-1197-Conf-Anx, paras 281: "AH may be fit to plead to those aspects of his case that do not relate to torture evidence. However, if as the trial proceeds, the issue of torture and torture evidence becomes increasingly relevant to his defence or to the case of the OAP, AH may find himself in the invidious position of being cross examined by an individual who he claims was complicit in his torture" and 293: "AH might face significant impairments to engage in exercising his fair trial rights. If AH faces the aforementioned issues during the court proceedings, he is no longer able to exercise his fair trial rights. If some evidence (even less than the 90% suggested by AH) was obtained under forced confession, every confrontation with the evidence presented in Court would serve as a trauma trigger. The Court proceedings per se would then provide a high risk for serious deterioration of AH's mental health, as they would indeed objectively confirm his suspicion of not being respected and treated as a human being."

The request to strike out Annexes D and F is inappropriate, as these documents do not contain substantive submissions or analysis

12. In the Request,¹⁶ the Prosecution seeks to strike out Annexes D and F on the basis that they ‘contain so-called substantive developments, which are in fact additional submissions’ in alleged contravention of Regulations 36(2)(b) and 37 of the Regulations of the Court.¹⁷ This request is misguided, and mischaracterises Annex D and F.
13. Annex D is a table which identifies inconsistencies between the Report of the Panel of Experts,¹⁸ and evidence filed in this case. It does not, as the Prosecution states, represent the Defence’s ‘assessment of the purported facts’ or ‘the Defence’s own interpretation of circumstances.’¹⁹ Rather, the Annex reproduces verbatim quotes from the Panel of Experts and the English translations of Mr. Al Hassan’s Detention Unit medical records. It is an objective record of each, as documented by medical professionals external to the Defence, with no analysis or conclusions drawn in relation to the inconsistencies between these documents.
14. Annex F is an email and attachment. The Prosecution states in the Request that the material contained in the attachment was ‘first raised by the Defence in its email in 2020’ and that ‘[t]he Defence clearly seeks to use this annex to supplement its arguments on the alleged need for the Accused to undergo treatment and regarding adjustments to the modalities of the trial. Tellingly, it is referred to only once in the Defence observations, in a footnote to apparently show that what the Defence proposes would be consistent with the practice in other ICL cases.’²⁰ *First*, the material contained in the attachment was ‘first raised’ by the Defence in the email of 2020 in response to a direct request from the Registry for submissions on this issue. *Second*, the purpose of the inclusion of this annex is not to supplement the Defence’s submissions on this issue but rather to preserve for the record the Defence’s submissions as they were provided in August 2020. As the Prosecution notes, the Chamber ruled on this issue and the Defence assumes that the Chamber had access to

¹⁶ ICC-01/12-01/18-1333-Conf, paras 17-22.

¹⁷ ICC-01/12-01/18-1333-Conf, para 17.

¹⁸ ICC-01/12-01/18-1197-Conf-Anx.

¹⁹ Cf ICC-01/12-01/18-1333-Conf, para 18.

²⁰ ICC-01/12-01/18-1333-Conf, para 19.

this material. As such, no prejudice is occasioned by the Defence preserving for the record the fact that it raised these issues, in connection with conformity with other ICL cases, in August 2020.

The reclassification request is moot

15. By the Request, the Prosecution requested access to Annexes E, G, H, I, J and K to the Defence Observations.²¹ As noted *infra*, the Prosecution was provided access to these documents on 4 and 5 March 2021. This part of the Request is therefore moot.

IV. Relief sought

16. The Defence respectfully requests that Trial Chamber X:
- a. **REJECT** the request to strike out Annexes A, B, D and F to the Defence Observations, and the parts of the Defence Observations which rely on Annex B; and
 - b. **DECLARE MOOT** the reclassification request in respect of Annexes E, G, H, I, J and K to the Defence Observations.



Melinda Taylor
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Dated this 15th Day of March 2021
At The Hague, The Netherlands

²¹ ICC-01/12-01/18-1333-Conf, paras 23-24.