

**Cour
Pénale
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**International
Criminal
Court**

Original: English

No.: ICC-01/12-01/18
Date: 29 November 2020
Date of submission:
4 February 2021

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-0641's prior recorded testimony and associated material",
29 November 2020, ICC-01/12-01/18-1168-Conf**

Source: Office of the Prosecutor

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

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I Introduction

1. Pursuant to articles 64(9), 69(2)-(4) of the Statute and rules 63(2) and 68(3) of the Rules of Procedure and Evidence ("Rules"), the Prosecution requests Trial Chamber X's ("Chamber") authorisation to (i) introduce into evidence Witness P-0641's ("P-0641") prior recorded statement and associated material as specified in sections I and II of Annex A ("Annex") to the present application; and (ii) conduct a streamlined supplementary examination of Witness P-0641 ("Request").
2. P-0641 is a male civilian [REDACTED]. In 2012-2013, he was [REDACTED]. He is also [REDACTED].
3. In his prior recorded statement and associated material, P-0641 provides information on, *inter alia*: (i) the situation in Timbuktu under the control of the armed groups in 2012-2013 ("Groups"), (ii) the restrictions imposed on the population, (iii) the role of the Islamic police, the *Hesbah* and the Islamic Tribunal and of the members belonging to these organs, including AL HASSAN, (iv) the crimes taking place during the occupation by the Groups and the key members of the armed groups involved in these crimes.
4. The Prosecution seeks to introduce into evidence P-0641's witness statement and annexes thereto as well as [REDACTED] and eight photographs mentioned in his statement pursuant to rule 68(3) of the Rules. These documents are relevant, probative and reliable.
5. Should this Request be granted, P-0641 will be asked to attest to the accuracy of his prior recorded statement and associated material during his testimony and confirm that he does not object to their submission into evidence.

6. Based on past practice, the Prosecution estimates that it will require in total about one hour¹ for the examination-in-chief of P-0641: namely, approximately 20 minutes for the formalities associated with the introduction into evidence of his prior recorded testimony and associated exhibits,² and an additional 40 minutes to conduct a supplementary examination to elicit further focussed, limited *viva voce* evidence of certain issues, including clarifications on the basis of his knowledge of topics covered in his statement and other discrete aspects arising out of those.

7. Granting the Request would not be prejudicial to the rights of the Accused and would enhance the expeditiousness of the proceedings by reducing the length of Witness P-0641's examination-in-chief by four hours, which amounts to 80% of the duration initially estimated.³

II Confidentiality

8. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this submission and its accompanying annex 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.

III Prosecution's Submissions

9. 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 where the individual does not object to the submission, and the Parties⁴ and Chamber have the opportunity to examine the witness.

¹ The Prosecution notes that P-0641 requires [REDACTED] which may increase the time needed.

² This estimate depends, in particular, on the procedure which the Prosecution will be required to follow in relation to the introduction into evidence of the associated material, *see* para. 63-66 below.

³ The Prosecution initially estimated five hours for P-0641's examination-in-chief. *See* ICC-01/12-01/18-740-Conf-AnxB, p. 1126.

⁴ 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".

10. Witness P-0641 provided a statement to the Prosecution in [REDACTED].⁵
The Prosecution identified Witness P-0641 as an appropriate witness for the procedure under rule 68(3) of the Rules.⁶

11. [REDACTED].⁷ This Request is therefore filed in accordance with the Chamber's instruction to submit by 30 November 2020 any rule 68(3) applications relating to those witnesses expected to be called after the end of the year 2020.⁸

12. Sections I and II of the Annex appended to this application list the materials which the Prosecution seeks to introduce into evidence for P-0641, and section III lists other items necessary for the understanding of P-0641's prior recorded statement, which the Prosecution does not seek to introduce into evidence under rule 68(3).

13. More precisely, section I of the Annex contains the witness statement⁹ and its three annexes: (i) [REDACTED],¹⁰ (ii) a video depicting the flogging of a woman for adultery, which [REDACTED] [REDACTED],¹¹ (iii) a video¹² depicting the flogging of a member of the Groups.¹³ It furthermore includes the transcripts and translations of the [REDACTED] to P-0641's statement, which the Prosecution seeks to add to its List of Evidence (see para. 71-75 below). Section II lists [REDACTED] and eight

⁵ [MLI-OTP-0072-0143-R04](#).

⁶ 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 submission of Witness P-0641's prior recorded testimony under rule 68(3) of the Rules. See ICC-01/12-01/18-740-Conf-AnxA, p. 4.

⁷ [REDACTED], p. 3.

⁸ ICC-01/12-01/18-1004, para. 21.

⁹ [REDACTED].

¹⁰ [REDACTED]

¹¹ [REDACTED]

¹² [REDACTED]

Section I: [REDACTED]

photographs shown to and commented upon by P-0641 during his interview.¹⁴
 Section III of the Annex contains [REDACTED] and a press
 article.¹⁵

14. The prior recorded testimony and associated material which the Prosecution seeks to introduce pursuant to rule 68(3) relate, *inter alia*, to: (i) Witness P-0641's [REDACTED] background; ii) context of the interview with the OTP and any possible prior statements; (iii) Witness P-0641's motivation for the interview with the OTP; iv) [REDACTED] [REDACTED]; v) life in Timbuktu before the occupation by the Groups; vi) the arrival and first period of the armed groups in Timbuktu in 2012; vii) the occupation and control by the armed groups in Timbuktu; viii) the organs installed by the groups such as the Islamic police, the *Hesbah* and the Islamic Tribunal and their role; ix) the members of the Groups, such as AL HASSAN, Abou Zeid, Iyad ag Ghaly, Adama, Abou Dzar, Demba Demba, Aziz, Al Housseyni, Lamine, Al Faqi, Hamed Moussa, Yazid, Sanda, Radwan, Abou Yahia, Baccar, Omar Ould Hamaha, Talha, Abdoul Djalil, Houka Houka, (x) the role of Al Hassan within the Islamic police; (xi) recruitment and training of individuals joining the Groups; (xii) the new rules imposed by the Groups; (xiii) violence against and detention of women; (xiv) crimes committed against the population which include floggings, amputation, rape and forced marriages, destruction of mausoleums and monuments; (xv) the reaction of the population of Timbuktu to the occupation, including *inter alia*, the *comité de crise* and protest marches; (xvi) economic and social consequences of the occupation; (xvii) P-0641's [REDACTED] own victimisation; (xviii) P-0641's identification of persons,

¹⁴ Section II: [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

Section III: [REDACTED]

; Press article: [REDACTED].

events and locations in Timbuktu, *inter alia* [REDACTED] photographs shown to him.

15. 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.¹⁶

16. As set out in section I of Annex A to this filing, the Prosecution seeks to introduce, in full, Witness P-0641's statement¹⁷ and its three annexes.¹⁸ The statement explains the facts identified above¹⁹ and provides details on the annexes. It further provides details on the eight photographs and the [REDACTED] videos 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.²⁰ These [REDACTED] items were explained by Witness P-0641 in his witness statement, and are relevant to the case against the Accused. Summaries of Witness P-0641's comments thereon, their content, and their relevance to the case, are provided below.

17. 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."²¹ 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

¹⁶ 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.

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ See para. 10 *supra*.

²⁰ For the audio content of these video excerpts which was not played to, or explained by the witness, the Prosecution will seek its admission through other witnesses.

²¹ 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.

rejecting a Prosecution request to admit a video through Witness P-0315.²² There is no reason to adopt any other test or standard for the admission of audio-visual as opposed to other types of material.

18. Since these videos or excerpts thereof were already played and these photographs already shown to P-0641 during his 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 photographs and videos or excerpts thereof as shown to him together with his explanation thereof,²³ especially as the Defence and the Chamber will be able to question him further in relation to them.

19. The Prosecution further notes that [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED].²⁶

A - Brief descriptions of the associated material

20. P-0641's comments on the eight photographs and [REDACTED] videos or excerpts thereof, which the Prosecution seeks to introduce, are set out in Section II of Annex A. Section II also provides the references to the corresponding paragraphs of the witness statement where Witness P-0641 explained the photographs and video excerpts as well as the relevant timestamps for the video material.

21. Below, the Prosecution sets out details regarding the content and relevance of those eight (8) photographs and [REDACTED] videos or excerpts thereof which it seeks to introduce as material associated with Witness P-0641's prior recorded testimony. During the interview the OTP investigators showed the videos or excerpts thereof

²² ICC-01/04-02/06-T-105-Red-ENG WT, p.95, 1.6-12.

²³ See ICC-01/12-01/18-789-AnxA, para. 58-59.

²⁴ [REDACTED]
[REDACTED]

²⁶ [REDACTED]

without sound to P-0641 so that he could comment whether he had seen these images before and whether he recognised something or someone on the images.

[REDACTED]

22. [REDACTED] were shown without sound to P-0641.

[REDACTED]

23. [REDACTED]

24. [REDACTED]

25. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

26. [REDACTED] were shown without sound to P-0641 [REDACTED]

27. [REDACTED]

28. [REDACTED]

[Redacted]

29. [Redacted]

30. [Redacted]

31. [Redacted]

32. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

33. [Redacted]

[Redacted]

34. [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

35. [Redacted]
[Redacted]
[Redacted].

36. [Redacted]
[Redacted]

[REDACTED]

37. [REDACTED]

[REDACTED] *and photographs* [REDACTED]

38. [REDACTED] (shown without sound) and photographs [REDACTED]
[REDACTED] were shown to P-0641 [REDACTED]
[REDACTED]
[REDACTED]

39. [REDACTED]
[REDACTED]

40. [REDACTED]
[REDACTED]

[Redacted]

41. [Redacted]

42. [Redacted]

43. [Redacted]

[Redacted]

44. [Redacted] were shown to P-0641 without sound [Redacted]

[Redacted]

[Redacted]

45. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

²⁷ [MLI-OTP-0072-0143-R04](#), para. 174.

[REDACTED]

46. [REDACTED]

[REDACTED]

47. [REDACTED]

[REDACTED]

48. [REDACTED]

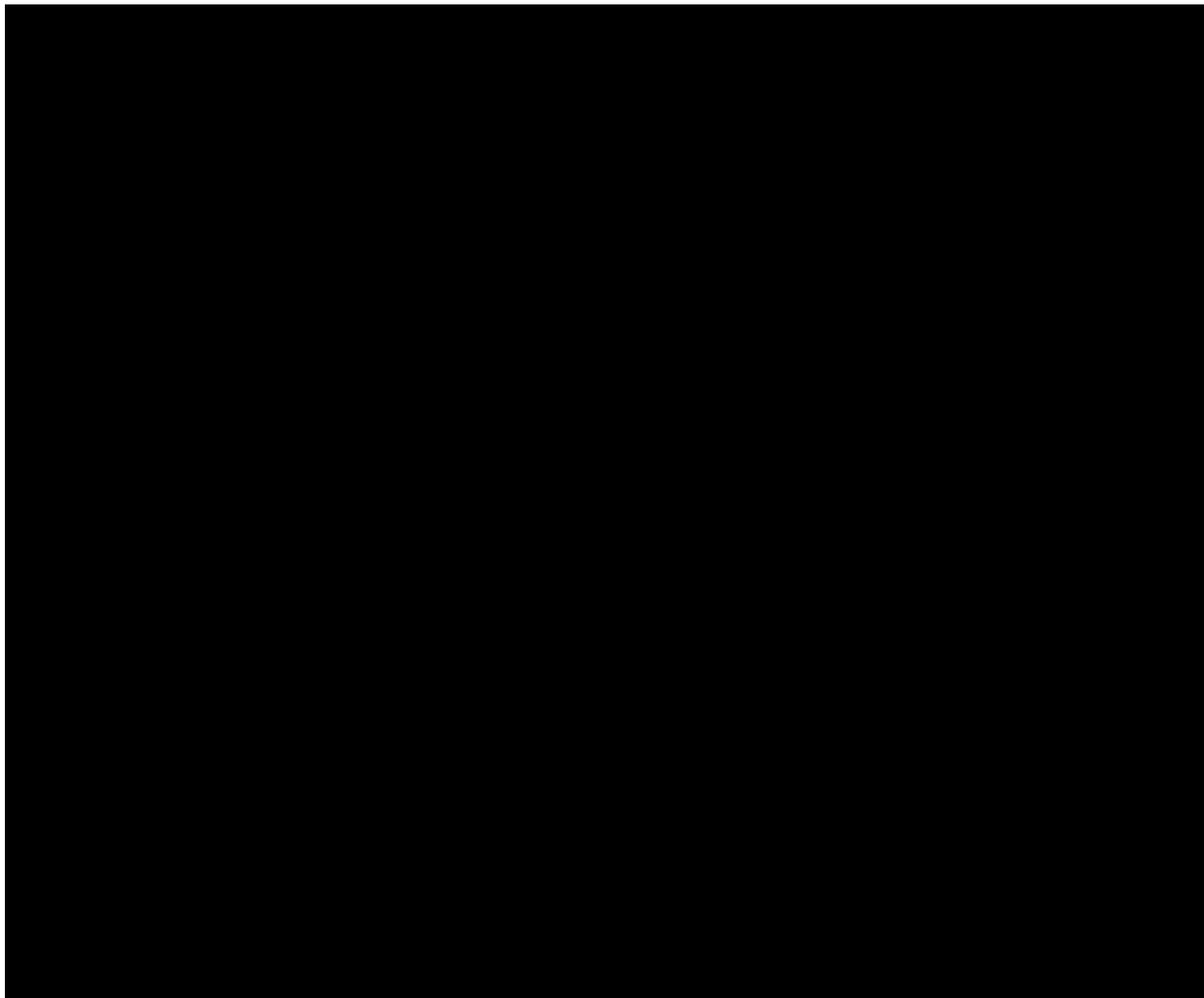
[REDACTED]

[REDACTED], and
photographs [REDACTED]

49. Towards the end of P-0641's interview, the investigators showed him some additional videos without sound and photographs.

50. [REDACTED]

[REDACTED]



51. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

52. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

53. [REDACTED]

54. [REDACTED]

55. [REDACTED]

56. [REDACTED]

57. [REDACTED]

B - Witness P-0641's prior recorded testimony should be introduced into evidence pursuant to rule 68(3)

The material listed in sections I and II of Annex A is relevant

58. The material listed in sections I and II of Annex A is relevant to the issues in this case. It relates to, *inter alia*: (i) the situation in Timbuktu under the control of the armed groups in 2012-2013 ("Groups"), (ii) the restrictions imposed on the population by the Groups, (iii) the role of the Islamic police, the *Hesbah* and the Islamic Tribunal and of the members belonging to these organs, including AL HASSAN, (iv) the crimes taking place during the occupation by the Groups and the key members of the armed groups involved in these crimes. P-0641's evidence is relevant to the charges of torture both as a crime against humanity and war crime (counts 1 and 3), other inhumane acts as a crime against humanity (count 2), cruel treatment as a war crime (count 4), outrages upon personal dignity as a war crime (count 5), passing of sentences as a war crime (count 6), attack against protected monuments as a war crime (count 7), forced marriage as other inhumane acts as a

28 [REDACTED]

crime against humanity (count 8), sexual slavery both as a crime against humanity and war crime (counts 9 and 10), rape both as a crime against humanity and war crime (counts 11 and 12) and persecution as a crime against humanity (count 13).

59. It is also relevant to the contextual elements of the crimes as well as to identifying a number of different locations where crimes were committed. P-0641's statement may assist the Chamber in its determination of the truth in this case.

The material listed in sections I and II of Annex A is probative and reliable

60. The material that the Prosecution seeks to introduce pursuant to rule 68(3) is probative and reliable. Witness P-0641 provided his witness statement voluntarily and in compliance with the requirements of rule 111 of the Rules. He explained the material associated to his prior recorded testimony from his perspective [REDACTED] [REDACTED] present in the city during the relevant time of the charges.

[REDACTED]. Furthermore, he witnessed in person some of the crimes committed by the Groups.

The introduction of Witness P-0641's material under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused

61. When he appears before the Chamber, P-0641 will be asked to confirm the accuracy of his statement and annexes thereto and whether he consents to the submission of his statement and associated material, in accordance with rule 68(3) of the Rules.

62. The Parties, the Legal Representatives of the Victims if applicable, and the Chamber will have the opportunity to examine this witness during the proceedings. Therefore, the introduction of Witness P-0641's material under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

C - Supplementary examination

63. Should Witness P-0641'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 proceedings²⁹ and the prior jurisprudence of this Court.³⁰

64. The Prosecution would first elicit further focussed, limited *viva voce* evidence of certain issues, including clarifications on the basis of his knowledge of topics covered in his statement and other discrete aspects arising out of those.

65. 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.

66. The Prosecution intends to complete the process of submission of Witness P-0641's material as well as its supplementary examination within about one hour. 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 or possibly more³¹ because of the facts included in his statement and the time-consuming nature of seeking to submit the photographs and videos or excerpts thereof as identified. Granting this Request would enhance the expeditiousness of the proceedings by reducing the length of P-0641's examination-in-chief by 80%.

D - Proposed procedure for the introduction of prior recorded testimony

²⁹ ICC-01/12-01/18-789-AnxA, para.65.

³⁰ 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.

³¹ The Prosecution notes that P-0641 requires [REDACTED] which may increase the time needed.

67. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0641's prior recorded testimony as he will be asked to confirm its accuracy and to provide any corrections or amendments.

68. During witness preparation, the Prosecution will ask Witness P-0641, *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.³² 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.³³

69. When Witness P-0641 appears in court, the Prosecution will seek to elicit any clarifications noted by the witness during witness preparation.³⁴ 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.

70. After tendering his prior recorded testimony into evidence, with any changes or clarifications noted on the record, the Prosecution will conduct a succinct supplementary examination of Witness P-0641 as outlined above (see paragraphs 6 and 63-66 *supra*).

IV Regulation 35(2) Request

71. The Prosecution seeks to add to its List of Evidence the transcripts and translations of the two videos³⁵ annexed to P-0641's statement.

72. In preparation of this application, the Prosecution discovered that the transcript and translation for the two videos annexed to P-0641's statement had not been

³² ICC-01/12-01/18-666-Anx, para.18-19.

³³ ICC-01/12-01/18-666-Anx, para.12-15.

³⁴ ICC-01/12-01/18-666-Anx, para. 50.

³⁵ [REDACTED].

completed. These four items³⁶ were urgently prepared and promptly disclosed in Trial INCRIM package 103 on 26 November 2020.

73. The original videos themselves to which these transcripts and translations relate, are already on the Prosecution's List of Evidence and were disclosed in Pre-Trial INCRIM Package 46 on 16 January 2020.

74. Given the limited number and volume of these items, there is no prejudice caused to the Defence. The four items in question are not voluminous: the translations and transcriptions are 1-2 pages each so that there is sufficient time to review them in advance of the witness's testimony.

75. The Prosecution submits that granting the late addition sought is in the interest of justice and determination of the truth and further recalls the Chamber's decision of 27 October 2020 at 13:24 and reiterated in the Chamber's decision of 23 November 2020 at 11:22 where the Chamber stated that: "transcripts and translations are to be regarded as accessories of the items included in the List of Evidence, and ultimately for the benefit of the Defence and those in court, including to avoid the need for evidence to be read and/or interpreted live. Accordingly, the Chamber considers the late addition to be in the interest of justice and determination of the truth, and that no prejudice arises to the Defence".

V Conclusion

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



Fatou Bensouda, Prosecutor

Dated this 29 November 2020
At The Hague, The Netherlands

³⁶ _____