

**Cour
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**International
Criminal
Court**

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Date: 30 May 2020

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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 Annex A

**Public redacted version of "Prosecution application under rule 68(3) to introduce
Witness MLI-OTP-P-0638's prior recorded testimony and associated material",
ICC-01/12-01/18-836-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. Pursuant to rule 68(3)¹, the Prosecution requests that Trial Chamber X² allow the Prosecution to: (i) introduce into evidence ■ paragraphs from Witness P-0638's witness statement and ■ discussed in these paragraphs; and (ii) conduct a brief supplementary examination of Witness P-0638 ("Request"). The Prosecution seeks to introduce the ■ as shown to the witness, without ■³

2. ■
 ■
 ■
 ■
 ■
 ■

3. This witness's prior recorded testimony and associated material primarily relate to ■ and are relevant to the charges in particular torture (counts 1 and 3), other inhumane acts (count 2), cruel treatment (count 4), outrages upon personal dignity (count 5), passing of sentences (count 6), attack against protected monuments (count 7), persecution (count 13). They are also relevant to the contextual elements of the crimes as well as to identifying a number of different locations where crimes were committed.

4. Witness P-0638 is listed in the ■ of witnesses, ■. He will be asked to attest to the accuracy of his prior recorded testimony at the beginning of his testimony against the Accused and to confirm his availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber.

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

² "Chamber".

³ See Annex A for details on the precise ■ paragraphs, and items which the Prosecution seeks to admit through this Request.

5. Based on past practice, the Prosecution estimates that it will require in total three hours for the examination-in-chief of P-0638: namely, approximately thirty minutes for the formalities associated with the admission of a witness's prior recorded testimony and associated exhibits,⁴ and an additional two and half hours to conduct a supplementary examination to elicit further focussed, limited *viva voce* evidence of certain issues, [REDACTED]

[REDACTED]. Eliciting further details on these topics is important for the Prosecution's case against the Accused.

6. 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-0638's examination-in-chief by two hours, which amounts to 40% of the duration initially estimated.⁵

Confidentiality

7. 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, in addition to referring to filings classified as confidential. The Prosecution shall file a public redacted version in due course.

Prosecution's Submissions

8. 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 the Chamber

⁴ This estimate depends, in particular, on the procedure which the Prosecution will be required to follow in relation to the admission of the associated material which it seeks to admit, *see* para.27-31 below.

⁵ The Prosecution initially estimated five hours for P-0638's examination-in-chief. *See* ICC-01/12-01/18-740-Conf-AnxB, p. 1115.

where the individual does not object to the submission, and the Parties⁶ and Chamber have the opportunity to examine the witness.

9. Witness P-0638 provided a statement to the Prosecution [REDACTED].⁷ The Prosecution identified Witness P-0638 as an appropriate witness for the procedure under rule 68(3) of the Rules.⁸

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

11. 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 into evidence, and other materials referred to in these passages, without which the passages would not be understandable.⁹

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”.

⁷ [REDACTED]

⁸ In accordance with ICC-01/12-01/18-789-AnxA, para. 62, the Prosecution provided the Prosecution List of Witnesses [REDACTED] in which it indicated its intention to apply for the admission of Witness P-0638’s prior recorded testimony under rule 68(3) of the Rules.

⁹ ICC-01/12-01/18-789-AnxA, para. 63. 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 of 28 May 2020 13:38.

12. As set out in section I of Annex A to this filing, the Prosecution seeks to introduce ■ paragraphs in Witness P-0638's statement. These paragraphs explain the facts identified above¹⁰ and provide details on ■ that were shown to the witness (without sound) during his interview, which the Prosecution also seeks to introduce under rule 68(3), as set out in section II of Annex A. The Prosecution does not seek to introduce the remainder of this witness' statement.¹¹

13. 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."¹² ■

■

■¹³

14. There is no reason to adopt any other test or standard for the admission of ■ as opposed to other types of material.

15. Since these ■ ere already ■ during P-0638's interview, and he already provided his explanations thereof, there is no need to repeat this lengthy exercise in court. Judicial expediency warrants the admission of the ■ shown to him together with his explanation thereof.¹⁴

¹⁰ See para. 10 *supra*.

¹¹ For the ■ of these ■ hich was not ■ or explained by the witness, the Prosecutio mission through other witnesses.

¹² ICC-01/04-02/06-T-105-Red-ENG ET, p.93, l.24 - p.94, l.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.

¹³ ■

¹⁴ See ICC-01/12-01/18-789-AnxA, para. 58-59.

Brief descriptions of the associated material

16. The relevant timestamps for the [redacted] which the Prosecution seeks to introduce are set out in Section II(A) of Annex A, which also provides references to the corresponding paragraphs of the witness statement where Witness P-0638 explained [redacted]

17. Below, the Prosecution sets out details regarding the content and relevance of those [redacted] which it seeks to introduce as material associated with Witness P-0638’s prior recorded testimony.

18. [redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]

[redacted].¹⁵

19. [redacted]
[redacted]
[redacted]

¹⁵ The [redacted] to Witness P-0638 [redacted] The Prosecution therefore will seek to admit the [redacted].

[REDACTED]

20. [REDACTED]

Witness P-0638's prior recorded testimony should be introduced into evidence pursuant to rule 68(3)

21. The prior recorded testimony and associated material set out in sections I and II of Annex A relate to [REDACTED] and are relevant to a number of crimes which the Accused has been charged with, in particular torture (counts 1 and 3), other inhumane acts (count 2), cruel treatment (count 4), outrages upon personal dignity (count 5), passing of sentences (count 6), attack against protected monuments (count 7), persecution (count 13). They are also relevant to the contextual elements of the crimes as well as to identifying a number of different locations where crimes were committed.

¹⁶ The [REDACTED] of Witness P-0638 [REDACTED] The Prosecution therefore will seek to admit the [REDACTED].
¹⁷ This [REDACTED].

22. The material that the Prosecution seeks to introduce pursuant to rule 68(3) is probative and reliable. Witness P-0638 provided his witness statement voluntarily

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. He will be asked to confirm the accuracy of his testimony when he appears before the Chamber.¹⁸ As such, the Parties, the participants if applicable, and the Chamber will have the opportunity to examine this 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-0638's prior recorded testimony under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

Supplementary examination

23. Should Witness P-0638's prior testimony and associated material be introduced into evidence, the Prosecution requests leave to conduct a streamlined supplementary examination in accordance with rule 68(3) of the Rules in line with the Decision on the conduct of proceedings¹⁹ and the prior jurisprudence of this Court.²⁰

24. The Prosecution would first elicit, *viva voce*, further details in relation to certain issues which were only briefly referred to during Witness P-0638's prior recorded testimony, [REDACTED]

[REDACTED]

¹⁸ ICC-01/12-01/18-789-AnxA, para.65.

¹⁹ ICC-01/12-01/18-789-AnxA, para.65

²⁰ 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.

25. 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 fair evaluation of the witness, the determination of the truth and to elicit further specific evidence.

26. The Prosecution intends to complete the process of admission of Witness P-0638's material as well as its supplementary examination within three hours. Should the Chamber reject this Request in whole or in part, the Prosecution may require up to the five hours originally estimated for this witness's examination-in-chief because of the time-consuming nature of seeking to admit [REDACTED] as identified, and the facts included in the paragraphs of his witness statement as indicated above.

Proposed procedure for the introduction of prior recorded testimony

27. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0638's prior recorded testimony as he will be asked to confirm its accuracy and to provide any corrections or amendments, if any.

28. During witness preparation, the Prosecution will ask Witness P-0638, *inter alia*, to review his prior recorded testimony, advise of any corrections or clarifications he wishes to make to it, and then to confirm its accuracy.²¹ 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.²²

29. When Witness P-0638 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.²³ The Prosecution will then ask the witness whether he has any

²¹ ICC-01/12-01/18-666-Anx, para.18-19.

²² ICC-01/12-01/18-666-Anx, para.12-15.

²³ ICC-01/12-01/18-666-Anx, para. 50.

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.

30. In order to save time, the Prosecution should not be required, for the purposes of admission, to show Witness P-0638 [REDACTED] which it seeks to admit through this Request, or even portions of [REDACTED] Witness P-0638 described them in his witness statement, and the Defence and the Chamber will be able to question him further in relation to them.

31. 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 brief supplementary examination of Witness P-0638 as outlined above.

Conclusion

32. For the foregoing reasons, the Prosecution requests that the Chamber grant its Request.



Fatou Bensouda, Prosecutor

Dated this 30 May 2020

At The Hague, The Netherlands