

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/12-01/18

Date: 14 April 2021

TRIAL CHAMBER X

Before:

**Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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***

Confidential

**Decision on the introduction into evidence of P-0125's prior recorded testimony
pursuant to Rule 68(2)(c) of the Rules**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Fatou Bensouda
James Stewart

Counsel for the Defence

Melinda Taylor
Kirsty Sutherland
Antoine Vey

Legal Representatives of Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 64(2), 67(1) and 69(2) of the Rome Statute (the ‘Statute’) and Rule 68(2)(c) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following decision.

I. Procedural history

1. On 6 May 2020, the Chamber issued its ‘Decision on the conduct of proceedings’,¹ which relevantly instructed the Office of the Prosecutor (the ‘Prosecution’) to file any applications pursuant to Rule 68(2) of the Rules no later than by the end of the year 2020.²
2. On 11 December 2020, the Prosecution filed a request seeking to introduce P-0125’s prior recorded testimony and associated material pursuant to Rule 68(2)(c) of the Rules (the ‘Request’).³
3. On 12 January 2021, granting a request from the Defence which was unopposed,⁴ the Single Judge set the timeframe for responses to the pending Rule 68(2) applications.⁵ The Chamber later granted another unopposed request from the Defence seeking a further extension of the time limit to respond to the Request.⁶
4. On 26 February 2021, the Legal Representatives of Victims filed a response⁷ in which they submit that, in their view, the Prosecution has satisfied all the

¹ ICC-01/12-01/18-789, with one public annex and two confidential annexes.

² Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 79-80.

³ Prosecution application under rule 68(2)(c) to introduce into evidence the prior recorded testimony and associated material of Prosecution Witness MLI-OTP-P-0125, ICC-01/12-01/18-1202-Conf (with confidential Annex A). The material sought to be introduced is listed in sections I and II of ICC-01/12-01/18-1202-Conf-AnxA (pp. 2-28).

⁴ Defence request under Regulation 35 for extension of time to file Rule 68 Responses, 8 January 2021, ICC-01/12-01/18-1243-Conf; and email from the Prosecution on 11 January 2021 at 13:18.

⁵ Email from the Single Judge to the parties and participants at 10:38.

⁶ Email from the Single Judge to the parties and participants on 24 February 2021 at 14:49. *See also*, Emails from the Prosecution and the Defence on the same day at 12:13 and 12:09, respectively.

⁷ Observations sur les requêtes du Procureur ICC-01/12-01/18-1193-Conf, ICC-01/12-01/18-1195-Conf, ICC-01/12-01/18-1196-Conf, ICC-01/12-01/18-1202-Conf, ICC-01/12-01/18-1206-Conf, ICC-01/12-01/18-1210-Conf, ICC-01/12-01/18-1217-Conf, formulées sur le fondement des Règles 68-2(b) et 68-2(c), ICC-01/12-01/18-1321-Conf.

requirements under Rule 68(2)(c) for the Request and that, accordingly, they do not have any related objection.

5. On 12 March 2021, the Defence filed its response to the Request (the 'Response'),⁸ in which it submits: (i) that the Prosecution has failed to demonstrate P-0125's death to the requisite standard;⁹ (ii) that P-0125's prior recorded testimony should not be introduced in full as parts thereof go to proof of Mr Al Hassan's acts and conduct, are materially in dispute and/or lack sufficient indicia of reliability;¹⁰ and (iii) that it has not been demonstrated that the introduction into evidence of the associated material would not be unduly prejudicial.¹¹ The Defence however indicates that, with the necessary redactions being applied, or else a proviso given by the Chamber, it does not oppose the introduction into evidence of parts of P-0125's statement under Rule 68(2)(c).¹²

II. Analysis

6. Pursuant to Rule 68(2)(c) 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 the following three requirements are met: (i) the prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligences, unavailable to testify orally; (ii) the necessity of measures under Article 56 of the Statute could not have been anticipated; and (iii) the prior recorded testimony has sufficient indicia of reliability. Rule 68(2)(c)(ii) also provides that the fact that the prior recorded testimony goes to proof of acts and conduct of the accused may be a factor against its introduction, or part of it. Further, as generally required in all instances of introduction of prior recorded testimony under Rule 68 of the Rules, this introduction must not be prejudicial to or inconsistent with the rights of the accused.

⁸ Defence response to 'Prosecution application under rule 68(2)(c) to introduce into evidence the prior recorded testimony and associated material of Prosecution Witness MLI-OTP-P-0125', ICC-01/12-01/18-1368-Conf.

⁹ Response, ICC-01/12-01/18-1368-Conf, paras 4-6.

¹⁰ Response, ICC-01/12-01/18-1368-Conf, paras 7-18.

¹¹ Response, ICC-01/12-01/18-1368-Conf, paras 21-23.

¹² Response, ICC-01/12-01/18-1368-Conf, paras 19-20.

7. The Chamber recalls that the full consideration of the standard evidentiary criteria for material introduced into evidence, in particular in terms of its relevance and probative value, is deferred to its eventual deliberation for its judgment.¹³

A. Whether P-0125 is unavailable to testify orally

8. The Prosecution submits that P-0125 died after giving his statement. In support, the Prosecution refers to investigators' notes which report the account of three individuals confirming the death of P-0125.¹⁴ The Prosecution also explains that they have recently been unable to contact P-0125's relatives, that his phone number appears to no longer be in use, and that they have sent a request to the Malian authorities seeking assistance to obtain a copy of P-0125's death certificate, but that this request remains outstanding.¹⁵
9. The Defence submits that the Prosecution did not satisfactorily demonstrate that P-0125 is unavailable to testify orally as required under Rule 68(2)(c) of the Rules. Referring to decisions of Trial Chamber IX and Trial Chamber IV, the Defence argues that relevant information, such as a death certificate or formal statements, should be submitted to substantiate such allegation.¹⁶ The Defence further submits that there is no evidence of any attempt by the Prosecution to obtain a death certificate directly from the hospital or local authorities of P-0125's last known residence, or a sworn statement from any witnesses who may have direct knowledge of the alleged death.¹⁷ In the view of the Defence, the Chamber should invite the Prosecution to further substantiate the allegation of P-0125's death.¹⁸

¹³ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, paras 34(i) and (ii). See also *Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 7.

¹⁴ Request, ICC-01/12-01/18-1202-Conf, paras 17-18, 21.

¹⁵ Request, ICC-01/12-01/18-1202-Conf, paras 19-20.

¹⁶ Request, ICC-01/12-01/18-1202-Conf, para. 4, referring to Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence, 19 June 2018, ICC-02/04-01/15-1288, para. 9; and Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, 20 November 2015, ICC-01/04-02/06-1029, para. 43.

¹⁷ Response, ICC-01/12-01/18-1368-Conf, para. 5.

¹⁸ Response, ICC-01/12-01/18-1368-Conf, para. 6.

10. The Chamber observes that the investigators' notes submitted describe the accounts of three individuals who stated to have known P-0125. The Chamber notes that these three individuals independently reported P-0125's death to Prosecution investigators during phone conversations. Two of them provided the (approximate) date of his death and one specified its cause (sickness).¹⁹ Moreover, the Chamber notes the Prosecution's submission that it has recently been unable to reach P-0125's relatives and that it provided an explanation as to why it did not obtain a death certificate to support its allegation. The Chamber considers that the investigators' notes contain probative information which, taken together, satisfactorily substantiate P-0125's death for the purpose of its Rule 68(2)(c) assessment. In particular, the Chamber notes that pursuant to Rule 68(2)(c) of the Rules and the information obtained by the Prosecution, this witness 'must be presumed dead'. Accordingly, in the circumstances, the Chamber finds that the provision of supplementary documentation, such as formal statements, is not required.

B. Whether the necessity of measures under Article 56 of the Statute could have been anticipated

11. Referring to the witness's reported age and medical condition, as well as the fact that he died less than three months after he finished giving his statement, the Prosecution submits that the need for measures under Article 56 of the Statute for P-0125's evidence could not reasonably have been anticipated.²⁰
12. The Chamber agrees with the Prosecution and notes that the Defence made no submissions on this requirement. Having had particular regard to the information provided by P-0125 during the course of a specific assessment,²¹ the Chamber finds that the Request sufficiently establishes that the necessity of measures under Article 56 of the Statute could not reasonably have been anticipated.

¹⁹ MLI-OTP-0078-9958, MLI-OTP-0078-9847, and MLI-OTP-0031-0554. The Chamber notes that the last two documents contain accounts which are contemporaneous to P-0125's death.

²⁰ Request, ICC-01/12-01/18-1202-Conf, para. 22, referring to MLI-OTP-0023-0004-R03, p. 0004 and MLI-OTP-0078-9951-R01.

²¹ MLI-OTP-0078-9951-R01 ('P-0125 told the team that he had no medical condition').

C. Whether P-0125's prior recorded testimony has sufficient indicia of reliability

13. The Prosecution seeks the introduction under Rule 68(2)(c) of the prior recorded testimony of P-0125 in full as well the associated material. The Prosecution argues that the prior recorded testimony has sufficient indicia of reliability and, in this regard, refers to the circumstances in which it arose, formal requirements, as well as its content, notably pointing to evidence of other witnesses which corroborates P-0125's accounts.²² The Prosecution also submits that the associated exhibits are all used and explained by P-0125 in his statement and are therefore necessary to understand it.²³
14. Pointing to the parts of P-0125's statement concerning the term 'Islamic Police' as well as alleged acts and conduct of members thereof, the Defence argues that they lack sufficient indicia of reliability and that their introduction into evidence pursuant to Rule 68(2)(c) is therefore prejudicial.²⁴ The Defence submits that P-0125's use of the term 'Islamic Police' is not the same as that of the Prosecution.²⁵ The Defence further notes that while the Prosecution appears to acknowledge that the relevant excerpts are 'mistaken' and 'confused', it nonetheless seeks to rely on them to support key allegations.²⁶ The Defence also submits that P-0125 does not provide a clear timeframe for his observations.²⁷
15. The Chamber notes that the prior recorded testimony of P-0125 is a statement obtained by the Prosecution in the ordinary course of its investigations in Mali, that it was signed by the witness and the investigators conducting the interview, was given voluntarily, obtained in the presence of a qualified interpreter, and was declared to be accurate by P-0125 at the time of giving it. The Chamber recalls the Appeals Chamber's ruling that, in their assessment of indicia of reliability under Rule 68(2)(b)(i) of the Rules, trial chambers are not obliged to consider

²² Request, ICC-01/12-01/18-1202-Conf, paras 24-28.

²³ Request, ICC-01/12-01/18-1202-Conf, para. 10.

²⁴ Response, ICC-01/12-01/18-1368-Conf, paras 15-18.

²⁵ Response, ICC-01/12-01/18-1368-Conf, para. 16.

²⁶ Response, ICC-01/12-01/18-1368-Conf, para. 17 referring to Request, ICC-01/12-01/18-1202-Conf, paras 35-36.

²⁷ Response, ICC-01/12-01/18-1368-Conf, para. 16.

factors beyond formal requirements.²⁸ Accordingly, and in line with the submission system adopted in the present case, the Chamber is satisfied that the Request establishes that P-0125's prior recorded testimony bears sufficient indicia of reliability of formal nature and is not so manifestly unbelievable or incoherent so as to make it unsuitable for introduction under Rule 68(2)(c) of the Rules. The Chamber therefore does not consider it necessary to discuss any further the Defence's submissions which go beyond formal requirement and finds without basis the Defence's submission that parts of P-0125's statement are so unreliable that their exclusion is warranted or else a prejudice would arise. These submissions will be considered by the Chamber in its ultimate assessment of the probative value and weight, if any, to be attributed to this evidence.

16. Turning to the associated material sought to be introduced, the Chamber notes that the Prosecution is seeking to introduce: (i) a handwritten note and a sketch by P-0125, together with their translation; as well as (ii) 16 video excerpts and 32 photographs which were shown to P-0125, together with their transcript and translation, where relevant.²⁹
17. The Defence argues that the introduction of associated material under Rule 68(2)(c) would be prejudicial. The Defence submits that P-0125 did not create, edit or handle these videos, but that they were simply shown to him, without sound, for the purpose of demonstrating his visual recognition of certain persons and places.³⁰ The Defence avers that, without a cross-examination, it is unable to test the witness' recognition, seek clarification regarding the source of his knowledge or confront him where he failed to recognise persons and places.³¹
18. The Chamber is not convinced by the Defence's argument in this respect. The Chamber notes that P-0125 was presented all the associated material submitted and that he discussed, at least to a certain extent, their content. Accordingly, and in the absence of specific reasons not to do so, the Chamber considers that the

²⁸ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, ICC-02/11-01/15-744 OA8, paras 3, 103-104.

²⁹ Request, ICC-01/12-01/18-1202-Conf, para. 10 and ICC-01/12-01/18-1202-Conf-AnxA, pp. 2-28.

³⁰ Response, ICC-01/12-01/18-1368-Conf, para. 22.

³¹ Response, ICC-01/12-01/18-1368-Conf, para. 22.

associated material identified by the Prosecution can be introduced into evidence via this witness pursuant to Rule 68(2)(c). The absence of cross-examination, which is due to the witness's unavailability, is a factor which will be considered by the Chamber in its ultimate assessment of the probative value and weight, if any, to be attributed to this evidence. The Chamber also fails to see how the fact that certain material was not sought to be introduced by the Prosecution – because P-0125 did not recognise persons or places – is prejudicial, noting that, should it wish to do so, the Defence can itself seek to have it introduced into evidence or seek to have admitted other related evidence.

D. Whether the prior recorded testimony goes to proof of Mr Al Hassan's acts and conduct and whether admission in part is warranted

19. The Prosecution submits that the fact that parts of P-0125's statement go to acts and conduct of Mr Al Hassan should not prevent its introduction. In support, it argues that these parts are limited in scope and partly corroborated.³² The Prosecution further submits that, if the Chamber decides not to introduce P-0125's evidence in full, it should authorise the introduction of the material but not rely on certain parts of his statement which refer to the accused for the purpose of establishing his acts and conduct.³³
20. The Defence opposes the introduction of P-0125's statement in full, including because parts thereof go to acts and conduct of the accused and because other parts relate to issues that are central to the Prosecution's case and materially in dispute.³⁴ In its view, allowing the relevant allegations to be admitted into evidence without any possibility for the Defence to question and challenge their author would be antithetical to Mr Al Hassan's rights to examine or have

³² Request, ICC-01/12-01/18-1202-Conf, paras 32-36, referring to P-0150, P-0580 and P-0114.

³³ Request, ICC-01/12-01/18-1202-Conf, paras 11, 37. In this regard, the Prosecution refers to the name in one sentence in paragraph 51, the entirety of paragraphs 53 and 54, one sentence in paragraph 121, and a phrase and a sentence in paragraph 165 (in connection with MLI-OTP-0022-0482).

³⁴ Response, ICC-01/12-01/18-1368-Conf, paras 7, 9-14. In addition to the parts identified by the Prosecution, the Defence refers to the content of paragraphs 50, 58, 65-66, 68, 70, 79-80, 87-88, 96-97, 159, 171-172.

examined the witnesses against him, and would therefore cause him undue prejudice.³⁵

21. The Chamber notes that, as mentioned by the Prosecution, Rule 68(2)(c)(ii) does not prevent the introduction of material which goes to acts and conduct of the accused but provides that it ‘may be a factor against its introduction, or part of it’. Having duly considered the content of P-0125’s statement, and how it is currently expected that it will be relied upon by the Prosecution in support of its case, the Chamber finds that, in the present circumstances, the fact that discrete parts of P-0125’s statement go to acts and conduct of Mr Al Hassan or relate to ‘live and important issues in the case’ need not bar its introduction under Rule 68(2)(c). The Chamber is of the view that admission in full will better assist its consideration of P-0125’s evidence as a whole and recalls that, pursuant to the approach adopted with respect to the submission of evidence,³⁶ full consideration of this material’s probative value, if any, is being deferred to the Chamber’s eventual deliberation for its judgment. It is also on this occasion that the Chamber will eventually attribute weight to this evidence and, in this regard, the Chamber refers to the Appeals Chamber’s ruling clarifying that, to protect the accused’s rights under Article 67(1)(e) of the Statute, ‘prior recorded testimony must not form the sole or decisive basis for the conviction for a particular crime as such’.³⁷

E. Conclusion

22. In light of the above, and having found that the introduction sought is neither prejudicial nor inconsistent with Mr Al Hassan’s rights, the Chamber authorises the Prosecution to introduce P-0125’s statement in full, as well as the associated material submitted, pursuant to Rule 68(2)(c) of the Rules.

³⁵ Response, ICC-01/12-01/18-1368-Conf, paras 11, 14.

³⁶ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, paras 34(i) and (ii).

³⁷ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021, ICC-01/04-02/06-2666-Red, paras 16, 630.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request;

AUTHORISES, pursuant to Rule 68(2)(c) of the Rules the introduction into evidence of the prior recorded testimony of P-0125 and associated material, as identified in footnote 3 above;

ORDERS the Registry to reflect in the eCourt metadata the introduction of the relevant material; and

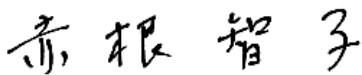
ORDERS the Prosecution to file a public redacted version of the Request no later than seven days after notification of the present decision.

Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua

Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated this Wednesday, 14 April 2021

At The Hague, The Netherlands