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No. ICC-01/12-01/18

Date: 15 June 2021

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 Prosecution application submitting 63 open source exhibits into
evidence**

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

The Office of the Prosecutor

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Counsel for the Defence

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Legal Representatives of Victims

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**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*, pursuant to Articles 64, 69 and 74(2) of the Rome Statute (the ‘Statute’) and Rules 63, 64 and 68 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following decision.

I. Procedural background

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 13 April 2021, the Office of the Prosecutor (the ‘Prosecution’) filed the ‘Prosecution’s second request for the admission of documentary evidence from the bar table’ (the ‘Request’).² In an annex to its Request, the Prosecution provides a table which lists the 63 items submitted and includes relevant information, notably a description of their content, an index of the most relevant portions (where appropriate), a description of each items’ purported relevance and probative value, as well as preliminary comments and objections made by the Defence.³
3. On 26 April 2021, the Defence filed its response to the Request.⁴ With the prior authorisation of the Single Judge,⁵ the Defence appends to its Response the table provided by the Prosecution with an added a column including Defence submissions on each item submitted (together, the ‘Response’).⁶ As further discussed below, the Defence opposes the submission into evidence of all but three of the exhibits identified by the Prosecution.⁷

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

² ICC-01/12-01/18-1412.

³ List of documents proposed for admission from the bar table, ICC-01/12-01/18-1412-Conf-Anx.

⁴ Defence Response to Prosecution’s Second Request for the Admission of Documentary Evidence from the Bar Table, ICC-01/12-01/18-1446.

⁵ Email from the Single Judge to the parties and participants on 26 April 2021 at 11.07.

⁶ Defence comments on List of documents proposed for admission from the bar table, ICC-01/12-01/18-1446-Conf-Anx.

⁷ With reference to Items 60, 61 and 63, the Defence indicates that it does not oppose the Chamber’s reliance on treaties or information concerning the date of ratification (Response, ICC-01/12-01/18-1446-Conf-Anx and ICC-01/12-01/18-1446, para. 19).

II. Analysis and determination

4. 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.’⁸
5. The Chamber notes that the Prosecution seeks to tender what it submits are official documents of United Nations bodies and specialised agencies, as well as other international organisations. These documents consist of reports, press releases, resolutions and photographs collected from open sources.⁹
6. The Chamber notes that, generally, the Defence opposes the submission into evidence of the items tendered from the bar table because ‘these documents cannot be considered sufficiently relevant or probative to be submitted into evidence’.¹⁰ 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.¹¹

7. The Chamber notes further objections from the Defence which are category-specific:
8. **Objection A.** The Defence objects to the submission of one exhibit from the bar table because ‘expert criteria and procedure’ were not fulfilled.¹² The Defence submits that the Prosecution did not apply to have the author of the relevant report

⁸ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 29.

⁹ Request, ICC-01/12-01/18-1412, para. 9 (‘published on these organisations’ websites).

¹⁰ Response, ICC-01/12-01/18-1446, para. 1.

¹¹ Response, ICC-01/12-01/18-1446, para. 21

¹² A Category A objection is formulated in respect of item 25 (ICC-01/12-01/18-1446-Conf-Anx).

appointed as an expert in the case and observes that the Chamber has previously treated such documents as testimonial in nature.

9. **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)’.¹³ In the view of the Defence, the probative value of these documents is either inexistent, severely diminished, or impossible to assess.
10. **Objection C.** The Defence also claims that certain exhibits or excerpts submitted are too vague to be relevant and that admission is therefore prejudicial.¹⁴ In this regard, and often pointing to the absence of specific time and location or identified alleged perpetrators or victims, the Defence submits that it is impossible to conclude if the information falls within the scope of the charges.
11. **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.¹⁵ The Chamber notes that some of these exhibits concern the period immediately after the charges and discuss the consequences of the crimes, for example the reconstruction of sites allegedly destroyed.
12. **Objection E.** The Defence objects to the submission of certain excerpts of an exhibit because they concern un-charged incidents.¹⁶

¹³ Category B objections are formulated in respect of Items 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 (ICC-01/12-01/18-1446-Conf-Anx). *See also*, Response, ICC-01/12-01/18-1446, paras 7, 12, 18, 20.

¹⁴ Category C objections are formulated in respect of Items 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 (ICC-01/12-01/18-1446-Conf-Anx). For some of these documents, and given the lack of detail, the Defence also argues that it cannot meaningfully respond to the identified relevance and submits that this in itself is prejudicial. The Chamber does not agree with these submissions.

¹⁵ Category D objections are formulated in respect of Items 5, 24, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 46, 47, 50, 52, 54, 57 and 58. The Chamber also notes related document-specific objections formulated in respect of Items 4 and 19 (ICC-01/12-01/18-1446-Conf-Anx).

¹⁶ A Category E objection is formulated in respect of Item 29 (ICC-01/12-01/18-1446-Conf-Anx). *See also*, the Prosecution’s submissions in response (Request, ICC-01/12-01/18-1412, para. 13).

13. **Objection F.** The Defence also objects to the Request with respect to certain exhibits which, it argues, should have been submitted through a witness.¹⁷ In this regard, the Defence submits that the Prosecution has not explained why it did not use these items with certain witnesses and avers that admitting these items through a bar table motion will cause more prejudice than if they were contextualised by a witness and subject to potential cross-examination.
14. **Objection G.** The Defence submits that the Prosecution has adduced no evidence or information that would allow the Chamber to independently verify the originality, integrity and location of photographs submitted and relatedly argues that statements from the photographer would be required to authenticate these exhibits.¹⁸
15. **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.¹⁹ For the Defence, these exhibits – mostly press releases and documents from the UN Security Council – contain ‘assertions’ or ‘opinion evidence’ which should not be tendered via the bar table, as doing so would be prejudicial.
16. **Other objections.** The Defence also suggests that some exhibits are duplicative of evidence already on the record. In its view, these items do not meaningfully contribute to the Chamber’s assessment of whether facts in issue are more or less probable and therefore fail to satisfy the relevance criterion for admission from the bar table.²⁰ The Defence also provides additional document-specific

¹⁷ Category F objections are formulated as document-specific objections in respect of Items 38, 39, 40, 41, 55 and 56 (ICC-01/12-01/18-1446-Conf-Anx). *See also* Response, ICC-01/12-01/18-1446, paras 9, 17.

¹⁸ Response, ICC-01/12-01/18-1446, para. 15. Category G objections are formulated in respect of Items 31, 32, 33, 34, 35, 36 and 37 (ICC-01/12-01/18-1446-Conf-Anx).

¹⁹ Category H objections are formulated in respect of Items 3, 9, 10, 11, 13, 14, 15, 39, 41, 42, 43, 45, 47, 48, 49, 50, 51, 52, 53, 54 (ICC-01/12-01/18-1446-Conf-Anx). The Chamber also notes related document-specific objections formulated in respect of Item 44 (ICC-01/12-01/18-1446-Conf-Anx).

²⁰ Such a document-specific objection is notably formulated in respect of Items 8, 17, 40, 48, 49, 53, 54, 55, 56, 62 (ICC-01/12-01/18-1446-Conf-Anx). *See also*, Response, ICC-01/12-01/18-1446, para. 17 (‘the material is superfluous and speaks to evidentiary weight rather than probative value’) and Request, ICC-01/12-01/18-1412, para. 18 (‘the proposed items largely corroborate the witnesses’ testimonies and other evidence being presented in the course of the trial.’)

objections²¹ which, in the view of the Chamber, do not warrant further discussion for the purpose of the present ruling.²²

17. With respect to Objection A, the Chamber agrees with the Defence and is of the view that admission of Item 25 (MLI-OTP-0067-1395), because such document is testimonial in nature, requires that the procedural requirements under Rule 68 of the Rules of Procedure and Evidence be satisfied.²³ Accordingly, this part of the Request is dismissed, without prejudice.
18. For all remaining items, the Chamber considers that the Defence objections, including those formulated under categories B to H, relate to the relevance, probative value and potential prejudice of the evidence concerned. The Chamber further observes that, as directed,²⁴ the Prosecution provided specific submissions on the relevance and probative value of each document submitted via its Request.²⁵ The Chamber sees no reason to exceptionally consider these submissions and objections at this point in time and, having found that there is no procedural bars that preclude the admission of all remaining items, defers their consideration until the judgment. Indeed, the Chamber is convinced that consideration thereof will be better rendered in light of the entirety of the evidence brought before it.
19. Finally, and concerning Objection F, the Chamber specifies that there is nothing prejudicial about submitting such evidence through this procedure. This method of submission of documentary evidence causes no shift in burden and has no bearing on how the Chamber will eventually evaluate and weigh the evidence.

²¹ Response, ICC-01/12-01/18-1446-Conf-Anx.

²² With regard to the Defence objection to the submission of Item 12, Judge Kimberly Prost reiterates that in the context of her role as Ombudsperson for the United Nations Security Council Al-Qaida Sanctions Committee from 2010 to 2015, she did not handle cases related to any situation in Mali and had no involvement whatsoever in the listing process (transcript of hearing on 12 December 2019, T-008, p. 5).

²³ Contra: Request, ICC-01/12-01/18-1412, para. 20.

²⁴ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, para. 77.

²⁵ Request, ICC-01/12-01/18-1412 and ICC-01/12-01/18-1412-Conf-Anx.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

DISMISSES the Request with respect to Item 25 (MLI-OTP-0067-1395);

GRANTS the remainder of the Request;

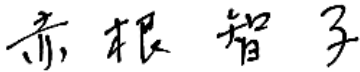
RECOGNISES as formally submitted all items listed in ICC-01/12-01/18-1412-Conf-Anx, with the exception of Item 25; and

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

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 Tuesday, 15 June 2021

At The Hague, The Netherlands