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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(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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**Victims Participation and Reparations
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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 and Rules 68(2)(b) of the Rules of Procedure and Evidence ('Rules'), issues the following decision.

I. Procedural history

1. On 6 May 2020, the Chamber issued its 'Decision on the conduct of proceedings',¹ which relevantly instructed the Office of the Prosecutor (the 'Prosecution') to file any applications pursuant to Rule 68(2) of the Rules no later than by the end of the year 2020.²
2. In December 2020, the Prosecution filed a number of applications pursuant to Rule 68(2)(b) of the Rules, seeking to introduce into evidence the prior recorded testimony and associated material of *inter alia* P-0656 (the 'P-0656 Request'),³ P-0963 (the 'P-0963 Request'),⁴ P-0188 (the 'P-0188 Request'),⁵ as well as P-0205 and P-0206 (the 'P-0205 and P-0206 Request').⁶
3. On 12 January 2021, granting a request from the Defence which was unopposed,⁷ the Single Judge set the timeframe for responses to the pending Rule 68(2) applications.⁸

¹ ICC-01/12-01/18-789, with one public annex and two confidential annexes.

² Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 79-80.

³ Prosecution application under rule 68(2)(b) to introduce into evidence Witness P-0656's prior recorded testimony and associated material, 7 December 2020, ICC-01/12-01/18-1193-Conf (with confidential Annex A). The material sought to be introduced is listed in sections I and II of ICC-01/12-01/18-1193-Conf-AnxA (p. 2).

⁴ 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 (with confidential Annex A). The material sought to be introduced is listed in ICC-01/12-01/18-1195-Conf-AnxA (pp. 2-3).

⁵ Corrigendum to the "Prosecution application under rule 68(2)(b) to introduce into evidence Witness P-0188's prior recorded testimony and associated material" (ICC-01/12-01/18-1205-Conf), 18 December 2020, ICC-01/12-01/18-1205-Conf-Corr (with a confidential annex containing an explanatory note). The material sought to be admitted is listed in sections I and II of ICC-01/12-01/18-1205-Conf-AnxA (pp. 2-22).

⁶ 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, notified on 17 December 2020, ICC-01/12-01/18-1208-Conf (with confidential Annex A). The material sought to be introduced is listed in sections I and II of ICC-01/12-01/18-1208-Conf-AnxA (pp. 2-207).

⁷ Defence request under Regulation 35 for extension of time to file Rule 68 Responses, 8 January 2021, ICC-01/12-01/18-1243-Conf; and email from the Prosecution on 11 January 2021 at 13:18.

⁸ Email from the Single Judge to the parties and participants at 10:38.

4. In the following weeks, the Defence filed three responses, in which it provides its observations on the P-0963 Request, the P-0656 Request, the P-0188 Request, as well as the P-0205 and P-0206 Request.⁹
5. The parties' submissions are discussed below, where warranted, as part of the Chamber's analysis.

II. Analysis

6. 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.
7. The Chamber refers to its prior decision setting out the relevant legal framework¹⁰ and stresses that the decision of whether to introduce a prior recorded testimony pursuant to Rule 68(2)(b) of the Rules is a discretionary one, and the entire purpose of this provision is to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.

A. P-0188 Request

8. The Prosecution submits that P-0188's prior recorded testimony relates to the processing, namely scanning and photographing, of evidence provided by P-0007 and P-0010.¹¹ The Prosecution argues that P-0188's evidence does not go to the

⁹ Defence response to the Prosecution's applications under rule 68(2)(b) to introduce into evidence the prior recorded testimony and associated material of MLI-OTP-P-0963, MLI-OTP-P-0656 and MLI-OTP-P-0188, 18 January 2021, notified on 19 January 2021, ICC-01/12-01/18-1253-Conf (the 'Second Response'); and Defence response to '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', 1 February 2021, ICC-01/12-01/18-1272-Conf (the 'Third Response').

¹⁰ Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules, 16 October 2020, ICC-01/12-01/18-1111-Conf (the 'First Rule 68(2)(b) Decision'), referring *inter alia* to 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 (the 'Ongwen Rule 68(2)(b) Decision').

¹¹ P-0188 Request, ICC-01/12-01/18-1205-Conf, paras 2-5.

acts and conducts of Mr Al Hassan, relates to issues not materially in dispute, and is corroborative and cumulative of the oral testimony of P-0010 and P-0007, as well as the evidence of P-0656 and P-0963 (discussed below).¹²

9. The Defence does not object to the introduction of P-0188's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules.¹³
10. Taking into consideration the relevant factors, and in the absence of any prejudice to Mr Al Hassan's rights, the Chamber authorises the Prosecution to introduce into evidence P-0188's prior recorded testimony and associated material pursuant to Rule 68(2)(b) of the Rules, subject to the receipt of the relevant declaration pursuant to the procedure previously articulated.¹⁴

B. P-0963 Request

11. The Prosecution submits that P-0963's prior recorded testimony is relevant to the chain of custody of material related to P-0010.¹⁵ The Prosecution states that P-0963's evidence does not go to the acts and conduct of the accused nor to issues materially in dispute, and is corroborative and cumulative of other evidence.¹⁶ It submits that introduction via Rule 68(2)(b) of the Rules is in the interests of justice as it would save time and not cause undue prejudice to the accused.¹⁷
12. The Defence does not object to the introduction of P-0963's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules.¹⁸
13. In light of the above, and particularly noting the limited nature and scope of P-0963's evidence, which is corroborative and cumulative of the oral testimony of P-0010, the Chamber authorises the Prosecution to introduce the prior recorded testimony of P-0963 and associated material pursuant to Rule 68(2)(b) of the Rules, subject to the receipt of the relevant certified declaration.

¹² P-0188 Request, ICC-01/12-01/18-1205-Conf, para. 6.

¹³ Second Response, ICC-01/12-01/18-1253-Conf, para. 7.

¹⁴ See First Rule 68(2)(b) Decision, ICC-01/12-01/18-1111-Conf, paras 16-19.

¹⁵ P-0963 Request, ICC-01/12-01/18-1195-Conf, para. 4.

¹⁶ P-0963 Request, ICC-01/12-01/18-1195-Conf, paras 5, 15-17.

¹⁷ P-0963 Request, ICC-01/12-01/18-1195-Conf, paras 20-21.

¹⁸ Second Response, ICC-01/12-01/18-1253-Conf, para. 7.

C. P-0656 Request

14. The Prosecution submits that the prior recorded testimony of P-0656 [REDACTED] Prosecution's Information and Evidence Unit (the 'IEU'), explains how the handling of evidence was operated within the IEU and concludes that it is likely that the seals of the envelopes containing documents provided by P-0010 – which were registered by P-0963 and processed by P-0188 and P-0102 – were broken by the IEU's staff.¹⁹
15. Recalling that the chain of custody related to the material gathered by P-0010 was already addressed by P-0010 himself before the Chamber, as well as in the prior recorded testimony of P-0188 and P-0963 (discussed above), the Prosecution submits that the prior recorded testimony of P-0656 is of a cumulative or corroborative nature.²⁰ Relatedly, the Prosecution argues that authorising the requested submission under Rule 68(2)(b) does not deprive the accused of his right and opportunity to challenge P-0656's evidence as the Defence already had the opportunity to cross-examine P-0010 regarding chain of custody issues for the relevant material and the Defence may in any event also lead contradictory evidence during the Defence case.²¹
16. Further, and relying on the standard retained by Trial Chamber IX in the *Ongwen* case, the Prosecution submits that P-0656's testimony relates to issues that are not materially in dispute because 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 the Chamber's eventual determination of the charges'.²²
17. The Defence objects to the introduction of P-0656's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules. The Defence submits that P-0656, [REDACTED], ought to be in a position to explain what happened to the evidence in the Prosecution's custody as well as why a full investigation has not been

¹⁹ P-0656 Request, ICC-01/12-01/18-1193-Conf, paras 21-22.

²⁰ P-0656 Request, ICC-01/12-01/18-1193-Conf, paras 23, 31.

²¹ Second Response, ICC-01/12-01/18-1193-Conf, para. 34.

²² P-0656 Request, ICC-01/12-01/18-1193-Conf, para. 30, referring to *Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 15.

carried out in relation to the breaking of the envelopes' seals.²³ The Defence submits that without cross-examining P-0656 on this matter, it is deprived of challenging a chain of custody violation which denies the accused his right to effectively challenge underlying evidence.²⁴

18. The Chamber first observes that P-0010 could only comment on the conditions of the gathering of the documents from the time of their collection until the moment he handed them to the Prosecution. He was therefore not in a position to answer Defence's queries about the breaking of the seal which allegedly happened while the envelopes were in the custody of the IEU. Accordingly, and contrary to the Prosecution submission, the Chamber is of the view that P-0656's prior recorded testimony is not cumulative with that of a *viva voce* witness.
19. The Chamber however recalls that there is a procedure in place enabling the Defence to seek to question Prosecution witnesses as part of its investigation,²⁵ and that the introduction of a witness's prior recorded testimony under Rule 68(2)(b) of the Rules does not, in and of itself, prevent that a supplementary statement is obtained from the witness. The Chamber notes that, should it wish to do so, and particularly noting that the witness [REDACTED], the Defence can seek to obtain further clarifications from him outside the framework of a cross-examination.
20. Finally, and having particular regard to the nature, scope, and content of his prior recorded testimony, the Chamber considers that reliance on Rule 68(2)(b) for P-0656 is in the interest of justice as it would save time without being prejudicial to or inconsistent with the rights of Mr Al Hassan.
21. In light of the above, the Chamber finds it unnecessary for P-0656 to appear for cross-examination and, having considered the relevant factors, it thus grants the P-0656 Request and allows the introduction into evidence of the witness's prior

²³ Second Response, ICC-01/12-01/18-1253-Conf, para. 8.

²⁴ Second Response, ICC-01/12-01/18-1253-Conf, para. 8.

²⁵ Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-01/12-01/18-674-Anx2.

recorded testimony and associated material, subject to the receipt of the required certified declaration.

D. P-0205 and P-0206 Request

22. The Prosecution seeks to introduce into evidence the joint report of experts P-0205 and P-0206 (the ‘Experts’), as well as the associated material. Arguing that their expertise will help establish the date of entry of the armed groups in Timbuktu by way of an analysis of the date of destruction of a cash dispenser at the BMS, the Prosecution submits that the prior recorded testimony of the Experts relates to background information and goes to proof of matters other than the acts and conduct of Mr Al Hassan.²⁶ The Prosecution further submits that the material sought to be introduced has sufficient indicia of reliability²⁷ and that granting the P-0205 and P-0206 Request will expedite the presentation of its case.²⁸
23. The Defence opposes the request. In its view, the Experts’ evidence demonstrates, at best, that the last cash withdrawal at one specific ATM was registered as taking place on 31 March 2012 and that there are a wide range of possible reasons why the ATM might have ceased to work. The Defence submits that the material put forward by the Prosecution does not establish its allegation that ‘the ATM had been vandalised when armed groups entered Timbuktu’.²⁹ The Defence therefore contends that the prior recorded testimony in question is not relevant to the charges and that the Prosecution’s P-0205 and P-0206 Request should be dismissed on that basis.
24. In the alternative, the Defence argues that the underlying evidence has no probative value. In this regard, the Defence submits that the Expert’s prior recorded testimony is simply incapable of significantly assisting the Chamber in reaching a conclusion on ‘the existence of the fall of Timbuktu and the armed conflict of a non-international character in Mali’, as argued by the Prosecution.³⁰

²⁶ P-0205 and P-0206 Request, ICC-01/12-01/18-1208-Conf, paras 1-2, 12, 18-22, 28.

²⁷ P-0205 and P-0206 Request, ICC-01/12-01/18-1208-Conf, paras 23, 25.

²⁸ P-0205 and P-0206 Request, ICC-01/12-01/18-1208-Conf, paras 4, 30.

²⁹ Third Response, ICC-01/12-01/18-1272-Conf, paras 2-6, referring notably to the Prosecution’s Witnesses Summaries, ICC-01/12-01/18-740-Conf-AnxB, p. 687, 689.

³⁰ Third Request, ICC-01/12-01/18-1272-Conf, para. 7.

In support, the Defence refers back to its abovementioned argument as to the relevance of the material tendered.

25. At the outset, the Chamber recalls that it previously decided that P-0205 and P-0206 may be called by the Prosecution as experts and that, at the time, the Defence did not oppose their proposed expert evidence (including the submission of their report).³¹
26. The Chamber is satisfied that the prior recorded testimony of the Experts does not relate to Mr Al Hassan's acts and conduct within the meaning of Rule 68(2)(b) of the Rules. The Chamber is also of the view that the issue raised by the Defence in relation to the relevance and probative value of the material sought to be introduced by way of the P-0205 and P-0206 Request does not render the joint report and associated material unsuitable for admission under Rule 68(2)(b).³² In this regard, and in line with the approach retained with respect to the submission of evidence, the Chamber recalls that full consideration of the standard evidentiary criteria – in particular relevance and probative value – is deferred to its eventual deliberation for its judgment.³³ The Chamber further notes that the relevant factors listed in Rule 68(2)(b)(i) of the Rules are not otherwise contested by the Defence.
27. Accordingly, having considered the relevant factors, and in the absence of any prejudice to Mr Al Hassan's rights, the Chamber authorises the Prosecution to introduce P-0205 and P-0206's joint report as well as the associated material pursuant to Rule 68(2)(b) of the Rules, subject to the receipt of the required certified declaration.

³¹ Decision on Prosecution's proposed experts witnesses, 5 August 2020, ICC-01/12-01/18-989-Red, para. 21. *See also*, Defence response to the Prosecution expert witness requests, 22 June 2020, notified on 23 June 2020, ICC-01/12-01/18-895-Conf, paras 2, 4.

³² *See Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, paras 17-19.

³³ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, paras 34(i) and (ii).

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS all abovementioned Prosecution requests under Rule 68(2)(b) of the Rules;

AUTHORISES, subject to the receipt of certified declarations, the introduction into evidence of the prior recorded testimony of P-0963, P-0188, P-0656, as well as P-0205 and P-0206, together with the relevant associated material referred to in footnotes 3 to 6 above;

ORDERS the Registry, upon filing of the above witnesses' certified declarations, to reflect in the eCourt metadata the introduction of the relevant material under Rule 68(2)(b); and

ORDERS the Prosecution to file public redacted version of the P-0963 Request, the P-0188 Request, the P-0656 Request, as well as the P-0205 and P-0206 Request, no later than two weeks 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 Tuesday, 23 February 2021

At The Hague, The Netherlands