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**No. ICC-01/12-01/18
Date: 23 February 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 Prosecution's fourth, fifth and sixth 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.

I. Procedural history

1. On 6 May 2020, the Chamber issued the ‘Directions on the conduct of proceedings’, notably adopting a procedure for the submission of evidence other than through a witness.¹
2. On 31 January 2022, in line with the time limit set by the Chamber,² the Office of the Prosecutor (the ‘Prosecution’) filed three requests seeking the admission of documentary evidence from the bar table (the ‘Requests’).³ In annexes to its Requests, the Prosecution provides tables 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

¹ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, paras 77-78.

² A deadline was initially set to 17 January 2022 for the Prosecution’s remaining applications on the submission of evidence not through a witness (Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence, 22 September 2021, ICC-01/12-01/18-1756, para. 2), which was subsequently postponed to 31 January 2022 (Email decision of 5 January 2022 at 15:46). The Single Judge further authorised the Prosecution to file these applications after the filing deadline (email dated 31 January 2022 at 11:47).

³ Corrigendum to Prosecution’s fourth request for the admission of documentary evidence from the bar table (ICC-01/12-01/18-2101-Conf), corrigendum filed on 3 February 2022, ICC-01/12-01/18-2101-Conf-Corr (the ‘Fourth Request’); Corrigendum to Prosecution’s fifth request for the admission of documentary evidence from the bar table, corrigendum filed on 3 February 2022, ICC-01/12-01/18-2098-Conf-Corr (the ‘Fifth Request’); and Amendment and Correction to the Prosecution’s sixth request for the admission of documentary evidence from the bar table and Request under Regulation 35 of the Regulations of the Court to include additional items on the Prosecution’s List of Evidence (ICC-01/12-01/18-2102-Conf), amendment and corrections filed on 4 February 2022, ICC-01/12-01/18-2102-Conf-Corr (the ‘Sixth Request’), and Explanatory Note, ICC-01/12-01/18-2102-Conf-Corr-Anx. The Single Judge ordered the Prosecution to put on the record of the case the corrigendum and amendment required with respect to the Sixth Request (email dated 4 January 2022 at 09:41).

probative value.⁴ The Requests respectively seek the submission of 62, 159, and 263 exhibits.⁵

3. On 4 February 2022, by way of an amendment and corrections, the Prosecution made a related request seeking to add to its List of Evidence ('LoE') five translations and two transcripts related to documents and videos already included on its LoE, as well as the cover page of a report already on its LoE.⁶
4. On 18 February 2022, having benefited from an extension of time, the Defence filed its responses to the Requests.⁷ With the prior authorisation of the Single Judge,⁸ the Defence appends to its Responses the tables provided by the Prosecution with an added column including Defence submissions on each item submitted (together, the 'Responses').⁹ As further discussed below, the Defence opposes the submission into evidence of almost all the exhibits identified by the Prosecution.

⁴ Annex A, B and C to the Fourth Request, ICC-01/12-01/18-2101-Conf-AnxA, ICC-01/12-01/18-2101-Conf-AnxB, and ICC-01/12-01/18-2101-Conf-AnxC; Annex A and B to the Fifth Request, ICC-01/12-01/18-2098-Conf-AnxA and ICC-01/12-01/18-2098-Conf-AnxB; and Annex A, B, C and D to the Sixth Request, ICC-01/12-01/18-2102-Conf-AnxA, ICC-01/12-01/18-2102-Conf-AnxB-Corr, ICC-01/12-01/18-2102-Conf-AnxC, and ICC-01/12-01/18-2102-Conf-AnxD (collectively the 'Annexes to the Responses').

⁵ The Chamber notes that the Prosecution seeks the submission of 266 exhibits in its Sixth Request. However, the Chamber notes that three exhibits are duplicated in Annex A and B to the Sixth Request, and therefore refers to the correct number in the text.

⁶ Sixth Request, ICC-01/12-01/18-2102-Conf-Corr, paras 21-25, 28.

⁷ Defence Response to 'Corrigendum to Prosecution's fourth request for the admission of documentary evidence from the bar table (ICC-01/12-01/18-2101-Conf)', ICC-01/12-01/18-2120-Conf (the 'Fourth Response'); Defence Response to 'Corrigendum to Prosecution's fifth request for the admission of documentary evidence from the bar table (ICC-01/12-01/18-2098)', ICC-01/12-01/18-2121-Conf (the 'Fifth Response'); Defence Response to 'Amendment and Correction to the Prosecution's sixth request for the admission of documentary evidence from the bar table and Request under Regulation 35 of the Regulations of the Court to include additional items on the Prosecution's List of Evidence (ICC-01/12-01/18-2102-Conf)', ICC-01/12-01/18-2122-Conf (the 'Sixth Response'). The Single Judge granted the Defence request to file its Responses after 4:00 pm (email dated 18 February 2022 at 09:06).

⁸ Email from the Single Judge to the parties and participants on 16 February 2022 at 9:27.

⁹ Annex A, B and C to the Fourth Response, ICC-01/12-01/18-2120-Conf-AnxA, ICC-01/12-01/18-2120-Conf-AnxB, and ICC-01/12-01/18-2120-Conf-AnxC; Annex A and B to the Fifth Response, ICC-01/12-01/18-2121-Conf-AnxA and ICC-01/12-01/18-2121-Conf-AnxB; Annex A, B, C and D to the Sixth Response, ICC-01/12-01/18-2122-Conf-AnxA, ICC-01/12-01/18-2122-Conf-AnxB, ICC-01/12-01/18-2122-Conf-AnxC, and ICC-01/12-01/18-2122-Conf-AnxD.

II. Inclusion of additional items to the LoE

5. The Chamber recalls that it may extend a time limit pursuant to Regulation 35(2) of the Regulations if ‘good cause’ is shown. Where such an application is made after the expiration of the original deadline, the applicant must demonstrate that acting within the original time limit was not possible for reasons outside of their control. Where the conditions of Regulation 35(2) of the Regulations are not met, this Chamber has nonetheless exceptionally authorised the late addition of evidence to the LoE where it is in the interests of justice to do so and where the evidence is deemed necessary for the determination of the truth, bearing in mind any potential prejudice to the Defence.¹⁰
6. The Chamber notes the Prosecution’s submission that the five transcripts and two translations it seeks to add to its LoE in the Sixth Request were only available after the submission of the LoE, and that the related original items are included on the LoE.¹¹ Regarding item MLI-OTP-0015-0080, the cover page of a report included on the LoE, the Chamber notes the Prosecution’s submission that it is an integral part of the report and should have been uploaded as part of that document, but that it was not correctly uploaded in Ringtail.¹² The Chamber also notes that in the Fifth Request, the Prosecution requests the addition of three translations to its LoE which were left out due to its oversight.¹³
7. The Chamber considers that the items the Prosecution seeks to add are accessories of items already on the LoE which are needed for it to appropriately understand and assess the related original exhibits. In addition, and contrary to the Defence submissions, the Chamber considers that MLI-OTP-0015-0080 is an auxiliary document which forms an integral part of the related report. Thus the Chamber finds that the late addition of these items to the LoE is in the interests of justice and will assist the Chamber in its determination of the truth, and that, given the

¹⁰ Decision on the Prosecution requests pursuant to Regulation 35 regarding P-0660 and P-0661 and to add 12 items to its Final List of Evidence, 5 August 2020, ICC-01/12-01/18-988-Conf, para. 6.

¹¹ Sixth Request, ICC-01/12-01/18-2102-Conf-Corr, paras 21-22, 25, 28, referring to MLI-OTP-0078-6335, MLI-OTP-0078-6341, MLI-OTP-0078-4895, MLI-OTP-0078-4904, MLI-OTP-0078-5584, MLI-OTP-0078-5594, MLI-OTP-0078-7281.

¹² Sixth Request, ICC-01/12-01/18-2102-Conf-Corr, paras 22, 25.

¹³ Fifth Request, ICC-01/12-01/18-2098-Conf-Corr, paras 64-68. These are MLI-OTP-0078-7329, MLI-OTP-0078-7331 and MLI-OTP-0080-1688.

nature and scope of the documents, no undue prejudice arises from the granting of this request.

8. The Chamber therefore authorises the late addition of the aforementioned items to the List of Evidence.

III. Submission of evidence from the bar table

9. The Chamber recalls that, in line with the approach it adopted with respect to the submission of evidence, ‘the Chamber will not issue rulings on admissibility for each item of evidence during the course of proceedings. Rather, the Chamber 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’.¹⁴
10. The Chamber notes that the exhibits submitted by the Prosecution consist of legislative material and referral documents, media articles and press releases, audio/video material, photographs, reports, speeches, correspondence, hospital and phone records, communication emails, handwritten notes and reports of court proceedings and military intelligence, and various other documents.¹⁵
11. The Chamber notes that some of the exhibits submitted by the Prosecution were already recognised as formally submitted by the Chamber in its previous decision on the submission of evidence from the bar table.¹⁶ The Chamber will therefore not consider any such exhibits as part of this assessment.
12. The Chamber notes that, generally, the Defence opposes the submission into evidence of the items tendered from the bar table because ‘these documents

¹⁴ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 29.

¹⁵ Fourth Request, ICC-01/12-01/18-2101-Conf-Corr, para. 9; Fifth Request, ICC-01/12-01/18-2098-Conf-Corr, para. 2; Sixth Request, ICC-01/12-01/18-2102-Conf-Corr, para. 2.

¹⁶ See e.g. MLI-OTP-0014-6070 and MLI-OTP-0020-0127; Decision on Prosecution application submitting 30 exhibits into evidence, 28 January 2022, ICC-01/12-01/18-2097.

cannot be considered sufficiently relevant or probative to be submitted into evidence'.¹⁷ In this regard, the Defence states:

The documents tendered universally provide little to no information on the sources of the specific points of information, so there is no way for the reliability to be interrogated. In the absence of relevance and/or probative value, the documents do not qualify for submission from the bar table. The impossibility of assessment of reliability means that the prejudicial impact eclipses their probative value.¹⁸

13. The Chamber notes further objections from the Defence which are category-specific and indicated in the Annexes to the Responses:
14. **Objection A.** The Defence objects to the submission of certain exhibits from the bar table because 'expert criteria and/or procedure' were not fulfilled and/or the items usurp the role of the Chamber. The Defence submits that the Prosecution seeks to submit items as a substitute for expert opinion evidence after the deadlines have expired and without fulfilling the procedures and criteria to do so.
15. **Objection B.** The Defence objects to the submission of certain exhibits or excerpts because their submission would be prejudicial 'due to non-attribution of the source of the information (e.g. anonymous hearsay)'. In the view of the Defence, the probative value of these documents is either inexistent, severely diminished, or impossible to assess.
16. **Objection C.** The Defence claims that certain exhibits or excerpts submitted are too vague to be relevant and that admission is therefore prejudicial. In this regard, the Defence submits that it is impossible to conclude if the information falls within the scope of the charges.
17. **Objection D.** The Defence objects to the submission of certain items because it argues they would not assist the Chamber in adjudicating facts falling within the temporal and/or geographic scope of the charges.

¹⁷ Fourth Response, ICC-01/12-01/18-2120-Conf, para. 1; Fifth Response, ICC-01/12-01/18-2121-Conf, para. 1; Sixth Response, ICC-01/12-01/18-2122-Conf, para. 1.

¹⁸ Fourth Response, ICC-01/12-01/18-2120-Conf, para. 22; Fifth Response, ICC-01/12-01/18-2121-Conf, para. 24; Sixth Response, ICC-01/12-01/18-2122-Conf, para. 26.

18. **Objection E.** The Defence objects to the submission of certain exhibits or excerpts because they concern un-charged incidents.
19. **Objection F.** The Defence also objects with respect to certain exhibits which, it argues, should have been submitted through a witness.
20. **Objection G.** The Defence objects to the submission of certain exhibits because they are not self-authenticating.
21. **Objection H.** The Defence submits that the reliability of certain exhibits it describes as ‘political declaration[s] or political statement[s]’ is impacted by their political nature and purpose, and that their admission would be prejudicial to the Defence. The Defence does not dispute their authenticity but objects to the items being submitted for the truth of the matter.
22. The Defence also formulates additional document-specific objections which, in the view of the Chamber, do not warrant further discussion for the purpose of the present ruling. The Chamber notes the Defence submissions that some of the exhibits are testimonial in nature and may only be introduced via Rule 68 of the Rules. However, the Chamber considers that none of the items the Prosecution seeks to introduce are prior recorded testimony the submission of which requires that the procedural requirements under Rule 68 of the Rules be satisfied.¹⁹
23. The only exception is the Defence objection to the submission of Item 11 of Annex D to the Sixth Request because of the lack of translation of the original material in Arabic. Consistent with Regulation 39 of the Regulations of the Court, the Chamber considers that this exhibit may only be recognised as formally submitted conditional to the provision of a translation in a working language of the Court.
24. The Chamber considers that all other Defence objections, including category and document-specific objections, relate to the relevance, probative value and

¹⁹ The Chamber specifies that, to the extent it previously rejected the submission of certain items where they were not shown to the relevant witnesses in court or were found not to be necessary to understand prior recorded testimonies introduced, these rulings have no bearing on the present assessment.

potential prejudice of the evidence concerned. The Chamber further observes that, as directed,²⁰ the Prosecution provided specific submissions on the relevance and probative value of each document submitted via its Request. The Chamber sees no reason to exceptionally consider these submissions and objections at this point in time and, having found that there are no procedural bars that preclude the admission of all remaining items, defers their consideration until the judgment. Indeed, in line with its previous approach,²¹ the Chamber is convinced that consideration thereof will be better rendered in light of the entirety of the evidence brought before it.

25. The present decision is the Chamber's last ruling on pending evidentiary motions submitted in the context of the Prosecution's presentation of evidence. The Chamber therefore considers the phase for the presentation of evidence by the Prosecution closed²² and specifies that various deadlines set in the lead up to the start of the Defence case are to be calculated as of today. As previously communicated to the parties and participants,²³ and consistent with the timeline adopted on 22 September 2021,²⁴ the Chamber will hear the Defence's opening statements on Monday, 9 May 2022 and the testimony of its first witness shall start immediately thereafter.

²⁰ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, para. 77.

²¹ Decision on Prosecution application submitting 63 open source exhibits into Evidence, 15 June 2021, ICC-01/12-01/18-1514, para. 18; Decision on Prosecution application submitting 30 exhibits into evidence, 28 January 2022, ICC-01/12-01/18-2097, para. 16.

²² The Chamber notes that a Prosecution's Notice signalling the formal end of its case was notified prematurely on 11 February 2022 (Notice of the end of the Prosecution's presentation of evidence, ICC-01/12-01/18-2110-Conf).

²³ Email from the Chamber, 11 February 2022, at 16:38.

²⁴ Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence, ICC-01/12-01/18-1756.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Requests in their entirety;

AUTHORISES the late inclusion of the items specified in section II of the present decision to the Prosecution's List of Evidence;

RECOGNISES as formally submitted all items listed in ICC-01/12-01/18-2098-Conf-AnxA, ICC-01/12-01/18-2098-Conf-AnxB, ICC-01/12-01/18-2101-Conf-AnxA, ICC-01/12-01/18-2101-Conf-AnxB, ICC-01/12-01/18-2101-Conf-AnxC, ICC-01/12-01/18-2102-Conf-AnxA, ICC-01/12-01/18-2102-Conf-AnxB-Corr, ICC-01/12-01/18-2102-Conf-AnxC, and ICC-01/12-01/18-2102-Conf-AnxD (with the exception of the items the Prosecution does not seek to submit or which were already recognised as formally submitted by the Chamber, and upon condition for one item – MLI-OTP-0007-0430 –, as specified at paragraph 23 above);

ORDERS the Registry to reflect that these items have been so recognised in the eCourt metadata;

INSTRUCTS the parties to file public redacted versions of the Requests and Responses by Thursday, 31 March 2022;

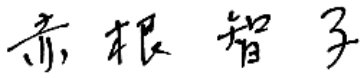
CONSIDERS the phase for the presentation of evidence by the Prosecution closed; and

DECIDES that hearings shall resume on 9 May 2022 at 9:30.

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 Wednesday, 23 February 2022

At The Hague, The Netherlands