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**No. ICC-01/12-01/18
Date: 8 December 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 final Defence request 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) of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on final Defence request 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 the deadline for the Defence to file any request for the submission of evidence other than through its remaining witnesses.² In the same decision, the Chamber decided that ‘within one week after the completion of the testimony of the last Defence witness, this request may be complemented in light of the evidence presented/(not) submitted after [the passing of the deadline for bar table motions]’.³
3. On 10 November 2022, the Chamber issued its decision on the twelve Defence bar table motions filed within the deadline for bar table motions (the ‘Defence Bar Table Decision’).⁴ The Chamber also varied the deadline for supplementary bar table motions and instructed the Defence to file any such motion by 27 November 2022.⁵
4. On 17 November 2022, the Defence filed the ‘Final Defence request for the admission of evidence from the bar table’, requesting the submission into

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

² ICC-01/12-01/18-2308, para. 5.

³ Sixth Directions, ICC-01/12-01/18-2308, para. 5.

⁴ Decision on the Defence requests for the admission of evidence from the bar table, ICC-01/12-01/18-2407.

⁵ Defence Bar Table Decision, ICC-01/12-01/18-2407, para. 22.

evidence of 55 items (the ‘Request’).⁶ In the two annexes to its Request, the Defence 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 probative value.

5. On 24 November 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Request (the ‘Response’).⁷ The Prosecution opposes the late addition of MLI-D28-0006-9117 to the Defence’s list of evidence (the ‘LoE’) on the basis that the Defence fails to meet the criteria under Regulation 35 of the Regulations. With respect to the 51 items in annex B to the Request, the Prosecution challenges their relevance and probative value and submits in particular that the evidence demonstrates a bias on the part of D-0147, to whom these 51 items relate to.
6. On 28 November 2022, the Defence submitted a request seeking leave to reply to three issues from the Response (the ‘Leave to Reply Request’).⁸ In response, the Prosecution noted that the draft annex to the Request was provided to the Prosecution immediately before the filing deadline, thus depriving the Prosecution of the time necessary to respond, and that none of the issues raised could not have been anticipated.⁹

II. Analysis

7. As a preliminary matter, the Chamber is compelled to address the timeliness of the Request. Having granted an extension, the deadline for the Defence to file bar table motions fell on 2 November 2022. The scope of any supplementary bar table motions that could be filed after the passing of the deadline was limited to those items that are necessary ‘in light of the evidence presented/(not) submitted’ after the passing of the deadline for bar table motions.¹⁰

⁶ Final Defence request for the admission of evidence from the bar table, ICC-01/12-01/18-2411-Conf (with two confidential annexes).

⁷ Email at 13:44.

⁸ Email at 09:25.

⁹ Email dated 28 November 2022 at 10:01.

¹⁰ Sixth Directions, ICC-01/12-01/18-2308, para. 5.

8. The Chamber observes that the majority of items subject to the Request, including all items contained in annex B to the Request, could and should have been submitted by the deadline, i.e. 2 November 2022. Further, the Request fails to demonstrate the existence of any good cause justifying its tardiness.
9. This notwithstanding, the Chamber notes that the items in annex B relate to D-0147 who, until October 2022, was expected to testify before the Chamber *viva voce*. For reasons mentioned below,¹¹ the Chamber considers that it is in the interests of justice to allow the late request for the submission of evidence from the bar table. Accordingly, while the Chamber in no way condones the practice of disregarding time limits, it decides to exceptionally entertain the Request in full.
10. The Chamber considers that the present matter can be properly adjudicated without further submissions from the Defence and accordingly rejects the Leave to Reply Request.

A. Request for the late addition of items to the LoE

11. The Chamber incorporates by reference the applicable law for the late addition of items to the LoE.¹²
12. MLI-D28-0006-9109 and MLI-D28-0006-9122 are items concerning events in November 2022. As such, the Chamber is satisfied that the Defence was unable to comply with the time limit for reasons outside its control and accordingly authorises their addition to the LoE.
13. The Defence also requests the late addition of MLI-D28-0006-9117, which it submits is highly relevant to the Defence case regarding torture against Mr Al Hassan, as well as 51 other items listed in annex B to the Request, which it submits are relevant to the sanitary situation in Timbuktu.¹³

¹¹ See paragraph 14 below.

¹² Defence Bar Table Decision, ICC-01/12-01/18-2407, para. 6.

¹³ Request, ICC-01/12-01/18-2411-Conf, paras 12-13.

14. The Chamber notes that the 51 items in annex B to the Request are items disclosed by the Prosecution and were included in the Prosecution's list of evidence. Similar documents authored by the same individual were also submitted via the Prosecution bar table motions. Furthermore, MLI-D28-0006-9117 is an open-source document which is brief and limited in nature. Accordingly, 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 to the Request and in the Response 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.

B. Submission of evidence from the bar table

15. 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.'¹⁴ Consistent with this approach, the Chamber is of the view that the Prosecution's submissions on the relevance and probative value of the items do not warrant further discussion for the purpose of the present ruling.¹⁵
16. Having satisfied itself that there are no procedural bars to the submission of the items, including that none of the items subject to the Request are testimonial in nature, the Chamber grants the Request and recognises the formal submission of all items listed in annexes A and B to the Request.

¹⁴ Defence Bar Table Decision, ICC-01/12-01/18-2407, para. 10; 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, para. 9; Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, paras 29-32, 77-78.

¹⁵ See Defence Bar Table Decision, ICC-01/12-01/18-2407, paras 19-20.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

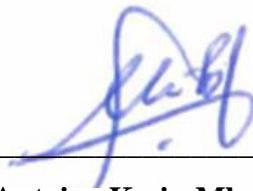
REJECTS the Leave to Reply Request;

GRANTS the Request;

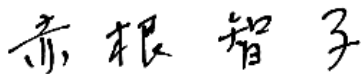
AUTHORISES the late inclusion of the items specified in paragraphs 12 and 13 of the present decision to the Defence's List of Evidence; and

RECOGNISES as formally submitted all items listed in annexes A and B to the Request.

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, 8 December 2022

At The Hague, The Netherlands