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**International
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Court**

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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
With confidential Annex A**

**Public redacted version of "Prosecution request to add P-0165 to its List of Witnesses and to add P-0165's prior recorded testimony to its List of Evidence pursuant to regulation 35 of the Regulations, and request for the introduction of P-0165's prior recorded testimony and associated material into evidence pursuant to rule 68 of the Rules of Procedure and Evidence",
22 December 2020, ICC-01/12-01/18-1226-Conf**

Source: Office of the Prosecutor

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

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I. Introduction

1. As anticipated in the Prosecution's submissions of 19 November 2020¹ and consistent with the Trial Chamber's order of 24 November 2020,² the Prosecution hereby seeks authorization pursuant to regulation 35 to add [REDACTED] P-0165 [REDACTED] [REDACTED] to its List of Witnesses, and to add P-0165's prior recorded testimony and its associated material to its List of Evidence. The Prosecution seek these measures in the interest of justice and the determination of the truth, in light of the Defence's allegation of torture and cruel, inhuman and degrading treatment ("CIDT"). In addition, acting within the original time-limit was not possible for reasons outside the Prosecution's control. As set out below, there is no prejudice to the Defence.

2. In addition, the Prosecution request that P-0165's prior recorded testimony and associated material—as specified in Annex A of the present application—be admitted into evidence pursuant to rule 68(2)(b). P-0165's prior recorded testimony and associated material is relevant.

[REDACTED]
[REDACTED]
[REDACTED]. P-0165's prior recorded testimony and associated material is probative and goes to proof of matters other than the acts and conduct of Mr Al Hassan as required by rule 68(2)(b). In addition, it (i) is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (ii) relates to background information; and (iii) is such that the interests of justice are best served by its introduction. All parties will benefit from an expedited presentation of the Prosecution's case. Admitting the prior recorded testimony of this witness under rule 68(2)(b) best serves the interest of justice and the determination of the truth. The cumulative nature and limited purpose of the evidence of this witness makes it unnecessary for the witness to appear for cross-examination. Granting the Prosecution's request would not cause any unfair prejudice to the Defence, who remains in a position to challenge the witness's evidence through means other than the witness's cross-examination. The Prosecution seeks the introduction of this material on a conditional basis, subject to the subsequent transmission of P-0165's certified declaration, pursuant to rule 68(2)(b)(ii) and (iii).

3. In the alternative, if the Chamber considers it necessary for P-0165 to appear before it, the Prosecution requests that his prior recorded testimony and associated material be admitted into evidence pursuant to rule 68(3). Admission of P-0165's prior recorded testimony and

¹ [REDACTED]

² ICC-01/12-01/18-1160, para. 10.

associated material under rule 68(3) is in the interest of conducting a streamlined examination of the witness. Should this request be granted, P-0165 will be asked to attest to the accuracy of his previous recorded testimony and associated material at the beginning of his testimony and will be available to be examined by the Defence, the Legal Representatives if applicable, and the Chamber. Examination of P-0165 by the Defence and the Legal Representatives should be limited to issues pertaining to P-0165's prior recorded testimony and associated material and not be used by the Defence to question P-0165 on unrelated matters. Granting the application would not be prejudicial to the rights of Mr Al Hassan and it would enhance the expeditiousness of the proceedings by reducing the length of P-0165's examination-in-chief and by focussing the scope of his examination by the Defence and the Legal Representative.

II. Confidentiality

4. The Prosecution files this document confidentially pursuant to regulation 23*bis*(2) because it refers to other documents that are subject to the same classification. In addition, this request and its annex refer to a potential Prosecution witness for whom protective measures will be sought should any of the above-mentioned requests be granted.³

III. Procedural background

5. On 14 April 2020, the Prosecution filed its list of witnesses, summaries of those witnesses and a provisional list of Prosecution evidence.⁴ On 12 May 2020, the Prosecution submitted further information in the Prosecution List of Witnesses and of the Prosecution Final List of Evidence.⁵

6. On 16 June 2020, the Defence filed a request to terminate the proceedings and a number of related requests.⁶ The Chamber ruled on this request on 24 August 2020.⁷ In this decision, the Chamber made no determinations on the Defence's allegations of torture CIDT but rather took those allegations at their highest.⁸ It noted that this approach was without prejudice to any future determinations on these matters.⁹ According to the Chamber, article 69(7) presented one of the appropriate statutory mechanisms to adjudicate these issues.¹⁰

³ [REDACTED].
⁴ [REDACTED].
⁵ [REDACTED].
⁶ [REDACTED].

⁷ [REDACTED] (a public redacted version was issued on 29 October 2020, ICC-01/12-01/18-1009-Red).

⁸ ICC-01/12-01/18-1009-Red, para. 80.

⁹ ICC-01/12-01/18-1009-Red, para. 80.

¹⁰ ICC-01/12-01/18-1009-Red, para. 121.

7. On 7, 12 and 13 October 2020, the Defence objected to a number of items proposed to be used by the Prosecution with witnesses P-0620,¹¹ P-0653¹² and P-0655,¹³ raising issues under article 69(7).

8. On 8, 13 and 14 October 2020, the Chamber authorised the use of the objected material during the examinations of P-0620,¹⁴ P-0653¹⁵ and P-0655,¹⁶ noting in each case that this was without prejudice to any eventual determination by the Chamber on admissibility pursuant to article 69(7), which would be made in due course.

9. On 15, 19 and 21 October 2020, following the testimonies of P-0620,¹⁷ P-0653¹⁸ and P-0655,¹⁹ the Defence objected to the Prosecution's submission of various items through the witnesses, also requesting the Chamber to exclude certain items and/or raising issues under article 69(7) on the ground of torture and CIDT. The Prosecution responded to these objections by email respectively on 16,²⁰ 21²¹ and 22²² October 2020.

10. On 6 November 2020, the Chamber issued its decisions on the submission of items for P-0620 and P-0621,²³ and P-0653 and P-0655,²⁴ accepting for submission some of the objected items, but noting that it may request further submissions from the parties and participants if deemed necessary for its determination. On the same date, the Chamber instructed the parties to submit "detailed and complete written submissions on the allegations regarding torture and CIDT and the related challenge under Article 69(7) of the Statute to the contested items for P-0620 and P-0655".²⁵

11. On 24 November 2020, the Chamber accepted the unopposed²⁶ Prosecution's request regarding the procedure to be adopted for submissions under article 69(7)²⁷ and "to allow for a more comprehensive and consolidated discussion and determination regarding the admissibility of the totality of the record of the accused's interview and related material".²⁸ It "ordere[d] the

¹¹ Email from the Defence, 7 October 2020, at 15:47.

¹² Email from the Defence, 12 October 2020, at 14:54.

¹³ Email from the Defence, 13 October 2020, at 15:35.

¹⁴ Email from the Chamber to the parties and participants, 8 October 2020, at 22:48.

¹⁵ Email from the Chamber to the parties and participants, 13 October 2020, at 11:50.

¹⁶ Email from the Chamber to the parties and participants, 14 October 2020, at 14:53.

¹⁷ Email from the Defence, 15 October 2020, at 15:39.

¹⁸ Email from the Defence, 19 October 2020, at 13:50.

¹⁹ Email from the Defence, 21 October 2020, at 15:03.

²⁰ Email from the Prosecution, 16 October 2020, 18:24.

²¹ Email from the Prosecution, 21 October 2020, at 14:43.

²² Email from the Prosecution 22 October 2020, at 15:20.

²³ Email from the Chamber, 6 November 2020, at 09:21.

²⁴ Email from the Chamber, 6 November 2020, at 15:56.

²⁵ ICC-01/12-01/18-1150, paras. 10-11.

²⁶ [REDACTED]

²⁷ [REDACTED]

²⁸ ICC-01/12-01/18-1160, para. 9.

Prosecution to file its Request for Introduction and any related requests for additions to its List of Evidence or Witnesses as soon as possible and no later than 31 December 2020.”²⁹ According to the same order, “[t]he Defence is to file any motion based on Article 69(7) of the Statute in respect of the Request for Introduction and responses to any requests for additions to the List of Evidence and Witnesses promptly thereafter.”³⁰

12. On 4 December 2020, the Chamber suspended some time-limits falling between 11 December 2020 and 10 January 2021.³¹

IV. Request for variation of time under regulation 35

13. The Prosecution seeks authorization pursuant to regulation 35 to add P-0165 [REDACTED] to its List of Witnesses and to add P-0165’s prior recorded testimony and its associated material—as specified in Annex A of the present application—to its List of Evidence.

14. The associated material consist of a) [REDACTED]
[REDACTED]
[REDACTED];³² and b) [REDACTED]
[REDACTED]
[REDACTED].³³

(i) *The law on variation of time under regulation 35*

15. The Chamber may extend a time limit pursuant to regulation 35(2) of the Regulations where “good cause” is shown. Where an application to extend a time limit 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.

16. The Chamber has previously held that, where the conditions of regulation 35(2) are not met, previous chambers of this Court have nevertheless authorised the late addition of evidence to the Prosecution’s list of evidence where it in the interests of justice to do so pursuant to the

²⁹ ICC-01/12-01/18-1160, para. 10. Through these instructions, the Chamber effectively authorized the Prosecution to file any request related to the introduction of evidence, in spite of the fact that the deadlines for the introduction of evidence under rule 68 have already expired.

³⁰ ICC-01/12-01/18-1160, para. 10.

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

chamber's powers under Article 64(2) and (6)(f),³⁴ and where the evidence is deemed necessary for the determination of the truth, pursuant to the chamber's powers under Articles 64(6)(d) and 69(3) of the Statute.³⁵

17. A relevant consideration is also whether the late addition would cause undue prejudice to the right of the Defence under Article 67(1)(b) to have adequate time and facilities to prepare its case.³⁶

(ii) *The Chamber should extend the time limits to include P-0165 to the List of Witnesses and to add P-0165's prior recorded testimony and associated material to its List of Evidence*

18. The Chamber should extend the time limits pursuant to regulation 35(2) because the addition of P-0165 to the List of Witnesses and his prior recorded statement and associated material to the List of Evidence is in the interests of justice. As held in the Chambers Termination Decision, the Defence's allegation of torture and CIDT may inform the Chamber's assessment on the weight to be given to Mr Al Hassan's prior recorded testimony as part of its decision under article 74.³⁷

19. In addition, and in any event, the Prosecution could not have anticipated the full relevance of P-0165's prior recorded testimony and its associated material at the time when it was due to file its List of Witnesses and List of Evidence. The Defence first announced that it will bring allegations that Mr Al Hassan has been subject to torture and CIDT already during the pre-trial proceedings.³⁸ [REDACTED]

[REDACTED]

[REDACTED].³⁹

In fact, one month later, the Defence first raised some of the facts in its Termination Request

³⁴ ICC-01/12-01/18-988-[REDACTED] para. 6, citing ICC-01/05-01/13-1191, para. 9-10.

³⁵ ICC-01/12-01/18-988-[REDACTED] para. 6, citing ICC-01/04-01/07-2325-Red, para. 15.

³⁶ ICC-01/12-01/18-988-[REDACTED] para. 6, citing ICC-01/04-01/07-2325-Red, para. 15.

³⁷ ICC-01/12-01/18-1009-Red, para. 119. The Prosecution does not seek an extension of time or to admit P-0165's prior recorded testimony and associated material merely to assist the Chamber in disposing of the upcoming Defence motion challenging the admissibility of Al Hassan's prior recorded testimony under article 69(7). Following the Chamber's guidance from the Termination Decision, P-0165's prior recorded testimony and associated material would not need to be admitted into evidence to dispose of the Defence's procedural motion under article 69(7). Accordingly, P-0165's prior recorded testimony (such as the expert reports) "do not constitute evidence but supporting material for a procedural motion, which do not need to meet the same admissibility criteria as evidence being considered in a trial judgment" (ICC-01/12-01/18-1009-Red, para. 123).

³⁸ ICC-01/12-01/18-T-003-ENG CT2, p. 9, l. 2 to p. 10, l. 24.; [REDACTED]

³⁹ [REDACTED]

of 16 June 2020.⁴⁰ [REDACTED]

[REDACTED]⁴¹

20. It was only at that stage that the Chamber instructed the parties to submit “detailed and complete written submissions on the allegations regarding torture and CIDT and the related challenge under Article 69(7) of the Statute to the contested items for P-0620 and P-0655”.⁴² This order was later amended in the Chamber’s decision of 24 November 2020, when it “ordere[d] the Prosecution to file its Request for Introduction and any related requests for additions to its List of Evidence or Witnesses” and instructed the Defence to “file any motion based on Article 69(7) of the Statute in respect of the Request for Introduction and responses to any requests for additions to the List of Evidence and Witnesses promptly thereafter.”⁴³

21. In any event, the requested variation of time would not cause undue prejudice to the right of the Defence under article 67(1)(b) to have adequate time and facilities to prepare its case. The admission of P-0165’s prior recorded testimony to support the fair evaluation of Mr Al Hassan’s prior recorded testimony as part of its decision under article 74 causes no prejudice. The Defence has ample time to challenge P-0165 and/or Mr Al Hassan’s prior recorded testimonies and to present their own evidence at a later stage in the proceedings.

(iii) *Conclusion*

22. For all the above reasons, the Prosecution requests authorization pursuant to regulation 35 to add P-0165 to its List of Witnesses and to add P-0165’s prior recorded testimony and its associated material to its List of Evidence.

⁴⁰ [REDACTED]

⁴¹ [REDACTED]

⁴² ICC-01/12-01/18-1150, paras. 10-11.

⁴³ ICC-01/12-01/18-1160, para. 10.

V. Request for the admission of P-0165’s prior recorded testimony and associated material under rule 68(2)(b) or in the alternative under rule 68(3)

A. Request for the admission of P-0165’s prior recorded testimony and associated material under rule 68(2)(b)

23. The Prosecution requests that the Chamber authorise the introduction into evidence under rule 68(2)(b) of the prior recorded testimony of P-0165 and associated material on a conditional basis pending the submission of the certified declaration of this witness.

(i) *The law on admission of prior recorded testimony under rule 68(2)(b)*

24. Pursuant to rule 68(2)(b), the Chamber may allow the introduction of the previously recorded testimony of a witness who is not present before the Chamber when that prior recorded testimony: (i) goes to proof of “a matter other than the acts and conduct of the accused”; and (ii) is accompanied by a declaration by the testifying person, witnessed by a person authorised by the Chamber or in accordance with the law and procedure of a State, as detailed in rule 68(2)(b)(ii) and (iii).⁴⁴

25. As generally required in all instances of introduction of prior recorded testimony under rule 68 of the Rules, this introduction must also not be prejudicial to or inconsistent with the rights of the accused.⁴⁵ The decision of whether to introduce a prior recorded testimony pursuant to this provision is a discretionary one, and the entire purpose of rule 68(2)(b) is to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.⁴⁶

26. When such situations are identified and pursuant to the criteria set out in rule 68(2)(b), prior recorded testimony may be introduced pursuant to this provision. In doing so, the Chamber will defer to its eventual deliberation for its judgment, the full consideration of the standard evidentiary criteria for such prior recorded testimony, in particular in terms of its relevance and probative value.⁴⁷

⁴⁴ In its Directions on the conduct of proceedings, the Chamber determined that parties may file applications for the admission of prior recorded testimonies pursuant to rule 68(2) of the Rules (ICC-01/12-01/18-789-AnxA, para. 80).

⁴⁵ ICC-01/12-01/18-1111-Red, para. 7, citing ICC-02/04-01/15-596-Red, para. 5.

⁴⁶ ICC-01/12-01/18-1111-Red, para. 7, citing ICC-02/04-01/15-596-Red, para. 6-7 and ICC-01/05-01/13-1478-Red-Corr, para. 95.

⁴⁷ ICC-01/12-01/18-1111-Red, para. 7, citing *inter alia* ICC-01/12-01/18-789-AnxA, paras. 34(i) and 34(ii).

- (ii) P-0165's prior recorded testimony⁴⁸ and associated material meet the criteria for admission under article 68(2)(b)

27. P-0165's statement constitutes "prior recorded testimony". [REDACTED] reflecting fact of which P-0165 has knowledge. The statement is also signed by P-0165 and it indicates the location where [REDACTED].

28. P-0165's prior recorded testimony and associated material do not relate to the acts and conduct of Mr Al Hassan as charged in the case against him. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

29. P-0165's prior recorded testimony and associated material are relevant to this case. They are relevant to the Chamber's ultimate assessment of the weight and probative value to be accorded to Mr Al Hassan's prior recorded testimony. In addition, although their submission is not required for this purpose,⁴⁹ they may assist the Chamber in disposing of the Defence's upcoming challenges under article 69(7) to the admissibility of Mr Al Hassan's prior recorded testimony and associated material.

30. P-0165's prior recorded testimony also bears sufficient indicia of reliability and has *prima facie* probative value. It was given voluntarily and was dated signed by P-0165. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED],⁵⁰ [REDACTED], [REDACTED]

[REDACTED]

[REDACTED], [REDACTED]

⁴⁸ [REDACTED].

⁴⁹ Following the Chamber's guidance from the Termination Decision, P-0165's prior recorded testimony and associated material would not need to be admitted into evidence to dispose of the Defence's procedural motion under article 69(7). Accordingly, P-0165's prior recorded testimony (such as the expert reports) "do not constitute evidence but supporting material for a procedural motion, which do not need to meet the same admissibility criteria as evidence being considered in a trial judgment" (ICC-01/12-01/18-1009-Red, para. 123).

⁵⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED].

31. The additional rule 68(2)(b)(i) factors further militate in favour of introducing P-0165's prior recorded testimony and related materials under rule 68(2)(b).

32. P-0165's prior recorded testimony is cumulative and corroborative in nature. [REDACTED]

[REDACTED]

[REDACTED].⁵¹ In addition, P-0165 testimony is also consistent with the account of other evidence on the record, for instance with [REDACTED]

[REDACTED].⁵²

33. P-0165's prior recorded testimony also concerns background information, in the sense that it does not go to proof of the facts and circumstances charged in in this case. Rather, it submitted to bolster the probative value of Mr Al Hassan's prior recorded testimony and the weight that the Chamber may accord to it. However, P-0165's prior recorded testimony does not mention the facts and circumstances charged in this case. In addition, P-0165's prior recorded testimony relates to an upcoming procedural Defence motion seeking the exclusion of Mr Al Hassan's prior recorded testimony under article 69(7).

34. Moreover, the interests of justice are best served by the admission of P-0165's prior recorded testimony because, by its terms, rule 68(2)(b) does not unfairly prejudice the Defence by permitting the introduction of evidence that will not be subject to cross-examination when this evidence is unrelated to the acts and conduct of an accused. Introducing into evidence P-0165's prior recorded testimony under rule 68(2)(b) would advance the interests of justice and contribute to a fair and expeditious trial by enabling the presentation of evidence in a more

⁵¹ [REDACTED]

⁵² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

concise and streamlined manner without causing undue prejudice to the fair trial rights of the Mr Al Hassan.

35. Finally, introduction into evidence under rule 68(2)(b) of P-0165's prior recorded testimony causes no undue prejudice to Mr Al Hassan. As noted above, the primary purpose for the introduction of P-0165's prior recorded testimony is to bolster the probative value and weight to be accorded to Mr Al Hassan's prior recorded testimony. The Defence retains the possibility to lead contradictory evidence when presenting its case at a later stage of the proceedings.

(iii) *Conclusion*

36. For all the above reasons, the Prosecution requests that the prior recorded testimony of P-0165 and associated material—as specified in Annex A of the present application—be introduced into evidence under rule 68(2)(b) on a conditional basis pending the submission of the certified declaration of this witness.

B. Alternative request for the admission of P-0165's prior recorded testimony and associated material under rule 68(3)

37. Should the Chamber deny the Prosecution's request to introduce P-0165's prior recorded testimony and associated material pursuant rule 68(2)(b), the Chamber should authorise the introduction of those materials under rule 68(3).

(i) *The law on admission of prior recorded testimony under rule 68(3)*

38. Rule 68(3) allows the introduction of prior recorded testimony when: (i) the witness is present before the Chamber; (ii) the witness does not object to the introduction of his or her prior recorded testimony; and (iii) both parties and the Chamber have the opportunity to examine the witness. As required under rule 68(1), the introduction of prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally. The Chamber has previously found that introduction under rule 68(3) of the Rules “entails a low risk of interfering with the fair trial rights of the accused since the witness still appears before the Chamber in court and the Defence will have the opportunity to examine the witness.”⁵³

⁵³ ICC-01/12-01/18-987-Red, para. 9, citing ICC-02/11-01/15-870 (“*Gbagbo and Blé Goudé Decision*”), para. 7.

39. A chamber's determination to allow the introduction of prior recorded testimony under rule 68(3) requires a case-by-case assessment and is discretionary in nature.⁵⁴ Accordingly, prior recorded testimony may still be introduced even if it relates to issues that are materially in dispute, central to core issues of the case, or are uncorroborated.⁵⁵ However, the Chamber will take into account, on a case-by-case basis, that the introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of trial generally.⁵⁶

(ii) *P-0165's prior recoded testimony and associated material meet the criteria for admission under rule 68(3)*

40. As explained above, P-0165's prior recorded testimony and associated material are relevant and have *prima facie* probative value.⁵⁷ In addition, the evidence is corroborative of other evidence,⁵⁸ and it concerns matter other than the facts and circumstances charged in this case.⁵⁹

41. The Chamber has held that the purpose of rule 68(3) as is to expedite proceedings and avoid unnecessary litigation in court.⁶⁰ When commencing this in-court testimony, P-0165 will be asked to attest to the authenticity and the accuracy of his prior recorded testimony and associated material. The Prosecution estimates that it will require around 1h30 for the examination-in-chief of P-0165, including approximately 15 minutes for the formalities associated with the admission of his prior recorded testimony and associated material. Should this application be rejected, the Prosecution will request that the Chamber authorise the Prosecution to examine P-0165 for 3h during his examination-in-chief.

42. Accordingly, the introduction of P-0165's prior recorded testimony and associated material pursuant to rule 68(3) serves good trial management, particularly streamlining of the presentation of evidence and the expeditiousness of proceedings.

⁵⁴ ICC-01/12-01/18-987-Red, para. 10, indicating that “[f]actors that may be considered, include, *inter alia*, whether: (i) the evidence relates to issues that are not materially in dispute; (ii) the evidence is not central to core issues in the case, but instead provides relevant background information; (iii) the evidence is corroborative of other evidence; (iv) introduction serves good trial management, particularly streamlining of the presentation of evidence and the expeditiousness of proceedings; and (v) introduction may prevent potential re-traumatisation of a vulnerable witness.”

⁵⁵ ICC-01/12-01/18-987-Red, para. 10.

⁵⁶ ICC-01/12-01/18-987-Red, para. 10.

⁵⁷ See para. 30 above.

⁵⁸ See para. 32 above.

⁵⁹ See para. 33 above.

⁶⁰ ICC-01/12-01/18-987-Red, para. 14, citing ICC-02/11-01/15-870, para. 15.

43. The introduction of P-0165's prior recorded testimony and associated material pursuant to rule 68(3) will not cause undue prejudice to Mr Al Hassan or affect the Defence's right to present its case. In addition, to the reasons set under the rule 68(2)(b) request above,⁶¹ the Defence will have a right to cross examine P-0165.

44. However, because of the limited scope of P-0165's prior recorded testimony, his cross-examination by the Defence and by the Legal Representatives should be strictly limited to issues pertaining to P-0165's prior recorded testimony and associated material. Although rule 140(2)(b) provides that examination of a witness by the non-calling party may extend to any "relevant matters", [REDACTED]

[REDACTED] Such expansive questioning would be irrelevant to the Chamber's determination of the weight or probative value to be given to Mr Al Hassan's prior recorded testimony or to dispose of the upcoming Defence challenge under article 69(7). Instead it would unnecessarily extend the length of the proceedings. In any event, as long the Defence does not exceed the scope of P-0165's prior recorded testimony, it may—during its cross-examination—address any concerns of credibility, incompleteness, and probative value that it may have with P-0165's prior recorded testimony.⁶²

45. Finally, as the statement in its entirety will be before the Chamber, it follows that the associated material used with the witness should also be introduced under rule 68(3) to ensure that the Chamber has full understanding of the testimony. This will not occasion any prejudice to the accused since rule 68(3) allows for cross-examination and the Defence will still have full opportunity to question the witness in order to address any issue relating to the associated material.⁶³

(iii) *Conclusion*

46. For all the above reasons, the Prosecution requests that the prior recorded testimony of P-0165 and associated material—as specified in Annex A of the present application—be introduced into evidence under rule 68(3).

⁶¹ See paras. 35 above.

⁶² ICC-01/12-01/18-987-Red, Decision on Prosecution's requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, 5 August 2020, para. 18.

⁶³ ICC-01/12-01/18-987-Red, Decision on Prosecution's requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, 5 August 2020, para. 17.

VI. Requested Relief

47. For the foregoing reasons, the Chamber should:

- authorize the Prosecution, pursuant to regulation 35, to add P-0165 to its List of Witnesses and to add P-0165's prior recorded testimony and its associated material to its List of Evidence; and
- authorize the introduction into evidence of the prior recorded testimony of P-0165 and associated material—as specified in Annex A of the present application—either under rule 68(2)(b) (on a conditional basis pending the submission of the certified declaration of this witness); or under rule 68(3).



Fatou Bensouda
Prosecutor

Dated this 22nd day of December 2020

At The Hague, The Netherlands.