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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

**Public redacted version of ‘Second decision on the admission of victims to
participate in trial proceedings’**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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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*, having regard to Article 68(1) and (3) of the Rome Statute, Rules 85, 89, and 91(1) of the Rules of Procedure and Evidence (the ‘Rules’), and Regulation 86 of the Regulations of the Court (the ‘Regulations’), issues this ‘Second decision on the admission of victims to participate in trial proceedings’.

I. Procedural history and submissions

1. On 12 March 2020, the Chamber issued its ‘Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial’ (the ‘First Decision on Victims’ Participation’).¹ In this decision, the Chamber set a procedure for the admission of victims to participate in the trial proceedings and adopted various deadlines for the transmission of victim applications for participation at trial. It relevantly decided that Group C applications, which are applicants for whom the Registry cannot make a clear determination as to their eligibility, were to be transmitted to the Chamber and the parties no later than 45 days before the trial commencement date.² This deadline was subsequently extended to the end of the Prosecution case following a request from the Registry and the Legal Representatives of victims (the ‘LRVs’).³
2. On 29 May 2020, the Registry transmitted five Group C application forms to the Chamber, providing unredacted versions thereof to the Office of the Prosecutor (the ‘Prosecution’) and the LRVs, and redacted versions to the Defence.⁴
3. On the same day, the Registry filed the ‘Registry First Assessment Report on Victim Applications for Participation in Trial Proceedings’,⁵ which includes a brief overview of the reasons why the Registry is not in a position to make a clear determination on the five Group C applications transmitted.

¹ ICC-01/12-01/18-661.

² First Decision on Victims’ Participation, ICC-01/12-01/18-661, para. 29.

³ Decision on request for extension of deadlines for the final transmission of victim applications for participation at trial, 12 June 2020, ICC-01/12-01/18-880.

⁴ Registry Transmission of Group C Victim Applications for Participation at Trial, ICC-01/12-01/18-834 (the ‘Registry Transmission’), with five confidential, *ex parte*, annexes (only available to the Prosecution and the Legal representatives of victims), as well as confidential redacted versions thereof.

⁵ ICC-01/12-01/18-835 (the ‘Registry Report’), with one confidential annex.

4. On 8 June 2020, the Prosecution submitted its observations on the Group C applications received.⁶ It recalls that the five applicants had been authorised to participate as victims at the confirmation hearing stage⁷ and argues that all five have suffered harm which was caused by incidents which continue to fall within the parameters of the charges.⁸ The Prosecution also submits that, should the Chamber consider that the information provided by some of the applicants is insufficient, they should be given an opportunity to provide clarifications, rather than be deprived of their status as participating victims at this stage.⁹
5. On 11 June 2020, the LRVs submitted their observations.¹⁰ They consider that the five applicants should retain their status as participatory victims for the purposes of the trial proceedings and further suggest that the simple fact of having been in Timbuktu during the relevant period suffices to establish harm caused by events which form part of the charges, most notably the crime against humanity of persecution.¹¹ Finally, the LRVs inform the Chamber that they remain available to assist should the Chamber consider that complementary information is required to determine the eligibility of the applicants.¹²
6. The Defence did not file observations.

II. Applicable law

7. As decided in its First Decision on Victims' Participation with regard to substantive legal issues related to the definition of victims,¹³ the Chamber refers to the consistent jurisprudence on Rule 85 of the Rules as set out by the Single Judge of Pre-Trial Chamber I.

⁶ Prosecution's Observations on Group C Victim Applications for Participation at Trial, registered on 5 June 2020, ICC-01/12-01/18-864-Conf-Exp (the 'Prosecution Observations') filed confidential, *ex parte*, only available to the Prosecution, the VWU, the VPRS and the LRVs.

⁷ Prosecution Observations, ICC-01/12-01/18-864-Conf-Exp, para. 2.

⁸ Prosecution Observations, ICC-01/12-01/18-864-Conf-Exp, para. 2.

⁹ Prosecution Observations, ICC-01/12-01/18-864-Conf-Exp, para. 4.

¹⁰ Observations des Représentants légaux des victimes relatives à « *Registry Transmission of Group C Victim Applications for Participation at Trial* », ICC-01/12-01/18-875-Conf-Exp (the 'LRVs Observations'). A confidential-redacted version thereof was provided via email on the same day, and notified the following day (ICC-01/12-01/18-875-Conf-Red).

¹¹ LRVs Observations, ICC-01/12-01/18-875-Conf-Red, paras 7, 13.

¹² LRVs Observations, ICC-01/12-01/18-875-Conf-Red, para. 15.

¹³ First Decision on Victims' Participation, ICC-01/12-01/18-661, para. 8.

8. It is recalled, in particular, that individuals seeking to be admitted as participating victims will have to demonstrate *prima facie* that they are victims within the meaning of Rule 85 of the Rules and shall therefore meet the following criteria: i) the applicant has established his/her identity as a natural person; ii) the applicant is alleged to have suffered harm; and iii) the personal harm reported by the applicant resulted from an incident falling within the temporal, geographic and material parameters of the case (the ‘Rule 85(a) Test’).¹⁴

III. Analysis

9. In its report, the Registry indicates that it could not make a clear determination as to whether or not five applicants provided information which satisfied the third criterion of the assessment under the Rule 85(a) Test. The Chamber’s assessment below will be limited to the contentious issues put before the Chamber.

A. Applicants who report having suffered personal harm as a result of their witnessing crimes perpetrated against individuals who are not their relatives

10. Two of the applications transmitted (a/45249/18 and a/45265/18) raise the question as to whether or not the harm reportedly suffered by applicants as a result of witnessing crimes perpetrated against other individuals who are not their relatives meets the requirements under the Rule 85(a) Test.
11. The Chamber notes that the Registry seeks guidance to determine if it should continue to apply Pre-Trial Chamber I’s approach to these cases of psychological harm, that is in concluding that applicants qualify as victims if they have shown that: i) they were present in Timbuktu; and ii) that they witnessed a crime committed against someone else.¹⁵

¹⁴ Pre-Trial Chamber I, Decision Establishing the Principles Applicable to Victims’ Application for Participation, 24 May 2018, ICC-01/12-01/18-37-tENG, para. 48.

¹⁵ Registry Report, ICC-01/12-01/18-835, paras 15-16. *See also* Pre-Trial Chamber I, Second Decision on the Principles Applicable to Victims’ Application for Participation, 8 October 2018, ICC-01/12-01/18-146-tENG (the ‘Second PTC I Decision’), paras 34-37.

12. From the outset, the Chamber notes the Appeals jurisprudence which stresses the importance of the assessment of the harm itself, as a matter of fact.¹⁶ As such, the nature of the crimes and events witnessed, together with the applicant's personal experience thereof, should be considered on a case-by-case basis in deciding on eligibility under Rule 85(a) of the Rules. Further, in the case at hand, and because the applicants are not related to the direct victims, the Chamber cannot presume that they have suffered personal harm as a result of the crimes.
13. **Applicant a/45249/18**¹⁷ reports having suffered harm and been traumatised as a result of her hearing various sounds, including the shouting and the cries occurring [REDACTED] during summary executions and mutilations. The Chamber further observes that, while she explains that she was not physically present at the scene of an amputation, it appears that it is the cumulative effect of her witnessing various violent events which occurred [REDACTED] in Timbuktu during the relevant period that has had a negative effect on her well-being.
14. **Applicant a/45265/18**¹⁸ describes having suffered harm which resulted from 'having lived' the public amputation executed in Timbuktu during the period of the charges. The Chamber however notes that it is not in a position to assess how proximate the harm suffered is to the crime charged in this case. Specifically, on the basis of the information contained in the application, the applicant may or may not have personally witnessed the public amputation, as opposed to having seen the amputated man afterwards.
15. With regard to the above, the Chamber emphasises that, where applicants are not in a close relationship with the direct victim, the requirements of the Rule 85(a) Test are not satisfied by the mere fact of having heard about the

¹⁶ Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute, 8 March 2018, ICC-01/04-01/07-3778-Conf, para. 115-120, albeit discussing psychological harm suffered by family members of direct victims.

¹⁷ Annex 3 to Registry Transmission, ICC-01/12-01/18-834-Conf-Exp-Anx3.

¹⁸ Annex 4 to Registry Transmission, ICC-01/12-01/18-834-Conf-Exp-Anx4.

events which form part of the charges and/or their consequences.¹⁹ The Chamber is of the view that, for the harm suffered to be personal, as well as sufficiently proximate to the crimes charged, the applicants must have personally witnessed the occurrence of the event in question, as opposed to having heard about it after the fact

16. Accordingly, on the basis of the Rule 85(a) requirements set out by Pre-Trial Chamber I, including the fact that a *prima facie* demonstration suffices for the purpose of admission, and having had particular regard to the nature of the crimes and events which occurred repeatedly, over the course of a long period of time, within the earshot of applicant a/45249/18 and [REDACTED], in particular the crime of persecution under count 13, the Chamber is satisfied that she qualifies as a victim in the present case on the basis of the psychological harm she suffered. With regard to applicant a/45265/18, however, the Chamber instructs the VPRS, in consultation with the LRVs where appropriate, to revert back to her in order to ascertain whether or not she was indeed an eyewitness to at least one of the incidents referred to in the application. On the basis of the complementary information received, the VPRS is to transmit anew this application to the Chamber, either as a potential victim (Group A) or not (Group B).

B. Applicants who report having suffered personal harm resulting from crimes allegedly committed by perpetrators whose identification is unclear

17. Three of the applications for participation transmitted (a/25006/14, a/35018/16, a/45574/18) raise the question as to whether or not harm suffered as a result of crimes allegedly committed during the geographical and temporal scope of the case, but by perpetrators who have not been clearly identified and/or are notably identified as belonging to the 'MNLA', falls within the framework of the charges.
18. The Chamber first observes that, as noted by the Registry, the identification of the alleged perpetrators by the applicants is not a mandatory piece of

¹⁹ See, e.g., Pre-Trial Chamber I, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, 29 October 2010, ICC-02/05-03/09-89, para. 39. See also, paras 34-35.

information for participation in the proceedings. Under Regulation 86(2)(d) of the Regulations, it is only required ‘to the extent possible’.²⁰

19. Further, and before turning to the content of the three applications transmitted, the Chamber clarifies that the assessment of victim eligibility is distinct from any assessment of the facts and circumstances described in the charges and is of a *prima facie* nature. In this regard, the Chamber finds that, as previously stated by Trial Chamber VI, victim eligibility determinations do not delineate and are without prejudice to the Chamber’s ultimate decision on the merits.²¹
20. **Applicant a/25006/14**²² describes the harm she suffered as a result of the sexual violence allegedly perpetrated by the MNLA during the relevant period in Timbuktu. She is explicitly included in the list of direct victims of the crimes charged under the pseudonym [REDACTED] and the events which caused the harm she reports are described in detail by Pre-Trial Chamber I as part of the facts underlying one of the incidents confirmed under counts 6 and 13.²³ Pre-Trial Chamber I also found that the material perpetrators of the crimes committed against applicant a/25006/14 belonged to the groups Ansar Dine/AQIM.²⁴
21. **Applicant a/35018/16**²⁵ describes her experience of capture and victim of sexual violence allegedly committed during the relevant period in Timbuktu. She is not a Prosecution witness nor a victim named as part of the charges, but [REDACTED].²⁶ [REDACTED].²⁷ It is noted that [REDACTED] were found

²⁰ See also Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution adopted by UN General Assembly, 16 December 2005, A/RES/60/147, Annex, para. 9.

²¹ See e.g., Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Second decision on victims’ participation in trial proceedings, 16 June 2015, ICC-01/04-02/06-650, para. 18.

²² Annex 1 to Registry Transmission, ICC-01/12-01/18-834-Conf-Exp-Anx1.

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ Annex 2 to Registry Transmission, ICC-01/12-01/18-834-Conf-Exp-Anx2.

²⁶ Prosecution Observations, ICC-01/12-01/18-864-Conf-Exp, paras 3 and 18.

²⁷ [REDACTED]; and Prosecution Observations, ICC-01/12-01/18-864-Conf-Exp, paras 3, 21.

by Pre-Trial Chamber I to be members of Ansar Dine/AQIM based in Timbuktu at the time.²⁸

22. **Applicant a/45574/18**²⁹ describes events during which she was notably captured, raped and flogged. These took place within the region of Timbuktu during the relevant period. The Chamber observes that the application refers to the perpetrators with reference to their clothes and the language that they spoke. The Chamber notes that both the LRVs and the Prosecution submit that the fact that applicant a/45574/18 did not further identify the alleged perpetrators does not put into question her eligibility as a participatory victim.³⁰
23. In light of the above, the Chamber is satisfied that, despite the unclear identification of the alleged perpetrator and/or referencing an armed group whose actions are not attributed to the accused, the three applicants have *prima facie* demonstrated that they have suffered harm which is the result of an incident falling within the scope of the charges, in particular the crime of persecution under count 13, but also the crime of passing of sentences without due process under count 6 for applicant a/25006/14. Indeed, the Chamber is of the view that a reference to the MNLA does not in and of itself exclude applicants, especially where other details from the application appear to indicate that the applicant's identification of the alleged perpetrators could be inaccurate. This conclusion is consistent with the standard under Rule 85(a) of the Rules as well as the approach adopted so far in this case,³¹ whereby applications for participation were assessed on the basis of their intrinsic coherence and a holistic view of all relevant information suggesting that the acts alleged occurred within the scope of the case, for example having had regard to the place and date of the reported events. Accordingly, the Chamber finds that the three applicants satisfy the eligibility requirements and can retain their status as participating victims for the purposes of the trial proceedings.

²⁸ Pre-Trial Chamber I, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Mohamed Ag Mahmoud, 30 September 2019, ICC-01/12-01/18-461-Conf-Corr, notably paras [REDACTED].

²⁹ Annex 5 to Registry Transmission, ICC-01/12-01/18-834-Conf-Exp-Anx5.

³⁰ LRVs Observations, ICC-01/12-01/18-875-Conf-Red, para. 14; Prosecution Observations, ICC-01/12-01/18-864-Conf-Exp, paras 27-29.

³¹ See e.g. Second PTC I Decision, ICC-01/12-01/18-146-tENG, paras 20-23.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PROVIDES the above guidance;

DECIDES that applicants a/45249/18, a/25006/14, a/35018/16, and a/45574/18 can retain their status as participating victims for the purposes of the trial proceedings;

DEFERS its ruling as regard the status of applicant a/45265/18 for the purposes of the trial proceedings; and

ORDERS the Prosecution to file a confidential redacted version of its observations (ICC-01/12-01/18-864-Conf-Exp).

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 Wednesday, 17 June 2020

At The Hague, The Netherlands