

**Cour
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**International
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Court**



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14 September 2020

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 the “Prosecution’s response to the Defence
Notice of Affirmative Defences”, 23 July 2020, ICC-01/12-01/18-970-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. The Defence Notice of Affirmative Defences¹ (“Defence Notice” or “Notice”) is both untimely and incomplete. It was filed on the eve of the trial without specifying the names of witnesses or any other evidence upon which the Accused intends to rely to establish the purported grounds for exclusion of his criminal responsibility, in violation of the applicable rules and the established case law of the Court.
2. The untimeliness and insufficiency of such Notice put the Prosecution at a disadvantageous position depriving it from any meaningful opportunity to react to it, properly investigate and prepare its case for trial in relation to these defences. The Prosecution has already filed its final lists of witnesses and evidence prior to receipt of such Notice.
3. The Prosecution therefore requests that the Defence be ordered to specify the names of witnesses and any other evidence upon which the Accused intends to rely to establish the purported grounds for excluding the Accused’s criminal responsibility. The Notice should not be considered as formally submitted until such information is provided. Upon receipt of a full notice as required by the Rules of Procedure and Evidence (“Rules”), the Prosecution should be afforded the necessary remedies required to overcome the prejudice caused as a result of the Defence’s untimely and insufficient Notice, including an appropriate period of time to investigate these defences in light of their supporting evidence, and the possibility for the Prosecution to amend its lists of witnesses and evidence accordingly.

II. Confidentiality

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

¹ ICC-01/12-01/18-951-Corr.

III. Submissions

A. The Notice is untimely

5. The Defence formal notification of specific grounds for the exclusion of criminal liability is tardy.
6. Pursuant to rule 79(2) of the Rules, the notification of grounds for exclusion of criminal liability falling under rule 79(1), namely the grounds provided for in article 31(1), “shall be given sufficiently in advance”. Rule 80(1) of the Rules refers to article 31(3) of the Statute, which includes grounds for excluding criminal responsibility other than the ones falling under article 31(1). Pursuant to rule 80(1) notice of the latter grounds should be done “sufficiently in advance of the commencement of the trial”.
7. As indicated in an earlier Prosecution filing,² Trial Chambers have consistently interpreted this to mean that notifications of grounds excluding criminal liability should be given prior to the commencement of trial.³ The Single Judge confirmed the above interpretation of rule 79 and rule 80 of the Rules, emphasizing that the notification that is sufficiently in advance to enable the Prosecutor to prepare adequately and to respond implies a notification prior to the commencement of trial.⁴
8. The jurisprudence of the Court establishes that providing such advance notification is necessary to allow the Prosecution to adequately respond to the Defence and prepare its case for trial accordingly, which lessens the possibility of delays that would affect the fair and expeditious conduct of the trial.⁵
9. As noted in the *Ongwen* case, “part of the purpose of Rule 79 and 80 notifications is to enable the Prosecution to respond to any affirmative defences, the Single Judge

² ICC-01/12-01/18-615, para. 100.

³ ICC-02/04-01/15-460, para. 8. See also; ICC-01/04-01/06-1235-Corr-Anx1, para. 29(b); ICC-01/05-01/13-1209, para. 8.

⁴ ICC-01/12-01/18-T-015-CONF-ENG, p. 32, l. 5-9 ; ICC-01/12-01/18-940-Conf, para. 10.

⁵ ICC-02/04-01/15-460, para. 9.

considers that the deadline to provide this information should be set sufficiently in advance of the Prosecution's [deadline] to provide its final lists of witnesses and evidence."⁶ Due to the Defence's failure to provide such notice in a timely manner, the Prosecution was not afforded any time to investigate those defences prior to the commencement of the trial. Nor was it able to include any witnesses or evidence in response to those defences on its respective lists of witnesses and evidence.

10. In spite of the Prosecution repeated requests for the Defence to provide notification of grounds excluding the liability of the Accused well before the commencement of trial,⁷ the Defence filed such notification on the eve of trial, notwithstanding its demonstrated ability to do so sufficiently in advance of the commencement of the trial.⁸

11. Long before any COVID-19 restrictions or any purported investigative impediments, the Defence was in a position to provide such notice. Indeed, it has demonstrated its ability to raise such grounds in multiple occasions, some of which date as early as 15 March 2019,⁹ but it failed to do so to the detriment of the Prosecution's ability to prepare and respond.

12. None of the Defence's excuses for its failure to give a full and timely notice as required by the Rules is persuasive.¹⁰ While understandably there might be some recent challenges caused by COVID-19, it remains unclear why the Defence failed to investigate its potential positive defences for two years prior to these recent challenges.

⁶ ICC-02/04-01/15-460, para. 18.

⁷ See e.g. ICC-01/12-01/18-T-011-CONF-ENG, p. 62, l. 4-63, l.17; ICC-01/12-01/18-T-015-CONF-ENG, p. 25, l. 19– p. 28, l. 10.

⁸ ICC-01/12-01/18-T-015-CONF-ENG, p. 33, l.11-14.

⁹ [REDACTED]. On 4 July 2019, the Defence flagged to the Chamber and parties, in its post-confirmation hearing submissions - that the Accused allegedly did not know that the legal process before the Islamic tribunals was illegal, or that the application of sharia law was unlawful. This appears akin to a defence under article 33. See, ICC-01/12-01/18-394-Red, para. 253-255. Then on 6 December 2019, the Defence clearly indicated that it investigates the possible Defences under article 31(1)(d) and 33(1). See ICC-01/12-01/18-519-Red, para. 32. On 6 June 2020, the Defence again referred to potential defences under articles 31(1)(d)/article 33(1). See ICC-01/12-01/18-870-Red2, para. 3.

¹⁰ ICC-01/12-01/18-519-Red, para. 32; ICC-01/12-01/18-870-Red2, para. 3; ICC-01/12-01/18-T-15-Conf, p. 28, l. 14-25, p. 29, l. 1-5.

13. Indeed, as noted by the Single Judge in the *Ongwen* case, several of the potential grounds for excluding criminal responsibility could generally be advanced on the basis of information solely within the Defence's control.¹¹

14. In any event and as previously noted, the Defence has been duly informed of the scope and contours of the Prosecution case in sufficient details from the inception of the case, and has duly received disclosure of evidence on a regular and continuous basis throughout the proceedings. Any modification sought to the Prosecution case has no bearing on the core of the case or the affirmative defences the Accused intends to raise.¹²

15. Further, prejudice to the Prosecution cannot be mitigated by a reference in passing by the Defence that it may consider certain affirmative defences. This type of equivocal statements is of no assistance to the Chamber or the parties and certainly does not exempt the Defence from its obligation to provide a formal notice in conformity with the Rules.

16. Clearly *contemplating* advancing grounds for excluding criminal responsibility cannot be considered in any way a substitute for making a *determination* to use such grounds at trial.¹³

B. *The Notice is insufficient*

17. Rule 79(1)(b) of the Rules stipulates that notification of defences under article 31(1) "shall specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground". The Defence Notice failed to comply with this rule.

18. The Prosecution submits that while this sub-rule is expressly referring to defences under article 31(1), its rationale (to give advanced notice in order to facilitate preparation) extends to any other grounds for excluding criminal

¹¹ ICC-02/04-01/15-460, para. 15.

¹² See e.g. ICC-01/12-01/18-892-Red, para. 48.

¹³ ICC-02/04-01/15-460, para. 11.

responsibility. This is reflected in the case law of the Court which clearly shows that Trial Chambers are empowered to extend the disclosure obligations in the interest of justice.¹⁴ This necessarily includes those disclosure obligations associated with notification of any affirmative defences beyond the ones enumerated in article 31(1) of the Statute.

19. As submitted by the Prosecution during the 30 June 2020 status conference, the Trial Chamber is empowered to order the Defence to give full notice with its associated disclosure, pursuant to articles 64(3)(c), 64(6)(d), 64(6)(f), 64(9)(b) and 68 of the Statute, rules 78, 79 and 80 of the Rules and regulation 54(p) of the Regulations.¹⁵

20. In a similar context, Trial Chamber IX ordered the Defence to disclose the names of the witnesses and any other evidence upon which the Defence intends to rely in support of the affirmative defences pursuant to article 31(1) of the Statute nearly a month before the Prosecution's filing of its final list of evidence.¹⁶ Trial Chamber IX also considered that "a proper notification should also set out, in general terms, an indication of which of the charged crimes would, in the Defence submission, be covered by the alleged ground for excluding criminal responsibility".¹⁷ The Prosecution submits that such information should be provided in the present case to enable the Prosecution to adequately prepare.

21. In light of the above, the Prosecution submits that at a minimum, the Defence notice is in violation of the express terms of rule 79(1)(b) of the Rules for failing to specify the names of witnesses and any other evidence upon which the Accused intends to rely to establish the ground.

¹⁴ For instance, Trial Chamber I found that "Rule 79(4) reveals the Chamber has the power to order advance disclosure of any evidence outwith those defences that the accused intends to rely on. This interpretation is supported by the provisions of Regulation 54" ICC-01/04-01/06-1235-Corr-Anx1, para. 35.

¹⁵ ICC-01/12-01/18-T-015-CONF-ENG, p. 28, l. 5-10.

¹⁶ ICC-02/04-01/15-460, para. 13, 14-15.

¹⁷ ICC-02/04-01/15-460, para. 18-19.

22. In order to ensure the fair conduct of the trial, the Prosecution should be afforded the necessary remedies to counterbalance the prejudice caused by the Defence's tardy and insufficient notice. This should include affording the Prosecution a sufficient period of time to investigate these defences in light of their supporting evidence after receipt of full notice, following which it should be allowed to amend its lists of witnesses and evidence accordingly.

IV. Requested Relief

23. For the foregoing reasons, the Prosecution requests that the Chamber:

-) Find the Defence Notice insufficient and untimely;
-) Order the Defence to specify the names of witnesses and any other evidence upon which the Accused intends to rely to establish the purported grounds for excluding the Accused's criminal responsibility; and
-) Upon receipt of full notice as indicated above, afford the Prosecution an opportunity to seize the Chamber with a discrete request seeking specific remedies necessary to enable it to adequately respond to these defences and prepare its case accordingly.



Fatou Bensouda, Prosecutor

Dated this 23th day of July 2020

At The Hague, The Netherlands