



Original: English

No. **ICC-01/12-01/18**
Date: **16 November 2023**
Date of original: **28 October 2020**

TRIAL CHAMBER X

**Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane, Judge
Judge Kimberly Prost, Judge**

SITUATION IN THE REPUBLIC OF MALI

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

Public redacted version of

Decision on Defence request for provision of Independent Counsel's report

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

Fatou Bensouda
James Stewart

Counsel for the Defence

Melinda Taylor
Kirsty Sutherland

Legal Representatives of Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of Applicants**Unrepresented Victims****Unrepresented Applicants for Participation/Reparations****The Office of Public Counsel for Victims****The Office of Public Counsel for the Defence****States Representatives***Amicus Curiae***REGISTRY**

Registrar

Peter Lewis

Counsel Support Section

Esteban Peralta Losilla

Victims and Witnesses Unit**Detention Section****Victims Participation and Reparations Section****Other**

Catherine Mabilie

Trial Chamber X (the ‘Chamber’) of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Article 64 (2) of the Rome Statute (the ‘Statute’), issues the following ‘Decision on Defence request for provision of Independent Counsel’s report’.

1. On 22 September 2020, the Chamber directed the Registrar to appoint an independent counsel (the ‘Decision Appointing an Independent Counsel’).¹
2. On 28 September 2020, the Registrar appointed Ms Catherine Mabilie as Independent Counsel.²
3. On 9 October 2020, the Independent Counsel transmitted her report directly to the Chamber (the ‘Report’).³
4. On 20 October 2020, the Chamber issued its ‘Decision on Independent Counsel’s Report’.⁴
5. On 22 October 2020, the Defence requested the Chamber to disclose the Report to Mr Al Hassan and to the Defence on an *ex parte* basis (the ‘Request’).⁵
6. The Chamber notes the Defence’s submissions that [REDACTED].⁶ The Defence also submits that ‘Mr Al Hassan retains the right to see the Report’ and therefore seeks that it be provided to him.⁷
7. The Chamber also notes the Defence’s submissions that without access to the Report, it is impossible for the Defence to understand the basis for the alleged

¹ Decision on Associate Counsel’s request for withdrawal, ICC-01/12-01/18-1065-Conf, para. 12 (a public redacted version was filed that same date ICC-01/12-01/18-1065-Red).

² Independent Counsel’s Report dated 9 October 2020. *See also* e-mail from the Registry to Trial Chamber X Communications on 30 September 2020 at 14:09.

³ E-mail from Ms Catherine Mabilie to Trial Chamber X at 16:18. *See also* Transmission du rapport de mission du Conseil indépendant établi conformément à la "Public redacted version of "Decision on Associate Counsel's request for withdrawal", 16 October 2020, ICC-01/12-01/18-1112-Conf-Exp.

⁴ ICC-01/12-01/18-1118-Conf (a public redacted version was filed that same date ICC-01/12-01/18-1118-Red).

⁵ Defence Request for Provision of Independent Counsel’s Report, ICC-01/12-01/18-1121-Conf-Exp (a confidential redacted version was filed that same date ICC-01/12-01/18-1121-Conf-Red).

⁶ Request, ICC-01/12-01/18-1121-Conf-Exp, para. 5.

⁷ Request, ICC-01/12-01/18-1121-Conf-Red, para. 5.

issues of potential concern identified by the Chamber.⁸ It also submits that these circumstances raise *prima facie* concerns regarding judicial impartiality.⁹

8. The Chamber has had due regard to the aforesaid submissions of the Defence. Although it is understandable that the Accused and the Lead Counsel may have an interest in reading the Report, the Chamber does not agree with the Defence's suggestion that the Accused has the unconditional right to read the report [REDACTED].
9. Although the Report is the result of discussions between the Independent Counsel and Mr Al Hassan, it contains the expert and professional conclusions that the Independent Counsel transmitted to the Chamber on an *ex parte* basis. This was already foreseen by the Chamber, when, in appointing the Independent Counsel, it specifically instructed that '[s]hould any issue be identified by the independent counsel, he or she shall report to the Trial Chamber, on an *ex parte* basis, within 15 days from his or her appointment'.¹⁰
10. The Chamber observes that *ex parte* proceedings are permissible and foreseeable in the statutory framework, including in issues related to the rights to the accused. In the view of the Chamber the level of classification of the Report, exclusively between the Chamber and the Independent Counsel, is warranted and must remain. As noted above, the Independent Counsel was instructed to report back to the Chamber on an *ex parte* basis. Thus, the Independent Counsel fulfilled her mandate with the understanding that her Report to the Chamber would be considered solely by the Chamber. The Chamber considers that the confidence between Independent Counsel and the Chamber must endure, despite the Chamber having relieved the Independent Counsel of her mandate. Thus, the Chamber does not consider, in light of the Defence Request, that it is either appropriate or necessary to reconsider its decision on the *ex parte* nature of these proceedings, and therefore transmit the Report either to Mr Al Hassan or to his Lead Counsel.

⁸ Request, ICC-01/12-01/18-1121-Conf-Red, paras 6-7.

⁹ Request, ICC-01/12-01/18-1121-Conf-Red, para. 8.

¹⁰ Decision Appointing an Independent Counsel, ICC-01/12-01/18-1065-Red, para. 13 (emphasis added).

11. The Chamber notes that it has provided the Defence with the main contents of the Report which are relevant to the Lead Counsel.¹¹ Thus, Lead Counsel is cognisant of matters brought to the attention to the Chamber and that, in the view of the Chamber, may require ‘necessary steps’ from Lead Counsel. The issue is clear. It was noted already in the Decision Appointing the Independent Counsel: the ‘repeated unusual changes of associate counsel, and their potential impact on the trial’.¹² The issue was noted again by the Chamber in the Decision on Independent Counsel’s Report: that [REDACTED].¹³ The Chamber also reiterated that the ‘recurring withdrawals of Associate Counsel could have a potential impact on the trial, particularly at this stage of the proceedings, where the presentation of evidence has now started and witnesses are scheduled to testify continuously in the coming months’.¹⁴
12. In light of the above, the Chamber disagrees with the Defence that ‘without access to the Report’, it is impossible to understand the basis of the alleged issues of potential concern.¹⁵
13. The Chamber reiterates that at this stage it does not deem it necessary to take any further action on the matter.¹⁶

¹¹ Decision on Independent Counsel’s Report, ICC-01/12-01/18-1118-Conf, paras 4-6.

¹² ICC-01/12-01/18-1065-Conf, para. 10.

¹³ ICC-01/12-01/18-1118-Conf, para. 5.

¹⁴ Decision on Independent Counsel’s Report, ICC-01/12-01/18-1118-Conf, para. 8; Decision Appointing an Independent Counsel, ICC-01/12-01/18-1065-Red, para. 10.

¹⁵ Request, ICC-01/12-01/18-1121-Conf-Red, para. 7.

¹⁶ Decision on Independent Counsel’s Report, ICC-01/12-01/18-1118-Conf, para. 10.

FOR THESE REASONS, THE CHAMBER HEREBY

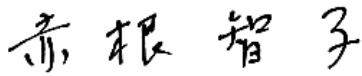
REJECTS the Request.

Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua

Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated 28 October 2020

At The Hague, The Netherlands