



Original: English

No.: ICC-01/12-01/18
Date: 7 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 "Prosecution application under rule 68(2)(b) to introduce into evidence Witness P-0656's prior recorded testimony and associated material", 7 December 2020, ICC-01/12-01/18-1193-Conf

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 (i) Witness P-0656’s formal declarations and (ii) two mission letters addressed to him.

2. Witness P-0656 [REDACTED]
[REDACTED]

3. P-0656 produced two formal declarations regarding [REDACTED]
[REDACTED] the evidence in sealed envelopes [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#), containing documents provided by P-0010, registered with IEU by P-0963, and subsequently processed by P-0188.¹

4. More precisely:

- Witness P-0963, [REDACTED]
interviewed P-0010 [REDACTED] and collected the documents which P-0010 had found during his visit to Timbuktu in February 2013;²
- On 12 April 2013, P-0963 handed the material over to the IEU for registration. In his own declaration, P-0963 states that after P-0010’s interview, he placed those documents into envelopes, which he sealed and signed.³ P-0963 and Witness P-0010 added their signature and the date on the tape sealing the envelopes. P-0963 declares that the envelopes were still closed and sealed when he handed them over to the IEU for registration on 12 April 2013. He furthermore states that he is sure that he did not open the sealed envelopes nor had access to them again after having handed them over to the IEU on 12

¹ These documents were subsequently processed by P-0102. For further information see [REDACTED]
[MLI-OTP-0074-0019](#) and [MLI-OTP-0074-1909](#). Also see ICC-01/12-01/18-T-023-Red-ENG, p. 25, l. 14 – p. 26, l. 20.

² Statement of P-0010, [REDACTED]

³ [REDACTED]

April 2013. These evidence envelopes bear the ERNs [MLI-OTP-0002-0111](#), [MLI-OTP-0002-0113](#), [MLI-OTP-0002-0122](#) and [MLI-OTP-0002-0124](#) respectively;

- Later on, when [REDACTED] P-0188 was asked to process the material contained in the sealed envelopes [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#), she noticed that the seals of these envelopes had been broken.⁴

5. P-0656's formal declarations and associated material are thus relevant to the chain of custody related to P-0010's material: he explains how the handling of evidence was operated by the IEU and concludes that it is likely that the seals of those envelopes were broken by IEU staff.

6. P-0656'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 issues related to P-0010's material have been addressed by P-0010 during his testimony before the Chamber.⁵ They are furthermore addressed in the prior recorded testimony of P-0188⁶ and P-0963⁷ (that will be subject of two other rule 68(2)(b) applications).

7. All parties will benefit from an expedited presentation of the Prosecution's case. Introducing 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

⁴ [REDACTED]

⁵ ICC-01/12-01/18-T-020-Red-ENG, p. 17, l. 7 – p. 19, l. 1.

⁶ [REDACTED]

⁷ [REDACTED]

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

9. The Prosecution seeks the introduction of this material on a conditional basis, subject to the subsequent transmission of Witness P-0656'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 witness. 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.⁸

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

⁸ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 80.

or inconsistent with the rights of the accused.⁹ 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.¹⁰ 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.¹¹

Prosecution's Submissions

I. The prior recorded testimony of Witness P-0656 should be introduced into evidence pursuant to rule 68(2)(b)

14. Pursuant to rule 68(2)(b) of the Rules, the Prosecution seeks to introduce into evidence (i) the two formal declarations¹² P-0656 produced and (ii) the two mission letters¹³ related to the respective formal declarations. The prior recorded testimony of this witness should be introduced into evidence for the reasons set out below.

a. The material of Witness P-0656 constitutes "prior recorded testimony" in the sense of rule 68

15. The formal declarations of Witness P-0656 constitute "prior recorded testimony". The Prosecution nonetheless notes that this is primarily a *mutatis*

⁹ 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.

¹⁰ 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.

¹¹ 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).

¹² [REDACTED] and [REDACTED].

¹³ [REDACTED] and [REDACTED].

mutandis approach, since such declarations are different from a statement obtained by the Prosecution under rules 111 or 112 or from an expert report, which can both be introduced under rule 68.

16. Just as witnesses provide statements or 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’),¹⁴ P-0656 provided his formal declarations understanding that he was providing information which might be relied upon in the legal proceedings at hand.

17. More specifically, P-0656 was answering the questions in the mission letters sent to him. The Prosecution wishes to adduce P-0656’s prior recorded testimony for the truth of its contents.¹⁵ P-0656 has signed the formal declarations certifying that the facts contained therein are true and correct to the best of his knowledge and information. One of P-0656’s colleagues – for each of the formal declarations a different one - affirmed that P-0656 personally signed the formal declaration as his free and voluntary act and deed by signing such declaration at the bottom. Furthermore, the procedural safeguards of rule 68(2)(b)(ii) and (iii) would be followed.

18. Should the Chamber consider rule 68(2)(b) to be inapplicable due to the nature of the formal declarations, the Chamber may recognise them as formally submitted pursuant to its general powers under article 69 of the Statute.

¹⁴ *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.

¹⁵ *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.

b. The prior recorded testimony of Witness P-0656 goes to proof of matters other than the acts and conduct of the Accused

19. Pursuant to rule 68(2)(b) of the Rules, the Prosecution seeks to introduce into evidence Witness P-0656's formal declarations and related mission letters addressed to him.

20. P-0656's evidence does not in any way relate to the acts and conduct of the Accused.

21. As mentioned above, Witness P-0656 [REDACTED]
[REDACTED]

22. P-0656 produced the two formal declarations in question regarding the personnel with access to the evidence in the sealed envelopes [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#), containing documents provided by P-0010, registered by P-0963, and processed by P-0188.¹⁶ P-0656 explained how the handling of evidence was operated by the IEU and concluded that it is likely that the seals of the envelopes [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#) were broken by IEU staff (see for details paragraph 4 above).

23. P-0656's prior recorded testimony concerns the chain of custody related to P-0010's material, which has already been addressed by P-0010 himself¹⁷ during his testimony before the Chamber. It is also addressed in the prior recorded testimony of P-0188¹⁸ and P-0963.¹⁹

¹⁶ These documents were subsequently processed by P-0102. For further information see [REDACTED], [MLI-OTP-0074-0019](#) and [MLI-OTP-0074-1909](#). Also see ICC-01/12-01/18-T-023-Red-ENG, p. 25, l. 14 – p. 26, l. 20.

¹⁷ ICC-01/12-01/18-T-020-Red-ENG, p. 17, l. 7 – p. 19, l. 1.

¹⁸ [REDACTED]

¹⁹ [REDACTED]

c. The prior recorded testimony has sufficient indicia of reliability

24. The prior recorded testimony of Witness P-0656 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 his account.

25. P-0656 signed the formal declarations certifying that the facts contained therein are true and correct to the best of his knowledge and information. Two of P-0656's colleagues - a different one for each of the formal declarations - signed the documents as well, affirming that P-0656 personally signed the formal declaration as his free and voluntary act and deed.

26. In addition, Witness P-0656, [REDACTED]

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

27. As explained in more detail above, the prior recorded testimony of Witness P-0656 is relevant to the chain of custody of the sealed envelopes containing material collected from P-0010.

28. 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-0656's prior recorded testimony under rule 68(2)(b)

29. 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*

30. The 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.²⁰

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

31. The prior recorded testimony is of a cumulative or corroborative nature in that, as mentioned above, the chain of custody issue related to P-0010's material has already been addressed by P-0010²¹ during his testimony before the Chamber. It is furthermore addressed in the prior recorded testimony of P-0188²² and P-0963.²³

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

32. 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. Introducing into evidence the prior recorded testimony of Witness P-0656 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

²⁰ *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.

²¹ ICC-01/12-01/18-T-020-Red-ENG, p. 17, l. 7 – p. 19, l. 1.

²² [REDACTED]

²³ [REDACTED]

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."²⁴

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

34. As required under rule 68(1) of the Rules, the introduction into evidence pursuant to rule 68(2)(b) of Witness P-0656's prior recorded testimony "would not be prejudicial to or inconsistent with the rights of the Accused". The Defence's inability to cross-examine Witness P-0656, and the submission of the evidence at this stage of the proceedings, does not deprive the Accused of his right and opportunity to challenge the evidence. The Defence already had the opportunity to cross-examine P-0010 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 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

a. Associated material

35. Section II of Annex A lists the mission letters sent to P-0656, which the Prosecution seeks to introduce into evidence through P-0656 under rule 68(2)(b). The mission letters are clearly associated to P-0656's formal declarations, as P-0656 refers

²⁴ [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.

in his formal declarations to Mr Gilles Dutertre's inquiry of 28 October 2019²⁵ and 13 January 2020²⁶ respectively, to which the formal declarations are a response.

b. Other material

36. Section III of Annex A refers to 20 items that the Prosecution does not seek to introduce, but which are necessary for a complete understanding of the prior recorded testimony.

37. Section III lists:

- the four sealed envelopes containing the material collected from P-0010²⁷,
- the note²⁸ prepared by P-0188 on sealed envelopes [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#) and the photographs taken by Witness P-0188 of items contained in the envelopes [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#)²⁹ and photographs of those envelopes before and after resealing,³⁰ and
- the declaration drafted by P-0963 in relation to the sealed envelopes [MLI-OTP-0002-0111](#), [MLI-OTP-0002-0113](#), [MLI-OTP-0002-0122](#) and [MLI-OTP-0002-0124](#) as well as the corresponding mission letter.³¹

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

III. Provision of certified declaration for Witness P-0656

²⁵ [REDACTED]

²⁶ [REDACTED]

²⁷ Submitted into evidence through P-0010 and to be introduced into evidence through P-0963: [MLI-OTP-0002-0111](#), [MLI-OTP-0002-0113](#) and [MLI-OTP-0002-0122](#), [MLI-OTP-0002-0111](#) and [MLI-OTP-0002-0122](#) also to be introduced into evidence through P-0188.

²⁸ To be introduced into evidence through P-0188.

²⁹ Submitted into evidence through P-0010 and to be introduced into evidence through P-0188: [MLI-OTP-0002-0756](#), [MLI-OTP-0002-0757](#), [MLI-OTP-0002-0759](#), [MLI-OTP-0002-0760](#), [MLI-OTP-0002-0776](#), [MLI-OTP-0002-0776](#), [MLI-OTP-0002-0781](#) and [MLI-OTP-0002-0783](#). To be introduced into evidence through P-0188: [REDACTED] and [REDACTED].

³⁰ To be introduced into evidence through P-0188: [REDACTED] and [REDACTED]

³¹ To be introduced into evidence through P-0963.

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-0656 and associated material on a conditional basis pending the submission of the certified declaration of this witness.

Conclusion

40. For the foregoing reasons, the Prosecution requests that the Chamber conditionally authorise the introduction into evidence of Witness P-0656's prior recorded testimony and associated material, pending submission of the certified declaration.



Fatou Bensouda, Prosecutor

Dated this 7 December 2020

At The Hague, The Netherlands