

**Cour
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**International
Criminal
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 under rule 68(3) to introduce
Witness MLI-OTP-P-0004's prior recorded testimony and associated material",
ICC-01/12-01/18-846-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. The Prosecution requests Trial Chamber X's¹ authorisation to (i) introduce into evidence certain passages from Witness P-0004's prior recorded testimony ([REDACTED]), as well as associated material, as specified in sections I and II of Annex A² to the present application pursuant to rule 68(3);³ (ii) admit [REDACTED] [REDACTED]⁴ [REDACTED]⁵ as specified in section III of Annex A pursuant to articles 64(9), 69(2)-(4)⁶ and rule 63(2); and (iii) conduct a supplementary examination of Witness P-0004 ("Request").

2. Witness P-0004 has been [REDACTED] [REDACTED] [REDACTED], and is [REDACTED]. He witnessed, [REDACTED] events, [REDACTED] and crimes relevant to the charges 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), rape (counts 11 and 12) persecution (count 13). They are also relevant to the contextual elements of the crimes, the different armed groups and their roles, as well as to identifying a number of key members of the Groups and different locations where crimes were committed.

3. Witness P-0004 is [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 and to confirm his availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber.

¹ "Chamber".

² See Annex A for details on the precise excerpts, paragraphs, and items which the Prosecution seeks to introduce through this Request.

³ Rules of Procedure and Evidence ("Rules").

⁴ [REDACTED].

⁵ A [REDACTED].
[REDACTED].
Rome Statute ("Statute").

4. Based on past practice, the Prosecution estimates that it will require in total five hours and thirty minutes for the examination-in-chief of P-0004: namely, approximately thirty minutes for the formalities associated with the admission of a witness's prior recorded testimony and associated exhibits,⁷ and an additional five hours to conduct a supplementary examination to elicit further focussed *viva voce* evidence of certain issues, including the timeline of the arrival of the different armed groups to Timbuktu, their roles and duration of their presence during the 2012/2013 events, [REDACTED], [REDACTED] [REDACTED], crimes committed against the population in Timbuktu as a result of the application of the new rules including flogging, amputation and violations against women. Examining these topics *viva voce* and eliciting further details thereon are important for the Prosecution's case against the Accused.

5. 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-0004's examination-in-chief by an hour and a half, relative to the duration initially estimated.⁸

Confidentiality

6. Pursuant to regulation 23bis(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, in addition to referring to filings classified as confidential. The Prosecution shall file a public redacted version in due course.

⁷ 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.15-26 below.

⁸ The Prosecution initially estimated [REDACTED] hours for P-0004's examination-in-chief. *See* ICC-01/12-01/18-740-Conf-AnxB, p. 6.

Prosecution's Submissions

7. 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 where the individual does not object to the submission, and the Parties⁹ and Chamber have the opportunity to examine the witness.

8. Witness P-0004 provided two statements to the Prosecution, [REDACTED]¹⁰ [REDACTED].¹¹ The Prosecution identified Witness P-0004 as an appropriate witness for the procedure under rule 68(3) of the Rules.¹²

9. The prior recorded testimony and associated material which the Prosecution seeks to introduce pursuant to rule 68(3) relate, *inter alia*, to: (i) Witness P-0004's personal and professional background; (ii) P-0004's description of

the events leading to the attacks against

these monuments and the resulting destruction of certain monuments;¹³ (iii) P-0004's identification of individuals and locations relevant to the charges;¹⁴ (iv) [REDACTED]
[REDACTED]¹⁵ and (v) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

⁹ 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".

¹⁰ [REDACTED].
¹¹ [REDACTED].

¹² [REDACTED]
[REDACTED]
[REDACTED].
[REDACTED]
[REDACTED].
[REDACTED]
[REDACTED].
[REDACTED].

10. 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, without which the passages would not be understandable.¹⁶

11. As set out in section I of Annex A to this filing, the Prosecution seeks to introduce certain paragraphs from Witness P-0004's [REDACTED]¹⁷ which explain the facts identified above¹⁸ and provide details on 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-0004's witness statements or other material referred to therein.

12. Section II of Annex A lists [REDACTED] items explained by P-0004 in his statements, namely [REDACTED]¹⁹

[REDACTED]²⁰ [REDACTED]

[REDACTED]²¹ [REDACTED]

[REDACTED]²² [REDACTED]

[REDACTED]

[REDACTED]²³ a map of Timbuktu [REDACTED] which P-0004 marked with locations of affected mausoleums and monuments,²⁴ [REDACTED]

[REDACTED]

¹⁶ [REDACTED] 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].

¹⁷ [REDACTED].

¹⁸ See para. 9 *supra*.

¹⁹ [REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

²⁴ [REDACTED].

[REDACTED]

,²⁵ and two investigation notes containing the identities of individuals referred to anonymously in P-0004's statements.²⁶ The Prosecution seeks to introduce these items under rule 68(3). A brief summary of these items and their relevance to the case against the Accused is provided below.

13. 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."²⁷ [REDACTED]

[REDACTED]

[REDACTED]²⁸ [REDACTED]

[REDACTED]

14. Finally, section III of Annex A contains

²⁹

[REDACTED]³⁰ [REDACTED]

[REDACTED]. The Prosecution seeks to admit these [REDACTED] pursuant to articles 64(9), 69(2) (3) and (4) of the Statute and rule 63(2) of the Rules.

²⁵ [REDACTED]

[REDACTED].

²⁷ [REDACTED]

[REDACTED]

²⁸ [REDACTED]

²⁹ [REDACTED]

³⁰ [REDACTED]

[REDACTED]

[REDACTED].³²

18.

[REDACTED].³³

[REDACTED]

[REDACTED].

19. [REDACTED].³⁴

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

20. [REDACTED].³⁵

[REDACTED]

[REDACTED].³⁶

[REDACTED]

[REDACTED]

³² [REDACTED]

³⁴ [REDACTED]

[REDACTED]

[REDACTED].

21. [REDACTED]³⁷ [REDACTED]
 [REDACTED]³⁸ [REDACTED]
 [REDACTED]
 [REDACTED].

22. [REDACTED]
 [REDACTED], they
 provide details relevant to the charges in particular the attack against protected
 monuments (count 7).

23. [REDACTED]³⁹ [REDACTED]
 [REDACTED]
 [REDACTED]⁴⁰ [REDACTED]
 [REDACTED]
 [REDACTED]⁴¹ In view of its content, and P-
 0004's explanation, this [REDACTED] is relevant to the case against the Accused, in
 particular, the charges of other inhumane acts (count 2), rape (count 11 and 12) and
 persecution (count 13).

24. *A map of Timbuktu:*⁴² [REDACTED]
 [REDACTED]
 [REDACTED]. In the course of his interview
 with the OTP in [REDACTED], P-0004 marked certain locations of affected mausoleums and

³⁷ [REDACTED]
 [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

monuments in this map which he described in his statement.⁴³ In view of its content and P-0004's explanation, this map together with other evidence identifies the relevant protected monuments destroyed by the Groups and therefore is relevant in particular to the charge of attack against protected monuments (count 7).

25. [REDACTED]⁴⁴ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁴⁵ [REDACTED]
[REDACTED].

26. [REDACTED]⁴⁶ [REDACTED] [REDACTED]
[REDACTED] identify P-0004's sources of information and the identity of individuals referred to anonymously in his [REDACTED] statement as detailed in Section II of Annex A to this filing.

Witness P-0004's prior recorded testimony should be introduced into evidence pursuant to rule 68(3)

27. The prior recorded testimony and associated material set out in sections I and II of Annex A relate, in particular, to the destruction of protected mausoleums and monuments in Timbuktu, [REDACTED], P-0004's identification of individuals and locations relevant to the charges and violations committed against women in Timbuktu during the 2012/2013 events. These matters are relevant to a number of crimes which the Accused has been charged with, in particular other inhumane acts (count 2), attack against protected monuments (count 7), persecution (count 13). They are also relevant to the contextual elements of the

⁴³ [REDACTED]
[REDACTED].
[REDACTED].

⁴⁶ [REDACTED].

crimes as well as to identifying a number of different locations where crimes were committed.

28. The material that the Prosecution seeks to introduce pursuant to rule 68(3) is probative and reliable. Witness P-0004 provided his witness statements voluntarily and in accordance with the requisite formalities of rule 111 of the Rules and explained his relation to the material associated to his prior recorded testimony [REDACTED]

[REDACTED]

[REDACTED]. He will be asked to confirm the accuracy of his testimony when he appears before the Chamber.⁴⁷ As such, the Parties, the participants 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-0004's prior recorded testimony under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

Supplementary examination

29. Should Witness P-0004'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 in line with the Decision on the conduct of proceedings⁴⁸ and the prior jurisprudence of this Court.⁴⁹

30. The Prosecution would first elicit, *viva voce*, further details in relation to certain issues which were only briefly referred to during Witness P-0004's prior recorded testimony, including the application of the new rules and the targeting of women.

⁴⁷ ICC-01/12-01/18-789-AnxA, para.65.

⁴⁸ ICC-01/12-01/18-789-AnxA, para.65

⁴⁹ 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.

The Prosecution would ensure that the witness is not merely asked to repeat the information which he already provided in his prior recorded testimony. Further the Prosecution will elicit evidence pertaining to certain issues, including the timeline of the arrival of the different armed groups to Timbuktu, their roles and duration of their presence during the 2012/2013 events, [REDACTED]

[REDACTED], crimes committed against the population in Timbuktu as a result of the application of the new rules including flogging, amputation. Examining these topics *viva voce* and eliciting further details thereon are important for the Prosecution's case against the Accused. As such, this supplementary examination is necessary for the fair evaluation of the witness and the determination of the truth.

31. The Prosecution intends to complete the process of admission of Witness P-0004's material as well as its supplementary examination within five hours and thirty minutes: namely, approximately thirty minutes for the formalities associated with the admission of a witness's prior recorded testimony and associated exhibits, and an additional five hours to conduct a supplementary examination. Should the Chamber reject this Request in whole or in part, the Prosecution may require up to the seven hours originally estimated for this witness's examination-in-chief,⁵⁰ because of the time-consuming nature of seeking to admit the [REDACTED] [REDACTED] associated documents, and the facts included in the paragraphs of his witness statements as indicated above.

Proposed procedure for the introduction of prior recorded testimony

32. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0004's prior recorded testimony as he will be asked to confirm its accuracy and to provide corrections or amendments, if any.

⁵⁰ See [REDACTED]

33. During witness preparation, the Prosecution will ask Witness P-0004, *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.⁵¹ 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.⁵²

34. When Witness P-0004 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.⁵³ 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.

35. In order to save time, the Prosecution should not be required, for the purposes of admission, to show Witness P-0004 associated materials, which it seeks to admit through this Request. Witness P-0004 described them in his witness statement, and the Defence and the Chamber will be able to question him further in relation to them.

36. 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 brief supplementary examination of Witness P-0004 as outlined above.

37. Finally, the Prosecution seeks to admit [REDACTED]⁵⁴ [REDACTED]
[REDACTED]⁵⁵ as set out in section III of Annex A of this application, [REDACTED]

⁵¹ ICC-01/12-01/18-666-Anx, para.18-19.

⁵² ICC-01/12-01/18-666-Anx, para.12, 14, 31.

⁵³ ICC-01/12-01/18-666-Anx, para. 50.

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

[REDACTED] pursuant to articles
64(9), 69(2) (3) and (4) of the Statute and rule 63(2) of the Rules.

Conclusion

38. For the foregoing reasons, the Prosecution requests that the Chamber grant its Request.

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Fatou Bensouda, Prosecutor

Dated this 1 June 2020

At The Hague, The Netherlands