

**Cour
Pénale
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**International
Criminal
Court**

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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 MOHAMOUD***

**Public
With confidential Annex**

**Prosecution's second request for the admission of
documentary evidence from the bar table**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Office of the Prosecutor (“Prosecution” or “OTP”) seeks the submission into evidence of 63 items of evidence from the bar table, in accordance with articles 64(9)(a), 69(3) and 69(4) of the Rome Statute (“Statute”), rule 63(2) of the Rules of Procedure and Evidence (“Rules”) and the Directions on the conduct of proceedings (“Directions”).¹ These documents are relevant to issues at trial and they are probative, bearing sufficient indicia of reliability to be submitted into evidence. Their submission would assist Trial Chamber X (“Chamber”)’s determination of the truth and contribute to an expeditious trial.
2. These 63 items (listed in the attached table “Annex”) are all official documents of the United Nations (“UN”) and other international organisations which the Prosecution collected from open sources.
3. In accordance with paragraphs 77 and 78 of the Directions, the Annex contains the following information concerning each of these items: (i) its evidence registration number (“ERN”); (ii) its main date; (iii) a short description of the content of each item; (iv) where the item is lengthy, an index of the most relevant portions; (v) a description of the item’s relevance; (vi) its *prima facie* probative value, including authenticity; and (vii) comments/objections made by the Defence regarding its submission into evidence from the bar table.²
4. In general, the Defence’s arguments go to the relevance and probative value of the evidence concerned, which will be decided at the end of the trial when the Chamber considers the totality of evidence. None of the Defence’s objections preclude the submission of the evidence at this stage.

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

² Email from the Defence to the Prosecution of 9 March 2021 at 19:20. The Defence’s explanations as to different categories of objections, which the Defence included in the draft bar table attached to this email, are included in the last page of the Annex.

Confidentiality

5. The Annex is classified as confidential as it contains information from *inter parte* communications.

Applicable Law

6. As noted by trial chambers in other cases, the admission of documentary evidence through a “bar table” motion is a practice established in the jurisprudence of the Court.³ Article 64(9)(a) of the Statute gives the Chamber the power to rule on the “admissibility or relevance of evidence” and rule 63(2) of the Rules provides that the Chamber shall have the authority to “assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69”. Further, according to article 69(4) of the Statute, a Chamber may rule on “the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness”.
7. In its Directions on the conduct of proceedings the Chamber has already indicated that a party or participant wishing to tender evidence without it being introduced through a witness shall file an application accompanied by a table containing *inter alia* (i) a short description of the content of each item; (ii) in case of a lengthy document, an index of the most relevant portions of the document or recording; and (iii) a description of its relevance, and *prima facie* probative value.⁴ It has further instructed the tendering participant to first inquire whether the opposing participant consents or objects to the tendering of items, and, if applicable, the grounds for any such objection, and to include them in the accompanying table.⁵
8. According to the case law, the admissibility of evidence “other than direct oral testimony”⁶ requires consideration of three key factors: the relevance of the

³ See e.g., ICC-01/04-02/06-1181, para. 6; ICC-01/09-01/11-1353, para. 13.

⁴ ICC-01/12-01/18-789-AnxA, para.77.

⁵ ICC-01/12-01/18-789-AnxA, para.78.

⁶ ICC-01/04-01/06-1399-Corr, para. 26.

evidence to the issues at trial, its probative value and the prejudicial effect (if any) of its introduction as weighed against the probative value of the evidence.⁷ The assessment of both relevance and probative value is conducted on a *prima facie* basis.⁸

Submissions

9. The Prosecution seeks the submission into evidence of 63 documents published by UN bodies and specialised agencies, such as the UN Security Council, the Office of the UN High Commissioner for Human Rights (“OHCHR”) and the UN Educational, Scientific and Cultural Organization (“UNESCO”), as well as several other international organisations. These documents include reports, press releases, resolutions and photographs published on these organisations’ websites.

(i) The material is prima facie relevant to issues at trial and/or to an eventual sentence

10. The documents listed in the Annex are relevant to the issues at trial, such as the existence of a non-international armed conflict (including the nature of Ansar Dine/AQIM as organised armed groups), the common purpose of Ansar Dine/AQIM, or the protected character of the buildings subject to an attack.

11. In addition, or alternatively, they are relevant to factors that may be considered in sentencing,⁹ such as the gravity of the crimes and the extent of the damage caused, in particular the harm caused to the victims and their families.¹⁰ The Prosecution offers specific submissions on the relevance of each document in the Annex.

12. The Defence objects in respect of 19 items, such as MINUSMA photographs of destroyed mausoleums and UNESCO press releases relating to their

⁷ See e.g., ICC-01/04-01/06-1399-Corr, para. 27-32; ICC-01/05-01/08-2012-Red, para. 13-16; ICC-01/09-01/11-1353, para. 15; ICC-01/04-02/06-1181, para. 7.

⁸ ICC-01/04-01/06-1399-Corr, para.27-28; ICC-01/05-01/08-2012-Red, para. 13.

⁹ Article 76(1) of the Statute requires the Chamber to take into account “the evidence and submissions presented and submissions made during the trial that are relevant to the sentence” when considering the appropriate sentence to be imposed in the event of a conviction.

¹⁰ Rule 145(1)(c) of the Rules.

reconstruction,¹¹ on the basis that they do not “assist the Chamber in adjudicating facts falling within the temporal and geographic scope of the case”.¹² However, items which are not contemporaneous to the events can be relevant, for example, to the extent of the damage caused.¹³ When read in their proper context, items or portions thereof referring to other locations are relevant to the patterns of crimes observed in the north of Mali, including Timbuktu, during its occupation by the armed groups.¹⁴

13. The Defence also claims in respect of 28 items that the item or portion relied upon is too vague.¹⁵ However, evidence of general patterns of crimes is relevant to the contextual elements of the crimes charged, as well as to elements of the modes of liability, including the Accused’s intent and knowledge and the groups’ common purpose. This also applies in relation to items which do not specifically relate to charged incidents.¹⁶ When assessed in isolation or in relation to other items of evidence in the case,¹⁷ each item included in the Annex is relevant to one or more issues at trial.

(ii) The material has prima facie probative value

14. The items proposed for submission in the Annex are probative of issues at trial. These documents all contain sufficient indicia of reliability, including authenticity, to be submitted into evidence. The Prosecution offers specific submissions on the probative value of each document in the Annex.

¹¹ Objection D in respect of items no. 5, 24, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 46, 47, 50, 52, 54, 57, 58.

¹² See Annex, p. 51.

¹³ See, e.g. MLI-OTP-0028-0833 (item 58), UNESCO press release of 30 June 2015 referring to the reconstruction of the mausoleums of Timbuktu which had been destroyed in 2012.

¹⁴ See, e.g. MLI-OTP-0013-3500 (item no. 27), p. 3512-3513, para. 44; MLI-OTP-0033-2301 (item no. 29), p. 2312, para. 45 and Objection D raised by the Defence in relation thereto. With respect to MLI-OTP-0014-5183 (item no. 5), the Defence objection regarding para. 59 is inapposite as it is not part of the most relevant portions identified by the Prosecution and specified in the table.

¹⁵ Objection C in respect of items no. 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 26, 27, 28, 29, 48, 49, 59, 62.

¹⁶ Objection E in respect of item no. 29.

¹⁷ See e.g. ICC-01/05-01/08-2012-Red, para. 14.

15. All items are self-authenticating as they are official documents publicly available from official sources. The documents were all prepared in the ordinary course of the activities of the relevant organisation. In addition, the documents contain other indicia of reliability, including – variously – logo and letterhead. Some of the items contain features such as dates of publication (where available), authors, and methodology or context of preparation. Many were prepared and published contemporaneously with or close in time to the period relevant to the charges. These factors provide sufficient basis for the Chamber to conduct an independent evaluation of the *prima facie* reliability of each item.
16. Contrary to the Defence’s challenge in respect of the 7 photographs of a destroyed mausoleum,¹⁸ there is no need for the photographer to authenticate these photographs downloaded from MINUSMA’s site. They contain sufficient indicia of authenticity, such as the name of the photographer and the date on which they were taken.
17. The Defence objects to the submission of 20 items on the basis that each amounts to a political declaration or political statement.¹⁹ The 20 items concerned are documents from the UN Security Council or press releases from the UN Secretary General or UNESCO Director-General in relation to the situation in Mali, in particular the attacks against its cultural heritage. Many of these documents were issued contemporaneously to the events as they were reported. The Defence fails to substantiate its claim that they are in any way motivated by political considerations, or that their reliability is impacted by their alleged political nature and purpose.

(iii) There is no prejudice outweighing the probative value

18. The probative value of the items outweighs any potential prejudice arising from their submission into evidence from the bar table for the following reasons:

¹⁸ Objection G in respect of items no. 31-37.

¹⁹ Objection H in respect of items no. 3, 9, 10, 11, 13, 14, 15, 39, 41, 42, 43, 45, 47, 48, 49, 50, 51, 52, 53, 54.

- as outlined in the Annex, each proposed item is relevant to one or more discrete issues at trial;
- each of the proposed items possesses sufficient indicia of reliability to warrant its submission and to enable the Chamber to fairly evaluate it;
- the Accused had sufficient notice of both the content of the items and the Prosecution's intention to rely on them as incriminatory evidence because a large majority have been disclosed and included in the confidential List of Evidence ("LoE") filed before the confirmation of charges' hearing in July 2019²⁰ and all have been included in the final LoE filed in May 2020²¹; and
- the proposed items largely corroborate the witnesses' testimonies and other evidence being presented in the course of the trial.

19. In respect of 27 items, such as reports of the UN Secretary General and the UN OHCHR, the Defence objects to their submission on the basis, *inter alia*, that it would be prejudicial due to "non-attribution of the source of the information (e.g. anonymous hearsay)".²² However, as confirmed by the Appeals Chamber in the *Bemba et al.* case, there is no bar to the introduction or reliance on hearsay evidence in the legal framework of the Court.²³ The Appeals Chamber in *Ngudjolo* also acknowledged that the fact that evidence is hearsay does not necessarily deprive it of probative value, and that the weight or probative value afforded to it will depend upon "the infinitely variable circumstances which surround hearsay evidence".²⁴ Information based on anonymous sources may also be considered as corroboratory evidence.²⁵

²⁰ ICC-01/12-01/18-335-Conf-AnxI, filed on 8 May 2019.

²¹ ICC-01/12-01/18-805-Conf-AnxB filed on 13 May 2020. MLI-OTP-0073-0008 (no. 8 in the Annex), MLI-OTP-0069-4120 (no. 21), MLI-OTP-0073-0031 (no. 22), MLI-OTP-0073-0070 (no. 23), were disclosed between January-March 2020.

²² Objection B raised in relation to items no. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 20, 21, 23, 25, 26, 27, 28, 29, 42, 43, 48, 51, 59, 62.

²³ ICC-01/05-01/13-2275-Red, para. 874.

²⁴ ICC-01/04-02/12-271-Corr, para. 226.

²⁵ See ICC-01/04-02/06-2359, fn. 1751.

20. With respect to the brief by the UN Special Rapporteur in the field of cultural rights, submitted in the context of the reparation proceedings in the *Al Mahdi* case, the Defence argues that the criteria and procedure for submitting expert evidence are not fulfilled.²⁶ However, the relevant portions that the Prosecution seeks to submit, for the most part, simply outline relevant international standards relating to cultural heritage and describe the scope of the harm suffered as a result of the destruction of the mausoleums in Timbuktu.²⁷ These extracts cannot be considered as testimonial in nature or “prior recorded testimony” within the meaning of rule 68 of the Rules.
21. In respect of six items from UNESCO, the Defence suggests that the Prosecution should have introduced these items through witnesses who have testified, such as P-0151 and/or P-0431 and contends that the Prosecution has not explained why it did not raise the item with these witnesses.²⁸ However, there is no requirement in the Directions on the conduct of proceedings adopted by this Chamber that a party provide the reason for not tendering the item through a witness.²⁹ Nor is there requirement that any documentary evidence should, where possible, be admitted through a witness.³⁰ This remains *inter alia* a question of expeditiousness of the proceedings, judicial economy and weight. Further, as held by TC IX in *Ongwen*, the submission of evidence via the “bar table” as opposed to through rule 68(2)(b) or 68(3) of the Rules or in-court testimony does not in any way preclude the Defence from challenging the evidence, including by calling witnesses as appropriate and/or submitting any evidence in support of its challenge.³¹ TC IX

²⁶ Objection A raised in relation to item no. 25.

²⁷ MLI-OTP-0067-1395, p. 1397-1430.

²⁸ See Defence comments in relation to items no. 38, 39, 40, 41, 55 and 56.

²⁹ For example, TCVI in *Ntaganda*, which admitted the system of admission, rather than submission, of evidence, specifically required a party wishing to tender evidence without it being introduced through a witness to indicate the reason for not tendering the item through a witness. See e.g. ICC-01/04-02/06-619, para. 53; ICC-01/04-02/06-1838, para. 13.

³⁰ See contra, ICC-01/04-02/06-1838, para. 13.

³¹ ICC-02/04-01/15-795, para. 15.

even noted that there is nothing prejudicial about submitting evidence that goes to critical elements of the charges through procedure other than a witness.³²

22. In any event, in this instance, due to the limited time allocated for their examinations in chief, it was not possible for the Prosecution to introduce the contested items through P-0151 or P-0431. P-0151 testified on the basis of rule 68(3) of the Rules, with 30-45 minutes allocated for the Prosecution's questioning, so the Prosecution focused on submitting through him items associated with his prior recorded testimony.³³ For P-0431, the Prosecution's application to introduce his prior recorded testimony under rule 68(3) was rejected, and two hours were allocated for his examination in chief.³⁴ The Prosecution focused on submitting through him items which P-0431 produced and/or of which he had personal knowledge. No other witness has testified through whom the Prosecution could have potentially introduced these items from UNESCO.
23. In addition, the contested items corroborate other evidence, including evidence submitted through P-0151 and P-0431 whom the Defence had an opportunity to cross-examine. Contrary to the Defence's claim,³⁵ allowing the submission of these items through a bar table motion will not cause undue prejudice to the Defence. Rather, again, it will contribute to the expeditious conduct of the proceedings.
24. Finally, the Defence opposes the submission of the UN Security Council Sanctions Committee's list of individuals, groups, undertakings and other entities associated with Al-Qaeda, *inter alia*, "given the role of Judge Prost as ombudsperson" for this committee between 2010 to 2015 and the lack of clarity as to "what information she was privy to in relation to AQMI during her term".³⁶ However, Judge Prost has made it clear that none of the 60 cases she handled during her five-year term were

³² ICC-02/04-01/15-795, para. 49.

³³ ICC-01/12-01/18-989-Red, para. 82.

³⁴ ICC-01/12-01/18-1267-Red, para. 9.

³⁵ See Defence comments in relation to items no. 38, 39, 40, 41, 55 and 56, arguing that: "Admitting this item through a bar table motion will cause more prejudice than if it were contextualised by a witness and subject to potential cross-examination."

³⁶ MLI-OTP-0001-2001 (item no. 12) and the Defence comments thereto.

“related in any way to any situation in Mali”.³⁷ Further, there is no reason to believe that she had any role in the listing of AQIM and its members such as Mokhtar Belmokhtar and Abou Zeid , which took place before the start of her term in 2010.³⁸ No prejudice would be caused by the submission of this item into evidence.

Conclusion

25. For the foregoing reasons, the Prosecution requests that all items listed in the Annex be submitted into evidence.



Fatou Bensouda, Prosecutor

Dated this 13 April 2021

At The Hague, the Netherlands

³⁷ ICC-01/12-01/18-T-008-ENG, p. 5, l. 16-17.

³⁸ AQIM was listed in 2001, Mokhtar Belmokhtar in 2003 and Abou Zeid in 2008 .