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**International
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Court**



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5 February 2021

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
Witnesses MLI-OTP-P-0587 and MLI-OTP-P-0617’s report and associated material
into evidence, and regulation 35 request”,
2 November 2020, ICC-01/12-01/18-1136-Conf**

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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Introduction

1. Pursuant to articles 64(9), 69(2)-(4)¹ and rules 63(2) and 68(3) of the Rules of Procedure and Evidence (“Rules”), the Prosecution requests Trial Chamber X’s (“Chamber”) authorisation to (i) introduce into evidence the expert report Witnesses P-0587 and P-0617 produced together,² as well as associated material, as specified in sections I and II of Annex A to the present application; and (ii) conduct a succinct streamlined supplementary examination of Witnesses P-0587 and P-0617 (“Request”).

2. Witnesses P-0587 and P-0617 (“Experts”) are experts on the analysis of Call Data Records (CDRs), [REDACTED]

[REDACTED] On 5 August 2020, the Chamber considered that they may be called to testify as experts.³ They produced together a report analysing the CDRs related to mobile phone numbers used in and around Timbuktu at the time relevant to the charges.⁴ Based on their analysis of the relevant CDRs, P-0587 and P-0617 produced, *inter alia*, graphics to illustrate the communications between various phone numbers attributed to several members of the Groups in and around Timbuktu at the time of the occupation of the city by the Groups. P-0617 and P-0587 also specifically looked at the activity of a phone number known to be used by the Accused⁵ for the entire period of the occupation as well as on specific dates on which relevant incidents, such as floggings, amputation and execution, took place.

3. The report and the anticipated testimony of P-0587 and P-0617 will be of assistance to the Chamber in analysing contacts between members of the common purpose or plan,⁶ including the Accused, and their movement and locations within Timbuktu

¹ Rome Statute (“Statute”).

² [REDACTED]

³ ICC-01/12-01/18-989-Conf, ‘Decision on Prosecution’s proposed expert witnesses’, para. 32.

⁴ Report by P-0587 and P-0617, [REDACTED].

⁵ Based on other evidence, [REDACTED]

⁶ [REDACTED]

■ during particular events and the overall period relevant to the charges. These are relevant to the issues in the case, such as the existence of a group with a common purpose or plan and the Accused's contribution to the crimes charged, including in particular those under counts 7 and 13.

4. P-0587 and P-0617 are listed in the second block of witnesses, and scheduled to testify in 2021.⁷ Should this Request be granted, they will be asked to attest to the accuracy of their report at the beginning of their testimony and to confirm their availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber.

5. Based on past practices, the Prosecution estimates that it will require one hour per witness for the examination-in-chief of P-0587 and P-0617 which would include approximately 30 minutes for the formalities associated with the introduction into evidence of the expert witnesses' report and associated materials, and an additional 30 minutes to conduct a succinct supplementary examination to elicit further focused *viva voce* evidence, notably about their methodology – totalling two hours for both witnesses.

6. 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 Expert Witnesses P-0587 and P-0617's in-court testimony by seven hours in total.⁸

Confidentiality

7. Pursuant to regulation 23*bis*(1) of the Regulations of the Court ("Regulations"), the Prosecution files this submission and its accompanying annex as confidential because they contain confidential information including information regarding

⁷ See ICC-01/12-01/18-805-Conf-AnxA, p. 3.

⁸ The Prosecution originally estimated 4 hours and a half for its examination-in-chief of each of those two witnesses totalling 9 hours for both witnesses. See ICC-01/12-01/18-740-Conf-AnxB, p. 816, 982.

Prosecution witnesses P-0587 and P-0617, in addition to referring to filings classified as confidential. The Prosecution shall file a public redacted version in due course.

Prosecution's Submissions

Request for authorisation to introduce P-0587 and P-0617's material into evidence

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

9. P-0587 and P-0617 produced an expert report to the Prosecution [REDACTED]
[REDACTED] The Prosecution has identified P-0587 and P-0617 as appropriate witnesses for the procedure under rule 68(3) of the Rules.

10. As set out in section I of Annex A of this filing, the Prosecution seeks to introduce, in full, P-0587 and P-0617's report⁹ and the material P-0587 and P-0617 provided to the Prosecution.¹⁰

11. The report is relevant. P-0587 and P-0617 analysed the CDRs related to mobile phone numbers used in and around Timbuktu at the time relevant to the charges pursuant to the mission letters sent by the Prosecution.¹¹ [REDACTED]
the relevant CDRs, P-0617 and P-0587 produced, *inter alia*, graphics to illustrate the communications between various phone numbers attributed to several members of the Groups in and around Timbuktu at the time of the occupation of the city by the Groups. P-0617 and P-0587 also specifically looked at the activity of a phone number known to be used by the Accused for the entire period of the occupation as well as

⁹ Report by P-0587 and P-0617, [REDACTED].

¹⁰ [REDACTED]

¹¹ Mission letter and addendums thereto, [REDACTED]
[REDACTED]

on specific dates on which relevant incidents, such as floggings, amputation and execution, took place.

12. The report and anticipated testimony of P-0587 and P-0617 will be of assistance to the Chamber in analysing contacts between members of the common purpose or plan, including the Accused, and their movement and locations within Timbuktu during particular events and the overall period relevant to the charges. These are relevant to the issues in the case, such as the existence of a group with a common purpose or plan and the Accused's contribution to the crimes charged, including in particular those under counts 7 and 13.

13. The report is probative and reliable. The content of the report falls within the scope of the witnesses' expertise, which the Chamber has already recognised. It was prepared voluntarily for the Prosecution by P-0587 and P-0617 in the understanding that it could be used as evidence in this case.

14. Furthermore, P-0587 and P-0617 will be asked to confirm the accuracy of the report and any eventual clarifications thereto when they appear before the Chamber. As such, the Parties, the participants if applicable, and the Chamber will have the opportunity to examine these witnesses during the proceedings and they will confirm whether they consent to the submission of the report and associated materials, in accordance with rule 68(3) of the Rules. Therefore, the submission of Witnesses P-0587 and P-0617's materials under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

15. The Prosecution also seeks to introduce into evidence the Prosecution's letters of instructions¹² and associated material thereto, the materials necessary to establish

¹² Mission letter and addendums thereto, [REDACTED]

P-0587 and P-0617's expertise, two investigation notes¹³ and the sample that P-0587 sent to the Prosecution [REDACTED]⁴ - all contained in section II of Annex A.

16. Section II of Annex A lists four mission letters and their associated material. The associated material for the first mission letter

[REDACTED]

The material associated to the second mission letter [REDACTED]

[REDACTED]

[REDACTED] The third mission letter [REDACTED] has no associated material. The material associated to the fourth mission letter [REDACTED]

[REDACTED]

[REDACTED]⁶ This material is integral to P-0587 and P-0617's analysis. Section II of Annex A also lists P-0587's *curriculum vitae*,²⁷ the investigation note containing information on P-0617's professional experience as provided by P-0587²⁸ and the CV as provided by P-0617 if the Chamber allows its late disclosure

13 [REDACTED]
 14 [REDACTED] Also see contact note [REDACTED].
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

and amendment of the List of Evidence ("LoE")²⁹ – *see infra*. Furthermore, section II of Annex A lists two investigation notes³⁰ and the sample that P-0587 sent to the Prosecution [REDACTED]³¹

17. 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."³²

18. The material collected [REDACTED] was used by Witness P-0587 and P-0617 in the preparation of their report. The mission letters and the contacts described in the two investigation notes are referred to in the report.³³

19. Section III of Annex A lists other items necessary to understand P-0587 and P-0617's report which the Prosecution does not seek to introduce into evidence through these witnesses. These items are a) the forensic image of [REDACTED]³⁴ b) a forensic copy report and a forensic image acquisition report³⁵, both of which were submitted into evidence through witness P-0075, c) the letter from [REDACTED]³⁶ and the envelope in which the material was sent to the ICC³⁷, and d) contact notes with P-0587 and P-0587's supervisor (P-0588).³⁸ All of these items give context concerning the production of the report.

²⁹ [REDACTED]

³⁰ [REDACTED] (contact with P-0587 and P-0588 [REDACTED] and [REDACTED] (contact with P-0587 and P-0617 [REDACTED])

³¹ [REDACTED]

³² 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.

³³ The mission letters are referred to in the report, [REDACTED]
[REDACTED] The contacts as described in investigation notes [REDACTED] are referred to in the report, [REDACTED]

³⁴ [REDACTED]

³⁵ [REDACTED]

³⁶ [REDACTED]

³⁷ [REDACTED]

³⁸ Six of those contact notes have been disclosed under Rule 77: [REDACTED] (all five contacts with P-0588 [REDACTED])

Proposed procedure for the introduction of the Experts' materials

20. Should this application be granted, the Prosecution submits that there will be no need to read into evidence the report as the witnesses will be asked to confirm its accuracy and to provide corrections or amendments, if any.

21. During witness preparation, the Prosecution will ask Witnesses P-0587 and P-0617, *inter alia*, to review their report and associated material, to advise of any corrections or clarifications they wish to make, and to confirm the accuracy of the report. In accordance with the Witness Preparation Protocol, these sessions will be video-recorded and the Prosecution will disclose a log of the sessions clearly indicating any changes or corrections which the witnesses make.³⁹

22. When P-0587 and P-0617 appear in court, the Prosecution will seek to elicit any clarifications noted by the witnesses during witness preparation.⁴⁰ The Prosecution will then ask the witnesses whether they have any further changes or clarifications to make to the report and to confirm their consent to be questioned by the parties and the Chamber.

23. 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 then conduct a succinct supplementary examination of P-0587 and P-0617. The supplementary examination will notably touch upon the methodology including the material the report is based on, the processing of the received data, the software and services used, the products generated by the Experts, the review process and the conclusions in particular.

██████████ respectively) and ██████████
 ██████████ contact with P-0587 ██████████). One has been disclosed as incriminating material: ██████████
 ██████████ contact with P-0588 ██████████.

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

⁴⁰ ICC-01/12-01/18-666-Anx, para. 50.

24. Witnesses P-0587 and P-0617 are experts in the subject matters to which their proposed testimony relates. The content of their report falls within the scope of their expertise and their proposed testimony and associated materials are probative and reliable. They are relevant to the issues in the case, such as the existence of a group with a common purpose or plan and the Accused's contribution to the crimes charged, including, in particular, those under counts 7 and 13.

25. The Prosecution estimates that it will require one hour per witness for the examination-in-chief of P-0587 and P-0617, which would include approximately 30 minutes for the formalities associated with the introduction into evidence of the expert witnesses' report and associated materials, and an additional 30 minutes to conduct a succinct supplementary examination to elicit further focused *viva voce* evidence – totalling two hours for both witnesses.

26. The Parties, the Legal Representative of Victims (if applicable), and the Chamber will have the opportunity to examine P-0587 and P-0617 during the proceedings.

27. Granting the application to introduce their report and associated material as requested would not be prejudicial to the rights of the Accused and it would enhance the expeditiousness of the proceedings by reducing the length of P-0587 and P-0617's examination-in-chief from nine hours to two hours in total.

Request to allow late disclosure/amendment of the LoE with P-0617's curriculum vitae under regulation 35 of the Regulations of the Court

28. The Prosecution further seeks pursuant to regulation 35 of the Regulations authorisation to amend its List of Evidence by adding P-0617's CV.⁴¹

29. So far only the investigation note with information on P-0617's professional experience as provided by P-0587⁴² is on the LoE. Whilst preparing this request, it

⁴¹ [REDACTED]

was noticed that P-0617's CV had not been received yet, although asked for several times.⁴³ After sending another reminder, the Prosecution received P-0617's CV [REDACTED]

[REDACTED] As P-0617's CV only came into the Prosecution's possession after the original deadline for the final LoE elapsed, it could not be included in the LoE.

30. The Prosecution recalls that a Chamber may extend a time limit under regulation 35(2) of the Regulations "if good cause is shown",⁴⁴ or where it is in the "interests of justice"⁴⁵ to do so. 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 the evidence that it deems necessary for the determination of the truth.⁴⁶

31. In this instance, it is in the interests of justice and determination of the truth that this document be added to the Prosecution List of Evidence as it assists in understanding the basis for the expertise of P-0617. P-0617's CV gives an up-to-date reading of P-0617's profile and expertise coming from P-0617 himself. There is no undue prejudice to the Defence as P-0617's professional experience as provided by P-0587 and included in an investigator's note⁴⁷ is already on the Prosecution's LoE and given the limited nature of P-0617's CV.

⁴² [REDACTED]

⁴³ The experts were requested in the mission letters to annex their CVs to their expert report. At the time of preparing the Prosecution application related to proposed experts, ICC-01/12-01/18-842-Conf, when the Prosecution identified that the expert CVs had not been annexed to their report, the CVs of P-0587 and P-0617 were requested again. The Prosecution received P-0587's CV [REDACTED]. For P-0617, the Prosecution prepared an investigation note regarding his professional experience based on information provided by P-0587, [REDACTED]. Whilst preparing the request at hand, it was noticed that P-0617's CV had still not been received. [REDACTED] The Prosecution received P-0617's CV [REDACTED].

⁴⁴ ICC-01/04-01/06-834, para.7.

⁴⁵ See ICC-01/04-01/10-505, para.11.

⁴⁶ 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.

⁴⁷ [REDACTED]

Conclusion

32. For the foregoing reasons, the Prosecution asks that the Chamber grant its Request.



Fatou Bensouda, Prosecutor

Dated this 2nd day of November 2020

At The Hague, The Netherlands