

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/12-01/18

Date: 28 January 2022

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 the introduction into evidence of P-0590's prior recorded testimony
pursuant to Rule 68(2)(b) of the Rules and related Regulation 35 requests**

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 6 May 2020, the Chamber issued its 'Decision on the conduct of proceedings',¹ which relevantly instructed the Office of the Prosecutor (the 'Prosecution') to file any applications for the introduction of evidence pursuant to Rule 68(2) of the Rules no later than by the end of the year 2020.²
2. On 22 September 2021, and after noting that the Prosecution 'may be expected to complete its presentation of evidence in the first few weeks of 2022', the Chamber set to 1 December 2021 the deadline for it to file any remaining request pursuant to Rule 68(2) of the Rules.³
3. On 3 November 2021, the Prosecution submitted an updated list of its remaining witnesses, notably indicating that a request under Rule 68(2)(b) of the Rules would be filed with respect to P-0590.⁴
4. On 1 December 2021, the Prosecution filed a request seeking to add items related to P-0590 to its List of Evidence (the 'LoE') and, as anticipated, to introduce into evidence his prior recorded testimony and associated materials pursuant to Rule 68(2)(b) of the Rules (the 'Request').⁵ The Prosecution also informs that it no longer seeks to rely upon P-0590's medical expertise and that the Request is accordingly limited to P-0590's evidence regarding the processing of sealed

¹ ICC-01/12-01/18-789 (with one public and two confidential annexes).

² Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 79-80.

³ Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence, ICC-01/12-01/18-1756 (the 'Fifth CoP Decision'), para. 3.

⁴ Remaining Witnesses' List, ICC-01/12-01/18-1878-Conf-AnxA, p. 3.

⁵ Requête de l'Accusation aux fins d'ajouter deux notes de corrections, deux lettres de mission et des traductions à la liste des éléments de preuve, en vertu de la norme 35 du Règlement de la Cour, et aux fins d'introduire au dossier de l'affaire les rapports du témoin MLI-OTP-P-0590 sur la chaîne de possession de la preuve et le matériel qui y est associé, en application de la règle 68(2)(b) du Règlement de procédure et de preuve, ICC-01/12-01/18-2021-Conf (with two confidential annexes). The material sought to be introduced is listed in Sections I and II of ICC-01/12-01/18-2021-Conf-AnxB, with the Request being limited to exhibits which are not already recognised as formally submitted.

evidence bags containing exhibits collected by P-0055 in Timbuktu in 2013.⁶ The material sought to be introduced under Rule 68(2)(b) of the Rules therefore consists of a process report prepared by P-0590, its addendum, correction notes, as well as associated material in the form of two mission letters, the hundreds of exhibits processed by P-0590, their translations, and related seals (together the 'Material'). Late addition to the LoE is requested for the mission letters, the correction notes, as well as 52 translations of associated exhibits (together the 'Additional Items').

5. On 17 December 2021, having been granted an extension of time,⁷ the Defence filed its response to the Request, seeking that the Chamber rejects it in its entirety.⁸ The Defence mainly submits that: (i) the Prosecution failed to establish grounds under Regulation 35 of the Regulations for the extension of time sought;⁹ (ii) the introduction of the Material under Rule 68(2)(b) of the Rules will profoundly prejudice Mr Al Hassan's fair trial rights;¹⁰ and (iii) P-0590's prior recorded testimony and associated material lack the required reliability for submission under Rule 68(2)(b) of the Rules.¹¹

I. Inclusion of the Additional Items to the LoE

6. The Chamber recalls that it may extend a time limit pursuant to Regulation 35(2) of the Regulations if 'good cause' is shown. Where such an application is made after the expiration of the original deadline, the applicant must demonstrate that acting within the original time limit was not possible for reasons outside of their control. Where the conditions of Regulation 35(2) are not met, this Chamber has

⁶ Request, ICC-01/12-01/18-2021-Conf, para. 5, referring to Witnesses Summaries, ICC-01/12-01/18-740-Conf-AnxB, pp. 888-924.

⁷ Email decision by the Single Judge dated 8 December 2021 at 14:49, granting a Defence request which was unopposed (see Prosecution email of 8 December 2021 at 14:03; and Defence Regulation 35 Request for Extension of Time to File Rule 68 Responses relating to Witnesses P-0130 and P-0590, 8 December 2021, ICC-01/12-01/18-2059-Conf).

⁸ Defence response to 'Requête de l'Accusation aux fins d'ajouter deux notes de corrections, deux lettres de mission et des traductions à la liste des éléments de preuve, en vertu de la norme 35 du Règlement de la Cour, et aux fins d'introduire au dossier de l'affaire les rapports du témoin MLI-OTP-P-0590 sur la chaîne de possession de la preuve et le matériel qui y est associé, en application de la règle 68(2)(b) du Règlement de procédure et de preuve', ICC-01/12-01/18-2076-Conf (with confidential Annex A).

⁹ Response, ICC-01/12-01/18-2076-Conf, paras 4-11.

¹⁰ Response, ICC-01/12-01/18-2076-Conf, paras 47-51.

¹¹ Response, ICC-01/12-01/18-2076-Conf, paras 26-36, 41-46.

nonetheless exceptionally authorised the late addition of evidence to the LoE where it is in the interests of justice to do so and where the evidence is deemed necessary for the determination of the truth, bearing in mind any potential prejudice to the Defence.¹²

7. The Chamber notes the Prosecution's submission that, having identified a number of clerical errors in P-0590's report, it sought correction thereof in November 2021 which resulted in the two correction notes and related mission letters now sought to be added to the LoE.¹³ In this regard, and without going into the content or reliability of P-0590's evidence,¹⁴ the Chamber notes that the corrections sought are needed for it to appropriately understand and assess P-0590's testimony and thus finds that it was necessary and in the interest of justice for the Prosecution to seek and await these updates prior to requesting the introduction into evidence of the Material. The Chamber further observes that the remaining Additional Items are translations of exhibits already included in the LoE and that draft versions of 49 of these 52 translations were already included in the LoE.¹⁵ In any event, the Chamber recalls that it has consistently regarded translations as accessories of the main items included in the LoE.
8. Bearing in mind the technical nature of P-0590's testimony, and particularly given the fact that all the Additional Items consist of updates, corrections, or accessories to exhibits already included in the LoE, the Chamber dismisses the Defence's argument relating to the 'absence of notice'¹⁶ and finds that no undue prejudice arises from the granting of the first part of the Request. The Chamber thus authorises the late addition of the Additional Items to the LoE.

II. Introduction of the Material pursuant to Rule 68(2)(b) of the Rules

9. From the outset, the Chamber recalls that its initial instruction for the Prosecution to file Rule 68 applications before the end of the year 2020 specifically provided

¹² Decision on the Prosecution requests pursuant to Regulation 35 regarding P-0660 and P-0661 and to add 12 items to its Final List of Evidence, 5 August 2020, ICC-01/12-01/18-2021-988-Conf, para. 6.

¹³ Requests, ICC-01/12-01/18-2021-Conf, paras 29, 34-36.

¹⁴ The Chamber accordingly did not address the Defence's related arguments in the context of this assessment (see Response, ICC-01/12-01/18-2076-Conf, para. 6).

¹⁵ Request, ICC-01/12-01/18-2021-Conf, paras 37-39.

¹⁶ Response, ICC-01/12-01/18-2076-Conf, paras 8, 10.

that later applications were not excluded.¹⁷ The Chamber accordingly finds that good cause under Regulation 35(2) of the Regulations need not have been established with respect to the second part of the Request and, having had further regard to the nature and scope of P-0590's prior recorded testimony, is unconvinced by the Defence's argument that consideration thereof at an advanced stage of the Prosecution's case is prejudicial. To the contrary, and as further discussed below, the Chamber finds that the Prosecution's recent choice to rely on Rules 68(2)(b) of the Rules for P-0590's evidence is appropriate and fully consistent with the Chamber's recent reminder that the parties are required to present their case in an efficient manner and should minimise cumulative evidence.¹⁸

10. Turning to the merits, the Chamber refers to the legal framework as set out in its prior decisions.¹⁹
11. The Chamber observes that P-0590's prior recorded testimony relates to the processing of sealed material collected by P-0055 and P-0057. His evidence is technical in nature and clearly does not go to the acts and conduct of the Accused. Similarly, P-0590's prior recorded testimony does not relate to the circumstances of the gathering or *provenance* of the associated material and the Chamber therefore does not agree with the Defence's suggestion that the Request should be dismissed because it goes to 'live and important issue in the case'.²⁰ The Chamber is further of the view that P-0590's prior recorded testimony bears sufficient indicia of reliability of formal nature and considers that the matters raised by the Defence in this regard, notably concerning his qualification as well as limitations to his reports,²¹ do not prevent the submission of P-0590's evidence at this stage. The Chamber also finds that reliance on Rule 68(2)(b) of the Rules in the case at hand is in the interest of justice as it saves time without being

¹⁷ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 80.

¹⁸ Fifth CoP Decision, ICC-01/12-01/18-1756, para. 22.

¹⁹ 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.

²⁰ Response, ICC-01/12-01/18-2076-Conf, paras 15-25.

²¹ Response, ICC-01/12-01/18-2076-Conf, paras 30, 32-33.

prejudicial to or inconsistent with the rights of Mr Al Hassan.²² Relatedly, the Chamber emphasises that P-0055 and P-0057 testified orally before the Chamber²³ and that the Defence was able to cross-examine them, including on facts relevant to the gathering of evidence processed by P-0590. In these circumstances, the Chamber finds it unnecessary for P-0590 to appear for cross-examination and, having further considered the remaining factors, finds it appropriate to authorise the introduction of his prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, subject to the receipt of the required certified declaration.

12. In line with its prior decisions,²⁴ the Chamber does not consider that the Defence's concerns prevent the submission of the material discussed in P-0590's evidence as associated material.²⁵ The Chamber observes that, while P-0590 is not the author of the relevant documents and that his testimony does not relate to their content, his intervention is, as pointed out by the Prosecution, at the end of their 'chain of custody'.²⁶ Moreover, the Chamber notes that the Prosecution's intention to rely on the original exhibits collected, as well as their accessories items (such as translations and evidence bags) was clearly communicated from an early stage, as well as already linked to P-0590.²⁷ While the Chamber acknowledges the large volume of documentary material submitted by way of the Request, it also notes that other witnesses have already discussed the relevant

²² The Chamber is unconvinced by the Defence's submission that the Request is incompatible with the Chamber's truth-seeking functions because other evidence from P-0590 on matters of relevance to the Defence case are not sought to be introduced and the Defence would thereby be deprived of an opportunity to examine P-0590 on these topics (Response, ICC-01/12-01/18-2076-Conf, para. 37). The Chamber finds that the Defence's opportunity to adduce relevant evidence is not unique to P-0590 and in any event notes that, should it consider it necessary, the Defence may seek to introduce additional evidence from P-0590 in the context of its case.

²³ For P-0055: Transcripts of hearings on 31 August and 1 September 2021, ICC-01/12-01/18-T-123-Red-ENG and ICC-01/12-01/18-T-124-Red-ENG. For P-0057: Transcripts of hearings on 10 and 11 September 2020, ICC-01/12-01/18-T-021-Red2-ENG CT and ICC-01/12-01/18-T-022-Red2-ENG CT.

²⁴ Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, ICC-01/12-01/18-1413, para. 18; and Public redacted version of 'Decision on the introduction into evidence of P-0570's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules', 11 August 2021, ICC-01/12-01/18-1588-Conf, para. 32.

²⁵ Response, ICC-01/12-01/18-2076-Conf, notably paras 41-46.

²⁶ Request, ICC-01/12-01/18-2021-Conf, para. 48.

²⁷ See Witnesses Summaries, Witnesses Summaries, ICC-01/12-01/18-740-Conf-AnxB, pp. 888-924. See also, Annex A to the Request, ICC-01/12-01/18-2021-Conf-AnxA. The Chamber also emphasises that all original items processed by P-0590 are on the LoE.

exhibits, either individually or in bulk.²⁸ Indeed, as noted immediately above, this includes P-0055 and P-0057, who were both questioned about the circumstances of their gathering. While not all relevant exhibits were submitted on that occasion, each of the larger seals including these individual physical items were formally submitted via P-0055,²⁹ that is after he appeared in court and was questioned by the parties. The Chamber notes that P-0150 was also questioned in court about the content of many of the original exhibits, most of which were subsequently submitted.³⁰ Recalling that the formal submission of evidence is in any event without prejudice to their admissibility and the weight to be given to each item of evidence, the Chamber is of the view that no undue prejudice arises and that introduction of the associated material under Rule 68(2)(b) of the Rules is not incompatible with Mr Al Hassan's fair trial rights.³¹ The relevant parties' submissions, including issues of authenticity, will be considered by the Chamber in the context of its ultimate and holistic assessment of the evidence.³² Finally, concerning the Defence's request for a deadline to be set for it to submit further related submissions,³³ the Chamber does not find it necessary and indicates that these are matters which the Defence will have the opportunity to address during the presentation of its case and/or final pleadings.

13. In light of the above, having found that all the procedural requirements are satisfied and that the introduction sought is neither prejudicial nor inconsistent with Mr Al Hassan's rights, the Chamber grants the second part of the Request pursuant to Rule 68(2)(b) of the Rules and authorises the Prosecution to introduce

²⁸ The Chamber further notes that, while the total number of associated items is very high, these individual items are in part duplicative (i.e. same documents in different languages) and consist mainly of one-page photographs, as opposed to lengthy documents.

²⁹ Email decision of 8 September 2021 at 16:08.

³⁰ Email decision of 22 August 2021 at 8:28.

³¹ The Chamber notably distinguishes the present decision from a prior ruling where it dismissed a Prosecution's request to tender additional material under Rule 68(3) of the Rules on the eve of a witness's *viva voce* testimony (see Email from the Chamber dated 21 September 2020 at 13:20, also annexed to the Response, ICC-01/12-01/18-2076-Conf-AnxA). The Chamber further notes that, on that occasion, the Chamber indicated that its decision dismissing the Prosecution's request to tender certain material via P-0075 was 'without prejudice to the items being submitted in another way in accordance with the Chamber's Directions on the conduct of proceedings, for example through P-0075 in court, through other witnesses as appropriate, or through a 'bar table' motion.'

³² The Chamber does not consider it necessary to discuss further and specifically the issues raised by the Defence with respect to item MLI-OTP-0055-1934.

³³ Response, ICC-01/12-01/18-2076-Conf, paras 50-51.

into evidence the prior recorded testimony of P-0590 as well as all identified associated material.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request;

AUTHORISES the late inclusion of the Additional Items to the Prosecution's LoE;

AUTHORISES, subject to the receipt of a certified declaration, and pursuant to Rule 68(2)(b) of the Rules, the introduction into evidence of the Material, as identified in footnote 5 above;

ORDERS the Registry, upon filing of the abovementioned certified declaration, to reflect in the eCourt metadata the introduction of the Material;

ORDERS the Prosecution to file a public redacted version of the Request no later than four weeks after notification of the present decision; and

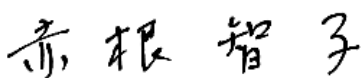
ORDERS the Defence to file a public redacted version of the Response no later than two weeks after notification of the public redacted version of the Request.

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 Friday, 28 January 2022

At The Hague, The Netherlands