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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

Public Redacted Version of “Defence response to ‘Prosecution second application under rule 68(2)(b) to introduce MLI-OTP-P-0113’s statement and associated material into evidence’”, 14 October 2021, ICC-01/12-01/18-1811-Conf

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Karim A. A. Khan QC
Gilles Dutertre

Counsel for the Defence

Melinda Taylor
Kirsty Sutherland

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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

Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. On 16 December 2020, the Office of the Prosecutor ('Prosecution') submitted its 'Prosecution application under rule 68(2)(b) to introduce MLI-OTP-P-0113's statement and associated material into evidence' ('First Application').¹ By the First Application, the Prosecution sought to submit the prior recorded testimony of P-0113 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules').
2. On 19 January 2021, the Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ('Defence') submitted its response to the First Application ('First Response'),² opposing the First Application.
3. On 26 March 2021, Trial Chamber X ('the Chamber') issued its 'Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules and Partially Dissenting Opinion of Judge Kimberly Prost' ('Decision').³ By the Decision, the Majority of the Chamber rejected the First Application without prejudice and decided that it would prefer to hear the evidence of P-0113 pursuant to Rule 68(3) of the Rules and granted in-court protective measures accordingly.⁴ In her Honour's Partially Dissenting Opinion, Judge Prost found that she would have permitted the submission of parts of P-0113's prior recorded testimony pursuant to Rule 68(2)(b), with the parts not appropriate for submission set out in paragraph 6 of that Opinion.⁵
4. On 17 September 2021, the Prosecution submitted its 'Prosecution second application under rule 68(2)(b) to introduce MLI-OTP-P-0113's prior recorded testimony and associated material into evidence' ('Second Application').⁶ By this Second Application, the Prosecution again seeks to submit the prior recorded testimony of P-0113 pursuant to Rule 68(2)(b)⁷ in the form of P-0113's statement in part only,⁸ one video (and its associated transcript and translation),⁹ one photograph,¹⁰ a letter [REDACTED] and its

¹ ICC-01/12-01/18-1207-Conf.

² ICC-01/12-01/18-1252-Conf.

³ ICC-01/12-01/18-1402-Conf-Red; ICC-01/12-01/18-1402-Conf-Anx.

⁴ ICC-01/12-01/18-1402-Conf-Red, paras 12-16 and disposition.

⁵ ICC-01/12-01/18-1402-Conf-Anx, paras 6 and 13.

⁶ ICC-01/12-01/18-1727-Conf.

⁷ ICC-01/12-01/18-1727-Conf, paras 7 and 9.

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

English translation,¹¹ [REDACTED]¹² and [REDACTED].¹³ The Prosecution also wishes to associate eight videos (and associated transcripts and translations) and one photograph already formally submitted with P-0113 on eCourt.¹⁴

5. On 23 September 2021, the Single Judge set the deadline for responses to the Second Application as 14 October 2021.¹⁵
6. The Defence maintains its opposition to the submission of P-0113's prior recorded testimony and associated material on the following bases:
 - a. *First*, the Prosecution has failed to establish the requisite standard for reconsideration of the Chamber's Decision;
 - b. *Second*, the Prosecution has failed to establish that this testimony is of corroborative nature and would save time in court; and
 - c. *Third*, the Prosecution has failed to demonstrate that the introduction of P-0113's prior recorded statement and associated materials does not cause undue prejudice to Mr Al Hassan's fair trial rights, because of the inconsistencies contained in the Request.
7. For the reasons stated in this response, the Defence respectfully requests the Chamber to reject the Second Application.

II. Confidentiality

8. Pursuant to Regulation 23bis(2) of the Regulations of Court, this response has been filed confidentially as it responds to a filing of the same classification. A public redacted version will be filed forthwith.

III. Submissions

The Second Application constitutes a request for reconsideration of the Decision, for which the Prosecution has failed to establish the requisite standard

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ ICC-01/12-01/18-1727-Conf, para. 6; [REDACTED].

¹⁵ [REDACTED].

9. By the Decision, the Majority of the Chamber decided that it would prefer to hear P-0113's evidence pursuant to Rule 68(3), with the Defence entitled to cross-examine the witness. By the Second Application, the Prosecution seeks, again, to have P-0113 testify pursuant to Rule 68(2)(b). The Second Application therefore constitutes a request for reconsideration of the Decision.
10. Chambers of this Court have recognised an inherent power to reconsider decisions, on an exceptional basis, if the decision in question:
- a. was issued without first affording affected parties the right to be heard;¹⁶
 - b. is based on a clear error of reasoning;¹⁷
 - c. is manifestly unsound or unsatisfactory, or would lead to an injustice;¹⁸ or
 - d. new or previously unavailable information requires the Chamber to reconsider its previous ruling.¹⁹
11. The Second Application does not establish any clear basis for reconsideration: it identifies no failure of procedural fairness, no error committed by the Chamber, no new information which has arisen, nor any injustice caused by the Decision. The same reasons argued in the First Application²⁰ [REDACTED] are relied upon in the Second Application:²¹ the crux of the Prosecution's arguments are that P-0113 remains unwilling to testify, even with the mechanisms under Rule 68(3) and protective measures attaching to his testimony.²² That is not 'new or previously unavailable information' as the First Application clearly stated that P-0113 did not wish to appear before the Chamber²³ and the Prosecution's own evidence and submissions on this issue state that P-0113's

¹⁶ *Yekatom and Ngaïssona*, [ICC-01/14-01/18-206](#), paras 15-21; *Katanga and Ngudjolo*, [ICC-01/04-01/07-259](#).

¹⁷ *Ongwen*, [ICC-02/04-01/15-1259](#), para. 12; [ICC-02/04-01/15-468](#), para. 4; [ICC-02/04-01/15-610](#), para. 7.

¹⁸ *Ntaganda*, [ICC-01/04-02/06-519](#), para. 12; [ICC-01/04-02/06-1049-Red](#), para. 12; [ICC-01/04-02/06-1282](#), para. 12. See also *Ongwen*, [ICC-02/04-01/15-468](#), para. 4; *Bemba et al*, [ICC-01/05-01/13-1282](#), para. 8; [ICC-01/05-01/13-1552](#), para. 6; [ICC-01/05-01/13-1854](#), paras 75-76.

¹⁹ *Bemba*, [ICC-01/05-01/08-1691](#), para. 17; *Ongwen*, [ICC-02/04-01/15-1259](#), para. 12.

²⁰ ICC-01/12-01/18-1207-Conf, para. 17.

²¹ ICC-01/12-01/18-1727-Conf, paras 29 and 31-32.

²² ICC-01/12-01/18-1727-Conf, para. 28.

²³ ICC-01/12-01/18-1207-Conf, para. 17; [REDACTED].

objection to testifying is to testifying in court, not testifying publicly.²⁴ This is, in fact, noted by the Single Judge in her Honour's Dissenting Opinion where Judge Prost states:²⁵

Given the Prosecution's extensive use of protective measures in this case, it is evident that in discussing possible testimony with this witness, the Prosecution would have already exhaustively canvassed use of such measures to no avail. Evidently it is also in the Prosecution interest to adduce the totality of the statement via Rule 68(3). Nonetheless, the P-0113 Request makes it clear that this witness is not prepared to testify orally [REDACTED].

12. As such, P-0113's position has not changed since the First Application, so there is no new information on this issue.

13. Even setting aside the issue of the request for reconsideration, the burden of proof falls on the Prosecution to establish the factual threshold required for introducing the prior recorded testimony in question – supported by evidence of sufficient specificity and probative value to satisfy the Chamber that the requirements of Rule 68(2)(b) are met.²⁶ Notably, Rule 68(2)(b) applications carry a higher threshold than Rule 68(3) applications, as unlike in the latter case, the Defence has no opportunity to cross examine Rule 68(2)(b) witnesses in court.²⁷

14. For the reasons set forth below, in the present case, the Second Application fails to meet the applicable criteria.

P-0113's statement is not of a cumulative or corroborative nature

15. The Prosecution alleges that P-0113's evidence is of a 'cumulative or corroborative nature',²⁸ and argues on this basis that this evidence should be introduced. A relevant factor for the Trial Chamber is whether the other testimony has been, or will be, provided on 'similar facts' as those set out in the tendered statement.²⁹ Prior recorded testimony has previously been rejected where such testimony was uncorroborated or inconsistent

²⁴ ICC-01/12-01/18-1727-Conf, para. 31; [REDACTED]. According to this [REDACTED] and P-0113 told the Prosecution [REDACTED].

²⁵ ICC-01/12-01/18-1402-Conf-Red, para. 11.

²⁶ *Ruto and Sang*, [ICC-01/09-01/11-1938-Corr-Red2](#), para. 37.

²⁷ *Gbagbo and Blé Goudé*, [ICC-02/11-01/15-722-Red](#), para. 5.

²⁸ ICC-01/12-01/18-1727-Conf, paras 55-56.

²⁹ *Ntaganda*, [ICC-01/04-02/06-1715-Red](#), para. 14.

with the testimony of other witnesses in the case.³⁰ The Appeals Chamber provided guidance in the *Ntaganda* decision on corroboration, stating:³¹

Trial Chambers enjoy broad discretion in assessing inconsistencies within the evidence and in deciding whether corroboration is necessary. Different testimonies do not need to be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others. Accordingly, while testimonies need not be identical in all aspects, they must confirm, even if in different ways, the same fact.

16. P-0113's evidence is not capable of corroborating other testimony in this case due to: *first*, its unreliable, hearsay nature: by his own admission, P-0113 did not personally witness the alleged crimes (with the exception of one case of flogging from a distance) but had only heard about them from unspecified sources;³² and *second*, its inability to confirm the same facts as those found in the testimony of other witnesses as key claims made by P-0113 in his statement are not corroborated, or are contradicted, by other sources.
17. There are major discrepancies between P-0113's account [REDACTED] and that provided by other Prosecution witnesses, [REDACTED]. [REDACTED].³³ [REDACTED].³⁴
18. Furthermore, [REDACTED],³⁵ [REDACTED].³⁶ This statement by P-0113 in his evidence – that he opposed this policy – is largely self-serving and would need to be the

³⁰ *Ntaganda*, [ICC-01/04-02/06-1667-Red](#), paras 17-19; [ICC-01/04-02/06-2099](#), para. 31.

³¹ [ICC-01/04-02/06-2666-Red](#), para. 18.

³² [REDACTED].

³³ [REDACTED].

³⁴ *Ntaganda*, [ICC-01/04-02/06-2359](#), para. 177: "The Chamber considers that, because of the way they were issued, i.e. on the basis of the witness's accounts alone for the electoral card and on the basis of the hospital's certificate for the document from the *État civil*, these items cannot serve as independent corroboration." See also ICTR, *Bizimingu*, [Judgment and Sentence](#), para. 367: "Turning to Witness GBR, his evidence about lists is not only hearsay, but sources of some of his testimony regarding lists appeared before the Chamber. Thus, while his testimony naturally complements the first-hand evidence led by the Prosecution, it does not provide independent corroboration of that account."

³⁵ [REDACTED].

³⁶ [REDACTED].

subject of cross-examination. [REDACTED]³⁷ [REDACTED]³⁸ [REDACTED]³⁹ [REDACTED].⁴⁰

19. [REDACTED]⁴¹ and [REDACTED].⁴²

20. [REDACTED]⁴³ whereas [REDACTED].⁴⁴ Testing P-0113's evidence on cross examination would therefore be crucial, not only for establishing the reliability and probative value of P-0113, [REDACTED]. [REDACTED], it is imperative that the Defence have an opportunity to cross-examine P-0113 himself.

21. Furthermore, P-0113 claims that [REDACTED],⁴⁵ an allegation not corroborated by the evidence of any other witness or reflected in the charges.

22. P-0113 also claims that [REDACTED].⁴⁶ This is a contentious point disputed by P-0152.⁴⁷ Similarly, P-0113 claims that he believes a [REDACTED]⁴⁸ and that there is [REDACTED]⁴⁹ without providing any justification for this belief and despite his own evidence⁵⁰ (and the evidence of others including P-0152,⁵¹ P-0065,⁵² [REDACTED]⁵³) that Ansar Dine was responsible for ending abuses by MNLA in Timbuktu.

23. P-0113's allegation that [REDACTED]⁵⁴ is not supported by other evidence in the case: [REDACTED]⁵⁵ [REDACTED]⁵⁶ and P-0130, who testifies that he was present in

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ See [REDACTED].

⁵¹ P-0152 testified that Iyad Ag Ghaly viewed the MNLA as 'one of his enemies' ([REDACTED]), that the precise nature of the relationships between the MNLA, Ansar Dine and AQIM would not have been clear to people in the community ([REDACTED]) and that either AQIM or Ansar Dine [REDACTED].

⁵² P-0065 testified that it seemed that the disagreement was very clear between MNLA and the rest of the jihadist groups ([REDACTED]).

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ ICC-01/12-01/18-1727-Conf, paras 57, 58, 59, 61, 62, 64, 65

⁵⁶ [REDACTED].

Timbuktu during the entirety of 2012,⁵⁷ does not mention [REDACTED]. P-0113's claim that [REDACTED]⁵⁸ is inconsistent with [REDACTED] evidence that [REDACTED]⁵⁹ and [REDACTED].⁶⁰

24. P-0113's claim that women were held for up to three days in a row in a room by the *Hesbah*⁶¹ is prejudicial as there is no source of evidence, and this claim has been disputed by other witnesses including [REDACTED]⁶² and is inconsistent with the evidence of fact witnesses P-0565 ([REDACTED]⁶³); and P-0554 ([REDACTED]).⁶⁴ P-0113's testimony concerning linkages between the Islamic Police and the *Hesbah*⁶⁵ appears to be highly unreliable: it is vague and yet seems to make prejudicial claims regarding collaboration between the two bodies based solely on the fact that members of both groups attended meetings.

P-0113's testimony pertains to live and important issues in the case

25. P-0113's evidence (even with the exclusions proposed by the Prosecution) touches on live and important issues, including the existence of an armed conflict;⁶⁶ the role, functions and criminality of various organs established by the armed groups, including the Islamic Police, the *Hesbah* and the Islamic Tribunal;⁶⁷ and allegations pertaining to charged criminal conduct including detentions, floggings, amputation, rape and destruction of mausoleums.⁶⁸
26. In determining whether introduction of prior recorded testimony may be allowed under 68(2)(b)(i), the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question "relates to issues that are not materially in dispute" or "relates to background information". According to Trial Chamber IX, the issue is "whether the prior recorded testimony relates to matters which are soundly and conceivably disputed between the

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

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".⁶⁹ By comparison, this Trial Chamber has previously recognised that evidence on core issues is not to be introduced pursuant to Rule 68(3), which carries a lower threshold for admission.⁷⁰ Thus, prior testimony on live and important issues in the case has been held inadmissible under Rule 68(2)(b).⁷¹

27. All of the noted issues are crucial to the Prosecution's case against Mr. Al Hassan and are consistently disputed by the Defence. Consequently, P-0113's statement should not be admitted under Rule 68(2)(b).

P-0113 is in a position to provide evidence on Defence lines of argument, and the Defence would therefore be prejudiced by not being able to examine the witness concerning these issues

28. P-0113's evidence, in its current form, contains multiple statements relevant to the persecution of Arab and Touareg peoples in Timbuktu and Mali,⁷² a matter which has repeatedly been confirmed by other witnesses, including P-0065,⁷³ P-0654,⁷⁴ and [REDACTED].⁷⁵ P-0654 and P-0113's testimony differs on the crucial point regarding the killing [REDACTED]⁷⁶ whereas P-0654 testified that [REDACTED].⁷⁷ The Defence will be deprived of an opportunity to explore with P-0113 the PEXO aspects of his testimony if the Chamber accepts introduction of his testimony through Rule 68(2).

P-0113's prior recorded testimony lacks reliability

29. P-0113's prior recorded testimony raises questions as to his credibility as a witness in this case. Such issues can only be adequately tested on cross examination. The admission of this prior recorded testimony under Rule 68(2)(b) would deprive the Defence of an opportunity to test the reliability of P-0113's evidence.

⁶⁹ Ongwen, [ICC-02/04-01/15-596-Red](#), para. 15.

⁷⁰ ICC-01/12-01/18-987-Conf, para. 24.

⁷¹ Katanga and Ngudjolo, [ICC-01/04-01/07-2362](#), paras 27-28, 33-34; Ongwen, [ICC-02/04-01/15-596-Red](#), paras 214-215.

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

30. Pursuant to Rule 68(2)(b)(i), prior recorded testimony must demonstrate ‘sufficient indicia of reliability’. Whilst the Trial Chamber is not obliged to consider factors beyond formal requirements in its assessment of indicia of reliability, neither is the Trial Chamber precluded from considering other factors, if this is necessary and appropriate in a particular case.⁷⁸
31. P-0113’s prior recorded testimony raises questions as to his reliability as a witness, which need be tested on cross-examination. During one of his meetings with investigators, P-0113 had [REDACTED].⁷⁹ [REDACTED].⁸⁰ [REDACTED]. As such, P-0113’s prior recorded testimony fails to demonstrate sufficient indicia of reliability.

The Defence objects to the submission of the associated materials

32. The Prosecution has failed to demonstrate with sufficient specificity and probative value that each of the associated materials listed in the Annex⁸¹ are admissible under Rule 68(2)(b) and Article 69(4) of the ICC Statute.
33. Materials associated with the prior recorded statements are admissible only if (i) the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced (forming an integral part of the statement), and (ii) their admission is not unduly prejudicial to the accused in accordance with Article 69(4) of the ICC Statute (any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence).⁸² As with all matters relating to the admission of evidence in written form, the admissibility of associated materials ought to be demonstrated with “cautious item-by-item analysis”.⁸³
34. By way of general objection – the Prosecution has failed to demonstrate to any degree of specificity and probative value how each item listed in the Annex satisfies the admissibility criteria, namely that each item is necessary to read and understand the prior recorded testimony being introduced and that its admission is not unduly prejudicial to

⁷⁸ *Gbagbo and Blé Goudé*, [ICC-02/11-01/15-744](#), para. 104.

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ [REDACTED].

⁸² *Ruto and Sang*, [ICC-01/09-01/11-1938-Corr-Red2](#), para. 33; *Ongwen*, [ICC-02/04-01/15-596-Red](#), para. 10.

⁸³ *Gbagbo*, [ICC-02/11-01/15-744](#), para. 69.

Mr. Al Hassan. Instead, the Prosecution has limited itself to a “brief description of the associated material”⁸⁴ and references to paragraphs in the statement where the materials are mentioned.⁸⁵ As the burden of proof is on the Prosecution to demonstrate admissibility of prior recorded testimony under Rule 68(2)(b) with sufficient specificity and probative value,⁸⁶ then logically, the same burden applies in relation to the associated materials.

35. More specifically, the Prosecution has not demonstrated that the videos and associated transcripts and translations (both those intended for submission and those for submissions on weight) are not unduly prejudicial to Mr. Al Hassan, namely as to the fair evaluation of this evidence. The witness did not create, edit or handle the videos in question. He was simply shown the videos for the purpose of demonstrating his visual recognition of certain persons and places. The importance of personal knowledge concerning in particular the time periods and locations of items of evidence is demonstrated by the previous practice of Chambers of this Court. In *Katanga*, Trial Chamber II held, ‘[s]ince the relevance of audio and video material depends on the date and/or location of recording, evidence must be provided in this regard.’⁸⁷ Similar statements were made in *Ntaganda*,⁸⁸ *Bemba*,⁸⁹ and later in *Katanga*.⁹⁰ This case law also emphasises the need for

⁸⁴ ICC-01/12-01/18-1727-Conf, paras 71-75.

⁸⁵ [REDACTED].

⁸⁶ *Ruto and Sang*, [ICC-01/09-01/11-1938-Corr-Red2](#), para. 37.

⁸⁷ [ICC-01/04-01/07-2635](#), para. 24(d).

⁸⁸ [ICC-01/04-02/06-2201-Red](#), paras 51-52:

“51. A video excerpt of Document 129, DRC-OTP-0036-0006, is tendered by the Defence together with the corresponding excerpts of its transcript, Document 130, DRC-OTP-0018-0363. They purport to relate to the consequences of an attack on Nyankunde. The Chamber finds that, absent further information on the date and circumstances of the creation of this video, or any other form of authentication, it cannot assess relevance and probative value of the video and corresponding transcript, and therefore denies their admission into evidence.

52. For the same reasons, the Chamber declines to admit the excerpt of Document 134, DRC-D18-0001-0440, into evidence. As the Defence notes, the video seems to be recorded on 8 June 2003, but in the absence of further information on its creation, or any other form of authentication, and what is depicted, the Chamber finds that it is not prima facie relevant or probative, and therefore denies its admission into evidence.”

⁸⁹ [ICC-01/05-01/08-2299-Red](#), paras 121-122:

“121. Recording CAR-OTP-0005-0159, is dated 13 February 2003 and is approximately one minute long. According to the prosecution this is an interview by journalist Ms Carinne Frenck with the accused in which he indicates that his troops will start withdrawing from the CAR. However, the Chamber notes that, contrary to the prosecution’s submissions, nowhere in the recording is the journalist identified. Further, the prosecution has provided no evidence whatsoever as to this recording’s originality or integrity. In fact, the recording is evidently an excerpt of a longer interview which has not been submitted to the Chamber in its entirety. As regards the origin of this recording, although the prosecution states that the source is RFI, no evidence has been provided to that effect. The Chamber notes, however, that the defence has not contested that this recording emanates from RFI or that the voice of one of the persons in this recording is that of the accused.

122. In the view of the Chamber, although the audio recording purports to be an interview of the accused by a journalist concerning the MLC’s withdrawal from the CAR in March 2003, the item is unlikely to assist in the

evidence of originality and integrity.⁹¹ Having failed to elicit evidence concerning P-0113's personal knowledge of these documents, introduction of the videos through P-0113 (where applicable) and acceptance of the testimony concerning each of the videos would be prejudicial and unfair. Without cross-examination, the Defence is unable to test the witness' recognition or whether the recognition arises from personal experience, hearsay or evidence contamination by investigators or others. Moreover, the Defence is precluded from confronting the witness with parts of his testimony where he failed to recognise persons and places, and the Prosecution is not seeking to adduce these materials into evidence.

36. The Prosecution has not demonstrated why item [REDACTED] is necessary to read and understand the prior recorded testimony being introduced, or that it is not unduly prejudicial to Mr. Al Hassan. The referenced paragraph in [REDACTED]⁹² merely states that [REDACTED].⁹³ The witness does not discuss the contents of the document in detail, explain how it pertains to the evidence in his statement or [REDACTED] for the unreferenced document. Without cross-examination, the Defence is unable to test the reliability of the information contained in the document or its chain of custody.

37. The Prosecution has not demonstrated that item [REDACTED] is not unduly prejudicial to Mr. Al Hassan. In paragraph 96 of his statement, P-0113 claims that [REDACTED] – a claim that goes to the core of the charges against Mr. Al Hassan. This specifically goes to the alleged relationship [REDACTED], a matter which was meant to be excluded from the scope of the witness's testimony under Rule 68(2), and a matter which without cross-examination, the Defence is unable to test the reliability of the information contained in the document, its provenance or its chain of custody.

Chamber's determination of this particular issue. The recording would only be of minimal relevance to the Chamber's determination of the case. Further, the recording is only an excerpt and the Chamber has not been provided with sufficient information in order to verify that this brief excerpt actually emanates from RFI or one of its reporters or correspondents. As previously stated, the prosecution should provide recordings in full and not just excerpts of them, and unless the recording bears sufficient indicia that it is what it purports to be (i.e. an RFI transmission), the prosecution must also provide information on its source, originality and integrity. In light of the absence of this information, the alleged probative value of the recording is outweighed by its potentially prejudicial effect on a fair trial. The Chamber therefore rejects the admission of recording CAR-OTP-0005-0159."

⁹⁰ [ICC-01/04-01/07-T-187-Red-ENG WT 14-09-2010](#), p. 37, line 1 to p. 38, line 9.

⁹¹ *Katanga*, [ICC-01/04-01/07-2635](#), para. 24(d): '[b]efore video or audio material can be admitted, the Chamber will require evidence of originality and integrity'; *Bemba*, [ICC-01/05-01/08-2299-Red](#), paras 121-122.

⁹² [REDACTED].

⁹³ [REDACTED].

Introduction of P-0113's prior recorded testimony and associated materials would be prejudicial to Mr. Al Hassan's fair trial rights and the interests of justice

38. The Rule 68(2)(b) mechanism for admitting prior recorded testimony is an antithesis to the principles of orality and publicity and the adversarial nature of criminal proceedings.⁹⁴ As such, rather than calling for a balancing act between judicial economy and fair trial rights, it must be restricted to circumstances where it can have no prejudicial effect on the rights of the accused. To this end, Rule 68(2)(b) includes guidelines for the Trial Chamber – limiting its application to prior testimony which is cumulative and uncontroversial. Depriving the Defence of the right to cross-examine a witness may only be justified in circumstances where the Defence has other equally effective means of challenging the reliability and probative value of the proffered evidence. Such occasions are by their very nature – very rare. The advantages of testimony given *viva voce* were recently described by Trial Chamber V: “[n]ot only is the testimony given under oath and under the Chamber’s oversight, it further enables the Chamber and the accused to hear natural and spontaneous accounts from witnesses, to directly and closely observe their reactions, demeanour and composure, and to immediately seek clarifications”.⁹⁵
39. The Prosecution’s application to introduce P-0113’s prior recorded testimony and associated materials is a thinly veiled attempt to adduce important and contested evidence from a witness who refuses to testify *viva voce*, at the expense of Mr. Al Hassan’s fair trial rights. Despite the Prosecution’s assurances that it will not seek to rely on parts of the testimony that mention Mr. Al Hassan [REDACTED], looked at in its entirety, P-0113’s references to Mr. Al Hassan’s alleged acts and conduct are numerous, significant to the Prosecution’s case and go to the core of the testimony. Aside from Mr. Al Hassan’s alleged conduct, the testimony raises other live and important issues in the case. Some of those issues are not corroborated by other evidence in the case, and some are directly contradicted by other Prosecution witnesses. Finally, the testimony raises important questions as to P-0113’s reliability as a witness. All of the above issues are significant, and must be tested on cross-examination, if P-0113’s testimony is to be entered into evidence. Without cross-examination, Mr. Al Hassan would be deprived of effectively

⁹⁴ *Yekatom and Ngaïssona*, [ICC-01/14-01/18-685](#), para. 30.

⁹⁵ *Yekatom and Ngaïssona*, [ICC-01/14-01/18-685](#), para. 33; see also *Bemba*, [ICC-01/05-01/08-1386](#), para. 76.

challenging the reliability and probative value of the evidence adduced against him, and there are no effective substitutes for cross-examination in these circumstances.

40. As demonstrated in this response, the tendered evidence is not cumulative or corroborative, and indeed relates to live and important issues. Furthermore, while the Defence has respect for P-0113's [REDACTED], this cannot be used to deprive Mr Al Hassan of key fair trial rights in proceedings before the ICC. Consequently, the Prosecution has, again, failed to provide evidence of sufficient specificity and probative value to satisfy the Chamber that the requirements of Rule 68(2)(b) are met in the present case.

If P-0113's prior recorded testimony and associated materials are introduced, the prior recorded testimony should only be introduced in part and little or no weight should be given to the sections of the statement which touch on live and important issues, are based on hearsay and/or are uncorroborated or contradicted by the testimony of other witnesses

41. By the Second Application, the Prosecution seeks to introduce P-0113's prior recorded testimony in part only, with the exception of sections of the prior recorded testimony concerning Mr Al Hassan's acts and conduct.⁹⁶ Given the findings of the Majority in the Decision⁹⁷ and the Single Judge in her Partially Dissenting Opinion⁹⁸ regarding the impact which introduction of the sections concerning Mr Al Hassan's acts and conducts would have on fundamental rights of the accused, there is no justification for introducing material which would be prejudicial to Mr Al Hassan without the Defence having any opportunity to cross-examine the witness. While the Chamber has previously indicated

⁹⁶ The proposed sections for exclusion are [REDACTED].

⁹⁷ ICC-01/12-01/18-1402-Conf-Red, para. 12: "The Majority of the Chamber notes that P-0113's prior recorded testimony consists of a 39-page statement which discusses a wide array of matters and events which go beyond background' information. The Majority also takes note of the Defence's arguments that P-0113's statement contains evidence relating to issues that are 'materially in dispute' and notes the Prosecution's submission that it is seeking to introduce evidence that is 'highly relevant to and probative of the charges against the [a]ccused'. In light of the content and scope of his prior recorded testimony, and at this stage, the Majority prefers to receive P-0113's evidence *viva voce*."

⁹⁸ ICC-01/12-01/18-1402-Conf-Anx, para. 8: "I find it appropriate, and necessary in this case in order to comply with the requirements of Rule 68(2)(b) and avoid prejudice to the accused, to consider only certain parts of P-0113's statement for admission. I also believe that that the Defence rightly identified two additional paragraphs containing information which ought to also be excluded from submission under Rule 68(2)(b) of the Rules because they go to proof of the acts and conduct of Mr Al Hassan (being referred to as 'the *Commissaire*')."

that it did not wish to introduce prior recorded testimony in a piecemeal fashion,⁹⁹ as the Single Judge noted in her Honour's Partially Dissenting Opinion¹⁰⁰ the situations under Rule 68(2)(b) and Rule 68(3) are distinct and the introduction of the entirety of P-0113's prior recorded testimony is – as all Judges of the Chamber have previously found – inappropriate.

42. Furthermore, if the prior recorded testimony is introduced pursuant to Rule 68(2), the Chamber should give little or no weight to those sections of the statement which discuss live and important issues, are based on hearsay and/or are uncorroborated or contradicted by other witnesses, given that the Defence will have no opportunity to cross-examine or in any other way test this evidence. In contrast, given that the Prosecution has had a full opportunity to examine and test P-0113's evidence during witness interviews, any exculpatory sections should be given full weight given the lack of prejudice that would be occasioned to the Prosecution.¹⁰¹ This is consistent with the Chamber's duty to take remedial steps to cure any prejudice arising from the unavailability of exculpatory evidence, including by making inferences of fact in favour of the Defence.¹⁰²

IV. Relief Sought

43. For all of the above reasons, the Defence respectfully requests the Trial Chamber **REJECT** the Second Application. In the event that the Chamber grants the Second Application, evidence which pertains to any live and important issues in the case, is of a hearsay nature, and/or is uncorroborated or contradicted by other witnesses must not be given any or any significant weight as the Defence will have no opportunity to cross-examine the witness. However, any exculpatory aspects of his statement must – in that case – be given full weight as the Prosecution had an opportunity to question the witness and would suffer no prejudice.

⁹⁹ ICC-01/12-01/18-987-Conf, paras 12-16.

¹⁰⁰ ICC-01/12-01/18-1402-Conf-Anx, para. 5.

¹⁰¹ See generally regarding the power of the Chamber to rely on certain parts of a witness' testimony while rejecting other parts: ICTR, *Setako*, [Appeals Judgement](#), para. 48; ICTY, *Haradinaj*, [Appeals Judgement](#), para. 201.

¹⁰² *Lubanga*, [ICC-01/04-01/06-1644](#), paras 35, 57-58; ICTR, *Bizimungu et al*, [Judgement](#), para. 176.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 14th Day of October 2021
At The Hague, The Netherlands