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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, *EX PARTE*, Annexes A and B,
Available only to the Prosecution and Defence**

Public redacted version of "Prosecution requests to add five items to its List of Evidence pursuant to regulation 35 of the Regulations of the Court and for the introduction of P-0598's and P-0661's prior recorded testimony and associated material into evidence pursuant to rule 68 of the Rules of Procedure and Evidence", 18 December 2020, ICC-01/12-01/18-1215-Conf

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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 seeks the authorisation of Trial Chamber X ("Chamber") pursuant to regulation 35 of the Regulations of the Court ("Regulations"), to call P-0661 as an expert witness in this case ("Expert Request"),³ and to add five items (P-0598 and P-0661's experts' reports, mission letters and P-0661's CV)⁴ to the Prosecution's List of Evidence ("LoE Request"). Acting within the original time-limit was not possible for reasons outside the Prosecution's control and, in any event, it is in the interests of justice and necessary for determination of the truth that the Chamber grant the Expert Request and the LoE Request. As set out below, there is no prejudice to the Defence.
2. In addition, the Prosecution seeks to introduce into evidence the prior recorded testimony of expert witnesses P-0598 and P-0661 and their associated material, as specified in sections I and II of confidential Annexes A and B to the present application, pursuant to rule 68 of the Rules of Procedure and Evidence ("Rules") ("Rule 68 Request"). In particular, the Prosecution seeks the introduction of their prior recorded testimony (P-0598 and P-0661's experts' reports) and associated material (mission letters and CVs)⁵ pursuant to rule 68(2)(b) of the Rules.
3. P-0598 is a medical doctor and expert in forensic medicine. P-0661 is a medical doctor and expert in forensic psychiatry. Their prior recorded testimony and associated material are relevant to the voluntary nature of Mr AL HASSAN's interviews and related material and the probative value of this evidence. Their respective reports confirm *inter alia* that the interviews by the Office of the Prosecutor with Mr AL HASSAN were voluntary and indicate that Mr AL HASSAN's scars could have been caused accidentally.

¹ [REDACTED]

² ICC-01/12-01/18-1160, para. 10.

³ While P-0661 is already on the Prosecution's List of Witnesses, the Chamber dismissed without prejudice the Prosecution's earlier request for an extension of time under regulation 35 of the Regulations to apply for authorization to call him as an expert, as further explained in the Background section below. *See* ICC-01/12-01/18-988-[REDACTED] para. 11.

⁴ The Chamber already authorised the Prosecution to add P-0598's updated CV to its List of Evidence, as further explained in the Background section below. *See* ICC-01/12-01/18-1111-[REDACTED], para. 12-13.

⁵ Subject to the receipt of the declaration in accordance with rule 68(2)(b)(ii) and (iii) of the Rules, the Chamber already authorised the Prosecution to introduce P-0598's CV ([MLI-OTP-0078-7643-R01](#)) pursuant to rule 68(2)(b) of the Rules, as further explained in the Background section below. *See* ICC-01/12-01/18-1111-[REDACTED] para.11.

4. Their prior recorded testimony is probative and goes to proof of matters other than the acts and conduct of the Accused as required by rule 68(2)(b). In addition, it (i) is of a cumulative or corroborative nature to other evidence; (ii) relates to background information; and (iii) is such that the interests of justice are best served by its introduction.

5. All parties will benefit from an expedited presentation of the Prosecution's case. Admitting the prior recorded testimony of these witnesses 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 these witnesses makes it unnecessary for them to appear for cross-examination. Granting the Prosecution's request under rule 68(2)(b) would not cause any unfair prejudice to the Accused, who remains in a position to challenge these witnesses' evidence through means other than their cross-examination. The Prosecution seeks the introduction of this material on a conditional basis, subject to the subsequent transmission of the certified declarations of P-0598 and P-0661, pursuant to rule 68(2)(b)(ii) and (iii).

6. In the alternative, if the Chamber does not accept the introduction of the experts' prior recorded testimony and associated material under rule 68(2)(b), the Prosecution seeks to introduce this evidence pursuant to rule 68(3) of the Rules, and to conduct a streamlined supplementary examination of these witnesses. Should this request under rule 68(3) be granted, P-0598 and P-0661 will be asked to attest to the accuracy of their previous recorded testimony and associated material at the beginning of their testimony and will be available to be examined by the parties, Legal Representatives if applicable, and the Chamber. Granting the application to introduce the prior recorded testimony of P-0598 and P-0661 and associated material as requested would not be prejudicial to the rights of the Accused and it would enhance the expeditiousness of the proceedings by significantly reducing the length of P-0598's and P-0661's examination-in-chief.

7. The Chamber should grant the Expert Request, the LoE Request and the Rule 68 Request.

II. Confidentiality

8. Pursuant to regulation 23*bis*(1) of the Regulations, the Prosecution files this submission and its accompanying annexes—identifying the materials that the Prosecution seeks to introduce into evidence pursuant to rule 68 of the Rules for P-0598 and P-0661—as

confidential because they refer to documents and filings classified as confidential, including expert reports referring to the Accused's physical and mental condition. Out of abundance of caution the annexes are filed *ex parte*, available only to the Prosecution and the Defence, because they refer to medical records.

III. Background

9. At the pre-trial stage of the case, the Chamber established the deadline for the Prosecution's final List of Evidence as 12 May 2020,⁶ and for the Prosecution to seek authorisation to call witnesses as experts as 1 June 2020.⁷

10. On 14 April 2020, the Prosecution filed its List of Witnesses, summaries of those witnesses' expected testimony and a provisional list of Prosecution evidence.⁸

11. [REDACTED]
[REDACTED].⁹

12. [REDACTED]
[REDACTED]
[REDACTED]¹⁰ [REDACTED]
[REDACTED].¹¹

13. On 12 May 2020, the Prosecution submitted further information on the Prosecution List of Witnesses and the Prosecution final List of Evidence.¹² On 12 August 2020, the Prosecution filed its updated List of Evidence.¹³

14. P-0598 and P-0061 are on the Prosecution's List of Witnesses.¹⁴

⁶ ICC-01/12-01/18-548, para. 10 and ICC-01/12-01/18-677, para. 15.

⁷ ICC-01/12-01/18-789-AnxA, para. 66-67.

⁸ [REDACTED]

⁹ [REDACTED]

¹⁰ [REDACTED]

¹⁰ [REDACTED] As mentioned at ICC-01/12-01/18-740-Conf-AnxB, p. 1198, his mission was cancelled due to the COVID-19 pandemic. If needed, a request under regulation 35 of the RoC will be filed for addition to the LoE of his reports and associated material, [REDACTED]

¹¹ [REDACTED]

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ [REDACTED]

15. On 17 June 2020, the Defence filed a request to terminate the proceedings and a number of related requests.¹⁵ The Prosecution responded on 27 July 2020,¹⁶ and in its response requested,¹⁷ *inter alia*, the Chamber’s authorisation to add to its List of Evidence the reports of P-0598¹⁸ and P-0661¹⁹, their latest CVs,²⁰ as well as the mission letters sent to the two experts by the Prosecution,²¹ and contact notes.²² On 7 August 2020, the Defence filed a reply.²³

16. The Chamber ruled on the Defence Request to terminate the proceedings and related requests on 24 August 2020.²⁴ In its Decision, the Chamber rejected the Prosecution’s request to add P-0598 and P-0661’s reports, related material and other material to the List of Evidence, because it saw no need for it in that context and at that time, since the expert reports did not constitute evidence but supporting material for a procedural motion, which did not need to meet the same admissibility criteria as evidence being considered in a trial judgment.²⁵ The Chamber found that “this is without prejudice for future requests by the parties on this matter.”²⁶

17. On 24 November 2020, the Chamber accepted the unopposed²⁷ Prosecution’s 19 November 2020 request regarding the procedure to be adopted for submissions under article 69(7)²⁸ of the Statute “to allow for a more comprehensive and consolidated discussion and determination regarding the admissibility of the totality of the record of the accused’s

¹⁵ [REDACTED]. See [REDACTED] (“Defence Request”) for the public redacted version, ICC-01/12-01/18-885-Corr-Red3.

¹⁶ [REDACTED]. A corrected version was subsequently filed, ICC-01/12-01/18-982-Conf-Exp-Corr (“Prosecution Response”).

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ P-0598’s CV, [MLI-OTP-0078-7643-R01](#); [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ ICC-01/12-01/18-991-[REDACTED] (“Defence Reply”).

²⁴ [REDACTED] (“Decision”). A public redacted version is available: ICC-01/12-01/18-1009-Red.

²⁵ Decision, para. 123, citing “For a similar approach, see TC VII in *Bemba et al.* ICC-01/05-01/13-1753, para. 11.”

²⁶ Decision, para. 123.

²⁷ [REDACTED].

²⁸ [REDACTED].

interview and related material”.²⁹ It “ordere[d] the 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.”³⁰

18. On 4 December 2020, the Chamber suspended time-limits falling between 11 December 2020 and 10 January 2021, with certain exceptions.³¹

19. Specifically as regards P-0661, on 1 June 2020, the Prosecution requested pursuant to regulation 35 of the Regulations that the Prosecution be allowed to *inter alia* file an application to call P-0661 as an expert [REDACTED] upon receipt of [REDACTED] expert report.³² On 5 August 2020,³³ noting that P-0661 was scheduled to appear during the [REDACTED] block of witnesses, and that the Prosecution was not yet in a position to provide the Chamber with all the requisite and complete information regarding P-0661’s expected evidence, the Chamber decided that it was premature to consider any request under regulation 35 at that stage. The Chamber instead found that the Prosecution “may return back to the Chamber on this matter at the appropriate time, if necessary.”³⁴

20. Specifically as regards P-0598, in its decision of 5 August 2020 the Chamber granted the Prosecution’s request that P-0598 be called to testify as an expert witness in this case, noting that the Defence did not object to his expertise.³⁵ The Chamber also indicated that consideration should be given to introducing his evidence pursuant to rule 68 of the Rules.³⁶ On 16 October 2020, the Chamber decided that P-0598’s reports [REDACTED] [REDACTED] and related material³⁷ shall be introduced pursuant to rule 68(2)(b) of the Rules, subject to the receipt of the relevant declaration.³⁸ The Chamber noted that the Defence did not object to the submission of P-0598’s reports in this way. The Chamber also authorised the Prosecution to add P-0598’s updated CV to its List of Evidence, noting that there was no objection from the Defence to this limited request, so that its late addition did not unduly

²⁹ ICC-01/12-01/18-1160, para. 9.

³⁰ ICC-01/12-01/18-1160, para. 10.

³¹ [REDACTED]

³² ICC-01/12-01/18-842-[REDACTED], para. 57-59.

³³ [REDACTED]. A public redacted version is available: ICC-01/12-01/18-988-Red.

³⁴ ICC-01/12-01/18-988-[REDACTED], para. 11.

³⁵ ICC-01/12-01/18-989-[REDACTED], para. 39.

³⁶ ICC-01/12-01/18-989-[REDACTED], para. 39.

³⁷ [REDACTED]

³⁸ ICC-01/12-01/18-1111-[REDACTED], para. 11.

prejudice the Defence, while having up-to-date information about P-0598 was in the interests of justice and the determination of the truth.³⁹

IV. Applicable law

A. Applicable law relevant to the Expert Request and the LoE Request

21. In its Directions on the Conduct of Proceedings, the Chamber adopted a procedure enabling the Parties to raise any objections in relation to proposed expert witnesses.⁴⁰ It determined that at the latest 20 days after the full disclosure deadline, the Prosecution shall file motivated applications seeking the Chamber's authorisation to call any of its witnesses as an expert,⁴¹ and set out the procedure for challenges to proposed experts' reports and qualifications,⁴² determining that "[w]here the Defence accepts the statement and/or report of a proposed Prosecution expert witness and does not wish to question him or her, the Chamber may decide that the relevant materials can be tendered into evidence without calling the expert witness to testify in person."⁴³

22. 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 his control.

23. 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 is in the interests of justice to do, so pursuant to the chamber's powers under Article 64(2) and (6)(f),⁴⁴ 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.⁴⁵

³⁹ ICC-01/12-01/18-1111-█, para. 12-13.

⁴⁰ See ICC-01/12-01/18-989-█, para. 9.

⁴¹ ICC-01/12-01/18-789-AnxA, para. 67.

⁴² ICC-01/12-01/18-789-AnxA, para. 68.

⁴³ ICC-01/12-01/18-789-AnxA, para. 69.

⁴⁴ ICC-01/12-01/18-988-█, para. 6, citing Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on the Prosecution Request to add 12 Items to its List of Evidence, ICC-01/05-01/13-1191, 27 August 2015, para. 9-10.

⁴⁵ ICC-01/12-01/18-988-█, para. 6, citing Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Public redacted version of Decision on the Prosecution Motion for leave to disclose and

24. According to the Chamber, a relevant consideration is also whether the late addition would cause undue prejudice to the right of the Defence under article 67(1)(b) of the Statute to have adequate time and facilities to prepare its case.⁴⁶

B. Applicable law relevant to the Rule 68 Request

(i) Rule 68(2)(b)

25. 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.⁴⁷

26. Pursuant to rule 68(2)(b) of the Rules, 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) of the Rules.

27. 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.⁴⁸ 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) of the Rules is to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.⁴⁹

28. When such situations are identified and pursuant to the criteria set out in rule 68(2)(b) of the Rules, prior recorded testimony may be introduced pursuant to this provision. In doing

add the investigator's report concerning Witness P-268 to the List of Incriminating Evidence, 27 September 2010, ICC-01/04-01/07-2325-Red, para. 15.

⁴⁶ ICC-01/12-01/18-988-█, para. 6, citing ICC-01/04-01/07-2325-Red, para. 15.

⁴⁷ ICC-01/12-01/18-789-AnxA, para. 79-80.

⁴⁸ ICC-01/12-01/18-1111-Red, para. 7, citing Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules (“*Ongwen* Rule 68(2)(b) Decision”), 18 November 2016, ICC-02/04-01/15-596-Red, para. 5.

⁴⁹ ICC-01/12-01/18-1111-Red, para. 7, citing *Ongwen* Rule 68(2)(b) Decision, para. 6-7 and Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, para. 95.

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.⁵⁰

(ii) Rule 68(3)

29. Rule 68(3) of the Rules 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.

30. As required under rule 68(1) of the Rules, 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.”⁵¹

31. The Chamber’s determination to allow the introduction of prior recorded testimony under rule 68(3) of the Rules requires a case-by-case assessment and is discretionary in nature.⁵² 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.⁵³ However, the Chamber will take into account, on a case-by-case basis, that the introduction

⁵⁰ ICC-01/12-01/18-1111-Red, para. 7, citing *inter alia* ICC-01/12-01/18-789-AnxA, para.34(i) and 34(ii).

⁵¹ ICC-01/12-01/18-987-Red, para. 9, citing Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the “Prosecution’s application to conditionally admit the prior recorded statements and related documents of witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3) and for testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1)”, 7 April 2017, ICC-02/11-01/15-870 (“*Gbagbo and Blé Goudé* Decision”), para. 7.

⁵² 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.”

⁵³ ICC-01/12-01/18-987-Red, para. 10 and citations therein.

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.⁵⁴

32. An assessment under rule 68(3) of the Rules is preliminary and without prejudice to the weight that the Chamber will ultimately attach to a witness's evidence, which indeed can only be determined once the Chamber has heard all of the evidence. Accordingly, at this point in the proceedings, a determination whether a witness statement is suitable for introduction under rule 68(3) of the Rules is a preliminary decision, subject to the satisfaction of the conditions of this provision during the trial, and once the witness appears before the Chamber.⁵⁵

33. The Chamber has held that the purpose of rule 68(3) of the Rules is to expedite proceedings and avoid unnecessary litigation in court.⁵⁶

34. As the prior recorded testimony in its entirety will be before the Chamber, it follows that material used with the witness must 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) of the Rules allows for cross-examination and the Defence will still have full opportunity to question the witness in order to address any issue relating to these supporting materials.⁵⁷

35. Although the Chamber will rule on case-by-case basis whether the use of rule 68(3) of the Rules is appropriate for a particular witness, this provision grants the Defence a full unaffected right to cross-examine the witness. Accordingly, the Defence may address any concerns of credibility, incompleteness, and probative value during cross-examination. Similarly, the Defence will be afforded the opportunity to question the relevant witnesses in relation to matters of an exculpatory nature.⁵⁸

V. Submissions

A. Expert Request - the Chamber should allow the Prosecution to call P-0661 as an expert

⁵⁴ ICC-01/12-01/18-987-Red, para. 10 and citations therein.

⁵⁵ ICC-01/12-01/18-987-Red, para. 11 and citations therein.

⁵⁶ ICC-01/12-01/18-987-Red, para. 14, citing *Gbagbo and Blé Goudé* Decision, ICC-02/11-01/15-870, para. 15.

⁵⁷ ICC-01/12-01/18-987-Red, para. 17.

⁵⁸ ICC-01/12-01/18-987-Red, para. 18.

36. P-0661 should be called as an expert in this case. P-0661 is a medical doctor and expert in forensic psychiatry. [REDACTED]

[REDACTED]

[REDACTED].⁵⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁶⁰ [REDACTED]

[REDACTED].⁶¹ [REDACTED]

[REDACTED].⁶² [REDACTED]

[REDACTED].⁶³ In addition, P-0661's report falls within P-0661's area of expertise.

37. Acting within the original time limit to request the Chamber's authorisation to call P-0661 as an expert was not possible for reasons outside the Prosecution's control. As explained earlier under the Background section, the Prosecution had sought authorisation from the Chamber under regulation 35 of the Regulations to call P-0661 as an expert, before the Defence filed its Defence Request for termination of the proceedings. At that stage, the Chamber found that the Prosecution's request was premature and that the Prosecution may return to the Chamber at the appropriate stage. The Prosecution returns to the Chamber on this issue now because in its Rule 68 Request, it is seeking to introduce P-0661's expert report and associated material under rule 68 of the Rules.

38. In any event, it is in the interest of justice and necessary for the determination of the truth that P-0661 be authorised to give testimony as an expert in this case because his expert testimony in the subject area of his expertise would be of assistance to the Chamber in understanding or determining the issues of a technical nature in P-0661's report.

39. There is no prejudice to the Defence in this approach. The Defence was on notice of the Prosecution's intention to call P-0661 as an expert witness in this case. [REDACTED]

[REDACTED]

⁵⁹ [REDACTED]

⁶⁰ [REDACTED]

⁶¹ [REDACTED]

⁶² [REDACTED]

⁶³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁶⁴ Similarly, in its reply to the Prosecution Response to the Defence Request to terminate the proceedings, the Defence challenged P-0661's report but did not appear to challenge his qualifications.⁶⁵

40. Regarding P-0598, the Chamber has already authorised the Prosecution to call P-0598 as an expert in this case. P-0598 is a medical doctor and expert in forensic medicine. [REDACTED]

[REDACTED]⁶⁶ [REDACTED]

[REDACTED]⁶⁷ [REDACTED]⁶⁸ [REDACTED]. P-0598's report falls within P-0598's area of expertise.

B. LoE Request: the Chamber should allow the inclusion of five items from the expert reports and associated material in the List of Evidence

41. With the exception of P-0598's CV,⁶⁹ five items of the prior recorded testimony of P-0598 and P-0661 and associated material, could not be included in the Prosecution's List of Evidence for reasons outside the Prosecution's control because (i) the relevant reports of experts consultants Drs Porterfield and Cohen, providing the original rationale for the preparation of P-0661 and P-0598's reports, were only disclosed to the Prosecution after the 12 May 2020 disclosure deadline, and relevant material as late as 15 July 2020;⁷⁰ and (ii) the significance of these reports by Drs Porterfield and Cohen only became fully apparent after the filing of the Defence Request on 17 June 2020.

42. Notwithstanding the tardy disclosure by the Defence of key material related to their consultants' reports, the Prosecution requested P-0598⁷¹ to analyse Dr Cohen's first report on the physical examination of Mr AL HASSAN [REDACTED]

⁶⁴ [REDACTED]

⁶⁵ [REDACTED]

⁶⁶ P-0598's CV, [MLI-OTP-0078-7643-R01](#), p. 7646.

⁶⁷ [REDACTED]

⁶⁸ P-0598's CV, [MLI-OTP-0078-7643-R01](#), p. 7645.

⁶⁹ The Chamber already authorised the Prosecution to add P-0598's updated CV to its List of Evidence. *See* ICC-01/12-01/18-1111-[REDACTED], para. 12-13.

⁷⁰ While Dr Porterfield's report and Dr Cohen's first report were disclosed on 20 and 22 May 2020, respectively, many of the relevant items were only disclosed on 15 July 2020.

⁷¹ [REDACTED]

45. Their late addition would not cause undue prejudice to the right of the Defence under article 67(1)(b) of the Statute to have adequate time and facilities to prepare its case because these items were disclosed to the Defence already in July 2020, and the intention to include them in the Prosecution List of Evidence was communicated to the Defence in the Prosecution Response to the Defence Request for termination of the proceedings.

C. The Chamber should grant the Rule 68 Request because it would enhance the expeditiousness of the proceedings and would not be prejudicial to the rights of the Accused

46. Under the Directions on the Conduct of the Proceedings, “[w]here the Defence accepts the statement and/or report of a proposed Prosecution expert witness and does not wish to question his or her, the Chamber may decide that the relevant materials can be tendered into evidence without calling the expert witness to testify in person.”⁸²

47. In any other case, however, the Prosecution requests the introduction of the prior recorded testimony of P-0598 and P-0661 and their associated material pursuant to rule 68(2)(b) or in the alternative pursuant to rule 68(3) of the Rules.

i. The prior recorded testimony of P-0598 and P-0661 and associated material should be introduced into evidence pursuant to rule 68(2)(b)

48. The Prosecution requests that the Chamber authorise the introduction into evidence under rule 68(2)(b) of the prior recorded testimony of P-0598 and P-0661 and associated material on a conditional basis, pending the submission of the certified declaration of these witnesses.

49. The expert reports of P-0661 and P-0598 constitute “prior recorded testimony”. This Chamber has accepted the applicability of rule 68(3) of the Rules to expert reports, allowing the evidence of a number of experts in this case to be introduced under this provision subject to compliance with the procedural pre-requisites thereof.⁸³ Moreover, the Chamber also

⁸² ICC-01/12-01/18-789-AnxA, Directions on the conduct of proceedings, para. 69.

⁸³ ICC-01/12-01/18-989-██████████.

admitted the expert report of P-0598 concerning [REDACTED] pursuant to rule 68(2)(b) of the Rules, subject to the provision of the relevant declaration.⁸⁴

50. The prior recorded testimony of P-0661 and P-0598 and associated material are relevant to the voluntary nature of the interviews of Mr AL HASSAN and related material and to the reliability of this evidence. Thus, they are relevant to the Chamber's ultimate assessment of the weight and probative value to be accorded to Mr AL HASSAN's interviews and related material. In addition, although their submission is not required for this purpose,⁸⁵ 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 interviews and related material. They do not relate to the acts and conduct of the Accused as charged in the case against him.

51. [REDACTED]
[REDACTED]
[REDACTED].⁸⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁸⁷ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁸⁸ [REDACTED]

⁸⁴ ICC-01/12-01/18-1111-[REDACTED], para. 1-2, 5-11.

⁸⁵ Decision, para. 123.

⁸⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁸⁷ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁸⁸ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸⁹

52. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹¹

53. The prior recorded testimony of P-0598 and P-0661 bears sufficient indicia of reliability and has *prima facie* probative value because their signed reports were prepared on the basis of their review of relevant material/ evidence,⁹² and pursuant to instructions to provide objective opinions as expert witnesses.⁹³ The opinions expressed in their reports are of a technical nature and, in light of their qualifications and experience, fall within the scope of their expertise. P-0598 and P-0661 are well placed to provide these opinions.

[REDACTED]

[REDACTED]

⁸⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹² [REDACTED]

⁹³ [REDACTED]

[REDACTED]

54. Additional rule 68(2)(b)(i) factors militate in favour of introducing P-0598 and P-0661's prior recorded testimony and associated material under rule 68(2)(b).

55. P-0598 and P-0661's prior recorded testimony is of a cumulative or corroborative nature, including with the the audio recordings of interviews of Mr AL HASSAN, their transcripts and related material, as well as other documentary evidence which the Prosecution is separately applying to introduce.

56. P-0598 and P-0661's prior recorded testimony also concerns background information within the meaning of rule 68(2)(b), in the sense that it does not mention the facts and circumstances charged in this case. It is submitted to bolster the probative value of Mr AL HASSAN's interviews and related material and the weight that the Chamber may accord to this evidence. However, these experts' prior recorded testimony does not mention the facts and circumstances charged in this case. In addition, their 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).

57. While the Defence in its Defence Reply to the Prosecution Response to the Defence Request to terminate the proceedings challenged P-0598 and P-0661's reports and their conclusions,⁹⁴ the fact that the prior recorded testimony of P-0598 and P-0661 may relate to issues in dispute, does not foreclose its introduction under this provision. While the Chamber shall take into consideration these factors in the determination of whether to allow the introduction of prior recorded testimony under rule 68(2)(b) of the Rules, they are not mandatory pre-conditions for the applicability of this provision, but factors guiding the Chamber's exercise of its discretion.⁹⁵

58. Overall, the interests of justice are best served by the admission of the 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 the prior recorded testimony of P-0598 and P-0661 under rule 68(2)(b) would advance the interests of justice and contribute to a fair and expeditious trial by enabling the presentation

⁹⁴ [REDACTED]

⁹⁵ ICC-02/04-01/15-596-Red, T. Ch. IX, *Prosecutor v. Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, para. 6.

of evidence in a more concise and streamlined manner, without causing undue prejudice to the fair trial rights of the Accused.

59. Finally, introduction into evidence under rule 68(2)(b) of the prior recorded testimony causes no undue prejudice to the Accused, as inability to cross-examine P-0598 and P-0661 on their expert reports and the submission of the evidence at this stage of the proceedings do not deprive the Accused of his right and opportunity to challenge this evidence. It is submitted to bolster the probative value of Mr AL HASSAN's interviews and related material and the weight that the Chamber may accord to this evidence. The Defence retains the possibility to lead contradictory evidence when presenting its case at a later stage of the proceedings and/or—to the extent that discrepancies exist with any other evidence—address the prior recorded testimony during closing submissions and advance arguments on the weight to be attributed to the prior recorded testimony.

ii. In the alternative, the prior recorded testimony of P-0598 and P-0661 and associated material should be introduced into evidence pursuant to rule 68(3)

60. Should the Chamber deny the Prosecution's request to introduce P-0598 and P-0661's prior recorded testimony and associated material pursuant to rule 68(2)(b), the Chamber should authorise the Prosecution to introduce it under rule 68(3) of the Rules.

61. As explained above, the prior recorded testimony of P-0598 and P-0661 and associated material are relevant and has *prima facie* probative value.

62. P-0598 and P-0661 will be asked to attest to the authenticity and the accuracy of their prior recorded testimony and associated material at the beginning of their testimony. The Prosecution estimates that it will require around 1h30min each for the examination-in-chief of P-0598 and P-0661, including approximately 20 minutes each for the formalities associated with the admission of their prior recorded testimony and associated material. Should this application be rejected, the Prosecution will request that the Chamber authorise the Prosecution to examine P-0598 and P-0661 for around 4h each during their examination-in-chief.

63. During its supplementary examination of these expert witnesses, the Prosecution intends to elicit focused, limited *viva voce* evidence of their methodology, conclusions and material

reviewed by them for the purpose of preparing their reports.

iii. Brief description of the associated material which is sought to be introduced under rule 68 together with the prior recorded testimony

64. Section II of confidential Annexes A and B describes the associated material which the Prosecution seeks to introduce under rule 68. In addition to their reports, the Prosecution seeks the introduction of the mission letter to these experts as well as their CVs. The mission letters are referred to in their reports and are necessary to understand them, while their CVs are necessary to understand why their reports fall within their area of expertise.⁹⁶

iv. Brief description of other material

65. Section III of confidential Annexes A and B refers to items that the Prosecution does not seek to introduce under rule 68 as part of the present application, but which are relevant to their prior recorded testimony insofar as they were provided to P-0598 and P-0661 for the purpose of preparing their expert reports, or are otherwise referred to for completeness. Their itemised description can be found in section III of the Annexes.

66. The Prosecution does not seek the submission of this material pursuant to the present application even where such material was provided to the experts and is referred to in the prior recorded testimony of P-0598 and P-0661. In particular, the Prosecution is separately seeking the submission of the audio recordings of interviews of Mr AL HASSAN, their transcripts and related material. As for the Defence consultants' reports referred to in the prior recorded testimony of P-0598 and P-0661, in the Prosecution's view, P-0598 and P-0661's expert reports can be understood without their submission, as free-standing reports,⁹⁷ moreover since the Prosecution opposes their submission in light of insufficient reliability,⁹⁸ and as additionally and impermissibly providing the Accused with an opportunity to give an unsworn account not subject to cross-examination.⁹⁹ Finally, as regards the medical records

⁹⁶ Subject to the receipt of the declaration in accordance with rule 68(2)(b)(ii) and (iii) of the Rules, the Chamber authorised the Prosecution to introduce P-0598's CV ([MLI-OTP-0078-7643-R01](#)) pursuant to rule 68(2)(b) of the Rules. See ICC-01/12-01/18-1111-[REDACTED], para.11.

⁹⁷ [REDACTED]

⁹⁸ See Prosecution Response, para. [REDACTED], 141-143, 146-154, 156-161. See also Decision, para. 99, 106-108, fn. 187.

⁹⁹ See Prosecution Response, para. 116.

provided to P-0598 and P-0661, and referred to in their expert reports, in the Prosecution's submission these reports can also be understood without them and in any event the Chamber is free to consult these medical records.

VI. Requested Relief

67. For the foregoing reasons, the Chamber should grant the Expert Request, the LoE Request and the Rule 68 Request. Thus, the Chamber should:

- A. Authorise the Prosecution, pursuant to regulation 35, to add five items from P-0598 and P-0661's prior recorded testimony and their associated material to the Prosecution List of Evidence; and
- B. Authorise the introduction into evidence of the prior recorded testimony of P-598 and P-0661 and associated material—as specified in confidential Annexes A and B to 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 18th day of December 2020

At The Hague, The Netherlands