



Original: English

No.: ICC-01/12-01/18
Date: 18 December 2020
Date of submission:
8 March 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 “Corrigendum to the “Prosecution application under rule 68(2)(b) to introduce into evidence Witness P-0188’s prior recorded testimony and associated material “, 18 December 2020, ICC-01/12-01/18-1205-Conf-Corr

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 Kirsty Sutherland

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 Other Section

Introduction

1. Pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”), the Prosecution requests the authorisation of Trial Chamber X (“Chamber”) to introduce into evidence Witness P-0188’s prior recorded testimony and its associated material, namely, a mission letter addressed to her and the material processed by the witness.

2. Witness P-0188 (“P-0188”) [REDACTED]
[REDACTED]

3. P-0188 produced two notes and a clarification note (or addendum) regarding the processing of evidence provided by Prosecution witnesses P-0007 and P-0010 contained in sealed envelopes.

4. More precisely:

- In February 2013, P-0188 assisted with the scanning of a number of documents secured in two sealed envelopes registered under the ERN [REDACTED] and [REDACTED] (material provided by Witness P-0007). She produced a note in which she described the adopted scanning procedure.¹ Following a Prosecution’s request for clarification² in January 2020, P-0188 produced an addendum to the above note in which she further clarified the process;³
- In April 2013, P-0188 assisted with the photographing of a number of documents secured in two sealed evidence envelopes registered under the ERN [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#)⁴ (material provided by Witness P-0010). She produced a note in which she described the procedure

1
2
3
4

NB: P-0188’s note concerns document [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#). The note makes reference to “MLI-OTP-0002-0123”, which is a typo. The ERN of the document is [MLI-OTP-0002-0122](#) (page 0123 is the second page of that document).

that she adopted (and noticed that the seals of these envelopes had been broken,⁵ which is addressed by both P-0963 and P-0656 in reference to whom the OTP filed recent rule 68(2)(b) applications⁶).

5. P-0188's prior recorded testimony and associated material are relevant to the chain of custody related to P-0007 and P-0010's material: she explains how she handled the sealed envelopes and the evidence contained therein.

6. P-0188's prior recorded testimony is probative and goes to proof of matters other than the acts and conduct of the Accused as required by rule 68(2)(b). In addition, it relates to issues that are not materially in dispute and is of a cumulative or corroborative nature, in that the chain of custody aspects related to witnesses P-0007 and P-0010's material are also addressed by other witnesses, including P-0007 and P-0010 themselves during their testimony before the Chamber,⁷ and – in relation to material provided by P-0010 – by P-0102, who also testified *viva voce* before the Chamber,⁸ and by P-0656⁹ and P-0963¹⁰ in their prior recorded testimony.¹¹

7. All parties will benefit from an expedited presentation of the Prosecution's case. Admitting the prior recorded testimony of this witness under rule 68(2)(b) best serves the interest of justice and the determination of the truth.

8. The cumulative nature and limited purpose of the evidence of this witness makes it unnecessary for the witness to appear for cross-examination. Granting the Prosecution's request would not cause any unfair prejudice to the Accused, who

⁵ [REDACTED]
⁶ [REDACTED].

⁷ ICC-01/12-01/18-T-019-CONF-ENG, p.15-17, l.24-5 and p.27, l.2-22; ICC-01/12-01/18-T-020-Red-ENG, p. 17, l. 7 – p. 19, l. 1.

⁸ See [MLI-OTP-0074-1909](#), 'Forensic Expert Report', 18 January 2020 (for the processing of the material provided by P-0010 contained in sealed envelope [MLI-OTP-0002-0122](#)). During his testimony on 14 September 2020, P-0102 confirmed the accuracy of the report: see ICC-01/12-01/18-T-023-Red-ENG, p.25, l.14 to p.26, l.20.

⁹ [REDACTED] and [REDACTED].
¹⁰ [REDACTED]

¹¹ As mentioned above, the prior recorded testimony of P-0656 and P-0963 are subject of two other rule 68(2)(b) applications.

remains in a position to challenge the witness's evidence through means other than a witness' cross-examination.

9. The Prosecution seeks the introduction of this material on a conditional basis, subject to the subsequent transmission of Witness P-0188's certified declaration, pursuant to rule 68(2)(b)(ii) and (iii).

Confidentiality

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

Applicable Law

11. In its Directions on the conduct of proceedings, the Chamber determined that parties may file applications for the admission of prior recorded testimonies pursuant to rule 68(2) of the Rules.¹²

12. Pursuant to rule 68(2)(b) of the Rules, the Chamber may allow the introduction of the previously recorded testimony of a witness who is not present before the Chamber when that prior recorded testimony: (i) goes to proof of "a matter other than the acts and conduct of the accused"; and (ii) is accompanied by a declaration by the testifying person, witnessed by a person authorised by the Chamber or in accordance with the law and procedure of a State, as detailed in rule 68(2)(b)(ii) and (iii) of the Rules.

13. As generally required in all instances of introduction of prior recorded testimony under rule 68 of the Rules, this introduction must also not be prejudicial to or

¹² Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 80.

inconsistent with the rights of the accused.¹³ The decision of whether to introduce a prior recorded testimony pursuant to this provision is a discretionary one, and the entire purpose of rule 68(2)(b) of the Rules is to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.¹⁴

14. When such situations are identified and pursuant to the criteria set out in rule 68(2)(b) of the Rules, prior recorded testimony may be introduced pursuant to this provision. In doing so, the Chamber will defer to its eventual deliberation for its judgment, the full consideration of the standard evidentiary criteria for such prior recorded testimony, in particular in terms of its relevance and probative value.¹⁵

Prosecution's Submissions

I. The prior recorded testimony of Witness P-0188 should be introduced into evidence pursuant to rule 68(2)(b)

15. Pursuant to rule 68(2)(b) of the Rules, the Prosecution seeks to introduce into evidence the two notes¹⁶ and one addendum¹⁷ provided by Witness P-0188 and the material associated to these notes listed in Section II of the Annex, namely, a mission letter addressed to her¹⁸ and the material processed by the witness.¹⁹

a. The material of Witness P-0188 constitutes "prior recorded testimony" in the sense of rule 68

¹³ ICC-01/12-01/18-1111-Red, Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules, para. 7.

¹⁴ ICC-01/12-01/18-1111-Red, Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules, para. 7.

¹⁵ ICC-01/12-01/18-1111-Red, Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules, para. 7, citing *inter alia* Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para.34(i) and 34(ii).

¹⁶

¹⁷

¹⁸

¹⁹ See, Annex A, Section II, namely: the four sealed envelopes and the photographs/scans taken by P-0188.

16. The technical notes and addendum of Witness P-0188 constitute “prior recorded testimony” within the meaning of rule 68 of the Rules.

17. Witness P-0188 was tasked by the Prosecution to process the forensic evidence contained in the four sealed bags in question because she possessed sufficient qualifications and expertise in the handling of such material. [REDACTED]

[REDACTED] she notably was able to conduct and describe the unsealing and resealing of the evidence envelopes and the manipulation of the material contained therein, respecting all precautions necessary for such procedure to avoid (cross-)contamination and damage to forensic evidence. The Prosecution submits that P-0188’s technical notes and addendum are similar in nature to expert reports, which can be introduced under rule 68(2)(b),²⁰ and should be treated as such, *mutatis mutandis*, for the purpose of this application.²¹

18. In addition, just as experts provide expert reports understanding that they are providing information which may be relied upon in the context of legal proceedings, namely when they are ‘questioned in the capacity as [a] witness[] in the context of or in anticipation of legal proceedings’,²² P-0188 provided her notes and addendum understanding that she was providing information which might be relied upon in the legal proceedings at hand. More specifically, P-0188 was responding to requests placed to her by OTP investigators who had previously collected the material, and, in respect of the addendum, to questions in the mission letter sent to her. The Prosecution

²⁰ See for example, ICC-01/12-01/18-1111-Red, Decision on the introduction of P-0598’s evidence pursuant to Rule 68(2)(b) of the Rules, para.11, where the Chamber authorises the Prosecution to introduce the expert reports of P-0598 and related material pursuant to Rule 68(2)(b) of the Rules.

²¹ [REDACTED]

²² *Prosecutor v. Ongwen*, [Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules ICC-02/04-01/15-596-Red](#) 18 November 2016, para. 9; *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, [Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68\(2\) and \(3\) Requests](#), ICC-01/05-01/13-1478-Red-Corr, 12 November 2015, paras. 31, 32.

wishes to adduce P-0188's prior recorded testimony for the truth of its contents.²³ Furthermore, should this Request be granted by the Chamber, the procedural safeguards of rule 68(2)(b)(ii) and (iii) would be followed.

19. Should the Chamber consider rule 68(2)(b) to be inapplicable due to the nature of the notes, the Chamber may admit them pursuant to their general powers under article 69 of the Statute.

b. The prior recorded testimony of Witness P-0188 goes to proof of matters other than the acts and conduct of the Accused

20. P-0188's evidence does not in any way relate to the acts and conduct of the Accused. Although a number of the documents she processed were drafted and/or signed by the Accused, her evidence only relates to the way documents collected from Prosecution witnesses P-0007 and P-0010 were handled and scanned/photographed. Other witnesses will testify on the content of those documents. More specifically:

- As mentioned above, P-0188 [REDACTED]
[REDACTED]
- P-0188 produced the two notes and one addendum in question regarding the processing of evidence in sealed envelopes [REDACTED]
[REDACTED] [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#), containing documents provided by Prosecution witnesses P-0007 and P-0010, and registered by P-0963 (as regards documents provided by Witness P-0010). In her notes, she explained how she handled the sealed envelopes and the

²³ *Prosecutor v. Bemba, Kilolo, Mangenda, Babala & Arido*, [Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68\(2\) and \(3\) Requests](#), ICC-01/05-01/13-1478-Red-Corr, 12 November 2015, para. 34.

procedure she followed to scan/photograph the material collected by P-0007 and P-0010 contained in those envelopes;²⁴

- Most importantly, P-0188's prior recorded testimony and associated material concern solely the chain of custody related to P-0007 and P-0010's material, which has already been addressed by P-0007²⁵ and P-0010²⁶ themselves during their testimony before the Chamber. Regarding material provided by P-0010, it is also addressed in the prior recorded testimony of P-0102,²⁷ who has already testified *viva voce* before the Chamber on this matter,²⁸ and of P-0963²⁹ and P-0656³⁰.

21. In addition, among P-0007 and P-0010's material, those deemed relevant to this case have already been submitted into evidence through these witnesses,³¹ and recognised by the Chamber as formally submitted.³²

c. The prior recorded testimony has sufficient indicia of reliability

22. The prior recorded testimony of Witness P-0188 bears sufficient indicia of reliability because it is truthful, authentic, consistent and was provided voluntarily. There is no indication of a motive for the witness to fabricate or distort her account. The notes, and addendum, were produced voluntarily and were signed by the witness.

²⁴ In addition, while processing the material provided by P-0010, P-0188 noticed that the seals of the evidence envelopes had been broken (see [REDACTED]). P-0963 explained how he registered those envelopes with the Information and Evidence Unit ("IEU") of the ICC OTP (see [REDACTED]). Further, P-0656, [REDACTED] concluded that it was likely that the seals of those envelopes had been broken by IEU staff (see [REDACTED] and [REDACTED]).

²⁵ ICC-01/12-01/18-T-019-CONF-ENG, p.15-17, l.24-5 and p.27, l.2-22.

²⁶ ICC-01/12-01/18-T-020-Red-ENG, p.17, l.7 to p.19, l.14.

²⁷ [MLI-OTP-0074-1909](#).

²⁸ See ICC-01/12-01/18-T-023-Red-ENG, p.25, l.14 to p.26, l.20. During his testimony on 14 September 2020, P-0102 confirmed the accuracy of his Forensic Expert Report [MLI-OTP-0074-1909](#).

²⁹ [REDACTED]

³⁰ [REDACTED] See also [REDACTED]

³¹ See Annex A, Section II, which indicates which items were submitted into evidence through P-0007 and P-0010.

³² Decision on submitted material for P-0007, communicated via email on 18 September 2020 at 18:36; Decision on submitted material for P-0010, communicated via email on 22 September 2020 at 13:21.

23. P-0188 [REDACTED] was well-placed to process evidence provided by the Prosecution witnesses.

24. P-0188 was aware that her assistance in the scanning and/or photographing of documents contained in the sealed envelopes in question was given with the purpose of preserving forensic evidence. The procedure she adopted in handling the sealed envelopes and the documents contained therein was followed with this objective in mind.

d. The prior recorded testimony is relevant and has *prima facie* probative value

25. As explained above, the prior recorded testimony of Witness P-0188 is relevant to the chain of custody of the sealed envelopes containing material collected from Prosecution witnesses P-0007 and P-0010.

26. As shown above, the prior recorded testimony has *prima facie* probative value because it bears sufficient indicia of reliability.

e. Additional rule 68(2)(b)(i) factors militate in favour of introducing Witness P-0188's prior recorded testimony under rule 68(2)(b)

27. Some of the factors that the Chamber must consider in determining whether the introduction of prior recorded testimony that goes to proof of a matter other than the acts and conduct of the accused may be allowed are whether the prior recorded testimony relates to issues that are not materially in dispute, is of a cumulative or corroborative nature in that other witnesses will give or have given oral testimony of similar facts, and is such that the interests of justice are best served by its introduction.

- i. The prior recorded testimony relates to issues that are not materially in dispute*

28. P-0188's prior recorded testimony relates to issues that are not materially in dispute in that it does not relate to matters which are soundly and conceivably disputed between the parties and are crucial, or of at least sufficient significance for the Chamber's eventual determination of the charges against the accused in its judgment under article 74 of the Statute.³³

ii. The prior recorded testimony is of a cumulative or corroborative nature

29. P-0188's prior recorded testimony is of a cumulative or corroborative nature because the chain of custody related to witnesses P-0007 and P-0010's material is also addressed by other witnesses, including P-0007³⁴ and P-0010³⁵ themselves who have already testified *viva voce* before the Chamber. In addition, the chain of custody related to Witness P-0010's material was also addressed by Witness P-0102, who has already testified *viva voce* before the Chamber on this matter,³⁶ and in the prior recorded testimony of witnesses P-0963³⁷ and P-0656.³⁸

iii. The interests of justice are best served by the introduction of the prior recorded testimony

30. By its terms, rule 68(2)(b) does not unfairly prejudice the Defence by permitting the introduction of evidence that will not be subject to cross-examination when this evidence is unrelated to the acts and conduct of an accused. That both Parties can avail themselves of this provision further underscores its inherent neutrality and that it advances the interests of justice.

³³ *Prosecutor v. Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red, 18 November 2016, para. 15.

³⁴ ICC-01/12-01/18-T-019-CONF-ENG, p.15-17, l.24-5 and p.27, l.2-22

³⁵ ICC-01/12-01/18-T-020-Red-ENG, p.17, l.7 to p.19, l.14.

³⁶ See ICC-01/12-01/18-T-023-Red-ENG, p.25, l.14 to p.26, l.20. During his testimony on 14 September 2020, P-0102 confirmed the accuracy of his Forensic Expert Report [MLI-OTP-0074-1909](#).

³⁷ [REDACTED] (affidavit produced by P-0963 on the handling of the documents until their registration by IEU).

³⁸ [REDACTED] (P-0656 explained how the handling of evidence was operated by IEU).

31. Introducing into evidence the prior recorded testimony of Witness P-0188 under rule 68(2)(b) of the Rules would advance the interests of justice and contribute to a fair and expeditious trial by enabling the presentation of evidence in a more concise and streamlined manner without causing undue prejudice to the fair trial rights of the Accused. This aligns with the stated goal behind the rule's adoption which was to "reduce the length of ICC proceedings and streamline evidence presentation, while also having due regard to the principles of fairness and the rights of the accused."³⁹

f. Introduction into evidence of the prior recorded testimony causes no undue prejudice to the Accused

32. As required under rule 68(1) of the Rules, the introduction into evidence pursuant to rule 68(2)(b) of Witness P-0188's prior recorded testimony "would not be prejudicial to or inconsistent with the rights of the Accused". The Defence's inability to cross-examine P-0188 and the submission of the evidence at this stage of the proceedings do not deprive the Accused of his right and opportunity to challenge the evidence. The Defence already had the opportunity to cross-examine P-0007, P-0010 and P-0102 regarding the issues related to the chain of custody of the relevant material. It may also lead contradictory evidence during the Defence case, or—to the extent that discrepancies would exist with any other evidence—address the prior testimony during closing submissions and advance arguments on the weight to be attributed to the prior recorded testimony.

II. Brief description of material

33. Section I of Annex A lists the two notes and clarification note (or addendum) produced by P-0188 regarding the processing of evidence provided by Prosecution witnesses P-0007 and P-0010 contained in sealed envelopes [REDACTED]

³⁹ [ICC-ASP/12/37/Add.1](#), Assembly of State Parties, Study Group on Governance, Working Group on Lessons Learnt: Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), 31 October 2013, para. 11.

██████████ [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#), as described above (*see* paragraph 4 above).

34. Section II of Annex A lists material associated with the prior recorded testimony of P-0188, which the Prosecution seeks to introduce into evidence through P-0188 under rule 68(2)(b), comprising of:

- (i) the mission letter sent to P-0188,⁴⁰ in response to which P-0188 provided a clarification note;⁴¹
- (ii) the sealed envelopes in question containing the documents collected from witnesses P-0007 and P-0010 (other than P-0007 and P-0010's witness statements) and the photographs of sealed envelopes [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#) taken by P-0188 before and after the resealing⁴²; and
- (iii) the scans/photographs taken by Witness P-0188 of items contained in the sealed envelopes, and their translation.⁴³

35. These items are referred to in P-0188's notes, which would not be understandable without them. They are clearly associated with P-0188's prior recorded testimony.⁴⁴

Other material

36. Section III of Annex A refers to seven items the Prosecution does not seek to introduce but which are necessary for a complete understanding of the prior recorded testimony.

⁴⁰ ██████████

⁴¹ ██████████

⁴² To be submitted into evidence through P-0188: ██████████

██████████ and ██████████

⁴³ See Annex A Section II for the full list of items.

⁴⁴ See, e.g., ICC-02/04-01/15-596-Red, para. 10.

37. Section III lists:

- the two formal declarations drafted by P-0656 and the two mission letters addressed to him,⁴⁵
- the affidavit drafted by P-0963 in relation notably to the sealed envelopes [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#) and the corresponding mission letter,⁴⁶
- the report drafted by P-0102 in relation to the sealed envelope [MLI-OTP-0002-0122](#) and the corresponding mission letter.⁴⁷

38. These items provide context to the chain of custody of the sealed envelopes containing the material collected from Prosecution witnesses P-0007 and P-0010.

III. Provision of certified declaration for Witness P-0188

39. The Prosecution requests that the Chamber authorise the introduction into evidence under rule 68(2)(b) of the prior recorded testimony of Witness P-0188 and associated material on a conditional basis, pending the submission of the certified declaration of this witness.

⁴⁵ To be introduced into evidence through P-0656.

⁴⁶ To be introduced into evidence through P-0963.

⁴⁷ Submitted into evidence through P-0102.

Conclusion

40. For the foregoing reasons, the Prosecution requests that the Chamber conditionally authorise the introduction into evidence of Witness P-0188's prior recorded testimony and associated material, pending submission of the certified declaration.

A handwritten signature in blue ink, appearing to read 'Bensouda', is written over a horizontal line.

Fatou Bensouda, Prosecutor

Dated this 18 December 2020

At The Hague, The Netherlands