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No. ICC-01/12-01/18

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TRIAL CHAMBER X

Before:

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

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF

***THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD***

Public redacted version of

**Decision on the introduction into evidence of P-0524's prior recorded testimony
pursuant to Rule 68(2)(b) of the Rules**

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

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TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 64(2), 67(1) and 69(2) of the Rome Statute (the ‘Statute’) and Rule 68(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following decision.

I. Procedural history and submissions

1. On 31 January 2022, the Office of the Prosecutor (the ‘Prosecution’) filed an application to introduce P-0524’s prior recorded testimony (the ‘Statement’)¹ into evidence pursuant to Rule 68(2)(b) of the Rules (the ‘Request’).² The Prosecution recalls that P-0524’s testimony was delayed from [REDACTED] to the end of March 2022 due to her employment obligations.³ On the basis that this timeframe would unnecessarily delay the end of the Prosecution case and disproportionately impact on the expeditiousness of the proceedings, the Prosecution requests the introduction of P-0524’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules.⁴
2. The Prosecution submits that P-0524’s evidence relates principally to the issue of sexual crimes committed by the armed groups in Timbuktu during the charged period.⁵ The Prosecution notes that virtually the entire Statement concerns matters other than the acts and conduct of the accused. It notes that there are two discrete references to the accused, but states that it does not seek to introduce these parts into evidence⁶ and submits that these references can be safely detached from the rest of the Statement without causing any distortion to the evidence.⁷ The Prosecution submits that the Statement is reliable, relevant, and probative.⁸

¹ Statement, MLI-OTP-0071-0246-R11 with additional redactions in paras 62 and 181 to references to the accused as described in footnote 6 below.

² Prosecution application under rule 68(2)(b) to introduce MLI-OTP-P-0524’s prior recorded testimony, ICC-01/12-01/18-2099-Conf (with one confidential annex).

³ Request, ICC-01/12-01/18-2099-Conf, paras 2, 7-9.

⁴ Request, ICC-01/12-01/18-2099-Conf, paras 2, 7-9. *See also* email from the Chamber, 21 January 2022, at 13:36.

⁵ Request, ICC-01/12-01/18-2099-Conf, paras 4, 13.

⁶ Request, ICC-01/12-01/18-2099-Conf, paras 1, 16-17. *See also* ICC-01/12-01/18-2099-Conf-AnxA, pp. 13, 28. These are the name ‘AL HASSAN’ in the second last sentence of para. 62, and the last two lines of para. 181 except for the word ‘victimes’.

⁷ Request, ICC-01/12-01/18-2099-Conf, paras 1, 16-18.

⁸ Request, ICC-01/12-01/18-2099-Conf, paras 3, 13, 25-30.

It further submits that additional Rule 68(2)(b)(i) factors militate in favour of introducing the Statement pursuant to this provision, namely that the evidence is of a cumulative or corroborative nature⁹ and its introduction into evidence is in the interests of justice.¹⁰ It further submits that introduction into evidence of the Statement causes no undue prejudice to the accused.¹¹

3. On 14 February 2022, following an extension of time,¹² the Defence filed its response to the Request (the ‘Response’).¹³ The Defence submits that the Request should be rejected on the basis: (i) that the evidence is inconsistent and uncorroborated by the evidence on the record;¹⁴ (ii) that the evidence lacks reliability and probative value due to P-0524’s [REDACTED], P-0524’s reliance on hearsay and incorporation of inappropriate opinion evidence, and the fact that the Prosecution itself has specifically impeached a portion of P-0524’s evidence;¹⁵ (iii) that the evidence pertains to live and important issues in this case which are materially in dispute;¹⁶ and (iv) of P-0524’s role as [REDACTED].¹⁷ The Defence further submits that introduction of the evidence would prejudice the accused due to the Defence’s inability to question P-0524 on [REDACTED], her relationships, and numerous Defence lines of argument.¹⁸

II. Analysis

4. The Chamber refers to its prior decisions setting out the relevant legal framework. It stresses that the decision of whether to introduce a prior recorded testimony pursuant to Rule 68(2)(b) of the Rules is a discretionary one, and the entire

⁹ Request, ICC-01/12-01/18-2099-Conf, paras 31-38.

¹⁰ Request, ICC-01/12-01/18-2099-Conf, paras 3, 12, 39.

¹¹ Request, ICC-01/12-01/18-2099-Conf, paras 3, 13.

¹² Email from the Chamber, 1 February 2022, at 13:44.

¹³ Defence response to ‘Prosecution application under rule 68(2)(b) to introduce MLI-OTP-P-0524’s prior recorded testimony’, ICC-01/12-01/18-2113-Conf (with two confidential annexes).

¹⁴ Response, ICC-01/12-01/18-2113-Conf, paras 3, 7-12.

¹⁵ Response, ICC-01/12-01/18-2113-Conf, paras 3, 13-21.

¹⁶ Response, ICC-01/12-01/18-2113-Conf, paras 3, 38-40.

¹⁷ Response, ICC-01/12-01/18-2113-Conf, paras 3, 26-32.

¹⁸ Response, ICC-01/12-01/18-2113-Conf, paras 3, 22-37, 44.

purpose of this provision is to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.¹⁹

5. At the outset the Chamber notes the Defence's reference to the Chamber's earlier rejection of the Prosecution's Rule 68(3) request for P-0524, including the Chamber's finding in that context that it was more appropriate to hear P-0524's testimony entirely *viva voce*.²⁰ The Chamber recalls however, that this decision was taken more than a year ago, and notes the developments in the proceedings since that time, including the additional oral testimonies heard about alleged sexual violence. Noting these factors, as well as the different statutory context of the Request, the Chamber does not consider its previous findings to prejudice the present decision in any way.

6. The Chamber recalls that under Rule 68(2)(b) of the Rules, a prior recorded testimony can only be introduced when it 'goes to proof of a matter other than the acts and conduct of the accused'. The presence of limited references to the acts and conduct of the accused in a prior recorded testimony does not *per se* bar its introduction under Rule 68(2)(b) of the Rules, where such references can be excluded, as foreseen by the Chamber's directions on the conduct of proceedings.²¹ With regard to the Statement, the Chamber notes that the two discrete references to the accused identified by the Prosecution²² are peripheral and that their exclusion would have no distortive effect whatsoever on the overall narrative of P-0524's evidence. The Chamber is satisfied that, with the exclusion of these two references, the Statement goes to proof of a matter other than the acts and conduct of the accused.

¹⁹ Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-1402-Red2, 26 March 2021, para. 9; Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules, 16 October 2020, ICC-01/12-01/18-1111-Red, para. 7.

²⁰ Response, ICC-01/12-01/18-2113-Conf, paras 1, 5-6, 44; Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 26 January 2021, ICC-01/12-01/18-1267-Conf, paras 51-52.

²¹ Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules, 15 November 2021, ICC-01/12-01/18-1924, para. 13; P Dissenting Opinion of Judge Kimberly Prost, 15 November 2021, ICC-01/12-01/18-1924-Anx, para. 3.

²² See footnote 7 above.

7. The Chamber will now turn to the factors under Rule 68(2)(b)(i) of the Rules. While guiding the exercise of its discretion, these factors are not mandatory pre-conditions for the introduction of prior recorded testimony under Rule 68(2)(b) of the Rules.²³ In conducting its assessment, it must be borne in mind that, in line with this Chamber's approach to evidence,²⁴ matters pertaining to the probative value or weight will in principle not be considered at this point in time.
8. The Chamber notes that P-0524's Statement relates mainly to [REDACTED] sexual violence in Timbuktu. P-0524's statement also describes [REDACTED].²⁵ The evidence is principally relevant to the charges of other inhumane acts in the form of forced marriages as a crime against humanity (count 8), sexual slavery (counts 9 and 10), rape (counts 11 and 12), and persecution (count 13).
9. The Chamber considers that for the most part the Statement relates to matters which are not related to the key factual aspects of the case, in particular the core of the Statement which covers: (i) background information on P-0524 [REDACTED];²⁶ (ii) [REDACTED] sexual violence;²⁷ (iii) P-0524's [REDACTED];²⁸ and (iv) P-0524's [REDACTED].²⁹
10. The Chamber further notes that P-0524 [REDACTED] provides her observations regarding [REDACTED].³⁰ She also provides her detailed recollections of [REDACTED].³¹ In relation to the latter, the Chamber notes that [REDACTED].³² Indeed, the Chamber notes that [REDACTED].³³ Notwithstanding, the Chamber considers the core evidence provided by P-0524 on these matters to be cumulative or potentially corroborative of evidence already

²³ 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, 18 November 2016, ICC-02/04-01/15-596-Red, para. 6.

²⁴ ICC-01/12-01/18-789-AnxA, paras 27-34.

²⁵ Statement, MLI-OTP-0071-0246-R11, paras 11-12.

²⁶ Statement, MLI-OTP-0071-0246-R11, paras 15-22, 26-33.

²⁷ Statement, MLI-OTP-0071-0246-R11, paras 47-61, 63-66, 140-150. *See also* paras 161-182.

²⁸ Statement, MLI-OTP-0071-0246-R11, paras 34-46, 62.

²⁹ Statement, MLI-OTP-0071-0246-R11, paras 67-73.

³⁰ *E.g.* Statement, MLI-OTP-0071-0246-R11, paras 26, 31, 45, 63, 143-146.

³¹ Statement, MLI-OTP-0071-0246-R11, paras 74-139.

³² [REDACTED].

³³ [REDACTED].

on the record, in particular the testimony of other witnesses who have appeared before the Chamber, including [REDACTED].³⁴ In particular, the Chamber notes that P-0524's evidence of 'jihadists' raping and forcibly marrying women and girls during the charged period generally reflects the course of conduct described by those witnesses. Furthermore, and having had regard to specific factual allegations which do not appear to be corroborated or cumulative of other evidence on the record, the Chamber recalls that, in line with the Appeals Chamber's guidance, a prior recorded testimony must not form the sole or decisive basis for the conviction for a particular crime as such.³⁵

11. The Chamber duly notes that the Defence submission that P-0524's evidence is inconsistent with other evidence of these accounts on the record.³⁶ However, Chamber recalls that the relevant consideration is whether other testimony has been provided on 'similar facts' and that it is not required that the accounts accord in every detail.³⁷ The Chamber also notes that the Defence has had the opportunity to extensively cross examine [REDACTED], including matters related to the reliability and credibility of their accounts.³⁸ In relation to the information in the Statement regarding the capture of Timbuktu and other crimes and abuses committed there,³⁹ the Chamber notes that this comprises a limited part of P-0524's Statement and is, in any event, fairly cumulative or corroborative of oral testimony already heard.

12. In relation to indicia of reliability, the Chamber recalls that it is not required to consider factors beyond formal requirements.⁴⁰ The Chamber is satisfied that the

³⁴ [REDACTED].

³⁵ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, ICC-01/04-02/06-2666-Red, paras 16, 629-630.

³⁶ Response, ICC-01/12-01/18-2113-Conf, paras 3, 7-12.

³⁷ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b), 12 January 2017, ICC-01/04-02/06-1715-Red, para. 14.

³⁸ [REDACTED].

³⁹ Statement, MLI-OTP-0071-0246-R11, paras 23-25, 151-160.

⁴⁰ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, ICC-02/11-01/15-744 OA8, paras 3, 103-104.

Statement bears sufficient indicia of reliability of a formal nature. The Statement was obtained by the Prosecution investigators voluntarily, and the witness declared that the Statement that was read back to her in the French language was true to the best of her knowledge.⁴¹ The other arguments raised by the Defence challenging the probative value, if any, of P-0524's evidence⁴² will be duly considered as part of the Chamber's ultimate assessment of all evidence.

13. The Chamber notes the Defence argument that P-0524's role [REDACTED] renders it inappropriate to authorise introduction of her evidence under Rule 68(2)(b) of the Rules.⁴³ Nevertheless, the Chamber notes that the issue of [REDACTED] and the Defence has already [REDACTED].⁴⁴ As such, the Chamber does not consider that this issue would render introduction of the Statement under Rule 68(2)(b) prejudicial to the rights of the accused.
14. Finally, the Chamber considers that since P-0524's appearance in court could not be secured in a timely manner, the interests of justice are best served by the introduction of her Statement pursuant to Rule 68(2)(b) of the Rules. As already noted,⁴⁵ the Chamber considers that delaying P-0524's testimony to late March 2022 when the Prosecution's case is otherwise expected to conclude shortly would disproportionately and unnecessarily delay the proceedings.
15. Potential prejudice to the Defence can also be mitigated by the Chamber duly taking into account the absence of cross-examination as part of its ultimate assessment of the probative value and weight, if any, to be attributed to P-0524's evidence. The Chamber will also be in a position to eventually exclude, if warranted, any portions of the P-0524's statement should prejudice outweigh its probative value. For these reasons, and in light of the above, the Chamber grants the request and authorises the introduction into evidence of the Statement pursuant to Rule 68(2)(b) of the Rules, subject to the receipt of the required certified declaration.

⁴¹ Statement, MLI-OTP-0071-0246-R11 at 0274.

⁴² *Inter alia*, Response, ICC-01/12-01/18-2113-Conf, paras 3, 13-21 32.

⁴³ Response, ICC-01/12-01/18-2113-Conf, paras 3, 26-32.

⁴⁴ [REDACTED].

⁴⁵ Email from the Chamber, 21 January 2022, at 13:36.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request;

AUTHORISES, subject to the receipt of the certified declaration, the introduction into evidence of the prior recorded testimony of P-0524, as referred to in footnote 1 above; and

INSTRUCTS the Registry to reflect in the eCourt metadata the introduction of the relevant material under Rule 68(2)(b) upon filing of the certified declaration.

Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated 21 February 2022

At The Hague, The Netherlands