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Date: 14 April 2021

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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
MAHMOUD**

Public redacted version of

**Third Decision on the introduction of prior recorded testimonies pursuant to
Rule 68(2)(b) of the Rules**

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart

Counsel for the Defence

Melinda Taylor
Kirsty Sutherland
Antoine Vey

Legal Representatives of Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

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*, having regard to Articles 64(2), 64(6)(e), 64(7), 67(1), 68(1) and (2), and 69(2) of the Rome Statute, Rules 68(2)(b) and 87 of the Rules of Procedure and Evidence ('Rules') and Regulation 20 of the Regulations of the Court, issues the following decision.

I. Procedural history

1. On 6 May 2020, the Chamber issued its 'Decision on the conduct of proceedings',¹ which relevantly instructed the Office of the Prosecutor (the 'Prosecution') to file any applications pursuant to Rule 68(2) of the Rules no later than by the end of the year 2020.²
2. In December 2020, the Prosecution filed a number of applications pursuant to Rule 68(2)(b) of the Rules, notably seeking to introduce into evidence the prior recorded testimony and associated material of P-0113 (the 'P-0113 Request'),³ P-0555 (the 'P-0555 Request'),⁴ P-0172 (the 'P-0172 Request'),⁵ P-0915 (the 'P-0915 Request'),⁶ as well as P-0204 and P-0630 (the 'P-0204 and P-0630 Request').⁷

¹ ICC-01/12-01/18-789, with one public annex and two confidential annexes.

² Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 79-80.

³ Prosecution application under rule 68(2)(b) to introduce MLI-OTP-P-0113's statement and associated material into evidence, 16 December 2020, ICC-01/12-01/18-1207-Conf (with confidential Annex A). The material sought to be introduced is listed in sections I and II of ICC-01/12-01/18-1207-Conf-AnxA (pp. 2-9).

⁴ Prosecution application under rule 68(2)(b) to introduce into evidence MLI-OTP-P-0555's expert report and associated material, 14 December 2020, ICC-01/12-01/18-1206-Conf (with confidential Annex A). The material sought to be introduced is listed in sections I and II of ICC-01/12-01/18-1206-Conf-AnxA (pp. 2-3).

⁵ Prosecution application under rule 68(2)(b) to introduce into evidence ML-OTP-P-0172's report and associated material, 16 December 2020, notified on 17 December 2020, ICC-01/12-01/18-1210-Conf (with confidential Annex A). The material sought to be introduced is listed in ICC-01/12-01/18-1210-Conf-AnxA.

⁶ Prosecution application under rule 68(2)(b) to introduce into evidence Witness P-0915's prior recorded testimony and associated material, 18 December 2020, ICC-01/12-01/18-1217-Conf (with confidential Annex A). The material sought to be admitted now is listed sections I and II (first two items only) of ICC-01/12-01/18-1217-Conf-AnxA (pp. 2-3). The material sought to be admitted only once P-0055 testifies is listed in section II (items 3 to 196) of ICC-01/12-01/18-1217-Conf-AnxA (pp. 3-21).

⁷ Prosecution application under rule 68(2)(b) to introduce into evidence Witness P-0204's and Witness P-0630's prior recorded testimony and associated material, 9 December 2020, ICC-01/12-01/18-1196-Conf (with confidential Annex A). The material sought to be introduced is listed in ICC-01/12-01/18-1196-Conf-AnxA.

3. On 12 January 2021, granting a request from the Defence which was unopposed,⁸ the Single Judge set the timeframe for responses to the pending Rule 68(2) applications.⁹
4. On 18 January 2021, the Defence filed a response to the P-0113 Request,¹⁰ in which it objects to the introduction into evidence of P-0113's prior recorded testimony.
5. On 26 February 2021, the Defence filed a response to the P-0915 Request and a consolidated response to the P-0555 Request, the P-0172 Request, as well as the P-0204 and P-0630 Request.¹¹ The Defence does not object to the introduction of the relevant witnesses' prior recorded testimony, but makes submissions and objections in relation to discrete exhibits which are sought to be introduced as associated material.
6. Also on 26 February 2021, the Legal Representatives of Victims filed a response¹² in which they submit that, in their view, the Prosecution has satisfied all the requirements under Rule 68(2)(b) for each of the above-mentioned requests and that, accordingly, they do not have any related objection.
7. The submissions received are discussed below, where warranted, as part of the Chamber's analysis.

⁸ Defence request under Regulation 35 for extension of time to file Rule 68 Responses, 8 January 2021, ICC-01/12-01/18-1243-Conf; and email from the Prosecution on 11 January 2021 at 13:18.

⁹ Email from the Single Judge to the parties and participants at 10:38.

¹⁰ Defence response to 'Prosecution application under rule 68(2)(b) to introduce MLI-OTP-P-0113's statement and associated material into evidence', 18 January 2021 notified on 19 January 2021, ICC-01/12-01/18-1252-Conf (the 'First Response').

¹¹ Defence response to 'Prosecution application under rule 68(2)(b) to introduce into evidence Witness P-0915's prior recorded testimony and associated material', ICC-01/12-01/18-1323-Conf (the 'Second Response'); Consolidated Defence response to Rule 68(2)(b) requests ICC-01/12-01/18-1196-Conf, ICC-01/12-01/18-1206-Conf, and ICC-01/12-01/18-1210-Conf, ICC-01/12-01/18-1322-Conf (the 'Third Response') (with one confidential annex and one confidential, *ex parte*, only available to the parties and the Registry annexe).

¹² Observations sur les requêtes du Procureur ICC-01/12-01/18-1193-Conf, ICC-01/12-01/18-1195-Conf, ICC-01/12-01/18-1196-Conf, ICC-01/12-01/18-1202-Conf, ICC-01/12-01/18-1206-Conf, ICC-01/12-01/18-1210-Conf, ICC-01/12-01/18-1217-Conf, formulées sur le fondement des Règles 68-2(b) et 68-2(c), ICC-01/12-01/18-1321-Conf.

II. Analysis

8. Pursuant to Rule 68(2)(b) of the Rules, the Chamber may allow the introduction of the previously recorded testimony of a witness who is not present before the Chamber when that prior recorded testimony: (i) goes to proof of ‘a matter other than the acts and conduct of the accused’; and (ii) is accompanied by a declaration by the testifying person, witnessed by a person authorised by the Chamber or in accordance with the law and procedure of a State, as detailed in Rule 68(2)(b)(ii) and (iii) of the Rules.
9. The Chamber refers to its prior decisions setting out the relevant legal framework¹³ and stresses that the decision of whether to introduce a prior recorded testimony pursuant to Rule 68(2)(b) of the Rules is a discretionary one, and the entire purpose of this provision is to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.

A. P-0113 Request

10. The Prosecution seeks to introduce the portions of P-0113’s prior recorded testimony which, it submits, concern proof of matters other than the acts and conduct of Mr Al Hassan.¹⁴ These are, according to the Prosecution, cumulative and corroborative in nature.¹⁵ The Prosecution specifies that, in light of the requirements under Rule 68(2)(b) of the Rules, it does not seek to submit into evidence the nine paragraphs of P-0113’s statement and one associated exhibit, which, go to the acts and conduct of the accused.¹⁶ The Prosecution also notes that although P-0113 has consented to the introduction of his prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, he is unwilling to testify *viva voce* [REDACTED].¹⁷ In this regard, the Prosecution submits that [REDACTED]

¹³ Decision on the introduction of P-0598’s evidence pursuant to Rule 68(2)(b) of the Rules, 16 October 2020, ICC-01/12-01/18-1111-Conf (the ‘First Rule 68(2)(b) Decision’), referring *inter alia* to Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red (the ‘Ongwen Rule 68(2)(b) Decision’).

¹⁴ P-0113 Request, ICC-01/12-01/18-1207-Conf, paras 2, 20-28.

¹⁵ P-0113 Request, ICC-01/12-01/18-1207-Conf, paras 32-40.

¹⁶ P-0113 Request, ICC-01/12-01/18-1207-Conf, paras 6, 24, 29; and ICC-01/12-01/18-1207-Conf-AnxA, p. 2. The paragraphs concerned are paras 58, 81, 83, 91, 93, 100, 103, 143, 145.

¹⁷ P-0113 Request, ICC-01/12-01/18-1207-Conf, paras 7, 17.

outweighs the interest in having him appear before the Chamber and therefore submits that the P-0113 Request is in the interests of justice¹⁸ and causes no undue prejudice to the accused.¹⁹

11. The Defence opposes the P-0113 Request. The Defence avers that the paragraphs the Prosecution proposes to exclude are not peripheral and discreet in nature but inseparable from the rest of P-0113's statement.²⁰ In this regard, the Defence argues that written statements cannot be submitted piecemeal, but that the determination under Rule 68(2)(b) must consider the whole testimony.²¹ It also contends that, contrary to the Prosecution submission, key parts of the prior recorded testimony tendered relate to Mr Al Hassan's alleged acts and conduct even if they do not explicitly mention him. The Defence further submits that P-0113's evidence pertains to live and important issues in the case, including the armed groups' leadership and Mr Al Hassan's alleged linkage to that leadership and its conduct, but also other matters, such as the Hesbah and the Islamic Tribunal, which are all disputed by the Defence.²² Moreover, the Defence argues that important claims made by P-0113 are not corroborated or are contradicted by other sources, including *inter alia*, the position of the *Commissaire* of the Islamic Police and the alleged meeting of the *Comité de Crise* with the armed groups.²³ The Defence further objects to the introduction of the associated material, since, in its submission, the Prosecution has failed to demonstrate any degree of specificity and probative value for each item.²⁴
12. The Majority of the Chamber notes that P-0113's prior recorded testimony consists of a 39-page statement which discusses a wide array of matters and events which go beyond 'background' information. The Majority also takes note of the Defence's arguments that P-0113's statement contains evidence relating to

¹⁸ P-0113 Request, ICC-01/12-01/18-1207-Conf, paras 41-42.

¹⁹ P-0113 Request, ICC-01/12-01/18-1207-Conf, paras 43-44.

²⁰ First Response, ICC-01/12-01/18-1252-Conf, paras 7-10.

²¹ First Response, ICC-01/12-01/18-1252-Conf, para. 8, referring to Decision on Prosecution's requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, 21 October, ICC-01/12-01/18-987-Red, para. 13; and *Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 13.

²² First Response, ICC-01/12-01/18-1252-Conf, paras 11-13.

²³ First Response, ICC-01/12-01/18-1252-Conf, paras 14-17.

²⁴ First Response, ICC-01/12-01/18-1252-Conf, para. 24.

issues that are ‘materially in dispute’ and notes the Prosecution’s submission that it is seeking to introduce evidence that is ‘highly relevant to and probative of the charges against the [a]ccused’.²⁵ In light of the content and scope of his prior recorded testimony, and at this stage, the Majority prefers to receive P-0113’s evidence *viva voce*. Accordingly, in the exercise of its discretion under Rule 68 of the Rules, the Majority dismisses the P-0113 Request, without prejudice to the Prosecution filing another application pursuant to Rule 68(2) of the Rules for this witness at a later stage, if considered necessary.

13. The Majority however considers that Rule 68(3) of the Rules is more appropriate to introduce P-0113’s prior recorded testimony and, in this regard, refers to the relevant applicable law detailed in its prior decisions.²⁶ The Majority also considers that the formalities under Rule 68(3) of the Rules and any supplementary examination of this witness shall be completed within 1,5 hour.
14. As regards P-0113’s reported unwillingness to testify *viva voce*, the Majority is of the view that the implementation of protective measures *vis-à-vis* the public may address the witness’s concerns. In this regard, the Majority notes that the Prosecution had previously requested in-court protective measures in the form of the use of a pseudonym, facial and voice distortion, as well as use of private sessions and/or closed sessions.²⁷ The Majority notes these were unopposed. The Majority further notes that the Victims and Witnesses Unit reports that P-0113 [REDACTED].²⁸

²⁵ P-0113 Request, ICC-01/12-01/18-1207-Conf, para. 25.

²⁶ Decision on Prosecution’s requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, 5 August 2020, ICC-01/12-01/18-987-Conf (a public redacted version was notified on 21 October 2020, ICC-01/12-01/18-987-Red); Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 26 January 2021, ICC-01/12-01/18-1267-Conf (a public redacted version was notified on 17 February 2021, ICC-01/12-01/18-1267-Red).

²⁷ Prosecution’s third application for in-court protective measures for Block 2 and Block 3 witnesses and request for additional time to contact Witness MLI-OTP- P-0660, 31 August 2020, notified on 1 September 2020, ICC-01/12-01/18-1022-Red2 (the ‘Protective Measures Request’).

²⁸ Victims and Witnesses Unit’s Observations on the “Deuxième requête de l’Accusation sur le fondement de la règle 87 aux fins de mesures de protection des témoins du Bloc 2 et du Bloc 3”, on the “Prosecution’s third application for in court protective measures for Block 2 and Block 3 witnesses and request for additional time to contact Witness MLI-OTP- P-0660” and on the “Prosecution’s application for in-court protective measures for MLI-OTP-P-0660”, 18 September 2020, ICC-01/12-01/18-1052-Conf-Exp, para. 18.

15. The Majority is satisfied that an objectively justifiable risk for P-0113 has been demonstrated. In particular, the Majority notes that the witness [REDACTED].²⁹ Having regard to the current security situation [REDACTED],³⁰ the Majority considers that P-0113 would face a significant and impermissible risk to his safety should his identity, and consequently his cooperation with the Court, become known to the public. Accordingly, the Majority grants P-0113 in-court protective measures in the form of the use of a pseudonym, facial and voice distortion, as well as use of private sessions and/or closed sessions.
16. In fact, the Majority takes notes of the witness's concerns [REDACTED] and finds that these concerns relate to circumstances which could eventually justify holding his testimony entirely in closed session. The Majority finds it appropriate to consider additional in-court protective measures in the form of delaying the public broadcast of P-0113's testimony, as well as the publication of the relevant transcripts, until the completion of his testimony and the until after the entire testimony has been reviewed and redacted as appropriate., The Majority therefore invites the Prosecution to explore this possibility with the witness and, if warranted, to revert back to the Chamber for it to consider further these additional in-court protective measures pursuant to Rule 87(2)(d) of the Rules.

B. P-0555 Request

17. The Prosecution seeks to introduce into evidence the report of expert P-0555, which relates to the enhancement of five videos of the *Comité de crise* in Timbuktu, as well as the associated material. The Prosecution submits that P-0555's report is technical in nature, relates to issues which are not materially in dispute, and goes to proof of matters other than the acts and conduct of Mr Al Hassan.³¹ The Prosecution further submits that P-0555's evidence has sufficient indicia of reliability and that the Defence's inability to cross-examine P-0555 on

²⁹ Protective Measures Request, ICC-01/12-01/18-1022-Conf-Exp, para. 38

³⁰ [REDACTED].

³¹ P-0555 Request, ICC-01/12-01/18-1206-Conf, paras 15, 19, 22.

his evidence does not deprive the accused of his right and opportunity to challenge the related evidence.³²

18. The Defence does not object to the introduction of P-0555's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, but objects to the introduction of four associated exhibits.³³ The Defence submits that, since P-0555 can only speak to the issue of enhancement and not to the content and reliability of the original videos, and since the original versions of the videos are yet to be introduced into evidence, it would be inappropriate to introduce the enhanced material unless and until the Prosecution has satisfied the threshold for submitting the underlying material. In this regard, the Defence recalls that the Chamber rejected the Prosecution request to submit these items into evidence via P-0075.³⁴
19. The Chamber is satisfied that the prior recorded testimony of P-0555, who was authorised to testify as an expert in this case,³⁵ does not relate to Mr Al Hassan's acts and conduct within the meaning of Rule 68(2)(b) of the Rules. Having considered the relevant factors, and in the absence of any prejudice to the Defence, the Chamber authorises the Prosecution to introduce P-0555's report as well as the associated material pursuant to Rule 68(2)(b) of the Rules, subject to the receipt of the required certified declaration.
20. Concerning the four contested exhibits, the Chamber does not find it necessary to defer its ruling. The Chamber emphasises that it is the introduction of the modified videos with enhanced audio³⁶ which is now authorised to be introduced together with the expert's related technical report. This does not relieve the Prosecution of its obligation to seek introduction of the original videos, either via a witness or the bar table.³⁷ Accordingly, the Chamber does not consider that the matters raised by the Defence prevent submission of the said items at this stage.

³² P-0555 Request, ICC-01/12-01/18-1206-Conf, para. 25.

³³ Third Response, ICC-01/12-01/18-1322-Conf, para. 39.

³⁴ Email from the Chamber to the parties and participants, 12 October 2020 at 12:35.

³⁵ Decision on Prosecution's proposed experts witnesses, 5 August 2020, ICC-01/12-01/18-989-Red, para. 29.

³⁶ MLI-OTP-0049-0128, MLI-OTP-0049-0129, MLI-OTP-0049-0130 and MLI-OTP-0049-0131.

³⁷ See Decision on Prosecution's proposed expert witnesses, 5 August 2020, ICC-01/12-01/18-989-Red, para. 119.

In line with the approach retained with respect to the submission of evidence, full consideration of this material's relevance and probative value, if any, is being deferred to the Chamber's eventual deliberation for its judgment.³⁸

C. P-0172 Request

21. The Prosecution seeks to introduce into evidence the report and associated material of P-0172 [REDACTED]. Because the report is limited to describing the audio enhancements applied to a video, the Prosecution submits that P-0172's evidence, which is technical in nature, goes to proof of matters other than the acts and conduct of Mr Al Hassan.³⁹ The Prosecution stresses that P-0172 does not comment on the substance of the video whose audio track he enhanced and that introducing P-0172's report under Rule 68(2)(b) would expedite the presentation of its case and therefore serve the interests of justice.⁴⁰
22. The Defence does not object to the introduction of P-0172's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, but objects to the introduction of one associated exhibit.⁴¹ The Defence observes that this item⁴² is a video that purportedly depicts Mr Al Hassan and that it is being relied upon by the Prosecution to prove its case on modes of liability. Stressing that the video was not created by P-0172 but rather by [REDACTED], the Defence argues that introducing the video as associated material to P-0172 under Rule 68(2)(b) would prejudice the Defence by depriving it of an opportunity to properly challenge a piece of evidence that purports to go to Mr Al Hassan's alleged acts and conduct. It submits that the video must be introduced through [REDACTED] so that the Defence can cross-examine its author on the video's authenticity.
23. The Chamber is satisfied that the prior recorded testimony of P-0172 does not relate to Mr Al Hassan's acts and conduct within the meaning of Rule 68(2)(b) of the Rules. Concerning the Defence's objection to the introduction of one

³⁸ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, paras 34(i) and (ii).

³⁹ P-0172 Request, ICC-01/12-01/18-1210-Conf, para. 17.

⁴⁰ P-0172 Request, ICC-01/12-01/18-1210-Conf, paras 3, 25.

⁴¹ Third Response, ICC-01/12-01/18-1322-Conf, paras 7-8.

⁴² MLI-OTP-0041-0605.

associated exhibit, the Chamber notes that the contested video was already recognised as formally submitted via P-0065.⁴³ Accordingly, having considered the relevant factors, and in the absence of any prejudice to the Defence, the Chamber authorises the Prosecution to introduce P-0172's report as well as the associated material pursuant to Rule 68(2)(b) of the Rules, subject to the receipt of the required certified declaration.

D. P-0915 Request

24. The Prosecution submits that P-0915, [REDACTED], is a technical witness whose report is related to the processing of evidence collected by P-0055.⁴⁴ The Prosecution seeks to introduce into evidence P-0915's report and annexes thereto as well as, once P-0055 has testified,⁴⁵ the associated materials.⁴⁶ The Prosecution submits that P-0915's report does not relate to the acts and conduct of Mr Al Hassan⁴⁷ and that it relates to issues that are not materially in dispute.⁴⁸ The Prosecution further argues that P-0915's prior recorded testimony is of a cumulative or corroborative nature with the upcoming testimony of P-0055 and that, since the Defence will be able to cross-examine P-0055 during his upcoming testimony, notably regarding the chain of custody of the evidence processed by P-0915, the P-0915 Request causes no undue prejudice to the accused.⁴⁹
25. The Defence does not object to the introduction of P-0915's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, but objects to the introduction of the associated exhibits via P-0915.⁵⁰ The Defence submits in this regard that 'procedural fairness requires this material to be introduced through P-0055', as opposed to alongside it. In support, the Defence points to the Prosecution's submission that it is P-0055 who will testify to chain of custody, relevance and probative value of all but two of the associated exhibits. In the view of the

⁴³ Email from the Chamber to the parties and participants on 18 December 2020 at 10:05. *See also* Transcript of hearing on 3 November 2020, ICC-01/12-01/18-T-039-CONF-ENG ET, p. 47, line 23 to p. 48, line 21.

⁴⁴ P-0915 Request, ICC-01/12-01/18-1217-Conf, paras 2, 14, 16.

⁴⁵ *See* P-0915 Request, ICC-01/12-01/18-1217-Conf, paras 18, 31.

⁴⁶ P-0915 Request, ICC-01/12-01/18-1217-Conf, para. 18.

⁴⁷ P-0915 Request, ICC-01/12-01/18-1217-Conf, para. 17.

⁴⁸ P-0915 Request, ICC-01/12-01/18-1217-Conf, para. 24.

⁴⁹ P-0915 Request, ICC-01/12-01/18-1217-Conf, para 25, 28.

⁵⁰ Second Response, ICC-01/12-01/18-1323-Conf, paras 2, 4-6.

Defence, it is therefore inappropriate to submit these items together with the prior recorded testimony of P-0915.

26. The Chamber is satisfied that the prior recorded testimony of P-0915 does not relate to Mr Al Hassan's acts and conduct within the meaning of Rule 68(2)(b) of the Rules. Having considered the relevant factors, and in the absence of any prejudice to the Defence, the Chamber authorises the Prosecution to introduce into evidence under Rule 68(2)(b) of the Rules P-0915's report and annexes thereto as well as two associated items,⁵¹ subject to the receipt of the required certified declaration. The Chamber does not find the parties' submission as to the appropriate way forward for the remaining associated exhibits to be meaningfully different⁵² and it simply takes note of the fact that these exhibits, which are discussed in P-0915's report, but were collected by P-0055, will be formally submitted by the Prosecution upon completion of the latter's upcoming testimony.

E. P-0204 and P-0630 Request

27. The Prosecution seeks the introduction into evidence of the reports and associated work products of P-0204 and P-0630, two technicians who specialise in digital and interactive platforms, together with their associated material. The Prosecution explains that the two witnesses created the platform which was used as a visual presentation tool during the Prosecution's opening statement and which is also meant to assist with the localisation of certain places of relevance to the charges during the course of the trial.⁵³ As such, the Prosecution submits that the P-0204 and P-0630 Request seeks the introduction of material which relates to background information and goes to proof of matters other than the acts and conduct of Mr Al Hassan.⁵⁴ The Prosecution further submits that the technical

⁵¹ MLI-OTP-0049-0677 and MLI-OTP-0050-0423. See P-0915 Request, ICC-01/12-01/18-1217-Conf, para. 32.

⁵² The Chamber notes that the Prosecution seeks 'that the content of the sealed bags detailed by P-0915 in Section II of Annex A [documents 3 to 198] be introduced into evidence once P-0055 will have testified regarding their collection in Timbuktu. This will provide a complete portrait of their chain of custody and also provide information regarding their relevance and probative value.' (P-0915 Request, ICC-01/12-01/18-1217-Conf, para. 31).

⁵³ P-0204 and P-0630 Request, ICC-01/12-01/18-1196-Conf, para. 2.

⁵⁴ P-0204 and P-0630 Request, ICC-01/12-01/18-1196-Conf, paras 16-25, 32-33.

and cumulative nature of the related evidence makes it unnecessary for P-0204 and P-0630 to appear for cross-examination.⁵⁵

28. The Defence does not object to the introduction into evidence of P-0204 and P-0630's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, subject to two caveats.⁵⁶ First, the Defence wishes to ascertain that the presentation or use of underlying videos and other material that populate the virtual platform is subject to the relevant materials themselves being separately submitted into evidence. Second, the Defence submits that, pursuant to the principle of equality of arms, the Defence should be given full access to the virtual platform and therefore require training or guidance on how to use and navigate the platform submitted.
29. The Chamber first notes that the Prosecution clarified that the P-0204 and P-0630 Request 'does not supersede or replace the submission of evidence that [the virtual platform] contains' and that 'the assets and materials it is composed of have been or will be submitted into evidence through witnesses separately'.⁵⁷ Moreover, the Chamber notes the Prosecution's submission that the platform is 'capable of being operated at the Court and in compliance with the ICC system'.⁵⁸ In this regard, the Chamber observes that it appears the parties have already exchanged emails with a view to facilitate contacts between the Defence and P-0204 and P-0630.⁵⁹ The Chamber therefore understand that the parties have a shared understanding as to the status of the evidence which populates the virtual platform and that the Defence will be given functional access to the relevant material in due course.
30. The Chamber is satisfied that the prior recorded testimony of P-0204 and P-0630 does not relate to Mr Al Hassan's acts and conduct within the meaning of Rule 68(2)(b) of the Rules. Having considered the relevant factors, and – with the abovementioned caveats – in the absence of any prejudice to the Defence, the Chamber grants the P-0204 and P-0630 Request and authorises the Prosecution

⁵⁵ P-0204 and P-0630 Request, ICC-01/12-01/18-1196-Conf, para. 6.

⁵⁶ Third Response, ICC-01/12-01/18-1322-Conf, paras 4-6.

⁵⁷ P-0204 and P-0630 Request, ICC-01/12-01/18-1196-Conf, para. 24.

⁵⁸ P-0204 and P-0630 Request, ICC-01/12-01/18-1196-Conf, para. 23.

⁵⁹ Annex A to the Third Response, ICC-01/12-01/18-1322-Conf-Exp-AnxA.

to introduce into evidence their reports and work products as well as the associated material, subject to the receipt of the required certified declaration.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY, BY MAJORITY,

REJECTS the P-0113 Request, without prejudice;

DECIDES, subject to the procedural pre-requisites of Rule 68(3) of the Rules being satisfied when P-0113 appears, that his prior recorded testimony and associated material, referred to in footnote 3 above, are allowed to be introduced into evidence under Rule 68(3);

GRANTS the request for in-court protective measures with respect to P-0113;

AND, UNANIMOUSLY,

GRANTS all other abovementioned Prosecution requests under Rule 68(2)(b) of the Rules;

AUTHORISES, subject to the receipt of certified declarations, the introduction into evidence of the prior recorded testimony of P-0555, P-0172, P-0915, as well as P-0204 and P-0630, together with the relevant associated material, referred to in footnotes 4 to 7 and 51 above;

ORDERS the Registry, upon filing of the above witnesses' certified declarations, to reflect in the eCourt metadata the introduction of the relevant material under Rule 68(2)(b); and

ORDERS the Prosecution to file public redacted version of the P-0113 Request, P-0555 Request, the P-0172 Request, the P-0915 Request, as well as the P-0204 and P-0630 Request, no later than two weeks after notification of the present decision.

Judge Kimberly Prost appends a partially dissenting opinion.

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 Friday, 26 March 2021

At The Hague, The Netherlands