

**Cour  
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**International  
Criminal  
Court**



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No.: **ICC-01/12-01/18**

Date: **1 June 2020**

Date of Submission: **10 June 2020**

**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 admit  
Witness MLI-OTP-P-0065’s prior recorded testimony and associated materials”,  
ICC-01/12-01/18-844-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) of the Rules of Procedure and Evidence<sup>1</sup>, the Prosecution requests that Trial Chamber VI (“Chamber”):

- (i) admit into evidence [REDACTED] statements of Witness P-0065 and [REDACTED] related annexes;
- (ii) admit into evidence materials provided by Witness P-0065 [REDACTED]  
[REDACTED]  
[REDACTED] that are relevant to the case against the Accused and on which he commented in his statements;
- (iii) grant the Prosecution leave to conduct a supplementary examination of Witness P-0065.

2. The Prosecution seeks to admit [REDACTED]<sup>2</sup> and also seeks admission, pursuant to articles 64(9), 69(2), (3) and (4) of the Rome Statute (“Statute”) and rule 63(2) of the Rules, of the [REDACTED]

[REDACTED] The Prosecution indicates that

[REDACTED] The Prosecution points out that in some instances

[REDACTED] (i) either because there was [REDACTED]

(ii) despite its best efforts the Prosecution was unable to secure [REDACTED]

3. [REDACTED]

[REDACTED]

[REDACTED]

<sup>1</sup> Rules of Procedure and Evidence (“Rules”).

<sup>2</sup> [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. [REDACTED]

[REDACTED]

[REDACTED]

6. [REDACTED]

[REDACTED]

[REDACTED]

7. Witness P-0065 will testify [REDACTED]

[REDACTED] He will be asked to attest to the accuracy of his prior recorded testimony at the beginning of his testimony against the Accused<sup>3</sup> and to confirm his availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber.

8. Based on past practice, the Prosecution estimates that it will require in total [REDACTED] hours and 45 minutes for the examination-in-chief of P-0065: namely, approximately thirty to forty-five minutes for the formalities associated with the admission of the

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<sup>3</sup> ICC-01/12-01/18-789-AnxA, para.65.

witness's prior recorded testimony and associated exhibits,<sup>4</sup> and an additional [REDACTED] hours to conduct a supplementary examination to elicit further focussed, limited *viva voce* evidence of certain issues, including [REDACTED]

[REDACTED] which was only briefly addressed in his prior recorded testimony. Eliciting further information on these topics is important for the Prosecution's case against the Accused. The Prosecution also intends to question Witness P-0065 about [REDACTED]

9. Granting the application 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-0065's examination-in-chief by approximately 6 hours and 15 minutes<sup>5</sup>.

### **Confidentiality**

10. Pursuant to regulation 23bis(1) of the Regulations of the Court, the Prosecution files this submission and its accompanying annexe as confidential because they relate to *inter partes* proceedings and because they contain confidential information including information regarding a Prosecution witness, in addition to referring to filings classified as confidential. The Prosecution will 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 the Chamber

<sup>4</sup> 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.29 below.

<sup>5</sup> See ICC-01/12-01/18-740-Con-AnxB.

where he/she does not object to the submission, and the Parties<sup>6</sup> and Chamber have the opportunity to examine the witness.

12. Witness P-0065 provided [REDACTED] statements to the Prosecution respectively in [REDACTED] The Prosecution identified Witness P-0065 as an appropriate witness for the procedure under rule 68(3) of the Rules.<sup>7</sup>

13. The prior recorded testimony and associated material which the Prosecution seeks to admit pursuant to rule 68(3) relates, *inter alia*, to: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14. The Prosecution does not seek to admit through this application any material that is directly related to the role, or the acts and conduct of the Accused. While acknowledging that other Chambers of this Court have previously rejected rule 68(3) applications which sought to exclude portions of prior recorded testimony that pertained to the acts and conduct of the accused and opinion evidence related to the accused<sup>8</sup> (as well as applications that included such evidence from a witness who was central to the case<sup>9</sup>), the appropriateness of the approach must be judged on a case-by-case basis.<sup>10</sup> In this case, not seeking admission of such materials does not affect the overall credibility and consistency of the witness statements. Indeed, P-0065 [REDACTED]

<sup>6</sup> 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”.

<sup>7</sup> In accordance with ICC-01/12-01/18-789-AnxA, para. 62, the Prosecution provided the Prosecution List of Witnesses 15 April 2020, in which it indicated its intention to apply for the admission of Witness P-0065’s prior recorded testimony under rule 68(3) of the Rules.

<sup>8</sup> ICC-02/11-01/15-870, para. 14; ICC-02/11-01/15-950-Red, para. 80.

<sup>9</sup> ICC-01/04-02/06-961, para. 10-12.

<sup>10</sup> ICC-01/04-02/06-961, para. 10.

the majority of which is not sought for admission for that very reason.

15. In its Decision on the conduct of proceedings, the Chamber ordered the Prosecution to file motivated applications together with copies of the previously recorded testimony, identifying precisely the passages it wishes to tender into evidence and other materials referred to in these passages, without which, the passages would not be understandable.<sup>11</sup>

16. As set out in section I of Annex A to this filing, the Prosecution seeks to introduce [REDACTED] paragraphs of Witness P-0065's [REDACTED] witness statements, and [REDACTED] annexes thereto in full. The Prosecution does not seek to introduce under rule 68(3) the remainder of these witness statements or the other annexes thereto.

17. Section II of Annex A lists the associated evidence, shown to and explained by Witness P-0065 in his witness statements, which the Prosecution seeks to introduce under rule 68(3) and are relevant to the case against the Accused:

- [REDACTED] (section II(A));
- [REDACTED] (section II(B));
- [REDACTED] (section II(C));
- [REDACTED] (section II(D));
- [REDACTED] (section II(E)).

18. The far-right column of Section II of Annex A includes brief summaries of these materials, their content, and their relevance to this case.

<sup>11</sup> ICC-01/12-01/18-789-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 of 28 May 2020 13:38.

19. 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.”<sup>12</sup> [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>13</sup> This is evidenced by [REDACTED]

[REDACTED]<sup>14</sup> [REDACTED]  
[REDACTED]

20. Section III of Annex A refers to [REDACTED] that the Prosecution believes are necessary for a complete understanding of this witness’s prior recorded testimony.<sup>15</sup> These [REDACTED] can be divided into two categories. The first category of items, listed in section III(A) and for which the Prosecution seeks admission, concern Witness P-0065’s [REDACTED] on which he commented in his first statement. The second category of items, listed in section III(B), and for which the Prosecution does not seek admission are investigation notes related to the conduct of the interview of Witness P-0065.

### **Brief descriptions of the associated material**

21. The Prosecution seeks to introduced into evidence through this witness: (i) [REDACTED]  
[REDACTED]<sup>16</sup> (ii) [REDACTED]  
[REDACTED]; (iii) [REDACTED]; (iv) [REDACTED]  
[REDACTED] (v) [REDACTED]  
[REDACTED]

<sup>12</sup> 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.

<sup>13</sup> [REDACTED]

<sup>14</sup> [REDACTED]

<sup>15</sup> See ICC-01/12-01/18-789-AnxA, para. 59.

<sup>16</sup> [REDACTED]

22. The Prosecution summarises the content of these materials in Annex A, and explains their relevance in the Annex.

*Witness P-0065's prior recorded testimony should be admitted pursuant to rule 68(3)*

23. The prior recorded testimony and associated material set out in sections I and II of Annex A are relevant to establishing a number of crimes which the Accused has been charged with, in particular persecution and torture. They are also relevant in relation to a number of elements of the modes of liability through which the Accused has been charged for those and other crimes and the contextual elements of the crimes.

24. The material that the Prosecution seeks to admit is probative and reliable. Witness P-0065 provided his witness statements voluntarily and in accordance with the requisite formalities of rule 111 of the Rules.<sup>17</sup> They are essentially based on

[REDACTED]

[REDACTED]

[REDACTED] He will be asked to confirm the accuracy of his testimony when he appears before the Chamber.<sup>18</sup> As such, the Parties, the Legal Representatives 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-0065's prior recorded testimony is not prejudicial to or inconsistent with the rights of the Accused.

<sup>17</sup> Trial Chamber VI admitted witness statements pursuant to rule 68(3) of the Rules, see e.g. ICC-01/04-02/06-T-106-Red-ENG WT, p.90, l.12 – p.91, l.1 (open session); ICC-01/04-02/06-T-108-Red-ENG WT p.96, l.21 – p.101, l.5 (open session). Other Chambers have also considered that witness statements may constitute prior recorded testimony, see e.g. ICC-01/04-01/06-1603, para.18-19; ICC-01/09-01/11-1938-Corr-Red2, para.33.

<sup>18</sup> ICC-01/12-01/18-789-AnxA, para.65.

### *Supplementary examination*

25. Should Witness P-0065's prior recorded testimony and associated material be admitted into evidence, the Prosecution requests leave to conduct a streamlined supplementary examination in accordance with rule 68(3) of the Rules and in line with the Decision on the conduct of proceedings<sup>19</sup> and the prior jurisprudence of this Court.<sup>20</sup>

26. The Prosecution would first elicit, *viva voce*, including through [REDACTED] during his prior recorded testimony, further details in relation to certain issues which were only referred to during Witness P-0065's prior recorded testimony, including (i) [REDACTED]  
[REDACTED]  
[REDACTED] (ii) [REDACTED]  
[REDACTED] and (iii) [REDACTED]  
[REDACTED]

27. 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.

28. The Prosecution intends to complete the process of admission of Witness P-0065's material as well as its supplementary examination within approximately [REDACTED] hours 45 minutes. Should the Chamber reject this application in whole or in part, the Prosecution may require up to the [REDACTED] hours originally estimated for this witness'

<sup>19</sup> ICC-01/12-01/18-789-AnxA, para.65

<sup>20</sup> 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.

examination-in-chief<sup>21</sup> because *inter alia* [REDACTED]  
[REDACTED]

### **Proposed procedure for the introduction of prior recorded testimony**

29. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0065's prior testimony as he will be asked to confirm its accuracy and to provide corrections or amendments, if any.

30. During witness preparation, the Prosecution will ask Witness P-0065, *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.<sup>22</sup> 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.<sup>23</sup>

31. When Witness P-0065 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.<sup>24</sup> 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.

32. In order to save time, the Prosecution should not be required, for the purposes of admission, [REDACTED] which it seeks to admit through this Request, [REDACTED]. [REDACTED]

[REDACTED] and the Defence and the Chamber will be able to question him further in relation to them. [REDACTED]

[REDACTED] which it seeks to

<sup>21</sup> ICC-01/12-01/18-Conf-AnxB.

<sup>22</sup> ICC-01/12-01/18-666-Anx, para.18-19.

<sup>23</sup> ICC-01/12-01/18-666-Anx, para.12-15.

<sup>24</sup> ICC-01/12-01/18-666-Anx, para. 50.

admit pursuant to rule 68(3) in order for him to [REDACTED] that process would be extremely time consuming. Should such an exercise be required, the Prosecution would still seek additional time for its supplementary examination and ask to extend the witness's examination-in-chief accordingly due to the necessity to tender [REDACTED] relevant material [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

33. 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 focused supplementary examination of Witness P-0065 as outlined above, including on the acts and conduct of the Accused.

[REDACTED]

34. The Prosecution seeks to admit all [REDACTED] [REDACTED] pursuant to articles 64(9), 69(2) (3) and (4) of the Statute and rule 63(2) of the Rules. The relevant references to the [REDACTED] which the Prosecution seeks to admit are set out in Annex A under Section IV.

### Conclusion

35. 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