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No.: **ICC-02/04-01/15**

Date: **21 January 2022**

APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Reine Alapini-Gansou
Judge Gocha Lordkipanidze

SITUATION IN UGANDA

IN THE CASE OF *PROSECUTOR* v. *DOMINIC ONGWEN*

Public

Motion to Strike Paragraphs 51-52 of the ‘Defence Response to the *Amici Curiae* Observations’ (ICC-02/04-01/15-1950)

Source: Office of the Prosecutor

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Introduction

1. The Prosecution requests that paragraphs 51-52 of the Defence response to the observations of the *amici curiae* are dismissed *in limine*, together with associated annexes, and disregarded for the remainder of this appeal.¹ These paragraphs do not respond to the observation of any *amicus curiae*, but simply advance new—and misplaced—allegations to supplement arguments in the Defence appeal brief.² There is no reason why the Defence could not previously have included these allegations, if it considered necessary. The Appeals Chamber has previously dismissed “unauthorised” submissions cloaked in the guise of a response to another participant as a practice which it considered to be “inappropriate”.³

Submissions

2. Having addressed aspects of the observations of *amicus curiae* Braakman, the Defence commences a sub-section entitled “Relevance of the *Al Hassan* case”.⁴ Yet neither Braakman nor any other *amicus curiae* addressing article 31(1)(a) of the Statute make reference to *Al Hassan*,⁵ nor does the Defence even claim that they do so.⁶ To the contrary, it is *the Defence* who suggests that Braakman might find “[t]he situation of *Al Hassan*” to be “particularly instructive here”.⁷ Nothing in the Defence submissions concerning *Al Hassan* is related to any observation made by the *amici curiae*,⁸ and cannot properly be construed as a ‘response’.

3. Specifically, in paragraphs 51-52 of its submissions, the Defence refers to the participation of two Prosecution expert witnesses (in this case) in an unrelated panel confirming the fitness of Mr Al Hassan to stand trial, and asserts that their approach in that context is contradictory to their evidence.⁹ In this respect, the Defence makes seven discrete allegations, each intended to supplement arguments which have already been raised on appeal and addressed by the Prosecution and the participating victims, concerning: the use of open-

¹ See ICC-02/04-01/15-1950 A A2 (“[Defence Response](#)”), paras. 51-52. See also Annexes B, E, F.

² See ICC-02/04-01/15-1866-Red (“[Defence Appeal against Conviction](#)”). Compare ICC-02/04-01/15-1882-Red (“[Prosecution Response](#)”), paras. 166-302.

³ See e.g. ICC-01/05-01/08-3497 A (“[Bemba Summary Dismissal Decision](#)”), paras. 12-13.

⁴ [Defence Response](#), p. 16.

⁵ See e.g. ICC-02/04-01/15-1926 (“[Ssekandi Brief](#)”); ICC-02/04-01/15-1929 (“[Gerry et al. Brief](#)”); ICC-02/04-01/15-1930 (“[Minkowitz et al. Brief](#)”); ICC-02/04-01/15-1936 (“[Clarke et al. Brief](#)”); ICC-02/04-01/15-1937 (“[ADC-ICT Brief](#)”); ICC-02/04-01/15-1942 (“[Braakman Brief](#)”). None of these submissions contains any reference either to “Al Hassan” or the *Al Hassan* case number.

⁶ See e.g. [Defence Response](#), paras. 46-52.

⁷ [Defence Response](#), para. 49 (fn. 86).

⁸ [Defence Response](#), paras. 51-52.

⁹ [Defence Response](#), paras. 51-52.

ended questions;¹⁰ the use of DSM-IV rather than DSM-V;¹¹ the impact of childhood experiences on trauma;¹² the use of standardized testing;¹³ malingering;¹⁴ professional courtesy,¹⁵ and; cultural factors.¹⁶ The Defence further refers to three annexes in this context. All of these arguments could have been made in their brief, but were not.

4. Quite apart from being inappropriate in principle, this ‘back-door’ tactic now impedes the fair and expeditious conduct of the proceedings, by limiting the ability of other parties and participants to assist the Appeals Chamber on the matters raised. In particular, the Defence has deprived the Prosecution and the participating victims of opportunity to respond in writing (and hence with similar detail and supporting references) to these last-minute, de-contextualised allegations. Without the intervention of the Appeals Chamber, the Prosecution and participating victims may feel obliged to use up valuable (and limited) time in the forthcoming oral hearing, addressing these convoluted evidentiary disputes, to the detriment of their submissions in response to the Appeals Chamber’s own anticipated questions.

Conclusion

5. For the reasons set out above, the Prosecution requests that paragraphs 51-52 of the Defence Response, and associated annexes, are dismissed *in limine*. In the alternative, the parties and participants should be afforded reasonable opportunity to respond in writing.



Karim Khan Q.C., Prosecutor

Dated this 21st day of January 2022
At The Hague, The Netherlands

¹⁰ See [Defence Response](#), para. 52(a). Compare e.g. [Prosecution Response](#), paras. 205, 211-212 (in the context of malingering).

¹¹ See [Defence Response](#), fn. 96; Annex B. Compare e.g. [Prosecution Response](#), paras. 209-210.

¹² See [Defence Response](#), para. 52(b). Compare e.g. [Prosecution Response](#), paras. 177, 262-266, 286-301.

¹³ See [Defence Response](#), para. 52(c); Annexes E, F. Compare e.g. [Prosecution Response](#), paras. 211-212 (in the context of malingering).

¹⁴ See [Defence Response](#), para. 52(d). Compare e.g. [Prosecution Response](#), paras. 211-212, 246-251.

¹⁵ See [Defence Response](#), para. 52(e). Compare e.g. [Prosecution Response](#), paras. 207-208, 214-215.

¹⁶ See [Defence Response](#), para. 52(f). Compare e.g. [Prosecution Response](#), paras. 170, 208, 267-285.