



Original: English

No.: ICC-01/12-01/18
Date: **14 December 2020**
Date of submission:
8 April 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 MLI-OTP-P-0555's expert report and associated material", 14 December 2020, ICC-01/12-01/18-1206-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
Mr. Antoine Vey

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 Trial Chamber X’s (“Chamber”) authorisation to introduce into evidence Witness P-0555’s (“P-0555”) expert report¹ and associated material, as specified in Annex A to the present application (“Request”), in lieu of his *viva voce* testimony in this case.

2. P-0555 is an expert in audio enhancement who produced a report and audio enhancements in relation to videos of the *Comité de crise* in Timbuktu.² [REDACTED]

[REDACTED]³ The Chamber has authorised P-0555 to testify as an expert witness.⁴

3. As P-0555’s expert report relates solely to describing the audio enhancements he applied to videos of the *Comité de crise* in Timbuktu - it does not concern the acts and conduct of the Accused. Allowing its introduction into evidence under rule 68(2)(b) of the Rules will therefore not prejudice the Accused even if the Defence will not have the opportunity to cross-examine him.

4. The technical nature and the content of P-0555’s evidence obviates the need for his *viva voce* testimony. Allowing its introduction into evidence under rule 68(2)(b) of the Rules will expedite the presentation of the Prosecution case, thereby benefiting both parties and serving the interests of justice.

5. The material associated with P-0555’s expert report⁵ which the Prosecution seeks to introduce into evidence is comprised of the the enhanced audio tracks,⁶ the

¹ [REDACTED].

² [REDACTED].

³ [REDACTED].

⁴ ICC-01/12-01/18-989 [REDACTED], para. 29.

⁵ [REDACTED].

letter of instruction on the basis of which he prepared his expert report,⁷ and two booklets outlining P-0555's obligations as an expert [REDACTED].⁸

6. P-0555's evidence is relevant to the charge of persecution (count 13) and the common purpose or plan and organisational policy of the Groups.

7. Should this Request be granted, P-0555 will execute a declaration that the contents of his statement and associated material are true and correct to the best of his knowledge and belief, in accordance with the requirements under rule 68(2)(b)(ii) and (iii). The Chamber has designated a Registry Senior Legal Advisor, or a person designated by him, to witness declarations in this case pursuant to rule 68(2)(b) of the Rules.⁹

Confidentiality

8. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this Request and its annex as confidential because they contain information identifying P-0555. The Prosecution shall file a public redacted version in due course.

Applicable Law

9. 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.¹⁰

10. 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

⁶ [REDACTED]

⁷ [REDACTED]

⁸ [REDACTED]

⁹ ICC-01/12-01/18-1111 [REDACTED], para. 16.

¹⁰ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 80.

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.

11. 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 inconsistent with the rights of the accused.¹¹ 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.¹²

12. When such situations are identified, and in accordance with 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.¹³

13. This Request is filed in accordance with the Chamber’s instruction that rule 68(2) applications be filed by the end of 2020.¹⁴

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.

¹² 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.

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, citing *inter alia* Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para.34(i) and 34(ii).

¹⁴ ICC-01/12-01/18-789-AnxA, para. 80.

Submissions

I. The prior recorded testimony of Witness P-0555 should be introduced into evidence pursuant to rule 68(2)(b) of the Rules

14. Rule 68(2)(b) of the Rules allows the introduction of a witness's previously recorded testimony that goes to proof of a matter other than the acts and conduct of the accused. When the Prosecution sought to qualify P-0555 as an expert, it informed the Chamber that it intended to seek the introduction of his report and associated material pursuant to rule 68(2)(b) of the Rules.¹⁵ In authorising P-0555 to testify as an expert, the Chamber indicated that it "will decide in due course, and once the Prosecution formally requests the introduction of his evidence pursuant to Rule 68 of the Rules, on the appropriate mode of testimony for this witness."¹⁶

15. Given the technical nature and content of P-0555's evidence, which goes to proof of matters other than the acts and conduct of the accused, the Prosecution seeks to introduce his expert report and associated material into evidence under rule 68(2)(b) of the Rules.

a. The material of Witness P-0555 constitutes "prior recorded testimony" in the sense of rule 68 of the Rules

16. The term "previously recorded testimony" includes statements and transcripts of interviews taken pursuant to rules 111 and 112 of the Rules respectively, together with the associated exhibits.¹⁷ Trial Chambers VI and IX relied on rule 68(3) of the Rules to receive evidence from expert witnesses in the *Ntaganda* and *Ongwen* cases,¹⁸

¹⁵ ICC-01/12-01/18-842 [REDACTED], para. 20.

¹⁶ ICC-01/12-01/18-989 [REDACTED], para. 29.

¹⁷ See ICC-01/05-01/08-1386, OA5 OA6, paras.79-81, confirming that written witness statements can be introduced as "previously recorded testimony". See also ICC-01/09-01/11-1938-Red-Corr, paras.30-33, analysing the term "previously recorded testimony" in light of the Rules' *travaux préparatoires*, the Court's prior case-law and the need to ensure language consistency within the rule in interpreting it; ICC-01/05-01/08-2012-Red, para.136; ICC-01/05-01/08-886, para.6; ICC-01/04-01/06-1603, para.18; ICC-01/04-01/07-2289-Corr-Red; ICC-01/04-01/07-2362.

¹⁸ ICC-01/04-02/06-845, [REDACTED].

even absent a request from the calling party.¹⁹ The Prosecution nonetheless notes that this is primarily a *mutatis mutandis* approach since an expert report is different from a statement obtained by the Prosecution under rules 111 or 112 of the Rules.

17. The present Chamber accepted the applicability of rule 68(3) of the Rules to expert reports, allowing the evidence of experts P-0152, P-0653, P-0655, P-0104, P-0151, P-0620, P-0621, P-0657, P-0102, P-0064, P-0635 and P-0075 to be introduced under this provision subject to compliance with the procedural prerequisites thereof.²⁰

18. Moreover, the Chamber also admitted the expert report of P-0598 pursuant to rule 68(2)(b) of the Rules, finding that this provision was more suitable for its introduction than rule 68(3) of the Rules which the Prosecution invoked.²¹

b. The prior recorded testimony of Witness P-0555 goes to proof of matters other than the acts and conduct of the Accused

19. P-0555's expert report relates solely to describing the audio enhancements he applied to videos of the *Comité de crise* in Timbuktu. His report does not concern the acts and conduct of the Accused, and does not comment on the content of the videos.

c. The prior recorded testimony has sufficient indicia of reliability

20. P-0555 is an expert in audio enhancement independent of the Prosecution. [REDACTED]

[REDACTED]

[REDACTED].²² The Chamber has authorised P-0555 to testify as an expert witness.²³ His expert report²⁴

¹⁹ 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.

²⁰ ICC-01/12-01/18-989 [REDACTED], p. 40.

²¹ ICC-01/12-01/18-1111 [REDACTED], para. 1-2, 5-11.

²² [REDACTED].

²³ ICC-01/12-01/18-989 [REDACTED], para. 29.

²⁴ [REDACTED].

describes the audio enhancements he applied to five videos: an activity within his area of expertise, his report is *prima facie* reliable.

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

21. P-0555's report relates to the enhancement of five videos of the *Comité de crise* in Timbuktu during its occupation by the armed groups. The audio enhancement enables the better appreciation of these videos, which in turn are relevant to the charge of persecution (count 13) and the common purpose or plan and organisational policy of the Groups. P-0555's audio enhancement of the videos will enable the Chamber to better appreciate their content in conjunction with relevant substantive commentary from other Prosecution witnesses (such as P-0065²⁵ [REDACTED]) in a position to describe the people, places and/or events depicted in the videos.

Additional rule 68(2)(b)(i) factors militate in favour of introducing Witness P-0555's prior recorded testimony under rule 68(2)(b) of the Rules

i. P-0555's expert report relates to issues which are not materially in dispute

22. P-0555's evidence is purely technical in nature as it relates solely to audio enhancements. P-0555 does not comment on the substance of the videos whose audio tracks he enhanced. Other Prosecution witnesses will do so, and the Defence will have the opportunity to cross-examine them. The audio enhancements are not materially in dispute in the present case.

²⁵ See P-0065's comments on [MLI-OTP-0018-0014](#) at ICC-01/12-01/18-T-038-[REDACTED] at p. 29, l. 6-17 (open session); [REDACTED]; [REDACTED]; p. 31, l. 4-25 (open session); p. 32, l. 1-25, p. 33, l. 1-25, p. 34, l. 1-6, p. 36, l. 2-17 (open session).

ii. *The interests of justice are best served by the admission of the prior recorded testimony*

23. By its terms, rule 68(2)(b) of the Rules 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.

24. Introducing into evidence the prior recorded testimony of P-0555 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."²⁶

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

25. As required under rule 68(1) of the Rules, the introduction into evidence pursuant to rule 68(2)(b) of the Rules of P-0555's prior recorded testimony "would not be prejudicial to or inconsistent with the rights of the Accused". The inability to cross-examine P-0555 on his evidence, and the admission of the evidence at this stage of the proceedings, does not deprive the Accused of his right and opportunity to challenge the evidence. As pointed out above, P-0555 does not comment on the substance of the videos whose audio tracks he enhanced. Other Prosecution witnesses will do so, and the Defence will have the opportunity to cross-examine these witnesses and to lead contradictory evidence during the Defence case.

²⁶ [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.

The Chamber will accord the appropriate level of weight and probative value to these videos on the basis of the strength and reliability of commentary on their content provided by forthcoming Prosecution witnesses. The Defence also retains the possibility to address the prior testimony during closing submissions and advance arguments on the weight to be attributed to the prior recorded testimony.

f. Brief description of the associated material

26. Attached as Annex A to this application is a table listing P-0555's expert report²⁷ and associated material which the Prosecution seeks to introduce into evidence²⁸ consisting of: a mission letter [REDACTED]²⁹ the enhanced audio tracks,³⁰ the letter of instruction on the basis of which he prepared his expert report,³¹ and two booklets outlining P-0555's obligations as an expert [REDACTED]³².

27. The mission letter is addressed to P-0102, but due to his heavy workload, he delegated this to P-0555: as per the mission letter, P-0102 was authorised to seek the assistance of any expert or technician if necessary.³³

28. Annex A³⁴ also lists a mission letter³⁵ and two videos,³⁶ which the Prosecution does not seek to introduce into evidence. These two videos, which P-0555 was requested to analyse through the mission letter, [REDACTED].

²⁷ [REDACTED].

²⁸ Annex A, Table II.

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ Annex A, Table III.

³⁵ [REDACTED].

³⁶ [REDACTED].

II. Provision of certified declaration for P-0555

29. Should this Request be granted, P-0555 will execute a declaration that the contents of his statement and associated material are true and correct to the best of his knowledge and belief, in accordance with the requirements under rule 68(2)(b)(ii) and (iii). The Chamber has designated a Registry Senior Legal Advisor, or a person designated by him, to witness declarations in this case pursuant to rule 68(2)(b) of the Rules.³⁷

Conclusion

30. For the foregoing reasons, the Prosecution asks that the Chamber grant this Request.



Fatou Bensouda, Prosecutor

Dated this 14 December 2020

At The Hague, The Netherlands

³⁷ ICC-01/12-01/18-1111-[REDACTED], para. 16.