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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 introduce MLI-OTP-P-0055 and MLI-OTP-P-0057’s reports and associated material into evidence”, ICC-01/12-01/18-849-Conf, 1 June 2020

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

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1. Pursuant to articles 64(9), 69(2)-(4)¹ and rules 63(2) and 68(3),² the Prosecution requests Trial Chamber X's³ authorisation to introduce into evidence, at the beginning of P-0055 and P-0057's testimony, five reports on a forensic mission conducted in Timbuktu [REDACTED].

2. [REDACTED]
[REDACTED]
[REDACTED]⁴ [REDACTED]
[REDACTED]. [REDACTED]
[REDACTED].

3. P-0055 and P-0057 visited locations of interest to the Prosecution's investigation in Tumbuktu, including various mausoleums and monuments destroyed or damaged during the occupation of Timbuktu; [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

4. Depending on the location, the reports –all authored by P-0055, three co-authored with P-0057– describe the layout of the locations and provide details of their physical conditions; document the photographing and collection of documents and objects; and explain the chain-of-custody and processing of the evidence after the mission.

5. The Prosecution also seeks to introduce into evidence the materials associated with the reports, comprised of letters of instruction,⁵ photographs taken by P-0055 and P-0057 during the mission, objects obtained from [REDACTED]

¹ Rome Statute ("Statute").

² Rules of Procedure and Evidence ("Rules").

³ "Chamber".

⁴ [REDACTED]

⁵ These letters are reproduced or identified in P-0055's reports.

[REDACTED]
[REDACTED], a map indicating the location of the sites visited during the mission, a sketch P-0057 prepared [REDACTED], and evidence bags relevant to the chain of custody of documents collected [REDACTED] during the mission.⁶

6. The reports and associated material are primarily relevant to the charge against AL HASSAN of attack against protected monuments (count 7) and persecution (count 13). P-0055 and P-0057's documentation of the physical environment in which [REDACTED] operated will provide important context for the testimonies of subsequent witnesses, [REDACTED]
[REDACTED]

[REDACTED]. The numerous photographs of the various mausoleums and monuments which were destroyed or damaged during the occupation of Timbuktu are directly relevant to count 7 relating to attack against protected monuments.

7. Witnesses P-0055 and P-0057 will testify [REDACTED]
[REDACTED] They will be asked to attest to the accuracy of the reports at the beginning of their testimony against the Accused and to confirm their 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 2.5 hours for the examination-in-chief of P-0055: namely, approximately thirty to forty-five minutes for the formalities associated with the admission of a witness's materials, and additional 1.75 hours to conduct a streamlined supplementary examination to elicit details of the processing, after the mission, of the documents

⁶ These documents will be subsequently introduced into evidence through other witnesses.

[REDACTED] P-0055 will discuss how the documents, stored in evidence bags upon collection, were repackaged into additional evidence bags⁷ (which, in turn, were later processed [REDACTED]). P-0055 will also provide additional comments on his reports.

9. As regards P-0057, the Prosecution estimates that it will require one to 1.5 hours for his examination-in-chief: namely, approximately thirty to forty-five minutes to address the formalities associated with the admission of a witness's prior recorded testimony and associated exhibits and additional thirty to forty-five minutes to conduct a streamlined supplementary examination within which he can comment on the reports.

10. Granting this request would not be prejudicial to or inconsistent with the rights of the Accused and it would enhance the expeditiousness of the proceedings by reducing the length of Witness P-0055's examination-in-chief by two hours and Witness P-0057's examination-in-chief by one to 1.5 hours.

Confidentiality

11. 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 identifying information regarding these Prosecution witnesses. The Prosecution shall file a public redacted version in due course.

Prosecution's Submissions

12. The Prosecution requests authorisation to introduce P-0055 and P-0057's reports and associated material through the same procedure used in the *Ntaganda* and

⁷ [REDACTED].

Ongwen cases to introduce expert reports, namely pursuant to rule 68(3),⁸ where it was used even absent a request from the calling party.⁹ Rule 68(3) provides that the Chamber may allow the introduction of the previously recorded testimony of a witness who is present before it where the individual does not object to the submission, and the Parties¹⁰ and Chamber have the opportunity to examine the witness. The Prosecution nonetheless notes that this is primarily a *mutatis mutandis* approach, since a report is not testimonial in nature, and in this sense, 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 P-0055 and P-0057's reports, the Chamber may admit them pursuant to its general powers under article 69 of the Statute.

13. The Prosecution identified Witnesses P-0055 and P-0057 as appropriate witnesses for the procedure under rule 68(3) of the Rules.¹¹

14. The material which the Prosecution seeks to introduce into evidence comprises five forensic reports that P-0055 either prepared in their entirety or co-authored with other P-0057 (with one report having [REDACTED] as a third co-author):

- Report 1, [REDACTED]
[REDACTED] ;
- Report 2: [REDACTED]
[REDACTED] ;
- Report 3, [REDACTED]

⁸ ICC-01/04-02/06-845, ICC-01/04-02/06-T-31-CONF-ENG, p.75, l.7-16.

⁹ 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, l. 6.

¹⁰ 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".

¹¹ 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.

- Report 4, [REDACTED]
[REDACTED]
[REDACTED]; and

- Report 5, [REDACTED]
[REDACTED].

15. Annex A to this filing lists the five forensic reports, the photographs contained in the reports, and their annexes.

16. In Report 1 [REDACTED], P-0055 and P-0057 describe the mission [REDACTED] in Timbuktu (conditions and difficulties), the methodology used, how the photographs were taken and stored (their chain of custody) and their findings at the sites. P-0055 also describes the chain of custody of evidence bags in which items taken were placed. This report can be introduced through either P-0055 or P-0057, whichever testifies first.

17. Report 2 [REDACTED] relates to P-0055's visit to [REDACTED]
[REDACTED]. The report describes [REDACTED] location in relation to the rest [REDACTED]
[REDACTED]. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. The Prosecution seeks to introduce this report through P-0055.

18. Report 3 [REDACTED] describes the mission in Timbuktu (conditions and difficulties), the methodology used, how the photographs were taken and stored

(their chain of custody) and P-0055 and P-0057's observations on the sites. ■

[REDACTED] This report can be introduced through either P-0055 or P-0057, whichever testifies first.

19. Report 4 [REDACTED] provides answers to questions sent in the mission letter [REDACTED] and provides a photo album of [REDACTED] [REDACTED] situating the image on the photograph on a site sketch and indicating the viewing angle. This report can be introduced through either P-0055 or P-0057, whichever testifies first.

20. Report 5 [REDACTED] describes how sealed bags [REDACTED] [REDACTED] were unsealed, the material therein regrouped by sets of items, re-packed in new evidence bags, and re-sealed. The whole process was photographed. P-0055 was assisted by [REDACTED] The report contains an inventory of the ERNs of the new evidence bags,¹² with a description of the items contained in them and linking them to the corresponding original evidence bags [REDACTED] [REDACTED] The Prosecution seeks to introduce this report through P-0055.

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21. Section II of Annex A lists material associated with four of the reports, which the Prosecution also seeks to introduce into evidence:

- In relation to Report 1, the associated materials (to be introduced through P-0055 or P-0057) consist of the relevant letter of instructions, evidence bags, photographs, a chisel and cylinder P-0055 found close to [REDACTED] [REDACTED], and objects which appear to be [REDACTED] that P-0055 obtained [REDACTED] during his visit (to be introduced through P-0055), the [REDACTED] authorisation [REDACTED] for the [REDACTED] [REDACTED] to be forcibly opened and the map entitled [REDACTED] which plots all the locations in Timbuktu P-0055 visited during his mission and documented in the forensic reports;
- The materials associated with Report 3 (to be introduced through P-0055 or P-0057) are photographs taken by P-0055 and P-0057 at the various sites visited but which were not reproduced or annexed to the report itself, the relevant letter of instructions, a sketch [REDACTED] [REDACTED], and evidence bags;
- As regards Report 4, the associated materials (to be introduced through P-0055 or P-0057) comprise of the corresponding letter of instructions, and sections of Report 4 referred to as 'annexes', and which include: a map of the places visited, photographs embedded in the report which were used to respond to questions in the letter of instructions and photographs taken [REDACTED] [REDACTED];
- The materials associated with Report 5 (to be introduced through P-0055) are the CD listed as an annex to Report 5 which contains [REDACTED] report, and evidence bags involved in that forensic exercise, by which certain pieces of evidence were taken out of sealed evidence bags containing several items, were then re-sealed, and the various items obtained during the forensic

mission were then placed in new evidence bags, reducing the number of items contained in each evidence bag. This report meticulously documents this exercise for chain of custody purposes. Two letters of instructions are also associated with this report, one of them the Prosecution's letter of instruction to P-0055, and the other a letter by which P-0055 authorises [REDACTED] to assist him in this forensic exercise. The Prosecution will seek to introduce [REDACTED] report through P-0055, as it is annexed to Report 5. The Prosecution, however, will alternatively also seek to introduce [REDACTED] through that witness under rule 68(2)(b).

The reports of Witnesses P-0055 and P-0057 and associated material should be introduced into evidence

22. The reports and associated material set out in sections I and II of Annex A are relevant to establishing the crimes which the Accused has been charged with, in particular, counts 7 and 13. They are also relevant to the locations of many of the crimes charged [REDACTED]

[REDACTED]

23. The material that the Prosecution seeks to introduce into evidence is probative and reliable. Witnesses P-0055 and P-0057 acted pursuant to various letters of instruction issued by the Prosecution in the present case. [REDACTED]

[REDACTED]

24. The chisel and cylinder P-0055 found close to [REDACTED] are relevant and probative as they may have been tools [REDACTED] and therefore directly relevant to count 7 relating to attacks against protected

monuments. The [REDACTED] objects found at [REDACTED], on the other hand, help establish witnesses' accounts of the Groups' prohibition and confiscation of [REDACTED] found in Timbuktu residents' possession. This is relevant to count 13 as regards persecution on religious grounds.

25. P-0055 and P-0057 will attest to the accuracy of the photographs they took and to their observations in their reports. P-0055 will also affirm the provenance of all objects collected, including the sealed bags in which he stored and sealed, due to the security conditions, the documents for later processing. As mentioned above, the documents placed in these sealed evidence bags will be introduced through other witnesses, including those who can speak to the contents of these documents.

26. The Prosecution will introduce Reports 1, 3 and 4 and their associated materials, which are co-authored by P-0055 and P-0057, through whichever witness testifies first. Photographs taken by P-0055 and P-0057, along with a sketch drawn by P-0057, which all correspond to Report 3, however, will be introduced through the witness who took them.

27. The Parties, the participants if applicable, and the Chamber, will have the opportunity to examine the witnesses during the proceedings and they will confirm whether they consent to the introduction of their materials. Therefore, the admission of the reports and their associated material is not prejudicial to or inconsistent with the rights of the Accused.

Supplementary examination

28. Should P-0055 and P-0057's reports and associated material be introduced into evidence as proposed, 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 proceedings¹³ and the prior jurisprudence of this Court.¹⁴

29. The Prosecution would first elicit, *viva voce*, further details in relation to the issues set out above.¹⁵ The Prosecution would ensure that the witnesses are not merely asked to repeat the information already provided in their reports. This supplementary examination is necessary for the determination of the truth and to elicit further evidence specific to the *Al Hassan* case.

30. The Prosecution intends to complete the process of admission of Witness P-0055's material as well as its supplementary examination within 2.5 hours. Should the Chamber reject this request in whole or in part, the Prosecution may require up to the 4.5 hours originally estimated for this witness's examination-in-chief. In particular, P-0055's explanation regarding the sealed evidence bags he processed, resulting in the generation of additional sealed evidence bags, is expected to be rather lengthy given its technical nature.

31. The Prosecution intends to complete the process of admission of Witness P-0057's material as well as its supplementary examination within one to 1.5 hours. Should the Chamber reject this request in whole or in part, the Prosecution may require up to the 2.5 hours originally estimated for this witness's examination-in-chief.

Proposed procedure for the introduction of the reports of P-0055 and P-0057 and associated materials

32. Should this application be granted, the Prosecution submits that there will be

¹³ ICC-01/12-01/18-789-AnxA, para.65

¹⁴ 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.

¹⁵ See *supra*, para. 8 and 9.

no need to read into evidence the reports, as P-0055 and P-0057 will be asked to confirm their accuracy and to provide corrections or amendments, if any.

33. During witness preparation, the Prosecution will ask Witnesses P-0055 and P-0057, *inter alia*, to review their reports, advise of any corrections or clarifications they wish to make to it, and then to confirm their accuracy.¹⁶ 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.¹⁷

34. When Witnesses P-0055 and P-0057 appear in court, the Prosecution will seek to elicit, in principle by way of neutral questions, any clarifications noted by the witnesses during witness preparation.¹⁸ The Prosecution will then ask the witnesses whether they have any further changes or clarifications to make to their reports and to confirm their consent to be questioned by the Parties and the Chamber.

35. After tendering the reports and associated materials into evidence, with any changes or clarifications noted on the record, the Prosecution will then conduct a supplementary examination of P-0055 and P-0057 as discussed above.

Conclusion

36. For the foregoing reasons, the Prosecution asks that the Chamber authorise the introduction of the reports of Witnesses P-0055 and P-0057 and associated materials and to permit the Prosecution to conduct a supplementary examination of the two witnesses.

¹⁶ ICC-01/12-01/18-666-Anx, para.18-19.

¹⁷ ICC-01/12-01/18-666-Anx, para.12-15, 31.

¹⁸ ICC-01/12-01/18-666-Anx, para. 50.



Fatou Bensouda, Prosecutor

Dated this 1 June 2020

At The Hague, The Netherlands