



Original: English

**No. ICC-01/12-01/18
Date: 15 November 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***

Public

**Decision on second Prosecution request for the introduction of P-0113's evidence
pursuant to Rule 68(2)(b) of the Rules**

To be notified in accordance with Regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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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)(b) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules’.

I. Procedural history

1. On 16 December 2020, the Office of the Prosecutor (the ‘Prosecution’) filed a request seeking to introduce P-0113’s prior statement and associated material under Rule 68(2)(b) of the Rules (the ‘First Request’).¹
2. On 18 January 2021, the Defence filed its response to the First Request, seeking that it be rejected (the ‘First Response’).²
3. On 26 March 2021, the Chamber issued its ‘Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules’, in which it notably rejected, by majority, the First Request without prejudice (the ‘First Decision’).³ Judge Kimberly Prost dissented from the majority’s findings concerning the prior recorded testimony of P-0113.⁴
4. On 20 September 2021, the Prosecution filed a second request seeking to introduce P-0113’s prior statement and associated material under Rule 68(2)(b) of the Rules (the ‘Second Request’).⁵

¹ Prosecution application under rule 68(2)(b) to introduce MLI-OTP-P-0113’s statement and associated material into evidence, ICC-01/12-01/18-1207-Conf (with one confidential annex; a public redacted version was filed on 8 April 2021).

² Defence response to ‘Prosecution application under rule 68(2)(b) to introduce MLI-OTP-P-0113’s statement and associated material into evidence’, ICC-01/12-01/18-1252-Conf.

³ ICC-01/12-01/18-1402-Conf-Exp (with one confidential annex; a confidential redacted version was filed on the same date; a public redacted version of the decision and its annex was filed on 14 April 2021).

⁴ ICC-01/12-01/18-1402-Conf-Anx (the ‘First Dissenting Opinion’; a public redacted version of the decision and its annex was filed on 14 April 2021).

⁵ Prosecution second application under rule 68(2)(b) to introduce MLI-OTP-P-0113’s prior recorded testimony and associated material into evidence, 17 September 2021, ICC-01/12-01/18-1727-Conf (with one confidential annex).

5. On 14 October 2021, having benefited from an extension of time,⁶ the Defence filed its response to the Second Request (the ‘Second Response’).⁷
6. The submissions received are discussed below, where warranted, as part of the Chamber’s analysis.

II. Analysis

A. Admissibility of the Second Request

7. As a preliminary matter, the Chamber will address the submissions of the Defence that the Second Request fails to meet the necessary criteria for reconsideration.⁸
8. The Chamber recalls that by way of the First Decision, the Majority dismissed the First Request ‘without prejudice to the Prosecution filing another application pursuant to Rule 68(2) of the Rules for [P-0113] at a later stage, *if considered necessary*.’⁹ Contrary to the arguments of the Defence, the First Decision did not in any way suggest that a further application pursuant to Rule 68(2) of the Rules may only be filed should there be ‘new information’ on this issue or other basis for reconsideration.
9. In the view of the Chamber, the persistent unwillingness of P-0113 to testify¹⁰ constitutes a sufficient basis for the Prosecution to submit anew an application pursuant to Rule 68(2)(b) of the Rules. Accordingly, the Chamber sees no merit in the Defence argument that the Second Request constitutes a request for reconsideration of the First Decision, for which the Prosecution has failed to establish the requisite standard.

B. Merits

10. Having concluded that it was unnecessary for the Prosecution to demonstrate that the threshold for reconsideration of the First Decision is met, the Chamber will

⁶ Email from the Chamber dated 23 September 2021 at 09:40. *See also*, Defence request under Regulation 35 for extension of time to file Rule 68 Responses relating to P-0661 and P-0113, 21 September 2021, ICC-01/12-01/18-1748-Conf, with two confidential annexes.

⁷ Defence response to ‘Prosecution second application under rule 68(2)(b) to introduce MLI-OTP-P-0113’s statement and associated material into evidence’, ICC-01/12-01/18-1811-Conf.

⁸ Second Response, ICC-01/12-01/18-1811-Conf, paras 9-12.

⁹ First Decision, ICC-01/12-01/18-1402-Red2, para. 12 [emphasis added].

¹⁰ Second Request, ICC-01/12-01/18-1727-Conf, paras 31-33.

turn to the merits of the Second Request. For the reasons that follow, the Chamber, by majority, Judge Kimberly Prost dissenting, rejects the Second Request.

11. The Majority refers to the Chamber's prior decisions setting out the relevant legal framework. It stresses that the decision of whether to introduce a prior recorded testimony pursuant to Rule 68(2)(b) of the Rules is a discretionary one, and the entire purpose of this provision is to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.¹¹
12. The Majority recalls that under Rule 68(2)(b) of the Rules, a prior recorded testimony can only be introduced when it 'goes to proof of a matter other than the acts and conduct of the accused.' The expression 'acts and conduct of the accused' within the meaning of Rule 68(2) of the Rules should be interpreted as referring to the personal actions and omissions of the accused as opposed to the acts and conduct of other persons which could be attributed to the accused by reason of the mode of liability charged.¹² In this regard, the Majority further notes that even if the accused is not specifically named in the prior recorded testimony, the said testimony must be considered as going to the 'acts and conduct of the accused' if the Prosecution intends to rely on the relevant parts of the prior recorded testimony primarily for the purpose of establishing acts and conduct of the accused.¹³
13. The Majority notes that the presence of limited references to the acts and conduct of the accused in a prior recorded testimony does not *per se* bar its introduction

¹¹ First Decision, ICC-01/12-01/18-1402-Red2, para. 9; Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules, 16 October 2020, ICC-01/12-01/18-1111-Red, para. 7.

¹² Decision on the introduction into evidence of P-0570's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 13 July 2021, ICC-01/12-01/18-1588-Conf (the 'P-0570 Decision'; public redacted version filed on 11 August 2021), para. 9 citing Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red (the 'Ongwen Rule 68(2)(b) Decision'), paras 11-12; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of 'Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68', 2 December 2016, ICC-01/04-02/06-1667-Red, para. 11.

¹³ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules, 29 October 2015, ICC-01/05-01/13-1430, para. 8. See also *Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 13 (n. 26).

under Rule 68(2)(b) of the Rules.¹⁴ In this regard, it is recalled that the Chamber's Directions on the conduct of proceedings had already foreseen the possibility of partial introduction of prior recorded testimony under Rule 68(2)(b) of the Rules.¹⁵ Nonetheless, the Majority emphasises that whether excluding certain paragraphs from a prior recorded testimony would suffice to conform with the requirement that it 'goes to proof of a matter other than the acts and conduct of the accused' must be assessed on a case-by-case basis, taking into account the particulars of the case as well as the prior recorded testimony in question. Notably, the Majority considers that introduction of a prior recorded testimony pursuant to Rule 68(2)(b) of the Rules is only permissible where reference to the acts and conduct of the accused is peripheral and discrete, i.e. not of significance to the case or of limited importance and does not constitute the core of the testimony sought to be introduced.¹⁶

14. Turning to the prior recorded testimony of P-0113, the Prosecution avers that it can be introduced under Rule 68(2)(b) of the Rules after excluding certain paragraphs which 'go to Mr Al Hassan's acts and conduct and/or matters so proximate to Mr Al Hassan as to require their exclusion.'¹⁷ Although the Prosecution indeed identified key paragraphs going to the acts and conduct of Mr Al Hassan, the Majority is not satisfied that such references are peripheral and discrete or can be detached from their context in this instance. For the Majority, the paragraphs identified by the Prosecution are part of a longer section in which P-0113 provides evidence regarding key aspects of the narrative concerning the criminal responsibility of the accused, such as the role of the Islamic police and the interactions in between the various groups. As such, they go to the very core

¹⁴ *Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 13.

¹⁵ ICC-01/12-01/18-789-AnxA, para. 79 ('In accordance with Rule 68(2) of the Rules, the parties may file applications for the admission, in whole or in part, of the previously recorded testimony of witnesses' [emphasis added].) See also First Dissenting Opinion, ICC-01/12-01/18-1402-Anx-Red, para. 5.

¹⁶ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 2 July 2018, ICC-02/04-01/15-1294, para. 5; *Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 13.

¹⁷ Second Request, ICC-01/12-01/18-1727-Conf, para. 39. These are paragraphs 58, 68, 81, 83, 91, 93, 100, 103, 143 and 145 as well as the last two sentences of paragraph 105 of MLI-OTP-0022-0244.

of P-0113's evidence, as rightly pointed out by the Defence.¹⁸ The Majority is of the view that excluding the excerpts identified by the Prosecution, while retaining the remainder – most notably paragraphs immediately prior and after the identified excerpts –, would distort the substance of the narrative of P-0113's evidence, taken as a whole. The Majority therefore considers inapposite such a piecemeal approach to the witness's evidence under Rule 68(2)(b) of the Rules.¹⁹

15. In any case, and contrary to the arguments of the Prosecution,²⁰ the Majority finds that the discretionary factors to be considered under Rule 68(2)(b)(i) of the Rules also play against the introduction of P-0113's prior recorded testimony under this provision.
16. As already noted in the First Decision, P-0113's prior recorded testimony consists of a 39-page statement which discusses a wide array of matters and events which go beyond 'background' information.²¹ Indeed, P-0113's evidence touches on a significant range of materially disputed issues, including a charged incident,²² the functioning of the various organs established by the armed groups including the Islamic police,²³ as well as other alleged abuses.²⁴ The Majority also places great importance on the fact that certain parts at the core of P-0113's prior recorded testimony are proximate to the acts and conduct of the accused, particularly keeping in mind the mode of liability under which Mr Al Hassan is charged. For example, the Majority notes that the Prosecution's case is that Mr Al Hassan's requisite intent and knowledge under Articles 25 and 30 of the Statute can be inferred *inter alia* from the fact that he participated in the *comité de crise* meetings where complaints from the population were discussed.²⁵ While the Prosecution seeks to exclude paragraphs which explicitly mention Mr Al Hassan, the Majority

¹⁸ Second Response, ICC-01/12-01/18-1811-Conf, para. 39. *See also* First Response, ICC-01/12-01/18-1252-Conf, paras 8-10.

¹⁹ *Similarly see* Ongwen Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 13.

²⁰ Second Request, ICC-01/12-01/18-1727-Conf, paras 55-68.

²¹ First Decision, ICC-01/12-01/18-1402-Red2, para. 12.

²² MLI-OTP-0022-0244 at para. 90 *cited in* Annex A to the Submission of Prosecution Trial Brief, 18 May 2020, ICC-01/12-01/18-819-Conf-AnxA (the 'Trial Brief'), para. 198.

²³ *See for example* MLI-OTP-0022-0244, paras 104-105, 112.

²⁴ *See* MLI-OTP-0022-0244, paras 113-122. *See also* Second Response, ICC-01/12-01/18-1811-Conf, para. 25.

²⁵ Trial Brief, ICC-01/12-01/18-819-Conf-AnxA, para. 170.

considers that the remainder of the paragraphs belonging to the same section pertain to facts that are materially in dispute and are of significance for the Chamber's eventual determination of the charges against the accused in its judgment.²⁶

17. Further, the Majority observes that P-0113's prior recorded testimony is not entirely corroborative or cumulative in nature. In the Majority's view, the mere fact that other Prosecution witnesses provided testimony on a certain issue does not *per se* render P-0113's evidence on that issue corroborative or cumulative.
18. The Majority also finds untenable the arguments of the Prosecution that the interest of justice are best served by the introduction of the testimony as it would assist the Chamber in the search for the truth.²⁷ The Majority notes that, within the context of Rule 68(2)(b) of the Rules, 'interests of justice' are better served by the introduction in writing of a prior recorded testimony when such introduction would, *inter alia*, safeguard the expeditiousness of the proceedings, streamline the presentation of evidence, focus live testimony on those topics of greatest relevance to the proceedings, minimise cumulative in-court testimony, save resources of the institution which may rather be utilised for other purposes and/or avoid witnesses having to travel in order to appear in court.²⁸ However, the Prosecution has failed to demonstrate that the case at hand is one where introduction of evidence pursuant to this provision would contribute to judicial economy. Further, while the Chamber's truth seeking functions are of course of relevance, the fact that a witness is unwilling to testify before the Court cannot in itself be sufficient to shift the balance in favour of introducing under Rule 68(2)(b) of the Rules a prior recorded testimony which contains evidence which is uncorroborated, and which goes to crucial and highly contested matters. In this regard, the Majority emphasises that Rule 68(2)(b) of the Rules is a deviation from the general principle of orality enshrined in Article 69(2) of the Statute, in line with the accused's rights to examine the witnesses testifying against him, and

²⁶ See *Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 15.

²⁷ Second Request, ICC-01/12-01/18-1727-Conf, paras 55-68.

²⁸ *Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 16.

that recourse to this provision requires the conduct of a cautious and stringent assessment, notably to ensure that the introduction of written testimony is not prejudicial to or inconsistent with the rights of the accused.²⁹

19. Rather than serving the interests of justice, the introduction of P-0113's evidence, as sought, and particularly in light of the Defence's inability to cross-examine the witness, would be prejudicial in a way which the Majority considers could not be mitigated during the Chamber's ultimate evaluation of evidence at a later stage. The Majority therefore concludes that the request for introduction of P-0113's prior recorded testimony under Rule 68(2)(b) of the Rules must be rejected.

²⁹ Appeals Chamber, *The Prosecutor vs. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 12 February 2016, ICC-01/09-01/11-2024 (OA 10), paras 84-85; Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386 (OA 5 OA 6), para. 78. See also Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice Edouard Ngaïssona*, Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules, 16 October 2020, ICC-01/14-01/18-685, paras 30, 32.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY, BY MAJORITY,

REJECTS the Second Request; and

INSTRUCTS the parties to file public redacted versions of ICC-01/12-01/18-1252-Conf, ICC-01/12-01/18-1727-Conf and ICC-01/12-01/18-1811-Conf by Thursday, 20 January 2022.

Judge Kimberly Prost appends a dissenting opinion.

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 Monday, 15 November 2021

At The Hague, The Netherlands