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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 Annex A

Public redacted version of “Prosecution application to admit Witness MLI-OTP-P-0102’s reports and associated material, and regulation 35 request”, ICC-01/12-01/18-850-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. Witness P-0102 was tasked to carry out forensic missions for the Prosecution, whether as an expert in relation to ballistics, or as a technician in relation to his [REDACTED] and audio enhancement work. The Prosecution submits that he possesses sufficient qualifications and expertise in ballistics to testify as an expert, and can testify as a fact witness in relation to his [REDACTED] and audio enhancement work.

2. The Prosecution requests Trial Chamber X's¹ authorisation to call Witness P-0102 as a ballistics expert and, pursuant to articles 64(9), 69(2)-(4)² and rules 63(2) and rule 68(3)³, to introduce into evidence his expert report on ballistics⁴ and his reports on [REDACTED]⁵ and their associated materials, and materials relevant to P-0102's video analysis and audio enhancement work ("Request").

3. P-0102's Ballistics Expert Report properly falls within the scope of expert testimony and can assist the Chamber in understanding technical issues in dispute. The Ballistics Expert Report, the [REDACTED] Reports and the materials relevant to P-0102's video analysis and audio enhancement work are relevant to material issues in dispute in the case: namely, [REDACTED] which in turn relate to the Accused's individual criminal responsibility.

4. The admission of this evidence will enhance the expeditiousness of the proceedings by reducing the length of P-0102's in-court testimony. Should this application be granted, the Prosecution intends to conduct a streamlined examination of P-0102, covering also other aspects of his evidence.⁶

¹ "Chamber".

² Rome Statute ("Statute").

³ Rules of Procedure and Evidence ("Rules").

⁴ "Ballistics Expert Report".

⁵ "[REDACTED] Reports".

⁶ Such as the [REDACTED].

5. The Prosecution seeks an extension of time to amend the list of incriminatory evidence to include two items which are referred to in the expert report of P-0102 but had not been disclosed previously due to an oversight.

Confidentiality

6. 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 this 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

Request to hear Witness P-0102 as an expert on ballistics

7. The Prosecution requests that the Chamber hear witness P-0102 as an expert witness.

8. Pursuant to article 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;⁷ (ii) the proposed witness is an expert,⁸ giving due consideration to whether the person is included in the Registry's list of experts;⁹ 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.¹⁰

⁷ ICC-01/04-01/06-1069, para. 25; ICC-01/05-01/08-2273, para. 8; ICC-01/09-01/11-844, para. 12.

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

⁹ 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.

¹⁰ ICC-01/09-01/11-844, para. 12.

9. [REDACTED]

[REDACTED]¹¹ [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹² [REDACTED]

[REDACTED]¹³

10. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11. [REDACTED]

[REDACTED]

¹¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁴ [REDACTED] [REDACTED]
 [REDACTED]
 [REDACTED].

Witness P-0102's testimony as a fact witness

12. Witness P-0102 [REDACTED]
 [REDACTED]: [REDACTED]
 [REDACTED] relevant to the charges in the *Al Mahdi* case and [REDACTED]
 [REDACTED] of
 interest for the *Al Hassan* case [REDACTED].¹⁵ He produced reports detailing
 his work.

13. The first of the two [REDACTED] Reports focused on the [REDACTED]
 [REDACTED]
 relevant for the *Al Hassan* case. The second [REDACTED] Report concerned other [REDACTED]
 [REDACTED] for the *Al Hassan* case [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

14. He further provided technical assistance on two separate occasions in relation
 to the audio enhancement of videos of interest to the *Al Hassan* case.

15. His testimony is relevant to the crimes of destruction of protected object as well
 as to the [REDACTED] organs established by the Groups [REDACTED]
 [REDACTED]

16. The materials he collected during [REDACTED]
 [REDACTED]

¹⁴ [REDACTED]
¹⁵ [REDACTED].

where the individual does not object, and the Parties²¹ 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,²² even absent a request from the calling party.²³ The Prosecution nonetheless notes that this is primarily a *mutatis mutandis* approach, since a 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 reports, the Chamber may admit the reports pursuant to its general powers under article 69 of the Statute.

20. 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 that are available to the calling party and, without which, the passages would not be understandable.²⁴

21. The Prosecution seeks to introduce, in full, the Ballistics Expert Report, the ■■■ Reports and the materials relevant to P-0102's video analysis and audio enhancement work referred to above as well as in Annex A.

22. As explained above, this material is relevant, probative and reliable. P-0102 will be asked to attest to the authenticity and accuracy of his reports at the beginning of his testimony²⁵ and to confirm his availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber. P-0102 will be asked whether he consents to the introduction into evidence of his materials. The

²¹ 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”.

²² ICC-01/04-02/06-845, ICC-01/04-02/06-T-31-CONF-ENG, p.75, ll.7-16.

²³ ICC-01/04-02/06-T-87-ENG CT, pp. 3-4, ICC-01/04-02/06-T-113-Red-ENG WT, p.27, l. 17 - p.28, l. 6.

²⁴ 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.

²⁵ ICC-01/12-01/18-789-AnxA, para.65.

introduction of P-0102's materials is not prejudicial to the rights of the Accused and would enhance the expeditiousness of the proceedings by reducing the length of his in-court testimony.

23. Listed in sections I and II of Annex A to this application are the materials which the Prosecution seeks to introduce into evidence, stating that the Prosecution intends to introduce them into evidence in full.²⁶ The reports and [REDACTED] associated documents as listed in the annex as follows:

- Section I of the Annex lists P-0102's reports while Section II lists the materials associated with the reports, as well as the materials relevant to P-0102's video analysis and audio enhancement work. These associated materials include [REDACTED]
[REDACTED] and/or analysed as part of his technical work of video analysis and audio enhancement²⁷ or his expert work in ballistics. They also include letters of instructions related to his expert and technician work as well as the annexes to his reports.
- Section III of Annex A lists materials necessary to understand P-0102's reports, but which the Prosecution does not seek to introduce into evidence but which will be introduced through other witnesses.

Supplementary examination

24. Should Witness P-0102's materials be introduced into evidence as proposed, the Prosecution requests leave to conduct a supplementary examination. The Prosecution would first question the witness on the formalities associated with the introduction of the reports and associated exhibits, and then focus on eliciting further details on the methodology he used in preparing his reports, as well as other

²⁶ The Prosecution seeks to introduce the videos into evidence without sound.

²⁷ The materials relevant to P-0102's video analysis and audio enhancement are listed in sections II(B)(ii) and (iii) of Annex A.

aspects of his work including his ballistic report [REDACTED]

25. Based on past practice, the Prosecution estimates that it will require in total fourfive hours for the examination-in-chief of P-0102: namely, approximately thirty to forty-five minutes for the formalities associated with the introduction of his materialsthe witness's report and associated exhibits, and an additional three hours and 15 minutes to conduct a streamlined supplementary examination to elicit his methodology and further focussed, limited *viva voce* evidence of certain issues, [REDACTED] at the time of the events and the state of the mausoleums destroyed by the Groups in 2012, which require clarification,, as well as other matters dealt with by P-0102 [REDACTED] at the time of the events, P-0102's methodology, and [REDACTED].²⁸ Eliciting further information on these topics is important for the Prosecution's case against the Accused. The introduction of P-0102's evidence would reduce the length of his examination-in-chief by one hour (the estimate of five hours in the witness summary was based on the assumption that part of his evidence could be tendered under rule 68(3) with the Chamber's approval; the Prosecution herewith further tries to reduce the witness testimony by 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 because of the time-consuming nature of seeking to introduce the videos and photographs as identified.

Proposed procedure for the introduction of P-0102's materials

²⁸ See P-0102's witness summary in ICC-01/12-01/18-740-Con-AnxB.

26. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0102's reports, as he will be asked to confirm their accuracy and to provide corrections or amendments, if any.

27. During witness preparation, the Prosecution will ask Witness P-0102, *inter alia*, to review his reports, advise of any corrections or clarifications he wishes to make to them, and then to confirm their accuracy.²⁹ 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.³⁰

28. When Witness P-0102 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.³¹ The Prosecution will then ask the witness whether he has any further changes or clarifications to make to his reports and to confirm his consent to be questioned by the Parties and the Chamber.

29. In terms of further procedure, after tendering his reports into evidence, with any changes or clarifications noted on the record, the Prosecution will then conduct the supplementary examination requested.

Request to allow amendment of the list of evidence, under regulation 35 of the Regulations, with two items referred to by Witness P- 0102

30. The Prosecution further seeks authorisation, pursuant to regulation 35 of the Regulations, to amend its list of incriminatory evidence by adding two items. More specifically, these documents are:

²⁹ ICC-01/12-01/18-666-Anx, para.18-19.

³⁰ ICC-01/12-01/18-666-Anx, para.12-15, 31.

³¹ ICC-01/12-01/18-666-Anx, para. 50.

- [REDACTED] this item is a CD-Rom containing a video that has already been disclosed to the Defence³² and upon which witness P-0102 based his analysis for his Ballistics Expert Report;
- [REDACTED] this item is a video [REDACTED]
[REDACTED] Similar footage [REDACTED]
[REDACTED] was already disclosed to the Defence.³³

31. The Prosecution recalls that a Chamber may extend a time limit under regulation 35(2) of the Regulations “if good cause is shown”,³⁴ or where it is in the “interests of justice”³⁵ to do so. Moreover, where conditions of regulation 35(2) are not met, the Chamber may authorise the late addition of incriminating evidence pursuant to its powers under articles 64(6)(d) and 69(3) of the Statute to allow admission of the evidence that it deems necessary for the determination of the truth.³⁶

32. In this instance, it is in the interests of justice and determination of the truth that late disclosure of this material and its addition to the Prosecution list of evidence be allowed. The disclosure of these items is *inter alia* necessary to give a comprehensive overview of the history of the collection and processing of material which were relied upon in this case. There is no undue prejudice to the Defence. The material in question are only, for the first item, the container of a video previously disclosed to the Defence and, for the second item, a video which is part of a series of videos

³² This CD relates to video [REDACTED].

See e.g. [REDACTED]

ICC-01/04-01/06-834, para.7.

³⁵ See ICC-01/04-01/10-505, para.11.

³⁶ ICC-01/04-01/07-2325, para.15. In *Prosecutor v Katanga*, where the Prosecution requested disclosure much later in the proceedings, Trial Chamber II still found that there was a basis to allow for the admission of the evidence.

disclosed to the Defence. They are, for a large part, relied upon by the Prosecution in its Document containing the charges and Trial Brief.

Conclusion

33. Witnesses P-0102 is an expert in ballistics, a subject matter to which his proposed testimony relates [REDACTED]. The content of his reports falls within the scope of his expertise and his proposed testimony may assist the Chamber. Granting the Request (and the regulation 35 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 P-0102's examination-in-chief as set out above.

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



Fatou Bensouda, Prosecutor

Dated this 1 June 2020

At The Hague, The Netherlands