

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

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

Date: **30 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***

**Confidential**

**With Confidential Annex**

**Defence Response to ‘Prosecution response to Defence request for *in limine* dismissal  
and request to strike confidential Annex B and for leave to sur-reply to Defence  
article 69(7) reply’**

**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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Reparations Section****Other**

## I. Introduction

1. On 16 April 2021, the Prosecution filed its 'Prosecution response to Defence request for *in limine* dismissal and request to strike confidential Annex B and for leave to sur-reply to Defence article 69(7) reply'<sup>1</sup> ('Request').
2. By the Request, the Prosecution:
  - a. purported to 'respond'<sup>2</sup> to the Defence's submissions for *in limine* dismissal in its Article 69(7) Reply concerning the Prosecution's practice of incorporation of arguments by reference;<sup>3</sup>
  - b. requested to strike Annex B to the Defence's Article 69(7) Reply;<sup>4</sup> and
  - c. requested leave to sur-reply to the Defence's Article 69(7) Reply.<sup>5</sup>
3. On 19 April 2021, Trial Chamber X rejected the Prosecution's request to file a sur-reply on any of the issues identified.<sup>6</sup>
4. By this filing, the Defence responds to the remaining issues in the Request. There is no legal or factual basis for the Prosecution to submit a response or request to strike in connection with the Article 69(7) Reply.

## II. Confidentiality

5. Pursuant to regulation 23bis(2) of the Regulations, the Defence files this submission as confidential as it refers to filings and decisions of the same classification. A public redacted version will be filed in due course in accordance with the Chamber's instruction of 18 March 2021 concerning the filing of public redacted versions of filings in the Article 69(7) litigation.

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<sup>1</sup> ICC-01/12-01/18-1416-Conf.

<sup>2</sup> ICC-01/12-01/18-1416-Conf, paras 5-6

<sup>3</sup> ICC-01/12-01/18-1411-Conf-Exp, para 1.

<sup>4</sup> ICC-01/12-01/18-1416-Conf, para 7.

<sup>5</sup> ICC-01/12-01/18-1416-Conf, paras 8-12.

<sup>6</sup> Annex, p. 1.

### III. Submissions

*The Prosecution's request to strike Annex B to the Article 69(7) Reply is unfounded*

6. The Prosecution argues that Annex B to the Article 69(7) Reply should be struck as it is 'in effect submissions' in violation of regulation 36(2)(b) of the Regulations.<sup>7</sup> Contrary to this characterisation, Annex B contains no analysis, commentary or Defence argumentation; rather, it contains, verbatim extracts from the Prosecution's Article 69(7) Response as filed on the record and verbatim extracts from Prosecution and Defence evidence as filed on the record. Paragraph 5 and footnote 24 of the Article 69(7) Reply set out in full the Defence arguments and evidential citations concerning the argument in question (which is that the Prosecution's submissions mischaracterise or do not fully reflect the evidential record).<sup>8</sup> Annex B, by reproducing the material contained at these citations for the assistance of the parties, is merely providing 'relevant, non-argumentative material' as permitted under regulation 36(2)(b).
7. It is illogical that the Prosecution has introduced this request to strike, while at the same time, arguing that it was fair and appropriate for the Prosecution to incorporate voluminous past submissions by reference. The juxtaposition of the two matters in the Request should not be used to create a false equivalence between the Defence request to dismiss certain Prosecution arguments and the Prosecution's request to strike Annex B. The rationale of 'striking' annexes is to ensure that the parties do not use annexes as a vehicle to evade the page limits set for argument. This is the rationale that underpinned Defence concerns regarding the Prosecution's reliance on findings and linked citations set out in the Termination Request, since the linked citations concerned Prosecution argument and thus incorporated several pages of additional argument. In contrast, no additional argument has been included in Annex B and as such, the rationale for 'striking' does not apply. The purpose of page limits, which is to ensure expeditious proceedings, is also consistent with the use of annexes, setting out evidential materials in a clear and orderly manner. Annex B does not in form or substance offend the Chamber's determination of the page limit for the Reply.

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<sup>7</sup> ICC-01/12-01/18-1416-Conf, para 7.

<sup>8</sup> ICC-01/12-01/18-1411-Conf-Exp, para 5 and fn. 24.

*The Prosecution has improperly characterised its submissions concerning 'in limine dismissal' as a 'response'*

8. The Prosecution's practice of citing the Termination Decision, as a mechanism for incorporating lengthy Prosecution arguments into its Article 69(7) Response,<sup>9</sup> arose from the Article 69(7) Response, and was addressed in the Article 69(7) Reply, within the page limit established by the Chamber.<sup>10</sup> The Defence arguments fell within the parameters of the pending litigation: the Defence did not request the Chamber to take any measures that fell outside their residual power to accept or reject the arguments presented to them. The Defence also did not file a separate request addressing this issue. An argument that the Trial Chamber should reject or dismiss arguments also does not constitute a separate 'request', giving rise to an automatic right of reply.<sup>11</sup>
9. The Defence submissions were not, therefore, analogous to examples where a responding party has incorporated submissions requiring the Chamber take measures that were not within the parameters of the initial request initiating the litigation in question.<sup>12</sup> There is, therefore, no basis for the Prosecution to either artificially prolong this litigation or unilaterally grant itself a right of response by characterising arguments that should have fallen within the request to file a 'sur-reply' as a 'response'. The Prosecution's attempt to do so runs contrary to the very clearly articulated structure of Article 69(7) litigation set by the Chamber.
10. If the Prosecution were to be permitted to frame a response to a reply (which would be impermissible) as a response to a request (which would be permissible), then it would be equally open to the Defence to characterise this present filing as a request (i.e. as a request to strike) or as a response (addressing the merits of the argument). This would invite further responses or replies and offend the need for finality in litigation, based on an orderly succession of procedural acts.<sup>13</sup>

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<sup>9</sup> ICC-01/12-01/18-1411-Conf-Exp, fn 1 citing ICC-01/12-01/18-1401-Conf, fns 97, 98, 106, 111, 114, 120, 121, 127, 144, 145, 146, 151, 152, 183.

<sup>10</sup> ICC-01/12-01/18-1411-Conf-Exp, para 1.

<sup>11</sup> This is consistent with the determination of the Appeals Chamber that it was necessary for the OPCD to seek leave to reply to arguments in the Prosecution response, which contested the admissibility of the OPCD appeal: the OPCD did not have an automatic right of response: [ICC-01/09-01/20-89](#), para. 18.

<sup>12</sup> Cf [ICC-01/05-01/13-1154](#), para 8.

<sup>13</sup> See [ICC-02/04-01/15-1562](#), para. 163, referring to "the nature of the judicial process as an orderly succession of procedural acts provided by law that ensure the proper administration of justice, including the expeditious conduct of the proceedings".

#### IV. Request for relief

11. The Defence respectfully requests that Trial Chamber X disregard all issues arising from the 'Prosecution response to Defence request for *in limine* dismissal and request to strike confidential Annex B and for leave to sur-reply to Defence article 69(7) reply'.



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Melinda Taylor  
Counsel for Mr. Al Hassan

Dated this 30<sup>th</sup> Day of April 2021  
At The Hague, The Netherlands