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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
Second Decision on the introduction of prior recorded testimonies pursuant to
Rule 68(3) of the Rules**

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

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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(2), 64(6)(e), 64(7), 67(1) and 69(2) of the Rome Statute (the ‘Statute’), and Rules 68(1) and 68(3) of the Rules of Procedure and Evidence (the ‘Rules’), Regulation 23*bis* of the Regulations of the Court (the ‘Regulations’) and Regulation 94 of the Regulations of the Registry (the ‘Registry Regulations’), issues the following ‘Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules.’

I. Procedural background

1. On 6 May 2020, the Chamber adopted the ‘Directions on the conduct of proceedings’.¹ It instructed the Office of the Prosecutor (the ‘Prosecution’) to file its ‘motivated application seeking the Chamber’s authorisation to introduce any prior recorded testimony pursuant to Rule 68(3) of the Rules.’²
2. Between 14 October and 30 November 2020, in conformity with the time limit set by the Chamber,³ the Prosecution filed applications to introduce the prior recorded testimony and associated material of 10 witnesses into evidence pursuant to Rule 68(3) of the Rules (the ‘Rule 68(3) Application(s)'). The

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

² Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 63.

³ Supplemental decision on matters related to the conduct of proceedings, 19 August 2020, ICC-01/12-01/18-1004, para. 21.

witnesses concerned are: P-0431,⁴ P-0114,⁵ P-0622,⁶ P-0595,⁷ P-0587, P-0617,⁸ P-0081,⁹ P-0639,¹⁰ P-0641,¹¹ and P-0524.¹²

3. Between 26 October and 11 December 2020, the Defence filed responses to the aforesaid Prosecution's Rule 68(3) Applications.¹³

⁴ Prosecution application to introduce MLI-OTP-P-0431's prior recorded testimony and associated material into evidence, 13 October 2020, ICC-01/12-01/18-1100-Conf (with confidential Annex, ICC-01/12-01/18-1100-Conf-AnxA) (hereinafter 'P-0431 Application').

⁵ Prosecution application under rule 68(3) to introduce MLI-OTP-P-0114's statement and associated material into evidence, 14 October 2020, ICC-01/12-01/18-1106-Conf (with confidential Annex A) (hereinafter 'P-0114 Application').

⁶ Prosecution application under rule 68(3) to introduce MLI-OTP-P-0622's statement into evidence, 15 October 2020, ICC-01/12-01/18-1109-Conf (with confidential Annex A). A public redacted version was filed on 23 October 2020 (hereinafter 'P-0622 Application').

⁷ Prosecution application under rule 68(3) to introduce MLI-OTP-P-0595's prior statement and associated material into evidence, 27 October 2020, ICC-01/12-01/18-1131-Conf (with confidential Annex A) (hereinafter 'P-0595 Application').

⁸ Prosecution application under rule 68(3) to introduce Witnesses MLI-OTP-P-0587 and MLI-OTP-P-0617's report and associated material into evidence, and regulation 35 request, 2 November 2020, ICC-01/12-01/18-1136-Conf (with confidential Annex A) (hereinafter 'P-0587 and P-0617 Application').

⁹ Prosecution application under rule 68(3) of the Rules to introduce into evidence MLI-OTP-P-0081's prior recorded testimony and associated material, 18 November 2020, ICC-01/12-01/18-1157-Conf (with confidential Annex A) (hereinafter 'P-0081 Application').

¹⁰ Prosecution application under rule 68(3) to introduce MLI-OTP-P-0639's prior statement and associated material into evidence, 27 November 2020, ICC-01/12-01/18-1166-Conf (with confidential Annex A) (hereinafter 'P-0639 Application').

¹¹ Prosecution application under rule 68(3) to introduce Witness MLI-OTP-P-0641's prior recorded testimony and associated material, 30 November 2020, ICC-01/12-01/18-1168-Conf (with confidential Annex A) (hereinafter 'P-0641 Application').

¹² Prosecution's rule 68 application to introduce MLI-OTP-P-0524's statements and associated material into evidence, 30 November 2020, ICC-01/12-01/18-1169-Conf (with confidential Annex A) (hereinafter 'P-0524 Application').

¹³ Defence Response to Prosecution Rule 68(3) Requests regarding P-0431, P-0114 and P-0622, 26 October 2020, ICC-01/12-01/18-1127-Conf (hereinafter 'P-0431, P-0114 and P-0622 Response'); Defence Response to 'Prosecution application under rule 68(3) to introduce MLI-OTP-P-0595's prior statement and associated material into evidence', 9 November 2020, ICC-01/12-01/18-1151-Conf (hereinafter 'P-0595 Response'); Defence Response to 'Prosecution application under rule 68(3) to introduce Witnesses MLI-OTP-P-0587 and MLI-OTP-P-0617's report and associated material into evidence, and regulation 35 request', 13 November 2020, ICC-01/12-01/18-1155-Conf (hereinafter 'P-0587 and P-0617 Response'); Defence Response to 'Prosecution application under rule 68(3) of the Rules to introduce into evidence MLI-OTP-P-0081's prior recorded testimony and associated material', 30 November 2020, ICC-01/12-01/18-1170-Conf (hereinafter 'P-0081 Response'); Defence Response to 'Prosecution application under rule 68(3) to introduce MLI-OTP-P-0639's prior statement and associated material into evidence', 10 December 2020, ICC-01/12-01/18-1199-Conf (hereinafter 'P-0639 Response'); Defence Response to 'Prosecution application under rule 68(3) to introduce Witness MLI-OTP-P-0641's prior recorded testimony and associated material' and 'Prosecution's rule 68 application to introduce MLI-OTP-P-0524's statements and associated material', 11 December 2020, ICC-01/12-01/18-1203-Conf (hereinafter 'P-0641 and P-0524 Response').

II. Analysis

4. The Chamber incorporates by reference the applicable legal framework as set out in the Directions on the conduct of proceedings¹⁴ and its previous Decision on Prosecution's requests to introduce prior recorded testimonies under Rule 68(3) of the Rules (the 'First Rule 68(3) Decision').¹⁵

P-0431

5. The Prosecution seeks to introduce the witness statement and annexes of P-0431, as well as associated material.¹⁶ The Prosecution estimates it will need 50 minutes to examine the witness (instead of the originally estimated two hours).¹⁷
6. The Defence opposes the Rule 68(3) Application.¹⁸ First, the Defence reiterates its previous submissions as regards the credibility and reliability (lack of impartiality) of the witness and therefore submits that in-court testimony is the best way to test his credibility.¹⁹ Second, it submits that P-0431's witness statement is largely composed of evidence outside the scope of his expertise, is subjective and appears to rely on hearsay evidence and that cross-examination will not be a sufficient remedy.²⁰ Third, the Defence submits that the witness statement touches upon factual issues that in its view should not be admitted.²¹ Fourth, the Defence submits that no time will be saved, as the Prosecution estimates 50 minutes instead of two hours, but cross-examination would have to be prolonged if the evidence is introduced via Rule 68(3); thus, any time-saving is relatively limited or negligible.²²

¹⁴ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 63-65.

¹⁵ 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).

¹⁶ Rule 68(3) Application, ICC-01/12-01/18-1100-Conf, paras 1-2, 12-13 and Annex A, ICC-01/12-01/18-1100-Conf-AnxA. [REDACTED].

¹⁷ P-0431 Application, ICC-01/12-01/18-1100-Conf, paras 5, 17.

¹⁸ P-0431, P-0114 and P-0622 Response, ICC-01/12-01/18-1127-Conf.

¹⁹ P-0431, P-0114 and P-0622 Response, ICC-01/12-01/18-1127-Conf, paras 5, 7-10.

²⁰ P-0431, P-0114 and P-0622 Response, ICC-01/12-01/18-1127-Conf, para. 11.

²¹ P-0431, P-0114 and P-0622 Response, ICC-01/12-01/18-1127-Conf, para. 12.

²² P-0431, P-0114 and P-0622 Response, ICC-01/12-01/18-1127-Conf, para. 13.

7. At the outset, the Chamber recalls it previously authorised the Prosecution to call P-0431 as an expert witness. Indeed, it found that although certain areas of expertise such as social sciences or culture are not technical in nature, P-0431 has sufficient qualifications as an expert.²³
8. The Chamber recalls it has previously determined that the decision to authorise the submission of a prior recorded testimony pursuant to Rule 68(3) of the Rules is a discretionary one.²⁴ In the instant case, and balancing the time saved against the potential prejudice to the accused, the Chamber considers that the submission of P-0431's prior recorded testimony will not serve the principle of expeditiousness of the proceedings pursuant to this provision. Indeed, the Chamber notes that the estimated amount of hours that would be saved is negligible. Accordingly, the Chamber finds that the determination of the truth will be better served through the witness's *viva voce* testimony.
9. In light of the above, the Chamber rejects the Rule 68(3) Application in respect of P-0431. The Prosecution is therefore afforded the original estimated two hours to examine the witness. The Defence is similarly afforded two hours for its cross-examination of the witness. In this regard, the Chamber reminds the parties that the effect of this decision is that the Chamber will hear the evidence of P-0431 live. Accordingly, any use of prior statements or testimony in the course of examination or cross-examination must be strictly in accordance with the Directions on the conduct of proceedings and limited to instances where a proper foundation has been established before such use.²⁵

²³ Decision on Prosecution's proposed expert witnesses, 5 August 2020, ICC-01/12-01/18-989-Conf (a public redacted version was notified on 21 October 2020, ICC-01/12-01/18-989-Red) (hereinafter 'Experts Decision'), para. 25.

²⁴ First Rule 68(3) Decision, ICC-01/12-01/18-987-Red, para. 10, .

²⁵ Fourth decision on matters related to the conduct of proceedings, 26 January 2021, ICC-01/12-01/18-1265.

P-0114

10. The Prosecution requests authorisation to introduce pursuant to Rule 68(3) of the Rules two witnesses statements of P-0114, their annexes and associated material.²⁶ In relation to the first witness statement, the Prosecution seeks to introduce annexes [REDACTED].²⁷ The Prosecution also seeks to introduce associated material, including 80 photographs shown to and commented upon by P-0114, [REDACTED], as well as related internal OTP notes.²⁸ In relation to the second witness statement, [REDACTED], the Prosecution seeks to introduce related material, namely [REDACTED] photographs [REDACTED].²⁹ The Prosecution estimates it will need 1.5 hours for examination (instead of the originally estimated seven hours).³⁰ The Prosecution therefore submits that introduction pursuant to Rule 68(3) of the Rules will expedite proceedings. It submits that since the parties and the Chamber will be able to question the witness, granting the request will not be prejudicial to the accused.³¹
11. The Defence does not object to the submission of the first statement and related material, with the exception of the photographs.³² It however objects to the introduction pursuant to Rule 68(3) of the Rules of the second statement and its associated material.³³ In its view the second statement concerns the ‘acts and conducts of the accused’.³⁴ As regards the 80 photographs associated with the first statement, the Defence contends that P-0114 is not the author and did not recognise the contents of a number of them.³⁵

²⁶ P-0114 Application, ICC-01/12-01/18-1106-Conf, para. 1.

²⁷ P-0114 Application, ICC-01/12-01/18-1106-Conf, paras 3, 15. The first witness statement (MLI-OTP-0023-0344) and its annexes are identified in Annex A, Section I, p.1 (items 1-16).

²⁸ P-0114 Application, ICC-01/12-01/18-1106-Conf, paras 4,16. The associated material is identified in Annex A, Section II, pp.2-6 (items 1-85).

²⁹ P-0114 Application, ICC-01/12-01/18-1106-Conf, paras 5, 17. The second witness statement (MLI-OTP-0058-0030) is identified in Annex A, Section I, p. 1 (item 17). The associated material is identified in Annex A, Section III, p. 6 (items 1-6). The Prosecution does not seek to introduce the material identified at p. 7.

³⁰ P-0114 Application, ICC-01/12-01/18-1106-Conf, paras 8,22.

³¹ P-0114 Application, ICC-01/12-01/18-1106-Conf, paras, 20, 23.

³² P-0431, P-0114 and P-0622 Response, ICC-01/12-01/18-1127-Conf, paras 5, 14.

³³ P-0431, P-0114 and P-0622 Response, ICC-01/12-01/18-1127-Conf, para. 14.

³⁴ P-0431, P-0114 and P-0622 Response, ICC-01/12-01/18-1127-Conf, para. 15.

³⁵ P-0431, P-0114 and P-0622 Response, ICC-01/12-01/18-1127-Conf, para. 16.

12. The Chamber notes that P-0114 is a fact and overview witness, [REDACTED]. He was allegedly [REDACTED] was therefore present in Timbuktu during the relevant period. He appears to [REDACTED]. He is expected to testify about the history of the mausoleums, their destruction and religious persecution. The Chamber also notes that P-0114 was a witness in the *Al Mahdi* case.
13. As noted above, as regards the first statement, there is no objection from the Defence. Although, in relation to photographs associated with the first statement the Defence has made objections, the Chamber considers these refer more to the weight to be given to the photographs and P-0114's comments on them. The Chamber is of the view that these issues can be addressed by the Defence in its cross-examination, which remains unaffected by introduction of this material through Rule 68(3) of the Rules. Thus, the matters raised by the Defence do not prevent the submission of the said items at this stage. This is in line with the approach taken by the Chamber in its Directions on the conduct of proceedings, adopting a system that recognises submission of items of evidence 'without a prior ruling on relevance and/or admissibility' and considering 'relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused'.³⁶
14. As regards the second statement, and although it refers to acts and conduct of the accused, the Chamber observes that this does not necessarily prevent its introduction pursuant to Rule 68(3) of the Rules. Moreover, P-0114's evidence in this regard is limited. Moreover, the Defence will have full opportunity to cross-examine the witness in relation to this second statement. The Chamber lastly notes that significant time would be saved if P-0114 is called pursuant to Rule 68(3) of the Rules.
15. Accordingly, Chamber grants the Rule 68(3) Application in respect of P-0114. The Prosecution is authorised to complete the formalities under Rule 68(3) of the Rules and carry out the supplementary examination of the witness within the expected 1.5 hours.

³⁶ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 29

P-0622

16. The Prosecution requests authorisation to introduce pursuant to Rule 68(3) of the Rule the witness statement of P-0622. The Prosecution submits that his witness statement relates to the situation in Timbuktu before and after the arrival of armed groups, in particular the rules imposed by the armed groups, including the practice of forced marriage.³⁷ The Prosecution estimates it will require approximately 45 minutes for its examination of the witness (instead of the originally estimated three hours).³⁸
17. The Defence opposes the Rule 68(3) Application in respect of P-0622.³⁹ It submits that the witness statement: (a) is replete with hearsay evidence, including as regards charged incidents and describes events and facts vaguely without identifying source of information; (b) is problematic since P-0622 will testify about an alleged forced marriage [REDACTED];⁴⁰ and (c) relates to a core issue materially in dispute in this case.⁴¹
18. The Chamber notes that P-0622 is a crime base witness of alleged religious and sexist persecution and forced marriage. [REDACTED].
19. As regards objections in (a) above, the Chamber considers these refer more to the weight to be given to the evidence of P-0622. The Chamber is of the view that these issues can be addressed by the Defence in its cross-examination, which remains unaffected. The Defence will therefore have full opportunity to address, among others, the issue of the sources of P-0622's information. Thus, the matters raised by the Defence do not prevent the submission of the said items at this stage. This is in line with the approach taken by the Chamber in its Directions on the conduct of proceedings, adopting a system that recognises submission of items of evidence 'without a prior ruling on relevance and/or admissibility' and

³⁷ P-0622 Application, ICC-01/12-01/18-1109-Conf, paras 1, 10. There are no annexes or associated material identified in Annex A, solely the witness statement, MLI-OTP-0065-0558.

³⁸ P-0622 Application, ICC-01/12-01/18-1109-Conf, paras 5, 14.

³⁹ P-0431, P-0114 and P-0622 Response, ICC-01/12-01/18-1127-Conf, para. 18.

⁴⁰ P-0431, P-0114 and P-0622 Response, ICC-01/12-01/18-1127-Conf, para. 21.

⁴¹ P-0431, P-0114 and P-0622 Response, ICC-01/12-01/18-1127-Conf, paras, 19-28.

considering ‘relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused’.

20. As regards the objections in (b) above, the Chamber disagrees with the Defence and considers that the manner in which the evidence is introduced (in the instant case via Rule 68(3) of the Rules) [REDACTED]. As regards the matters raised by the Defence under (c), particularly as to whether a statement goes to ‘issues materially in dispute’, similarly does not prevent the submission of the said items pursuant to Rule 68(3) of the Rules, which does not include this requirement (unlike, for example Rule 68(2)(b)(i) of the Rules). Lastly, the Chamber notes that significant time will be saved if P-0622 is called pursuant to Rule 68(3) of the Rules, which outweighs any potential prejudice to the accused.
21. Accordingly, Chamber grants the Rule 68(3) Application in respect of P-0622. The Prosecution is authorised to complete the formalities under Rule 68(3) of the Rules and carry out the supplementary examination of the witness within the expected 45 minutes.

P-0595

22. The Prosecution seeks to introduce via Rule 68(3) of the Rules P-0595’s witness statement, [REDACTED]. The Prosecution also seeks leave to introduce 32 photographs and one video shown to P-0595 during his interview as well as an investigator’s note.⁴² The Prosecution submits that P-0595’s evidence will be corroborated [REDACTED].⁴³ As regards the photos to be introduced, the Prosecution submits that they were mostly [REDACTED].⁴⁴ The Prosecution estimates it will need one hour to examine the witness (instead of the originally estimated three hours).⁴⁵

⁴² P-0595 Application, ICC-01/12-01/18-1131-Conf, para. 1. The witness statement is MLI-OTP-0058-0196). The annexes are identified in Annex A, Section II(1)(2), pp.1-2. The associate material is identified in Annex A, Section II(3)and (4), pp. 2-4. The Prosecution does not seek to introduce the material identified at p. 5.

⁴³ P-0595 Application, ICC-01/12-01/18-1131-Conf, para. 16.

⁴⁴ P-0595 Application, ICC-01/12-01/18-1131-Conf, paras 18-19.

⁴⁵ P-0595 Application, ICC-01/12-01/18-1131-Conf, paras 5, 6, 31.

23. The Defence objects the Rule 68(3) Application in respect of P-0595.⁴⁶ It submits that his witness statement: (a) is vague, largely contains hearsay evidence and in multiple intervals the witness does not indicate the source of information;⁴⁷ and (b) is confusing and in order to establish properly the factual record of what the witness recalls, he should provide *viva voce* testimony.⁴⁸ The Defence further submits that [REDACTED], photographs and the video should not be accepted as prior recorded testimony, as the witness did not author any of these documents.⁴⁹ The Defence also argues that the use of Rule 68(3) of the Rules will not streamline the presentation of evidence as the saving of time is negligible.⁵⁰
24. The Chamber notes that P-0595 is a fact witness who is expected to testify about the amputation of [REDACTED], Dédéou Maiga, an alleged victim of a charged incident in this case. The Chamber notes the submission of the Prosecution, that his evidence will be corroborated by another Prosecution witness, [REDACTED]. The Chamber considers the matters raised by the Defence (*i.e.* that the witness statement is confusing) refer more to the weight to be given to P-0595's testimony. The Chamber is of the view that these issues can be addressed by the Defence in its cross-examination, which remains unaffected. Moreover, the matters raised by the Defence do not prevent the submission of the said items at this stage. This is in line with the approach taken by the Chamber in its Directions on the conduct of proceedings, adopting a system that recognises submission of items of evidence 'without a prior ruling on relevance and/or admissibility' and considering 'relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused'.⁵¹
25. Accordingly, the Chamber grants the Rule 68(3) Application in respect of P-0595. The Prosecution is authorised to complete the formalities under Rule 68(3) of the Rules and carry out the supplementary examination of this witness within the expected one hour.

⁴⁶ P-0595 Response, ICC-01/12-01/18-1151-Conf, para. 2.

⁴⁷ P-0595 Response, ICC-01/12-01/18-1151-Conf, paras 5-7.

⁴⁸ P-0595 Response, ICC-01/12-01/18-1151-Conf, para. 8.

⁴⁹ P-0595 Response, ICC-01/12-01/18-1151-Conf, paras 10-11.

⁵⁰ P-0595 Response, ICC-01/12-01/18-1151-Conf, paras 12-13.

⁵¹ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 29

P-0587 and P-0617

26. The Prosecution requests authorisation to introduce the joint report of P-0587 and P-0617, as well as related material (which includes the experts' CVs, a CD with maps and call data records ('CDRs'), the mission letters and addendums thereto and a DVD containing tables).⁵² The Prosecution also requests leave to add P-0617's CV to the List of Evidence, as it only received this in [REDACTED]2020.⁵³ The Prosecution estimates it will need two hours to examine both experts (instead of the originally estimated seven hours).⁵⁴
27. The Defence does not oppose the submission of the experts' report through Rule 68(3) of the Rules.⁵⁵ However, it opposes the submission of the underlying data (the CDRs and discs in which the CDRs were stored).⁵⁶ It argues that the experts are not in a position to testify as to the authenticity and reliability of these items.⁵⁷
28. The Chamber notes that P-0587 and P-0617 are experts in CDRs who co-authored a report, which relates to alleged telephone numbers of relevant individuals, including the accused. The Chamber recalls it authorised the Prosecution to call P-0587 and P-0617, among others, as expert witnesses.⁵⁸
29. The Chamber notes in particular that in the context of the Experts Decision, the Defence objected to P-0587 and P-0617's expertise arguing that their report was euro-centred and was premised on the assumption that the CDRs were authentic.⁵⁹ The Chamber resolved on that occasion that the expertise of P-0587

⁵² P-0587 and P-0617 Application, ICC-01/12-01/18-1136-Conf, paras 1, 10, 15, 16. The experts joint report (MLI-OTP-0061-1643) and associated material to be introduced pursuant to Rule 68(3) of the Rules are listed in Annex A, Sections I and II, p. 2-86. The Prosecution does not seek to introduce the material identified in Section III, p. 86-87.

⁵³ P-0587 and P-0617 Application, ICC-01/12-01/18-1136-Conf, paras 28-31.

⁵⁴ P-0587 and P-0617 Application, ICC-01/12-01/18-1136-Conf, paras 5-6.

⁵⁵ P-0587 and P-0617 Response, ICC-01/12-01/18-1155-Conf, para. 3.

⁵⁶ P-0587 and P-0617 Response, ICC-01/12-01/18-1155-Conf, paras 5-8.

⁵⁷ P-0587 and P-0617 Response, ICC-01/12-01/18-1155-Conf, paras 9-33.

⁵⁸ Experts Decision, ICC-01/12-01/18-989-Conf, paras 30-32.

⁵⁹ Experts Decision, ICC-01/12-01/18-989-Conf, paras 30-31, *referring to* Defence response to the Prosecution expert witness requests, 23 June 2020, ICC-01/12-01/18-895-Conf, paras 16-18.

and P-0617 may assist the Chamber, including in order to determine whether, as suggested by the Defence, CDRs have regional or local variables.⁶⁰

30. As a preliminary issue, and in relation to the request pursuant to Regulation 35 of the Regulations to introduce the CV of P-0587 in the list of evidence, the Chamber considers there is an unjustifiable delay on the part of the Prosecution, particularly since a similar request had already been granted.⁶¹ However, noting the limited nature of the item to be introduced and since the Defence does not object either to the addition to the list of evidence or its introduction through Rule 68(3) of the Rules, the Chamber authorises the addition of the updated CV to the Prosecution's list of evidence.
31. Turning to the Rule 68(3) Application in respect of P-0587 and P-0617, the Chamber notes that the Defence objects solely to the introduction of the data subject of their expertise but not to their joint expert report. The Chamber considers that the objections raised by the Defence relate more to the weight to be given to the experts' report and the underlying data, namely the CDRs. Moreover, the Chamber is of the view that the concerns raised by the Defence (*i.e.* experts capacity to testify on the authenticity and reliability of the data and local variables) can be duly addressed in the cross-examination, which remains unaffected. The Chamber notes specifically the Defence's argument that CDRs are largely unintelligible without further analysis.⁶² In fact, the Chamber is of the view that it is through technical experts such as P-0587 and P-0617 that such data becomes 'legible' for the purpose of trial proceedings. The matters raised by the Defence do not prevent the submission of the said items at this stage. This is in line with the approach taken by the Chamber in its Directions on the conduct of proceedings, adopting a system that recognises submission of items of evidence 'without a prior ruling on relevance and/or admissibility' and considering 'relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused'.⁶³ Lastly, the

⁶⁰ Experts Decision, ICC-01/12-01/18-989-Conf, para. 32.

⁶¹ 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, paras 12-14,

⁶² P-0587 and P-0617 Response, ICC-01/12-01/18-1155-Conf, para. 9

⁶³ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 29

Chamber considers that significant time would be saved if the experts are called pursuant to Rule 68(3) of the Rules, which only has a real meaning if the underlying data which they analysed in their report is introduced through this provision.

32. Accordingly, the Chamber grants the Rule 68(3) Application in respect of P-0587 and P-0617. The Prosecution is authorised to complete the formalities under Rule 68(3) of the Rules and carry out the supplementary examination of these two experts within the expected two hours.

P-0081

33. The Prosecution requests authorisation to introduce pursuant to Rule 68(3) of the Rules, P-0081's two written statements and annexes (two satellite images and a sketch).⁶⁴ It also seeks to introduce documents P-0081 referred to in his first statement, namely [REDACTED].⁶⁵ The Prosecution estimates it will need one hour to examine the witness (instead three hours the Prosecution now estimates).⁶⁶
34. The Defence opposes the Rule 68(3) Application for P-0081. It submits that his statements contain a large volume of irrelevant information [REDACTED].⁶⁷ The Defence submits that if the introduction via Rule 68(3) for P-0081 is authorised, it would be compelled to address all these irrelevant issues contained in the written statements, which will be contrary to the principle of judicial economy.⁶⁸ Alternatively, the Defence submits that if the Rule 68(3) Application is granted, the Chamber should confine the Prosecution to those issues disclosed in the witness's statements that are relevant to the charges.⁶⁹ The Defence specifically argues that the Prosecution should not be allowed to elicit evidence

⁶⁴ P-0081 Application, ICC-01/12-01/18-1157-Conf, paras 1, 3, 11. The first witness statement (MLI-OTP-0012-1152) and the second statement (MLI-OTP-0067-0299) and the annexes are identified in Annex A, Section I, p. 2.

⁶⁵ P-0081 Application, ICC-01/12-01/18-1157-Conf, paras 12-14. The associated material to be introduced pursuant to Rule 68(3) of the Rules is identified in Annex A, Section II, p. 2.

⁶⁶ P-0081 Application, ICC-01/12-01/18-1157-Conf, paras 6, 16.

⁶⁷ P-0081 Response, ICC-01/12-01/18-1170-Conf, para. 2.

⁶⁸ P-0081 Response, ICC-01/12-01/18-1170-Conf, paras 4-5.

⁶⁹ P-0081 Response, ICC-01/12-01/18-1170-Conf, para. 7.

for the first time on the stand (*i.e.* practice of forced marriage), which the Defence states the witness only referred to in a few sentences in his two statements.⁷⁰

35. The Chamber notes that P-0081 is a fact witness who at the time of the charges [REDACTED].
36. The Chamber notes that the Defence arguments, namely that portions of P-0081's witness statements are irrelevant to the charges, do not prevent the submission of the said items at this stage. This is in line with the approach taken by the Chamber in its Directions on the conduct of proceedings, adopting a system that recognises submission of items of evidence 'without a prior ruling on relevance and/or admissibility' and considering 'relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused'.⁷¹ However, it must be noted that analysis of the evidence introduced in the record, regardless of whether it is introduced entirely *viva voce* or pursuant to Rule 68 of the Rules, will be confined to the facts and circumstances of the charges confirmed in this case.
37. As regards the Defence's argument that the Prosecution should not be allowed to elicit new evidence for the first time on the stand (*i.e.* on forced marriage), the Chamber considers it is without merit. In particular, the Chamber notes that the Defence was clearly informed, within the disclosure deadline, of the P-0081's expected relevance to forced marriage, sexual violence and persecution,⁷² in addition to the contextual elements of war crimes and crimes against humanity. Thus, the Chamber sees no merit in the Defence's alternative request and considers that it is appropriate for the Prosecution to question on these issues in its examination.
38. Accordingly, the Chamber grants the Rule 68(3) Application in respect of P-0081. The Prosecution is authorised to complete the formalities under Rule 68(3) of the

⁷⁰ P-0081 Response, ICC-01/12-01/18-1170-Conf, paras 8-10

⁷¹ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 29

⁷² Dépôt de la Liste des témoins de l'Accusation, des résumés desdits témoins et de la Liste provisoire des éléments de preuve à charge, 15 April 2020, ICC-01/12-01/18-740-Conf-AnxB, p. 352, 356.

Rules and carry out the supplementary examination of this witness within the expected one hour.

P-0639

39. The Prosecution seeks to introduce P-0639's witness statement as well as six annexes attached thereto (containing a table and drawings made by the witness during his interview).⁷³ It also seeks authorization to introduce 33 photographs (used for identification purposes, as P-0639 identified individuals in seven photographs) and four videos shown to the witness during his interview (for location purposes), as well as one investigation note.⁷⁴ The Prosecution estimates it will need one hour (instead of the originally estimated five hours) to examine this witness.⁷⁵
40. The Defence does not oppose the submission of the written statement and its annexes.⁷⁶ It however opposes the introduction of the associated material which in its view cannot be considered testimony for the purposes of the Rule 68 of the Rules.⁷⁷
41. The Chamber notes that P-0639 is a crime base and overview witness who as resident of Timbuktu at the time of the charges and witnessed alleged crimes, in particular an alleged flogging which is a charged incident in this case. He also gave evidence about the alleged amputation of Dédéou Maiga.
42. The Chamber notes that the Defence does not oppose to the introduction of the witness statement and its annexes. As regards the Defence's objections to the associate material, the Chamber does not agree with the Defence's arguments that this cannot be introduced via Rule 68(3) of the Rules because P-0639 did not author some items or did not recognise individuals shown to him in photos. The Chamber considers that these objections refer more to the weight to be given to

⁷³ P-0639 Application, ICC-01/12-01/18-1166-Conf, paras 1, 14-30. The witness statement (MLI-OTP-0072-0290-R03) and the annexes are identified in Annex A, Section I, p. 2.

⁷⁴ P-0639 Application, ICC-01/12-01/18-1166-Conf, paras 12-13, 31. The associated material to be introduced via Rule 68(3) is identified in Annex A, Section II, p. 2-4.

⁷⁵ P-0639 Application, ICC-01/12-01/18-1166-Conf, paras 6, 7, 38.

⁷⁶ P-0639 Response, ICC-01/12-01/18-1199-Conf, para. 2.

⁷⁷ P-0639 Response, ICC-01/12-01/18-1199-Conf, paras 2, 4-6.

the associated material and P-0639's comments to them. The Chamber is of the view that these issues can be addressed by the Defence in its cross-examination, which remains unaffected. As such, the matters raised by the Defence do not prevent the submission of the said items at this stage. This is in line with the approach taken by the Chamber in its Directions on the conduct of proceedings, adopting a system that recognises submission of items of evidence 'without a prior ruling on relevance and/or admissibility' and considering 'relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused'.⁷⁸

43. Accordingly, the Chamber grants the Rule 68(3) Application in respect of P-0639. The Prosecution is authorised to complete the formalities under Rule 68(3) of the Rules and carry out the supplementary examination of this witness within the expected one hour.

P-0641

44. The Prosecution seeks to introduce P-0641's witness statement and its annexes (one document and two videos with their transcripts and translations).⁷⁹ It also seeks to introduce associated material, namely 18 videos and eight photographs mentioned in the witness statement.⁸⁰ The Prosecution estimates it will need one hour for his examination (instead of the originally estimated five hours).⁸¹
45. The Defence opposes the Rule 68(3) Application in respect of this witness.⁸² It submits that the witness statement: (a) concerns acts and conduct of the accused; (b) contains details specifically excluded from the scope of the charges in the confirmation of the charges; and (c) is extensively redacted (10 paragraphs).⁸³

⁷⁸ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 29

⁷⁹ P-0641 Application, ICC-01/12-01/18-1168-Conf, paras 1, 4, 13, 16. The witness statement (MLI-OTP-0072-0143-R04) and its annexes are identified in Annex A, Section I, p. 2.

⁸⁰ P-0641 Application, ICC-01/12-01/18-1168-Conf, paras 1, 4, 20-57. The associated material to be introduced via Rule 68(3) of the Rules is identified in Annex A, Section II, p. 3-23. The Prosecution does not seek to introduce the items identified in Annex A, Section III, p. 24.

⁸¹ P-0641 Application, ICC-01/12-01/18-1168-Conf, paras 6, 7, 66.

⁸² P-0641 and P-0524 Response, ICC-01/12-01/18-1203-Conf, para. 4.

⁸³ P-0641 and P-0524 Response, ICC-01/12-01/18-1203-Conf, paras 6-9.

46. The Chamber notes that P-0641 is a crime base, dual status witness, resident of Timbuktu at the time of the charges, who allegedly suffered and witnessed crimes (including charged incidents).
47. The Chamber observes, as noted by the Defence,⁸⁴ that in the confirmation of the charges, Pre-Trial Chamber I rejected to confirm incidents referred to in this witness's statement.⁸⁵ Accordingly, the Chamber considers it more appropriate to hear his evidence entirely *viva voce*. Moreover, and although the Chamber observes that time could be saved in the examination-in-chief, noting the Defence challenges this could eventually be negligible.
48. In light of the above, the Chamber rejects the Rule 68(3) Application in respect of P-0641. The Prosecution is therefore afforded the original estimated five hours to examine the witness. The Defence is similarly afforded five hours for its cross-examination of the witness.

P-0524

49. The Prosecution seeks to introduce the witness statement of P-0524, as well as associated material, namely a video, transcript and a short statement she signed.⁸⁶ The Prosecution estimates it will require 1.5 hours to examine the witness (instead of the originally estimated five hours).⁸⁷
50. The Defence opposes the Rule 68(3) Application in respect of P-0524.⁸⁸ It submits that P-0524 [REDACTED].⁸⁹ Referring to the Prosecution submissions, the Defence submits that P-0524's evidence [REDACTED].⁹⁰ The Defence also

⁸⁴ P-0641 and P-0524 Response, ICC-01/12-01/18-1203-Conf, footnote 22.

⁸⁵ Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf, avec une annexe confidentielle contenant la liste complète des charges confirmées à l'encontre de l'accusé, ICC-01/12-01/18-767-Conf-Anx, ICC-01/12-01/18-767-Conf-Corr, 1 May 2020, [REDACTED].

⁸⁶ P-0524 Application, ICC-01/12-01/18-1169-Conf, paras 1, 10-17. The witness statement (MLI-OTP-0071-0246-R04) and the associated material to be introduced pursuant to Rule 68(3) of the Rules are identified in Annex A, Sections I and II, p. 2. The Prosecution does not seek to introduce the material identified in Annex A, Section III, p. 2-3.

⁸⁷ P-0524 Application, ICC-01/12-01/18-1169-Conf, paras 5, 6, 21, 23.

⁸⁸ P-0641 and P-0524 Response, ICC-01/12-01/18-1203-Conf, para. 4.

⁸⁹ P-0641 and P-0524 Response, ICC-01/12-01/18-1203-Conf, para. 16.

⁹⁰ P-0641 and P-0524 Response, ICC-01/12-01/18-1203-Conf, paras 20-21.

particularly objects to the part of her written statement that refers to the [REDACTED], as it states that P-0524 is not in a position to validate the video in its entirety. The Defence also submits that this part of her statement is heavily redacted.⁹¹

51. The Chamber notes that P-0524 is an overview witness who in her work [REDACTED] alleged victims of sexual violence. The Chamber considers that given the [REDACTED] nature and contents of her statement, [REDACTED] it is more appropriate to hear her testimony entirely *viva voce*. Moreover, and although the Chamber observes that some time could be saved in the examination-in-chief, noting the Defence challenges, this could eventually be negligible, if the Defence needs to address the issues raised in their submissions.
52. In light of the above, the Chamber rejects the Rule 68(3) Application on in respect of P-0524. The Prosecution is therefore afforded the original estimated five hours to examine the witness. The Defence is similarly afforded five hours for its cross-examination of the witness.

⁹¹ P-0641 and P-0524 Response, ICC-01/12-01/18-1203-Conf, para. 24.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

GRANTS the Rule 68(3) Application in respect of P-0114, P-0622, P-0595, P-0587, P-0617, P-0081 and P-0639;

REJECTS the Rule 68(3) Application in respect of P-0431, P-0641 and P-0524; and

INSTRUCTS the Prosecution to file public redacted versions of filings ICC-01/12-01/18-1100-Conf, ICC-01/12-01/18-1106-Conf, ICC-01/12-01/18-1131-Conf, ICC-01/12-01/18-1136-Conf, ICC-01/12-01/18-1157-Conf, ICC-01/12-01/18-1166-Conf, ICC-01/12-01/18-1168-Conf and ICC-01/12-01/18-1169-Conf no later than 10 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 26 January 2021

At The Hague, The Netherlands