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No.: ICC-01/12-01/18

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1 September 2021

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
Judge Tomoko Akane
Judge Kimberly Prost

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
THE PROSECUTOR V. AL HASSAN AG ABDOUL AZIZ AG MOHAMED
AG MAHMOUD**

Public

Public redacted version of "Prosecution urgent request under regulation 35(2) of the Regulations of the Court to add to its List of Evidence and to apply under rule 68(2)(b) of the Rules of Procedure and Evidence, and application under rule 68(2)(b) to introduce into evidence prior recorded testimony of Witnesses P-0204 and P-0630", 18 August 2021, ICC-01/12-01/18-1659-Conf

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Court to:

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I. Introduction

1. Pursuant to regulation 35 of the Regulations of the Court (“Regulations”), the Prosecution requests that it be allowed to (1) add two items to its List of Evidence and (2) apply to submit them as prior recorded testimony of Witnesses P-0204 and P-0630 under rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”). The Prosecution also requests that the Chamber grant its rule 68(2)(b) application with respect to these two items of prior recorded testimony of P-0204 and P-0630, subject to the receipt of the required certified declaration.
2. The Prosecution files this application on an urgent basis with a view to being allowed to use one of the items (MLI-OTP-0080-3503) sought to be added to its List of Evidence with Witness P-0603, who is currently scheduled to begin testifying on 2 September 2021.

II. Confidentiality

3. Pursuant to regulation 23*bis*(1) of the Regulations, this application is filed confidentially as it contains information which may identify Prosecution witnesses. A public redacted version will be filed in due course.

III. Procedural History

4. At the pre-trial stage of the case, the Chamber established the deadline for the Prosecution List of Evidence as 12 May 2020.¹ Also at the pre-trial stage, the Chamber issued its Decision on the conduct of proceedings, instructing the Prosecution to file any applications pursuant to rule 68(2)(b) of the Rules by the end of 2020.²

¹ ICC-01/12-01/18-548, para. 10 and ICC-01/12-01/18-677, para. 15.

² ICC-01/12-01/18-789-AnxA, para. 79-80.

5. On 9 December 2020, the Prosecution filed an application under rule 68(2)(b) of the Rules to introduce into evidence the prior recorded testimony of Witnesses P-0204 and P-0630 and its associated material (“Original Application”).³ This prior recorded testimony consists of *inter alia* two interactive platforms, one used as a visual presentation tool in the *Al Mahdi* case⁴ related to sites where destruction of mausoleums occurred, and another which was used as a visual presentation tool in the current case during the opening statement and is meant to be used during the trial as well in order to help with the localization of certain places of interest to the case against the Accused (hereafter “Timbuktu platform”).⁵

6. On 25 March 2021, the Defence met with P-0204 and P-0630 in the presence of the Prosecution to discuss how to use and manipulate the Timbuktu platform. In the course of this meeting, two mistakes were discovered relating to the placement of two videos within Place Sankoré and on a street approaching Place de l’indépendance, respectively.⁶

7. On 26 March 2021, the Chamber granted the Original Application, subject to the receipt of the required certified declaration.⁷

8. P-0204 and P-0630 have since corrected the errors and the Prosecution has disclosed the corrected Timbuktu platform (MLI-OTP-0080-3503) and corresponding technical report addendum (MLI-OTP-0080-3499) to the Defence.⁸

9. The Prosecution seeks at present to add to its List of Evidence the revised Timbuktu platform (MLI-OTP-0080-3503) and corresponding technical report

³ [REDACTED] (“Original Application”). A public redacted version (ICC-01/12-01/18-1196-Red) was filed on 8 April 2021.

⁴ A public version is available at MLI-OTP-0065-0898 and a confidential one at [REDACTED]; see Original Application, para. 20-21. See also [REDACTED].

⁵ [REDACTED]; see Original Application, para. 22-24. See also [REDACTED].

⁶ [REDACTED].

⁷ ICC-01/12-01/18-1402-[REDACTED] para. 30, p. 14. A confidential redacted version ([REDACTED]) was filed on the same day. A public redacted version (ICC-01/12-01/18-1402-Red2) was filed on 14 April 2021.

⁸ [REDACTED].

addendum (MLI-OTP-0080-3499) and introduce them into evidence as prior recorded testimony of P-0204 and P-0630 under rule 68(2)(b) of the Rules.

IV. Applicable Law

10. Under regulation 35(2) of the Regulations, the Chamber may vary a time limit if good cause is shown. In particular, this provision specifies that “[a]fter the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.”

11. The Prosecution recalls the applicable law on the introduction of prior recorded testimony into evidence under rule 68(2)(b) of the Rules as laid down in the Chamber’s decision granting the Original Application and incorporates it by reference.⁹

V. Submissions

A. Requests for variation of time limits under regulation 35 of the Regulations

12. The present application is filed beyond the deadline of 12 May 2020 set by the Chamber for the Prosecution List of Evidence,¹⁰ and beyond the deadline of the end of 2020 set by the Chamber for rule 68(2)(b) applications.¹¹

13. The Prosecution submits there is good cause for the variation of the time limits so as to allow the addition of the two items to the List of Evidence and their introduction under rule 68(2)(b). Further, the Defence would not be prejudiced as the additional items of evidence relate to evidence which the Defence is already aware of

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

¹¹ ICC-01/12-01/18-789-AnxA, para. 79-80.

and aims simply at correcting the placement of two videos.

14. The present application was necessitated by the discovery of two mistakes in the Timbuktu platform, comprised of the erroneous placement of two videos. These errors were discovered only on 25 March 2021, during the meeting between the Defence and Witnesses P-0204 and P-0630, at which the Prosecution was present. These errors were therefore discovered ten months after the filing of the List of Evidence on 12 May 2020, over three months after filing the Original Application on 9 December 2020, and a day before the Chamber's 26 March 2021 decision granting the Original Application.

15. The Prosecution was therefore unable to have P-0204 and P-0630 correct these two errors before 12 May 2020 or the end of 2020 and to include a revised Timbuktu platform and corresponding technical report addendum in its original List of Evidence or submit them as part of the Original Application.

16. The Prosecution thus requests that it be allowed to add the corrected Timbuktu platform (MLI-OTP-0080-3503) and corresponding technical report addendum (MLI-OTP-0080-3499) to its List of Evidence and to apply to introduce them as prior recorded testimony of P-0204 and P-0630 under rule 68(2)(b) of the Rules.

B. Application for introduction into evidence of prior recorded testimony under rule 68(2)(b) of the Rules

17. The Prosecution recalls its submissions in its Original Application seeking the introduction into evidence of *inter alia* the [REDACTED] platforms and accompanying reports as prior recorded testimony of P-0204 and P-0630 under rule 68(2)(b) of the Rules, and incorporates them into the present application by reference.¹²

18. In its decision granting the Original Application subject to receipt of the

¹² Original Application, para. 14-40.

required certified declaration, the Chamber found that it was satisfied that “the prior recorded testimony of P-0204 and P-0630 does not relate to Mr Al Hassan’s acts and conduct within the meaning of Rule 68(2)(b) of the Rules”. “Having considered the relevant factors”, and “in the absence of any prejudice to the Defence” subject to being given functional access to the relevant material, the Chamber authorised the Prosecution to introduce into evidence *inter alia* their reports and work products.¹³ These findings equally apply to the two items sought to be introduced under rule 68(2)(b) through the present application, consisting of the corrected Timbuktu platform (MLI-OTP-0080-3503) and corresponding technical report addendum (MLI-OTP-0080-3499), which have been disclosed to the Defence.

VI. Conclusion

19. For the reasons set out above, the Prosecution requests that the Chamber grant its requests under regulation 35(2) of the Regulations and authorise the Prosecution to:

- a) Add the corrected Timbuktu platform (MLI-OTP-0080-3503) and corresponding technical report addendum (MLI-OTP-0080-3499) to its List of Evidence; and
- b) Allow the Prosecution to request their introduction as prior recorded testimony of P-0204 and P-0630 under rule 68(2)(b) of the Rules.

20. The Prosecution also requests that the Chamber grant its rule 68(2)(b) application with respect to these two items of prior recorded testimony of P-0204 and P-0630 (MLI-OTP-0080-3499 and MLI-OTP-0080-3503), subject to the receipt of the required certified declaration.

21. The Prosecution requests expedited consideration of this application with a

¹³ [REDACTED]

view to being allowed to use one of the items (MLI-OTP-0080-3503) with Witness P-0603, who is currently scheduled to begin testifying on 2 September 2021.

A handwritten signature in black ink, appearing to be 'K.A.Khan', with a horizontal line underneath it.

Karim A. A. Khan QC, Prosecutor

Dated this 18th day of August 2021

At The Hague, The Netherlands