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No.: **ICC-01/12-01/18**
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5 March 2021

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 A

**Public redacted version of "Prosecution application under rule 68(2)(b) to
introduce into evidence Witness MLI-OTP-P-0205 and Witness MLI-OTP-P-0206's
prior recorded testimony and associated material",
16 December 2020, ICC-01/12-01/18-1208-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: (i) Witness P-0205 and Witness P-0206’s joint report on the ATM of the *Banque Malienne de Solidarité* (“BMS”); and (ii) associated material comprised of letters, electronic parts of the ATM and financial documents originating from the ATM, which P-0205 and P-0206 relied upon in their report.
2. Witness P-0205 and Witness P-0206 are experts on forensic data analysis. They co-authored a report on the analysis of an ATM in Timbuktu that will be of assistance in identifying the date of entry of armed groups into the city of Timbuktu at the relevant time of the charges. They have both been authorised by the Chamber to testify as experts.¹
3. P-0205 and P-0206’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). In addition, it (i) relates to issues that are not materially in dispute; (ii) is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (iii) relates to background information; (vi) is such that the interests of justice are best served by its introduction in that way; and (v) has sufficient indicia of reliability.
4. All parties will benefit from an expedited presentation of the Prosecution’s case. Admitting the prior recorded testimony of these witnesses under rule 68(2)(b) best serves the interest of justice and the determination of the truth.
5. The limited purpose of the evidence of these witnesses makes it unnecessary for them to appear for cross-examination. Granting the Prosecution’s request would not

¹ [REDACTED]

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.

6. The Prosecution seeks the introduction of this material on a conditional basis, subject to the subsequent transmission of Witness P-0205 and Witness P-0206's certified declaration, pursuant to rule 68(2)(b)(ii) and (iii).

Confidentiality

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

Applicable Law

8. 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.²

9. 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.

10. 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

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

inconsistent with the rights of the accused.³ 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.⁴

11. 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.⁵

Prosecution's Submissions

I. The prior recorded testimony of Witness P-0205 and Witness P-0206 should be introduced into evidence pursuant to rule 68(2)(b)

12. Pursuant to rule 68(2)(b) of the Rules, the Prosecution seeks to introduce into evidence: (i) Witness P-0205 and Witness P-0206's joint report and (ii) associated materials which form the basis of their expert report. The prior recorded testimony of these witnesses should be introduced into evidence for the reasons set out below.

a. The material of Witness P-0205 and Witness P-0206 constitutes "prior recorded testimony" in the sense of Rule 68

13. The expert report of Witness P-0205 and Witness P-0206 constitutes "prior recorded testimony" in the sense of rule 68(2)(b).

³ 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.

⁴ 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.

⁵ 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).

14. The term “previously recorded testimony” includes statements and transcripts of interviews taken pursuant to rules 111 and 112 of the Rules, respectively, together with the associated exhibits.⁶ Trial Chambers VI and IX relied on rule 68(3) of the Rules to receive evidence from expert witnesses in the *Ntaganda* and *Ongwen* cases,⁷ even absent a request from the calling party.⁸ The Prosecution nonetheless notes that this is primarily a *mutatis mutandis* approach, since an expert report is different from a statement obtained by the Prosecution under rules 111 or 112 of the Rules.

15. The present Chamber accepted the applicability of rule 68(3) of the Rules to expert reports, allowing the evidence of experts⁹ to be introduced under this provision subject to compliance with the procedural prerequisites thereof.¹⁰

16. It has also previously authorised the introduction of material related to an expert witness’s report pursuant to rule 68(2)(b).¹¹

17. Furthermore, both Witness P-0205 and Witness P-0206 have been considered as experts in this case¹² and can be considered as persons “who, by virtue of some specialised knowledge, skill or training can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute.”¹³ The Defence did not

⁶ See ICC-01/05-01/08-1386, OA5 OA6, paras.79-81, confirming that written witness statements can be introduced as “previously recorded testimony”. See also ICC-01/09-01/11-1938-Red-Corr, paras.30-33, analysing the term “previously recorded testimony” in light of the Rules’ *travaux préparatoires*, the Court’s prior case-law and the need to ensure language consistency within the rule in interpreting it; ICC-01/05-01/08-2012-Red, para.136; ICC-01/05-01/08-886, para.6; ICC-01/04-01/06-1603, para.18; ICC-01/04-01/07-2289-Corr-Red; ICC-01/04-01/07-2362.

⁷ ICC-01/04-02/06-845, ICC-01/04-02/06-T-31-CONF-ENG, p.75, ll.7-16.

⁸ ICC-01/04-02/06-T-87-ENG CT, pp. 3-4, ICC-01/04-02/06-T-113-Red-ENG WT, p.27, l. 17 - p.28, ln. 6.

⁹ P-0152, P-0653, P-0655, P-0104, P-0151, P-0620, P-0621, P-0657, P-0102, P-0064, P-0635 and P-0075.

¹⁰ [REDACTED]

¹¹ 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. 11. See also 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. 79(i) and (ii). See further para. 63(i) and (ii) (in the context of rule 68(3)).

¹² [REDACTED]

¹³ Trial Chamber VI, Prosecutor v. Bosco Ntaganda, Decision on Defence preliminary challenges to Prosecution’s expert witnesses, 9 February 2016, ICC-01/04-02-06-1159, para. 7 (‘Ntaganda Expert Decision’); Trial Chamber V-A, Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupéu, 7 August 2013, ICC-01/09-01/11-844, para. 11; Referring to ICTY, Prosecutor v. Vujadin Popović et al., Decision on Joint Defence Interlocutory Appeal Concerning Status of Richard Butler as an Expert Witness, 30 January 2008, IT-05-88-AR73.2, para. 27 (‘Popović Expert Appeal’); ICTY,

oppose the submission of the proposed expert evidence; nor did it oppose the experts qualifications.¹⁴

b. The prior recorded testimony of Witness P-0205 and Witness P-0206 goes to proof of matters other than the acts and conduct of the Accused

18. The prior recorded testimony of Witness P-0205 and Witness P-0206 does not relate to the acts and conduct of the Accused as defined in the case-law of this and other courts.

19. P-0205 has been working [REDACTED]
[REDACTED]¹⁵ [REDACTED]
[REDACTED]¹⁶ [REDACTED]
[REDACTED]
[REDACTED]¹⁷
[REDACTED]¹⁸ [REDACTED]
[REDACTED]
[REDACTED]¹⁹

20. P-0206 has been working [REDACTED]
[REDACTED]²⁰ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²¹ [REDACTED]

Prosecutor v. Ratko Mladić, Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports, 19 October 2012, IT-09-92-T, para. 8 (‘Mladić Expert Decision’).

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[REDACTED]

[REDACTED].²²

21. Both Witness P-0205 and Witness P-0206 received a mission letter from the OTP [REDACTED] and co-produced a report [REDACTED] providing an analysis of the computer of the ATM of the *Banque Malienne de Solidarite* (BMS) in Timbuktu.²³ The ATM had been vandalised when armed groups entered Timbuktu in 2012. This report aimed at having a precise idea of the date of the fall of the city in 2012. The expert report contains findings concerning the computer of the ATM found in the BMS building in Timbuktu, including that the last withdrawal from that ATM was on 31 March 2012.

22. The Witnesses prior recorded testimony is therefore relevant to the existence of the fall of Timbuktu and the armed conflict of a non-international character in Mali in 2012.

c. The prior recorded testimony has sufficient indicia of reliability

23. The prior recorded testimony of Witness P-0205 and Witness P-0206 bears sufficient indicia of reliability because it is truthful, authentic, consistent and was provided voluntarily. Both witnesses are well-placed to provide evidence on computer analysis because they are both experts in this field.²⁴ It contains detailed information in relation to the steps taken to analyse the materials emanating from the ATM of the BMS in Timbuktu. In addition, the expert report of Witness P-0205 and Witness P-0206 was given voluntarily and drafted by the witnesses; and there is no indication of a motive for the witnesses to fabricate or distort their account. The following factors also support the reliability of the evidence.

²² P-0206's CV, [REDACTED]

²³ Report by P-0205 and P-0206, [REDACTED]

²⁴ See P-0205 and P-0206's CV at [REDACTED]

d. The prior recorded testimony is relevant and has *prima facie* probative value

24. As explained in more detail above, the prior recorded testimony of Witness P-0205 and Witness P-0206 is relevant regarding the date of the fall of Timbuktu and the existence of an armed conflict of a non-international character in Mali in 2012, in particular in the Timbuktu region in early 2012.

25. As shown above, the prior recorded testimony has *prima facie* probative value because it bears sufficient indicia of reliability. Further, as previously mentioned, the proposed expert report and the experts' qualifications are not contested by the Defense.

e. Additional rule 68(2)(b)(i) factors militate in favour of introducing Witness P-0205 and Witness P-0206's prior recorded testimony under rule 68(2)(b)

26. One of the factors that the Chamber must consider in determining whether the introduction of prior recorded testimony that goes to proof of a matter other than the acts and conduct of the accused may be allowed is whether (i) the prior recorded testimony relates to background information, and (ii) is such that the interests of justice are best served by its introduction.

27. In the case of Witness P-0205 and Witness P-0206, both criteria are met.

i. The prior recorded testimony relates to background information

28. As mentioned above, the report sheds light on the date of the fall of Timbuktu and the existence of an armed conflict of a non-international character in Mali in 2012, in particular in the Timbuktu region, as attested by the computer record of the ATM of the BMS in Timbuktu: the expert findings show that the ATM appeared to have stopped functioning or being used on or about the time at which armed groups entered the city of Timbuktu.

ii. The interests of justice are best served by the admission of the prior recorded testimony

29. By its terms, rule 68(2)(b) does not unfairly prejudice the Defence by permitting the introduction of evidence that will not be subject to cross-examination when this evidence is unrelated to the acts and conduct of an accused. That both Parties can avail themselves of this provision further underscores its inherent neutrality and that it advances the interests of justice.

30. Introducing into evidence the prior recorded testimony of Witness P-0205 and Witness P-0206 under rule 68(2)(b) would advance the interests of justice and contribute to a fair and expeditious trial by enabling the presentation of 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."²⁵

f. Introduction into evidence of the prior recorded testimony causes no undue prejudice to the Accused

31. As required under rule 68(1), the introduction into evidence pursuant to rule 68(2)(b) of Witness P-0205 and Witness P-0206's prior recorded testimony "would not be prejudicial to or inconsistent with the rights of the Accused". The inability to cross-examine Witness P-0205 and Witness P-0206 on their evidence, and the admission of the evidence at this stage of the proceedings, does not deprive the Accused of his right and opportunity to challenge the evidence. The Defence retains the possibility to cross-examine other *viva voce* witnesses on the basis of information contained in the prior

²⁵ [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.

recorded testimony of Witness P-0205 and Witness P-0206, lead contradictory evidence during the Defence case, or—to the extent that discrepancies would 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.

II. Brief description of the associated material

32. Section II of Annex A lists the mission letter related to the expert report, oath letters, the analysed forensic data, including from the computer and keyboard of the ATM,²⁶ as well as financial documents originating from the BMS ATM associated with the prior recorded testimony²⁷ which the Prosecution also seeks to introduce into evidence under rule 68(2)(b). These items form the basis of Witness P-0205 and Witness P-0206's joint expert report and are relevant to the case against the Accused.

33. Trial Chamber VI held in *Ntaganda* that “exhibits associated with a previously recorded testimony are admissible if the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced.”²⁸

34. The Chamber has also expressed the view that “it is the [prior recorded] testimony as a whole which will be introduced pursuant to Rule 68 of the Rules”,²⁹ and that, as the statement in its entirety will be before the Chamber, it follows that material used with the witness must be introduced under the applicable rule.³⁰

²⁶ Respectively [REDACTED] and [REDACTED]

²⁷ All the items related to the ATM have been collected on site by P-0055 who was at the time the head of the Forensic Science Section within the Office of the Prosecutor of the International Criminal Court.

²⁸ ICC-01/04-02/06-T-105-Red-ENG ET, *Prosecutor v. Ntaganda*, Trial Hearing of 20 June 2016, p.93, ln.24 - p.94, ln.7 (in the context of rule 68(3)). See also *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1205, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, para. 7 (in the context of rule 68(2)(c)); ICC-01/04-02/06-1029, para. 23, 35 (in the context of rule 68(2)(c)); *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1938-Corr-Red2, Decision on Prosecution Request for Admission of Prior Recorded (in the context of rule 68 in general), para. 33.

²⁹ ICC-01/12-01/18-987-Red, Decision on Prosecution's requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, para. 13. See also para. 15.

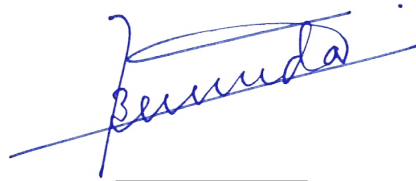
³⁰ See ICC-01/12-01/18-987-Red, Decision on Prosecution's requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, para. 17 (in the context of rule 68(3)).

III. Provision of certified declaration for Witness P-0205 and Witness P-0206

35. The Prosecution requests that the Chamber authorise the introduction into evidence under rule 68(2)(b) of the prior recorded testimony of Witness P-0205 and Witness P-0206 and associated material on a conditional basis pending the submission of the certified declaration of these witnesses.

Conclusion

36. For the foregoing reasons, the Prosecution requests that the Chamber conditionally authorise the introduction into evidence of Witness P-0205 and Witness P-0206's prior recorded testimony and associated material, pending submission of the certified declaration.

A handwritten signature in blue ink, appearing to read 'Bensouda', is written over a horizontal line.

Fatou Bensouda, Prosecutor

Dated this 16 December 2020

At The Hague, The Netherlands