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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 application under rule 68(2)(b) to introduce MLI-OTP-P-0113’s statement and associated material into evidence’”, 18 January 2021, ICC-01/12-01/18-1252-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:

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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' ('Prosecution's application').¹
2. The Defence for Mr. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ('Defence') hereby submits its response within the applicable timeframe.² The Defence objects to the admission of P-0113's prior recorded testimony and associated materials. The Prosecution has failed to provide evidence of sufficient specificity and probative value to satisfy the Chamber that the requirements of Rule 68(2)(b) are met. As demonstrated in this response, the prior recorded testimony goes to Mr. Al Hassan's acts and conduct, raises important and live issues in the case, is not cumulative or corroborative on key contentious issues and raises questions as to the witness' reliability. Furthermore, the Prosecution has failed to demonstrate to any degree of specificity and probative value how each item listed in the annex of associated materials satisfies the applicable admissibility criteria. Crucially, 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, by depriving him of his right to cross examine a Prosecution witness. For the reasons stated in this response, the Defence respectfully requests the Trial Chamber to reject the Prosecution's application to enter P-0113's prior testimony and associated material into evidence through Rule 68(2)(b).

II. Confidentiality

3. Pursuant to Regulation 23bis(2) of the Regulations of Court, this response has been filed confidentially as it refers to filings and decisions of the same classification.

III. Submissions

4. Judicial economy is at the heart of the Rule 68(2)(b) procedure for admitting prior recorded testimony – aimed at focusing live testimony on topics of the greatest relevance to the proceedings and minimising cumulative in-court witness testimony.³ Such aims are

¹ ICC-01/12-01/18-1207-Conf.

² [REDACTED].

³ [ICC-02/04-01/15-596-Red](#), para. 16.

strictly limited by the rights and interests of the accused and must never be used in a way that would be prejudicial to the fairness of the proceedings.⁴ To be admitted under Rule 68(2)(b), the prior recorded testimony in question must not refer to the acts and conduct of the accused. Other factors to be considered by the Trial Chamber include, but are not limited to: whether the statement pertains to live and important issues in the case, whether the evidence is cumulative or corroborative in nature, whether the evidence is consistent with the testimony of other witnesses, whether the evidence demonstrates a ‘sufficient indicia of reliability’, and crucially – whether its admission would cause prejudice to the rights of the accused. Notably, even if the prior recorded testimony meets the procedural requirements of Rule 68(2)(b), it is within the Trial Chamber’s discretion to reject it, where the Chamber’s evaluation of the probative value and credibility of the evidence might be affected by the witness not giving his or her evidence in open court.⁵

5. 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.⁶ 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.⁷
6. For the reasons set forth below, in the present case, the Prosecution’s application to introduce P-0013’s statement and associated material into evidence via Rule 68(2)(b) fails to meet the applicable criteria.

(1) P-0113’s statement refers to Mr. Al Hassan’s acts and conduct

7. Notwithstanding the Prosecution’s assertions that it “seeks to introduce the portions of P-0113’s statement which goes to proof of matters other than the acts and conduct of the Accused [sic]”,⁸ key parts of the tendered statement do relate to Mr. Al Hassan’s alleged acts and conduct.
8. The term ‘acts and conduct’ refers to actions of the accused which are described in the

⁴ [ICC-02/04-01/15-596-Red](#), para. 16; [ICC-02/11-01/15-870](#), para. 7.

⁵ [ICC-01/04-01/07-2362](#), para. 15.

⁶ [ICC-01/09-01/11-1938-Corr-Red2](#), para. 37.

⁷ [ICC-02/11-01/15-722-Red](#), para. 5.

⁸ ICC-01/12-01/18-1207-Conf, para. 6.

charges brought against him or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged.⁹ This includes testimony that – although not explicitly mentioning the accused – is tendered to prove the acts and conduct of the accused.¹⁰ Where – as in the present case – the prior recorded testimony includes explicit references to the accused, it may only be admitted under Rule 68(2)(b) where the references are of a “peripheral discreet” nature, the Prosecution indicates that it does not intend to rely on the references and the references are not of significance to the case and do not go to the core of (or are inseparable from) the statement (these three requirements are cumulative).¹¹ Moreover, ICC Trial Chamber IX has held that statements cannot be submitted piecemeal, and that “the Chamber must conduct its determination of whether a prior recorded testimony can be introduced under Rule 68(2)(b) of the Rules upon consideration of the whole testimony and, in turn, the whole testimony would be introduced under that provision”.¹²

9. Key parts of P-0113’s statement relate to and are tendered for the purpose of proving Mr. Al Hassan’s alleged acts and conduct. Throughout his statement, P-0113 alleges that [REDACTED] (assertions which are disputed by the Defence and contradicted by other witness evidence – see below).¹³ Whilst the Prosecution says it will not seek to introduce into evidence those references that identify Mr. Al Hassan [REDACTED],¹⁴ at least two paragraphs [REDACTED] remain in the submitted portion of the statement.¹⁵ It is the Prosecution’s case that Mr. Al Hassan was the ‘commissaire’ of the Islamic Police,¹⁶ thus any references to the acts and conduct of the ‘commissaire’ are clearly being tendered to prove Mr. Al Hassan’s acts and conduct.¹⁷
10. Moreover, while the Prosecution says it will not seek to introduce into evidence nine paragraphs from P-0113’s statement that identify Mr. Al Hassan [REDACTED], the

⁹ [ICC-02/04-01/15-596-Red](#), para. 12.

¹⁰ [ICC-01/05-01/13-1430](#), para. 8; [ICC-02/04-01/15-596-Red](#), fn. 26.

¹¹ [ICC-02/04-01/15-596-Red](#), para. 13; [ICC-02/04-01/15-1294](#), para. 5; [ICC-02/11-01/15-950-Red](#), para. 72.

¹² [ICC-02/04-01/15-596-Red](#), para. 13; Confirmed by Trial Chamber X in ICC-01/12-01/18-987-Conf, para. 13.

¹³ [REDACTED].

¹⁴ ICC-01/12-01/18-1207-Conf, paras. 6, 24.

¹⁵ [REDACTED].

¹⁶ ICC-01/12-01/18-819-Conf-AnxA, para. 113 et seq.

¹⁷ See [ICC-02/04-01/15-596-Red](#), fn. 26: “The Chamber emphasises that this situation is remarkably different from – and arguably the contrary of – situations in which the prior recorded testimony does not explicitly mention the accused but attributes certain acts and conduct to an unidentified person who is alleged by the Prosecution to be the accused and is, on this ground, relied upon precisely for the purpose of establishing acts and conduct of the accused” (citing ICC-01/05-01/13-1430, para. 8).

omitted paragraphs are not of a “peripheral discreet” nature, whilst the evidence therein is of clear significance to the Prosecution’s case against Mr. Al Hassan and is inseparable from the rest of the statement. As stated by the Prosecution, the value of P-0113’s statement lies in the fact that [REDACTED].¹⁸ 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.¹⁹ Thus, P-0113’s testimony in relation to the alleged criminal conduct is of very limited probative value. The value of P-0113’s testimony for the Prosecution is therefore his purported [REDACTED], and Mr. Al Hassan’s alleged linkage to that [REDACTED]. Throughout his statement, P-0113 alleges that Mr. Al Hassan [REDACTED].²⁰ As such, the references to Mr. Al Hassan are numerous and are of significance to the Prosecution’s case and go to the very core of P-0113’s statement. Considering P-0113’s statement in its entirety, it is clear that references to Mr. Al Hassan’s acts and conduct therein render it inadmissible under Rule 68(2)(b).

(2) P-0113’s statement pertains to live and important issues in the case

11. The tendered statement pertains to live and important issues in the case and therefore should not be admitted under Rule 68(2)(b).
12. 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 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”.²¹ By comparison, this Trial Chamber has previously recognised that evidence on core issues are not to be introduced pursuant to Rule 68(3) – which carries a lower threshold for admission.²²

¹⁸ ICC-01/12-01/18-1207-Conf, paras. 29, 31.

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [ICC-02/04-01/15-596-Red](#), para. 15.

²² ICC-01/12-01/18-987-Conf, para. 24.

Thus, prior testimony on live and important issues in the case has been held inadmissible under Rule 68(2)(b).²³

13. As discussed above, P-0113's prior recorded testimony chiefly pertains to the composition and structure of the armed groups' leadership, and to Al Hassan's alleged linkage to [REDACTED]. These matters go to the core of the Prosecution's case against Mr. Al Hassan and are disputed by the Defence – especially given that the bulk of the charges are based on his alleged facilitation or contribution to the commission of the alleged crimes [REDACTED].²⁴ Other live and important issues raised in P-0113's statement include: the existence of an armed conflict;²⁵ the role, functions and criminality of various organs established by the armed groups, including the Islamic Police, the *Hesba* and the Islamic Tribunal;²⁶ and allegations pertaining to charged criminal conduct including detentions, floggings, amputation, rape and destruction of mausoleums.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).

(3) *Important claims are not corroborated or are disputed by other sources*

14. Key claims made by P-0113 in his statement are not corroborated (or are contradicted) by other sources. It would be unfair to deprive the Defence of the right to cross-examine the witness in such circumstances, and the statement should not be admitted under Rule 68(2)(b).

15. 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.²⁸ Prior recorded testimony has previously been rejected where such testimony was uncorroborated or inconsistent with the testimony of other witnesses in the case.²⁹

16. Central to P-0113's statement is the claim that the Islamic Police [REDACTED].³⁰ On the

²³ [ICC-01/04-01/07-2362](#), paras. 27-28, 33-34; [ICC-02/04-01/15-596-Red](#), paras. 214-215.

²⁴ ICC-01/12-01/18-819-Conf-AnxA, paras. 162 et seq.

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [ICC-01/04-02/06-1715-Red](#), para. 14.

²⁹ [ICC-01/04-02/06-1667-Red](#), para. 17-19; [ICC-01/04-02/06-2099](#), para. 31.

³⁰ [REDACTED].

contrary, P-0114 [REDACTED] has stated that [REDACTED].³¹ Similarly, P-0114 stated that [REDACTED].³²

17. [REDACTED]. [REDACTED],³³ [REDACTED].³⁴ [REDACTED].³⁵ [REDACTED].³⁶

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].

18. P-0113 also claims that [REDACTED].³⁷ This is a contention point disputed by P-0152.³⁸

P-0113's allegations that [REDACTED]³⁹ is not supported by other evidence in the case. P-113's account on the fate of [REDACTED]⁴⁰ - is significantly different from that of P-0654 [REDACTED].⁴¹

(4) Reliability

19. P-0113's prior recorded testimony raises questions as to his credibility as a witness in this case. Such issues could 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.

20. Prior recorded testimony must demonstrate 'sufficient indicia of reliability'.⁴² 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.⁴³

21. 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-

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² Rule 68(2)(b)(i).

⁴³ [ICC-02/11-01/15-744](#), para. 104.

0113 had [REDACTED].⁴⁴ [REDACTED].⁴⁵ [REDACTED]. As such, P-0113's prior recorded testimony fails to demonstrate sufficient indicia of reliability.

(5) *Objections to associated materials*

22. The Prosecution has failed to demonstrate with sufficient specificity and probative value that each of the associated materials listed in the Annex⁴⁶ are admissible under Rule 68(2)(b) and Article 69(4) of the ICC Statute.
23. 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).⁴⁷ 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".⁴⁸
24. 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 Mr. Al Hassan. Instead, the Prosecution has limited itself to a "brief description of the associated material"⁴⁹ and references to paragraphs in the statement where the materials are mentioned. 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,⁵⁰ then logically, the same burden applies in relation to the associated materials. More specifically:

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [ICC-01/09-01/11-1938-Corr-Red2](#), para. 33; [ICC-02/04-01/15-596-Red](#), para. 10.

⁴⁸ [ICC-02/11-01/15-744](#), para. 69.

⁴⁹ ICC-01/12-01/18-1207-Conf, para. 45.

⁵⁰ [ICC-01/09-01/11-1938-Corr-Red2](#), para. 37.

- a. The Prosecution has not demonstrated that the 10 videos and associated transcripts and translations 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. 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.
- b. 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. [REDACTED]⁵¹ [REDACTED].⁵² The witness does not discuss the contents of the document in detail, explain how it pertains to the evidence in his statement or specify [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.
- c. 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. 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.

(6) Conclusion: admission 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

25. 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.⁵³ As such, rather than calling for a balancing act between judicial economy and fair trial

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [ICC-01/14-01/18-685](#), para. 30.

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. As recently put by Trial Chamber V, the advantages of testimony given *viva voce* are: “[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”.⁵⁴

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

27. The Prosecution claims that the interests of justice would be best served by the admission of the prior recorded testimony, because [REDACTED] outweighs the interests of having him appear before the Chamber, particularly as his evidence does not go to proof of acts and conduct of the Accused, and given its cumulative and corroborative nature”.⁵⁵ As

⁵⁴ [ICC-01/14-01/18-685](#), para. 33; see also: [ICC-01/05-01/08-1386](#), para. 76.

⁵⁵ ICC-01/12-01/18-1207-Conf, para. 42.

demonstrated in this response, the tendered evidence does go to Mr. Al Hassan's acts and conduct and is not cumulative or corroborative on key contentious issues. Furthermore, P-0113's [REDACTED] is not a factor that can be weighed against Mr. Al Hassan's fair trial rights in proceedings before the ICC. The admission of P-0113's prior recorded testimony through Rule 68(2)(b) would have the same impact on his actual or perceived neutrality as *viva voce* testimony with protected measures.⁵⁶

28. Consequently, the Prosecution has 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.

IV. Relief Sought

29. For all of the above reasons, the Defence respectfully requests the Trial Chamber **REJECT** the Prosecution's application to enter P-0113's prior testimony and associated material into evidence through Rule 68(2)(b).

30. In the event that the Chamber grants the Prosecution's application, evidence pertaining to any live issues in the case 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.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 18th Day of January 2021
At The Hague, The Netherlands

⁵⁶ His perceived neutrality would be the same, as his identity would be subject to similar protective measures – whether he appears *viva voce* or on paper. His actual neutrality would be just as undermined by the contents of his statement, as it would by the contents of his live testimony.