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February 2022

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 “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’”, 17 December 2021, ICC-01/12-01/18-2076-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. Introduction¹

1. On 1 December 2021, the Prosecution filed its ‘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’² (‘Request’).
2. By the Request, the Prosecution seeks:
 - a. Authorisation under Regulation 35 to add 58 items³ to the List of Evidence (‘Regulation 35 Request’); and
 - b. Submission pursuant to Rule 68(2)(b) of the Rules of Evidence and Procedure of Witness P-0590’s prior recorded testimony and associated material, including:
 - i. Two reports and one annex catalogue;⁴ and two correction notes,⁵ being the prior recorded testimony; and
 - ii. P-0590’s CV;⁶ four mission letters and two associated translations;⁷ 1,218 photographs, translations and physical items pertaining to evidentiary items, none of which P-0590 created;⁸ and 577 photographs which P-0590 allegedly took when resealing and reprocessing evidentiary items,⁹ being the associated material, (‘Rule 68(2)(b) Request’).
3. The Request should be rejected for four reasons:

¹ 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.

² ICC-01/12-01/18-2021-Conf.

³ ICC-01/12-01/18-2021-Conf, para. 52. The items are two correction notes, two mission letters, and 52 translations.

⁴ ICC-01/12-01/18-2021-Conf-AnxB, p. 2, Section I, lines 1-3.

⁵ ICC-01/12-01/18-2021-Conf-AnxB, p. 2, Section I, lines 4-5.

⁶ ICC-01/12-01/18-2021-Conf-AnxB, p. 2, Section II.A, line 1.

⁷ ICC-01/12-01/18-2021-Conf-AnxB, p. 2, Section II.A, lines 2-7.

⁸ The items to be submitted through P-0590 are listed under Section II.B of ICC-01/12-01/18-2021-Conf-AnxB are: pp. 2-3, lines 1-9, pp. 7-22, lines 121-624, p. 23, lines 627, 630-648, and 651-666, p. 24, lines 669-670, pp. 24-27, lines 673-763, pp. 27-45, lines 766-1324, and p. 45, 1327-1343. The remainder of the 1,343 items included in Section II.B have already been formally submitted: pp. 3-7, lines 10-120, p. 22, lines 625-626, p. 23, lines 628-629 and 649-650, p. 24, lines 667-668 and 671-672, p. 27, lines 764-765, and p. 45, lines 1325-1326.

⁹ ICC-01/12-01/18-2021-Conf-AnxB, pp. 45-58, Section II.C, lines 1-577.

- a. *First*, the Prosecution has failed to establish grounds for the granting of the Regulation 35 Request at this advanced stage of proceedings;
- b. *Second*, if granted, the Rule 68(2)(b) Request will profoundly prejudice Mr Al Hassan's fair trial rights, because the Defence will be deprived of an opportunity to cross-examine Witness P-0590 on the live and important issues related to P-0590's testimony;
- c. *Third*, the Prosecution seeks to submit an extensive suite of documentary material (i) for which there is no clear chain of custody, (ii) which was allegedly collected by an individual other than P-0590, and (iii) whose testimony concerning the alleged collection is directly contradicted by another Prosecution witness with personal knowledge of the locations in which the documentary material was found; and
- d. *Fourth*, P-0590's prior recorded testimony lacks the reliability required for submission under Rule 68(2)(b) given his lack of expertise and experience.

II. Submissions

The Prosecution has failed to establish good cause under Regulation 35 to permit the addition of the material to its List of Evidence

4. By the Request, the Prosecution seeks to add 56 items to the List of Evidence. As noted in the past,¹⁰ the Prosecution has been given ample opportunity to amend its List of Evidence, including in respect of 15 items where the Chamber explicitly recognised that the criteria under Regulation 35 have not been met.¹¹ Furthermore, the Prosecution's conduct in relation to these 56 items stands in stark contradiction of the Prosecution's obligations under Regulation 35 when seeking extension of a time limit when the time limit has already expired. As the Chamber is aware, Regulation 35(2) requires that '[a]fter the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can

¹⁰ ICC-01/12-01/18-1246-Conf, paras 20-22 ; ICC-01/12-01/18-1254-Conf, paras 10-11 and fns 17-23.

¹¹ In respect of the First Request under Regulation 35, the Prosecution was permitted to add 11 items which did not meet the requirements of Regulation 35: ICC-01/12-01/18-988-Conf, para. 15 (five items), para. 22 (one item), para. 25 (two items), para. 28 (three items). In respect of the Third Request under Regulation 35, the Prosecution was permitted to add 3 items which did not meet the requirements of Regulation 35: ICC-01/12-01/18-1286-Anx17. In respect of the Fourth Request under Regulation 35, the Prosecution was permitted to add 1 item which did not meet the requirements of Regulation 35: ICC-01/12-01/18-1403-Conf-Anx26.

demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.’

5. Concerning the two correction notes¹² and two mission letters,¹³ the Prosecution has not made any submissions as to why the Prosecution could not have obtained this material sooner. Particularly, the mission letters issued to Witness P-0590 concerning the correctness of his testimony were dated 17 November 2021¹⁴ (two weeks before the deadline for any Rule 68(2) application concerning Witness P-0590) and 25 November 2021¹⁵ (six days before the deadline), and each more than 18 months after the deadline for the Prosecution’s Final List of Evidence on 13 May 2021.¹⁶
6. The content of the mission letters further demonstrate why it is inappropriate to submit P-0590’s testimony through an avenue that inures it from cross-examination: put simply, there appear to be multiple inconsistencies and errors that speak to his lack of expertise in the field of document preservation and chain of custody and the lack of care that was employed in connection with the processes that he supervised. It is, moreover, self-evidently inappropriate for the Prosecution to instruct P-0590 with such missions at the very end of its case. If the Prosecution is of the view that these documents constitute evidence, then the rights enshrined in Article 67(1) dictate that this evidence should have been elicited and disclosed promptly, to enable the Defence to use such information in connection with related witnesses (including P-0055). This late instruction has generated clear prejudice and further underscores the impropriety of attempting to submit such a large volume of documentation through a completely inapposite Rule 68(2) witness.
7. Concerning the translations, each of these items the subject of the Regulation 35 Request has been disclosed as INCRIM evidence. This Court has identified that for the addition of incriminatory evidence, two elements are required: first, the new material must be either significantly more compelling than other items of evidence already disclosed to the Defence, or bring to light a previously unknown fact which has a significant bearing upon

¹² MLI-OTP-0080-4468-R01; MLI-OTP-0080-4538-R01.

¹³ MLI-OTP-0080-4525; MLI-OTP-0080-4532.

¹⁴ MLI-OTP-0080-4525.

¹⁵ MLI-OTP-0080-4532.

¹⁶ ICC-01/12-01/18-677, para. 15.

the case, and second, the late addition must not cause undue prejudice to the Defence's right to adequate time and facilities.¹⁷

8. The 52 translations were disclosed in June and July 2020,¹⁸ and the Prosecution has not acted with diligence in failing to add these items to their List until now. Indeed, the Prosecution did not indicate any intention to submit these translations through P-0590 until this request. If such intention had been communicated to the Defence, the Defence would have cross-examined Witnesses P-0150 and P-0626 in respect of these documents. In *Katanga and Ngudjolo*, the Chamber rejected a Prosecution request under Regulation 35(2) to add an investigator's report to their list of evidence:¹⁹

[T]he Chamber is of the view that the late disclosure and addition of the Report to the List of Incriminating Evidence would cause undue prejudice to the right of the accused under Article 67(1)(b) to have adequate time and facilities to prepare their case. The Report itself is a one page document with a few lines. Thus, the Defence may be able to study it within a short period of time. However, no matter how fast the Defence could familiarize itself with the Report, the fact remains that the late disclosure of this information would have deprived the Defence of an opportunity to examine Witness P-323 with the full knowledge of all pertinent information, since Witness P-323 has concluded his testimony. This would not only have violated the Defence's right to have adequate time and facilities to prepare its response to Witness P-323's testimony. It would have also undermined the Defence's right to examine witnesses against it under the same conditions as the Prosecution, as the latter already had the information concerning Witness P-268 when it examined Witness P-323, whereas the Defence did not.

9. Furthermore, these items are finalised translations of documents alleged to be [REDACTED] found at the Hotel La Maison in June 2013 by Prosecution investigators. The documents carry no indicia of authenticity in the form of stamps and signatures,²⁰ many

¹⁷ *Katanga and Ngudjolo*, [ICC-01/04-01/07-1869](#), paras 12, 18-19; see also [ICC-01/04-01/07-1336](#), paras 28-30.

¹⁸ ICC-01/12-01/18-2021-Conf, para. 2.

¹⁹ [ICC-01/04-01/07-2325-Red](#), paras 14-15, 17-19, 21-22.

²⁰ [REDACTED].

are just short fragments of writing,²¹ and some have extensive portions crossed out or misprinted,²² all indicating their draft or unofficial status.

10. In the absence of notice and noting the large volume of documentary material and complexity of this case, given the lack of a tangible link to the charges and/or clear evidence of their relevance, the substantive documents (and the translations deriving therefrom) should not be accepted for submission given their tendency to clog the case record and to prejudice the Defence.

11. For the above reasons, the Regulation 35 Request should be rejected.

The Prosecution has failed to establish grounds for the granting of the Rule 68(2)(b) Request

12. 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.²³ Such aims are 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.²⁴ 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 “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.²⁵

13. 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

²¹ [REDACTED].

²² [REDACTED].

²³ [ICC-02/04-01/15-596-Red](#), para. 16.

²⁴ [ICC-02/04-01/15-596-Red](#), para. 16; [ICC-02/11-01/15-870](#), para. 7.

²⁵ [ICC-01/04-01/07-2362](#), para. 15.

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 The European Court of Human Rights (‘ECtHR’) has held that “if the prosecution decides that a particular person is a relevant source of information and relies on his or her testimony at the trial, and if the testimony of that witness is used by the court to support a guilty verdict, it must be presumed that his or her personal attendance is necessary.”²⁸

14. For the reasons set forth below, in the present case, the Prosecution’s application to introduce P-0590’s prior recorded testimony and the associated material into evidence via Rule 68(2)(b) fails to meet the applicable criteria.

P-0590’s testimony pertains to live and important issues in the case

15. 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”.²⁹ 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.³⁰ Thus, prior testimony on live and important issues in the case has been held inadmissible under Rule 68(2)(b).³¹

16. Documentary evidence in the nature of the material annexed to the Request, and the manner in which it was obtained as discussed in the prior recorded testimony, is a matter at the

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

²⁷ [ICC-02/11-01/15-722-Red](#), para. 5.

²⁸ ECtHR Fourth Section, [Keskin v. The Netherlands](#), 2205/16, para. 45, citing, [Khordorkovsky and Lebedev v. Russia](#), 11082/06 and 13772/05, para. 712, and [Khordorkovsky and Lebedev v. Russia \(No. 2\)](#), 51111/07 and 42757/05, para. 484.

²⁹ [ICC-02/04-01/15-596-Red](#), para. 15.

³⁰ ICC-01/12-01/18-987-Conf, para. 24.

³¹ [ICC-01/04-01/07-2362](#), paras 27-28, 33-34; [ICC-02/04-01/15-596-Red](#), paras 214-215. See similarly ICTY, [Milutinović et al.](#), [Decision Denying Prosecution’s Second Motion for Admission of Evidence Pursuant to Rule 92 bis](#), para. 6; [Đorđević](#), [Decision on Prosecution’s Motion for Admission of Transcripts of Evidence of Forensic Witnesses in lieu of Viva Voce Testimony Pursuant to Rule 92 bis](#); [Lukić & Lukić](#), [Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis](#), para. 25.

heart of this case. This is demonstrated by the Prosecution's heavy reliance on documents allegedly found at the Hotel La Maison and Banque Malienne de Solidarité by Witness P-0055 in charging documents³² and the Defence's objection to the submission of such materials.³³ In the ICTY case of *Popović*, when considering similar controversy concerning evidence of intercepted communications, the Trial Chamber required a witness to appear for cross-examination, noting:³⁴

It is apparent that evidence of intercepted communications will play an important role in the Prosecution's case against the Accused. This was highlighted by the Prosecution's repeated reference to such communications during its opening statement and by Defence statements in response that the reliability of at least some of the communications will be challenged. Having reviewed the testimony and the exhibit provided, the Trial Chamber is persuaded that this evidence relates to a “live and important issue between the parties, as opposed to a peripheral or marginally relevant issue.” Thus, the Trial Chamber finds it appropriate to require this witness to appear at trial for cross-examination.

17. The provenance, and chain of custody, of the documents allegedly found at the Banque Malienne de Solidarité and Hotel La Maison by Witnesses P-0055 and P-0057 being an issue materially in dispute is a matter also demonstrated by the testimony of Prosecution witnesses in this case.
18. Witness P-0150, [REDACTED], gave evidence that no documents and no amulets had been left behind at the Hotel La Maison.³⁵
19. Witness P-0055, testifying as a Prosecution expert, also shed doubt on the integrity of the chain of custody. Over the course of his testimony, P-0055 conceded that he was not able to testify to the Banque Malienne de Solidarité and the Hotel La Maison being sealed and inaccessible [REDACTED], and therefore his testimony does not form a foundation for

³² Document containing the charges, ICC-01/12-01/18-335-Conf-Corr, paras 136, 139, 142, 165, 254, 304, 426, 429, 432, 439-441, 506, 532, 600, and 912-913, and fns 364, 373, 387, 388, 443, 639, 725, 1045, 1053, 1054, 1066, 1073, 1076, 1079, 1265, 1305, 1474, 2321, and 2330; Trial Brief, ICC-01/12-01/18-819-Conf-AnxA, paras 58, 61, 63, 99 and 194, and fns 181, 190, 203, 204, 299, and 617.

³³ ICC-01/12-01/18-1866-Conf-Anx4 (see Objection D); ICC-01/12-01/18-1867-Conf-Anx1, pp. 5-11.

³⁴ [Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis](#), paras 16, 32. Emphasis added.

³⁵ [REDACTED].

there being a clear and reliable chain of custody for the documents and items he allegedly found in these locations.

20. Over the course of his testimony, P-0055 was shown five documents which show or describe individuals gaining access to the Banque Malienne de Solidarité and Hotel La Maison [REDACTED].³⁶ Of these five documents, three of these documents are already in evidence: [REDACTED] and [REDACTED] were accepted for submission through the Defence,³⁷ and [REDACTED] was accepted for submission through the Prosecution.³⁸
21. Witness P-0055 stated that he did not ask the local authorities any questions about whether anyone had accessed the ATM room of the Banque Malienne de Solidarité before his arrival³⁹ and later testified that he did not test whether the windows the Banque Malienne de Solidarité could open and that the sign shown in MLI-OTP-0012-2071 had been removed by the date of his visit,⁴⁰ which indicates that individuals had gained access to the Banque Malienne de Solidarité and had removed items contained in and attached to the building.
22. As he concedes, P-0055 and his delegation did not video record their activities within these buildings or their discovery of any of the documents they allegedly found⁴¹ and he did not take any photographs of any rooms in the Banque Malienne de Solidarité he accessed apart from the ATM room.⁴² This is significant because P-0055 testified that he did not find all the documents he found in the Banque Malienne de Solidarité within the ATM room,⁴³ as indicated by the evidence bags.⁴⁴
23. P-0055 testifies that he did not think there was a rug in the room of the Hotel La Maison with the chest of drawers⁴⁵ and indeed none is shown in his pictures,⁴⁶ yet one is clearly visible in P-0007's photographs of the same chest of drawers [REDACTED]⁴⁷ and is

³⁶ Those five documents are: [REDACTED].

³⁷ ICC-01/12-01/18-1867-Conf, para. 7.

³⁸ ICC-01/12-01/18-1629-Conf, para. 6.

³⁹ ICC-01/12-01/18-T-124-CONF-ENG, p. 8, lines 2-6.

⁴⁰ ICC-01/12-01/18-T-124-CONF-ENG, p. 9, lines 12-21.

⁴¹ ICC-01/12-01/18-T-123-CONF-ENG, p. 67, lines 2-11 regarding the BMS; ICC-01/12-01/18-T-124-CONF-ENG, p. 10, line 25 to p. 11, line 1 regarding the Hotel La Maison.

⁴² ICC-01/12-01/18-T-124-CONF-ENG, p. 10, lines 5-14.

⁴³ ICC-01/12-01/18-T-124-CONF-ENG, p. 37, lines 1-4.

⁴⁴ [REDACTED].

⁴⁵ ICC-01/12-01/18-T-124-CONF-ENG, p. 29, lines 2-6; p. 40, lines 11-13,

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

described in MLI-D28-0004-6941.⁴⁸ Similarly, in MLI-D28-0004-6941, a journalist describes the presence of a short coil of rope in the room with the chest of drawers.⁴⁹ A short coil of rope is shown in a drawer of that chest of drawers in MLI-OTP-0006-2105 and the witness could not recall seeing any other pieces of rope elsewhere in the room.⁵⁰ This would suggest that the piece of rope seen by this journalist was either seen in this drawer (meaning that the journalist accessed the chest of drawers during his visit to the Hotel La Maison) or was moved into this drawer subsequently to this journalist's visit and prior to P-0055's visit, which would have implications for the chain of custody of the items allegedly found in the chest of drawers either way.

24. This indicates that the scene inside the Hotel La Maison between February and June 2013 was changed, and specifically in the room in which P-0055 allegedly found these items which he conceded were not hidden⁵¹ and the drawers in which they were found were not locked and some were even open.⁵²
25. In summary, the alleged chain of custody of the documents discussed in P-0590's prior recorded testimony is a live and important issue in this case, and one materially at issue. On this basis, the prior recorded testimony should not be accepted for submission pursuant to Rule 68(2)(b).

P-0590's prior recorded testimony lacks reliability

26. Witness P-0590's prior recorded testimony consists of five documents:
- a. One report dated 6 March 2020⁵³ and its annex catalogue;⁵⁴
 - b. An addendum report dated 31 January 2020;⁵⁵ and
 - c. Correction notes dated 23 November 2021 and 29 November 2021.⁵⁶

⁴⁸ ICC-01/12-01/18-T-124-CONF-ENG, p. 37, line 17 to p. 40, line 13.

⁴⁹ ICC-01/12-01/18-T-124-CONF-ENG, p. 39, line 25 to p. 40, line 3.

⁵⁰ ICC-01/12-01/18-T-124-CONF-ENG, p. 40, line 14 to p. 41, line 8.

⁵¹ ICC-01/12-01/18-T-124-CONF-ENG, p. 35, line 10 to p. 36, line 15,

⁵² ICC-01/12-01/18-T-124-CONF-ENG, p. 37, lines 10-16.

⁵³ MLI-OTP-0069-8559.

⁵⁴ MLI-OTP-0069-8642.

⁵⁵ MLI-OTP-0073-1193.

⁵⁶ MLI-OTP-0080-4468-R01; MLI-OTP-0080-4538-R01.

27. As stated in the report dated 6 March 2020, Witness P-0590's mission was to process evidence contained in a sealed bag, which comprised 27 sealed packages and a pre-registration form (PRF).⁵⁷ The instructions given to Witness P-0590 were to:⁵⁸

[REDACTED]

28. Similar instructions were given in relation to the addendum report dated 31 January 2020 where P-0590 was instructed to [REDACTED] and [REDACTED].⁵⁹

29. There are four major features of P-0590's reports which raise questions as to the reliability of his prior recorded testimony.

30. *First*, the activities described in the report dated 6 March 2020 occurred between August 2018⁶⁰ and November 2018.⁶¹ Similarly, the activities described in the addendum report dated 31 January 2020 occurred on 5 July 2019.⁶² These lapses of time raise questions as to the reliability of the information contained therein. In *Ntaganda*, Trial Chamber VI noted that this sort of time lapse has an impact of the reliability of a statement and may, coupled with other issues, militate against its admission under Rule 68.⁶³

31. *Second*, Witness P-0590 identified that there were two documents which could not be matched to any pre-existing ERNs, [REDACTED].⁶⁴ The Prosecution is seeking to submit through P-0590 [REDACTED].⁶⁵ This is a document which P-0590's evidence indicates has essentially no chain of custody and was placed in this sealed bag at an unknown time by an unknown person between the original photographing of the items in the sealed bags in January and February 2018⁶⁶ and August and September 2018, when they were accessed by P-0590.

32. *Third*, Witness P-0590 indicated that he had [REDACTED].⁶⁷ However, Witness P-0590 does not have any qualifications to handle these documents in the manner described in his

⁵⁷ MLI-OTP-0069-8559 at 8561.

⁵⁸ MLI-OTP-0069-8559 at 8561. [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ Witness P-0590 received MLI-OTP-0055-0054 and MLI-OTP-0055-0055 and broke the seals of these bags on 3 August 2018: MLI-OTP-0069-8559 at 8564. Witness P-0590 received MLI-OTP-0055-0004 to MLI-OTP-0055-0053 (inclusive) and broke the seals of these bags on 4 September 2018: MLI-OTP-0069-8559 at 8574.

⁶¹ The items MLI-OTP-0005-0004 to MLI-OTP-0055-0555 (inclusive) were returned to the IEU on 2 November 2018: MLI-OTP-0069-8559 at 8562.

⁶² MLI-OTP-0073-1193 at 1200.

⁶³ [ICC-01/04-02/06-2124](#), para. 8.

⁶⁴ [REDACTED].

⁶⁵ ICC-01/12-01/18-2021-Conf-AnxB, p. 45, line 1343.

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

report, nor does it appear that he has any experience processing evidence outside of these activities. As detailed in P-0590's curriculum vitae, his [REDACTED]⁶⁸ and [REDACTED]⁶⁹ are solely in the area of [REDACTED]. Similarly, P-0590's professional experience is limited to [REDACTED].⁷⁰ The only reference to anything pertaining to chain of custody or processing of evidence in P-0590's curriculum vitae is a short course [REDACTED] whereby P-0590 obtained a certificate in crime scene investigation,⁷¹ which is a distinct topic. Given the sensitivity of the material, and the significant volume processed, P-0590's lack of qualifications and experience raise issues as to the reliability of his methodology and reporting thereof.

33. *Fourth*, as stated above, Witness P-0590's duties for both reports were to open sealed evidence bags and cross-check their contents against images of their contents taken by other individuals prior to 2018.⁷² P-0590 cannot testify to the chain of custody of these documents before they entered his possession as his knowledge of the documents prior to accessing them in 2018 is limited to images taken by others.
34. In *Bagosora*, Trial Chamber I of the ICTR rejected a request to submit through a witness a report allegedly prepared by the FBI, along with documents allegedly found by employees of that agency and telephone directories, noting the following:⁷³

Even assuming that the FBI report itself could be considered in the absence of live testimony by its author, the report indicates that the interviewee was unable to verify the manner in which the documents were obtained. While the absence of such proof does not necessarily render a document inadmissible, the place and manner of discovery are important factors in assessing the authenticity of a document. Nor has the Prosecution attempted to establish the authorship of the documents, another possible indicium of reliability. Although the Prosecution attempted to correlate the contents of the documents with other evidence in the case, it did not do so with sufficient particularity to suggest that the documents are, indeed, authentic and reliable. Most of the documents are undated.

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

⁷¹ [REDACTED].

⁷² Report dated 6 March 2020: MLI-OTP-0069-8559 at 8561; report dated 31 January 2020: MLI-OTP-0073-1193 at 1196.

⁷³ *Bagosora*, [Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole](#), paras 10-11.

For these reasons, the Chamber finds that the twenty-two hand-written documents appearing at Tab 19 are not admissible. [...] Finally, the Chamber finds that the fifteen pages of telephone directories are also inadmissible, in the absence of reliable information verifying their origin.

35. Similarly, in the ICTR case of *Renzaho*, tape recordings where the accused allegedly made incriminating statements were excluded on the basis of an absence of information as to their provenance.⁷⁴ The vast majority of the material submitted as associated material similarly lacks dates and other indicia of reliability like stamps and signatures.⁷⁵

36. Given the above issues, P-0590 is not able to testify concerning the chain of custody and processing of these evidence bags and their contents, and the Request should be rejected.

P-0590 is in a position to provide evidence relevant to Defence lines of argument, and the Defence would therefore be prejudiced by not being able to examine the witness concerning these issues

37. Witness P-0590 was originally intended to testify to [REDACTED].⁷⁶ These matters are relevant to the credibility of those individuals and, therefore, the Defence case. The Prosecution have provided no explanation as to why this section of P-0590's testimony has been excised from the Rule 68(2)(b) Request. The submission of P-0590's testimony through Rule 68(2)(b) is incompatible with the truth-seeking functions of the Chamber and the Prosecution, since it deprives the Defence of the opportunity to examine P-0590 in relation to his expertise and his findings concerning these witnesses.

The Defence objects to the submission of the associated materials

38. The Prosecution has failed to demonstrate that each of the associated materials listed in Annex B holds sufficient specificity and probative value to be admissible under Rule 68(2)(b) and Article 69(4) of the ICC Statute.

39. 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

⁷⁴ [Decision on Exclusion of Testimony and Admission of Exhibit](#), 20 March 2007, paras 1-2.

⁷⁵ See e.g. the examples given *supra* at para. 9 and fns 20-22.

⁷⁶ ICC-01/12-01/18-740-Conf-AnxB, p. 888.

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).⁷⁷ 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”.⁷⁸

40. In this case, the ‘associated material’ sought to be submitted through Witness P-0590 comprises some 1,782 items. As concerns the 7 items of associated material under Section II.A (being Witness P-0590’s CV, the mission letters and associated translations), the Defence does not have any specific objection to these items, but submits that these items should be not accepted for submission on the grounds that the prior recorded testimony should not be submitted. Submission of the 1,775 items of associated material listed under Sections II.B and II.C is objected to on two grounds:

- a. *first*, these items do not form an integral part of the testimony of P-0590 and should have been submitted through another, more appropriate witness, and
- b. *second*, the admission of these items would be prejudicial to Mr Al Hassan and to the fairness of the trial as a whole.

41. Concerning the first issue, the vast majority of the items sought to be submitted as associated material (some 1,218 of the 1,775 items in total) are photographs and physical items related to documents allegedly collected by Witness P-0055 at the Hotel La Maison. Witness P-0590 is not the author of these documents. Furthermore, Witness P-0590 is not in a position to ‘explain’ these materials. He did not collect the items and cannot testify to the chain of custody beyond what his reports say: that he saw these items in envelopes and then sealed them into new envelopes. Witness P-0590 cannot testify to the integrity, authenticity or reliability of the documents. His testimony does not demonstrate that the criteria for admission are satisfied for these documents. The mere fact that his technical reports mention these documents cannot give rise to a legitimate basis for submitting these exhibits through him, in circumstances where the reports do not discharge the burden of demonstrating that the criteria of relevance, reliability and authenticity for these exhibits are satisfied. To hold otherwise would transform the notion of “associated exhibits” into a loophole for diluting the Prosecution’s burden of proof as concerns the submission of

⁷⁷ *Ruto and Sang*, [ICC-01/09-01/11-1938-Corr-Red2](#), para. 33; *Ongwen*, [ICC-02/04-01/15-596-Red](#), para. 10.

⁷⁸ *Gbagbo*, [ICC-02/11-01/15-744](#), para. 69.

documentary evidence: Prosecution staff could simply author a technical report for the purpose of creating a vehicle for submitting large swathes of evidence.

42. The Prosecution indicated in its Rule 68 applications regarding Witnesses P-0055 and P-0057 that it would be submitting the documents contained in the evidence bags (including those included in the Request) through other witnesses “including those who can speak to the contents of these documents”.⁷⁹ In the Chamber’s decisions concerning the material to be submitted through Witness P-0075, the Chamber rejected the submission of a large volume of substantive material through a Rule 68(3) witness who had analysed this material in the course of his reports prepared as an in-house Prosecution expert.⁸⁰ These rulings apply *a fortiori* here where this request falls pursuant to Rule 68(2)(b) and the Defence will have no opportunity to cross-examine P-0590. P-0055 cannot – and does not – authenticate the content of these documents or the chain of custody of the documents prior to when they were in his custody. The internal chain of custody about which P-0590 can testify is entirely reliant on the evidence of other witnesses through whom the Prosecution did not authenticate these items. Where the Prosecution is unable to demonstrate an undisturbed chain of custody from the point of collection or seizure,⁸¹ this Court has declined to place any weight on the documents in question.⁸²
43. Concerning the second issue, all of the 1,218 items submitted under Section II.B, and all of the 557 items submitted under Section II.C, have been disclosed as incriminatory evidence by the Prosecution.⁸³ Where the provenance of these documents is in doubt, the

⁷⁹ ICC-01/12-01/18-849-Conf, para. 25 and fn. 6,

⁸⁰ ICC-01/12-01/18-989-Conf, para. 119: “In relation to the material related to the aforesaid reports, the Chamber agrees with the Defence that Rule 68(3) of the Rules is not a substitute or alternative to seeking the submission of evidence via the bar table. However, the Chamber notes that the Prosecution has provided a summary of how each physical item is linked to the reports. The Chamber also notes that most of the items listed in Annex C (particularly Section III) are not to be submitted through this witness. Accordingly, the Chamber authorises the Prosecution to submit through P-0075 the limited number of related material listed in Section II of Annex C”; [REDACTED].

⁸¹ *Bagosora et al.*, para. 8: “there must be ‘sufficient indicia of reliability’ to justify its admission. Indicia of reliability which have justified admission of documents in the jurisprudence of the ad hoc Tribunals include: the place in which the document was seized, in conjunction with testimony describing the chain of custody since the seizure of the document; corroboration of the contents of the document with other evidence; and the nature of the document itself, such as signatures, stamps, or even the form of the handwriting.”

⁸² *Gbagbo and Blé Goudé*, ICC-02/11-01/15-1263-AnxB-Red, paras 1084-1085; see also paras 32-38. These reasons of Judge Henderson represented the view of the Majority in that case: ICC-02/11-01/15-1263, para. 29.

⁸³ All 1,218 items included under Section II.B of ICC-01/12-01/18-2021-Conf-AnxB, which are sought to be submitted through Witness P-0590, were either disclosed as INCRIM or initially disclosed under Rule 77 then reclassified to INCRIM. All 557 items included under Section II.C of ICC-01/12-01/18-2021-Conf-AnxB have been disclosed as INCRIM.

incriminatory nature of the evidence requires that more caution is taken before accepting the submission of documents.

44. This is particularly true given the large volume of documents submitted. In *Katanga and Ngudjolo*, Trial Chamber II rejected a request for the submission of documents pursuant to Rule 68(2) on the basis of, *inter alia*, the volume of material submitted and the lack of probative value:⁸⁴

Third, with regard to the passages of the statement that do relate to one or more of the 22 excerpts [...] as well as the 22 video excerpts themselves, the Chamber observes that, although they may be relevant to the propositions advanced by the Prosecution in paragraph 30 of its Request, their number and total duration are disproportional compared to their limited probative value.

[...] It would therefore unduly burden the case record for such a lengthy video excerpt to be admitted into evidence in its entirety, as this would impose a burden upon the Defence to address all the issues potentially raised by the video excerpt, given that the Prosecution has not indicated with sufficient clarity which exact inferences it proposes should be drawn from which specific passages in the excerpt.

45. Case law of this Court has made it clear that Rule 68 cannot be used as a catch-all method to submit onto the record large volumes of material.⁸⁵ Furthermore, there is a distinction between Rule 68(3) witnesses in this case through which this Chamber has accepted the submission of large volumes of documents, and the present application which concerns a Rule 68(2)(b) witness. Rule 68(2)(b) permits the submission of prior recorded testimony which “goes to proof of a matter other than the acts and conduct of the accused”. The term “acts and conduct” refers to actions of the accused which are described in the charges brought against him or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged.⁸⁶ This includes testimony that – although not explicitly mentioning the accused – is tendered to prove the acts and conduct of the accused.⁸⁷ The contents of these documents directly concern charged incidents, and in many instances, are uncorroborated. The teleological purpose of restricting the use of Rule 68(2)(b) in relation to statements that concern the acts and conduct of the accused

⁸⁴ [ICC-01/04-01/07-2233-Corr](#), paras 10, 12, 14, 16.

⁸⁵ [ICC-01/04-01/07-2233-Corr](#), paras 10, 12, 14, 16; [ICC-01/04-01/07-2289-Corr-Red](#), paras 22 and 23 (noting the importance of the fact that the witness would testify *viva voce* at a later date).

⁸⁶ [ICC-02/04-01/15-596-Red](#), para. 12.

⁸⁷ [ICC-01/05-01/13-1430](#), para. 8; [ICC-02/04-01/15-596-Red](#), fn. 26.

necessarily applies to associated exhibits. If it is prejudicial for a written statement to address such matters (without the benefit of in-court testimony and cross-examination), then it is equally prejudicial to tender written records of charged incidents, without the benefit of in-court testimony and cross-examination concerning the key elements of authenticity and reliability.

46. In these circumstances, noting the significance of the materials submitted (both in terms of their impact on the case and the sheer volume), P-0590's prior recorded testimony and associated materials should not be accepted for submission pursuant to Rule 68(2)(b).

Introduction of P-0590's prior recorded testimony and associated materials would be prejudicial to Mr Al Hassan's fair trial rights and the interests of justice

47. 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.⁸⁸ 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. In *Ongwen*, Trial Chamber IX recalled:⁸⁹

that the introduction of a prior recorded testimony is not permitted if it is prejudicial to or inconsistent with the rights of the accused as mandated by Rule 68(1) of the Rules. In this sense, the Chamber agrees with the Defence that, in any case, the Chamber 'must keep the rights of the accused at the forefront', and that under no circumstances can prior recorded testimonies be introduced when this is prejudicial to the fairness of the proceedings and, more specifically, the rights of the accused.

48. 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

⁸⁸ *Yekatom and Ngaïssona*, [ICC-01/14-01/18-685](#), para. 30.

⁸⁹ [ICC-02/04-01/15-596-Red](#), para. 16.

accounts from witnesses, to directly and closely observe their reactions, demeanour and composure, and to immediately seek clarifications”.⁹⁰

49. Given the above submissions, it would be contrary to Mr Al Hassan’s fair trial rights and the interests of justice for P-0590’s evidence, complex and important as it is, to be accepted for submission without the Defence being afforded an opportunity to question this witness.

If P-0590’s prior recorded testimony and associated materials are introduced, the Defence should be afforded an opportunity to provide submissions on the probative value and weight to be accorded to these items

50. Given the volume of materials sought to be admitted and their implications for the Chamber’s consideration of the charges against Mr Al Hassan, if P-0590’s prior recorded testimony and associated materials are introduced, the Defence should be afforded a separate opportunity to provide submissions on the probative value and weight to be accorded to these items, after the Chamber renders its decision.

51. At present, the Chamber is seised of an application that concerns only the most appropriate mode of receiving P-0590’s testimony (*viva voce* or through Rule 68(2)).⁹¹ It would fall outside the scope of this objective to require the Defence to adduce, through this response, arguments that may depend on whether the application is granted in whole or in part. At this point in time, it is still uncertain as to whether the witness will be required to testify and if so, which exhibits will be used in Court as opposed to being introduced through Rule 68(3) (in lieu of Rule 68(2)). If the Defence were compelled to include all of its arguments in the current response, this would effectively require the Defence to disclose in advance the arguments underpinning its potential cross-examination strategy for such exhibits (if P-0590 is required to testify *viva voce*). The procedural utility of receiving evidence in written form should not trump nor subvert the proper order of adversarial process. Put simply, since this procedural litigation is not a *fait accompli*, the Defence is entitled to reserve the rights that it would be entitled to exercise in case P-0590 is required to testify *viva voce*. This necessarily includes the right, set out in paragraph 34(iii) of ICC-01/12-01/18-789-AnxA, to submit observations following the conclusion of his testimony concerning the admission,

⁹⁰ *Yekatom and Ngaïssona*, [ICC-01/14-01/18-685](#), para. 33; see also *Bemba*, [ICC-01/05-01/08-1386](#), para. 76.

⁹¹ See by analogy, [ICC-02/11-01/15-744](#), para. 72: “In the Appeals Chamber’s view, rule 68 (3) of the Rules requires a Chamber to carry out a preliminary assessment of the evidence in question in order to determine whether its introduction under that provision is appropriate.”

weight and probative value of the exhibits, which the Prosecution intends to submit through him.

III. Relief Sought

52. For all of the above reasons, the Defence respectfully requests that the Trial Chamber **REJECT** the Request in its entirety. In the event that the Chamber grants the request, the Defence reserves the right to provide submissions on the probative value and weight to be accorded to the testimony of, and items submitted through, Witness P-0590.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 17th Day of December 2021
At The Hague, The Netherlands