

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/12-01/18

Date: 30 August 2021

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***

Confidential

**Decision on Prosecution request under Regulation 35 and application under Rule
68(2)(b) of the Rules concerning the introduction into evidence of the prior
recorded testimony of P-0204 and P-0630**

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

The Office of the Prosecutor

Karim A. A. Khan
James Stewart

Counsel for the Defence

Melinda Taylor

Legal Representatives of Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of Applicants**Unrepresented Victims****Unrepresented Applicants for
Participation/Reparations****The Office of Public Counsel for Victims****The Office of Public Counsel for the
Defence****States Representatives*****Amicus Curiae***

REGISTRY

Registrar

Peter Lewis

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****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, Rules 68(2)(b) of the Rules of Procedure and Evidence ('Rules'), and Regulation 35(2) of the Regulations of the Court (the 'Regulations'), issues the following decision.

1. On 26 March 2021, the Chamber granted a Prosecution application under to Rule 68(2)(b) of the Rules¹ and, subject to the receipt of certified declarations, authorised the introduction into evidence of the reports and associated work products of P-0204 and P-0630, two technicians who specialise in digital and interactive platforms, together with their associated material (the 'First Decision').²
2. On 18 August 2021, the Prosecution filed the 'Prosecution urgent request under regulation 35(2) of the Regulations of the Court to add to its List of Evidence and to apply under rule 68(2)(b) of the Rules of Procedure and Evidence, and application under rule 68(2)(b) to introduce into evidence prior recorded testimony of Witnesses P-0204 and P-0630' (the 'Request').³ The Prosecution seeks the Chamber's authorisation to i) add two items to its List of Evidence (the 'Material') and ii) to submit the Material as prior recorded testimony of P-0204 and P-0630 under Rule 68(2)(b) of the Rules.
3. On 27 August 2021, the Defence filed its response to the Request,⁴ opposing it on the basis that the Prosecution has failed to satisfy the requirements of Regulation 35 of the Regulations. The Defence notably argues that, since the Material was received and disclosed in July 2021, the Prosecution did not

¹ Prosecution application under rule 68(2)(b) to introduce into evidence Witness P-0204's and Witness P-0630's prior recorded testimony and associated material, 9 December 2020, ICC-01/12-01/18-1196-Conf (with confidential Annex A). The material sought to be introduced is listed in ICC-01/12-01/18-1196-Conf-AnxA.

² Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-1402-Conf-Exp (confidential and public redacted versions thereof were issued respectively on 26 March and 14 April 2021).

³ ICC-01/12-01/18-1659-Conf.

⁴ Defence response to 'Prosecution urgent request under regulation 35(2) of the Regulations of the Court to add to its List of Evidence and to apply under rule 68(2)(b) of the Rules of Procedure and Evidence, and application under rule 68(2)(b) to introduce into evidence prior recorded testimony of Witnesses P-0204 and P-0630', ICC-01/12-01/18-1668-Conf (the 'Response').

demonstrate that they acted with sufficient diligence and expedition in bringing this application.⁵ Moreover, the Defence further submits that, should the Material be accepted for submission, the proposed use of one of the item with witnesses (including Witness P-0603) will cause prejudice to the Defence and the fairness of the trial.⁶

4. The Chamber may extend a time limit pursuant to Regulation 35(2) of the Regulations if 'good cause' is shown. Where an application to extend a time limit is made after the expiration of the original deadline - as is the case with the Request for both the addition sought to the List of Evidence and the Rule 68(2)(b) application - the applicant must demonstrate that acting within the original time limit was not possible for reasons outside of their control.
5. The Chamber notes that the Material consists of a corrected version of the platform introduced into evidence pursuant to Rule 68(2)(b) of the Rules (MLI-OTP-0080-3503) and a technical report containing an explanation for the corrections made (MLI-OTP-0080-3499). The Chamber observes that P-0204 and P-0630 clarified that it is in the context of a call in March 2021 that they communicated an update to their work product whereby the placement of two videos on the platform was changed to better reflect their orientation.⁷ On that basis, the Chamber considers that the Prosecution has established that it was unable to formulate its Request within the time limits initially set for reasons outside of its control. The Chamber also takes no issue with the fact that the Request was filed by the Prosecution after the summer judicial recess. Moreover, given the limited nature of the Material, the Chamber finds that the late addition of these two items to the List of Evidence does not unduly prejudice the Defence. Finally, the Chamber is also of the view that having the witnesses' corrections on the evidentiary record will assist in its assessment of their evidence and, ultimately, the determination of the truth.

⁵ Response, ICC-01/12-01/18-1668-Conf, para. 6.

⁶ Response, ICC-01/12-01/18-1668-Conf, paras 7-17.

⁷ MLI-OTP-0080-3499, at 3501.

6. The Chamber therefore grants the requested late addition of these two items to the Prosecution's Final List of Evidence and, for the same reasons, also accepts the Prosecution's complementary application under Rule 68(2)(b).⁸ While the Request is filed after the deadline for Rule 68(2)(b) applications has elapsed, the Chamber notes that the Defence was already on notice that P-0204 and P-0630 would not testify orally and that their evidence was to be introduced under Rule 68(2)(b) of the Rules.
7. Turning to the merits of the Rule 68(2)(b) application, the Chamber refers to the relevant legal framework as set out in its prior decisions.⁹ Having considered the relevant factors, and with the caveat and considerations already set out in the First Decision, notably that their prior recorded testimony does not go to the acts and conduct of the Accused, the Chamber finds it appropriate to authorise the Prosecution to introduce into evidence the Material, subject to the receipt of the required certified declaration. In rendering the present decision, the Chamber does not find it necessary to entertain the Defence's objection to the proposed use by the Prosecution of the corrected platform (MLI-OTP-0080-3503) with witnesses, including P-0603. Such objection will be considered by the Chamber on the case-by-case basis at the relevant time.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request;

AUTHORISES the addition of the Material to the Prosecution's List of Evidence;

ORDERS the Prosecution to file an updated Final List of Evidence, reflecting this decision;

⁸ See Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 79-80.

⁹ ICC-01/12-01/18-1402-Red2, paras 8-9; and 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.

AUTHORISES, subject to the receipt of certified declarations, the introduction into evidence of the Material (MLI-OTP-0080-3503 and MLI-OTP-0080-3499) as prior recorded testimony of P-0204 and P-0630;

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

ORDERS the Prosecution to file public redacted version of the 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 Monday, 30 August 2021

At The Hague, The Netherlands