

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

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

**Date: 28 April 2022**

**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***

**Confidential**

**Decision on Defence's proposed expert witnesses and related applications seeking  
to introduce their prior recorded testimony under Rule 68(3) 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*, pursuant to Articles 64(2), 67(1)(c) and 69(2) of the Rome Statute (the ‘Statute’), Rule 68(1) and (3) of the Rules of Procedure and Evidence (the ‘Rules’), and Regulation 44 of the Regulations of the Court (the ‘Regulations’), issues the present decision.

## **I. Procedural history**

1. On 6 May 2020, the Chamber issued its ‘Directions on the conduct of proceedings’,<sup>1</sup> in which the Chamber, *inter alia*, adopted the procedure for the calling of expert witnesses as well as the introduction into evidence of prior recorded testimony pursuant to Rule 68(3) of the Rules.<sup>2</sup>
2. On 22 September 2021, the Chamber rendered a further decision on the conduct of proceedings, notably providing additional directions with regard to the upcoming start of the Defence case.<sup>3</sup>
3. On 6 April 2022, the Single Judge held an *inter partes* status conference<sup>4</sup> to assist in the preparation and efficient conduct of the Defence’s presentation of evidence, scheduled to start on 9 May 2022.<sup>5</sup>
4. On 8 April 2022, as forecasted during the status conference, the Defence filed a consolidated request related to the evidence of five proposed expert witnesses (the ‘Request’).<sup>6</sup> The Defence asks the Chamber to authorise that the following witnesses testify as experts: Dr Katherine Porterfield (D-0020), Dr Juliet Cohen (D-0025), Dr Brian Sommerlad (D-0500), Mr Nikolaos Kalantzis (D-0501), and

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<sup>1</sup> Decision on the conduct of proceedings and Annex A, 6 May 2020, ICC-01/12-01/18-789 and AnxA (‘Directions on the conduct of proceedings’).

<sup>2</sup> Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 62-70.

<sup>3</sup> Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence, ICC-01/12-01/18-1756, paras 7-22.

<sup>4</sup> Transcript of hearing on 6 April 2022, ICC-01/12-01/18-T-171-CONF-FRA ET.

<sup>5</sup> See Decision on the Prosecution’s fourth, fifth and sixth requests for the admission of evidence from the bar table, 23 February 2022, ICC-01/12-01/18-2127, para. 25.

<sup>6</sup> Defence application to call Witnesses MLI-D28-P-0020, MLI-D28-P-0025 MLI-D28-P-0500, MLI-D28-P-0501 and MLI-D28-P-0502 as experts and to introduce their reports and associated materials into evidence under rule 68(3), notified on 11 April 2022, ICC-01/12-01/18-2197-Conf, with two confidential annexes.

Dr Charles Morgan III (D-0502). It also seeks that the Chamber authorises the introduction into evidence of their prior recorded testimony and related material (the ‘Material’) pursuant to Rule 68(3) of the Rules.<sup>7</sup>

5. On 21 April 2022, the Prosecution filed its response to the Request (the ‘Response’),<sup>8</sup> opposing it with respect to D-0020, D-0025, D-0500 and D-0502, notably by challenging the witnesses’ qualifications, expertise, and/or the content, relevance, and/or reliability of their evidence. Amongst other things, the Prosecution submits that their proposed testimony usurp the Chamber’s role as the ultimate arbiter of fact and go beyond each of the witnesses’ purported expertise. The Prosecution further objects to the introduction of their evidence under Rule 68(3) of the Rules and requests, should any of them be called to testify, that the time allotted for their examination-in-chief be significantly reduced.
6. On 25 April 2022, as instructed, the Prosecution submitted via email time estimates for its examination of Defence witnesses. It seeks to question witnesses: (i) in principle, and outside the framework of Rule 68(3) of the Rules, for half of the time used by the Defence; and (ii) for the proposed experts, and should their evidence be introduced under Rule 68(3), for about 2 hours each.<sup>9</sup>

## II. Classification

7. The Chamber issues the present decision as confidential, but informs that a public version thereof will be notified in due course. To assist, the Defence is instructed to file a public redacted version of its Request before 20 May 2022, and the Prosecution of its Response by 27 May 2022. Relatedly, the Chamber observes that no requests for protective measures were filed under Rule 87 of the Rules for the Defence’s five proposed experts and clarifies, for the record, that the

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<sup>7</sup> The material submitted is discussed below with respect to each witness. The Chamber specifies that it is its understanding that the Request does not seek the introduction into evidence of the items listed in Annexes A and B to the Request.

<sup>8</sup> Prosecution response to “Defence application to call Witnesses MLI-D28-P-0020, MLI-D28-P-0025 MLI-D28-P-0500, MLI-D28-P-0501 and MLI-D28-P-0502 as experts and to introduce their reports and associated materials into evidence under rule 68(3)” (ICC-01/12-01/18-2197-Conf), ICC-01/12-01/18-2205-Conf.

<sup>9</sup> Email from the Prosecution on 25 April 2022 at 22:29.

testimony of these five witnesses are therefore expected to be obtained without in-court protective measures and mostly in open session.

### III. Applicable law

8. The Chamber incorporates by reference the applicable legal framework as set out in its earlier decisions on the introduction of prior recorded testimonies under Rule 68(3) of the Rules,<sup>10</sup> proposed experts witnesses,<sup>11</sup> as well as the Directions on the conduct of proceedings.<sup>12</sup>
9. The Chamber recalls that expert witnesses are persons ‘who, by virtue of some specialised knowledge, skill or training can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute’.<sup>13</sup> In determining whether a witness’s evidence may be introduced as expert evidence, the Chamber must consider whether: (i) the witness is an expert as defined above; (ii) the testimony in the subject area of expertise would be of assistance to the Chamber; (iii) the content of the report and/or the anticipated testimony falls within the area of expertise of the witness; and (iv) the content of the report and/or the anticipated testimony does not usurp the functions of the Chamber as the ultimate arbiter of fact and law.<sup>14</sup>
10. For the procedure under Rule 68(3) of the Rules, it is recalled that this provision allows the Chamber to authorise 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. In this respect, the Chamber reiterates that it expects the calling party to streamline its questioning considerably when introduction of the previously recorded testimony is allowed under Rule 68(3) of the Rules.<sup>15</sup> In accordance with this, the Chamber has

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<sup>10</sup> Decision on Prosecution’s requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, 5 August 2020, ICC-01/12-01/18-987-Red, paras 6-18.

<sup>11</sup> Public redacted version of the Decision on Prosecution’s proposed experts witnesses, 5 August 2020, ICC-01/12-01/18-989-Red (the ‘Decision on Prosecution proposed experts witnesses’), paras 9, 11-12.

<sup>12</sup> Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 63-70.

<sup>13</sup> Decision on Prosecution proposed experts witnesses, ICC-01/12-01/18-989-Red, para. 14 and jurisprudence cited therein.

<sup>14</sup> Decision on Prosecution proposed experts witnesses, ICC-01/12-01/18-989-Red, para. 16.

<sup>15</sup> Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 65.

reviewed the time sought by the Defence for its supplementary examinations and, having considered the content and nature of the prior recorded testimony submitted as well as the specific topics sought to be addressed orally with each proposed expert, the Chamber set below an appropriate amount of time for such examination by the Defence. The Chamber also set, having considered the estimates received on 25 April 2022, the amount of time allotted to the Prosecution for its cross-examination of each proposed expert.

11. The Chamber reiterates that the abovementioned assessments are being conducted on a *preliminary* basis at this stage. Accordingly, in the present decision, and as done previously,<sup>16</sup> the Chamber will only rule on those aspects of the challenges raised that it considers necessary to ensure a fair and expeditious trial, and in order to avoid unnecessary litigation during trial and in the course of the proposed experts' testimony. The Chamber may still decide to rule on specific objections to the experts' testimony, including their qualifications or admissibility of their reports, at a later stage, as they may arise during the trial.<sup>17</sup>

#### **IV. Submissions and Chamber's determination**

12. The Chamber will now turn to the proposed expert witnesses and the Defence request to introduce into evidence their prior recorded testimony, and associated material, under Rule 68(3) of the Rules.

##### **1. D-0020 (Dr Katherine Porterfield)**

13. The Defence submits that D-0020 has expertise in clinical psychology, particularly in the areas of PTSD and trauma.<sup>18</sup> The Defence submits that her report is relevant to the Chamber's evaluation of the psychological stress that Mr Al Hassan experienced during the time period coinciding with his ICC Prosecution interviews, as well as the impact thereof on his memory recall and suggestibility.<sup>19</sup> The Defence also argues that D-0020's expert evidence would

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<sup>16</sup> Decision on Prosecution proposed experts witnesses, ICC-01/12-01/18-989-Red, para. 11.

<sup>17</sup> Decision on Prosecution proposed experts witnesses, ICC-01/12-01/18-989-Red, para. 12.

<sup>18</sup> Request, ICC-01/12-01/18-2197-Conf, para. 16

<sup>19</sup> Request, ICC-01/12-01/18-2197-Conf, para. 15.

inform the Chamber's assessment of alleged positive defences of duress, superior orders and mistake of law.<sup>20</sup> The Defence further seeks to introduce into evidence under Rule 68(3) of the Rules: D-0020's report,<sup>21</sup> together with her CV,<sup>22</sup> an instruction letter,<sup>23</sup> a related letter signed by D-0020 and entitled 'diagnostic formulation',<sup>24</sup> as well as literature relied upon in her report.<sup>25</sup> Should this part of the Request be granted, the Defence estimates it will need 4 hours for its examination (instead of 9 hours without Rule 68(3)).

14. In addition to questioning her neutrality and objectivity, the Prosecution contends that the information in the Request does not support that D-0020 has the requisite expertise to opine on the areas of her proposed testimony.<sup>26</sup> The Prosecution also argues that D-0020's report covers issues and include conclusions that seek to usurp the role of the Chamber as the ultimate arbiter of fact.<sup>27</sup> The Prosecution further submits that, in any event, her report will not assist the Chamber since it already found it to be unreliable and of little if no weight.<sup>28</sup>
15. The Chamber notes that D-0020 has academic and professional expertise and qualifications in clinical psychology.<sup>29</sup> While the Chamber recalls that it afforded no weight to her reports in the context of its determination of a Defence challenge presented under Article 69(7) of the Statute,<sup>30</sup> the Chamber considers the present assessment to be distinct. Contrary to what the Prosecution argues, and for reasons similar to its decision with respect to Prosecution expert P-0662,<sup>31</sup> the Chamber finds that, at face value, D-0020's expert opinion may assist the

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<sup>20</sup> Request, ICC-01/12-01/18-2197-Conf, para. 15.

<sup>21</sup> MLI-D28-0002-0535.

<sup>22</sup> MLI-D28-0002-1624.

<sup>23</sup> MLI-D28-0003-1881.

<sup>24</sup> MLI-D28-0003-2071.

<sup>25</sup> MLI-D28-0003-1725, MLI-D28-0003-1696, MLI-D28-0003-1655, MLI-D28-0003-1667, MLI-D28-0003-1674, and MLI-D28-0003-1791.

<sup>26</sup> Response, ICC-01/12-01/18-2205-Conf, paras 8-15. *See also*, paras 33, 49-50.

<sup>27</sup> Response, ICC-01/12-01/18-2205-Conf, paras 16-18.

<sup>28</sup> Response, ICC-01/12-01/18-2205-Conf, paras 25-28.

<sup>29</sup> MLI-D28-0002-1624 (CV).

<sup>30</sup> Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements', 20 May 2021, ICC-01/12-01/18-1475-Red (the 'Article 69(7) Decision') (confidential version issued 17 May 2021), para. 48. The Chamber notably found that 'what is at issue is a factual determination as to the circumstances surrounding the gathering of the evidence and in this respect the consultant opinions do not assist the Chamber.'

<sup>31</sup> Decision on Prosecution proposed experts witnesses, ICC-01/12-01/18-989-Red, paras 43-45.

Chamber in its assessment of the evidence on the record, most notably the probative value and weight, if any, to be attributed to the statements of Mr Al Hassan,<sup>32</sup> as well as that of other detained witnesses.

16. Turning to the Prosecution's submission that D-0020's proposed evidence attempts to usurp the role of the Chamber as the trier of fact, the Chamber considers that, to the extent that D-0020's report discusses the credibility and reliability of the information provided to her by Mr Al Hassan *of his alleged torture and mistreatment*, this is not the same as the assessment to be conducted by the Chamber of other relevant accounts, most notably those contained in his statement to the Prosecution concerning his alleged role, acts and conduct in Timbuktu during the period of the charges. The Chamber nonetheless stresses that it is obviously D-0020's expert testimony which is submitted by way of the Request, and not the evidence provided by Mr Al Hassan to D-0020, and accordingly reiterates that, in accordance with the relevant legal framework, it may still pronounce on certain objections, including admissibility of some of the expert's evidence, later during the course of the proceedings. At this stage, for the purpose of the present and *preliminary* assessment, the Chamber is satisfied that the core of D-0020's submitted evidence is within the permissible scope of expert opinion and falls within her areas of expertise.
17. The Chamber accordingly finds that D-0020, who has all required qualifications and appears to have sufficient expertise in these areas, may be called to testify as an expert witness on PTSD and trauma. The Chamber recalls that related parties' submissions, including those challenging the reliability, relevance or neutrality of her expert opinion, will be duly considered as part of the Chamber's ultimate assessment or earlier on if warranted.

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<sup>32</sup> See notably Article 69(7) Decision, ICC-01/12-01/18-1745-Red, para. 75. The Chamber also considers the present assessment meaningfully different to that conducted when it assessed and declined a Prosecution request to add the material of P-0598 and P-0661 to its List of evidence because doing so was not '*necessary* for the determination of the truth' (Second decision on requests related to the submission into evidence of Mr Al Hassan's statements, 8 June 2021, ICC-01/12-01/18-1508, para. 31 (emphasis added); *contra*: Response, ICC-01/12-01/18-2205-Conf, para. 50).



18. Turning to the request to introduce D-0020's evidence under Rule 68(3) of the Rules, the Chamber considers that it will expedite the proceedings, while at the same time protect their fairness. Accordingly, particularly as issues related to the reliability of her evidence can be addressed by both parties in court, the Chamber authorises the introduction of D-0020's expert reports and related material pursuant to Rule 68(3) of the Rules.<sup>33</sup>
19. Bearing in mind the object and purpose of this provision, and the topics already identified by the Defence for its supplementary examination,<sup>34</sup> the Chamber considers that 2 and a half hours is appropriate for her examination by the Defence (instead of the 4 hours requested) as well as the Prosecution's. To assist in obtaining orally D-0020's supplementary evidence about whether or not access to certain items would have impacted on her evaluation and conclusions, the Defence is hereby directed to provide D-0020 with access to the additional material it wishes her to review so that she can take cognisance thereof, and reflect upon potential impact, prior to her appearance before the Chamber. A list of the material provided to her, as well as relevant exchanges with the Defence, shall be provided to the Chamber as well as all parties and participant ahead of her testimony, similarly to the Witness Preparation Log and Notes disclosed by the Prosecution during the course of its presentation of evidence.

## 2. D-0025 (Juliet Cohen)

20. The Defence submits that D-0025, a forensic physician, has produced reports concerning the medical state and conditions of detention described in Prosecution evidence.<sup>35</sup> The Defence submits that her reports are relevant to the Chamber's assessment of the evidential weight of such evidence.<sup>36</sup> Specifically, the Defence argues that D-0025's expert opinion will assist the Chamber in its evaluation of

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<sup>33</sup> The Chamber did not consider it necessary to rule, at this stage, on the Prosecution's request for all items referred to in the proposed experts' report to be formally submitted in order to assist with their full understanding (Response, ICC-01/12-01/18-2205-Conf, paras 60-63). If any, such a request should be brought to the Chamber's attention with a detailed list of the material sought to be recognised as submitted.

<sup>34</sup> Request, ICC-01/12-01/18-2197-Conf, paras 13, 23-24.

<sup>35</sup> Request, ICC-01/12-01/18-2197-Conf, paras 27, 30-32.

<sup>36</sup> Request, ICC-01/12-01/18-2197-Conf, paras 27, 30-32.

the reliability of information provided during periods of detention, including that of Mr Al Hassan, P-0605 and P-0626. The Defence seeks to introduce into evidence under Rule 68(3) of the Rules: D-0025's two reports<sup>37</sup> and, as associated exhibit, another report<sup>38</sup> which the Defence submits is 'probative to the methodological approach' employed by D-0025. Should this part of the Request be granted, the Defence estimates it will need 1 hour and 45 minutes to 2 hours for its examination (instead of 5 hours without Rule 68(3)).<sup>39</sup>

21. As for D-0020, the Prosecution submits that D-0025's proposed testimony seeks to usurp the role of the Chamber as the ultimate arbiter of fact<sup>40</sup> and that her reports will not assist the Chamber, notably because the latter already found them to be unreliable and of little if no weight.<sup>41</sup>
22. The Chamber finds that D-0025's qualifications and expertise as forensic physician are satisfactory<sup>42</sup> and generally considers that, as previously decided with respect to medical and forensic expert P-0590,<sup>43</sup> her proposed expert opinion may be of assistance to the Chamber. Notably, the Chamber is of the view D-0025's reports are relevant to the Chamber's assessment of the evidential weight to be attributed, if any, to Mr Al Hassan's statements. The Chamber accordingly authorises the Defence to call D-0025 as expert witness and given the technical nature of her evidence, sees no reason not to authorise introduction into evidence of her reports, and associated exhibits, pursuant to Rule 68(3) of the Rules.<sup>44</sup> Related parties' submissions, including those challenging the reliability of her expert opinion or parts thereof, will be duly considered as part of the Chamber's ultimate assessment, or earlier on during the course of the trial if warranted.

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<sup>37</sup> MLI-D28-0002-0500 and MLI-D28-0003-0031.

<sup>38</sup> MLI-D28-0003-2059.

<sup>39</sup> Request, ICC-01/12-01/18-2197-Conf, para. 34.

<sup>40</sup> Response, ICC-01/12-01/18-2205-Conf, paras 16-17, 19.

<sup>41</sup> Response, ICC-01/12-01/18-2205-Conf, paras 25-32.

<sup>42</sup> MLI-D28-0003-2059 from 2068 to 2070 (CV).

<sup>43</sup> Decision on Prosecution proposed experts witnesses, ICC-01/12-01/18-989-Conf, paras 33-36.

<sup>44</sup> While some parts of her reports may be more relevant than others, the Chamber finds it appropriate to consider them for introduction in their entirety (*contra*: Response, ICC-01/12-01/18-2205-Conf, paras 30-31).

23. Bearing in mind the object and purpose of Rule 68(3) of the Rules, and the topics already identified by the Defence for its supplementary examination,<sup>45</sup> the Chamber finds that a Defence examination of 2 hours with D-0025, as requested, shall be sufficient. The Prosecution is also allotted 2 hours for its cross-examination.

### 3. D-0500 (Dr Brian Sommerlad)

24. The Defence submits that D-0500, a plastic surgeon, provided evidence of a specialised and technical nature which will assist the Chamber in evaluating the probative value of photographic evidence concerning lesions as well as the reliability and weight of related testimonial evidence.<sup>46</sup> The Defence seeks to introduce into evidence under Rule 68(3) of the Rules: D-0500's six reports,<sup>47</sup> his CV,<sup>48</sup> the List of evidence relied upon in his reports,<sup>49</sup> the email correspondence with the Prosecution,<sup>50</sup> and the Istanbul Protocol.<sup>51</sup> Should this part of the Request be granted, the Defence estimates it will need 1 hour and 15 minutes for its examination (instead of 4 hours without Rule 68(3)).<sup>52</sup>
25. The Prosecution contests the expertise of D-0500, specifically submitting that the mission he undertook falls outside the scope of his expertise.<sup>53</sup> Describing his analysis as 'largely inconclusive', the Prosecution further argues that the reports of D-0500 are unlikely to assist the Chamber.<sup>54</sup>
26. The Chamber considers that D-0500's opinion, which is informed by his expertise as plastic surgeon,<sup>55</sup> may assist the Chamber in its assessment of injuries described and markings depicted as part of the evidentiary record. The Chamber

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<sup>45</sup> Request, ICC-01/12-01/18-2197-Conf, para. 34.

<sup>46</sup> Request, ICC-01/12-01/18-2197-Conf, paras 42-43, referring to P-0520, P-0557, P-0538, P-0565, P-0642, P-0547.

<sup>47</sup> MLI-D28-0006-2722-R01, MLI-D28-0006-2725-R01, MLI-D28-0006-2730-R01, MLI-D28-0006-2734-R01, MLI-D28-0006-2737-R01, and MLI-D28-0006-2778-R01.

<sup>48</sup> MLI-D28-0005-8372-R01.

<sup>49</sup> MLI-D28-0006-3004.

<sup>50</sup> MLI-D28-0006-2788.

<sup>51</sup> MLI-D28-0006-2639.

<sup>52</sup> Request, ICC-01/12-01/18-2197-Conf, para. 49.

<sup>53</sup> Response, ICC-01/12-01/18-2205-Conf, paras 2, 52-54.

<sup>54</sup> Response, ICC-01/12-01/18-2205-Conf, paras 2, 55.

<sup>55</sup> MLI-D28-0005-8372-R01 (CV).

disagrees with the Prosecution and finds that D-0500's analysis and conclusions remain strictly within the scope of his proposed expertise, leaving it for the Chamber to assess the credibility or reliability of any related evidence in a holistic manner. Given the technical nature of his evidence, the Chamber also sees no reason not to authorise introduction into evidence of his reports, and associated exhibits, pursuant to Rule 68(3) of the Rules. As requested, and to cover the specific topics already identified in the Request,<sup>56</sup> the Chamber finds it appropriate to authorise the Defence to examine D-0500 for 1 hour and 15 minutes. The Prosecution is allotted a maximum of 2 hours to cross-examine D-0500.

#### 4. D-0501 (Nikolaos Kalantzis)

27. The Defence submits that D-0501 is an expert in signature and handwriting examination and that his proposed evidence will notably assist the Chamber in assessing the reliability and probative value of the joint expert report prepared by P-0620 and P-0621 on document and handwriting authentication.<sup>57</sup> The Defence seeks to introduce into evidence under Rule 68(3) of the Rules: D-0501's report,<sup>58</sup> his CV,<sup>59</sup> the Registry's letter confirming D-0501's inclusion on the Court's list of experts,<sup>60</sup> as well as literature relied upon in his report.<sup>61</sup> Should this part of the Request be granted, the Defence estimates it will need 1 hour and 45 minutes hours for its examination (instead of 4 hours without Rule 68(3)).<sup>62</sup>

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<sup>56</sup> Request, ICC-01/12-01/18-2197-Conf, para. 49.

<sup>57</sup> Request, ICC-01/12-01/18-2197-Conf, paras 35-38, referring to Decision on Prosecution proposed experts, ICC-01/12-01/18-989-Red, paras 83-89.

<sup>58</sup> MLI-D28-0005-9928-R01.

<sup>59</sup> MLI-D28-0005-8399. The Chamber notes that this item is not available on JEM and does not appear on the Defence's Final List of evidence. This item is therefore not introduced into evidence by way of the present decision. The Chamber however notes that a version of D-0501's CV is nonetheless part of the evidentiary record, as contained in his report MLI-D28-0005-9928-R01 from 9950 to 9962, and accordingly available to the Chamber.

<sup>60</sup> MLI-D28-0006-4140.

<sup>61</sup> MLI-D28-0005-9423, MLI-D28-0005-9451, MLI-D28-0005-9512 (consisting of German original and English translation), MLI-D28-0005-9507, MLI-D28-0005-9496, MLI-D28-0005-9799, MLI-D28-0005-9428, MLI-D28-0005-9476, MLI-D28-0005-9465, MLI-D28-0005-9824, MLI-D28-0005-9409, MLI-D28-0005-9443, MLI-D28-0005-9808, MLI-D28-0005-9729, and MLI-D28-0005-9417. In addition, the Chamber understands that, as exhibit associated with D-0501's report, the Defence intended to seek the introduction of MLI-D28-0005-9460, and not MLI-D28-0005-9560 (an item which is not available on JEM and does not appear on the Defence's Final List of evidence).

<sup>62</sup> Request, ICC-01/12-01/18-2197-Conf, para. 41.

28. The Prosecution has concerns with the methodology adopted by D-0501 and the limited value of his report, but does not contest his qualification as an expert nor to the submission of his evidence under Rule 68(3) of the Rules.<sup>63</sup>
29. The Chamber notes that D-0501's qualifications and expertise are uncontested. In addition, the Chamber considers that his report may be of assistance to its assessment of evidence on the record, particularly the testimony of the two abovementioned Prosecution experts. The Chamber therefore finds that D-0501 may be called by the Defence to testify as an expert witness.
30. Given the technical nature of D-0501's evidence, the Chamber also sees no reason not to authorise introduction of his reports, and associated exhibits, pursuant to Rule 68(3) of the Rules. Furthermore, and since D-0501 need not be asked to provide a 'summary of his expertise' orally, the Chamber considers that a Defence examination of 1 and a half hours shall be sufficient to, as requested, seek that D-0501 attests to the accuracy of his report and be asked to explain the significance of his observations.<sup>64</sup> The Prosecution is also allotted 1 and a half hours with D-0501.

### **5. D-0502 (Dr Charles Morgan III)**

31. The Defence submits that D-0502's expert evidence concerning the impact of trauma/high stress environments on the quality and reliability of memory recall could assist the Chamber.<sup>65</sup> The Defence specifically refers to exposure to detention-related stress factors as well as the testimony of victim-witnesses.<sup>66</sup> The Defence seeks to introduce into evidence under Rule 68(3) of the Rules: D-0502's

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<sup>63</sup> Response, ICC-01/12-01/18-2205-Conf, paras 3, 57-59.

<sup>64</sup> Request, ICC-01/12-01/18-2197-Conf, para. 41.

<sup>65</sup> Request, ICC-01/12-01/18-2197-Conf, paras 4, 6-8.

<sup>66</sup> Request, ICC-01/12-01/18-2197-Conf, paras 8-9.

report,<sup>67</sup> his CV,<sup>68</sup> as well as reference materials relied upon.<sup>69</sup> Should this part of the Request be granted, the Defence estimates it will need 4 and a half hours for its examination (instead of 9 hours without Rule 68(3)).<sup>70</sup>

32. The Prosecution argues that D-0502's proposed testimony covers issues and conclusions that seek to usurp the role of the Chamber as the ultimate arbiter of fact.<sup>71</sup> In addition, the Prosecution contends that D-0502's report is 'flawed in terms of methodology adopted', submitting it is based on 'speculation, mischaracterisation of the record and/or lack of proper developed analysis', and that this in turns indicates that he does not have the necessary neutrality or objectivity to qualify as an expert before the Court.<sup>72</sup>
33. The Chamber notes that D-0502 has relevant academic and professional expertise in forensic psychiatry and that the Prosecution does not specifically challenge his expertise in this respect. For the reasons already explained above,<sup>73</sup> and notwithstanding the objections raised with respect to the methodology relied upon in his report, the Chamber considers that D-0502's evidence may assist the Chamber in its assessment of the evidence on the record of the case. The Chamber also considers the core of D-0502's report to falls within his area of expertise, *i.e.* the impact of trauma on memory recall, leaving it for the Chamber to assess the credibility or reliability of relevant evidence. Accordingly, the Chamber finds it appropriate to receive the testimony of D-0502 as expert witness and, noting that

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<sup>67</sup> MLI-D28-0005-9967-R01.

<sup>68</sup> MLI-D28-0005-8412. The Chamber notes that this item is not available on JEM and does not appear on the Defence's Final List of evidence. Instead of this item, the Chamber considers for introduction MLI-D28-0006-2741-R01, an item entitled 'Curriculum Vitae (CV) – Charles Morgan III' which is available on JEM and was included on the Defence's Final List of evidence.

<sup>69</sup> MLI-D28-0006-1509, MLI-D28-0006-1773, MLI-D28-0006-2074, MLI-D28-0006-1934, MLI-D28-0006-1943, MLI-D28-0006-2060, MLI-D28-0006-2035, MLI-D28-0006-1973, MLI-D28-0006-2086, MLI-D28-0006-2103, MLI-D28-0006-1569, MLI-D28-0006-1984, MLI-D28-0006-2050, MLI-D28-0006-1892, MLI-D28-0006-1517, MLI-D28-0006-1993, MLI-D28-0006-1824, MLI-D28-0006-2008, MLI-D28-0006-1835, MLI-D28-0006-2001, MLI-D28-0006-1864, MLI-D28-0006-2105, MLI-D28-0006-1817, MLI-D28-0006-2005, MLI-D28-0006-1602, MLI-D28-0006-1591, MLI-D28-0006-1911, MLI-D28-0006-1487, MLI-D28-0006-1971, MLI-D28-0006-1926, and MLI-D28-0006-1532.

<sup>70</sup> Request, ICC-01/12-01/18-2197-Conf, para. 41.

<sup>71</sup> Response, ICC-01/12-01/18-2205-Conf, paras 16-17, 20-24.

<sup>72</sup> Response, ICC-01/12-01/18-2205-Conf, paras 33-44.

<sup>73</sup> See above paragraph 15.

this will allow both parties to put questions to him, considers it appropriate to do so following the procedure provided for under Rule 68(3) of the Rules.

34. Bearing in mind the object and purpose of Rule 68(3) of the Rules, the topics identified by the Defence for its supplementary examination,<sup>74</sup> the Chamber considers that a Defence examination of a maximum of 3 hours (instead of the 4 and a half hours requested) shall be sufficient. In this regard, the Chamber considers it appropriate to already stress that the examination of D-0502 should be streamlined in order to avoid unnecessary repetitive evidence, particularly with that of D-0020. The Chamber considers that the Prosecution should also conduct its cross-examination of D-0502 within a maximum of 3 hours.

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<sup>74</sup> Request, ICC-01/12-01/18-2197-Conf, para. 12.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:**

**GRANTS** the Request;

**DECIDES** that D-0020, D-0025, D-0500, D-0501, and D-0502 may be called by the Defence to testify as expert witnesses;

**AUTHORISES**, subject to the relevant procedural pre-requisites being satisfied when they appear in court, introduction into evidence of the Material<sup>75</sup> pursuant to Rule 68(3) of the Rules; and

**ORDERS** the Defence to file a public redacted version of the Request by 20 May 2022 and the Prosecution of the Response by 27 May 2022.

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 this Thursday, 28 April 2022

At The Hague, The Netherlands

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<sup>75</sup> As listed above in footnotes 21-25, 37-38, 47-51, 58-61, and 67-69.