

**Cour
Pénale
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**International
Criminal
Court**

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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

Public redacted version of "Prosecution application to call Witness MLI-OTP-P-0152 as an expert and to introduce his report and associated material into evidence", ICC-01/12-01/18-837-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:

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1. As foreseen in the Decision on the Conduct of Proceedings,¹ the Prosecution requests that Trial Chamber X² authorise calling Witness P-0152 as an expert (“Proposed Expert”) and, pursuant to articles 64(9), 69(2)-(4)³ and rules 63(2) or 68(3)⁴, introducing into evidence his report and associated material and permit the Prosecution to conduct a streamlined supplementary examination (“Request”).
2. The Proposed Expert possesses sufficient qualifications and expertise in relation to the history and development of the 2012-2013 conflict in Mali, and the armed groups involved in the conflict. His report properly falls within the scope of expert testimony and details his analysis of the conflict and the various parties thereto.
3. The Prosecution seeks to introduce into evidence the Proposed Expert’s report (“Report”).⁵ In addition, it seeks to introduce materials necessary to establish his expertise, namely his *curriculum vitae*,⁶ the Prosecution’s letter of instructions,⁷ and two investigation notes containing further details of his expertise provided by the Proposed Expert to the Prosecution.⁸
4. The Proposed Expert’s report and associated material are relevant to the charges in this case, particularly the existence of a non-international armed conflict in northern Mali, a contextual element of the crimes charged under counts 3, 4, 5, 6, 7, 10 and 12.
5. The Proposed Expert will testify [REDACTED]. He will be asked to attest to the accuracy of his report at the beginning of his testimony against the Accused and

¹ ICC-01/12-01/18-789-AnxA, para. 67.

² “Chamber”.

³ Rome Statute (“Statute”).

⁴ Rules of Procedure and Evidence (“Rules”).

⁵ [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

to confirm his availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber.

6. The introduction of the Proposed Expert's report and associated documents would not be prejudicial to the rights of the Accused and would enhance the expeditiousness of the proceedings by reducing the length of the expert's examination-in-chief by half. Should this application be granted, the Prosecution's streamlined supplementary examination of the Proposed Expert would last 30 minutes.

Confidentiality

7. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this submission as confidential because it contains identifying information regarding this Prosecution witness, in addition to referring to filings classified as confidential. The Prosecution shall file a public redacted version in due course.

Prosecution's Submissions

Request to hear Witness P-0152 as an expert witness

8. Pursuant to articles 64(9)(a) and 69(4) of the Statute, the Chamber has the discretion to hear a witness as an expert when it is satisfied that (i) the proposed testimony in the relevant area of expertise would be of assistance,⁹ (ii) the proposed witness is an expert,¹⁰ giving due consideration to whether the person is included in the Registry's list of experts,¹¹ and (iii) the anticipated testimony falls within the expertise of the witness and does not usurp the functions of the Chamber as ultimate arbiter of fact and law.¹²

⁹ ICC-01/04-01/06-1069, para. 25; ICC-01/05-01/08-2273, para. 8; ICC-01/09-01/11-844, para. 12.

¹⁰ ICC-01/05-01/08-2273, para. 9; ICC-01/09-01/11-844, para. 11, 12.

¹¹ See also ICC-01/09-01/11-844, para. 20, noting that the placement of a particular witness on the Court's list of experts is an administrative act on the part of the Registrar that is not binding on the Chamber.

¹² ICC-01/09-01/11-844, para. 12.

9. Witness P-0152 holds a PhD in Political Science from [REDACTED] and has a career as a research professor of international affairs of over 25 years, teaching and directing post-doctorate researchers.¹³ His own research on Western Africa and Mali has featured in academic publications for close to 25 years.¹⁴ He has conducted field research in the region throughout his career¹⁵, including in Mali, [REDACTED].¹⁶ He has been to Timbuktu in the past and is knowledgeable about the different ethnicities living there and elsewhere in North Mali. As a result of this experience, Witness P-0152's expertise extends to the history and development of the conflict in Mali as well as the armed groups operating in the country. He has previously testified in [REDACTED] courts on topics similar to the subject matter of his expert report.¹⁷

10. Witness P-0152's Report addresses the causes of the conflict that started in Mali in 2012, its development in 2012-2013 in particular, and the different parties involved in the conflict.¹⁸ As such, the Report is relevant background to the charges in this case, particularly the existence of a non-international armed conflict in northern Mali, a contextual element of the crimes charged under counts 3, 4, 5, 6, 7, 10 and 12.

11. Other Chambers of this Court have relied on the evidence of similarly placed experts, called by the Prosecution or by the Chambers *proprio motu*, to establish the factual background to the conflict and to assist in the analysis of the nature of the armed conflict.¹⁹ Other Chambers have allowed a witness to be called as an expert to give evidence on the causes of the violence at the heart of the case.²⁰

¹³ [REDACTED]

¹⁴ [REDACTED]

¹⁶ [REDACTED]

¹⁷ [REDACTED]

¹⁸ [REDACTED]

[REDACTED]

¹⁹ ICC-01/04-01/06-2842, para. 67, 69; ICC-01/09-01/11-844, para. 18; ICC-01/04-02/06-2359, para. 2 (fn. 6).

²⁰ ICC-01/09-01/11-844, para. 21-23, ICC-02/04-01/15-1073, para. 14.

12. The Report is probative and reliable. It was prepared voluntarily for the Prosecution by the Proposed Expert in the understanding that it could be used as evidence of the existence of an armed conflict in Mali from 2012 and about the armed groups involved, and that its author could be selected as an expert witness at trial.²¹ The sources on which it is based are clearly identified in the report.

Request for authorisation to introduce Witness P-0152's evidence

13. Rule 68(3) of the Rules provides that the Chamber may allow the introduction of the prior recorded testimony of a witness who is present before the Chamber where the individual does not object to the submission, and the Parties²² and Chamber have the opportunity to examine the witness. Trial Chambers VI and IX relied on rule 68(3) to receive evidence from expert witnesses in the *Ntaganda* and *Ongwen* cases,²³ even absent a request from the calling party.²⁴ The Prosecution nonetheless notes that this is primarily a *mutatis mutandis* approach, since an expert report is not testimonial in nature, and in this sense, it is different from a statement obtained by the Prosecution under rules 111 or 112. Should the Chamber consider rule 68(3) to be inapplicable due to the documentary nature of the report, the Chamber may admit the report pursuant to its general powers under article 69 of the Statute. The Prosecution identified the Proposed Expert as an appropriate witness for the procedure under rule 68(3) of the Rules.²⁵

14. In its Decision on the conduct of proceedings, the Chamber ordered the Prosecution to file motivated rule 68(3) applications together with copies of the previously recorded testimony, identifying the precise passages it wishes to tender

²¹ [REDACTED]

²² 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”.

²³ ICC-01/04-02/06-845, ICC-01/04-02/06-T-31-CONF-ENG, p.75, ll.7-16.

²⁴ ICC-01/04-02/06-T-87-ENG CT, p. 3-4, ICC-01/04-02/06-T-113-Red-ENG WT, p.27, l. 17 - p.28, ln. 6.

²⁵ 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 use rule 68(3) with this witness. See ICC-01/12-01/18-740-Conf-AnxA.

into evidence, and other materials referred to in these passages that are available to the calling party and, without which, the passages would not be understandable.²⁶

15. The Prosecution seeks to introduce, in full, the Report²⁷ and the materials necessary to establish Witness P-0152's expertise, namely his *curriculum vitae*,²⁸ the Prosecution's letter of instructions,²⁹ and two investigation notes containing further details of his expertise provided by the Proposed Expert to the Prosecution.³⁰ Each of these items of evidence may be accessed by clicking on the hyperlinked ERNs with which they are identified herein, which launch the item in *eCourt*.³¹

16. The Report is, as addressed above, relevant, probative and reliable. The Proposed Expert will be asked to attest to the accuracy of the Report at the beginning of his testimony³² and to confirm his availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber. The witness will be asked whether he consents to the introduction of his materials under the rule. The introduction of the Proposed Expert's Report is not prejudicial to or inconsistent with the rights of the Accused.

17. Based on past practice, the Prosecution estimates that it will require in total one hour for the Proposed Expert's examination-in-chief, namely, approximately 30 minutes for the formalities associated with the introduction of his Report and associated exhibits, and an additional 30 minutes to conduct a streamlined supplementary examination to elicit further focussed, limited *viva voce* evidence of certain issues, including Ansar Dine and AQIM links and presence in Timbuktu as well as Iyad Ag Ghaly's role and ethnicities, which require clarification. Eliciting further information on these topics is important for the Prosecution's case against the

²⁶ ICC-01/12-01/18-789-Conf-AnxA, para. 63(i) and (ii).

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ As authorised by the Chamber [REDACTED].

³² ICC-01/12-01/18-789-AnxA, para.65.

Accused. The introduction of the Proposed Expert's evidence would reduce the length of his examination-in-chief by one hour.

Proposed procedure for the introduction of Proposed Expert's Report

18. Should this application be granted, the Prosecution submits that there will be no need to read into evidence the Report as he will be asked to confirm its accuracy and to provide corrections or amendments, if any.

19. During witness preparation, the Prosecution will ask the Proposed Expert, *inter alia*, to review his Report and associated material, advise of any corrections or clarifications he wishes to make, and to confirm the accuracy of the Report.³³ 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.³⁴

20. When the Proposed Expert 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.³⁵ The Prosecution will then ask the witness whether he has any further changes or clarifications to make to his Report and to confirm his consent to be questioned by the Parties and the Chamber.

21. In terms of further procedure, after tendering the Report, with any changes or clarifications noted on the record, and the associated material, the Prosecution will then conduct a supplementary examination of the Proposed Expert as outlined above.

³³ ICC-01/12-01/18-666-Anx, para. 18-19.

³⁴ ICC-01/12-01/18-666-Anx, para. 12, 14, 31.

³⁵ ICC-01/12-01/18-789-AnxA, para. 50.

Conclusion

22. The abovementioned qualifications and experience establish Witness P-0152's knowledge and expertise. The Chamber would be assisted in understanding the background to the armed conflict by the introduction into evidence of the Report. Witness P-0152's evidence does not usurp the function of the Chamber as the ultimate arbiter of fact and law.

23. Permitting the Proposed Expert's evidence to be introduced into evidence would not be prejudicial to or inconsistent with the rights of the Accused, as the witness would be available for questioning by the Defence, the Participants if applicable, and the Chamber. It would enhance the expeditiousness of the proceedings by reducing the length of the Proposed Experts' examination-in-chief as set out above.

24. For the foregoing reasons, the Prosecution asks that the Chamber grant its Request.



Fatou Bensouda, Prosecutor

Dated this 30 May 2020

At The Hague, The Netherlands