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**International  
Criminal  
Court**

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No.: **ICC-01/12-01/18**  
Date: **22 January 2021**  
Date of submission:  
**29 April 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**

**Public redacted version of “Defence Response to ‘Prosecution’s first request for the admission of documentary evidence from the bar table, and regulation 35 request””**

**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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**Other**

1. The Prosecution request for the admission of documentary evidence from the bar table, and regulation 35 request<sup>1</sup> notified on 18 December 2020<sup>2</sup> should be rejected in its entirety.
2. The Prosecution Request seeks the submission of four documents which are combined into one item that totals 6 pages.<sup>3</sup> The documents comprise of: (i) a ‘Fit on Arrival’ clearance form signed by a medical officer at the detention centre in the Hague; (ii) a ‘Medical Examination Form’ completed by the same medical officer at the detention centre in the Hague; (iii) a ‘Medical History’ form; and (iv) a ‘Medical Examination Form’ completed by a medical doctor in Mali prior to Mr Al Hassan’s transfer. All four documents are dated on 31 March 2018. All four documents are short, very basic and formulaic. The medical assessments are limited to check boxes, single word appraisals and one-sentence conclusions. The documents do not represent full and exhaustive medical examination reports, but rather *pro forma* documents necessary for travel and registration, suggesting only cursory physical examinations.
3. The Regulation 35 request to add this item to the List of Evidence (“LoE”) should be rejected on the ground that it is out of time. Further, the Prosecution’s request for its submission into evidence should be rejected because:
  - a. The Request must be examined within the context of the Article 69(7) litigation all relevant evidence;
  - b. The Prosecution has failed to specify the relevance of the Medical Reports to the applicable standard; and
  - c. The item does not have any or any significant probative value, and any probative value claimed by the Prosecution is outweighed by the prejudice that would be caused by its admission.
4. The Defence requests the Trial Chamber to make a determination on the Request rather than deferring the decision to the judgment. The Trial Chamber’s decision will

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<sup>1</sup> ICC-01/12-01/18-1213-Conf (‘Prosecution Request’ or ‘Request’).

<sup>2</sup> On 4 December 2020, the Trial Chamber held ‘that time limits falling between 11 December 2020 and 10 January 2021 are suspended’ with the three specified exceptions not relevant to the present response. The deadline for response is therefore 22 January 2021.

<sup>3</sup> MLI-D28-0003-1334 (‘Medical Reports’).

impact upon future Article 69(7) Defence submissions and therefore it is also requested that the Trial Chamber provide this decision prior to the Defence's submissions under Article 69(7).

5. Pursuant to Regulation 23*bis*(2) of the Regulations of Court, the present response is filed confidential because it responds to a filing of the same classification. The Defence does not object to it being re-classified.

## **I. The Regulation 35 request should be rejected**

6. The Prosecution request to add the item to the LoE pursuant to regulation 35(2) should be for being out of time. The Prosecution Request explains that it first received this item on **15 July 2020**. Its request was filed almost 5 months to the day. It explains that:

It could therefore not be included in the LoE submitted on 12 May 2020 as it had been outside the Prosecution's control and because **its relevance only became apparent subsequently**, after the Defence raised specific challenges regarding AL HASSAN's physical and mental health.<sup>4</sup>

7. Notwithstanding that earlier filings had already suggested Mr Al Hassan suffered from health concerns impacting upon the trial,<sup>5</sup> the Prosecution's argument should not be accepted given that the Defence raised the issue of Rule 135<sup>6</sup> fitness on **14 July 2020**.

8. Specifically the Defence requested that Trial Chamber X:

a. find that Mr. Al Hassan is unfit to stand trial on the basis of the evidence before the Chamber; or, in the alternative, b. order, pursuant to Rule 135, that an independent medical examination of Mr. Al Hassan's fitness to stand trial (and be detained), be conducted by an expert/s with specific expertise in evaluating PTSD-DS (that is, the dissociative sub-type of post-traumatic stress disorder), in torture survivors, who is available to meet with Mr. Al Hassan in person.<sup>7</sup>

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<sup>4</sup> Prosecution Request, para. 8.

<sup>5</sup> See for example ICC-01/12-01/18-680-Conf-Red at para 9, 15-17, 23

<sup>6</sup> Rules of Procedure and Evidence ('RPE').

<sup>7</sup> ICC-01/12-01/18-956, para. 17.

9. The Defence request preceded the disclosure of the Medical Reports. Relevance of this item to the case (as claimed by the Prosecution<sup>8</sup>) – if any – ought to have been apparent prior to 15 July 2020. In fact, the Prosecution was clearly aware that fitness was a ‘live’ issue in the case prior to this date. For example, a Prosecution request for disclosure of material underlying the Defence expert reports on **3 July 2020** noted that ‘the recent explicit argument by the Defence that the Accused is unfit to stand trial further increases the importance of obtaining all relevant material’.<sup>9</sup> The Medical Reports are among the category of items which the Prosecution was seeking in that request.<sup>10</sup> On **6 July 2020**, the Prosecution sought the disclosure of material on the basis that it was relevant to voluntariness in Prosecution interviews<sup>11</sup> and unfitness to stand trial.<sup>12</sup> Thus, if the Medical Reports have any purported relevance to the issue of Mr Al Hassan’s fitness, then it should have been obvious to the Prosecution at the point of their disclosure.
10. Therefore, the Defence requests that the Trial Chamber dismiss the Prosecution regulation 35(2) request to add the Medical Reports to its LoE on the ground that the request is out of time without reasonable justification.

## **II. The Prosecution request to submit the Medical Reports into evidence should be rejected**

11. The Prosecution’s request to submit the Medical Reports into evidence should be rejected on the grounds that: (a) the Medical Reports must be examined within the context of the Article 69(7) litigation all relevant evidence; (b) the Prosecution has failed to demonstrate the relevance of the Medical Reports to the applicable standard; and (c) the Prosecution has failed to demonstrate that the Medical Reports have any, or any significant, probative value. Moreover, any value that the Medical Reports may have is significantly outweighed by the prejudice their submission causes to Mr Al Hassan.

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<sup>8</sup> Prosecution Request, para. 14 but see also paras. 5 and 13.

<sup>9</sup> ICC-01/12-01/18-929-Conf, para. 3.

<sup>10</sup> ICC-01/12-01/18-929-Conf, para. 1 point 3, para. 22; *compare* with ICC-01/12-01/18-956, para. 5, footnote 10.

<sup>11</sup> ICC-01/12-01/18-929-Conf, para. 17.

<sup>12</sup> ICC-01/12-01/18-929-Conf, para. 24.

**The Medical Reports must be examined within the context of Article 69(7) litigation and all relevant evidence**

12. The Prosecution is asking the Trial Chamber to assess the admissibility of the Medical Reports separately from the context of litigation and evidence to which they are intrinsically linked. In so doing, the Prosecution is seeking a back door for the admission of separate items from the Article 69(7) litigation bundle, which should be considered in its entirety. This is neither appropriate nor fair to the Defence, and should be rejected.
13. By drawing the Defence into piecemeal litigation over separate but intrinsically linked evidentiary items, the Prosecution is attempting to create a back door for the admission of items that should be considered within the entirety of the Article 69(7) litigation. In so doing, the Prosecution is effectively cherry-picking records that support its case, while ignoring others that don't<sup>13</sup> – even where the records are intrinsically linked and come from the same source.<sup>14</sup> This tactic artificially insulates the Medical Reports from their context and does not allow the Trial Chamber to conduct a fully informed assessment of the tendered item's relevance and probative value. The tactic also deprives the Defence of the opportunity to effectively oppose the admission of the Medical Reports – an effective response to the Request would need to be tied to the pending Article 69(7) application which will focus on Mr Al Hassan's physical and mental state at the time of his interviews, not during his transfer to the ICC.<sup>15</sup> Moreover, adverse inference of fact should be drawn against the Prosecution as concerns the absence of any indication that it took steps to request and obtain other medical reports produced while he was detained at the DGSE (if such records were requested but not received – this is subject to the Prosecution's disclosure obligations, if such records do not exist, this fact is relevant to Mr Al Hassan's access to healthcare and CIDT).

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<sup>13</sup> ICC-02/11-01/15-995 OA11 OA12, para. 55: Rule 64(1) of RPE requires, in principle, the non-tendering party to raise any objections to the relevance or admissibility of evidence at the time of its submission to the Chamber. It is precisely for that reason that the Amended Directions require the tendering party to submit sufficient information; thus, the right to challenge the evidence is preserved as well as the discretion of the Trial Chamber to rule on admissibility.

<sup>14</sup> E.g.: the Prosecution does not seek admission of further medical records from the Detention Centre which would be crucial for the assessment of relevance and probative value of the Medical Reports.

<sup>15</sup> ICC-02/11-01/15-995 OA11 OA12, para. 56 : What is important is that the parties are able to raise issues on relevance or admissibility in light of all the information, either at the time of submission or subsequently within the confines of rule 64 (1) of the Rules.

14. For these reasons the Defence requests the Trial Chamber to reject the Request. Should the Request nevertheless be considered, the Defence reserves its rights to add to the submissions in the present response should arguments raised or evidence submitted in later litigation impact upon the criteria for submission of the Medical Reports.

**The Medical Reports should not be accepted for submission due to lack of relevance**

15. To be submitted through the bar table, evidentiary items must be at least *prima facie* relevant. The Prosecution's submission of this item at this stage in proceedings is self-defeating. The Medical Reports either became *prima facie* relevant on 14 July 2020 (see paragraph 7 above), or are not relevant at all. Their relevance cannot have accrued in value over the intervening five months. This notwithstanding, the purported *prima facie* relevance is not made out by the Prosecution, as the Prosecution fails to define the fact or position for which the Medical Records are being tendered with sufficient specificity, and fails to explain how the tendered item will make its proposition more probable.
16. The Trial Chamber's directions on the conduct of proceedings require a party to 'file an application accompanied by a table containing: [...] iii. a description [of each item's] relevance'.<sup>16</sup> Relevance has been interpreted to mean that the item relates to a material issue or fact in the sense of making it more or less probable that a material fact or issue is proven or disproven.<sup>17</sup> Prior Trial Chambers have also required specificity and clear explanations as to how the item of evidence tendered makes this factual proposition more probable or less probable.<sup>18</sup> Moreover, the tendering party must clearly define the specific purpose for which the item is being tendered.<sup>19</sup>

<sup>16</sup> ICC-01/12-01/18-789-AnxA, para. 77-78.

<sup>17</sup> See, for example, ICC-01/09-01/11-1353, para. 15 or ICC-01/04-01/07-2635, para. 16.

<sup>18</sup> ICC-01/04-01/07-2635, para. 16 ("Unless immediately apparent from the exhibit itself, it is the responsibility of the party tendering it to explain: (1) the relevance of a specific factual proposition to a material fact of the case; (2) how the item of evidence tendered makes this factual proposition more probable or less probable. If submissions on these points are not sufficiently clear or precise, or if the Chamber cannot ascertain the relevance of an item of evidence with reasonable precision, it may decide to reject it on those grounds.").

<sup>19</sup> ICC-01/04-01/07-2635, para. 17.

17. In the annex to the Request, the Prosecution indicates that the Medical Reports are “[REDACTED]”.<sup>20</sup> Conversely, in the Request, the Prosecution indicates that the Medical Reports “would assist Trial Chamber X [...] in the determination of the truth by providing relevant information concerning the **voluntary nature** and **probative value** of AL HASSAN’s interviews with the OTP investigators.”<sup>21</sup> The Prosecution goes on to say the Medical Reports are “directly relevant to determining whether any particular medical condition could have **impaired AL HASSAN’s capacity to be interviewed** prior to his transfer to The Hague, when he was under the custody of the Malian authorities”<sup>22</sup>.
18. Thus, the Prosecution appears to suggest that the *pro forma* Medical Reports conducted at the point of Mr Al Hassan’s transfer to the ICC are relevant to the Chamber’s determination of his physical and mental fitness at the time of the interviews, his capacity to be interviewed and the voluntary nature and probative value of the evidence extracted from those interviews. These are three distinct and highly contentious propositions. Moreover, the Prosecution offers no explanation for how the Medical Reports make each factual proposition more probable. The link is certainly not self-evident.
19. Then the Prosecution reveals its true intention, stating that would further assist the Chamber in disposing of the anticipated Defence’s challenges under Article 69(7).<sup>23</sup> The Defence has not yet filed its application under Article 69(7). Thus, for the Prosecution is inviting the Trial Chamber to find this item relevant to an anticipated argument.

### **The Medical Reports do not have the probative value claimed by the Prosecution**

20. The Medical Reports lack any or any significant probative value claimed because:
- a. The Medical Reports are of a very terse, summary and general nature;
  - b. There is no information demonstrating the medical officer’s independence or the methodology used for the examinations; and

<sup>20</sup> ICC-01/12-01/18-1213-Conf-AnxA (bold added).

<sup>21</sup> Request, para. 4 (bold added).

<sup>22</sup> Request, para. 18 (bold added).

<sup>23</sup> Request, para. 4.



c. The Prosecution proposes to rely on omissions from rather than assertions in the Medical Reports.

21. The contents of the Medical Reports is very terse, summary, and general. They give the impression of being similar to an intake form at a family doctor's practice. An indication of how limited the examination was can be found in relation to the hearing test. It is written 'test by whispering'. The section on mental health comprises of two blanks. The first is 'appearance' which indicates 'normal' and the second box is 'behavior' and indicates 'cooperative and courteous'. When considered in comparison to the detail of an expert examination for mental health, the negligible probative value of these answers becomes apparent.
22. The Prosecution argument is that the items are probative because they were created by 'independent and accredited professionals'.<sup>24</sup> The Prosecution has provided no evidence for this – no CV or other identifying information is provided for the medical officers in Mali or at the ICC. The Medical Report produced by the Malian medical officer indicates that he is the "[REDACTED]" – suggesting that he is a member of [REDACTED] that subjected Mr Al Hassan to torture and CIDT during his detention in Mali. According to Dr Porterfield, Mr Al Hassan describes the medical officer as "wearing a mark and camouflage clothing" and that he conducted his examination "in front of the guards".<sup>25</sup> Medical staff serving under law enforcement or security agencies cannot be presumed to be independent.<sup>26</sup> Moreover, the most advanced and contemporary standards in this regard require medical examinations to be conducted out of earshot and sight of police and non-medical staff.<sup>27</sup> Thus, the Prosecution has failed to establish to the requisite standard the independence and credentials of the Malian medical officer whose report it is tendering into evidence.

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<sup>24</sup> Request, para. 15.

<sup>25</sup> MLI-D28-0002-0535 at 0545.

<sup>26</sup> *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 23 September 2014, A/69/387, <https://undocs.org/A/69/387>, para. 37; *see also*, 'Forensic services must be independent from law enforcement agencies – UN Rapporteur on torture', 21 October 2014, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15195&LangID=E>.

<sup>27</sup> Council of Europe, "Training Manual on the Prohibition of Torture and Inhuman and Degrading Treatment and Punishment", 2018, p.58, available at: <https://rm.coe.int/training-manual-prohibiton-torture-eng/1680933627>.

23. Moreover, the Prosecution has not provided any information on the methodology used for the examination, rendering the Medical Reports unreliable. Conversely, Dr Porterfield's report indicates a very rudimentary procedure – incapable of providing reliable information on the propositions put forward by the Prosecution: describing the doctor as walking in, taking his blood pressure and leaving.<sup>28</sup> Given that so little information is available, it is not possible to assess whether by the time of his medical examination it could be said that Mr Al Hassan had had a 'change in [the] defendants' circumstances that would cure the coercive nature of their confinement'<sup>29</sup> and mistreatment and thus render the medical form as probative of much.<sup>30</sup> The Prosecution has also offered no evidence as to why either examiner would be trained to notice or alert to indications or the effects of torture or CIDT.<sup>31</sup> It thus cannot be claimed that either of the Medical Reports provide a basis for concluding that Mr Al Hassan was 'physically and mentally fit' or indeed that Mr Al Hassan had the capacity to give the interview or whether it was voluntary.
24. Furthermore, the Medical Reports were not prepared with the requisite degree of confidentiality required to instil confidence and reliability. They were prepared for the express purpose of being provided to the ICC Registry and Malian authorities for the purpose of processing Mr Al Hassan's transfer and subsequent detention. They cannot be relied upon for the stated purposes.
25. Crucially, the Prosecution's propositions rely on omissions in the Medical Reports, rather than positive assertions therein. The Prosecution seeks to rely on the absence of any mention of torture or CIDT to establish Mr Al Hassan's fitness and the voluntary nature of their interviews. Put simply, just because the reports do not mention torture and CIDT, does not establish to any degree that Mr Al Hassan was mentally or physically fit during his interviews. The omissions should not be given any weight – particularly as there is no information as to the questions put to Mr Al Hassan in the

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<sup>28</sup> MLI-D28-0002-0535 at 0545.

<sup>29</sup> *United States v. Karake*, 443 F. Supp. 2d 8 (D.D.C. 2006), para. 140

<sup>30</sup> This is without prejudice to argument the Defence may make in its Article 69(7) application as concerning the continuing effects of torture and the extent to which these effects vitiated the voluntary nature of contemporaneous interviews – including those conducted with medical personnel in close temporal proximity to his detention at the DGSE.

<sup>31</sup> *CAT/C/GC/3*, para. 35: CAT has, moreover, underscored that medical professionals involved in redress procedures must have specific methodological training in the field of torture "in order to prevent re-traumatization".

course of the examinations. The examinations appear to be predominantly ‘physical’. It is well established that “many symptoms attributable to torture or other ill-treatment are not physical. In those cases, psychological assessment displaces medical evaluation as the main source of information”.<sup>32</sup>

26. Reliance on omissions is also inappropriate because it does not account for Mr Al Hassan’s likely distrust of the medical examiners in the context of his prolonged and cruel detention – and therefore was unlikely to be forthcoming about any indicia of torture and CIDT in the course of the examinations. Indeed, as mentioned by Dr Porterfield: “Mr Al Hassan noted that he no longer believed that people were who they said they were [...] a person presenting themselves as a medical professional but dressed in a mask and camouflage made him highly anxious of who the person actually was”.<sup>33</sup>
27. There is also no information concerning the credentials of the individuals doing interpretation – if any – used to conduct the medical examination. Communication concerning health requires that the examinee is both comfortable and able to precisely explain themselves. Linguistic barriers impact upon both of these. There are interpretation requirements found in the Istanbul Protocol.<sup>34</sup> Absent information about the interpretation involved, it cannot be concluded that all relevant information was communicated by Mr Al Hassan or that the reports are an accurate representation of all health issues that Mr Al Hassan was experiencing.
28. The Prosecution refers to the contents of two interviews<sup>35</sup> with Mr Al Hassan as ‘corroborative’ of the Medical Reports. This reliance by the Prosecution in its Request implicates the issue of whether this Court can rely upon said interviews. The Prosecution seeks to corroborate the Medical Reports using interviews alleged by the Defence to be tainted by torture or CIDT so that it can argue that the interviews are not tainted by the same. The Trial Chamber should not accept the approach suggested by the Request whereby determination of the probative value of the Medical Reports is bootstrapped through reference to unadmitted and highly contentious evidence.

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<sup>32</sup> [A/69/387](#), para. 41.

<sup>33</sup> MLI-D28-0002-0535 at 0545.

<sup>34</sup> *Istanbul Protocol*, paras 150-153.

<sup>35</sup> ICC-01/12-01/18-1213-Conf-AnxA, p. 2 *citing* MLI-OTP-0060-1662 and MLI-OTP-0062-0969.

Unreliable evidence – material associated with torture and CIDT – does not corroborate other unreliable evidence.<sup>36</sup> Furthermore, there is a logical inconsistency in the Prosecution’s reliance on the contents of his statements to ‘corroborate’ the Medical Reports, where his statements contain numerous assertions by Mr Al Hassan that he was physically and mentally unwell on account of his detention at the DGSE.<sup>37</sup>

29. For the above-stated reasons, the Medical Reports have no probative value. Any probative value claimed by the prosecution is outweighed by the prejudice to the Defence highlighted throughout this Response.

### III. Relief sought

30. For the reasons set out above, the Defence respectfully requests the Trial Chamber X to:

- a. **DISMISS** the Prosecution Regulation 35 request to add MLI-D28-0003-1334 to its LoE; or
- b. **REJECT** the request for submission of item MLI-D28-0003-1334.

In either case, the Defence requests that Trial Chamber X:

- a. **PROVIDE** a determination upon the Request rather than deferring the decision to the judgment; and
- b. **DECIDE** upon the Prosecution’s request before the Defence is obliged to file its request for the exclusion of evidence pursuant to Article 69(7).




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Melinda Taylor  
Counsel for Mr. Al Hassan

Dated this 22<sup>nd</sup> Day of January 2021  
At The Hague, The Netherland

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<sup>36</sup> See, for example, Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, [ICC-01/05-01/08-3636-Red](#), Bemba Appeals Judgment, para. 64.

<sup>37</sup> The Defence’s reliance on the statements in this instance is permissible under Article 15 UNCAT.