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No. **ICC-01/12-01/18**
Date of original: **5 August 2020**
Date: **21 October 2020**

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 redacted version of

**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**

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

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**Unrepresented Applicants for
Participation/Reparations**

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REGISTRY

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**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, issues this ‘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’.

I. Procedural history

1. On 6 January 2020, the Chamber set the date for the commencement of trial at 14 July 2020 and adopted a calendar leading up to this date.¹ Notably, it set 14 April 2020 as the deadline for the Office of the Prosecutor (the ‘Prosecution’) to disclose the material in its possession and provide a list of evidence.² Upon a request from the Prosecution, this deadline was later postponed to 12 May 2020.³
2. On 12 May 2020, the Prosecution filed its final list of evidence (the ‘Final List of Evidence’).⁴
3. On 1 June 2020, in accordance with the deadlines set by the Chamber, the Prosecution filed a number of applications to call witnesses as experts and requests pursuant to Rule 68(3) of the Rules of Procedure and Evidence, in which it included a series of requests pursuant to Regulation 35 of the Regulations of the Court (the ‘Regulations’) to: (1) file an application to call P-0660 and P-0661 as experts [REDACTED] upon receipt of their expert report⁵ (the ‘First Request’); and (2) add 12 items to its Final List of Evidence (the ‘Second Request’).⁶

¹ Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548.

² Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548, paras 8, 10, 16.

³ Decision on the Prosecution request for extension of deadlines relating to the disclosure of evidence and a postponement of the starting date for trial, 20 March 2020, ICC-01/12-01/18-677 .

⁴ Annex B to the Prosecution submission of further information in the Prosecution List of Witnesses and of the Prosecution Final List of Evidence, ICC-01/12-01/18-805-Conf-AnxB (notified on 13 May 2020).

⁵ Prosecution application related to proposed experts, ICC-01/12-01/18-842-Conf (a public redacted version was notified on 7 June 2020, ICC-01/12-01/18-842-Red) (the ‘Experts Request’).

⁶ Prosecution application to introduce Witness MLI-OTP-P-0193’s report and associated material into evidence, and regulation 35 request, ICC-01/12-01/18-840-Conf (a public redacted version was notified on 11 June 2020, ICC-01/12-01/18-840-Red) (the ‘P-0193 Request’); Experts Request, ICC-01/12-01/18-842-Conf; Prosecution application to call Witnesses MLI-OTP-P-0653 and MLI-OTP-P-0655 as experts, to introduce their reports and associated material into evidence, and regulation 35 request,

4. On 23 June 2020, the Defence filed its response to the above-mentioned Requests⁷ (the ‘Defence Response’), in which it, *inter alia*, opposes part of the Second Request.
5. On 8 July 2020, having been granted leave to do so by the Single Judge,⁸ the Prosecution filed a reply to the Defence Response.⁹

II. Analysis

6. The Chamber may extend a time limit pursuant to Regulation 35(2) of the Regulations where ‘good cause’ is shown. Where an application to extend a time limit is made after the expiration of the original deadline - as is the case with the First and Second Requests - 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) are not met, previous chambers of this Court have nevertheless authorised the late addition of evidence to the Prosecution’s list of evidence where it is in the interests of justice to do, so pursuant to the chamber’s powers under Article 64(2) and (6)(f),¹⁰ and where the evidence is deemed necessary for the determination of the truth, pursuant to the chamber’s powers under Articles 64(6)(d) and 69(3) of the Statute.¹¹ A relevant consideration is also whether the late addition would cause

ICC-01/12-01/18-843-Conf (with two confidential annexes; a public redacted version was notified on 11 June 2020, ICC-01/12-01/18-843-Red) (the ‘P-0653 and P-0655 Request’); Prosecution application to admit Witness MLI-OTP-P-0102’s reports and associated material, and regulation 35 request, ICC-01/12-01/18-850-Conf (with one confidential annex; a public redacted version was notified on 10 June 2020, ICC-01/12-01/18-850-Red) (the ‘P-0102 Request’); Prosecution application to call Witnesses MLI-OTP-P-0064, MLI-OTP-P-0635 and MLI-OTP-P-0075 as experts and to introduce their reports and associated material into evidence, and regulation 35 request, ICC-01/12-01/18-851-Conf (with three confidential annexes; a public redacted version was notified on 10 June 2020, ICC-01/12-01/18-851-Red) (the ‘P-0064, P-0635 and P-0075 Request’).

⁷ Defence response to the Prosecution expert witness requests, ICC-01/12-01/18-895-Conf (with two confidential *ex parte* annexes, available only to the Defence, Prosecution and Registry).

⁸ Email from the Single Judge to the parties and participants, 2 July 2020, at 09:55.

⁹ Prosecution reply to Defence response to the Prosecution expert witness requests, ICC-01/12-01/18-895-Conf, ICC-01/12-01/18-937-Conf (dated 7 July 2020 but notified on 8 July 2020) (the ‘Prosecution Reply’).

¹⁰ See Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on the Prosecution Request to add 12 Items to its List of Evidence, ICC-01/05-01/13-1191, 27 August 2015, paras 9-10.

¹¹ See Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Public redacted version of Decision on the Prosecution Motion for leave to disclose and add the investigator’s report concerning Witness P-268 to the List of Incriminating Evidence, 27 September 2010, ICC-01/04-01/07-2325-Red, para.15.

undue prejudice to the right of the Defence under Article 67(l)(b) of the Statute to have adequate time and facilities to prepare its case.¹²

7. The Chamber will assess the First and Second Requests in turn, according to these principles.
8. At the outset, the Chamber notes that for a number of items requested to be added late to the Prosecution's Final List of Evidence, no explanation is given for the failure to include them within the original deadline, or the Prosecution indicates that they were not added within the deadline due to an oversight. The Chamber takes this opportunity to remind the Prosecution of the importance of diligently complying with its disclosure obligations in a timely manner, and the need to sufficiently justify requests pursuant to Regulation 35 of the Regulations. Failing to comply with a deadline due to inadvertence is not a reason outside of the Prosecution's control. The Chamber also emphasises that these late additions are exceptional and should not in any way become the norm during trial.

A. The First Request

9. The Prosecution requests leave to file an application to call P-0660 and P-0661 as experts after [REDACTED], and upon receipt of their expert reports.¹³ It further states that upon [REDACTED], a request under Regulation 35 will be filed for addition to the Final List of Evidence of the respective reports and associated material.¹⁴ The Prosecution also notes that, at this stage, it is not in a position to provide the Chamber with all the requisite and complete information regarding the evidence these witnesses are expected to provide.¹⁵
10. The Defence makes various submissions in relation to P-0660 and P-0661.¹⁶

¹² ICC-01/04-01/07-2325-Red, para.15.

¹³ Experts Request, ICC-01/12-01/18-842-Conf, para. 59; and generally, paras 57-59.

¹⁴ Experts Request, ICC-01/12-01/18-842-Conf, para. 57.

¹⁵ Experts Request, ICC-01/12-01/18-842-Red, para. 59.

¹⁶ Defence Response, ICC-01/12-01/18-895-Conf, paras 33-39. *See also* Prosecution Reply, ICC-01/12-01/18-937-Conf, para. 14.

11. The Chamber notes that P-0660 and P-0661 are scheduled to appear during the [REDACTED] block of witnesses.¹⁷ Noting that the Prosecution it is not yet in a position to provide the Chamber with all the requisite and complete information regarding the evidence these witnesses are expected to provide, the Chamber considers it premature to consider any request under Regulation 35 at this stage, as framed. The Prosecution may return back to the Chamber on this matter at the appropriate time, if necessary.

B. The Second Request

1. CVs and similar material

12. The Prosecution requests to add to its Final List of Evidence five documents concerning the professional qualifications of the following witnesses: (i) the *curriculum vitae* ('CV') of P-0587;¹⁸ (ii) a note regarding the professional background of P-0617;¹⁹ (iii) an updated CV of P-0643;²⁰ and (iv) the CVs of P-0653 and P-0655.²¹
13. In support of the late addition to the Final List of Evidence, the Prosecution submits that: (i) it only recently identified that P-0587's CV and the note regarding P-0617's professional background were not annexed to their expert reports as requested, and the documents were received by the Prosecution on [REDACTED];²² (ii) P-0643's CV was only provided on [REDACTED];²³ and (iii) electronic copies of P-0653's and P-0655's CVs were not in the Prosecution team's possession prior to the lockdown of the Court's headquarters due to COVID-19.²⁴
14. The Defence objects to the requests for the first three items. In relation to the CVs of P-0587 and P-0617, it points to the Prosecution's lack of diligence in

¹⁷ ICC-01/12-01/18-805-Conf-AnxA.

¹⁸ Experts Request, ICC-01/12-01/18-842-Red, para. 26: MLI-OTP-0078-5416-R01.

¹⁹ Experts Request, ICC-01/12-01/18-842-Red, para. 26: MLI-OTP-0078-5463.

²⁰ Experts Request, ICC-01/12-01/18-842-Red, para. 47: MLI-OTP-0078-5569-R01.

²¹ P-0653 and P-0655 Request, ICC-01/12-01/18-843-Red, paras 32-33: MLI-OTP-0078-4915; MLI-OTP-0078-4924.

²² Experts Request, ICC-01/12-01/18-842-Conf, para. 26.

²³ Experts Request, ICC-01/12-01/18-842-Conf, paras 47-48.

²⁴ P-0653 and P-0655 Request, ICC-01/12-01/18-843-Red, paras 7, 32.

requesting and obtaining the documents from these witnesses whom it engaged in [REDACTED], and also submits generally that it would not assist the Chamber to receive this evidence.²⁵ As concerns P-0643, the Defence submits that the updated CV has been written in a vague and imprecise manner, which makes it very difficult to ascertain the specific time periods and positions that have been occupied by P-0643. The Defence argues that the late disclosure of the additional CV and the incomplete nature of the information within both the original and updated CVs prejudice its ability to make an informed assessment of the expert.²⁶ The Defence raises general objections in relation to P-0653 and P-0655, although not in relation to this specific request.²⁷

15. The Chamber notes that the aforementioned documents came into the Prosecution's possession after the original deadline for the Final List of Evidence elapsed, some for reasons outside its control. Although the test in Regulation 35(2) is not satisfied for each of the items, the Chamber considers that the late addition of these items to the Final List of Evidence is in the interests of justice and will assist the Chamber in its determination of the truth, as the items assist in understanding the basis for the expertise of the five witnesses in question. This includes the updated CV of P-0643, which the Chamber notes contains details on time periods and positions occupied, contrary to the Defence contention. The Chamber also considers that the late addition of each of these documents to the Final List of Evidence does not unduly prejudice the Defence's preparation, given the limited nature of the documents.
16. The Chamber therefore grants the requested late addition of these five items to the Prosecution's Final List of Evidence.

2. P-0662's previous testimony in the Lubanga case

17. The Prosecution requests to add to its Final List of Evidence the transcript of the P-0662's testimony in the *Lubanga* case.²⁸ In the Prosecution's submission, the

²⁵ Defence Response, ICC-01/12-01/18-895-Conf, para. 20

²⁶ Defence Response, ICC-01/12-01/18-895-Conf, para. 25.

²⁷ Defence Response, ICC-01/12-01/18-895-Conf, paras 43-46.

²⁸ Experts Request, ICC-01/12-01/18-842-Conf, para. 56: MLI-OTP-0078-5466.

addition of the transcript is in the interests of justice and the determination of the truth as it will assist in understanding P-0662's anticipated testimony in this case. The Prosecution also states that the document was otherwise available in the Court's records system and website and the Defence will receive the testimony sufficiently in advance before P-0662 is due to testify.²⁹

18. The Defence opposes this request on the basis that the Prosecution has: (i) failed to demonstrate good cause as concerns the lateness of submitting this transcript, which concerns the qualifications of P-0662, and therefore, should have been disclosed to the Defence under Rule 77 of the Rules as soon as the Prosecution decided to call P-0662 as a witness in this case; and (ii) not explained the purpose and legal basis for including the transcripts of her testimony in the *Lubanga* case, which focused on trauma pertaining to child soldiers in the Democratic Republic of the Congo, on its list of incriminating evidence in this case. It submits that, since the transcripts constitute testimonial evidence, the Prosecution cannot submit them into evidence unless the Prosecution applies to do so through Rule 68. Given that the Prosecution intends to call P-0662 to testify as a *vive voce* witness, the Defence notes that there does not appear to be any utility in doing so.³⁰
19. The Chamber notes that the Prosecution has failed to explain why it did not include this lengthy transcript in its Final List of Evidence within the original deadline. Noting that the Prosecution has failed also to explain the purpose and legal basis for including this material, as submitted by the Defence, the Chamber is not convinced that it is in the interests of justice or determination of the truth to grant this request. The Chamber therefore rejects this request.

3. *Single photograph analysed in the report of P-0193*

20. The Prosecution requests to add to its Final List of Evidence one of the photographs analysed by P-0193 in his report.³¹ The Prosecution submits that the document is part of P-0193's report and its disclosure is necessary in order

²⁹ Experts Request, ICC-01/12-01/18-842-Red, para. 56.

³⁰ Defence Response, ICC-01/12-01/18-895-Conf, para. 32.

³¹ P-0193 Request, ICC-01/12-01/18-840-Red, para. 29; MLI-OTP-0018-2281.

to have a full overview of the geolocation analysis he conducted for the Prosecution.³² It also submits that there is no undue prejudice to the Defence, which has already received a series of videos showing the exact same event depicted on the picture.³³

21. The Defence makes no submission in relation to this specific request, although it contests that P-0193's is an 'expert' report and submits that it does not appear necessary for P-0193 to testify.³⁴
22. Although the Prosecution has failed to explain why this photograph was not included on the Final List of Evidence within the original deadline, the Chamber considers that it is in the interests of justice and determination of the truth to grant its late addition, noting that it is necessary to understand P-0193's report; that no undue prejudice arises to the Defence given that the content of the picture has already been disclosed to it in a different format; and that the Defence does not object to this specific request. The Chamber therefore grants the requested late addition of this item to the Prosecution's Final List of Evidence.

4. Two items referred to by P-0102

23. The Prosecution requests to add two items to its Final List of Evidence referred to by P-0102, which it says were not disclosed previously due to an oversight.³⁵ The first item is a CD-ROM containing a video that has been already disclosed to the Defence and upon which P-0102 based his analysis for his ballistics expert report.³⁶ The second item is a video; similar footage, [REDACTED] was already disclosed to the Defence.³⁷

³² P-0193 Request, ICC-01/12-01/18-840-Red, paras 30, 32.

³³ P-0193 Request, ICC-01/12-01/18-840-Red, paras 30, 32.

³⁴ Defence Response, ICC-01/12-01/18-895-Conf, para. 64.

³⁵ P-0102 Request, ICC-01/12-01/18-850-Red, paras 5, 30-32.

³⁶ P-0102 Request, ICC-01/12-01/18-850-Red, para. 30: MLI-OTP-0009-1749.

³⁷ P-0102 Request, ICC-01/12-01/18-850-Conf, para. 30: MLI-OTP-0018-0683.

24. The Defence makes no submission in relation to this specific request, although it submits P-0102's evidence is either irrelevant to the issues in this case or should be characterised as fact, rather than expert evidence.³⁸
25. Although the test in Regulation 35(2) is not satisfied for these items,³⁹ the Chamber considers that it is in the interests of justice and determination of the truth to grant their late addition, noting that they are necessary to comprehensively understand P-0102's report; that no undue prejudice arises to the Defence since the first item has already been disclosed and the second item forms part of a series of videos, the others of which have been disclosed to the Defence; and that the Defence does not object to this specific request. The Chamber therefore grants the requested late addition of these two items to the Prosecution's Final List of Evidence.

5. Hard disks and forensic copies

26. The Prosecution requests to add three items to its Final List of Evidence analysed or used by P-0075 in preparing associated forensic reports, which it says were not disclosed previously due to oversight.⁴⁰ More specifically, these items are: (i) [REDACTED] obtained from [REDACTED];⁴¹ (ii) the forensic copy [REDACTED] obtained from [REDACTED];⁴² and (iii) the physical item containing the forensic copies of [REDACTED], as well as the forensic copy of [REDACTED].⁴³ The Prosecution notes that the items in question are only containers of documents, of mainly video and photographs which were disclosed to the Defence; that for each item, either its original repository or its forensic copy, have already been disclosed to the Defence; and that equally, the relevant documents that they contain have also been disclosed to the Defence.⁴⁴

³⁸ Defence Response, ICC-01/12-01/18-895-Conf, paras 65-67.

³⁹ As noted above, failing to comply with a deadline due to inadvertence is not a reason outside of the Prosecution's control.

⁴⁰ P-0064, P-0635 and P-0075 Request, ICC-01/12-01/18-851-Red, paras 6, 51.

⁴¹ MLI-OTP-0016-0496.

⁴² MLI-OTP-0015-0467.

⁴³ MLI-OTP-0058-0439.

⁴⁴ P-0064, P-0635 and P-0075 Request, ICC-01/12-01/18-851-Conf, paras 51-52.

27. The Defence appears to make no submission in relation to this specific request, but has general objections to the characterisation of P-0075 as an expert, and strongly opposes the Prosecution's attempt to admit 'digital evidence' through P-0075.⁴⁵
28. Although the test in Regulation 35(2) is not satisfied for these items,⁴⁶ the Chamber considers that it is in the interests of justice and determination of the truth to grant their late addition. The Chamber considers that there is no undue prejudice to the Defence because it has already received this material in a different format as well as the relevant material contained therein. The Chamber therefore grants the requested late addition of these three items to the Prosecution's Final List of Evidence. However, this is without prejudice of the Chamber's determination on the Prosecution's request to call P-0075 as an expert witness or to introduce these items of evidence through P-0075.

⁴⁵ Defence Response, ICC-01/12-01/18-895-Conf, paras 53-59.

⁴⁶ As noted above, failing to comply with a deadline due to inadvertence is not a reason outside of the Prosecution's control.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

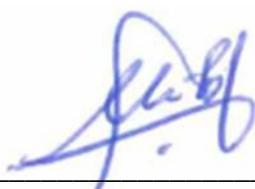
REJECTS the First Request as being premature;

PARTIALLY GRANTS the Second Request and authorises the addition of the 11 items referred to in paragraphs 12, 20, 23 and 26 to the Prosecution's Final List of Evidence;

REJECTS the remainder of the Second Request; and

ORDERS the Prosecution to file an updated Final List of Evidence, reflecting this 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 5 August 2020

At The Hague, The Netherlands