

**Cour  
Pénale  
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**International  
Criminal  
Court**

Original: **English**

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

Date: **2 March 2021**

Date of submission:  
**28 May 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 “Prosecution’s request to strike out four annexes to the  
*Defence Observations on Report of Panel of Experts (ICC-01/12-01/18-1316-Conf)*  
and to obtain access to *ex parte* annexes thereto”,  
2 March 2021, ICC-01/12-01/18-1333-Conf**

**Source:** Office of the Prosecutor

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court*****to:****The Office of the Prosecutor**

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## Introduction

1. On 23 February 2021, the Defence submitted its observations<sup>1</sup> (“Defence Observations”) to Trial Chamber X decision regarding the report of the panel of three experts<sup>2</sup> related to the issue of the Accused’s fitness to stand trial.
2. In doing so, the Defence acted in contravention of a specific instruction of the Chamber, by annexing a report by an expert separately instructed by the Defence – Dr Chisholm – and by relying upon it in the body of the Defence Observations.
3. The Defence also attached to the Defence Observations two annexes that contain arguments *akin* to additional observations in violation of regulations 36(2)(b) and 37 of the Regulations of the Court (“Regulations”), regarding permissible contents of annexes to filings and page limits respectively. This is also contrary to the Court case law on the rules on permissible page limits and contents of annexes, including a previous decision from this Chamber.
4. The Prosecution further notes that the Defence has failed to justify why it has not granted access to the Prosecution to almost half of the annexes appended to the Defence Observations and on which the Defence relies in the Defence Observations.
5. Accordingly, the Prosecution requests:
  - to have the Letter of instruction and the full report of Dr Chisholm as well as any observations of the Defence relying upon the report of Dr. Chisholm in the body of the Defence Observations stricken from the record;
  - to have Annexes D and F, that contain arguments *akin* to additional submissions, also stricken from the record; and,
  - to be granted access to all annexes related to the Defence Observations, and in particular Annexes E, G, H, I, J and K.

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<sup>1</sup> ICC-01/12-01/18-1316-[REDACTED]

<sup>2</sup> ICC-01/12-01/18-1006-[REDACTED].

## Confidentiality

6. This filing is classified as confidential under regulation 23*bis* of the Regulations of the Court because it contains confidential information and follows confidential decisions and filings related to the same topic.

## Submissions

### ***Dr. Chisholm’s Report, Letter of Instruction, and reliance on his report in the Defence Observations must be stricken from the record***

7. On 17 February 2021, Defence filed a request under regulation 35 for extension of time to file its observations to the Panel of Experts Report, in order to have Dr Chisholm to conduct a full review of the Panel’s conclusions prior to the Chamber making any determination pursuant to rule 135.<sup>3</sup>

8. On 18 February 2021, the Chamber issued a decision on this request, not authorising the parties to instruct their own experts to comment on the said Panel of Experts Report in order to submit their own experts’ observations before the Chamber.<sup>4</sup>

9. Despite this, the Defence assigned its own expert Dr Chisholm a mission to comment on the Panel’s Report.<sup>5</sup> The Defence then relied on Dr Chisholm’s assessment throughout the Defence Observations and appended the latter’s report as Annex B (incidentally, Dr Chisholm is an expert whose inclusion in the Panel had been initially proposed by the Defence<sup>6</sup> and not retained by the Chamber as part of the Panel).<sup>7</sup>

10. Relying on Dr Chisholm’s opinion runs counter to the Chamber’s clear rulings:

- First, in its decision in appointing the Panel the Chamber decided that it: “finds it appropriate to have *the opinions of independent experts who are appointed by virtue of the present decision* in order to properly continue to assess fitness to stand trial as

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<sup>3</sup> See ICC-01/12-01/18-1306-Conf.

<sup>4</sup> See email decision of 18 February 2021 at 16:26 “Decision on Defence request under Regulation 35 for extension of time to file its observations to the Panel Report (ICC-01/12-01/18-1306-Conf).

<sup>5</sup> See letter of instruction as featured in ICC-01/12-01/18-1316-Conf-AnxA, dated 20 February 2021.

<sup>6</sup> ICC-01/12-01/18-981-Conf-Corr. See also ICC-01/12-01/18-980-Conf, paras. 41-45; ICC-01/12-01/18-980-Conf-AnxA; ICC-01/12-01/18-980-Conf-AnxB.

<sup>7</sup> ICC-01/12-01/18-1006-██████. The panel is composed of three experts, including one proposed by the Defence.

the proceedings continue'.<sup>8</sup> Further, in appointing the independent experts to the Panel, the Chamber explicitly stated that: "from the standpoint of impartiality and neutrality, individuals who have already been engaged with the present case on behalf of a party or the participants should not be appointed".<sup>9</sup>

- Subsequently, when rejecting the Defence's regulation 35 request to submit the Defence observations later,<sup>10</sup> the Chamber made clear that: "[w]hile the Defence may of course decide to consult with medical experts of its choosing as necessary, *the Chamber does not consider it appropriate, or necessary, to receive observations of such individual(s) at this stage*, for the purpose of the Chamber's determination pursuant to Rule 135 of the Rules. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Chamber is of the view that *deciding otherwise would defeat the very purpose of the present process*, which is to determine Mr Al Hassan's ongoing fitness based on the professional opinions of independent Chamber appointed experts."<sup>11</sup>

11. In its decision on the Defence's regulation 35 request, the Chamber also clarified that it appointed the Panel, taking into account the views and proposals of the parties, "precisely in order to have independent Chamber appointed experts provide their professional opinion in relation to Mr Al Hassan's ongoing fitness, rather than having both parties appointing experts on their own behalf."<sup>12</sup>

<sup>8</sup> ICC-01/12-01/18-1006-█, para. 21. See also Email decision of 18 February 2021 at 16:26 "Decision on Defence request under Regulation 35 for extension of time to file its observations to the Panel Report (ICC-01/12-01/18-1306-Conf) citing ICC-01/12-01/18-1006-█, para. 21.

<sup>9</sup> ICC-01/12-01/18-1006-█, para. 25. See also Email decision of 18 February 2021 at 16:26 "Decision on Defence request under Regulation 35 for extension of time to file its observations to the Panel Report (ICC-01/12-01/18-1306-Conf)", citing "ICC-01/12-01/18-1006-█ para. 25.

<sup>10</sup> See ICC-01/12-01/18-1306-Conf. See also email decision of 18 February 2021 at 16:26 "Decision on Defence request under Regulation 35 for extension of time to file its observations to the Panel Report (ICC-01/12-01/18-1306-Conf)".

<sup>11</sup> See email decision of 18 February 2021 at 16:26 "Decision on Defence request under Regulation 35 for extension of time to file its observations to the Panel Report (ICC-01/12-01/18-1306-Conf)" (emphasis added).

<sup>12</sup> Email decision of 18 February 2021 at 16:26 "Decision on Defence request under Regulation 35 for extension of time to file its observations to the Panel Report (ICC-01/12-01/18-1306-Conf)".

12. Consequently, the Chamber's instructions were disregarded when the Defence submitted their own expert's report as an annex, and relied upon the Defence expert's report in the body of the Defence Observations.

13. The Defence asserts that it "is not seeking to use Dr. Chisholm's expertise to replace the PoE's role or their findings, but since the Defence did not have the opportunity to discuss matters directly with the PoE, it sought Dr. Chisholm's assistance to interpret the PoE's findings, and to apply those findings to recent developments not before the PoE (including the death of Mr. Al Hassan's daughter in December 2020) and certain procedural modalities not otherwise covered in the Report".<sup>13</sup>

14. In fact, this is merely an attempt to circumvent the Chamber's decisions. The Defence cited directly to Dr Chisholm's opinion and interpretation of the Panel's report and, as can be seen in the referencing of the Defence Observations, extensively relied on Dr. Chisholm's findings in its Observations.

15. In doing so, the Defence effectively seeks to add Dr. Chisholm's opinion and interpretation of the report of the Panel into its observations for the Chamber's consideration – contrary to the Chamber's clear decision that it does not want the parties to instruct their own separate experts on this matter for the purposes of making their observations. Incidentally, Dr. Chisholm's opinion and interpretation must be viewed as having limited value, even if it were accepted by the Chamber.

16. For these reasons, the Prosecution submits that the Chamber should strike from the record the Letter of Instruction and the report of Dr. Chisholm,<sup>14</sup> respectively referred to as Annex A and Annex B to the Defence Observations, as well as any observations made by the Defence based on Dr. Chisholm's assessment.

***The Annexes D and F effectively containing additional submissions  
must also be stricken from the record***

17. Annexes D and F of the Defence Observations contain so-called substantive developments, which are in fact additional submissions. These annexes should be stricken from the record as they violate regulation 36(2)(b) of the Regulations regarding the permissible use of annexes, and regulation 37 of the Regulations regarding the permissible

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<sup>13</sup> ICC-01/12-01/18-1316-Conf, para. 2.

<sup>14</sup> ICC-01/12-01/18-1316-Conf- AnxA and ICC-01/12-01/18-1316-Conf- AnxB.

page limits.

18. Annex D contains a 15 page-long table that constitutes an internal work product by the Defence detailing its own assessment of the purported facts. Large portions of this document appear to be a patchwork of different items of evidence, which reflect, in part, the Defence's own interpretation of circumstances rather than a purely objective representation of the facts.

19. Similarly, Annex F constitutes 10 pages of arguments that largely repeat written submissions regarding facts and law (in particular ICL jurisprudence) already ruled upon by the Chamber and first raised by the Defence in its email in 2020.<sup>15</sup> The Defence clearly seeks to use this annex to supplement its arguments on the alleged need for the Accused to undergo treatment and regarding adjustments to the modalities of the trial. Tellingly, it is referred to only once in the Defence observations, in a footnote to apparently show that what the Defence proposes would be consistent with the practice in other ICL cases.<sup>16</sup>

20. This is not the first time the Defence has adopted this practice. The Chamber previously ordered that Annex B to the Defence's application to terminate the proceedings, namely its abuse of process application, be struck out as an impermissible use of annexes, by containing argumentative material reflecting to some extent the Defence's interpretation of circumstances rather than a purely objective representation of facts.<sup>17</sup> Thus including submissions in annexes *in lieu* of the core of filings is impermissible.

21. Using these two annexes to include submissions is also contrary to other well established jurisprudence of this Court:

- In the *Situation in the Republic of Kenya*, the Appeals Chamber "note[d] that, in his Request for Disqualification, Mr Nyekorach-Matsanga 'adopts the reasons' contained in one of the annexes to the Request for Disqualification. The Appeals Chamber considers that this amounts to an attempt to circumvent the requirements of regulations 36 and 37 of the Regulations of the Court. To the extent that the annexes to the Request for Disqualification may be construed to contain submissions or argumentative material, the Appeals Chamber considers it appropriate to disregard

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<sup>15</sup> See page 4 to page 14 of ICC-01/12-01/18-1316-Conf-AnxF which were attached to an email by the Defence dated 14 August 2020 at 11:58.

<sup>16</sup> See ICC-01/12-01/18-1316-████, para. 29, footnote 103.

<sup>17</sup> ICC-01/12-01/18-932-████, para. 14-18.

such submissions or arguments contained therein.”<sup>18</sup>

- Additionally, in the *Bemba et al.* case in which Lead Counsel in this case was also involved, the Appeals Chamber “consider[ed] that the comments included in Annex F amount to submissions, which supplement those in Mr Bemba’s Appeal Brief. This circumvents the page limit and contravenes regulation 36 (2) (b) of the Regulations of the Court, which provides that “[a]n appendix shall not contain submissions”. Accordingly, the submissions included in Annex F will not be considered.”<sup>19</sup>

22. Both Annexes D and F must therefore be stricken from the record.

### ***Annexes to which the Prosecution still has no access***

23. The Prosecution notes that six annexes have not been available to the Prosecution to date. There is no explanation in the Defence Observations as to why confidential *ex parte* Annexes E, G, H, I, J and K are accessible to Defence and Registry only. Their content is also not described in the Defence Observations, even in general terms, which prevents the Prosecution from making any informed assessment on their potential relevance to the issues at hand.

24. Absent any valid justification for the upholding of the *ex parte* status of Annexes E, G, H, I, J and K, the Defence relies on in support of its Defence Observations, the Prosecution requests to be granted access to these annexes.

### **Conclusion**

25. For all of the above-stated reasons, the Prosecution requests that the Chamber:

- Strike from the record the Letter of Instruction and report of Dr Chisholm contained in Annexes A and B, and any observations of the Defence relying upon the report of Dr. Chisholm in the body of the Defence Observations;
- Strike from the record Annexes D and F appended to the Defence Observations as they contain arguments akin to additional submissions in violation of the rules on

<sup>18</sup> Situation in the Republic of Kenya, Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga, ICC-01/09-96-Red OA2, 11 July 2012, para. 5.

<sup>19</sup> *Prosecutor v. Bemba et al.*, Appeals Judgment, ICC-01/05-01/13-2275-Red, 8 March 2018, para. 778.



permissible use of annexes and allowable page limits; and

- Grant access to the Prosecution to Annexes E, G, H, I, J and K.



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Fatou Bensouda, Prosecutor

Dated this 2 March 2021

At The Hague, The Netherlands