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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 Annexes A and B

Public redacted version of “Prosecution application to call Witnesses MLI-OTP- P-0653 and MLI-OTP-P-0655 as experts, to introduce their reports and associated material into evidence, and regulation 35 request”, ICC-01/12-01/18-843-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. As foreseen in the Decision on the Conduct of Proceedings,¹ the Prosecution requests Trial Chamber X's ("Chamber") authorisation to call Witnesses P-0653 and P-0655 as experts ("Proposed Experts") and, pursuant to articles 64(9), 69(2)-(4) of the Rome Statute ("Statute") and rules 63(2) and 68(3) of the Rules of Procedure and Evidence ("Rules"), to introduce their reports and associated materials into evidence ("Request").

2. The Proposed Experts possess sufficient qualifications and expertise in relation to the subject matter of their proposed testimony respectively, namely, [REDACTED] authentication of the Accused in relevant [REDACTED]

3. Their reports properly fall within the scope of expert testimony and are relevant to the issues in the case. The Proposed Experts' reports would be of assistance to the Chamber because they are relevant to material issues in dispute in the case: namely, identification of the Accused in [REDACTED] in turn relevant to issues concerning the Accused's individual criminal responsibility.

4. The Prosecution seeks introduction into evidence of the Expert report and related documents of Expert Witness P-0653 detailed in Annex A and of Expert Witness P-0655 detailed in Annex B.²

5. The Proposed Experts will testify [REDACTED] They will be asked to attest to the accuracy of their reports at the beginning of his testimony against the Accused and to confirm their availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber.

¹ ICC-01/12-01/18-789-AnxA, para. 67.

² See Annexes A and B for the details on the precise items which the Prosecution seeks to admit for each witness and on the material that it does not seek to admit but which is necessary to understand the report of the expert.

6. The introduction into evidence of the Proposed Expert's reports and related documents would not be prejudicial to the rights of the Accused and would enhance the expeditiousness of the proceedings by reducing the length of the Proposed Experts' in-court testimony. Should this application be granted, the Prosecution intends to conduct a streamlined examination of each of the Proposed Experts.

7. The Prosecution seeks an extension of time to amend the list of incriminatory evidence to include the Proposed Experts' *curriculum vitae*, electronic copies of which were not available to the Prosecution team prior to the lockdown of the Court's headquarters.

Confidentiality

8. Pursuant to regulation 23*bis*(1) of the Regulations of the Court ("Regulations"), the Prosecution files this submission and its accompanying annexes as confidential because they contain confidential information including information regarding these 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-0653 and P-0655 as expert witnesses

9. The Prosecution requests that the Chamber hear the Proposed Expert witnesses P-0653 and P-0655 as expert witnesses.

10. Pursuant to article 64(9)(a) and 69(4) of the Statute,³ 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;⁴ (ii) the proposed

³ Rome Statute ("Statute").

⁴ ICC-01/04-01/06-1069, para. 25; ICC-01/05-01/08-2273, para. 8; ICC-01/09-01/11-844, para. 12.

witness is an expert,⁵ giving due consideration to whether the person is included in the Registry's list of experts;⁶ 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.⁷

Expert P-0653

11. Expert Witness P-0653 is [REDACTED] expert on forensic analysis of [REDACTED] and forensic [REDACTED] including [REDACTED] recognition and authentication.⁸ [REDACTED]

[REDACTED]

[REDACTED].⁹ [REDACTED]

[REDACTED].¹⁰ [REDACTED]

[REDACTED]

[REDACTED].¹¹ [REDACTED]

[REDACTED]

[REDACTED].¹²

12. [REDACTED]

[REDACTED]

[REDACTED].¹³ [REDACTED]

[REDACTED]

[REDACTED].¹⁴ [REDACTED]

[REDACTED]

⁵ ICC-01/05-01/08-2273, para. 9; ICC-01/09-01/11-844, paras. 11, 12.

⁶ See also [REDACTED]

ICC-01/09-01/11-844, para. 12.

⁸ [REDACTED]

⁹ [REDACTED]

¹⁰ [REDACTED]

¹¹ [REDACTED]

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ [REDACTED]

[REDACTED]¹⁵ [REDACTED]
[REDACTED]
[REDACTED]¹⁶ [REDACTED]
[REDACTED]
[REDACTED]¹⁷

13. [REDACTED]
[REDACTED]¹⁸ [REDACTED]
[REDACTED]
[REDACTED]¹⁹ [REDACTED]
[REDACTED]
[REDACTED]²⁰

14. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²¹

15. Her report deals with the forensic [REDACTED] and authentication of the [REDACTED]
[REDACTED]. Confirmation of the identity of the Accused in these materials is relevant to issues concerning the Accused's individual criminal responsibility, including his intent and knowledge and participation in crimes, as regards counts 1 to 13. The [REDACTED] materials in question include the following [REDACTED]

¹⁵ Curriculum Vitae of P-0653, [REDACTED]

¹⁶ Curriculum Vitae of P-0653, [REDACTED]

¹⁷ Curriculum Vitae of P-0653, [REDACTED]

¹⁸ Curriculum Vitae of P-0653, [REDACTED]

¹⁹ Curriculum Vitae of P-0653, [REDACTED]

²⁰ Curriculum Vitae of P-0653, [REDACTED]
[REDACTED]
[REDACTED]



Expert P-0655

16. Expert Witness P-0655 is [REDACTED] specialised in [REDACTED] recognition and authentication.²⁶ [REDACTED]

[REDACTED]

[REDACTED]²⁷ [REDACTED]

[REDACTED]²⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁹

17. [REDACTED]

[REDACTED]

²² See e.g. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]. Throughout this application, the ERN of the [REDACTED] is followed by the ERN of the corresponding expert's report, in parenthesis. See also [REDACTED]

²³ See e.g. [REDACTED]
[REDACTED]
[REDACTED]

See e.g. [REDACTED]
[REDACTED]

See e.g. [REDACTED]
[REDACTED]
[REDACTED]

²⁷ Curriculum Vitae of P-0655, [REDACTED]

²⁸ Curriculum Vitae of P-0655, [REDACTED]

²⁹ Curriculum Vitae of P-0655, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED],³⁰ [REDACTED]

[REDACTED]

[REDACTED].³¹

18. Expert Witness P-0655 provided the Prosecution with an expert report titled

[REDACTED]

[REDACTED]

[REDACTED].³²

19. His report relates to the forensic [REDACTED] authentication of the Accused [REDACTED] that concern events in Timbuktu in 2012 to 2013. Confirmation of the identity of the Accused in these materials is relevant to issues concerning the Accused's individual criminal responsibility, including his intent and knowledge and participation in crimes, as regards counts 1 to 13. The

[REDACTED]

The Proposed Experts' reports are probative and reliable. They were prepared for the Prosecution by the Proposed Experts in the understanding they could be used as

³⁰ Curriculum Vitae of P-0655, [REDACTED]

³¹ Curriculum Vitae of P-0655, [REDACTED]

³² [REDACTED]

³³ See e.g. [REDACTED]

See e.g. [REDACTED]

evidence and that the authors could be selected as expert witnesses at trial.³⁵ The sources on which the reports are based are clearly identified in the reports.

Request for authorisation to introduce P-0653 and P-0655's materials into evidence

20. The Prosecution identified the Proposed Experts as appropriate witnesses for the procedure under rule 68(3) of the Rules.³⁶

21. Rule 68(3) of the Rules provides that the Chamber may allow the introduction of the prior recorded testimony of a witness who is present before the Chamber where the individual does not object, and the Parties³⁷ 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,³⁸ even absent a request from the calling party.³⁹ The Prosecution nonetheless notes that this is primarily a *mutatis mutandis* approach, since an expert 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 report, the Chamber may admit the report pursuant to its general powers under article 69 of the Statute.

22. 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

³⁵ [REDACTED]

³⁶ 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 these witnesses. See ICC-01/12-01/18-740-Conf-AnxA .³⁷ 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”.

³⁷ 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”.

³⁸ ICC-01/04-02/06-845, ICC-01/04-02/06-T-31-CONF-ENG, p.75, ll.7-16.

³⁹ 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, ln. 6.

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.⁴⁰

23. The Prosecution seeks to introduce, in full, the Proposed Experts' reports. As explained above, the reports are relevant, probative and reliable. The Proposed Experts will be asked to attest to the authenticity and accuracy of their reports and/or statement at the beginning of their testimony⁴¹ and to confirm their availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber. Each witness will be asked whether she or he consents to the admission of his or her materials under the rule. The introduction of the Proposed Experts' reports and related documents is not prejudicial to the rights of the Accused.

P-0653

24. Listed in sections I and II of Annex A to this application are the materials which the Prosecution seeks to introduce into evidence, which include the report and its addendum and the Prosecution's letter of instructions to the witness. Section III of Annex A lists other materials necessary to understand Witness P-0653's report, although, which are not being introduced through P-0653. These include [REDACTED]

[REDACTED] materials assessed by P-0653⁴² for the purposes of forensic

Prosecution will seek to introduce these materials into evidence through other witnesses.

⁴⁰ 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 Annexes A and B, which is hyperlinked to the item of evidence in eCourt, as authorised by the Chamber in its email of [REDACTED]

⁴¹ ICC-01/12-01/18-789-AnxA, para. 65.

⁴² [REDACTED]

25. Based on past practice, the Prosecution estimates that it will require in total 2 hours for the examination-in-chief of P-0653: namely, approximately thirty to forty-five minutes for the formalities associated with the admission of her report and associated exhibits, and an additional 1 hour and 15 minutes to conduct a streamlined supplementary examination to elicit further focussed, limited *viva voce* evidence of certain issues to enhance understanding of the process: *inter alia*, the [REDACTED] authentication⁴³ and the level of confidence of [REDACTED] authentication for each [REDACTED] item described in her conclusion.⁴⁴ The introduction of P-0653's evidence would reduce the length of her examination-in-chief by one hour.

P-0655

26. Listed in sections I and II of Annex B to this application are the materials which the Prosecution seeks to admit into evidence, which include the report and the Prosecution's letter of instructions to the witness. Section III of Annex B lists other materials necessary to understand Witness P-0655's report, which are not being introduced through P-0655. [REDACTED]

[REDACTED] The Prosecution will seek to introduce these materials into evidence through other witnesses.

27. Based on past practice, the Prosecution estimates that it will require in total 2 hours for the examination-in-chief of P-0655: namely, approximately thirty to forty-five minutes for the formalities associated with the admission of his report and associated exhibits, and an additional 1 hour and 15 minutes to conduct a streamlined supplementary examination to elicit further focussed, limited *viva voce*

⁴³ [REDACTED]

⁴⁴ [REDACTED]

⁴⁵ [REDACTED]

evidence of certain issues to enhance understanding of the process: *inter alia*, the process [REDACTED] and authentication,⁴⁶ and the level of confidence for the [REDACTED]

[REDACTED]⁴⁷ The introduction of P-0655's evidence would reduce the length of his examination-in-chief by one hour.

Proposed procedure for the introduction of Proposed Experts' reports

28. Should this application be granted, the Prosecution submits that there will be no need to read into evidence the Proposed Experts' reports as they will be asked to confirm their accuracy and to provide corrections or amendments, if any.

29. During witness preparation, the Prosecution will ask the Proposed Experts, *inter alia*, to review their reports and associated material, advise of any corrections or clarifications they wishes to make, and to confirm the accuracy of the reports.⁴⁸ In accordance with the Witness Preparation Protocol these sessions will be video-recorded and the Prosecution will disclose a log of the session clearly indicating any changes or corrections which the witnesses make.⁴⁹

30. When the Proposed Experts appear in court, the Prosecution will seek to elicit, in principle by way of neutral questions, any clarifications noted by them during witness preparation.⁵⁰ 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.

31. In terms of further procedure, after tendering the Report, with any changes or clarifications noted on the record, and the associated material, the Prosecution will

⁴⁶ [REDACTED] (Annexe 1).

⁴⁷ [REDACTED] (Annexe 1).

⁴⁸ ICC-01/12-01/18-666-Anx, para. 18-19.

⁴⁹ ICC-01/12-01/18-666-Anx, para. 12, 14, 31.

⁵⁰ ICC-01/12-01/18-789-AnxA, para. 50.

then conduct a supplementary examination of the Proposed Expert as outlined above.

Request to allow late disclosure/addition to the list of evidence of the curriculum vitae of the Proposed Experts under regulation 35 of the Regulations

32. The Prosecution further seeks pursuant to regulation 35 of the Regulations authorisation to amend its list of incriminatory evidence, and introduce, the relevant *curriculum vitae* of the Experts P-0653 and P-0655. The *curriculum vitae* were not annexed to the digital versions of their expert reports as the Prosecution had requested, but were sent separately as hard copies to the Office [REDACTED]. However, the documents did not reach the Prosecution trial team prior to the lockdown. Unfortunately, the Prosecution only recently identified that the *curriculum vitae* were not incorporated as annexed to the reports, that hard copies were not processed or disclosed. The Prosecution requested from the experts updated versions of the *curriculum vitae*, [REDACTED], which were provided [REDACTED].⁵¹ [REDACTED], Expert witness P-0655 provided electronically a further updated *curriculum vitae* observing that there had been an error in dates indicated for his diplomas.⁵² These *curriculum vitae* of P-0653 and P-0655 are being disclosed.

33. In this instance, it is in the interests of justice and determination of the truth that late addition to the list of evidence of these documents be allowed and they be introduced through the experts. The documents assist in understanding the basis for the Proposed Experts expertise [REDACTED] and authentication. There is no undue prejudice to the Defence, who receives the *curriculum vitae* sufficiently in advance before the experts are due to testify.

⁵¹ Curriculum Vitae of P-0653, [REDACTED]; Curriculum Vitae of P-0655, [REDACTED]

⁵² Curriculum Vitae of P-0655, [REDACTED]

34. The Prosecution further requests that [REDACTED], that were analysed by the Experts P-0653 and P-0655, and are being disclosed as incriminatory evidence, also be included in the Prosecution's list of incriminatory evidence: (a) [REDACTED]; (b) [REDACTED], and, (c) [REDACTED]⁵³ (previously disclosed rule 77 [REDACTED]). These [REDACTED] are important to understand the testimony of P-0653 and P-0655, and are relevant to the Accused's individual criminal responsibility, so should therefore be admitted in the interests of justice and determination of the truth.

35. There is no prejudice to the Defence as these items are being disclosed well in advance of the testimony of [REDACTED] P-0653 and P-0655, and all are part of a sequence of other [REDACTED] evidence that has previously been disclosed as incriminatory evidence.

36. The Prosecution recalls that under regulation 35(2) of the Regulations, a Chamber may extend a time limit "if good cause is shown",⁵⁴ or where it is in the "interests of justice".⁵⁵ 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.⁵⁶

⁵³ Together with its transcript [REDACTED]

⁵⁴ ICC-01/04-01/06-834, para. 7.

⁵⁵ See ICC-01/04-01/10-505, para. 11.

⁵⁶ 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 there was a basis to allow for the admission of the evidence. However, in that instance provided the evidence was more compelling than other disclosed information, brings to light a previously unknown fact of significant bearing upon the case and late addition will not cause undue prejudice to the Defence.

Conclusion

37. Witnesses P-0653 and P-0655 are experts in the subject matters to which their proposed testimony relate. The content of their reports falls within the scope of their expertise and their proposed testimony may assist the Chamber. The Proposed Experts' reports do not usurp the function of the Chamber as the ultimate arbiter of fact and law.

38. Permitting the Proposed Experts' evidence to be introduced into evidence would not be prejudicial to or inconsistent with the rights of the Accused, as the witness would be available for questioning by the Defence and the Chamber. Granting this application (and the related regulation 35 request) would enhance the expeditiousness of the proceedings by reducing the length of the Proposed Experts' examination-in-chief as set out above.

39. 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