

Annex 73

Public

From: Trial Chamber X Communications
Sent: 31 March 2021 12:01
To: D28 Al Hassan Defence Team
Cc: Al Hassan Prosecution Team; V43 Victims Al Hassan Team; Associate Legal Officer-Court Officer; Chamber Decisions Communication; Trial Chamber X Communications
Subject: Decision on Defence inquiry concerning reply in Article 69(7) litigation

Dear counsel,

The Chamber's [Decision 1160](#) provided no automatic right of reply for the Defence and vacated the schedule established in the previous [Decision 1150](#) (which provided for a right of reply). This, implicitly, due to the change in sequencing of submissions in the amended procedure established pursuant to [Decision 1160](#).

However, notwithstanding, in the interest of expeditiousness, the Chamber hereby further authorises the Defence to file a reply in the litigation of its [Motion 1346](#) by 12 April 2021. In accordance with Regulation 24(5) of the Regulations, any such reply shall be limited to new issues raised in the response which the Defence could not reasonably have anticipated. Having regard to the content of the filings already on the record, the Chamber determines that pursuant to Regulation 37 of the Regulations, any such reply should be limited to 10 pages.

Kind regards

on behalf of Trial Chamber X

From: Taylor, Melinda <mtaylor[REDACTED]>
Sent: 31 March 2021 09:54
To: Trial Chamber X Communications <TrialChamberXCommunications[REDACTED]>
Cc: Al Hassan Prosecution Team <AlHassanProsecutionTeam[REDACTED]>; V43 Victims Al Hassan Team <V43LRVTeam[REDACTED]>; D28 Al Hassan Defence Team <D28AlHassanDefenceTeam[REDACTED]>; Associate Legal Officer-Court Officer <AssociateLegalOfficer-CourtOfficer[REDACTED]>
Subject: Urgent inquiry concerning reply
Importance: High

Dear Trial Chamber X, Dear Parties,

For the reasons set out below, the Defence for Mr. Al Hassan respectfully seeks clarification, on an urgent basis, as to whether it has a pre-authorised right to file a reply as concerns its Article 69(7) application.

1. In the initial decision establishing a procedure for Article 69(7) applications, the Trial Chamber provided an advance authorization for the Defence to file a reply, 14 days after receiving the Prosecution response.^[1] The decision did not impose any restrictions as concerns the content of such a reply.
2. At the request of the Prosecution, the Trial Chamber subsequently amended the procedure and deadlines to allow the Prosecution to first introduce all the items that it intended to rely upon in connection with the submission of interviews from Mr. Al Hassan.^[2] Although

the Trial Chamber vacated the deadline for submitting the Article 69(7) application, it did not address or reverse its determination that an automatic reply was warranted. Similarly, the decision of 17 February 2021, which directed the Defence to file the Article 69(7) application with two weeks, did not address the issue of a reply.^[3] The Prosecution's request, which triggered an amendment to the timing of filings, also did not address or contest the Chamber's determination that a reply would be appropriate.

3. The rationale for affording the Defence a right of reply also remains intact. Although the Prosecution had a full opportunity to present its case regarding the legality, reliability and integrity of the procedures used to collect the evidence of Mr. Al Hassan ('the Evidence') in its Article 56 application, it chose to reserve these arguments for its response to the Defence Article 69(7) application.^[4] The position for the Defence is thus the same as it would have been had the Trial Chamber maintained the initial procedure.
4. The right to file a reply is further bolstered by the system established by Rule 64(1) for objecting to the submission or admission of evidence. Rule 64(1) presupposes that the tendering party will, at the time of submission, "provide sufficient information on the relevance or admissibility of the item of evidence so as to enable the other parties to fully ventilate any objections thereto".^[5] While the Trial Chamber may exercise its discretion to receive additional submissions from the tendering party, the second sentence of Rule 64(1) requires the Trial Chamber to protect the rights of the non-tendering party by authorising them to introduce additional submissions in response.^[6] Since the Prosecution chose to set out in its arguments concerning Article 69(7) criteria in its Response, the second sentence of Rule 64(1) operates to provide the Defence with an additional opportunity "to fully ventilate any objections thereto".
5. A pre-authorised right of reply in relation to this specific application would also avoid ancillary litigation over the Easter recess. If the Defence were to file the reply in accordance with the timing set out in the 6 November 2020 decision, the reply would be due on 12 April 2021. This deadline allows for a more expeditious resolution of the Article 69(7) application than would be the case if the Defence were to file a request for leave to reply (due 1 April 2021), triggering a potential response (due 8 April 2021) and subsequent decision.

Kind regards

Melinda Taylor, on behalf of the Al Hassan Defence

^[1] ICC-01/12-01/18-1150, para. 11.

^[2] ICC-01/12-01/18-1160.

^[3] ICC-01/12-01/18-1304-Conf, para. 32.

^[4] ICC-01/12-01/18-1218-Red, para. 18: "in this request, the Prosecution is not required to anticipate its response to arguments that the Defence will make in its upcoming motion based on article 69(7). Rather, it will respond to such a motion and its arguments pursuant to its right under regulation 24(1)."

^[5] ICC-02/11-01/15-995, para. 54.

^[6] ICC-02/11-01/15-995, para. 56.

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^[1] ICC-01/12-01/18-1150, para. 11.

^[2] ICC-01/12-01/18-1160.

^[3] ICC-01/12-01/18-1304-Conf, para. 32.

^[4] ICC-01/12-01/18-1218-Red, para. 18: "in this request, the Prosecution is not required to anticipate its response to arguments that the Defence will make in its upcoming motion based on article 69(7). Rather, it will respond to such a motion and its arguments pursuant to its right under regulation 24(1)."

^[5] ICC-02/11-01/15-995, para. 54.

^[6] ICC-02/11-01/15-995, para. 56.