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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 A

Public redacted version of “Prosecution application under rule 68(2)(b) to introduce into evidence MLI-OTP-P-0172’s report and associated material”, 16 December 2020, ICC-01/12-01/18-1210-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 Trial Chamber X’s (“Chamber”) authorisation to introduce into evidence Witness P-0172’s (“P-0172”) report¹ and associated material, as specified in Annex A to the present application, in lieu of his *viva voce* testimony in this case.

2. P-0172 is [REDACTED]. He enhanced the audio track of video [REDACTED] and produced a report on this forensic activity.²

3. The technical nature and content of P-0172’s evidence obviates the need for his *viva voce* testimony. Introducing this evidence under rule 68(2)(b) of the Rules will expedite the presentation of the Prosecution case, thereby benefiting both parties and serving the interests of justice.

4. As P-0172’s report is solely of a technical and forensic nature limited to describing the audio enhancements he applied to a video, it does not concern the acts and conduct of the accused.

5. The material associated with P-0172’s report which the Prosecution also seeks to introduce into evidence is comprised of the mission letter addressed to P-0102,³ the original video [REDACTED] including its enhanced audio track⁴, and the supporting materials generated during the audio enhancement process.⁵ The Prosecution notes that in [REDACTED],⁶ P-0172 mistakenly identifies the ERN of the mission letter to P-0102 as [REDACTED], when it should be [REDACTED]. P-0172 explains in his report [REDACTED] that while the mission

¹ [REDACTED]
² [REDACTED]
³ [REDACTED]

⁴ The video with the enhanced audio is found at [REDACTED], p. 2, while the enhanced audio file saved separately from the video is found at [REDACTED], p. 5. Pages three and four of the ERN contain screenshots of the Accused taken from the video.

⁵ [REDACTED]
⁶ [REDACTED]

letter was addressed to P-0102, P-0172 carried out the audio enhancement of video [REDACTED] because of P-0102's high workload at the time.⁷

6. While P-0172's evidence does not go to proof of acts and conduct of the accused, the video to which P-0172's forensic activity relates is relevant to the modes of liability through which the accused is alleged to have committed the crimes with which he is charged. While the video features the Accused in his office, P-0172's evidence does not address the content of the video. Allowing the introduction into evidence of P-0172's report and associated material under rule 68(2)(b) of the Rules will therefore not prejudice the Accused even if the Defence will not have the opportunity to cross-examine P-0172. [REDACTED]⁸ and [REDACTED],⁹ among others, will testify as to the content of the video.

7. Should this Request be granted, P-0172 will confirm in a declaration that the contents of his prior recorded testimony, consisting of one report, is true and correct to the best of his knowledge and belief, in accordance with the requirements under rule 68(2)(b)(ii) and (iii). The Chamber has designated that the Registry Senior Legal Advisor, or a person designated by him, witness declarations in this case pursuant to rule 68(2)(b) of the Rules.¹⁰

Confidentiality

8. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this Request and its annex as confidential because they contain information identifying P-0172. The Prosecution shall file a public redacted version in due course.

⁷ [REDACTED].
⁸ [REDACTED].
⁹ [REDACTED].
¹⁰ ICC-01/12-01/18-1111-[REDACTED] para. 16.

Applicable Law

9. 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.¹¹

10. 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.

11. 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.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.¹³

12. 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.¹⁴

¹¹ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 80.

¹² 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.

¹³ 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.

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, citing *inter alia* Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para.34(i) and 34(ii).

13. This Request is filed in accordance with the Chamber's instruction that rule 68(2) applications be filed by the end of 2020.¹⁵

Submissions

I. The prior recorded testimony of Witness P-0172 should be introduced into evidence pursuant to rule 68(2)(b) of the Rules

14. Rule 68(2)(b) of the Rules allows the introduction of a witness's previously recorded testimony that goes to proof of a matter other than the acts and conduct of the accused.

15. Given the technical nature and content of P-0172's evidence, which goes to proof of matters other than the acts and conduct of the Accused, the Prosecution seeks to introduce his reports and associated material into evidence under rule 68(2)(b) of the Rules.

a. The material of Witness P-0555 constitutes "prior recorded testimony" in the sense of rule 68 of the Rules

16. 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.¹⁶ This Chamber has accepted the reports of witnesses P-0193, P-0055 and P-0057 as prior recorded testimony within the framework of rule 68(3) of the Rules.¹⁷

¹⁵ ICC-01/12-01/18-789-AnxA, para. 80.

¹⁶ 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.

¹⁷ See, ICC-01/12-01/18-987 [REDACTED].

b. The prior recorded testimony of Witness P-0555 goes to proof of matters other than the acts and conduct of the Accused

17. P-0172's report is solely of a technical and forensic nature limited to describing the enhancement carried out to the audio track of a video, and therefore does not concern the acts and conduct of the Accused. While the video features the Accused in his office, P-0172's evidence does not address the content of the video and its audio track.

c. The prior recorded testimony has sufficient indicia of reliability

18. Given the discrete, objective and technical nature of the work P-0172 carried out, his report describing this work is *prima facie* reliable.

19. [REDACTED] P-0172 was tasked with a discrete and objective technical task as described in the mission letter [REDACTED]. P-0172 explains in his report that while the mission letter was addressed to P-0102, P-0172 carried out the audio enhancement due to the high workload of P-0102 at the time.¹⁸ P-0172 prepared a report on this forensic activity.¹⁹

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

20. P-0172's prior recorded testimony comprised of his report²⁰ is relevant and has *prima facie* probative value as it relates to technical work carried out to the video [REDACTED] which, in turn, is relevant and has *prima facie* probative value. As described above, the report describes the enhancement carried out to the audio track of video [REDACTED].

18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED].

e. The associated material

21. The material associated with P-0172's report which the Prosecution seeks to introduce into evidence includes the enhanced audio track of video [REDACTED] which he created.

22. The video [REDACTED] whose audio track P-0172 enhanced, features the Accused in his office, and thereby allows for a better appreciation and understanding of what was said in this video. The video is thereby relevant to the modes of liability through which the Accused is alleged to have committed the crimes with which he is charged, and in this regard possesses *prima facie* probative value. Other Prosecution witnesses will provide evidence on the content of the video. [REDACTED]²¹ and [REDACTED]²² for instance, are expected to provide evidence that the Accused handled and decided matters by himself in his office at the Islamic police.

f. Additional rule 68(2)(b)(i) factors militate in favour of introducing Witness P-0172's prior recorded testimony under rule 68(2)(b) of the Rules

i. P-0172's report relates to issues which are not materially in dispute

23. P-0172's evidence is purely technical in nature as it relates solely to audio enhancement and the creation of a forensic copy. He does not comment on the substance of the video whose audio track he enhanced. Other Prosecution witnesses will do so, and the Defence will have the opportunity to cross-examine them. The issue of the technical aspects of audio enhancement is not materially in dispute in the present case.

²¹ [REDACTED].

²² [REDACTED].

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

24. By its terms, rule 68(2)(b) of the Rules 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.

25. Introducing into evidence the prior recorded testimony of P-0172 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 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.

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

26. As required under rule 68(1) of the Rules, the introduction into evidence pursuant to rule 68(2)(b) of the Rules of P-0172's prior recorded testimony "would not be prejudicial to or inconsistent with the rights of the Accused". The inability to cross-examine P-0172 on his evidence and the admission of the evidence at this stage of the proceedings do not deprive the Accused of his right and opportunity to challenge the evidence. As pointed out above, P-0172 does not comment on the substance of the video whose audio track he enhanced. Other Prosecution witnesses will do so, and the Defence will have the opportunity to cross-examine them and to lead contradictory evidence during the Defence case. The Chamber will accord the appropriate level of weight and probative value to the video on the basis of the strength and reliability of commentary on their content provided by forthcoming

Prosecution witnesses. The Defence also retains the possibility to address the prior testimony during closing submissions and advance arguments on the weight to be attributed to the prior recorded testimony.

h. Brief description of the associated material

27. Attached as Annex A to this application is a table which lists P-0172's report²³ and associated material consisting of the mission letter addressed to P-0102,²⁴ the original video [REDACTED] and its enhanced audio track,²⁵ and the supporting materials generated during the audio enhancement process.²⁶ The Prosecution notes that, in P-0172's report [REDACTED],²⁷ he mistakenly identifies the ERN of the mission letter to P-0102 as [REDACTED], when it should be [REDACTED]. P-0172 explains in his report that while the mission letter was addressed to P-0102, P-0172 carried out the audio enhancement due to the high workload of P-0102 at the time.²⁸

II. Provision of certified declaration for P-0172

28. Should this Request be granted, P-0172 will execute a declaration that the contents of his statement are true and correct to the best of his knowledge and belief, in accordance with the requirements under rule 68(2)(b)(ii) and (iii). The Chamber has designated that the Registry Senior Legal Advisor, or a person designated by him, witness declarations in this case pursuant to rule 68(2)(b) of the Rules.²⁹

²³ [REDACTED]

²⁴ [REDACTED]

²⁵ The video with the enhanced audio is found at [REDACTED] p. 2, while the enhanced audio file saved separately from the video is found at [REDACTED], p. 5.

²⁶ [REDACTED]

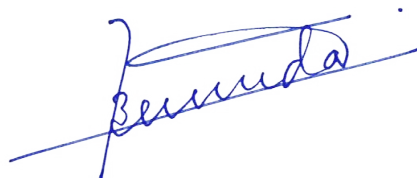
²⁷ [REDACTED]

²⁸ [REDACTED].

²⁹ ICC-01/12-01/18-1111-[REDACTED], para. 16.

Conclusion

29. For the foregoing reasons, the Prosecution asks that the Chamber grant this Request and allow the introduction of P-0172's report and associated material into evidence under rule 68(2)(b) of the Rules.



Fatou Bensouda, Prosecutor

Dated this 16 December 2020

At The Hague, The Netherlands