Cour Pénale Internationale

International Criminal Court

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No.**: ICC-01/12-01/18**
Date: **4 January 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

Defence Request for Reconsideration of 'Submission to the Registry pursuant to Article 34(1)(a) of the Code of Professional Conduct for counsel'

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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I. Introduction

1. The Defence for Mr. Al Hassan respectfully requests the Trial Chamber to reconsider its "Submission to the Registry pursuant to Article 34(1)(a) of the Code of Professional Conduct for counsel" ('the Submission'),[1] which was issued publicly on 31 December 2020.

2. In the current case, the basis for reconsideration is met insofar as:

   a. The Submission was issued without first affording the Defence with a right to be heard in relation to the allegation that the Defence had acted intentionally in a manner that was contrary to the Code;

   b. The Submission is based on an erroneous factual conclusion as concerns the Trial Chamber's interpretation of the tweet;

   c. Instigating disciplinary proceedings, in the absence of clear and established guidelines as concerns the content of social media statements, would have a chilling effect as concerns the ability of the Defence to exercise an internationally recognized right to use the media to draw attention to the rights and interests of the defendant, and the work of the Defence.

II. Submissions

3. In the Submission, the Trial Chamber made various findings concerning Counsel's obligations under the Code of Conduct,[2] and further decided to refer the matter to the Registry for submission to the Disciplinary Commissioner. Article 34(5) of the Code of Conduct specifies that disciplinary complaints shall be kept confidential during the initial phase of the proceedings. This serves to preserve the reputation of Counsel during the initial phase of the process. The Chamber's findings were, however, presented in a public decision, which was notified to all the parties and participants in this case, and which will presumably be made available through the ICC website. This finding thus has personal and professional consequences, including as concerns the right of the Defence to make public statements,

[1] ICC-01/12-01/18-1234.
[2] ICC-01/12-01/18-1234, para. 5: "By publicly disclosing the existence and outcome of a confidential decision of the Chamber, Counsel has flagrantly breached these requirements of the Code of Conduct"; para. 6: "The content of the Tweet directly violates these obligations. Finally, the Chamber finds the Tweet in totality by its content and sarcastic tone to be highly offensive and disrespectful of the Chamber and the Court as a judicial institution."

irrespective as to whether a formal sanction has been attached to it.[3] The Submission thus constitutes a 'decision', which is subject to potential reconsideration.

4. The Presidency, and various Chambers have reconsidered previous decisions, in circumstances where the party concerned:

   a. Had not been afforded a right to be heard, before the issuance of the decision in question;[4]

   b. Demonstrated a clear error of legal reasoning or an erroneous factual conclusion;[5] or

   c. Established that reconsideration was warranted, in order to prevent injustice or a manifestly unsound resolution of the issue in question.[6]

5. The basis for reconsideration is met by virtue of the fact that the Trial Chamber issued the Submission without first hearing from the Defence. As a result of doing so, the Trial Chamber adopted a factual interpretation of the tweet in question which was not consistent with the intended meaning or purpose of the tweet. The summary nature of the Submission further means that the contours of the legal obligations at stake remain unclear. As a result, the ability of the Defence to make public communications is adversely impacted.

6. It is a fundamental tenet of natural justice that before issuing adverse findings against a party or an individual, the party or person concerned should first be afforded a right to be heard in relation to such allegations. This principle, which has been applied in connection with findings that suggest that Counsel has acted in a manner that is not consistent with applicable ethical rules,[7] is enshrined in the procedures set out in the Code of Conduct for investigating

[3] See *Steur v. Netherlands*, 39657/98, para. 29: "The Court acknowledges that no sanction was imposed on the applicant – not even the lightest sanction, a mere admonition. Nonetheless, the applicant was censured, that is, he was formally found at fault in that he had breached the applicable professional standards. This could have a negative effect on the applicant, in the sense that he might feel restricted in his choice of factual and legal arguments when defending his clients in future cases. It is therefore reasonable to consider that the applicant was made subject to a "formality" or a "restriction" on his freedom of expression." See also paras. 37-39, and 44 as concerns the fair trial implications.

[4] *Prosecutor v. Yekatom & Ngaïssona* ICC-01/14-01/18-206, paras 15–21 (referring to the *Katanga and Ngudjolo* decision ICC-01/04-01/07-259.

[5] *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-301, paras. 19-20. See also *Prosecutor v. Ongwen* ICC-02/04-01/15-468, para. 4, *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11-1813, para. 19.

[6] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2705, paras. 13-18, *Prosecutor v. Katanga* ICC-01/04-01/07-3833, para. 25.

[7] See for example, ICTR, *Prosecutor v. Pauline Nyiramasuhuko & Arsene Shalom Ntahobali* (Case No. ICTR-97-21-T), *Sylvain Nsabimana & Alphonse Nteziryayo* (Case No. ICTR-97-29-T), *Joseph Kanyabashi* (Case No. ICTR-96-15-T) and *Elie Ndayambaje* (Case No. ICTR-96-8-T), Decision On The Prosecutor's Further

and adjudicating alleged violations of the Code.[8] The principle also applies broadly to any findings or measures that are likely to impact on an individuals' rights: the principle thus applies not only to the outcome of such a process, but an initial finding that such a process should be initiated.[9] It further serves to ensure the appearance of impartiality of judicial findings concerning the conduct of the parties appearing before them.[10]

7. The ability of the Defence to exercise the right to be heard is of particular importance in light of the absence of any clear and specific legal standards concerning the content of press statements by defence lawyers. It would also be both fair and appropriate to afford Counsel the opportunity to clarify and contextualise her comments, in particular, in order to dispel any public perception that either Counsel or the Defence by extension were criticizing or impugning the judicial conduct of the Chamber.

8. As concerns the first aspect, although the Court has rendered findings concerning public commentary made by representatives of the Prosecution, both the Court, and the ECHR have affirmed that the same standards do not apply to the Defence. Whereas the Prosecution acts as a dispassionate representative of the State, which is required to respect the presumption of innocence, the Defence is tasked with the role of vigorously and independently advocating for the interests of their client.[11] When the issue arose for consideration in *Blé Goudé*, after first hearing from the Defence, the Chamber dismissed the matter, due to the absence of any objective and tangible impact on the trial proceedings before the Chamber.[12] In a separate

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Allegations Of Contempt, 30 November 2001, para. 10; See also, ECHR, *Ramos Nunes De Carvalho E Sá v. Portugal* (Grand Chamber), 55391/13, 57728/13 and 74041/13, paras. 33, 187-192.

[8] See for example, Article 37(1) of the Code of Conduct.

[9] For the position under the European Charter of Fundamental Rights and Freedoms, see Judgment of the General Court, Case T-395/15 P, paras 108-109: "pursuant to Article 41(2)(a) of the Charter, every person has the right to be heard before any individual measure which would affect him or her adversely is taken. Furthermore, observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement (judgment in *Kamino International Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 39).
109 According to the case-law, the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely (see the judgment in *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08 P, EU:C:2009:598, paragraph 83).

[10] *Kyprianou v. Cyprus*, 73797/01, paras. 74-75.

[11] ICC-01/04-01/06-2433, para. 41; *Steur v. Netherlands*, 39657/98, para. 39: "39. The Court notes that the applicant's criticism during the trial was aimed at the manner in which evidence was obtained by an investigating officer exercising his powers to interrogate the applicant's client in a criminal case and while the latter was in custody. As the Court has noted with reference to public prosecutors (see Nikula, cited above, § 50), the difference between the positions of an accused and an investigating officer calls for increased protection of statements whereby an accused criticises such an officer. This applies equally in this case, where the way in which such evidence was gathered was criticised in civil proceedings in which that evidence was to be used".

[12] ICC-02/11-01/15-1176.

opinion, Judge Tarfusser emphasized the following principles, derived from internationally recognized human rights:[13]

> the need to avoid any "chilling effect" that any interference may have on its exercise; that this freedom not only protects information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also extends to those "that offend, shock and disturb" and that these principles are held even more vigorously when the scrutinised expressions concern matters of public interest, such as, typically, the functioning of the judicial system. Not only are lawyers also entitled to the right to freedom of expression, as a fundamental tenet of the independence of the legal profession, but they - in light of their role "as intermediaries between the public and the courts"- should "be able to draw the public's attention to potential shortcomings in the justice system" and "to comment in public on the administration of justice". Lawyers are also entitled to pursue their client's defence "by means of an appearance on the television news or a statement in the press, and through such channels … may inform the public about shortcomings" in the proceedings; this, in particular, in respect of high-profile cases having attracted wide media attention. Furthermore, freedom of opinion, as a fundamental part of the right secured by Article 10, enjoys an even broader protection: since the truth of value judgements, as opposed to statements of facts, is not susceptible of proof, such value judgments are protected even when delivered in a "harsh" manner, and may be found to exceed the scope of the freedom only when deprived of sufficient factual basis.

9. In criminal proceeding and in particular, in high profile trials, defence lawyers have a special obligation and role to act as the "custodial of the client's word",[14] and to ensure that the public is aware that the defendant at the center of the trial is not simply an abstract object of media attention, but a person, who is presumed innocent. The ECHR has further affirmed that Article 10 of the Convention affords defence lawyers the right to make public comment on a range of

[13] ICC-02/11-01/15-1176-Anx, para. 2.

[14] See joint observations of the Paris Bar Association, the National Bar Council and the Conference of Chairmen of French Bars, as set out in *Morice v France*, para. 119-121:
119. In their view, the point of principle in the present case was the lawyer's freedom of expression to defend his client when he was addressing the press, where the case had attracted a certain level of public interest. The resulting issue was how to determine when comments became excessive, however strong they might be, if they affected an opponent, a judge or a fellow lawyer.
120. Every lawyer, however well known, was the custodian of the client's word. When a case came to public attention, it was the lawyer's responsibility to continue to defend that client, whether by taking any necessary ad hoc proceedings or by adding his own voice to the media storm, as had become the norm. This was no longer a lawyer's right but a duty attached to his position, whether the story of the case broke some time before any public hearing, as was often the case, or later.
121. Lawyers were entitled to criticise the court's ruling and to relay any criticism their clients might wish to make. The lawyer's comments were then necessarily interpreted and received by the public as partial and subjective. The parallel between the judge's duty of discretion and the lawyer's freedom of speech was not convincing. Whilst the word of the judge would be received as objective, the words of the lawyer were taken as the expression of a protest by a party. It was not unusual, therefore, for a judge to be obliged to remain silent, whilst comments by a lawyer, for a party to the proceedings, would in no way disrupt the independence and authority of the justice system.

issues concerning the content and conduct of the proceedings, and that such comment can serve to reinforce public confidence in the independent role of the legal profession, and their right to effectively represent their client's interests.[15] There is, moreover, a public interest in discussing and receiving information concerning criminal proceedings and the functioning of the judiciary; as such, any restrictions should be narrowly interpreted and enforced.[16]

[15] *Morice v. France*, paras. 138-139: "Turning now to remarks made outside the courtroom, the Court reiterates that the defence of a client may be pursued by means of an appearance on the television news or a statement in the press, and through such channels the lawyer may inform the public of shortcomings that are likely to undermine pre-trial proceedings (see *Mor*, cited above, § 59). The Court takes the view, in this connection, that a lawyer cannot be held responsible for everything published in the form of an "interview", in particular where the press has edited the statements and he or she has denied making certain remarks (see *Amihalachioaie*, cited above, § 37). In the above-cited *Foglia* case, it also found that lawyers could not justifiably be held responsible for the actions of the press (see *Foglia*, cited above, § 97). Similarly, where a case is widely covered in the media on account of the seriousness of the facts and the individuals likely to be implicated, a lawyer cannot be penalised for breaching the secrecy of the judicial investigation where he or she has merely made personal comments on information which is already known to the journalists and which they intend to report, with or without those comments. Nevertheless, when making public statements, a lawyer is not exempted from his duty of prudence in relation to the secrecy of a pending judicial investigation (see *Mor*, cited above, §§ 55-56). Lawyers cannot, moreover, make remarks that are so serious that they overstep the permissible expression of comments without a sound factual basis (see *Karpetas*, cited above, § 78; see also *A. v. Finland* (dec.), no. 44998/98, 8 January 2004), nor can they proffer insults (see *Coutant*, cited above). In the circumstances in *Gouveia Gomes Fernandes and Freitas e Costa* (cited above, § 48), the use of a tone that was not insulting but caustic, or even sarcastic, in remarks about judges was regarded as compatible with Article 10. The Court assesses remarks in their general context, in particular to ascertain whether they can be regarded as misleading or as a gratuitous personal attack (see *Ormanni v. Italy*, no. 30278/04, § 73, 17 July 2007, and *Gouveia Gomes Fernandes and Freitas e Costa*, cited above, § 51) and to ensure that the expressions used have a sufficiently close connection with the facts of the case (see *Feldek v. Slovakia*, no. 29032/95, § 86, ECHR 2001-VIII, and *Gouveia Gomes Fernandes and Freitas e Costa*, cited above)."

See also *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*, 1529/08, paras. 47-48:
47. En l'espèce, la Cour n'est pas convaincue par l'argument du Gouvernement selon lequel les requérants n'auraient fait que défendre leur intérêt personnel. S'il est vrai que les intéressés réagissaient à un article – lui aussi virulent et pour le moins polémique – précédemment publié dans la presse, il ressort du texte litigieux que les requérants se prononçaient, sur un ton certes critique, sur une législation qui permettait le jugement séparé de coaccusés dans une affaire de corruption. L'article en question s'inscrivait donc dans le cadre d'un débat sur le fonctionnement de la justice, ce qui relève manifestement de l'intérêt général.
48. La Cour constate que certaines des affirmations des requérants dénotaient effectivement un ton acerbe, voire sarcastique, à l'égard de la juge F.G. Elle estime qu'elles ne sauraient toutefois être qualifiées d'injurieuses et qu'elles relèvent plutôt de la critique admissible (Skałka c. Pologne, n° 43425/98, § 34, 27 mai 2003).

[16] *Morice v. France*, paras. 152-153: "In addition, as the Court has previously found, the public have a legitimate interest in the provision and availability of information regarding criminal proceedings (see *July and SARL Libération*, cited above, § 66) and remarks concerning the functioning of the judiciary relate to a matter of public interest (see paragraph 125 above). The Court has in fact already been called upon on two occasions, in *Floquet and Esménard* and *July and SARL Libération* (both cited above), to examine complaints relating to the Borrel case and to the right to freedom of expression in respect of comments on the handling of the judicial investigation, finding in each of those cases that there was a debate on a matter of public interest. Accordingly, the Court takes the view that the applicant's impugned remarks, which also concerned, as in the said judgments in *Floquet and Esménard* and *July and SARL Libération*, the functioning of the judiciary and the handling of the Borrel case, fell within the context of a debate on a matter of public interest, thus calling for a high level of protection of freedom of expression, with a particularly narrow margin of appreciation accordingly being afforded to the authorities."

10. Within the context of this case, the Single Judge directed the parties not to use public commentary as a means to influence or prejudice the outcome of matters that were *sub judice* before the Chamber. The Chamber has, at the same time, underscored the importance of publicity of the proceedings, and actively encouraged the parties to do their utmost to make ensure that as much information as possible is in the public sphere, and available to the public following the hearings, even if the original source material is confidential (i.e. as is the case with cross-examination conducted on the basis of confidential witness statements).

11. As concerns the particular litigation concerning Mr. Al Hassan's request for a custodial visit, it was the understanding of the Defence that the confidentiality of the decision was tied to the confidentiality of the Defence request, which in turn, related to security considerations concerning the modalities of possible implementation. The Defence filed a public redacted version of the request on 23 December, after the decision was issued. Counsel thus had a good faith belief that since Mr. Al Hassan's ongoing presence in the detention unit is a matter of public record (and one which will be apparent through his presence at court hearings, through Defence visits to him at the detention unit, and communications with his family from the detention unit) the outcome of the request was obvious, and not subject to any confidentiality measures. Counsel did not quote or refer to the contents of the decision, and noting its rejection served to ensure that the public redacted version of the Request did not trigger any expectation or trepidation that Mr. Al Hassan's release might be imminent.

12. The content of the tweet notes the existence of the verdicts, but does not quote, describe or critique their reasoning, or otherwise suggest that decisions should not be complied with, or respected in full, for as long as they are in force. Mr. Al Hassan, through the Defence, has expressed its appreciation for the Trial Chamber's intervention in facilitating his telephone communications with his family,[17] and Counsel would like to express her sincere regret for for any offence felt by the Chamber. The Defence is also grateful for the Trial Chamber's willingness and availability to adjudicate the release request at such short notice. It is possible, in this regard, to comply with, and recognize the legitimacy of judicial activity directed towards ensuring the right to speedy proceedings, while at the same time, noting that there are personal and professional ramifications of such measures, as there are, for any trial process.

13. The intent of the tweet was thus to juxtapose the fact that at a time associated with festivities, receiving presents, and enjoying family life, the Defence and defendant were receiving

[17] ICC-01/12-01/18-1212-Red, para. 12.

significant decisions, and to thereby highlight the difficult and continuous work of the Defence, in light of the personal experiences of a defendant, who is not just an object of a criminal trial, but an individual with very specific cares and concerns.

14. These issues go beyond the specific litigation in any particular trial, and relate to the public interest in appreciating the nature and impact of lengthy criminal proceedings involving defendants detained far from home. It is for this reason a common advocacy tool for defence lawyers to use festive dates (such as Christmas or News Years) to draw attention to the fact that such times can be a particularly lonely and difficult time for foreign nationals detained abroad, who are displaced and distanced from their families and communities, and this in turn, triggers specific obligations for the Defence at this point in time.

15. The role of the Defence in addressing such matters is particularly important in this case since Al Hassan has no ability to explain such matters to the public, nor is he permitted to discuss his case or public filings with his immediate family, even if such filings relate to them directly. Mr. Al Hassan cannot tell his children that he had asked to visit them, and although he cannot, it is not because he does not wish to be with them at this time. He also cannot inform his community and friends of his pain in losing his daughter, or his distress at being unable to comfort and provide for his family at this time, or to otherwise perform his role as a father and husband. It is the Defence, rather, that must act as an intermediary between Mr. Al Hassan, his family, and the public, and between Mr. Al Hassan and the Chamber.

16. This role generates a significant workload for the Defence, and a significant degree of vicarious trauma in circumstances where the Defence is required to act as such an interlocutor in relation to matters of a tragic or traumatic nature. Whereas a person affected by the bereavement of a close family member can generally take time off to grieve and recover, a detained defendant has not such option, as reflected by the fact that, even though it is the judicial recess, since the death of his daughter, Mr. Al Hassan has continued to receive a range of decisions and filings on complex and sensitive issues. Even if the deadline for responding or appealing such filings has been temporarily suspended, the Defence has an ongoing duty to notify and translate their content to Mr. Al Hassan, to discuss with him the particular ramifications as concerns his legal and personal rights, and to take steps to ensure that the Defence will be in a position to take any following steps in an expeditious manner. This work is particularly difficult when the developments concern the loss of Mr. Al Hassan's daughter or pertain to Mr. Al Hassan's experiences while detained in Mali.

17. The consequences for both Mr. Al Hassan and the Defence were amplified during the Christmas holiday period, during which in person detention unit meetings were suspended. This meant that any developments in the case required Defence team members to address highly personal issues with their client by telephone, and to absorb the related distress or disappointment, at a time when they were in their homes, attempting, if possible, to enjoy and fulfil their own rights and obligations to their family, at the end of an exceptionally difficult year. This dimension to Defence work is often overlooked by the public or unknown, notwithstanding the public interest in appreciating the functioning of the Defence, or being aware that the trial process engenders work, 365 days a year.

18. Counsel also further hopes that this public filing will further clarify and confirm that Counsel and the Defence fully respect and comply with all judicial decisions and orders issued by Trial Chamber X, and Chambers of the Court, and further appreciate the steps that have been taken by Trial Chamber X thus far.

19. Accordingly, rather than prohibiting or penalizing such communications, the Defence respectfully submits that it would be appropriate and consistent with the principle of legality and foreseeability, to promulgate an ICC policy for press statements, which takes into consideration the different roles of the parties and participants (including the Registry), and internationally recognized human rights concerning the role of publicity within criminal proceedings, and the presumption of innocence.

III. Relief sought

20. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Honourable Trial Chamber to reconsider and reverse its decision to issue the 'Submission to the Registry pursuant to Article 34(1)(a) of the Code of Professional Conduct for counsel'.

Melinda Taylor
Counsel for Mr Al Hassan

Dated this 4th Day of January 2021
At The Hague, The Netherlands