

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: **31 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 into evidence Witness MLI-OTP-P-0654's prior recorded testimony and associated material", ICC-01/12-01/18-839-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:

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Counsel for the Defence

Ms Melinda Taylor

Ms Marie-Hélène Proulx

Mr Thomas Hannis

Legal Representatives of the Victims

Mr Seydou Doumbia

Mr Mayombo Kassongo

Mr Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section Other

1. Pursuant to rule 68(3) of the Rules,¹ the Prosecution requests Trial Chamber X's² authorisation to introduce into evidence: (i) [REDACTED] paragraphs from Witness P-0654's [REDACTED] witness statements and annexes thereto; and (ii) associated material comprised of one document, [REDACTED], [REDACTED], [REDACTED] and [REDACTED] which P-0654 commented on in his [REDACTED] witness statement.

2. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].³ [REDACTED]
[REDACTED]

3. P-0654's prior recorded testimony and associated material primarily relates to the structure and policies of the Groups, different organs created by the Groups, their members and several of the charged incidents, including destruction of mausoleums, floggings and amputation. They are relevant to the charges against Al HASSAN, 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) and 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-0654 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

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

² "Chamber".

³ Members of the Groups operating in Timbuktu and its region as well as members of the organs they created are collectively referred to as the "Organisation".

and to confirm his availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber.

5. Based on past practice, the Prosecution estimates that it will require in total [REDACTED] [REDACTED] for the examination-in-chief of P-0654: namely, approximately [REDACTED] [REDACTED] for the formalities associated with the admission of a witness's prior recorded testimony and associated exhibits,⁴ and additional [REDACTED] to conduct a streamlined supplementary examination to elicit further focussed *viva voce* evidence on certain issues, including the role of the Accused in the Islamic Police, [REDACTED] [REDACTED], the direct involvement of the Accused and other members of the Islamic Police in some of the charged incidents and the functioning of the Islamic Tribunal [REDACTED] [REDACTED]. Eliciting further information on these topics is important for the Prosecution's case against the Accused. [REDACTED]

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-0654's examination-in-chief by [REDACTED]

Confidentiality

7. 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. The Prosecution shall file a public redacted version in due course.

⁴ This estimate depends, in particular, on the procedure which the Prosecution will be required to follow in relation to the introduction of the associated material relevant to this application, see paras.47-51 below.

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 it where the individual does not object to the submission, and the Parties⁵ and Chamber have the opportunity to examine the witness.

9. [REDACTED]
[REDACTED].⁶ The Prosecution identified Witness P-0654 as an appropriate witness for the procedure under rule 68(3) of the Rules.⁷

10. The prior recorded testimony and associated material which the Prosecution seeks to introduce pursuant to rule 68(3) of the Rules relates, *inter alia*, to: (i) Witness P-0654's [REDACTED]
[REDACTED]
[REDACTED] (ii) his prior contacts with the Prosecution,
[REDACTED]
[REDACTED]; (iii) his description of life in Timbuktu before the arrival of the Groups and during the time when they controlled the city; (iv) key leaders and other members of the Organisation; (v) the role of different organs established by the Groups, including the Islamic Police, the Islamic Tribunal and the *Hesbah*, [REDACTED]; (vi) [REDACTED]
[REDACTED]; and (vii) crimes committed against the population, including destruction of mausoleums, floggings and amputation.

⁵ 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".

⁶ [REDACTED]

⁷ In accordance with ICC-01/12-01/18-789-AnxA, [REDACTED], the Prosecution provided the Prosecution List of Witnesses [REDACTED], in which it indicated its intention to apply for the admission of Witness P-0654's prior recorded testimony under rule 68(3) of the Rules.

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 that are available to the calling party and, without which the passages would not be understandable.⁸

12. Section I of Annex A to this filing sets out [REDACTED] paragraphs that the Prosecution seeks to introduce into evidence from the [REDACTED] witness statements of P-0654 and five annexes thereto. These paragraphs include P-0654's explanations regarding the material associated with his prior recorded testimony which the Prosecution also seeks to introduce under rule 68(3). The Prosecution does not seek to introduce the remainder of P-0654's witness statements or other material referred to therein.

13. Section II of Annex A lists [REDACTED] items associated with P-0654's prior recorded testimony which the Prosecution also seeks to introduce into evidence, namely: (i) [REDACTED] [REDACTED] and [REDACTED] [REDACTED] (ii) [REDACTED] and (iii) 1 document. These items were shown to Witness P-0654 during his interviews and explained in his witness statements, and are relevant to the case against the Accused. Brief summaries of Witness P-0654's comments [REDACTED] the document, their content, and their relevance to this case, are provided below.

14. The Decision on the conduct of proceedings foresees the use of audio-visual materials during witness testimony provided the moving Party establishes the relevance of the exercise, by showing, [REDACTED]

⁸ ICC-01/12-01/18-789-Conf-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.

[REDACTED].⁹ [REDACTED]

[REDACTED].

15. 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.”¹⁰ [REDACTED]

[REDACTED]

[REDACTED]¹¹ [REDACTED]
[REDACTED]

16. Section III of Annex A refers to two items that the Prosecution does not seek to introduce, but which are necessary for a complete understanding of P-0654’s prior recorded testimony. [REDACTED]

[REDACTED]

[REDACTED].¹² [REDACTED]

[REDACTED]

[REDACTED].¹³

Brief descriptions of the associated material

17. The Prosecution provides below details of the content and relevance of [REDACTED]
[REDACTED] which it seeks to introduce as material associated with
Witness P-0654’s prior recorded testimony. While all [REDACTED]

⁹ [REDACTED].

¹ ICC-01/04-02/06-T-105-Red-ENG ET, p.93, ln.24 - p.94, ln.7. *See also* ICC-01/04-02/06-1205, para.7; ICC-01/04-02/06-1029, paras.23, 35; ICC-01/09-01/11-1938-Corr-Red2, para.33.

¹¹ [REDACTED].

¹² [REDACTED]

¹³ [REDACTED]

20. [REDACTED]¹⁹ [REDACTED]
[REDACTED]
[REDACTED]²⁰ [REDACTED]
[REDACTED]
[REDACTED]

21. [REDACTED]²¹ [REDACTED]
[REDACTED]
[REDACTED]²² [REDACTED]
[REDACTED]
[REDACTED]

22. [REDACTED]²³ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²⁴ [REDACTED]
[REDACTED]
[REDACTED]

23. [REDACTED]²⁵ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²⁶ [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
[REDACTED]
[REDACTED]
23 [REDACTED]
[REDACTED]
[REDACTED]
25 [REDACTED]
26 [REDACTED]

24.

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25.

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26.

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[REDACTED]³² [REDACTED]
[REDACTED]
[REDACTED].

27. [REDACTED]³³ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁴ [REDACTED]
[REDACTED]
[REDACTED]

28. *Document 1*:³⁵ [REDACTED]
[REDACTED]
[REDACTED]³⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

29. [REDACTED] [REDACTED]: [REDACTED]
[REDACTED]. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁷ [REDACTED]
[REDACTED]
[REDACTED]

³² [REDACTED]
³³ [REDACTED]
³⁴ [REDACTED]
³⁵ [REDACTED]
³⁶ [REDACTED]
³⁷ [REDACTED]

31. [REDACTED] [REDACTED] : [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

32. [REDACTED] [REDACTED] : [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 40 [REDACTED]

38 [REDACTED]
39 [REDACTED]
40 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

33. [REDACTED] [REDACTED] : [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ⁴¹ [REDACTED]

[REDACTED]

[REDACTED]

34. [REDACTED] [REDACTED] : [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ⁴² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

35. [REDACTED] : [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ⁴³ [REDACTED]

[REDACTED]

[REDACTED]

⁴¹ [REDACTED]

⁴² [REDACTED]

⁴³ [REDACTED]

36. [REDACTED]: T [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁴⁴ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

37. [REDACTED]: [REDACTED]
[REDACTED]
[REDACTED].⁴⁵ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

38. [REDACTED]: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁴⁶ [REDACTED]
[REDACTED]
[REDACTED]

44 [REDACTED]
45 [REDACTED]
46 [REDACTED]

39. [REDACTED]: [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

Witness P-0654's prior recorded testimony should be introduced pursuant to rule 68(3) of the Rules

40. The prior recorded testimony 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 1 to 7 and 13. They are also relevant to the contextual elements of the crimes and the elements of the modes of liability pursuant to which the Accused has been charged, including the common purpose of the Groups.

41. The material that the Prosecution seeks to introduce pursuant to rule 68(3) is probative and reliable. Witness P-0654 provided his witness statement voluntarily and in accordance with the requisite formalities of rule 111 of the Rules. He will be asked to confirm the accuracy of his prior recorded testimony when he appears before the Chamber⁴⁸ [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

⁴⁷ [REDACTED]

⁴⁸ ICC-01/12-01/18-789-AnxA, para.65.

42. The Parties, the participants if applicable, and the Chamber, will have the opportunity to examine the 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-0654's prior recorded testimony and its associated material under rule 68(3) of the Rules is not prejudicial to or inconsistent with the rights of the Accused.

Supplementary examination

43. Should Witness P-0654'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 and in line with the Decision on the conduct of proceedings⁴⁹ and the prior jurisprudence of this Court.⁵⁰

44. The Prosecution would first elicit, *viva voce*, further details in relation to certain issues, including the role of the Accused in the Islamic Police [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

45. 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.

⁴⁹ ICC-01/12-01/18-789-AnxA, para.65

⁵⁰ ICC-01/04-01/06-T-205-Red3, p.19, ln.11 et seq; ICC-01/04-01/07-2233-Corr, paras.16-17; ICC-01/04-01/06-1603, para.25; ICC-01/04-02/06-T-110-Red2-ENG, p.34, lns.8-13 ; ICC-02/11-01/15-498-AnxA, para.40.

46. The Prosecution intends to complete the process of admission of Witness P-0654's material as well as its supplementary examination within [REDACTED]. Should the Chamber reject this Request in whole or in part, the Prosecution may require up to the [REDACTED] originally estimated for this witness's examination-in-chief [REDACTED].⁵¹

Proposed procedure for the introduction of prior recorded testimony

47. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0654's prior recorded testimony as he will be asked to confirm its accuracy and to provide any corrections or amendments, if any.

48. During witness preparation, the Prosecution will ask Witness P-0654, *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.⁵² 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.⁵³

49. When Witness P-0654 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.⁵⁴ 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.

⁵¹ The Prosecution notes that [REDACTED] originally estimated for P-0654's examination-in-chief were still based on the premise that some of his prior recorded testimony and associated material may be introduced pursuant to rule 68(3) of the Rules.

⁵² ICC-01/12-01/18-666-Anx, paras.18-19.

⁵³ ICC-01/12-01/18-666-Anx, paras.12-15.

⁵⁴ ICC-01/12-01/18-666-Anx, para. 50.

50. In order to save time, the Prosecution should not be required, for the purposes of admission, to [REDACTED] which it seeks to introduce through this Request, or even [REDACTED] Witness P-0654 described them in his witness statement, and the Defence and the Chamber will be able to question him further in relation to them. Even if the Prosecution were to show the witness, for example, a [REDACTED] which it seeks to introduce pursuant to rule 68(3) of the Rules in order for him to identify them, that process would likely last at least [REDACTED]. Additionally, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

51. 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 supplementary examination of Witness P-0654 as outlined above.

Conclusion

52. For the foregoing reasons, the Prosecution asks that the Chamber authorise the introduction of Witness P-0654's prior recorded testimony and associated materials and to permit the Prosecution to conduct a supplementary examination.



Fatou Bensouda, Prosecutor

Dated this 31 May 2020

At The Hague, The Netherlands