

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/12-01/18**  
Date: **17 December 2020**  
Date of submission:  
**26 April 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 MOHAMOUD***

**Public  
With confidential Annex A**

**Public redacted version of "Prosecution's first request for the admission of  
documentary evidence from the bar table, and regulation 35 request",  
17 December 2020, ICC-01/12-01/18-1213-Conf**

**Source:** The Office of the Prosecutor

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

**Counsel for the Defence**

Ms Melinda Taylor

Ms Kirsty Sutherland

Mr Antoine Vey

**Legal Representatives of Victims**

Mr Seydou Doumbia

Mr Mayombo Kassongo

Mr Fidel Luvengika Nsita

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Section**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Introduction

1. The Office of the Prosecutor (“Prosecution” or “OTP”):
  - requests pursuant to regulation 35(2) of the Regulations of the Court (“RoC”) the Chamber’s authorisation to add one item (consisting of three medical documents) to its Final List of Evidence (“LoE”);<sup>1</sup> and
  - seeks the submission into evidence of the said item, in accordance with articles 64(9)(a), 69(3) and 69(4) of the Rome Statute (“Statute”) and rule 63(2) of the Rules of Procedure and Evidence (“Rules”).
  
2. The three medical forms composing the item in question are related to AL HASSAN’s physical and mental condition at the time of his transfer from the Malian authorities to the ICC Registry, on 31 March 2018.<sup>2</sup> More precisely, these are:
  - [REDACTED]  
[REDACTED]  
[REDACTED];
  - [REDACTED]  
[REDACTED]  
[REDACTED]; and
  - [REDACTED].
  
3. This item was disclosed by the Defence on [REDACTED], concerns AL HASSAN’s physical and mental fitness and is relevant to the voluntary nature of AL HASSAN’s interviews and the probative value of that evidence.<sup>3</sup> In connection with the Prosecution’s submission of the totality of the audio recordings of interviews of

<sup>1</sup> [REDACTED].

<sup>2</sup> [REDACTED].

<sup>3</sup> As agreed by this Chamber, the Prosecution is about to file a request to introduce the totality of the audio recordings of interviews of AL HASSAN, their transcripts and related material. See [REDACTED] (Prosecution’s request) and ICC-01/12-01/18-1160-Conf (Trial Chamber X’s decision).

AL HASSAN, their transcripts and related material, it is in the interests of justice to allow delayed addition of these documents to the Prosecution LoE.

4. This material is relevant to matters to be considered by the Chamber in this case, is probative, and bears sufficient indicia of reliability to be submitted. Its submission would assist Trial Chamber X (“Chamber”) in the determination of the truth by providing relevant information concerning the voluntary nature and probative value of AL HASSAN’s interviews with the OTP investigators.<sup>4</sup> In addition, its submission, although not required in the context of a challenge to the admissibility of evidence brought pursuant to article 69(7) of the Statute,<sup>5</sup> would further assist the Chamber in disposing of the anticipated Defence’s challenges under this provision.

5. In accordance with the Chamber’s Decision on the conduct of proceedings,<sup>6</sup> the attached Annex contains the following information concerning this item: (i) its evidence registration number (“ERN”); (ii) its main date; (iii) a brief description of the document; (iv) its relevance; (v) its *prima facie* probative value, including authenticity; (vi) its date of disclosure; noting that (vii) [REDACTED]

[REDACTED]

[REDACTED].<sup>7</sup>

### Confidentiality

6. This document and its annex are filed as confidential as they refer to an item, namely a medical record concerning the Accused, that is subject to the same classification.

<sup>4</sup> In this regard and as agreed by this Chamber, the Prosecution is about to file a request to introduce the totality of the audio recordings of interviews of AL HASSAN, their transcripts and related material. See [REDACTED] (Prosecution’s request) and ICC-01/12-01/18-1160-Conf (Trial Chamber X’s decision).

<sup>5</sup> See ICC-01/12-01/18-1009-Red, para.123.

<sup>6</sup> ICC-01/12-01/18-789-AnxA, para.77-78.

<sup>7</sup> [REDACTED].

## Submissions

### I. Request to allow amendment of the Prosecution LoE with [REDACTED] under regulation 35 of the Regulations

7. The Prosecution seeks pursuant to regulation 35 of the Regulations authorisation to amend its Final LoE by adding document [REDACTED].<sup>8</sup>
8. This document contains medical forms describing AL HASSAN's general medical condition on 31 March 2018, information to which he was naturally privy to. This item was only disclosed by the Defence on [REDACTED].<sup>9</sup> It could therefore not be included in the LoE submitted on [REDACTED]<sup>10</sup> as it had been outside the Prosecution's control and because its relevance only became apparent subsequently, after the Defence raised specific challenges regarding AL HASSAN's physical and mental health.
9. The Prosecution recalls that a Chamber may extend a time limit under regulation 35(2) of the Regulations "if good cause is shown",<sup>11</sup> or where it is in the "interests of justice"<sup>12</sup> to do so. Moreover, where conditions of regulation 35(2) are not met, the Chamber may authorise the late addition of incriminating evidence pursuant to its powers under articles 64(6)(d) and 69(3) of the Statute to allow admission of the evidence that it deems necessary for the determination of the truth.<sup>13</sup>
10. In this instance, it is in the interests of justice and determination of the truth that late addition to the Prosecution Final List of Evidence be allowed as it will be of relevance for matters to be considered by the Chamber in this case, notably in relation to the admission of the record of AL HASSAN's interviews with the OTP.

<sup>8</sup> [REDACTED].

<sup>9</sup> [REDACTED].

<sup>10</sup> [REDACTED].

<sup>11</sup> ICC-01/04-01/06-834, para.7.

<sup>12</sup> See ICC-01/04-01/10-505, para.11.

<sup>13</sup> ICC-01/04-01/07-2325-Red, para.15.

11. There is no undue prejudice to the Defence as this item has been in the possession of the Defence, who disclosed it to the Prosecution, and contains information based on AL HASSAN's own statements to medical practitioners.

## II. Request for the submission of a document as evidence from the bar table

### Applicable Law

12. As noted by trial chambers in previous cases, the admission of documentary evidence through a "bar table" motion is a practice established in the jurisprudence of the Court.<sup>14</sup> 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".

13. In its Decision 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 (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.<sup>15</sup> It has further instructed the tendering participant to first inquire whether the opposing participant

<sup>14</sup> See for example, ICC-01/04-02/06-1181, para. 6; ICC-01/09-01/11-1353, para. 13.

<sup>15</sup> ICC-01/12-01/18-789-AnxA, para.77.

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.<sup>16</sup>

14. According to the case law, the admissibility of evidence other than testimony requires consideration of three key factors: its relevance to the issues at trial, its *prima facie* probative value and its prejudicial effect (if any) as weighed against the probative value.<sup>17</sup> The assessment of both relevance and probative value is conducted on a *prima facie* basis.<sup>18</sup>

### Analysis

15. The Prosecution seeks the submission of document [REDACTED], which contains the copies of [REDACTED] forms issued by independent accredited professionals prior to his transfer from Mali to The Hague, and upon his arrival at the ICC Detention Centre on 31 March 2018.

*(i) The material is relevant to matters to be considered by the Chamber in this case*

16. Document [REDACTED] is relevant as it is logically connected to the question of the admissibility of the evidence provided by AL HASSAN during his interviews with the OTP under article 56 of the Statute, and which the Prosecution seeks to introduce into evidence under article 69 of the Statute.<sup>19</sup> The Prosecution offers specific submissions on the relevance of this document in Annex A.

<sup>16</sup> ICC-01/12-01/18-789-AnxA, para.78.

<sup>17</sup> See for example, 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.

<sup>18</sup> ICC-01/04-01/06-1399-Corr, para.27-28; ICC-01/05-01/08-2012-Red, para. 13.

<sup>19</sup> See [REDACTED] and ICC-01/12-01/18-1160, para. 9-10.

17. More specifically, this document contributes to demonstrating the voluntariness of the statements made by AL HASSAN when interviewed by the OTP, by [REDACTED]

18. Notably, in accordance with regulation 190 Regulations of the Registry (“Regulations”), AL HASSAN was examined upon his arrival at the ICC detention centre “with a view to diagnosing any physical or mental illness, and/or any indication of mistreatment”.<sup>20</sup> The medical forms produced are therefore directly relevant to determining whether any particular medical condition could have impaired AL HASSAN’s capacity to be interviewed prior to his transfer to The Hague, when he was under the custody of the Malian authorities.

19. This document may also become further relevant in the context of anticipated Defence’s challenges under article 69(7) of the Statute following allegations made by the Defence on alleged torture or cruel, inhuman and degrading treatment of AL HASSAN.<sup>21</sup>

*(ii) The material has prima facie probative value*

20. The item proposed for submission in Annex A contains sufficient indicia of reliability, including authenticity, to safely be admitted into evidence. The Prosecution offers specific submissions on its probative value in Annex A.

21. The determination of the probative value of an item of evidence will always be a fact-specific inquiry and may take into account multiple factors, including the indicia of reliability, trustworthiness, accuracy or voluntariness that inhere in the

---

<sup>20</sup> Regulation 190(1) of the Regulations of the Registry.

<sup>21</sup> See ICC-01/12-01/18-1150 and ICC-01/12-01/18-1160, para.10.



item of potential evidence, as well as the circumstances in which the evidence arose, as well as the extent to which the item has been authenticated.<sup>22</sup> Items may be *prima facie* reliable if “they bear sufficient indicia of reliability such as logo, letter head, signature, date or stamp, and appear to have been produced in the ordinary course of the activities of the persons or organisations who created them”.<sup>23</sup>

22. The medical [REDACTED] forms, [REDACTED] [REDACTED] are official documents filled in by independent accredited professionals. The forms were all prepared in the ordinary course of activities, [REDACTED] They were produced contemporaneously [REDACTED] and, concerning [REDACTED] [REDACTED], in accordance with regulation 190 of the Regulations of the Registry.

23. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

24. These factors provide sufficient basis for the Chamber to conduct an independent evaluation of the *prima facie* reliability of each item.

(iii) *There is no prejudicial effect outweighing the probative value*

25. Finally, where applicable, the probative value of the item in question must be weighed against the prejudicial effect that its admission as evidence “may cause to a

<sup>22</sup> See for example, ICC-01/05-01/08-2012-Red, para. 15.

<sup>23</sup> ICC-01/05-01/08-2299-Red, para. 9; ICC-01/04-01/07-2635, para. 24, b.

fair trial or to a fair evaluation of the testimony of a witness”.<sup>24</sup> In this regard, consideration may be given to “such factors as whether an item’s admission would encroach on the accused’s rights under Article 67(1) of the Statute or potentially delay proceedings because it is unnecessary or cumulative of other evidence”.<sup>25</sup>

26. The submission of [REDACTED] from the bar table is not unfairly prejudicial to the Accused. AL HASSAN had sufficient notice of the content of the item. More specifically, the probative value of this item outweighs any potential prejudice arising from its submission for the following reasons: (i) this item is relevant to the admissibility and probative value of the statements given by AL HASSAN to the OTP (which are being introduced separately in a upcoming Prosecution’s request under article 69 of the Statute<sup>26</sup>), in the sense that it contributes to their reliability; (ii) this item possesses the enumerated indicia of reliability to warrant its submission and to enable the Chamber to fairly evaluate it; and (iii) this item will corroborate evidence to be presented in the course of the trial concerning AL HASSAN’s general physical and mental fitness or in the course of the anticipated article 69(7) litigation.

### Conclusion

27. For the foregoing reasons, the Prosecution requests that [REDACTED] be added on the Prosecution LoE and admitted into evidence.



\_\_\_\_\_  
**Fatou Bensouda, Prosecutor**

Dated this 17 December 2020  
At The Hague, the Netherlands

<sup>24</sup> ICC-01/05-01/08-2012-Red, para. 16; ICC-01/04-01/06-1399-Corr, para.31.

<sup>25</sup> ICC-01/05-01/08-2012-Red, para. 16.

<sup>26</sup> See [REDACTED] and ICC-01/12-01/18, para. 9-10.