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**No. ICC-01/12-01/18
Date: 10 November 2022**

TRIAL CHAMBER X

**Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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

Decision on the Defence requests for the admission of evidence from the bar table

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

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TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, pursuant to Articles 64, 67(1), 69 and 74(2) of the Rome Statute (the ‘Statute’), Rules 63 and 64 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulations 35(2) and 39 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on the Defence requests for the admission of evidence from the bar table’.

I. Procedural history

1. On 6 May 2020, the Chamber issued its Directions on the conduct of proceedings, notably adopting a procedure for the submission of evidence other than through a witness.¹
2. On 29 August 2022, the Chamber issued its sixth decision on matters related to the conduct of proceedings (the ‘Sixth Directions’), notably setting 24 October 2022 as the deadline for the Defence to file any request for the submission of evidence other than through its remaining witnesses.² The deadline was extended by the Single Judge to 31 October 2022³ and subsequently to 2 November 2022.⁴
3. Between 26 October and 2 November 2022, the Defence filed twelve requests, seeking the admission of a total of 293 pieces of documentary evidence from the bar table.⁵ In annexes to its Requests (the ‘Annexes’), the Defence provides tables

¹ ICC-01/12-01/18-789-AnxA, paras 77-78.

² ICC-01/12-01/18-2308, para. 5.

³ Email of 17 October 2022 at 14:11. A request for a further extension of time was rejected without prejudice on 26 October 2022. (Email of 11:12.)

⁴ Email of 28 October 2022 at 15:05.

⁵ Defence request for the admission of evidence from the bar table of items related to the issue of an alleged armed conflict of non-international nature, 26 October 2022, ICC-01/12-01/18-2391-Conf (with one confidential annex; the ‘First Request’); Defence Request for the Admission of Evidence From the Bar Table of Items Related to the Alleged Destruction of Cultural Heritage, 27 October 2022, ICC-01/12-01/18-2392-Conf (with one confidential annex; the ‘Second Request’); Defence request for the admission of evidence from the bar table of items related to the approach to women in Mali and related social values, 28 October 2022, ICC-01/12-01/18-2393-Conf (with two confidential annexes; the ‘Third Request’); Defence Request for the Admission of Evidence From the Bar Table of Items Related to Mr Al Hassan’s Individual Criminal Responsibility, 28 October 2022, ICC-01/12-01/18-2394-Conf (with two confidential annexes; the ‘Fourth Request’); Defence request for the admission of evidence from the bar table of items related to an alleged organisational policy and the relevant political climate, 31 October 2022, ICC-01/12-01/18-2395-Conf (with three confidential annexes; the ‘Fifth Request’); Defence Request for the Admission of Evidence From the Bar Table of Items Related to the Security and Humanitarian Situation, 31 October 2022, ICC-01/12-01/18-2396-Conf (with three confidential annexes;

which list the items submitted, as well as a description of their content, an index of the most relevant portions (where appropriate) as well as a description of each item's purported relevance and probative value.⁶ Consistent with paragraph 78 of the Directions on the conduct of proceedings, the Annexes also contain the Prosecution's position on each item.

4. Between 31 October and 9 November 2022, the Prosecution submitted via email its responses to the Requests (the 'Responses').⁷ In the Responses, the Prosecution refers to its arguments included in the Annexes and provides discrete additional lines of arguments in response to the Requests.
5. Noting that the LRVs have not filed responses to any of the Requests so far, and having considered the nature of the Requests, the Chamber considers it

the 'Sixth Request'); Defence request for the admission of evidence from the bar table of items related to traditional justice and Islamic law, 31 October 2022, ICC-01/12-01/18-2397-Conf (with two confidential annexes; the 'Seventh Request'); Defence Request for the Admission of Evidence from the Bar Table of Items Related to Defence Witnesses, OTP witnesses and NGOs' influence on the collecting of evidence, 1 November 2022, ICC-01/12-01/18-2398-Conf (with four confidential annexes; the 'Eighth Request'); Defence request for the admission of evidence from the bar table related to the torture endured by Mr Al Hassan ('General Materials'), 2 November 2022, ICC-01/12-01/18-2399-Conf (with one confidential annex; the 'Ninth Request'); Defence request for the admission of evidence from the bar table related to Mr Al Hassan's medical records, 2 November 2022, ICC-01/12-01/18-2400-Conf (with one confidential annex; the 'Tenth Request'); Defence request for the admission of evidence from the bar table related to torture by Barkhane and the DGSE on other witnesses, 2 November 2022, ICC-01/12-01/18-2401-Conf (with one confidential annex; the 'Eleventh Request'); Defence request for the admission of evidence from the bar table of miscellaneous items and videos, 2 November 2022, ICC-01/12-01/18-2402-Conf (with two confidential annexes; the 'Twelfth Request').

⁶ On 23 September 2022, the Single Judge confirmed that the annexes to any bar table motion may exceptionally contain substantive arguments. (Email of 15:29.)

⁷ Email of 31 October 2022 at 11:06 (the 'First Response'); email of 31 October 2022 at 11:28 (the 'Second Response'); email of 31 October 2022 at 11:33 (the 'Third Response'); Email of 9 November 2022 at 11:41 (the 'Fourth Response'); email of 31 October at 12:35 (the 'Fifth Response'); email of 1 November 2022 at 11:04 (the 'Sixth Response'); email of 1 November 2022 at 10:40 (the 'Seventh Response'); email of 3 November 2022 at 16:40 (the 'Eighth Response'); email of 4 November 2022 at 12:00 (the 'Ninth Response'); email of 4 November 2022 at 12:13 (the 'Tenth Response'); email of 3 November 2022 at 17:00 (the 'Eleventh Response'); email of 4 November 2022 at 12:16 (the 'Twelfth Response').

In the Seventh Response, the Prosecution also requests the Chamber to order that the Defence remove the term 'fallacious' from paragraph 8 of the Seventh Request. The Defence responded via email to this part of the Prosecution's submissions, notably explaining that 'its submissions should not be understood to impute bad faith or any form of deception to the Prosecution' and that '[t]he word was also directed towards the charges and not Prosecution staff.' (email of 1 November 2022 at 11:21). In light of the exchanges between the parties, the Chamber considers it unnecessary to intervene with respect to this discrete issue.

appropriate to exceptionally render the present decision before the passing of the standard response deadline.

II. Request for the late addition of items to the Defence's list of evidence (the 'LoE')

6. The Chamber recalls that, pursuant to the second sentence of Regulation 35(2) of the Regulations, after the lapse of a time limit, the party requesting variation is required to demonstrate that it was unable to file the application within the time limit for reasons outside its control. Where the conditions of Regulation 35(2) of the Regulations are not met, a party's late addition of certain items to its LoE may be granted where it is in the interests of justice to do so and where consideration of the items in question is deemed necessary for the determination of the truth.⁸
7. The Chamber notes that the Defence requests the addition to the LoE of several items, including: two items that had been available to the Prosecution but inadvertently left out of the LoE;⁹ an item that reproduces the contents of an item already on the LoE;¹⁰ an item whose translation is already on the LoE;¹¹ and an open source article.¹² Noting that the late addition to the LoE of these items are unopposed as well as that most of these items are brief in nature, the Chamber considers it appropriate to authorise their late addition to the LoE.
8. In addition, the Defence requests the late addition of four videos as well as eight related transcripts and translations to the LoE,¹³ with respect to which the Defence submits that it was previously unable to properly ascertain their relevance given that the name of the individual in the titles is spelled differently,¹⁴

⁸ Decision on the Defence request pursuant to Regulation 35 regarding D 0002, D 0003, D-0004 and D-0008 and on the introduction of their prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, 26 October 2022, ICC-01/12-01/18-2388-Conf (the 'DGSE Decision'), para. 8.

⁹ MLI-D28-0004-3314; MLI-D28-0004-0005.

¹⁰ MLI-D28-0006-9093.

¹¹ MLI-OTP-0018-1058-R01.

¹² MLI-D28-0006-9074.

¹³ MLI-OTP-0069-3775; MLI-OTP-0078-5586; MLI-OTP-0078-5597; MLI-D28-0006-9100; MLI-D28-0006-9101; MLI-OTP-0069-3776; MLI-OTP-0078-4585; MLI-OTP-0078-4660; MLI-OTP-0069-3769; MLI-D28-0006-9094; MLI-OTP-0069-3772; MLI-D28-0006-9102.

¹⁴ Twelfth Request, ICC-01/12-01/18-2402, para. 9.

two Prosecution investigation notes,¹⁵ open source items that were recently obtained,¹⁶ a social media post,¹⁷ and an email.¹⁸ With respect to these items, the Prosecution observes that the Defence fails to demonstrate that the requirements under Regulation 35 of the Regulations are met. However, as these items are mostly items disclosed by the Prosecution, as well as other items that are limited in scope, the Chamber considers that authorising their late addition to the LoE would not unduly prejudice the Prosecution. Further having considered the parties' submissions in the Annexes with respect to the relevance and probative value of these items, and without prejudice to its eventual assessment of their relevance and probative value, the Chamber is satisfied that it is in the interest of justice to authorise their late addition to the LoE.

9. With respect to MLI-D28-0004-2908, the Chamber observes that contrary to the Defence's submissions, the item is already on the LoE.¹⁹

III. Submission of evidence from the bar table

10. The Chamber recalls that, in line with the approach it adopted with respect to the submission of evidence, it 'will recognise the submission of items of evidence without a prior ruling on relevance and/or admissibility and will consider its relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.'²⁰
11. The Chamber notes that some of the exhibits submitted by the Defence were already recognised as formally submitted in previous decisions.²¹ The Chamber will therefore not consider these exhibits as part of this assessment.

¹⁵ MLI-OTP-0062-0852-R01, MLI-OTP-0077-5166.

¹⁶ MLI-D28-0006-5567, MLI-D28-0006-5606; MLI-D28-0006-9029.

¹⁷ MLI-D28-0005-6837.

¹⁸ MLI-OTP-0077-5163.

¹⁹ Annex 1 to the Defence submission of its updated list of evidence, ICC-01/12-01/18-2196-Conf-Anx1, p. 14.

²⁰ Decision on the Prosecution's fourth, fifth and sixth requests for the admission of evidence from the bar table, 23 February 2022, ICC-01/12-01/18-2127 (the 'Second Prosecution Bar Table Decision'), para. 9.

²¹ MLI-OTP-0069-3776, MLI-OTP-0078-4585 and MLI-OTP-0078-4660 were formally submitted via the Second Prosecution Bar Table Decision. MLI-D28-0003-0416 was formally submitted via the DGSE

A. Items that are testimonial in nature

12. In line with its previous determination, the Chamber considers that items that are testimonial in nature may not be submitted via the bar table.²² The Prosecution argues that several exhibits, including videos, articles, blogs, social media posts, reports and medical documents, are testimonial in nature and therefore may not be submitted via the bar table.
13. In this regard, the Chamber incorporates by reference the definition of prior recorded testimony as previously set out, notably that ‘the person providing the statement understands that he or she is providing information which may be relied upon in the context of legal proceedings.’²³ Accordingly, not every conversation a person has or every communication provided by the person qualifies as ‘testimony’ - it is rather only those where persons are questioned in their capacity as witnesses in the context of or in anticipation of legal proceedings.²⁴
14. The Chamber also observes that the Prosecution avers that several items are associated with items that are testimonial in nature and accordingly may only be submitted via Rule 68 of the Rules. The Chamber recalls its previous determination that items need not independently qualify as prior recorded testimony in order to be considered an associated exhibit forming an integral part of the prior recorded testimony.²⁵ Accordingly, the Chamber considers misplaced the Prosecution’s submission that associated exhibits *ipso facto* become testimonial themselves.²⁶ In respect of the items subject to the Requests, the

Decision. MLI-D28-0003-2194-R01 was formally submitted via D-0025. MLI-D28-0006-2873 was formally submitted via D-0093.

²² Decision on Prosecution application submitting 63 open source exhibits into evidence, 15 June 2021, ICC-01/12-01/18-1514 (the ‘First Prosecution Bar Table Decision’), para. 17.

²³ Decision on Defence request for the introduction into evidence of the prior recorded testimony of D-0512, D-0516 and D-0554 pursuant to Rule 68 of the Rules, 18 May 2022, ICC-01/12-01/18-2228-Conf, para. 12.

²⁴ Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on the Prosecution’s Second Request to Introduce Evidence Other than Through a Witness, 15 March 2022, ICC-01/09-01/20-299, para. 11.

²⁵ Decision on the introduction into evidence of the prior recorded testimony of D-0146, D-0524, D-0627 and D-0628 pursuant to Rule 68(2)(b) of the Rules, 17 October 2022, ICC-01/12-01/18-2378, para. 14.

²⁶ Similarly see Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Third Prosecution Submission Request (Call Data Records), ICC-01/14-01/18-1499, 5 July 2022, para. 27.

Chamber has therefore assessed if the relevant items themselves independently constitute a prior recorded testimony.

15. Amongst the items submitted, the Chamber observes that several reports prepared by P-0590 (the ‘P-0590 Reports’) are sought for submission via the Eleventh Request.²⁷ These reports were prepared by P-0590 in the context of proceedings before the Court, at the request of the Prosecution, and in order to obtain the ‘expert opinion’ of the witness.²⁸ Accordingly, the Chamber is of the view that the P-0590 Reports are testimonial in nature.
16. The Chamber notes that the Defence does not specifically contest the Prosecution’s position that the P-0590 Reports are testimonial but instead submits that the possibility of the Defence to submit these items through P-0590 was eliminated when the Prosecution decided not to call the witness *viva voce* and refers to the Chamber’s previous determination that ‘the Defence may seek to introduce additional evidence from P-0590 in the context of its case.’²⁹
17. The Chamber is unconvinced by these submissions advanced by the Defence. While the Defence was indeed entitled to seek to introduce additional evidence from P-0590 as part of its presentation of evidence, this does not justify circumventing the procedural requirements under Rule 68 of the Rules for items that are testimonial in nature. For these reasons, the Chamber rejects the submission of the P-0590 Reports.
18. With respect to the remainder of the items, the Chamber is satisfied that they are not testimonial material that may not be submitted through bar table motions.

²⁷ MLI-OTP-0067-0290-R02; MLI-OTP-0069-7980-R01; MLI-OTP-0069-8009-R01; MLI-OTP-0069-8019; MLI-OTP-0068-4612; and MLI-OTP-0056-0373-R01.

²⁸ See *for example* mission letter MLI-OTP-0066-0609 at 0610; mission letter MLI-OTP-0073-0957 at 0958; mission letter MLI-OTP-0066-0615 at 0616; mission letter MLI-OTP-0066-0618 at 0619.

²⁹ ICC-01/12-01/18-2401-Conf-Anx *referring to* Decision on the introduction into evidence of P-0590’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules and related Regulation 35 requests, 28 January 2022, ICC-01/12-01/18-2096, para. 11 (n. 22.)

B. Other objections raised by the Prosecution

19. The Prosecution opposes the submission of the vast majority of items subject to the Requests and disputes the Defence's submissions made with respect to their relevance and probative value. Save for those objections addressed in section III-A of the present decision, the Chamber considers that all Prosecution objections relate to the relevance, probative value and potential prejudice of the evidence concerned, which need not be considered at this stage.³⁰ The Chamber notes that these objections largely mirror the categories of objections made by the Defence with respect to the Prosecution's bar table motions and is of the view that they do not warrant further discussion for the purpose of the present ruling.
20. Nonetheless, the Chamber specifies that, consistent with its approach taken during the Prosecution's presentation of evidence, the Chamber does not consider relevant, for the purpose of the present determination, that the Chamber previously rejected the submission of certain items via witnesses or Rule 68 of the Rules.³¹ Neither does the fact that a certain item was not used with or submitted through the relevant witness affect the receivability of a request for submission of said item via the bar table.³²

C. Translations of items

21. The Chamber notes that in the Tenth Request, the Defence seeks to submit several medical documents that are in the Dutch language. While the submission of translations of several of these documents³³ are not sought by the Defence, having considered Regulation 39(1) of the Regulations, the Chamber considers it appropriate to recognise, *proprio motu*, the formal submission of these translations.

³⁰ The Chamber notes that in response to the Prosecution's objection that a translation of an item in the Sixth Request is inaccurate, the Defence has corrected the relevant error via an image update. (Sixth Request, ICC-01/12-01/18-2396-Conf, para. 19) The Chamber accordingly finds that it is unnecessary to address said objection in the present decision.

³¹ Second Prosecution Bar Table Decision, ICC-01/12-01/18-2127, para. 22 (n.19.)

³² See First Prosecution Bar Table Decision, ICC-01/12-01/18-1514, para. 19.

³³ MLI-D28-0003-1341; MLI-D28-0003-1453; MLI-D28-0003-1403; MLI-D28-0003-1404; MLI-D28-0003-1842; MLI-D28-0003-1444; MLI-D28-0003-1847

IV. Supplementary bar table motions and rebuttal evidence

22. In the Sixth Directions, the Chamber notably decided that ‘[i]f necessary, and within one week after the completion of the testimony of the last Defence witness, [the Defence bar table motions] may be complemented [...]’.³⁴ The Chamber notes that since the issuance of the Sixth Directions, the Single Judge accepted the Defence’s proposals to call D-0246 on 14-15 November, instead of the week of 17 October as initially planned for,³⁵ and further extended the deadline for the submission of Defence bar table motions to 2 November 2022.³⁶ Having considered that the Chamber has already adjudicated requests for the submission of items via all the witnesses who testified so far, and in the interest of expeditiousness, the Chamber sets the deadline for any supplementary bar table motion to Thursday, 17 November 2022. Should the Defence consider it unnecessary to file a supplementary bar table motion, it should so notify by the same deadline.
23. Considering that the Prosecution has filed a provisional notice that it does not intend to seek the Chamber’s leave to present rebuttal evidence,³⁷ the Chamber considers that any supplementary request to present rebuttal evidence must be filed within two days of notification of the conclusion of the Defence’s presentation of evidence.

³⁴ Sixth Directions, ICC-01/12-01/18-2308, para. 5.

³⁵ Email of 12 October 2022 at 12:37.

³⁶ See paragraph 2 above.

³⁷ Prosecution preliminary notice regarding potential rebuttal evidence, 11 October 2022, ICC-01/12-01/18-2374.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PARTIALLY GRANTS the Requests;

AUTHORISES the late inclusion of the items specified in paragraphs 7 and 8 of the present decision to the Defence's List of Evidence;

RECOGNISES as formally submitted all items subject to the Requests, with the exception of items identified in paragraphs 11 and 15 of the present decision;

RECOGNISES as formally submitted all items identified in paragraph 21 of the present decision;

INSTRUCTS the Registry to reflect that these items have been so recognised in the metadata; and

ADOPTS the deadlines stipulated at paragraphs 22 and 23 of the present decision.

Done in both English and French, the English version being authoritative.

Judge Antoine Kesia-Mbe Mindua
Presiding Judge

Judge Tomoko Akane

Judge Kimberly Prost

Dated this Thursday, 10 November 2022

At The Hague, The Netherlands