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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

Decision on the introduction of evidence of witness P-0643

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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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*, pursuant to Articles 64(2), 64(6)(e), 64(7), 67(1) and 69(2) of the Rome Statute (the ‘Statute’), and Rules 68(1) and 68(3) of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on the introduction of evidence of witness P-0643.’

I. Procedural background

1. On 6 May 2020, the Chamber adopted the ‘Directions on the conduct of proceedings’.¹ It instructed the Office of the Prosecutor (the ‘Prosecution’) to file its ‘motivated application seeking the Chamber’s authorisation to introduce any prior recorded testimony pursuant to Rule 68(3) of the Rules’.²
2. On 5 August 2020, the Chamber rendered its ‘Decision on Prosecution’s proposed expert witnesses’ (the ‘Experts Decision’).³
3. On 10 March, 2021, the Prosecution filed a request related to the introduction of evidence of P-0643 (the ‘Request’).⁴
4. On 22 March 2021, the Defence responded to the Request (the ‘Response’), opposing it.⁵

II. Submissions and analysis

A. Introduction

5. At the outset, the Chamber notes that the Request is three-fold:

¹ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA.

² Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 63.

³ Decision on Prosecution’s proposed expert witnesses, 5 August 2020, ICC-01/12-01/18-989-Conf (a public redacted version was notified on 21 October 2020, ICC-01/12-01/18-989-Red).

⁴ Prosecution application to add three items related to Witness MLI-OTP-P-0643 to its List of Evidence under regulation 35, to call Witness MLI-OTP-P-0643 as an expert witness and to introduce MLI-OTP-P-0643’s prior recorded testimony under Rule 68(3), ICC-01/12-01/18-1350-Conf (with confidential annexes A and B).

⁵ Defence response to ‘Prosecution application to add three items related to Witness MLI-OTP-P-0643 to its List of Evidence under regulation 35, to call Witness MLI-OTP-P-0643 as an expert witness and to introduce MLI-OTP-P-0643’s prior recorded testimony under Rule 68(3), ICC-01/12-01/18-1387-Conf (with confidential annexes A and B).

- a. pursuant to Regulation 35 of the Regulations, the Prosecution seeks authorisation to add three items related to P-0643 to its List of Evidence and submit a late application for this witness pursuant to Rule 68(3) of the Rules;
- b. the Prosecution seeks authorisation to call P-0643 as an expert witness and, additionally or alternatively, as a fact witness on certain topics; and
- c. the Prosecution seeks authorisation to introduce his prior recorded testimony pursuant to Rule 68(3) of the Rules.

B. Requests pursuant to Regulation 35 of the Regulations

6. As noted above, the Prosecution makes two requests pursuant to Regulation 35 of the Regulations. First, it requests the late addition of three items of evidence to the List of Evidence. Second, it requests the late submission of a request to introduce P-0643's prior recorded testimony pursuant to Rule 68(3) of the Rules.
7. The Chamber notes that the material sought to be added to the List of Evidence comprises:
 - a. A letter of instruction dated November 2020 sent to P-0643 (MLI-OTP-0077-3146-R01). The letter foresees that P-0643 could rely on information contained in an aide-memoire he had previously prepared and transmitted to the Prosecution on 11 April 2020 (MLI-OTP-0078-1054) (the 'April 2020 aide-memoire');
 - b. P-0643's report dated January 2021 (MLI-OTP-0077-2933-R01) (the '2021 Report'); and
 - c. P-0643's updated CV (MLI-OTP-0077-3039-R01).
8. The April 2020 aide-memoire was disclosed to the Defence in April 2020. The letter of instruction, the 2021 Report and the updated CV were disclosed to the Defence in February 2021. Other related items (already included in the List of Evidence) are also sought to be introduced via Rule 68(3) of the Rules as set out below.

9. As regards the reasons for the delay, and recalling its submissions in the context of the Experts Decision, the Prosecution states that due to the COVID-19 pandemic, an interview with P-0643 planned for March 2020, was cancelled. Accordingly, P-0643 was asked to update a draft aide-memoire he had prepared for that interview. As a result, P-0643 transmitted the updated April 2020 aide-memoire to the Prosecution on 11 April 2020.⁶ The Prosecution submits it nevertheless only instructed P-0643 as an expert in November 2020 as it first had to wait for the Chamber's Experts' Decision (issued in August 2020) and thereafter was busy with the start of the trial. Additionally, the Prosecution submits it needed to secure funds for payment of fees to call P-0643 as an expert.⁷
10. In light of the above, Chamber disagrees with the Defence that the Prosecution failed to establish good cause for the requested extension of deadline.⁸ As noted already in the context of the Experts Decision,⁹ such a delay was foreseeable, bearing in mind, among other factors, the COVID-19 pandemic. Although the Chamber agrees with the Defence that workload is not a reason for the delay and that the Defence also faces workload,¹⁰ the Chamber is cognisant of the steps taken by the Prosecution to obtain the evidence of P-0643 in the context of the COVID-19 pandemic, and in order to secure funds to pay for his expert fees. Bearing all this in mind, the Chamber considers that the delay in the instant case is justified.
11. Moreover, the Chamber considers that the late addition of three items of evidence and the late application pursuant to Rule 68(3) of the Rules will not unduly prejudice the Defence. First, the Defence was already on notice of this upcoming Request since 2020. Second, as submitted by both parties, much of the information contained in the 2021 Report was already included in the April 2020 aide-memoire and that there appear to be similarities and overlaps between

⁶ Request, ICC-01/12-01/18-1350-Conf, paras 6-8.

⁷ Request, ICC-01/12-01/18-1350-Conf, paras 9-12.

⁸ Response, ICC-01/12-01/18-1387-Conf, para. 8.

⁹ Experts Decision, ICC-01/12-01/18-989-Conf, para. 40.

¹⁰ Response, ICC-01/12-01/18-1387-Conf, paras 9-14.

the April 2020 aide-memoire and the 2021 Report.¹¹ Moreover, as regards the letter of instruction and the updated CV, the Chamber notes that given their limited content and nature, the late addition of these items will be of insignificant impact to the preparation of the Defence.

12. In light of the above, the Chamber considers that even considering the delay, it is in the interests of justice to authorise the late addition of these three items, bearing in mind their relevance as submitted by the Prosecution and the limited prejudice to the accused.
13. Accordingly, the Chamber authorises the addition of items MLI-OTP-0077-3146-R01, MLI-OTP-0077-2933-R01 and MLI-OTP-0077-3039-R01 to the Prosecution's List of Evidence.
14. For the same reasons above, and noting that the Prosecution seeks to submit the 2021 Report as a prior recorded testimony pursuant to Rule 68(3) of the Rules, the Chamber equally authorises the late submission of a request pursuant to this provision.

C. P-0643 qualifications as an expert witness

15. The Chamber incorporates by reference the applicable legal framework as set out in its Experts Decision,¹² particularly that the decision as to whether a person is an expert is discretionary.¹³
16. In the Experts Decision the Chamber deferred its decision on P-0643 as follows:

The Chamber notes that P-0643 has extensive academic and professional expertise in the area of law, with particular expertise in Malian law, human rights, women's issues, religion and culture, peace and reconciliation, among others. It also notes that the Defence does not contest his expertise in law. However, the Chamber notes that the Prosecution is yet to obtain a witness statement from the witness and that until then, there is uncertainty as to the scope and nature of his testimony. Accordingly, the Chamber defers its decision in relation to P-0643. Only if and when the Prosecution obtains a witness statement and decides on the topics to be covered by P-

¹¹ Request, ICC-01/12-01/18-1350-Conf, paras 22-31; Response, ICC-01/12-01/18-1387-Conf, para. 12 and Annex A.

¹² Experts Decision, ICC-01/12-01/18-989-Conf, paras 14-17.

¹³ Experts Decision, ICC-01/12-01/18-989-Conf, para. 15.

0643, will the Chamber be in a position to determine whether his suggested expert testimony is appropriate [footnotes omitted].¹⁴

17. The Chamber notes that contrary to what it foreshadowed in the context of the Experts Decision, the Prosecution no longer intends to meet with P-0643 to take a witness statement but instead seeks authorisation to call him as an expert and introduce his 2021 Report.¹⁵
18. As noted by the Defence,¹⁶ in the Experts Decision the Chamber stated that it would rule on P-0643's expertise when the Prosecution obtained a witness statement (as foreseen at the time). Notwithstanding, the Chamber disagrees with the Defence's submissions that the production of such a witness statement is a pre-requisite to decide on P-0643's expertise and authorise the introduction of his evidence. In fact, on previous occasions the Chamber has ruled on the expertise of witnesses on the basis of reports and not witness statements.¹⁷ Moreover, the pre-requisite is not in the form (the witness statement), but in the content of the proposed evidence and namely whether the Chamber has before it clear information indicating 'the scope and nature of the expert testimony'.¹⁸
19. In the view of the Chamber, the 2021 Report and associated material to be relied on by the Prosecution clearly demarcate the scope and nature of the expected expert evidence. Moreover, in its Request and accompanying annexes the Prosecution indicates the material to be introduced into evidence and their expected relevance. In particular, the Chamber notes that according to the Prosecution, P-0643's 2021 Report relates to, *inter alia*, national laws of Mali, justice, sharia law, conflict resolution, peace processes and reconciliation and also to the history of Timbuktu, its population, culture, behaviours, and also to 'victimisation of the inhabitants of Timbuktu, as applicable, during the 2012-

¹⁴ Experts Decision, ICC-01/12-01/18-989-Conf, para. 42.

¹⁵ Request, ICC-01/12-01/18-1350-Conf, para. 16.

¹⁶ Response, ICC-01/12-01/18-1387-Conf, para. 4.

¹⁷ Experts Decision, ICC-01/12-01/18-989-Conf, para. 16.

¹⁸ Experts Decision, ICC-01/12-01/18-989-Conf, para. 42.

2013 crisis'.¹⁹ The Prosecution submits P-0643's evidence is therefore relevant to counts 6, 7, 8-12 and 13.²⁰

20. The Chamber therefore disagrees with the Defence's submissions that the Request should be dismissed *in limine* as it lacks a fundamental requirement (the written statement).²¹ Accordingly, it will examine further below whether P-0643 can be called as an expert.
21. The Chamber recalls that in the context of the Experts Decision, P-0643 was presented by the Prosecution as a [REDACTED], expert in public law and the legal framework and national laws of Mali.²² Although the Chamber notes that in relation the present Request, the Defence contends that P-0643 does not meet the standards to qualify as an expert,²³ in the context of the Experts Decision, the Defence did not object that P-0643 could qualify as an expert in Malian law but contested his expertise in other areas.²⁴
22. As noted by the Prosecution,²⁵ the Chamber already indicated that P-0643 has extensive academic and professional expertise in the area of law, with particular expertise in Malian law, human rights, women's issues, religion and culture, peace and reconciliation, among others.²⁶ The Chamber considers these findings still stand.
23. The Chamber observes that according to the Prosecution, P-0643 will testify about [REDACTED].²⁷ Although the Chamber notes that the Prosecution requests alternatively that P-0643 could testify on some topics as a fact witness and on other topics as an expert,²⁸ the Chamber considers it would be 'artificial to divide his testimony into expert evidence and fact evidence',²⁹ particularly

¹⁹ Request, ICC-01/12-01/18-1350-Conf, para. 14.

²⁰ Request, ICC-01/12-01/18-1350-Conf, para. 15.

²¹ Response, ICC-01/12-01/18-1387-Conf, paras 5-6.

²² Experts Decision, ICC-01/12-01/18-989-Conf, para. 40.

²³ Response, ICC-01/12-01/18-1387-Conf, paras 2-3.

²⁴ Experts Decision, ICC-01/12-01/18-989-Conf, para. 41.

²⁵ Request, ICC-01/12-01/18-1350-Conf, para. 32.

²⁶ Experts Decision, ICC-01/12-01/18-989-Conf, para. 42.

²⁷ Request, ICC-01/12-01/18-1350-Conf, para. 33.

²⁸ Request, ICC-01/12-01/18-1350-Conf, para. 37.

²⁹ Experts Decision, ICC-01/12-01/18-989-Conf, para. 100.

considering P-0643's apparent vast experience in various of the topics he is expected to testify, including but not restricted to the law. However, the Chamber will take this into consideration when assessing the weight to be given to P-0643's evidence in areas that may go beyond his expertise or that are not relevant to this case.³⁰

24. As regards the challenges raised by the Defence on the quality of the report (for example P-0643's sources and methodology),³¹ the Defence will have ample time during the cross-examination to question P-0643 on these and other issues raised in its Response. Moreover, these objections do not prevent the submission of the evidence at this stage, and P-0643's evidence will be evaluated holistically with all the other evidence on the record in the Article 74 judgment.
25. Accordingly, the Chamber authorises the Prosecution to call P-0643 as expert witness.

D. Introduction of evidence pursuant to Rule 68(3) of the Rules

26. The Chamber incorporates by reference the applicable legal framework as set out in the Directions on the conduct of proceedings³² and its previous decisions on Prosecution's requests to introduce prior recorded testimonies under Rule 68(3) of the Rules.³³
27. The Chamber notes that the Prosecution seeks to introduce P-0643's evidence via Rule 68(3) of the Rules, including P-0643's 2021 Report and original April 2020 aide-memoire, as well as the letter of instruction of November 2020 and previous letters of instruction, the updated CV and previous versions of his CV.

³⁰ Experts Decision, ICC-01/12-01/18-989-Conf, para. 100.

³¹ Response, ICC-01/12-01/18-1387-Conf, paras 20, 26-29 and Annex C.

³² Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 63-65.

³³ Decision on Prosecution's requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, 5 August 2020, ICC-01/12-01/18-987-Conf (a public redacted version was notified on 21 October 2020, ICC-01/12-01/18-987-Red); Experts Decision, ICC-01/12-01/18-989-Conf; Decision on the introduction of P-0662's prior recorded testimony pursuant to Rules 68(3) of the Rules, 21 October 2020, ICC-01/12-01/18-1119; Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 26 January 2021, ICC-01/12-01/18-1267-Conf (a public redacted version was notified on 17 February 2021, ICC-01/12-01/18-1267-Red).

It also seeks to introduce related material to attest his experience (*i.e.* a memorandum, his PhD diploma and documents related to projects he handled).³⁴

28. The Prosecution expects it will require 2 hours for the examination of P-0643 (30 minutes for formalities and 1.5 hours of supplementary examination). Instead, if Rule 68(3) is not granted, the Prosecution estimates 5 hours of examination-in-chief.³⁵
29. The Defence does not make specific submissions on the Rule 68(3) introduction of P-0643's evidence, but argues that the Prosecution's proposed procedure to elicit more elaborate information from P-0643 during the preparation session or during the examination-in-chief is inadequate and prejudicial.³⁶
30. The Chamber considers that significant time would be saved if P-0643 is called to testify pursuant to Rule 68(3) of the Rules. At the same time, the Chamber notes the Defence's right to cross-examine the expert remains unaffected.
31. Accordingly, the Chamber grants the Rule 68(3) Application in respect of P-0643. However, bearing in mind the object and purpose of Rule 68(3) of the Rules, the Chamber considers that the Prosecution must focus its examination in order to complete the formalities under this provision and conduct any supplementary questioning of P-0643 within one hour.
32. Noting the stage of the proceedings, and bearing in mind that the Prosecution foresees to call P-0643 to testify in May 2021,³⁷ the present Request is granted without prejudice to the Defence applying, if necessary, for an adjournment in order to prepare for the cross-examination.

³⁴ Request, ICC-01/12-01/18-1350-Conf, paras 45-51 and Annex B.

³⁵ Request, ICC-01/12-01/18-1350-Conf, paras 44, 54-56.

³⁶ Response, ICC-01/12-01/18-1387-Conf, paras 4, 18.

³⁷ Request, ICC-01/12-01/18-1350-Conf, para. 38. *See also* e-mail from the Prosecution on 31 March 2021 at 15:13.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

AUTHORISES the Prosecution, pursuant to Regulation 35 of the Regulations, to add three items related to P-0643 to its List of Evidence and submit a late application for this witness pursuant to Rule 68(3) of the Rules;

AUTHORISES the Prosecution to call P-0643 as an expert witness;

AUTHORISES the Prosecution to introduce P-0643's prior recorded testimony pursuant to Rule 68(3) of the Rules;

ORDERS the Prosecution to update its List of Evidence accordingly; and

ORDERS the Prosecution to file a public redacted version of its Request no later than 10 days 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 12 April 2021

At The Hague, The Netherlands