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TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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

With confidential Annex

Public redacted version of "Prosecution application under rule 68(2)(b) to introduce into evidence Witness P-0963's prior recorded testimony and associated material", 9 December 2020, ICC-01/12-01/18-1195-Conf

Source: Office of the Prosecutor

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

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Introduction

1. Pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”), the Prosecution requests the authorisation of Trial Chamber X (“Chamber”) to introduce into evidence Witness P-0963’s prior recorded testimony¹ and its associated material, namely, a mission letter addressed to him.²

2. As explained in the recent Prosecution rule 68(2)(b) filing regarding P-0656 prior recorded testimony,³ Witness P-0963 is [REDACTED] [REDACTED] and collected documents which P-0010 had found during his visit to Timbuktu in February 2013.⁴ In his declaration, P-0963 states that after the interview with P-0010’s he placed those documents and P-0010’s witness statement into four evidence envelopes, which he sealed and added his signature and the date of collection.⁵ Upon return to the ICC headquarters on 12 April 2013, P-0963 registered the four evidence envelopes containing evidence collected from P-0010 with the Information and Evidence Unit (“IEU”) of the Office.⁶ When P-0188 was asked to process the material collected by P-0010 in Timbuktu and contained in two of the evidence envelopes registered by P-0963, she noticed that the seals had been broken.⁷ P-0656, [REDACTED] states that it is likely that the seals were broken by IEU staff.⁸

1 [REDACTED]
[REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

[REDACTED]

7 [REDACTED]

8 [REDACTED]

3. In this context, P-0963's declaration clarifies that at the time of their registration with the IEU the four evidence envelopes were closed and sealed, and that he had not opened or accessed those envelopes thereafter.⁹
4. P-0963's prior recorded testimony and associated material are thus relevant to the chain of custody related to P-0010's material.
5. P-0963's prior recorded testimony is probative and goes to proof of matters other than the acts and conduct of the Accused as required by rule 68(2)(b) of the Rules. In addition, his evidence relates to issues that are not materially in dispute. It is of a cumulative or corroborative nature, in that the chain of custody issues related to P-0010's material are also addressed by other witnesses, i.e. P-0010¹⁰, who has already testified, and the prior recorded testimony of P-0188¹¹ and P-0656.¹²
6. All parties will benefit from an expedited presentation of the Prosecution's case. Admitting the prior recorded testimony of this witness under rule 68(2)(b) of the Rules best serves the interest of justice and the determination of the truth.
7. The cumulative and limited nature of the evidence of this witness makes it unnecessary for the witness to appear for cross-examination. Granting the Prosecution's request would not cause any unfair prejudice to the Accused, who remains in a position to challenge the witness's evidence through means other than the witness's cross-examination.
8. The Prosecution seeks the introduction of this material on a conditional basis, subject to the subsequent transmission of Witness P-0963's certified declaration, pursuant to rule 68(2)(b)(ii) and (iii) of the Rules.

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Confidentiality

9. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this application and its accompanying annex (“Annex”) as confidential because they contain confidential information including information regarding a Prosecution witness. The Prosecution shall file a public redacted version in due course.

Applicable Law

10. 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.¹³

11. 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.¹⁴

12. The decision of whether to introduce a prior recorded testimony pursuant to this provision is a discretionary one, 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.¹⁵ When such situations are identified and pursuant to the criteria set out in rule 68(2)(b) of the Rules, prior recorded testimony

¹³ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 80.

¹⁴ ICC-01/12-01/18-1111-Red, Decision on the introduction of P-0598’s evidence pursuant to Rule 68(2)(b) of the Rules, para. 7.

¹⁵ ICC-01/12-01/18-1111-Red, Decision on the introduction of P-0598’s evidence pursuant to Rule 68(2)(b) of the Rules, para. 7.

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.¹⁶

Prosecution's Submissions

I. The prior recorded testimony of Witness P-0963 should be introduced into evidence pursuant to rule 68(2)(b) of the Rules

13. Pursuant to rule 68(2)(b) of the Rules, the Prosecution seeks to introduce into evidence Witness P-0963's declaration¹⁷ and associated material listed in Section II of the Annex.

14. The declaration provided by P-0963 constitutes "prior recorded testimony" within the meaning of rule 68 of the Rules. While it is not a statement taken pursuant to rule 111 or 112 of the Rules or an expert report, it was produced by P-0963 in response to a mission letter sent by the Prosecution, on the understanding that he was providing information which may be relied upon in the context of legal proceedings.¹⁸ The Prosecution wishes to adduce P-0963's prior recorded testimony for the truth of its contents.¹⁹ Furthermore, should this Request be granted by the Chamber, the procedural safeguards of rule 68(2)(b)(ii) and (iii) would be followed.

15. P-0963's prior recorded testimony relates to issues that are not materially in dispute in that it does not relate to "matters which are soundly and conceivably disputed between the parties, and are crucial, or of at least sufficient significance for

¹⁶ ICC-01/12-01/18-1111-Red, Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules, para. 7, citing *inter alia* Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para.34(i) and 34(ii).

¹⁷ [REDACTED]

¹⁸ See, e.g., ICC-02/04-01/15-596-Red, para. 9; ICC-01/05-01/13-1478-Red-Corr, para. 31-32. See also ICC-01/05-01/13-2275-Red, para. 303-308 in which the Appeals Chamber considered that an investigation note prepared by two investigators was of testimonial nature and that the Trial Chamber therefore erred in relying on this document when it had not been introduced pursuant to rule 68 of the Rules.

¹⁹ See, e.g., ICC-01/05-01/13-1478-Red-Corr, para. 33.

the Chamber's eventual determination of the charges against the accused in its judgment under Article 74 of the Statute".²⁰

16. P-0963's prior recorded testimony is of a cumulative or corroborative nature because the chain of custody related to P-0010's material is also addressed by other witnesses, including P-0010 himself²¹ who has already testified *viva voce* before the Chamber. It is also addressed in the prior recorded testimony of P-0188²² and P-0656.²³ Among P-0010's material, those deemed relevant to this case have already been submitted into evidence through P-0010,²⁴ and recognised by the Chamber as formally submitted.²⁵

17. P-0963's evidence does not in any way relate to the acts and conduct of the Accused.

18. The prior recorded testimony of Witness P-0963 bears sufficient indicia of reliability because it is truthful, authentic, and consistent. There is no indication of a motive for the witness to fabricate or distort his account. The declaration of Witness P-0963 was given voluntarily and was signed by the witness.

19. In addition, Witness P-0963 is well-placed to provide evidence on the issue of the chain of custody related to P-0010's material because he collected this material at the time of P-0010's interview in April 2013.

20. Introducing into evidence the prior recorded testimony of Witness P-0963 and associated material under rule 68(2)(b) of the Rules would advance the interests of justice and contribute to a fair and expeditious trial by enabling the presentation of

²⁰ ICC-02/04-01/15-596-Red, para. 15.

²¹ ICC-01/12-01/18-T-020-Red-ENG, p. 17, l. 7 – p. 19, l. 1.

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evidence in a more concise and streamlined manner without causing undue prejudice to the fair trial rights of the Accused. This aligns with the stated goal behind the rule's adoption which was to "reduce the length of ICC proceedings and streamline evidence presentation, while also having due regard to the principles of fairness and the rights of the accused."²⁶

21. As required under rule 68(1) of the Rules, the introduction into evidence pursuant to rule 68(2)(b) of Witness P-0963's prior recorded testimony and associated material "would not be prejudicial to or inconsistent with the rights of the Accused". The Defence's inability to cross-examine Witness P-0963 does not deprive the Accused of his right and opportunity to challenge the evidence. The Defence already had the opportunity to cross-examine P-0010 regarding the issues related to the chain of custody of the relevant material. It may also lead contradictory evidence during the Defence case, or—to the extent that discrepancies exist with any other evidence—address the prior testimony during closing submissions and advance arguments on the weight to be attributed to the prior recorded testimony of P-0963.

II. Brief description of the associated material

22. Section II of the Annex lists material associated with the prior recorded testimony of P-0963, which the Prosecution seeks to introduce into evidence through P-0963 under rule 68(2)(b) of the Rules, comprising of:

- (i) the mission letter addressed to P-0963,²⁷ in response to which P-0963's declaration was prepared. The mission letter also includes as annex [REDACTED]

[REDACTED]

[REDACTED]²⁸ and

²⁶ [ICC-ASP/12/37/Add.1](#), Assembly of State Parties, Study Group on Governance, Working Group on Lessons Learnt: Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), 31 October 2013, para. 11.

²⁷ [REDACTED]

²⁸ [REDACTED]

- (ii) three sealed envelopes containing the documents collected by P-0963 from P-0010 (other than P-0010's witness statement).²⁹

23. These items are referred to in P-0963's declaration, which would not be understandable without them. They are clearly associated with P-0963's prior recorded testimony.³⁰

III. Provision of certified declaration for Witness P-0963

24. The Prosecution requests that the Chamber authorise the introduction into evidence under rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-0963 and associated material on a conditional basis pending the submission of the certified declaration of this witness.

Conclusion

25. For the foregoing reasons, the Prosecution requests that the Chamber conditionally authorise the introduction into evidence of Witness P-0963's prior recorded testimony and associated material, pending submission of the certified declaration.



Fatou Bensouda, Prosecutor

Dated this 9 December 2020

At The Hague, The Netherlands

²⁹ [REDACTED]

³⁰ See, e.g., ICC-02/04-01/15-596-Red, para. 10.