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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)(c) to
introduce into evidence the
prior recorded testimony and associated material of Prosecution Witness
MLI-OTP-P-0570”, 1st April 2021, ICC-01/12-01/18-1408-Conf**

Source: Office of the Prosecutor

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I. Introduction

1. Pursuant to articles 64(9)(a), 69(2)-(4) of the Rome Statute (“Statute”) and rules 63(2) and 68(2)(c) of the Rules of Procedure and Evidence (“Rules”), the Prosecution requests Trial Chamber X’s (“Chamber”) authorisation to introduce into evidence Witness MLI-OTP-P-0570’s (“P-0570”) prior recorded testimony and associated material (together, “Documents”) as specified in Annex A (“Annex”) to the present application.¹

2. Specifically, Prosecution seeks to introduce P-0570’s prior recorded testimony in its totality, namely the totality of P-0570’s witness statement² and its annexes (“the statement”). The annexes to P-0570’s statement are: a) a photograph of a curtain to assist P-0570 with describing colours,³ b) a sketch [REDACTED]⁴ and c) a form filled in by P-0570 giving her informed consent for the Prosecution to access her medical records.⁵

3. The Prosecution also seeks to introduce associated material to P-0570’s prior recorded testimony, namely, a) the pictures of places and people which were shown to her when the Prosecution took her statement⁶, b) an investigation note explaining that [REDACTED]

[REDACTED]⁷

4. The Documents can be introduced under rule 68(2)(c) because: (i) P-0570 is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence, as the Witness is afflicted by a severe medical condition which

¹ The Prosecution is in the process of disclosing with redactions, as well as re-disclosing with lesser redactions, certain documents listed in Annex A. For this reason, in this application and in Annex A, the Prosecution does not refer to the latest available version of these documents, and it does not include hyperlinks to E-Court for them.

² [REDACTED]

³ [REDACTED]

⁴ [REDACTED]

⁵ [REDACTED]

⁶ See Annex.

⁷ [REDACTED]

affects her [REDACTED] (ii) the Prosecution could not anticipate the need for article 56 measures to obtain P-0570's prior recorded testimony; (iii) P-0570's prior recorded testimony is reliable; and, (iv) the introduction of P-0570's prior recorded testimony and associated material is not prejudicial to or inconsistent with the rights of the Accused.

5. The Chamber initially granted the Prosecution's request for the delayed disclosure of Witness P-0570's identity and identifying information until 45 days before her testimony.⁸ Given P-0570's health issues, in particular [REDACTED] the Prosecution, requested a variation of the time limit to file a Rule 68 application, which was granted,⁹ in order to further assess her condition.¹⁰

II. Confidentiality

6. 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 that could lead to P-0570's identification. The Prosecution shall file a public redacted version in due course.

III. Applicable law

7. In its Directions on the conduct of proceedings, the Chamber determined that the parties may file applications for the admission of prior recorded testimonies pursuant to rule 68(2) of the Rules.¹¹

8. Under rule 68(2)(c) of the Rules, the Chamber may, after having heard the parties, allow the introduction of previously recorded testimony coming from a person who has died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally, provided that:

⁸ ICC-01/12-01/18-794-Red2, para. 24

⁹ [REDACTED].

¹⁰ ICC-01/12-01/18-1165-Conf-Red.

¹¹ ICC-01/12-01/18-789-AnxA, Directions on the conduct of proceedings, para. 79-80.

- (i) the Chamber is satisfied that the person is unavailable as set out above;
- (ii) the necessity of measures under Article 56 of the Statute could not be anticipated;
- (iii) the prior recorded testimony has sufficient indicia of reliability;¹² and
- (iv) its introduction is not prejudicial to or inconsistent with the rights of the accused;¹³

9. Under rule 68(2)(c)(ii) of the Rules, “the fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it”.

10. Therefore 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. Finally, in accordance with the Chamber’s Directions on the conduct of proceedings,¹⁵ applications under rule 68(2)(c) of the Rules shall be filed together with:

- (i) copies of the previously recorded testimony and any supporting material, identifying precisely which passages thereof are tendered into evidence; and
- (ii) other material referred to in the passages tendered into evidence,

¹² See ICC-01/04-02/06-1029, *Prosecutor v. Ntaganda*, Trial Chamber VI, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, 20 November 2015, para. 12. See also, Rule 68(1) and 2(c) of the Rules.

¹³ Rule 68(1) of the Rules and article 69(2) of the Rome Statute. See also ICC-01/12-01/18-1111-Conf, Decision on the introduction of P-0598’s evidence pursuant to Rule 68(2)(b) of the Rules, para. 7 (“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”).

¹⁴ See ICC-01/12-01/18-789-AnxA, Directions on the conduct of proceedings, para. 34(i) and (ii). See also ICC-01/12-01/18-1111-Conf, Decision on the introduction of P-0598’s evidence pursuant to Rule 68(2)(b) of the Rules, para. 7.

¹⁵ ICC-01/12-01/18-789-AnxA, Directions on the conduct of proceedings, para. 79.

without which the said passages would not be understandable, if this material is available.

IV. Prosecution's Submissions

Witness P-0570 is unavailable to testify due to obstacles that cannot be overcome with reasonable diligence

12. As shown in [REDACTED], the Prosecution sought on numerous occasions to make contact with P-0570.

13. On [REDACTED] the Prosecution was informed that P-0570 had fallen ill [REDACTED] and that [REDACTED]
[REDACTED]¹⁶

14. Following this information, the Prosecution established telephone contact with P-0570 from which it appeared that P-0570 had [REDACTED]¹⁷ [REDACTED] then informed the Prosecution of her medical condition.¹⁸ After several phone contacts with P-0570, the Prosecution asked P-0570 to provide medical documentation.¹⁹ On 24 November 2020, the Prosecution obtained medical documentation related to P-0570.²⁰

15. On 21st December 2020, the Prosecution requested that P-0590 (former OTP staff member of the Forensic Science Section) review P-0570's medical record "to provide an expert opinion about the probable causes and expectations" regarding her health

16. [REDACTED]
17. [REDACTED]
18. [REDACTED]
19. [REDACTED]
20. [REDACTED]

issues.²¹ For the purposes of his expert report P-0590 did not personally examine P-0570. On 6 January 2021, P-0590 provided his report.²²

16. Further, the Prosecution requested P-0598 who is a professor of forensic medicine to conduct a medical examination of P-0570 to establish a report on her medical condition.²³ This examination was conducted [REDACTED]
[REDACTED]²⁴ On [REDACTED] P-0598 provided his final report.²⁵

17. According to P-0598, it appears that in [REDACTED] P-0570 suffered [REDACTED]
[REDACTED]²⁶ P-0570 cannot [REDACTED]²⁷
[REDACTED].²⁸ It appears that her physical condition has been [REDACTED]
[REDACTED]
[REDACTED]²⁹ [REDACTED]
[REDACTED]³⁰ [REDACTED]³¹ [REDACTED]
[REDACTED]³²

18. P-0598's report concluded that « *Compte tenu* [REDACTED]
[REDACTED] *il semble à l'expert que l'intéressée n'est pas apte* [REDACTED] *un*

²¹ [REDACTED]

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED]: « Pour répondre précisément aux questions de la mission du bureau du Procureur de la Cour Pénale Internationale, [REDACTED]
[REDACTED] ».

²⁵ [REDACTED].

²⁶ See [REDACTED] (« [REDACTED]
[REDACTED] »).

²⁷ See [REDACTED] (« [REDACTED] »), p. [REDACTED];

See also [REDACTED]

²⁸ See [REDACTED] p.4198 (« [REDACTED]
[REDACTED], p. [REDACTED]. See also [REDACTED].

²⁹ See [REDACTED] (« [REDACTED]
[REDACTED] »), [REDACTED]

³⁰ See [REDACTED]).

³¹ See M [REDACTED]
[REDACTED]).

³² See [REDACTED]).

témoignage de la Cour paraît difficile ». According to him: [REDACTED]

[REDACTED] *survenues* [REDACTED]
[REDACTED] *contre-indiquent* [REDACTED] *une déposition d'un*
témoignage devant la Cour. »³³ He adds that no improvement of [REDACTED] (the
consequences of her illness) is to be expected (« *Il ne semble pas à l'expert qu'une*
amélioration [REDACTED] *puisse être attendue* »).³⁴

19. Given [REDACTED] P-0570 is
unavailable to testify orally before the Court, and an accompanying declaration
cannot be arranged for her under rule 68-2-b of the Rules.

The necessity of measures under article 56 could not be anticipated

20. The Prosecution did not anticipate the need to take measures under article 56 of
the Statute as there were no indications of medical issues that could prevent P-0570
from being able to testify when she gave a statement to the Prosecution in 2017.

21. The Prosecution only discovered that she had medical issues [REDACTED]
[REDACTED]³⁵ As shown in [REDACTED], the Prosecution sought on numerous
occasions to make contact with P-0570 and eventually required the use of a third
person to facilitate contact with the Witness and obtain a copy of P-0570's medical
file, which was received on 24 November 2020³⁶ (see *supra* paras. 13-14).

P-0570's statement is relevant, reliable and has probative value

22. P-0570 was interviewed by investigators [REDACTED]
and she provided a signed statement, to which three documents were annexed.³⁷

³³ See [REDACTED].

³⁴ See [REDACTED].

³⁵ [REDACTED]

³⁶ [REDACTED]

³⁷ Witness P-0570 signed this statement in the presence of the investigators after attesting : “*La présente déclaration m’a été relue [REDACTED] et est véridique pour autant que je sache et que je m’en souviens. J’ai fait cette déclaration de mon plein gré et je comprends qu’elle peut être*

23. The statement is relevant to issues and charges in this case. P-0570 is a named victim of Count [REDACTED] Count [REDACTED] [REDACTED], and Count [REDACTED]. In addition, the Chamber has notified the parties and participants of the possibility that the legal characterisation of the facts and circumstances set out in the charges in relation to P-0570 may be subject to change insofar as the facts and circumstances underlying the incidents related to P-0570 may be considered as [REDACTED].³⁸ Apart from her account of her own victimisation, P-0570 provides information on other cases [REDACTED].

24. P-0570's statement is *prima facie* probative, reliable, and was voluntarily provided. P-0570 further attested that she understood that her statement could be used in judicial proceedings before the Court and she could be called to testify as a witness.³⁹ P-0570 was interviewed by OTP investigators [REDACTED] and she provided a 26 page statement. Her statement was taken in compliance with the formalities of rule 111 of the Rules.⁴⁰ It was given [REDACTED] and translated by an accredited interpreter.⁴¹ P-0570 initialled each page and signed an attestation confirming the veracity of the content of her statement in the presence of the investigators.⁴²

25. In her statement,⁴³ P-0570 provided a detailed account of what happened to her, describing the arrival of the groups in Timbuktu, the rules imposed by the groups on the population of Timbuktu, [REDACTED]

utilisée dans le cadre d'une procédure judiciaire devant la Cour pénale internationale et que je peux être appelée à témoigner en public devant celle-ci ». [REDACTED].

³⁸ [REDACTED].
³⁹ Statement of P-0570, MLI-OTP-0049-0047, p.0072-0073. P-0570 signed this statement in the presence of the investigators after attesting that the statement : "La présente déclaration m'a été relue [REDACTED] et est véridique pour autant que je sache et que je m'en souviens. J'ai fait cette déclaration de bon gré et je comprends qu'elle peut être utilisée dans le cadre d'une procédure judiciaire devant la Cour pénale internationale et que je peux être appelée à témoigner en public devant celle-ci ».

⁴⁰ See Statement of P-0570, [REDACTED].

⁴¹ Statement of P-0570, [REDACTED].

⁴² See Statement of P-0570, [REDACTED].

⁴³ Statement of P-0570, [REDACTED].

[REDACTED]

[REDACTED] Her account is internally consistent.

26. During P-0570's interview, OTP investigators showed P-0570 10 photographs of persons of interest and three pictures of locations of interest.⁴⁴ [REDACTED]

[REDACTED]⁴⁵

27. Further demonstrating its reliability, the evidence described in P-0570's Statement is corroborated by the evidence of other witnesses such as P-0636 (who recently testified), P-0547 and P-0542 [REDACTED]

28. Similarly to the accounts of P-0542⁴⁶ and P-0547,⁴⁷ P-0570 describes [REDACTED]
[REDACTED]⁴⁸ [REDACTED] like P-0542 and P-0547. Moreover, they were arrested by members of the groups. P-0570 describes how one of the "dijihadistes", who were in a car with a black flag and white writings on it, arrested her.⁴⁹

29. P-0570 stated that her veil was falling when she was arrested.⁵⁰ P-0542 describes how a man with a rifle and who was dressed in the same way as the other "islamists" arrested her.⁵¹ P-0547 was also arrested by two men who were in a car with a black flag and white writings on it.⁵² P-0636 testified that she had been arrested by armed "islamists" who were in a vehicle.⁵³ In addition, these four witnesses explain that the reason why they were arrested is because they have infringed the dress code. P-0542 stated that the veil she was wearing was forbidden.⁵⁴ P-0547 explained that she was

⁴⁴ Statement of P-0570, [REDACTED]

⁴⁵ Statement of P-0570, [REDACTED].

⁴⁶ Statement of P-0542, [REDACTED].

⁴⁷ Statement of P-0547, [REDACTED].

⁴⁸ Statement of P-0570, [REDACTED]

⁴⁹ Statement of P-0570, [REDACTED]

⁵⁰ Statement of P-0570, [REDACTED].

⁵¹ Statement of P-0542, [REDACTED].

⁵² Statement of P-0547, [REDACTED].

⁵³ [REDACTED]

⁵⁴ Statement of P-0542, [REDACTED]

not properly covered when she was arrested.⁵⁵ P-0636 testified that she was arrested because of her clothing.⁵⁶

The introduction under rule 68(2)(c) of P-0570's prior recorded testimony and associated material is not prejudicial to or inconsistent with the rights of the Accused

30. First, P-0570's statement does not go to the acts and conduct of the Accused. This limits potential prejudice to the Accused of their introduction via rule 68(2)(c).

31. Factors that may be taken into account in ensuring that the introduction of prior recorded testimony is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally include whether the evidence provides relevant background information and whether the evidence is cumulative or corroborative of other evidence.⁵⁷

32. Certain aspects of P-0570's evidence provide relevant background information, for example her account about when the armed groups arrived in Timbuktu, how they treated the population, their new rules and their new institutions.⁵⁸

33. As mentioned above, evidence described in P-0570's Statement is also of a cumulative or corroborative nature, in that other witnesses will give or have given testimony of similar facts, such as P-0636, P-0547 and P-0542 who [REDACTED]

34. Finally, it is in the interest of justice, including the Chamber's truth-seeking role, to introduce the Documents under rule 68(2)(c).

35. Aside from the prior recorded testimony and the associated material for which

⁵⁵ Statement of P-0547, [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ See ICC-01/05-01/08-1386, Judgement on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", App. Ch., 3 May 2011, para. 78.

⁵⁸ Statement of P-0570, [REDACTED].

the Prosecution seeks admission,⁵⁹ the Annex contains in a third section material related to P-0570's prior recorded testimony but for which the Prosecution does not seek admission.⁶⁰ This material is included for sake of completeness but the Prosecution cannot attest to the reliability of some documents. This is the case of the [REDACTED]⁶¹ or the [REDACTED]⁶². The Prosecution also included in this category the documents, which will assist the Chamber in determining P-0570's unavailability.⁶³

V. Conclusion

36. For the foregoing reasons, the Prosecution requests the Chamber to authorise the introduction into evidence of the documents referred to in paragraphs 2 and 3 pursuant to rule 68(2)(c) of the Rules.



Karim A. A. Khan, Prosecutor

Dated this 27th of July 2021

At The Hague, The Netherlands

⁵⁹ See Annex, pages 1-7 (I and II); *See also supra* paras. 2-3.

⁶⁰ See Annex, p. 8-10.

⁶¹ [REDACTED]

⁶² [REDACTED]

⁶³ See Annex, Documents related to P-0570's health, p. 9-10.