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**International
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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 Annexes A and B

Public redacted version of "Prosecution application under rule 68(3) to introduce into evidence Witness MLI-OTP-P-0150's prior recorded testimony and associated material", ICC-01/12-01/18-841-Conf, 1 June 2020

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court to:*

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Counsel for the Defence

Ms Melinda Taylor

Ms Marie-Hélène Proulx

Mr Thomas Hannis

Legal Representatives of the Victims

Mr Seydou Doumbia

Mr Mayombo Kassongo

Mr Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section Other

Introduction

1. Pursuant to rule 68(3) of the Rules,¹ the Prosecution requests Trial Chamber X's² authorisation to introduce into evidence some passages from Witness P-0150's prior recorded statements as well as associated material [REDACTED]. Annex A to the present filing details: i) the specific passages from the interviews related to that topic and ii) the associated material which comprises [REDACTED].
2. [REDACTED].³
3. [REDACTED]
4. The prior recorded testimony of P-0150 [REDACTED] as well associated material are relevant to the charge of passing of sentences (count 6), torture (counts 1 and 3), other inhumane acts (count 2), cruel treatment (count 4), outrages upon personal dignity (count 5) and persecution (count 13) against Al

¹ Rules of Procedure and Evidence ("Rules").

² "Chamber".

³ [REDACTED]

HASSAN. They are also relevant to the contextual elements of the crime as well as to identifying a number of different actors and members of the common purpose.

5. P-0150's prior recorded testimony amounts to a total of [REDACTED] corresponding to [REDACTED] pages. The Prosecution seeks to introduce into evidence portions of [REDACTED] of these [REDACTED]. As mentioned before,⁴ his testimony is expected to take up to [REDACTED] of examination-in-chief and will cover [REDACTED] topics such as: [REDACTED]

6. The admission through Rule 68(3) of the parts of his prior recorded testimony [REDACTED] will reduce the length of his examination-in-chief, including by cutting out the time-consuming process of the introduction in the courtroom of [REDACTED]. The result will be, on that topic, a more streamlined and focused supplementary examination intended to elicit further *viva voce* evidence [REDACTED]

7. Witness P-0150 will testify [REDACTED]. He will be asked to attest to the accuracy of his prior recorded testimony [REDACTED], at the beginning of his testimony against the Accused and to confirm his availability and willingness

⁴ ICC-01/12-01/18-740-Conf-AnxB.

to be examined on that topic by the Parties, Legal Representatives if applicable, and the Chamber.

8. Based on past practice, the Prosecution estimates that it will reduce by [REDACTED] [REDACTED] the examination-in-chief of P-0150. This estimation includes the formalities associated with the admission of a witness's prior recorded testimony and associated exhibits⁵ and supplementary examination [REDACTED] [REDACTED]

9. Granting the request would not be prejudicial to the rights of the Accused and it would enhance the expeditiousness of the proceedings by reducing the length of Witness P-0150's examination-in-chief to [REDACTED] in total.

Confidentiality

10. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this submission and its accompanying annexes as confidential because they contain confidential information including information regarding Prosecution witnesses. The Prosecution shall file a public redacted version in due course.

Prosecution's Submissions

11. Rule 68(3) of the Rules provides that the Chamber may allow the introduction of the previously recorded testimony of a witness who is present before it where the individual does not object to the submission, and the Parties⁶ and Chamber have the opportunity to examine the witness.

12. Witness P-0150 provided statements to the Prosecution [REDACTED]
[REDACTED]

⁵ This estimate depends, in particular, on the procedure which the Prosecution will be required to follow in relation to the introduction of the associated material relevant to this application, *see* paras. 28-32 below.

⁶ ICC-02/11-01/15-744 OA 8, para. 69, stating that "rule 68 (3) of the Rules provides for the possibility for the Prosecutor, the defence and the Chamber to have the opportunity to examine the witness during the proceedings – this de facto includes the calling party, which in the instant case is the Prosecutor".

[REDACTED]

[REDACTED].⁷ Considering the length of his prior recorded statements, the Prosecution identified Witness P-0150 as an appropriate witness for the procedure under rule 68(3) of the Rules [REDACTED].⁸

13. The prior recorded testimony and associated material which the Prosecution seeks to introduce pursuant to rule 68(3) of the Rules relates, *inter alia*, to: (i) [REDACTED]
[REDACTED]; (ii) [REDACTED]
[REDACTED]; (iii) [REDACTED]
[REDACTED]; (v) [REDACTED]
[REDACTED]
[REDACTED] (vii) [REDACTED]

14. In its Decision on the conduct of proceedings, the Chamber ordered that the calling party file an application with copies of the previously recorded testimony, identifying precisely the passages it wishes to introduce into evidence and other materials referred to in these passages, without which, the passages would not be understandable.⁹

15. Section I of Annex A to this filing sets out excerpts of [REDACTED] of interviews which the Prosecution seeks to introduce into evidence with a summary of the information provided by P-0150 in those passages. These summaries demonstrate the relevance of each passage. [REDACTED]
[REDACTED]

⁷ See Annex B.

⁸ In accordance with ICC-01/12-01/18-789-AnxA, para. 62, the Prosecution provided the Prosecution List of Witnesses on 15 April 2020, in which it indicated its intention to apply for the admission of Witness P-0150's prior recorded testimony under rule 68(3) of the Rules.

⁹ ICC-01/12-01/18-789-Conf-AnxA, para. 63(i) and (ii). Each item of evidence which the Prosecution seeks to introduce into evidence through the present application may be accessed by clicking on the ERN listed in Annex A, which is hyperlinked to the item of evidence in eCourt, as authorised by the Chamber in its email [REDACTED].

16. The Prosecution does not seek to introduce under rule 68(3) the remainder of P-0150's witness statements or other material referred to therein, as it will be elicited *viva voce* in the courtroom.

17. The Decision on the conduct of proceedings foresees the use of audio-visual materials during witness testimony provided the moving Party establishes the relevance of the exercise, by showing, "for example that the witness has personal knowledge of the making of the recording or its contents".¹⁰ Witness P-0150's relation to each video is set out in Annex A to this application.

18. Trial Chamber VI held in *Ntaganda* that "exhibits associated with a previously recorded testimony are admissible if the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced."¹¹ This standard is applicable to documents of a written nature as well as to those of an audio-visual nature. This is evidenced by Trial Chamber VI's reference to the same standard in rejecting a Prosecution request to admit a video through a witness (Witness P-0315 in that case).¹² There is no reason to adopt any other test or standard for the admission of audio-visual as opposed to other types of material.

Associated material

19. Listed in section II of Annex A are the materials commented upon by P-0150 during his interviews [REDACTED] which the Prosecution seeks to introduce into evidence. In this section the Prosecution describes each item¹³ and provides a brief summary of P-0150's comments about each item, with the reference to the precise passage of the [REDACTED] interview in which he makes those

¹⁰ ICC-01/12-01/18-789-AnxA, para. 58.

¹¹ ICC-01/04-02/06-T-105-Red-ENG ET, p.93, ln.24 - p.94, ln.7. *See also* ICC-01/04-02/06-1205, para.7; ICC-01/04-02/06-1029, para.23, 35; ICC-01/09-01/11-1938-Corr-Red2, para.33.

¹² ICC-01/04-02/06-T-105-Red-ENG WT, p.95, l.6-12.

¹³ See "Description" column.

comments.¹⁴ The items listed in this section of the chart are: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

- [REDACTED]¹⁵
[REDACTED]¹⁶ [REDACTED]
[REDACTED]

- [REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]
[REDACTED]

¹⁴ See the far-right column on section II of Annex A.

¹⁵ [REDACTED]

¹⁶ [REDACTED]

20. The videos and video excerpts are being proposed for admission without sound, as they were played without sound during the P-0150's interview.

██
██

Witness P-0150's prior recorded testimony should be introduced pursuant to rule 68(3) of the Rules

21. The prior recorded testimony and associated material set out in sections I and II of Annex A are relevant to establishing the crimes which the Accused has been charged with, in particular, counts 1 to 6 and 13. They are also relevant to the contextual elements of the crimes as well as to identifying a number of different actors and members of the common purpose.

22. The material that the Prosecution seeks to introduce pursuant to rule 68(3) is probative and reliable. Witness P-0150 provided his witness statement voluntarily

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██ He will be asked to confirm the accuracy of his prior recorded testimony when he appears before the Chamber.¹⁷

23. The Parties, the participants if applicable, and the Chamber, will have the opportunity to examine the witness during the proceedings and he will confirm whether he consents to the admission of his materials, in accordance with rule 68(3) of the Rules. Therefore, the admission of Witness P-0150's prior recorded testimony and its associated material under rule 68(3) of the Rules is not prejudicial to or inconsistent with the rights of the Accused.

¹⁷ ICC-01/12-01/18-789-AnxA, para.65.

Supplementary examination

24. Should Witness P-0150's prior testimony and associated material [REDACTED] [REDACTED] be introduced into evidence, the Prosecution requests leave to conduct a streamlined supplementary examination on that topic, in accordance with rule 68(3) of the Rules and in line with the Decision on the conduct of proceedings¹⁸ and the prior jurisprudence of this Court.¹⁹

25. The Prosecution would elicit, *viva voce*, further information [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

26. The Prosecution would ensure that the witness is not merely asked to repeat the information which he already provided in his prior recorded testimony. This supplementary examination is necessary for the determination of the truth and to elicit further evidence specific to the *Al Hassan* case.

27. The Prosecution intends to complete the process of admission of Witness P-0150's material as well as its supplementary examination within [REDACTED]. Should the Chamber reject this request in whole or in part, the Prosecution may require up to the [REDACTED] originally estimated for this witness's examination-in-chief [REDACTED].

¹⁸ ICC-01/12-01/18-789-AnxA, para.65

¹⁹ ICC-01/04-01/06-T-205-Red3, p.19, l.11 et seq; ICC-01/04-01/07-2233-Corr, para.16-17; ICC-01/04-01/06-1603, para.25; ICC-01/04-02/06-T-110-Red2-ENG, p.34, l.8-13 ; ICC-02/11-01/15-498-AnxA, para.40.

Proposed procedure for the introduction of prior recorded testimony

28. Should this application be granted, the Prosecution submits that there will be no need to read into evidence the passages identified in Annex A of Witness P-0150's prior testimony as he will be asked to confirm its accuracy and to provide any corrections or amendments, if any.

29. During witness preparation, the Prosecution will ask Witness P-0150, *inter alia*, to review his prior testimony, advise of any corrections or clarifications he wishes to make to it, and then to confirm its accuracy.²⁰ In accordance with the Witness Preparation Protocol this session will be video-recorded and the Prosecution will disclose a log of the session clearly indicating any changes or corrections which the witness makes.²¹

30. When Witness P-0150 appears in court, the Prosecution will seek to elicit, in principle by way of neutral questions, any clarifications noted by the witness during witness preparation.²² The Prosecution will then ask the witness whether he has any further changes or clarifications to make to his prior recorded testimony and to confirm his consent to be questioned by the Parties and the Chamber.

31. In order to save time, the Prosecution should not be required, for the purposes of admission, to show Witness P-0150 [REDACTED] [REDACTED] which it seeks to introduce through this application. Witness P-0150 described them in his witness statement, and the Defence and the Chamber will be able to question him further in relation to them.

32. In terms of further procedure, after tendering his prior recorded testimony into evidence, with any changes or clarifications noted on the record, the Prosecution will then conduct a supplementary examination of Witness P-0150 as outlined above.

²⁰ ICC-01/12-01/18-666-Anx, para.18-19.

²¹ ICC-01/12-01/18-666-Anx, para.12-15, 31.

²² ICC-01/12-01/18-666-Anx, para. 50.

Conclusion

33. For the foregoing reasons, the Prosecution asks that the Chamber authorise the introduction of [REDACTED] of P-0150's prior recorded testimony and associated materials and to permit the Prosecution to ask supplementary questions on this topic during its examination-in-chief.



Fatou Bensouda, Prosecutor

Dated this 31 May 2020

At The Hague, The Netherlands