

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

*Original: English*

No.: ICC-01/12-01/18

Date: 2 October 2020

**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**

**Registry's Observations on Matters related to Rule 68(2)(b) Certifications in light  
of the Coronavirus Pandemic**

**Source:** Registry

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

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**REGISTRY**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
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**Other**

## I. Introduction

1. Pursuant to the email instruction issued by the Single Judge of Trial Chamber X of the International Criminal Court (“Order”, “Chamber” and “Court”, respectively),<sup>1</sup> the Registry hereby submits its observations on the “Prosecution’s urgent request to designate a person authorised to witness a declaration under rule 68(2)(b) of the Rules of Procedure and Evidence” filed by the Office of the Prosecutor (“Request”, “Rules”, “Rule 68(2)(b) Certification” and “Prosecution”, respectively).<sup>2</sup> The Prosecution having observed in its Request that the Rule 68(2)(b) Certifications may take place within “the context of certain travel limitations associated with the current global pandemic”,<sup>3</sup> the present observations are made in light of the Coronavirus Pandemic (“Pandemic”).
  
2. Over the past five years, the established practice at the Court has been that the relevant Chamber designates the Registry Senior Legal Adviser (“Registry SLA”),<sup>4</sup> or a person delegated by him, as the person authorised to witness a declaration under rule 68(2)(b) of the Rules.<sup>5</sup> As explained below, to the extent

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<sup>1</sup> Email from the Single Judge of Trial Chamber X to the Registry on 25 September 2020, 15.23.

<sup>2</sup> Prosecution, Request, ICC-01/12-01/18-1068, 24 September 2020.

<sup>3</sup> Prosecution, Request, para. 2.

<sup>4</sup> The former title of the Registry Senior Legal Adviser, Chief of the Registry Legal Office, was “Registry Legal Counsel”.

<sup>5</sup> See for example, Trial Chamber V, *Yekatom and Ngaïssona* case, “Decision on the Prosecution’s Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence”, ICC-01/14-01/18-508, 6 May 2020; Trial Chamber VI, *Ntaganda* case, Decision on Prosecution’s request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules ICC-01/04-02/06-729, 16 July 2015, p.5 and paras. 1 and 5 on the fact that there was at this date no established practice; See also in the *Ntaganda* case, Registry’s Submission on the “Prosecution’s Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence”, ICC-01/04-02/06-666, 22 June 2015, page 3; Trial Chamber VII, *Bemba et Al.* case, “Decision on the Prosecution’s Request to Designate a Person Authorised to Witness a Declaration Under Rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-01/05-01/13-1109, 29 July 2015, para. 6 and p.5.; See also in the *Bemba et Al.* case, “Registry’s Submission on the ‘Prosecution’s Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence’”, ICC-01/05-01/13-1036, 25 June 2015 (notified 26 June 2015) and “Registry submission on the forms to be used for declarations made pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence”, ICC-01/05-01/13-1050, 14 August 2015; Trial Chamber I, *Gbagbo and Blé Goudé* case, “Decision on the Prosecution’s request to designate a

possible, the Registry stands ready to continue fulfilling this function. However, in light of the Pandemic and pursuant to rule 68(2)(b)(iii) of the Rules, a person witnessing such a declaration “in accordance with the law and procedure of a State” (i.e. a local official) may be, in certain circumstances further detailed below, an alternative solution for the Chamber to consider.

## II. Applicable law

3. The following provisions are of particular relevance to the present submissions: article 43 of the Rome Statute (“Statute”) and rule 68(2)(b)(ii) and (iii) of the Rules. In relevant parts, rule 68(2)(b)(ii) states that a prior recorded testimony may only be introduced - and further admitted as evidence in a witness’ absence -, “if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person’s knowledge and belief”; rule 68(2)(b)(iii) states, *inter alia*, that the declaration itself “must be witnessed by a person authorised to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State.”

## III. Submissions

### A – Persons authorized to witness a rule 68(2)(b) declaration

#### *Registry SLA, or anyone delegated by him, as designated by a Chamber*

4. For the purpose of Rule 68(2)(b) Certifications as mentioned above, when a Chamber has deemed it appropriate to designate a representative of the Registry, the Registry SLA, or anyone delegated by him, has been considered over the past five years to be best placed.<sup>6</sup> When making such a designation, Chambers have taken into consideration the nature of the functions envisioned under rule 68(2)(b)(iii) of the Rules.

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person authorised to witness a declaration under Rule 68(2)(b) of the Rules”, ICC-02/11-01/15-303, 21 October 2015.

<sup>6</sup> *Ibid.*

5. By way of background, the Registry SLA would always delegate a Registry staff with a legal background and this staff is trained before carrying out the functions pursuant to rule 68(2)(b) of the Rules. These functions may entail, *inter alia*, traveling abroad to meet in person the witnesses who gave to the calling party – be it the Prosecution or the Defence – prior recorded testimonies to be certified. In its yearly budget, the Registry Legal Office takes into account the necessary travels outside the Netherlands required for the provision of advice on and assistance in these certifications. Based on past experiences, standardized forms of accompanying declarations have been developed and are used during certification missions. Noting that “the template for such declarations has been uniform across all cases to date before the Court”, Trial Chamber V has recently approved the said forms as “Standard Declaration”.<sup>7</sup> Should the Chamber require so, the Registry may file them in the record on the present case.<sup>8</sup>
  
6. Finally, the Registry specifies that the calling parties are not present during the certification process. This process may however require the presence of an interpreter or a reading assistant in the event of illiterate witnesses, as the case may be.

#### *A designated Chamber’s Legal Officer*

7. Whilst this is a possibility under the existing legal framework, it has not been the practice to date at the Court. In addition, regardless of the person designated by the Chamber – be it the Registry SLA or a Chamber’s Legal Officer – these persons may face, as further detailed below, similar logistical

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<sup>7</sup> Trial Chamber V, “Decision on the Prosecution’s Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence”, ICC-01/14-01/18-508, 6 May 2020, para. 8.

<sup>8</sup> See for similar approach, *Ibid.*

issues in witnessing a declaration under rule 68(2)(b) of the Rules in the current circumstances of the Pandemic.

***A local official authorized to witness a rule 68(2)(b) declaration in accordance with the law and procedure of a State***

8. In accordance with rule 68(2)(b)(iii) of the Rules, the person witnessing a rule 68(2)(b) declaration may be a local official authorized to do so in accordance with the law and procedure of the State. This may be the case, for example, when the calling party has requested the cooperation of a State where a relevant witness is located (i.e. request for assistance in accordance with Part 9 of the Statute). The State in question, through its relevant national authorities, may execute the party's request for cooperation and certify accordingly the witness' prior statement(s). The certifying person may be a local judge or a notary, for example. In that case, the calling party organises the certification process directly with the local official duly authorized under the domestic law and procedure. In this scenario, save for a possible issue of lack of cooperation, the Chamber would not need to designate or authorize anyone.
9. Due to the neutral role of the Registry and the parties' independence with respect to collecting and introducing evidence, the Registry, unless designated by the Chamber, is not involved in this type of certification process.

**B – Possible options in light of the Pandemic**

10. Based on its past experience in witnessing rule 68(2)(b) declarations, the Registry submits, for the purpose of the present observations, the following three scenarios for the Chamber's consideration. For each of them, the Registry makes recommendations taking into account any restrictive

measures and regulations adopted by governmental authorities in the context of the Pandemic.

*Witnesses located in The Netherlands or in nearby countries, if any*

11. Depending on the travel restrictions within Europe, and subject to the decision of the Chamber, the Registry SLA or a person designated by him, could conduct Rule 68(2)(b) Certification missions and meet witnesses concerned in person, as per the usual practice.
12. Notwithstanding any travel restrictions, should the Registry SLA be designated by the Chamber in accordance with rule 68(2)(iii) of the Rules, conducting the certification missions remotely may be envisaged. This would be a novel approach at the Court and, at this juncture, the Registry is in a position to make the following preliminary submissions.
13. Conducting Rule 68(2)(b) Certifications remotely would require the calling party to have prior, separate and, as the case may be, remote contacts with the witnesses concerned. These contacts are crucial to ensure that the witnesses will be able to confirm to the Registry SLA, on the day of the certification, that they have read in their entirety the contents of the prior recorded testimony on a given date and that these contents are true and correct to the best of his/her knowledge, subject to the possible modifications.
14. Furthermore, for any designated person to conduct certifications remotely under the conditions set out in rule 68(2)(b)(ii) and (iii) of the Rules, a feasibility assessment may be required before any such certifications can take place, notably to take into account the profile and location of the witness (i.e. language requirements, reading capacity, secure internet connection, access to a computer with camera and related computer skills, etc.). This would allow the Registry to address and resolve to the extent possible any technical and logistical difficulties that both, the certifying person and the witnesses may

face. This assessment usually follows informal discussions with the calling party. The Registry notes that in the present case, the Prosecution has offered to “liaise directly with such [designated] person or unit to provide all necessary information, and logistical or practical arrangements concerning the relevant witnesses”.<sup>9</sup>

15. If the certification process is done remotely, one of the difficulties for the certifying officer would be to confirm whether the witness appearing online is indeed the person he/she claims to be. The certifying officer would have to look at the person through a camera and check his/her identifying documents bearing his/her picture. Conducting this comparison exercise remotely may be challenging. Furthermore, due to the physical distance, although not impossible, it would be more difficult for the certifying officer to ensure that the documentation provided to him/her is exactly the same as that to which the witness is referring.
16. Due to the novelty and complexities of this option, should the Chamber opt for remote Rule 68(2)(b) Certifications, further submissions from the parties and the Registry may be required.
17. In light of the above, with regard to any certification process in a European country other than The Netherlands, in case of travel restrictions within Europe, a local official authorized in accordance with national law and procedure would likely be the best placed to conduct Rule 68(2)(b) Certifications.

*Witnesses located in a State where the Court has a Country Office, if any*

18. To the extent that Rule 68(2)(b) Certifications would concern witnesses located in the Republic of Mali (“Mali”), if any, the Registry notes that the

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<sup>9</sup> Prosecution, Request, para. 7.



state of emergency is in place until 31 October 2020 and the number of both, cumulative positive COVID-19 cases and cumulative deaths have consistently increased since the last Registry's update in May 2020 on the Pandemic situation in Mali.<sup>10</sup> There are currently international and internal travel restrictions decided by the Government of the Mali due to the Pandemic, including a mandatory 14-day self-isolation for all travellers upon arrival in Mali. In addition, with regard to Court's staff field missions from abroad to Mali or within Mali, except for missions that would be considered "essential",<sup>11</sup> the feasibility assessment of such missions remains the same as that previously submitted before the Chamber.<sup>12</sup>

19. Therefore, for witnesses based in Mali, if any, these restrictions currently affect the conduct of any Rule 68(2)(b) Certifications, regardless of who would conduct such certifications (i.e. Registry SLA, a person delegated by him, a Chamber's Legal Officer, a local official).

20. That said, should the Registry SLA be designated by the Chamber for the purpose of Rule 68(2)(b) Certifications, a person delegated by him may well be trained remotely. The Registry will explore the option of resorting to the staff in the relevant Country Office and determine, on the basis of the requirements to be met (e.g. legal background) and the circumstances to be considered (e.g. number of certifications), whether any of those staff members would be able to conduct any of the required certifications.

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<sup>10</sup> <https://www.tableau.com/covid-19-coronavirus-data-resources>

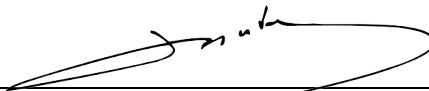
<sup>11</sup> Based on security, medical and feasibility assessments, the approval by the relevant Head of Organ is required for any essential missions to take place. Depending on the options described in the present observations, should a mission receive the Registrar's approval, in line with the United Nations in-country decisions, the Court's personnel travelling to Mali will be required to go into self-isolation for 14 days upon arrival to Mali.

<sup>12</sup> See Confidential Annex I to "Registry's Observations on methods of work to minimise the impact of COVID-19 and related measures on the conduct of proceedings (ICC-01/12-01/18-776)", ICC-01/12-01/18-824-Conf-AnxI, 20 May 2020.

21. Furthermore, with regard to the Country Office, the latter remains operational with regulations in place to prevent further spreading of the virus at the premises of the Court in Bamako (e.g. remote working arrangements are in place, staff members have been advised to minimise any/operational movement to the Office and to consider full prevention measures - mask, gloves, glasses -, social distancing and hygienic measures.)
22. Apart from the option described above, another option to consider would be for the calling party to request the assistance of national authorities and to identify locally a person duly authorised to certify a prior recorded testimony. This option would be particularly relevant for witnesses located outside Bamako, if any, should the travel restrictions on internal movements within Mali is prolonged for a significant period of time.

*Witnesses located in a State where the Court has no Country Office, if any*

23. In this option, in the event of travel restrictions affecting this State, a local official authorized in accordance with national law and procedure would likely be the best placed to conduct certifications in accordance with the conditions set out under rule 68(2)(b) of the Rules.




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Marc Dubuisson  
Director Division of Judicial Services  
on behalf of Peter Lewis, Registrar

Dated this 2 October 2020

At The Hague, The Netherlands