



**Original: English**

**No. ICC-01/12-01/18  
Date: 26 October 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***

**Public redacted version of**

**Decision on the Defence request pursuant to Regulation 35 regarding D-0002,  
D-0003, D-0004 and D-0008 and on the introduction of their 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, 67(1) and 69(2) of the Rome Statute (the ‘Statute’), Rule 68(1) and (2)(b) of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on the Defence request pursuant to Regulation 35 regarding D 0002, D 0003, D-0004 and D-0008 and on the introduction of their prior recorded testimony pursuant to Rule 68(2)(b) of the Rules’.

## **I. Procedural history**

1. On 27 September 2022, the Defence filed a request to add D-0002, D-0003, D-0004 and D-0008 (the ‘DGSE Witnesses’), who provide evidence related to the *Direction générale de la sécurité d’État* (the ‘DGSE’), to the Defence’s list of witnesses and introduce their prior recorded testimony<sup>1</sup> as well as associated exhibits<sup>2</sup> pursuant to Rule 68(2) of the Rules (the ‘Request’).<sup>3</sup>
2. On 3 October 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Request (the ‘Response’),<sup>4</sup> opposing both the late addition of the DGSE witnesses to the Defence’s list of witnesses as well as the introduction into evidence of their prior recorded testimony pursuant to Rule 68(2)(b) of the Rules.
3. On 4 October 2022, the Defence filed a request seeking leave to reply to the Response (the ‘Leave to Reply Request’)<sup>5</sup> on the following three issues: (i)

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<sup>1</sup> D-0002: MLI-D28-0003-0417-R01, D-0003: MLI-D28-0003-0657-R01 and MLI-D28-0003-0665-R01, D-0004: MLI-D28-0003-0661-R01 and D-0008: MLI-D28-0003-0675-R01.

<sup>2</sup> D-0002: MLI-D28-0003-0416 and D-0003: MLI-D28-0003-1245, MLI-D28-0003-1246, MLI-D28-0003-1249, MLI-D28-0003-0654, MLI-D28-0003-2046, MLI-D28-0003-2030, MLI-D28-0003-2047, MLI-D28-0003-2036, MLI-D28-0003-2048, MLI-D28-0003-2040, MLI-D28-0003-0001, MLI-D28-0003-0005, MLI-D28-0003-0017, MLI-D28-0003-0024, MLI-D28-0003-0014, MLI-D28-0003-0027, MLI-D28-0003-2039 and MLI-D28-0003-2045.

<sup>3</sup> Defence Request to submit DGSE testimony into evidence through Rule 68(2), ICC-01/12-01/18-2348-Conf.

<sup>4</sup> Prosecution response to “Defence Request to submit DGSE testimony into evidence through Rule 68(2)”, ICC-01/12-01/18-2365-Conf.

<sup>5</sup> Corrigendum to ‘Defence request for leave to reply to “Prosecution response to “Defence Request to submit DGSE testimony into evidence through Rule 68(2)”’”, ICC-01/12-01/18-2366-Conf-Corr (corrigendum, with an explanatory note, filed on the same date as the original).

whether it is necessary to satisfy the criteria of Regulation 35 of the Regulations in circumstances where there has been timely notice of the calling party's intention to introduce the item into evidence; (ii) the interplay between Article 69(7) and Article 69(4) of the Statute; and (iii) erroneous or incomplete characterisation of the facts by the Prosecution.

4. On the same date, the Prosecution responded, requesting the Leave to Reply Request to be rejected.<sup>6</sup>

## **II. Analysis**

### **A. Late addition of the DGSE Witnesses to the witness list**

5. In the Request, the Defence requests authorisation to add four witnesses, who provide testimony in relation to the detention conditions at the DGSE, to its list of witnesses. The Defence submits that the testimony of the DGSE Witnesses are relevant to the weight and reliability of evidence obtained from those who were detained at the DGSE.<sup>7</sup> Further, the Defence submits that it is in the interest of justice to grant authorisation and that there is no prejudice as: (i) the Prosecution received the prior recorded testimony of the DGSE Witnesses before the commencement of the trial; (ii) the Prosecution was already provided notice by virtue of the fact that the prior recorded testimony of the DGSE Witnesses were on the Defence list of evidence; and (iii) the prior recorded testimony were already used by the Defence in the context of the Article 69(7) litigation.<sup>8</sup>
6. The Prosecution opposes this part of the Request. It points out, in particular, that the Defence has failed to explain how it was unable to include the DGSE Witnesses in its list of witnesses for reasons outside its control, despite having obtained all the material in 2019 or 2020 and having used them in the present proceedings.<sup>9</sup> The Prosecution further contends that the Defence should have known that testimonial evidence may not be submitted via bar table motions

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<sup>6</sup> Email from the Prosecution dated 4 October 2022 at 18:07.

<sup>7</sup> Request, ICC-01/12-01/18-2348-Conf, paras 3-4.

<sup>8</sup> Request, ICC-01/12-01/18-2348-Conf, paras 4, 10-11.

<sup>9</sup> Response, ICC-01/12-01/18-2635-Conf, paras 8-9.

and that it was accordingly warranted to include the relevant witnesses in its list of witnesses.<sup>10</sup>

7. The Chamber considers that further submissions will not assist in adjudicating the Request and accordingly rejects the Leave to Reply Request. Nonetheless, the Chamber takes note of the clarification contained therein that the legal basis through which the Defence seeks the introduction of the DGSE witnesses' prior recorded testimony is Rule 68(2)(b) of the Rules.<sup>11</sup>
8. The Chamber recalls that, pursuant to the second sentence of Regulation 35(2) of the Regulations, after the lapse of a time limit, the party requesting variation is required to demonstrate that it was unable to file the application within the time limit for reasons outside its control. Where the conditions of Regulation 35(2) of the Regulations are not met, late addition of evidence may be granted where it is in the interests of justice to do so and where the evidence is deemed necessary for the determination of the truth.<sup>12</sup>
9. The Chamber observes that the Defence fails to justify that the tardiness of its request is due to reasons outside its control. Nonetheless, the Chamber notes that, while the DGSE witnesses were not included in its list of witnesses, the Defence duly listed the DGSE Witnesses' prior recorded testimony in its list of evidence, which was provided before the commencement of its presentation of evidence.<sup>13</sup>
10. The Chamber recalls that, in rejecting the Defence's request to exclude certain items pursuant to Article 69(7) of the Statute, it held that the evidentiary weight which the Chamber may ultimately attach to admitted evidence in its final assessment was a distinct question.<sup>14</sup> While full consideration of the standard

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<sup>10</sup> Response, ICC-01/12-01/18-2635-Conf, para. 11.

<sup>11</sup> Leave to Reply Request, ICC-01/12-01/18-2366-Conf-Corr, para. 14.

<sup>12</sup> See Decision on the Prosecution requests pursuant to Regulation 35 regarding P-0660 and P-0661 and to add 12 items to its Final List of Evidence, 5 August 2020, ICC-01/12-01/18-988-Conf, para. 6.

<sup>13</sup> Annex 1 to the Defence submission of its updated list of evidence, 6 April 2022, ICC-01/12-01/18-2196-Conf-Anx1; Annex 1 to the Defence submission of its list of evidence, 25 March 2022, ICC-01/12-01/18-2154-Conf-Anx1.

<sup>14</sup> Decision on requests related to the submission into evidence of Mr Al Hassan's statements, 17 May 2021, ICC-01/12-01/18-1475-Conf, para. 29.

evidentiary criteria of the suggested evidence will be deferred to the Chamber's deliberation of its judgment pursuant to Article 74 of the Statute, the Chamber considers that the DGSE Witnesses' evidence could be of relevance to the weight and reliability of other evidence on the case record, which both parties characterise as being a 'key issue'.<sup>15</sup> In addition, having given due regard to the fact that the prior recorded testimony of the DGSE Witnesses were already included in the list of evidence, the Chamber agrees with the Defence that granting late addition will not cause undue prejudice as the Prosecution was on sufficient notice. Finally, the Chamber notes that granting the Request would not have any impact on the expeditiousness of the proceedings as the Defence does not intend to call the relevant witnesses to testify *viva voce* but rather requests the introduction of their evidence pursuant to Rule 68(2)(b) of the Rules. Accordingly, the Chamber grants the first part of the Request and authorises the late addition of witnesses D-0002, D-0003, D-0004 and D-0008 to the Defence's list of witnesses.

#### **B. Introduction into evidence pursuant to Rule 68(2)(b) of the Rules**

11. With respect to the applicable law on Rule 68(2)(b) of the Rules, the Chamber refers to its prior decision setting out the relevant framework and considerations.<sup>16</sup> The Chamber notably recalls that Rule 68(2)(b) of the Rules creates two incremental steps. The Chamber must: first, determine whether the prior recorded testimony in question relates to 'proof of a matter other than the acts and conduct of the accused'; and second, assess the factors under Rule 68(2)(b)(i) of the Rules as well as any other factors that are relevant under the circumstances to ensure a fair trial.
12. With respect to the four witnesses subject to the Request, the Chamber is satisfied that their testimony go to proof of matters other than the acts and conduct of the

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<sup>15</sup> Request, ICC-01/12-01/18-2348-Conf, para. 3; Response, ICC-01/12-01/18-2635-Conf, para. 12.

<sup>16</sup> Decision on the introduction into evidence of D-0511, D-0539, and D-0553's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, 9 June 2022, ICC-01/12-01/18-2241 (the 'D-0511, D-0539 and D-0553 Decision'), paras 6-8, 10-11, 15-16, 19, referring notably to Judgment on the appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules", 13 May 2022, ICC-01/12-01/18-2222, paras 48, 55, 81.

accused. The Chamber will accordingly proceed to the discretionary factors under Rule 68(2)(b)(i) of the Rules.

*1. D-0002 and D-0004*

13. The Chamber notes that D-0002 provides testimony on: (i) his experience being arrested several times by the Malian armed forces; (ii) conditions of detention and interrogations at the *Gendarmarie*, Camp 1 and the DGSE (iii) the effects of the detention on him; (iv) identification of other detainees and (v) their experience of torture at the DGSE. The Defence also seeks to introduce into evidence as associated exhibit an order for D-0002's release, which indicates that he was released well before Mr Al Hassan was detained at the DGSE.
14. Similarly, D-0004 provides testimony on: (i) his arrest and detention at the DGSE; and (ii) conditions of other detainees.
15. The Prosecution objects to the introduction of the prior recorded testimony of both witnesses, submitting on one hand that their testimony relate to materially disputed issues and at the same time that they are of marginal relevance.<sup>17</sup>
16. In line with the approach it has adopted with respect to the submission of evidence, the Chamber is of the view that the Prosecution's arguments on relevance are better addressed as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.<sup>18</sup> For the purpose of the present assessment under Rule 68(2)(b) of the Rules, it suffices to note that the evidence of both witnesses may, on a *prima facie* basis, be relevant to assessing the reliability and probative value of other evidence on the case record.<sup>19</sup>
17. With respect to the Prosecution's contention that both witnesses provide testimony on materially disputed issues, the Chamber recalls its previous

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<sup>17</sup> Response, ICC-01/12-01/18-2365-Conf, paras 12, 14, 17.

<sup>18</sup> Decision on the introduction into evidence of the prior recorded testimony of D-0146, D-0524, D-0627 and D-0628 pursuant to Rule 68(2)(b) of the Rules, 17 October 2022, ICC-01/12-01/18-2378 (the 'D-0146 Decision'), para. 10.

<sup>19</sup> D-0146 Decision, ICC-01/12-01/18-2378, para. 10.

determination on a similar matter and considers that the mere fact that a witness's prior recorded testimony relates to a contested aspect of the case does not *per se* render that prior recorded testimony one that relates to materially disputed issues, within the meaning of Rule 68(2)(b)(i) of the Rules.<sup>20</sup> Instead, the Chamber will assess the relevant prior recorded testimony on a case-by-case basis, taking into account, *inter alia*, whether there are specific accounts that appear to be crucial for the underlying factual and legal issues in dispute.<sup>21</sup>

18. While the prior recorded testimony of D-0002 and D-0004 may relate to the assessment of the reliability and probative value of evidence, the Chamber notes that their accounts concern the general detention conditions at the DGSE, which are cumulative of the testimony of other witnesses, and that their detention does not coincide with the period during which the accused was allegedly detained at the DGSE. The Chamber accordingly finds that D-0002's and D-0004's prior recorded testimony do not, *prima facie*, appear crucial for the underlying factual and legal issues in dispute. Thus, the Chamber is of the view that the prior recorded testimony of D-0002 and D-0004 relate to issues that are not materially in dispute and are of a cumulative or corroborative nature. The Chamber is also satisfied that both prior recorded testimony bear sufficient indicia of reliability of a formal nature. Accordingly, the Chamber authorises, subject to the receipt of the certified declarations, the introduction into evidence of the prior recorded testimony of D-0002 and D-0004 pursuant to Rule 68(2)(b) of the Rules.

19. With respect to the associated exhibit related to D-0002's evidence, the Chamber notes that this document is referred to in D-0002's prior recorded testimony and accordingly authorises the submission of this item as an associated exhibit.

## 2. D-0003

20. D-0003 is [REDACTED] who provides evidence related to the detention of others at the DGSE. Specifically, the prior recorded testimony of D-0003 authenticate

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<sup>20</sup> Decision on the introduction into evidence of D-0511, D-0539, and D-0553's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, 9 June 2022, ICC-01/12-01/18-2241 (the 'D-0511 Decision'), para. 18; Decision on the introduction into evidence of the prior recorded testimony of D-0534 and D-0245 pursuant to Rule 68(2)(b) of the Rules, 6 July 2022, ICC-01/12-01/18-2277, para. 10.

<sup>21</sup> D-0511 Decision, ICC-01/12-01/18-2241, para. 18.



several items discussed below, which relate to the disappearance of a journalist named Birama Touré.

21. The Prosecution opposes the introduction of D-0003's evidence, challenging the reliability and probative value of the associated exhibits.<sup>22</sup> The Prosecution also disagrees with the Defence's submission on the relevance of D-0003's testimony,<sup>23</sup> which the Chamber does not consider necessary to address at this juncture. Additionally, the Prosecution also submits that two media articles, which the Defence seeks to submit as associated exhibits, were neither shown to nor provided by D-0003 and as such may not be considered as material associated with D-0003's statement.<sup>24</sup>
22. The Chamber notes that the prior recorded testimony of D-0003 is limited in its scope and relates to background information, providing evidence essentially on the chain of custody of the associated exhibits and clarifications thereto. Consistent with its approach,<sup>25</sup> the Chamber considers it appropriate to address the Prosecution's submission on the reliability and probative value of the associated exhibits during the ultimate assessment of all evidence. As the Chamber is also satisfied that the prior recorded testimony of D-0003 bears sufficient indicia of reliability of a formal nature, it authorises, subject to the receipt of the certified declaration, the submission into evidence of the prior recorded testimony of D-0003 pursuant to Rule 68(2)(b) of the Rules.
23. Turning to the associated exhibits,<sup>26</sup> the Chamber notes that the WhatsApp conversation (MLI-D28-0003-0654), three audio files and their transcripts (MLI-D28-0003-2046 and MLI-D28-0003-2030; MLI-D28-0003-2047 and MLI-D28-0003-2036; MLI-D28-0003-2048 ad MLI-D28-0003-2040), and three transcripts of conversations (MLI-D28-0003-1246; MLI-D28-0003-1249; MLI-D28-0003-1245) are referenced in the prior recorded testimony of D-0003 and as such may

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<sup>22</sup> Response, ICC-01/12-01/18-2365-Conf, para. 15.

<sup>23</sup> Response, ICC-01/12-01/18-2365-Conf, para. 16.

<sup>24</sup> Response, ICC-01/12-01/18-2365-Conf, para. 16 (n. 30).

<sup>25</sup> D-0146 Decision, ICC-01/12-01/18-2378, para. 14.

<sup>26</sup> The Chamber notes that due to the discrepancies between items listed in paragraphs 12 and 18 of the Request, the scope of the items the Defence seeks to submit into evidence as associated exhibits is unclear. For the purpose of the present determination, the Chamber has considered any item listed in either paragraph 12 or 18 of the Request as an item the Defence seeks to introduce as an associated exhibit.

be introduced into evidence as associated exhibits. The Chamber also considers it appropriate to recognise the submission of two related items (MLI-D28-0003-2039; MLI-D28-0003-2045), which are notes prepared by the Court translators whilst preparing the aforementioned transcripts of audio files.

24. The remainder of the submitted items comprise of: a [REDACTED] of D-0003's evidence concerning the disappearance of Birama Touré (MLI-D28-0003-0001); a *procès-verbal* related to investigations concerning the disappearance of Birama Touré (MLI-D28-0003-0005); a civil party complaint filed in France in relation to Birama Touré (MLI-D28-0003-0017); a WhatsApp exchange which appears to be identical with MLI-D28-0003-0654 (MLI-D28-0003-0024) and two media articles (MLI-D28-0003-0014; MLI-D28-0003-0027). While these items relate to the subject discussed in D-0003's prior recorded testimony, they are neither referenced nor discussed in his prior recorded testimony. In the view of the Chamber, these items also do not appear necessary to understand the content of D-0003's prior recorded testimony. Thus, they do not form an integral part of the prior recorded testimony itself and, accordingly, may not be submitted as associated exhibits to his Rule 68(2)(b) evidence.

### 3. D-0008

25. D-0008 is a [REDACTED]. D-0008 testifies about: (i) investigations into crimes committed in the north of Mali within the framework of the Malian justice system; (ii) the position of the DGSE within the Malian legal system, including its link with the prosecutor and the judicial system; (iii) reliability of reports emanating from the DGSE; and (iv) his views on the legality of detention and interrogation at the DGSE.
26. The Prosecution, first and foremost, challenges the indicia of reliability of D-0008's prior recorded testimony, submitting that the statement, which appears to have been written by the witness himself, contains no: indication that he was informed of the possibility of his statement being used in the context of ICC proceedings; details on the meeting with the Defence team; or basic personal

details normally included in prior recorded testimony.<sup>27</sup> The Prosecution also makes submission on the weight and relevance of D-0008's testimony,<sup>28</sup> which the Chamber does not consider necessary to address at this juncture.

27. The Chamber notes that, as put forward by the Prosecution, the prior recorded testimony of D-0008 appears to have been written by the witness himself and does not contain certain details that have so far been included in prior recorded testimony introduced into evidence in this case. While the Chamber has previously held that the formal record of questioning requirements in Rule 111 of the Rules do not apply to the Defence,<sup>29</sup> it is nonetheless incumbent on the Defence to ensure that the information contained in or provided with the prior recorded testimony satisfactorily establishes that it has 'sufficient indicia of reliability', as required under Rule 68(2)(b)(i) of the Rules.
28. With respect to the prior recorded testimony at hand, the Chamber notes that D-0008's prior recorded testimony appears to have been written and provided to the Defence by the witness himself, that the witness signed the statement and that each page is signed with 'Vu'. Concerning the Prosecution's submissions related to the alleged lack of clarity regarding D-0008's awareness and consent to his statement being used in the context of ICC proceedings, the Chamber recalls that Rule 68(2)(b)(ii) of the Rules stipulates that a prior recorded testimony may only be introduced into evidence pursuant to Rule 68(2)(b) if 'it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief.'<sup>30</sup> In the view of the Chamber, this process would sufficiently ensure that the witness is given an opportunity to confirm the truthfulness of the contents of his prior recorded testimony, which is to be used in the present proceedings, while being

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<sup>27</sup> Response, ICC-01/12-01/18-2365-Conf, paras 18-19.

<sup>28</sup> Response, ICC-01/12-01/18-2365-Conf, para. 20.

<sup>29</sup> Decision on Defence request for the introduction into evidence of the prior recorded testimony of D-0512, D-0516 and D-0554 pursuant to Rule 68 of the Rules, 18 May 2022, ICC-01/12-01/18-2228-Conf, para. 12.

<sup>30</sup> In line with Rule 68(2)(b)(iii) of the Rules, the person witnessing such declaration is required to verify that the witness: (i) is the person identified in the prior recorded testimony; (ii) assures that he or she is making the declaration voluntarily and without undue influence; (iii) states that the contents of the prior recorded testimony are, to the best of that person's knowledge and belief, true and correct; and (iv) was informed that if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony.

informed of the consequences of providing false testimony. Accordingly, and having also considered the profile of the particular witness, the Chamber considers that the lack of details in the prior recorded testimony of D-0008, does not render it unreliable to the extent that it cannot be introduced into evidence pursuant to Rule 68(2)(b) of the Rules. The degree to which the prior recorded testimony of D-0008 contains identifying and other relevant information may nonetheless inform the Chamber's ultimate assessment of its probative value.

29. Further, the Chamber notes that D-0008's testimony concerns general aspects of the DGSE, and does not refer to specific details concerning the detention of Mr Al Hassan or other Prosecution witnesses. Thus, the Chamber is satisfied that the prior recorded testimony of D-0008 relates to issues that are not materially in dispute and is of a corroborative nature. Accordingly, the Chamber authorises, subject to the receipt of the certified declaration, the introduction into evidence of the prior recorded testimony of D-0008 pursuant to Rule 68(2)(b) of the Rules.

#### *4. Conclusion*

30. For the aforementioned reasons, the Chamber authorises, subject to the receipt of the certified declarations, the introduction into evidence of the following items pursuant to Rule 68(2)(b) of the Rules:
- D-0002: prior recorded testimony MLI-D28-0003-0417-R01 and associated exhibit MLI-D28-0003-0416;
  - D-0003: prior recorded testimony MLI-D28-0003-0657-R01 and MLI-D28-0003-0665-R01 as well as associated exhibits MLI-D29-0003-0654, MLI-D28-0003-2046, MLI-D28-0003-2030, MLI-D28-0003-2039, MLI-D28-0003-2047, MLI-D28-0003-2036, MLI-D28-0003-2048, MLI-D28-0003-2040, MLI-D28-0003-2045, MLI-D28-0003-1245, MLI-D28-0003-1246 and MLI-D28-0003-1249;
  - D-0004: prior recorded testimony MLI-D28-0003-0661-R01; and
  - D-0008: prior recorded testimony MLI-D28-0003-0675-R01.

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

**REJECTS** the Leave to Reply Request;

**PARTIALLY GRANTS** the Request;

**AUTHORISES** the late addition of witnesses D-0002, D-0003, D-0004 and D-0008 to the Defence's list of witnesses;

**AUTHORISES**, subject to the receipt of the certified declarations, the introduction into evidence of the prior recorded testimony of D-0002, D-0003, D-0004 and D-0008 together with the relevant associated exhibits, as identified in paragraph 30 of the present decision;

**INSTRUCTS** the Registry to reflect in the record's metadata the introduction of the relevant material under Rule 68(2)(b) of the Rules upon filing of the relevant certified declarations; and

**REJECTS** the remainder of the Request.

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 Wednesday, 26 October 2022

At The Hague, The Netherlands