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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 Witness P-0915’s prior recorded testimony and associated material”, 18 December 2020, ICC-01/12-01/18-1217-Conf

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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-0915’s report and annexes thereto; and (ii) associated material comprised of the photographs of the documents,¹ which P-0915 opened from sealed bags, scanned and re-packed, as well as a summary and [REDACTED] note relating to the handling of exhibits.

2. Witness P-0915 [REDACTED]
[REDACTED] processed evidence collected by P-0055 during his mission to Timbuktu [REDACTED]
[REDACTED].² She is a technical witness whose reports are related to the processing of evidence in relation to sealed bags containing documents collected by P-0055 [REDACTED]
[REDACTED]

3. P-0915’s report and associated material are relevant to the forensic preservation and chain of custody of documents pertaining to the armed Groups’ organisation in Timbuktu during the relevant period, and their control of the city. These documents help establish their level of organisation within the city and their degree of control.³

4. P-0915’s prior recorded testimony within the meaning of Rule 68(2)(b) is probative and goes to proof of matters other than the acts and conduct of the Accused as required by rule 68(2)(b). It also has sufficient indicia of reliability. In addition, P-0915’s report: (i) relates to issues that are not materially in dispute; (ii) is of a cumulative or corroborative nature, in that other witnesses will give oral testimony of similar facts like [REDACTED]; and (iii) is such that the interests of justice are best served by

¹ The photographs represent the collected documents with their respective ERNs.

² Regarding the exhibits collected in Timbuktu by P-0055 [REDACTED] [REDACTED]. See also Annex A Section III.

³ See for instance the pictures of documents titled [REDACTED]
[REDACTED]

its introduction. All parties will benefit from an expedited presentation of the Prosecution's case.

5. The cumulative nature of P-0915's testimony with [REDACTED] evidence and limited purpose of the evidence of this witness makes it unnecessary for this 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 other means.

6. The Prosecution seeks the introduction of this material on a conditional basis, subject to the subsequent transmission of Witness P-0915'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 a Prosecution witness. 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.⁴

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

⁴ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 80.

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 prior recorded testimony is introduced under rule 68 of the Rules, this introduction must also not be prejudicial to or inconsistent with the rights of the accused.⁵ The decision of whether to introduce 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.⁶

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.⁷

Prosecution's Submissions

I. The prior recorded testimony of Witness P-0915 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) P-0915's report (■ ■■■■■■■■) titled "Activity report") and its

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.

⁶ 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.

⁷ 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).

similar in nature to expert reports, which can be introduced under rule 68(2)(b),¹⁷ and should be treated as such, *mutatis mutandis*, for the purpose of this application. The Prosecution notes that the Chamber already authorised the introduction of non-expert witnesses reports under Rule 68(3) of the Rules.¹⁸

15. In addition, just as experts provide expert reports with the understanding that these may be relied upon in the context of legal proceedings, namely when they are ‘questioned in the capacity as [a] witness[] in the context of or in anticipation of legal proceedings’,¹⁹ P-0915 drafted her activity report with the understanding that she was providing information which might be relied upon in the legal proceedings at hand.

b. The prior recorded testimony of Witness P-0915 goes to proof of matters other than the acts and conduct of the Accused

16. [REDACTED], the OTP sent a mission letter²⁰ [REDACTED], [REDACTED]
[REDACTED]
[REDACTED]. [REDACTED], [REDACTED] tasked P-0915, [REDACTED]
[REDACTED] to conduct the activities mentioned in paragraph 2 of the [REDACTED] mission letter: to open, scan, re-pack and re-seal the bags [REDACTED]
[REDACTED] P-0915’s activity report details the handling of these sealed bags. It also describes their content and chain of

¹⁷ See for example, 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, where the Chamber authorises the Prosecution to introduce the expert reports of P-0598 and related material pursuant to Rule 68(2)(b) of the Rules.

¹⁸ See ICC-01/12-01/18-987 [REDACTED], paras. 50-53, 54-60, 61 for P-0193, P-0055 and P-0057.

¹⁹ *Prosecutor v. Ongwen*, [Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules ICC-02/04-01/15-596-Red](#) 18 November 2016, para. 9; *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, [Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68\(2\) and \(3\) Requests](#), ICC-01/05-01/13-1478-Red-Corr, 12 November 2015, paras. 31, 32.

²⁰ [REDACTED].

custody.²¹ These sealed bags were collected by P-0055 during a forensic mission carried out in Timbuktu [REDACTED].

17. As shown above, the prior recorded testimony of Witness P-0915 does not relate to the acts and conduct of the Accused as defined in the case-law of this and other courts, but relates to the chain of custody - the process of opening the sealed bags, photographing the documents contained therein, scanning them, and resealing the bags.²²

18. The Prosecution clarifies that it seeks to introduce the associated material²³ detailed in P-0915's activity report ([REDACTED]) – [REDACTED]

c. The prior recorded testimony has sufficient indicia of reliability

19. The prior recorded testimony of Witness P-0915 bears sufficient indicia of reliability because it is truthful, authentic, and consistent. The report was given voluntarily and drafted by the witness herself. [REDACTED]

[REDACTED], Witness P-0915 processed the evidence which had been collected by Witness P-0055. The report contains detailed information in relation to the steps taken in the methodology section.²⁴ It also contains an inventory of the exhibits handled and their content.²⁵

20. P-0915 was aware that her assistance in the opening, scanning and photographing of documents contained in the sealed bags in question was given with the purpose of preserving and uploading forensic evidence. The procedure she

²¹ [REDACTED]

²² See [REDACTED]

²³ See Annex A, Section II, documents 3 to 198.

²⁴ [REDACTED]

²⁵ [REDACTED]

adopted in handling the sealed bags and the documents contained therein was followed with this objective in mind.

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

21. As explained above, the prior recorded testimony of Witness P-0915 is relevant to the handling of evidence collected by Witness P-0055 during a forensic mission in Timbuktu [REDACTED].

22. As shown above, the prior recorded testimony has *prima facie* probative value because it bears sufficient indicia of reliability.

e. Additional rule 68(2)(b)(i) factors militate in favour of introducing Witness P-0915's prior recorded testimony under rule 68(2)(b)

23. Some 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 are whether the prior recorded testimony relates to issues that are not materially in dispute, is of a cumulative or corroborative nature (in that other witnesses will give or have given oral testimony of similar facts), and is such that the interests of justice are best served by its introduction.

i. The prior recorded testimony relates to issues that are not materially in dispute

24. P-0915'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 the Chamber's eventual determination of the charges against the accused in its judgment under article 74 of the Statute.²⁶

²⁶ *Prosecutor v. Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red, 18 November 2016, para. 15.

ii. *The prior recorded testimony is of a cumulative or corroborative nature*

25. P-0915's prior recorded testimony is of a cumulative or corroborative nature because the chain of custody of the documents mentioned in Section II of Annex A²⁷ will also be addressed by ██████ in his upcoming *viva voce* testimony.

iii. *The interests of justice are best served by the introduction of the prior recorded testimony*

26. 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.

27. Introducing into evidence the prior recorded testimony of Witness P-0915 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."²⁸

²⁷ Documents 3 to 198.

²⁸ [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.

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

28. As required under rule 68(1), the introduction into evidence pursuant to rule 68(2)(b) of Witness P-0915's prior recorded testimony "would not be prejudicial to or inconsistent with the rights of the Accused". The inability to cross-examine Witness P-0915 on her 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. In fact, the Defence will be able to cross-examine [REDACTED] during his upcoming testimony [REDACTED]. Further, the Defence can lead contradictory evidence during its 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.

II. Brief description of the associated material

29. Section I of the Annex contains the prior recorded testimony of P-0915, namely her activity report [REDACTED], which describes the handling of the following sealed bags [REDACTED]. The prior recorded testimony [REDACTED] refers in its annex²⁹ to the digital version of the activity report ([REDACTED]) and to the two mission letters [REDACTED].

30. Section II of Annex A lists the photographs of the documents³⁰ which were contained in the above mentioned sealed bags. These photographs were taken by P-0915 when she processed the exhibits and they constitute the associated material

²⁹ [REDACTED], p. 0048.

³⁰ See Annex A, Section II, documents 3 to 198.

which the Prosecution also seeks to introduce into evidence under rule 68(2)(b) along the prior recorded testimony. These items form the basis of Witness P-0915's report and are relevant to the case against the Accused.

31. The Prosecution requests that the content of the sealed bags detailed by P-0915 in Section II of Annex A³¹ be introduced into evidence [REDACTED]
[REDACTED] This will provide a complete portrait of their chain of custody and also provide information regarding their relevance and probative value.

32. Section II of Annex A also contains a document [REDACTED] regarding a pre-assessment of exhibits contained in sealed bags³², which were collected by P-0055 in Timbuktu during his mission [REDACTED] and [REDACTED] note regarding the opening of these sealed bags [REDACTED]

33. Section III contains the technical activity report [REDACTED]
[REDACTED] as well as the six sealed bags handled by P-0915,³³ which will be introduced via [REDACTED].

III. Provision of certified declaration for Witness P-0915

34. The Prosecution requests that the Chamber authorise the introduction into evidence under rule 68(2)(b) of the prior recorded testimony of Witness P-0915 and associated material on a conditional basis pending the submission of the certified declaration of this witness.

³¹ Documents 3 to 198.

³² The sealed bags in question are [REDACTED]
[REDACTED]

³³ Annex A, Section III, documents 2 to 6.

Conclusion

35. For the foregoing reasons, the Prosecution requests that the Chamber conditionally authorise the introduction into evidence of Witness P-0915's prior recorded testimony and associated material, pending submission of the certified declaration.



Fatou Bensouda, Prosecutor

Dated this 18 December 2020

At The Hague, The Netherlands