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No. ICC-01/12-01/18

Date: 29 October 2020

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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 the
Decision on the introduction of P-0598's evidence 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:

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**Unrepresented Applicants for
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Defence**

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Counsel Support Section

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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), 67(1) and 69(2) of the Rome Statute ('Statute') and Rule 68 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules'.

I. Procedural history and submissions

1. On 17 September 2020, the Office of the Prosecutor (the 'Prosecution') filed a request seeking to introduce P-0598's two reports and related material pursuant to Rule 68(3) of the Rules (the 'P-0598 Request').¹ The Prosecution calculates that it will need only 25 minutes for its examination of the witness (10 minutes for formalities and 15 for supplementary examination).² The Prosecution also requests to add to its List of Evidence, pursuant to Regulation 35 of the Regulation of the Court (the 'Regulations'), updated curriculum vitae of the expert (the 'CV').³
2. On 29 September 2020, the Defence filed its response to the P-0598 Request (the 'Response').⁴ It submits that the witness should not be called to testify. Instead, the Defence suggests that the reports and related material can be submitted via Rule 68(2)(b) of the Rules.⁵ The Defence does not make any objection to the request to add the CV to the Prosecution's List of Evidence.
3. On 24 September 2020, the Prosecution filed a request for the Chamber to designate a person authorised to witness declarations pursuant to Rule 68(2)(b) of the Rules (the 'Rule 68(2)(b) Request').⁶ It submits that although the provision permits persons so authorised under national laws and procedure to

¹ Prosecution application to introduce MLI-OTP-P-0598's reports and associated material into evidence, and regulation 35 request, ICC-01/12-01/18-1051-Conf (with confidential Annex A, ICC-01/12-01/18-1051-Conf-AnxA). The material sought to be introduced is listed in sections I and II of ICC-01/12-01/18-1051-Conf-AnxA.

² P-0598 Request, ICC-01/12-01/18-1051-Conf, para. 4.

³ P-0598 Request, ICC-01/12-01/18-1051-Conf, paras 14, 20-23.

⁴ Defence response to the 'Prosecution application to introduce MLI-OTP-P-0598's reports and associated material into evidence, and regulation 35 request', ICC-01/12-01/18-1076-Conf.

⁵ Response, ICC-01/12-01/18-1076-Conf, para. 9.

⁶ 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, ICC-01/12-01/18-1068.

witness declarations, the Chamber's designation of such an individual (i.e. a staff member of the Registry) will promote efficiency and consistency with the Court-wide practice.⁷

4. On 2 October 2020, the Registry, upon instruction of the Chamber,⁸ filed its observations on the Rule 68(2)(b) Request.⁹ The Registry submits that the established practice at the Court has been that the Registry Senior Legal Adviser (the 'SLA') or a person delegated by him, is the person authorised to witness a declaration under Rule 68(2)(b) of the Rules. It submits that, to the extent possible, the Registry is ready to continue fulfilling this function.¹⁰ The Registry submits that pursuant to this established practice, a template for such declarations has been uniform across all cases to date (the 'Standard Declaration').¹¹ The Registry also states that although not the practice to date at the Court, a Chamber's Legal Officer could be designated to fulfil this task.¹² It also submits that a local official authorised in accordance with the law and procedure of a State (i.e. a notary or a judge) could be designated under Rule 68(2)(b) of the Rules.¹³ The Registry states that given the current COVID-19 pandemic, the person to be designated may vary depending on the country where the witness is located or travel restrictions are in place.¹⁴ The Registry also foresees that the certification under Rule 68(2)(b) of the Rules could be done remotely.¹⁵ The Registry also states that it could train Registry staff in ICC country offices, including but not limited to Mali, so that they could act upon delegation of the SLA.¹⁶ Finally, the Registry indicates that the calling party could request the assistance of national authorities to identify locally a person authorised to certify under Rule 68(2)(b) of the Rules,¹⁷ particularly as regards

⁷ Rule 68(2)(b) Request, ICC-01/12-01/18-1068, para. 6.

⁸ E-mail from Trial Chamber X Communications on 25 September 2020 at 15:23.

⁹ Registry's Observations on Matters related to Rule 68(2)(b) Certifications in light of the Corona virus Pandemic, ICC-01/12-01/18-1088.

¹⁰ Registry Observations, ICC-01/12-01/18-1088, para. 2.

¹¹ Registry Observations, ICC-01/12-01/18-1088, para. 5.

¹² Registry Observations, ICC-01/12-01/18-1088, para. 7.

¹³ Registry Observations, ICC-01/12-01/18-1088, para. 8.

¹⁴ Registry Observations, ICC-01/12-01/18-1088, paras 11, 17.

¹⁵ Registry Observations, ICC-01/12-01/18-1088, paras 12-16.

¹⁶ Registry Observations, ICC-01/12-01/18-1088, paras 20-21.

¹⁷ Registry Observations, ICC-01/12-01/18-1088, para. 22.

witnesses located in a State where the Court has no country office and in case there are travel restrictions affecting this State.

II. Analysis

5. The Chamber has given due consideration to the submissions of the parties, and in particular to the suggestion of the Defence that the evidence of P-0598 be introduced pursuant to Rule 68(2)(b) of the Rules instead of Rule 68(3). For the reasons set out below, the Chamber considers that Rule 68(2)(b) of the Rules is a more appropriate avenue to introduce this expert evidence. Having regard to the Prosecution and Registry observations on the person to be designated to certify declarations under Rule 68(2)(b) of the Rules, the Chamber will also rule on this matter in the present decision.

A. P-0598 Request

6. In its Directions on the conduct of proceedings, the Chamber determined that parties may file applications for the admission of prior recorded testimonies pursuant to Rule 68(2) of the Rules.¹⁸
7. 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. As generally required in all instances of introduction of prior recorded testimony under Rule 68 of the Rules, this introduction must also not be prejudicial to or inconsistent with the rights of the accused.¹⁹ The decision of whether to introduce a prior recorded testimony

¹⁸ [Directions on the conduct of proceedings](#), ICC-01/12-01/18-789-AnxA, para. 80.

¹⁹ 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, para. 5 (‘Ongwen Rule 68(2)(b) Decision’).

pursuant to this provision is a discretionary one,²⁰ and the entire purpose of Rule 68(2)(b) of the Rules is to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.²¹ When such situations are identified and pursuant to the criteria set out in Rule 68(2)(b) of the Rules, prior recorded testimony may be introduced pursuant to this provision. In doing so, the Chamber will defer to its eventual deliberation for its judgment, the full consideration of the standard evidentiary criteria for such prior recorded testimony, in particular in terms of its relevance and probative value.²²

8. The Chamber notes that it previously decided that P-0598 could be called to testify as an expert witness in this case. In the context of that same decision, following submissions of the Defence, the Chamber indicated that it would decide in due course on the appropriate mode of testimony for this expert witness.²³
9. The Chamber notes that the Defence did not object to this witness's expertise and does not object to the submission of his reports and related material pursuant to Rule 68(2)(b) of the Rules.²⁴
10. The Chamber considers that, in light of the nature and limited content and significance to this case of the evidence provided by P-0598, and considering that the Defence in fact proposes this manner of testimony, his expert reports and related material may be introduced without the need that the evidence be 'tested' through oral examination of the expert witness at trial.²⁵ Considering

²⁰ [Ongwen Rule 68\(2\)\(b\) Decision](#), ICC-02/04-01/15-596-Red, para. 6; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on Prosecution Rule 68\(2\) and \(3\) Requests](#), 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, para. 95 ('Bemba et al. Rule 68 Decision').

²¹ [Ongwen Rule 68\(2\)\(b\) Decision](#), ICC-02/04-01/15-596-Red, para. 7; [Bemba et al. Rule 68 Decision](#), ICC-01/05-01/13-1478-Red-Corr, para. 106.

²² [Directions on the conduct of proceedings](#), 6 May 2020, ICC-01/12-01/18-789-AnxA, paras 34(i) and (ii). See also [Ongwen Rule 68\(2\)\(b\) Decision](#), ICC-02/04-01/15-596-Red, para. 7.

²³ Decision on Prosecution's proposed expert witnesses, 5 August 2020, ICC-01/12-01/18-989-Conf, paras 37-39.

²⁴ Defence response to the Prosecution expert witness requests, 22 June 2020, ICC-01/12-01/18-895-Conf, para. 23; Response, ICC-01/12-01/18-1076-Conf, paras 8-9.

²⁵ See similarly [Ongwen Rule 68\(2\)\(b\) Decision](#), ICC-02/04-01/15-596-Red, para. 7.

the minimal time estimated by the Prosecution for examination of this witness²⁶ and the Defence's implicit waiver of its right to cross-examine the witness, the Chamber considers that the introduction of his evidence is more appropriately done pursuant to Rule 68(2)(b) of the Rules. The Chamber however notes that all the material classified as 'Material necessary to understand P-0598's prior record testimony'²⁷ is not to be introduced through this witness.

11. In light of the above, and subject to the receipt of the declaration discussed below, the Chamber authorises the Prosecution to introduce the expert reports of P-0598 and related material pursuant to Rule 68(2)(b) of the Rules.²⁸
12. As regards the request pursuant to Regulation 35 of the Regulations, the Chamber recalls the applicable law as established in its prior decisions.²⁹ The Chamber notes that there is no objection from the Defence and that the request is limited to an updated version of the expert's CV. Accordingly, the Chamber considers that the late addition of this updated CV does not unduly prejudice the Defence. Furthermore, the Chamber deems that having up-to-date information about this expert, particularly since he will no longer be called to testify in court, is in the interests of justice and the determination of the truth.
13. Accordingly, the Prosecution is authorised to add to its List of Evidence the updated CV, item MLI-OTP-0078-7643.

B. Designation of a person to certify declarations under Rule 68(2)(b) of the Rules

14. As noted above, the introduction of the prior recorded testimony of P-0598 is subject to the receipt and filing in the case record of the accompanying declaration by the expert witness in accordance with Rule 68(2)(b)(ii) and (iii) of the Rules. This latter sub-paragraph provides that the declaration must be

²⁶ [REDACTED]. See Dépôt de la Liste des témoins de l'Accusation, des résumés desdits témoins et de la Liste provisoire des éléments de preuve à charge, 14 April 2020, ICC-01/12-01/18-740-Conf-AnxB, p. 937.

²⁷ See section III of ICC-01/12-01/18-1051-Conf-AnxA.

²⁸ [REDACTED].

²⁹ See *in particular* Decision on the Prosecution requests pursuant to Regulation 35 regarding P-0660 and P-0661 and to add 12 items to its Final List of Evidence, 5 August 2020, ICC-01/12-01/18-988-Conf, para. 6.

witnessed by a person authorised by the Chamber for this purpose, or otherwise obtained in accordance with the law and procedure of a State.

15. The Chamber agrees with the Prosecution,³⁰ that the Registry SLA is best placed to witness such declarations, also considering that, as observed by the Registry,³¹ this has been established in previous decisions of the Court. The Chamber accordingly designates the Registry SLA, or a person delegated by him, to witness P-0598's declaration made pursuant to Rule 68(2)(b) of the Rules.
16. The Chamber considers that, more generally for the purposes of these proceedings, established practice should apply and the Registry, as the neutral organ of the court, through its SLA or a person designated by him, should witness any future declaration pursuant to Rule 68(2)(b) of the Rules.³²
17. The Chamber considers that that the Standard Declaration, which has been uniform across all cases to date, is apt for the purpose of P-0598 and any eventual Rule 68(2)(b) witness in this case.
18. However, the Chamber acknowledges that the current COVID-19 pandemic has highlighted the need for flexibility in how these declarations are executed in practice. While the Registry SLA remains responsible for the function, more emphasis should be placed on the use of delegated persons. This would not only be useful given the current travel restrictions but also more generally in light of economic constraints and the need for improved efficiency. In this context, the Chamber welcomes the Registry's proposal to train its staff in the country offices for the purpose of Rule 68(2)(b) declarations and the use of technology for remote execution of this function. Furthermore, the Registry should consider cooperation agreements with other Courts or international organizations and, if appropriate, national authorities.

³⁰ Rule 68(2)(b) Request, ICC-01/12-01/18-1068, para. 6.

³¹ Registry Observations, ICC-01/12-01/18-1088, para. 2.

³² See more recently, the decision taken by Trial Chamber V in the case of *The Prosecutor v. Yekatom and Ngaïssona*, [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](#), 6 May 2020, ICC-01/14-01/18-508, para. 6.

19. Finally should the Registry encounter problems with a specific declaration it can bring that matter to the attention of the Chamber providing, in consultation with the parties, possible alternatives.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

AUTHORISES the addition of item MLI-OTP-0078-7643 to the Prosecution's List of Evidence;

AUTHORISES, pursuant to Rule 68(2)(b) of the Rules, and subject to the receipt of the relevant declaration, the introduction into evidence of the prior recorded testimony of P-0598, as identified in footnote 28 above;

DESIGNATES, pursuant to Rule 68(2)(b)(iii) of the Rules, the Registry SLA, or any other person delegated by him, to witness declarations under Rule 68(2)(b) of the Rules;

APPROVES the Standard Declaration;

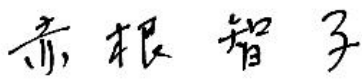
ORDERS the Registry, upon filing of P-0598's declaration under Rule 68(2)(b) of the Rules, to reflect in the eCourt metadata the introduction of his prior recorded testimony as identified in the present decision; and

ORDERS the Prosecution to file a public redacted version of ICC-01/12-01/18-1051-Conf no later than seven days after notification of the present decision.

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, 16 October 2020
At The Hague, The Netherlands