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**International
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Court**

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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 Witness MLI-OTP-P-0193's report and associated material into evidence, and regulation 35 request", ICC-01/12-01/18-840-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 Rules¹, the Prosecution requests Trial Chamber X's² authorisation to introduce into evidence: (i) Witness P-0193's report on geolocation of video and images ("Geolocation Report") and its three annexes; and (ii) associated material comprised of two photographs taken as material of reference for P-0193's analysis and two notes authored by P-0193 on material used for the preparation of the report.

2. Witness P-0193 is [REDACTED] [REDACTED]³ [REDACTED] who specialises in identifying the actual geographical location of objects (such as a photo or video camera), a process known as geolocation. [REDACTED], he produced a report for the Office on the geolocation of protected sites in Timbuktu that are depicted on photographs and videos in the OTP collection. These sites were the object of attacks by members of Ansar Dine and AQMI ("the Groups") in 2012. His report and associated material are relevant to the charges against the Accused of attacks against protected monuments (count 7) and persecution (count 13). They are also relevant to the contextual elements of the crimes as well as to the common purpose of the Groups.

3. Witness P-0193 will testify [REDACTED] [REDACTED]. He will be asked to attest to the accuracy of his report at the beginning of his testimony against the Accused and to confirm his availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber.

4. Based on past practice, the Prosecution estimates that it will require in total 50 minutes for the examination-in-chief of P-0193: namely, approximately 15 minutes for the formalities associated with the introduction of the witness's report and

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

² "Chamber".

³ [REDACTED].

associated exhibits,⁴ and an additional 35 minutes to conduct a supplementary examination to elicit his methodology.

5. 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-0193's examination-in-chief by half (45 minutes to an hour).

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

Prosecution's Submissions

7. The Prosecution seeks to introduce into evidence P-0193's Geolocation Report. The report identifies the "geolocation" or actual geographical location of photographs or videos in the present case by comparing details of that material with details of other visual material the location of which is known (*e.g.* by its geocoordinates).⁵ The process of geolocating an object, while time-intensive and requiring attention to details, does not necessarily require expert knowledge. The location of an object is not a matter of opinion, but of visual verification, done through observation.

8. The Prosecution requests authorisation to introduce the Geolocation Report through the same procedure used in the *Ntaganda* and *Ongwen* cases to introduce expert reports, namely pursuant to rule 68(3),⁶ where it was used even absent a

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.

⁵ [REDACTED]

⁶ ICC-01/04-02/06-845, ICC-01/04-02/06-T-31-CONF-ENG, p.75, ll.7-16.

request from the calling party.⁷ 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 Parties⁸ and Chamber have the opportunity to examine the witness. The Prosecution nonetheless notes that this is primarily a *mutatis mutandis* approach, since a report such as the Geolocation 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 the Geolocation Report, the Chamber may admit it pursuant to its general powers under article 69 of the Statute.

9. Upon instructions from the Office of the Prosecutor, Witness P-0193 provided his Geolocation Report to the Prosecution [REDACTED]
[REDACTED].⁹ The report has become relevant in the present proceedings and was disclosed to the Accused in May 2019. The Prosecution identified Witness P-0193 as an appropriate witness for the procedure under rule 68(3) of the Rules.¹⁰

10. The report and associated material which the Prosecution seeks to introduce pursuant to rule 68(3) of the Rules enable to determine the location where videos and still images relevant to the case were shot. The identification of these locations, in turn, makes it possible to identify the sites depicted on the selected imagery, which is relevant to the charges of directing attacks against protected objects as a war crime and of persecution as a crime against humanity (respectively counts 7 and 13).

⁷ 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.

⁸ 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”.

⁹ [REDACTED]
[REDACTED].

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 introduction of Witness P-0193’s material under rule 68(3) of the Rules.

Notably, some of the images analysed in P-0193's report depict protected sites as they are being attacked by members of the Groups during the relevant time, as will be shown through other witnesses.

11. 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.¹¹

12. The Prosecution seeks to introduce into evidence P-0193's Geolocation Report in its entirety, as all the imagery analysed is relevant to the charges mentioned above.¹²

13. Section I of Annex A to this application sets out, in addition to the report,¹³ three annexes to the report,¹⁴ which the Prosecution seeks to introduce into evidence.

14. Section II of Annex A lists two photographs used as reference points in P-0193's report¹⁵ and two notes authored by P-0193 on material used for the preparation of the report,¹⁶ all of which the Prosecution seeks to introduce into evidence. This material is integral to P-0193's analysis. A brief summary of the items, their content, and their relevance to the case is provided below.

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

¹¹ 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

[REDACTED]

¹⁴ [REDACTED]. The three annexes can be found at [REDACTED]

¹⁶ [REDACTED]

recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced.”¹⁷ 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 rejecting a Prosecution request to admit a video through a witness (Witness P-0315 in that case).¹⁸ There is no reason to adopt any other test or standard for the admission of audio-visual as opposed to other types of material.

16. Section III of Annex A refers to items that the Prosecution does not seek to introduce, but which are necessary for a complete understanding of P-0193’s report. These items are the 57 videos, video excerpts or photographs analysed by P-0193 in the Geolocation Report,¹⁹ four reports and a panoramic presentation prepared by other Prosecution witnesses, which P-0193 used for his analysis in the Geolocation Report,²⁰ and P-0193’s *curriculum vitae*.²¹ These materials, except for P-0193’s *curriculum vitae*, will be introduced into evidence as necessary through other witnesses.

Brief descriptions of the associated material

17. The Prosecution summarises the content and relevance of the items which it seeks to introduce as material associated with Witness P-0193’s report.

18. *Two photographs from* [REDACTED] :²² These two photographs were collected online and used by Witness P-0193 in the preparation of his report to help him conduct the comparison analysis for one site of interest, namely the [REDACTED]

¹⁷ 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.

¹⁸ ICC-01/04-02/06-T-105-Red-ENG WT, p.95, l.6-12.

¹⁹ See Annex A, Section III. A. for the full lists.

²⁰ [REDACTED]

²² [REDACTED]

. [REDACTED]

[REDACTED]. The two photographs collected online and relied upon by P-0193 [REDACTED]. The fact that these pictures came with geolocation information and contain identical features to photographs of the same location, namely the [REDACTED], makes them reliable material in support of P-0193's comparison analysis.

19. *Two notes drafted by P-0193 in relation to the Geolocation Report:*²³ These two notes are contemporaneous to the drafting of the Geolocation Report and are both authored by P-0193. One gives the web address (or URL) from which the two photographs mentioned above were retrieved;²⁴ the other lists the material analysed or referenced in the Geolocation Report.²⁵

Witness P-0193's Geolocation Report should be introduced into evidence

20. The Geolocation Report and associated material 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 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.

21. The Geolocation Report and its associated material are probative and reliable. Witness P-0193 provided his report voluntarily in the understanding that it could be used as evidence. In his report, he clearly identifies the sources on which it is based and the methodology he used.²⁶ He will be available to answer questions on the

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

methodology and supporting material he used when he appears before the Chamber.²⁷

22. As such, the Parties, the participants if applicable, and the Chamber will have the opportunity to examine P-0193 during the proceedings and he will confirm whether he consents to the introduction of his material, in accordance with rule 68(3) of the Rules. Therefore, the introduction of Witness P-0193's report and associated material is not prejudicial to or inconsistent with the rights of the Accused.

Supplementary examination

23. Should Witness P-0193's report and associated material be introduced into evidence as proposed, the Prosecution requests leave to conduct a brief supplementary examination. The Prosecution would first question the witness on the formalities associated with the introduction of the report and associated exhibits, and then focus on eliciting further details on the methodology he used in preparing his report.

24. The Prosecution intends to complete the process of introduction of Witness P-0193's material as well as its supplementary examination within 50 minutes. Should the Chamber reject this request in whole or in part, the Prosecution may require up to four hours. The one and a half hours originally estimated for this witness' examination-in-chief²⁸ was based on the assumption that P-0193's report would be submitted under rule 68(3). The Prosecution presently tries to further limit, *via* the present application, the examination in chief to less than an hour.

²⁷ ICC-01/12-01/18-789-AnxA, para.65.

²⁸ [REDACTED].

Proposed procedure for the introduction of P-0193's materials

25. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0193's report, as he will be asked to confirm its accuracy and to provide corrections or amendments, if any.

26. During witness preparation, the Prosecution will ask Witness P-0193, *inter alia*, to review his report, advise of any corrections or clarifications he wishes to make to it, and then to confirm its 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

27. When Witness P-0193 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 report and to confirm his consent to be questioned by the Parties and the Chamber.

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

Request to allow late disclosure/amendment of the list of evidence with one of the photographs analysed in Witness P-0193's report under regulation 35 of the Regulations

29. The Prosecution further seeks pursuant to regulation 35 of the Regulations authorisation to amend its list of incriminatory evidence, and introduce one of the photographs analysed by Witness P-0193 in his report.³²

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.

³² [REDACTED]

30. The photograph depicts [REDACTED]. The same [REDACTED] appears on a series of videos, which have already been disclosed to the Defence and which are also analysed in Witness P-0193's report.³³ The relevance of this photograph has become apparent in relation to P-0193's Geolocation Report. It does not contain any information that is not already available to the Defence and its disclosure is only mandated to allow a comprehensive understanding of Witness P-0193's report.

31. The Prosecution recalls that under regulation 35(2) of the Regulations, a Chamber may extend a time limit "if good cause is shown",³⁴ or where it is in the "interests of justice".³⁵ 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 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 document and its addition to the Prosecution list of evidence be allowed. The document is part of Witness P-0193's report and its disclosure is necessary in order to have a full overview of the geolocation analysis he has conducted for the OTP. There is no undue prejudice to the Defence, who has already received a series of videos showing the exact same event.

Conclusion

33. For the foregoing reasons, the Prosecution asks that the Chamber grant this request.

³³ 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.



Fatou Bensouda, Prosecutor

Dated this 31 May 2020

At The Hague, The Netherlands