

**Cour
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**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**
Date: **9 December 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 second application under rule 68(2)(b) to
introduce
MLI-OTP-P-0113’s prior recorded testimony and associated material into evidence”
(ICC-01/12-01/18-1727-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**

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I. Introduction

1. In this second application, the Prosecution requests anew Trial Chamber X's ("Chamber") authorisation to introduce into evidence, pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence, Prosecution Witness MLI-OTP-P-0113's previously recorded testimony and associated material, as described in sections I and II of confidential Annex A.

2. While a Majority of the Chamber dismissed without prejudice the Prosecution's first rule 68(2)(b) application in respect of this witness (designated, below, as "First P-0113 Request"), preferring to receive Prosecution Witness MLI-OTP-P-0113's ("P-0113") evidence *viva voce* under rule 68(3), the Prosecution finds it necessary, at this stage, to file another application under rule 68(2)(b) to introduce P-0113's prior recorded testimony and associated material into evidence ("Second P-0113 Request").

3. This is because P-0113 is very firm in his decision not to testify *viva voce*, even under rule 68(3) and with the Prosecution requesting additional in-court protective measures: while P-0113's consents to the submission of his prior recorded testimony and associated material into evidence, he remains unwilling to appear before the Chamber. As justification for his unwillingness to appear before the Chamber P-0113 referred to his expressed concerns about [REDACTED].

4. P-0113's evidence is relevant to the charges of persecution (count 13), directing attacks against protected objects (count 7), torture (counts 1 and 3), other inhumane acts (count 2), cruel treatment (count 4), outrages upon personal dignity (count 5), and rape (counts 11 and 12), and to the contextual elements of crimes against humanity and war crimes.

5. P-0113 was [REDACTED]. His prior recorded testimony is comprised of his statement to the Prosecution.¹ In his statement, P-0113 described the situation in Timbuktu before and during the occupation of Timbuktu, and the roles of the various armed groups and the main actors from these groups with whom he interacted. He also described incidents of violence he witnessed or heard about, including the destruction of mausoleums, floggings and amputation.²

¹ [REDACTED].

² [REDACTED].

6. The material associated with P-0113's prior recorded testimony includes nine videos and two photographs he was shown during his interview with the Prosecution,³ and transcripts and translations related to the videos. Of these, the Prosecution does not seek the submission into evidence of eight videos (and associated transcripts and translations) and one photograph which have been formally submitted already, but requests that they appear as "Related to Witness MLI-OTP-P-0113" in E-court.

7. The Prosecution does request the submission into evidence of one video⁴ (and its transcript and translation) and one photograph not formally submitted yet.⁵ Other associated material sought to be submitted are a letter dated [REDACTED]⁶ as well as its English translation,⁷ [REDACTED]
[REDACTED],⁸ [REDACTED]
[REDACTED]
[REDACTED].⁹

8. P-0113's evidence is *prima facie* reliable, as his statement satisfies formal requirements and relates to matters which P-0113 observed first-hand or learned about as a resident of Timbuktu [REDACTED]
[REDACTED].

9. The Prosecution seeks to introduce P-0113's statement in part only, insofar as it is limited to proof of matters other than the acts and conduct of Mr Al Hassan as required by rule 68(2)(b). Specifically, the Prosecution does not seek to introduce into evidence ten paragraphs as well as the last two sentences of paragraph 105 of P-0113's statement which relate to Mr Al Hassan's acts and conduct, particularly that he was the *commissaire* of the Islamic police.¹⁰ Similarly, the Prosecution does not seek to introduce one investigation note

³ [REDACTED]
[REDACTED]
[REDACTED] The Prosecution does not seek submission of [REDACTED], as explained below.

⁴ [REDACTED]

⁵ [REDACTED]

⁶ [REDACTED]

⁷ [REDACTED]

⁸ [REDACTED]

⁹ [REDACTED]

¹⁰ [REDACTED]
[REDACTED]

into evidence, [REDACTED]

[REDACTED].¹¹

10. The Prosecution thus requests under rule 68(2)(b) that the Chamber authorise the introduction into evidence of the prior recorded testimony of P-0113 and associated material as described below and on a conditional basis pending submission of this witness's certified declaration.

II. Confidentiality

11. Pursuant to regulation 23bis(1) of the Regulations of the Court, the Prosecution files this Second P-0113 Request and its annex as confidential because they contain information identifying P-0113. The Majority of the Chamber granted in-court protective measures for P-0113 in the form of the use of a pseudonym, facial and voice distortion and use of private and/or closed sessions.¹² The Prosecution will file a public redacted version of its Second P-0113 Request in due course.

III. Procedural Background

12. On 16 December 2020, within the time-limit established by the Chamber,¹³ the Prosecution filed its "Prosecution application under rule 68(2)(b) to introduce MLI-OTP-P-0113's statement and associated material into evidence" ("First P-0113 Request").¹⁴

13. On 19 January 2021, the Defence responded to the First P-0113 Request, objecting to the statement and associated material being introduced into evidence.¹⁵

14. On 26 March 2021, the Chamber issued its Decision on First P-0113 Request.¹⁶ The Chamber by Majority, Judge Prost dissenting, dismissed "in the exercise of its discretion under Rule 68" the First P-0113 Request, "without prejudice to the Prosecution filing another

¹¹ [REDACTED].

¹² ICC-01/12-01/18-1402-Conf-Red, para. 15.

¹³ See ICC-01/12-01/18-789-AnxA, para. 80 (no later than by the end of the year 2020).

¹⁴ ICC-01/12-01/18-1207-Conf [REDACTED]. The material sought to be introduced was listed in sections I and II of [REDACTED].

¹⁵ [REDACTED].

¹⁶ ICC-01/12-01/18-1402-Conf-Red.

application pursuant to Rule 68(2) of the Rules for this witness at a later stage, if considered necessary.”¹⁷

15. The Majority found that P-0113’s prior recorded testimony discussed “a wide array of matters and events which go beyond ‘background’ information”.¹⁸ It also took note of Defence arguments that P-0113’s statement contained “evidence relating to issues that are ‘materially in dispute’ and notes the Prosecution’s submission that it is seeking to introduce evidence that is ‘highly relevant to and probative of the charges against the [a]ccused’.”¹⁹ It determined that “[i]n light of the content and scope of his prior recorded testimony, and at this stage, the Majority prefers to receive P-0113’s evidence *viva voce*.”²⁰

16. Thus, the Majority decided that, subject to the procedural pre-requisites of rule 68(3) being satisfied, his prior recorded testimony and associated material were allowed to be introduced into evidence under rule 68(3).²¹ The Majority considered that rule 68(3) was more appropriate to introduce P-0113’s prior recorded testimony and that the formalities under rule 68(3) and any supplementary examination of P-0113 should be completed within 1,5 hour.²²

17. The Majority was of the view that the implementation of protective measures *vis-à-vis* the public may address the witness’s concerns resulting in P-0113’s reported unwillingness to testify *viva voce*.²³ The Majority granted in-court protective measures requested by the Prosecution: use of a pseudonym, facial and voice distortion, as well as use of private and/or closed sessions.²⁴

18. The Majority further took note of the witness’s concerns [REDACTED] and finds that these concerns relate to circumstances which could eventually justify holding his testimony entirely in closed session”, thus finding it appropriate to consider additional in-court protective measures.²⁵ The Majority therefore “invite[d] the Prosecution to explore this possibility with the witness and, if warranted, to

¹⁷ ICC-01/12-01/18-1402-Conf-Red, para. 12. *See also* p. 14.

¹⁸ ICC-01/12-01/18-1402-Conf-Red, para. 12.

¹⁹ ICC-01/12-01/18-1402-Conf-Red, para. 12, citing ICC-01/12-01/18-1207-Conf, para. 25.

²⁰ ICC-01/12-01/18-1402-Conf-Red, para. 12.

²¹ ICC-01/12-01/18-1402-Conf-Red, p. 14.

²² ICC-01/12-01/18-1402-Conf-Red, para. 13.

²³ ICC-01/12-01/18-1402-Conf-Red, para. 14.

²⁴ ICC-01/12-01/18-1402-Conf-Red, para. 15.

²⁵ ICC-01/12-01/18-1402-Conf-Red, para. 16.

revert back to the Chamber for it to consider further these additional in-court protective measures pursuant to Rule 87(2)(d) of the Rules.”²⁶

19. In the Partially Dissenting Opinion,²⁷ Judge Prost found that she would have authorised the introduction into evidence of parts of P-0113’s prior recorded testimony, together with the associated material.²⁸ Having weighed all the relevant factors under rule 68(2)(b)(i), Judge Prost concluded that introduction of this material, with the exception of the nine paragraphs of P-0113’s statement which the Prosecution did not seek to submit, as well as paragraph 68 and the last two sentences of paragraph 105, was fully compliant with the requirements of rule 68(2)(b) and would not have been prejudicial to or inconsistent with the rights of the accused.²⁹

IV. Applicable Law

20. In its Directions on the conduct of proceedings, the Chamber determined that parties may file applications for the admission, in whole or in part, of prior recorded testimonies pursuant to rule 68(2).³⁰

21. Pursuant to rule 68(2)(b), 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).³¹

22. The Chamber has held that “in line with the jurisprudence of this Court, the expression ‘acts and conduct of the accused’ within the meaning of Rule 68(2) of the Rules must be interpreted in its plain natural meaning, i.e. as referring to the personal actions and omissions

²⁶ ICC-01/12-01/18-1402-Conf-Red, para. 16 (delaying the public broadcast of P-0113’s testimony, as well as the publication of the relevant transcripts, until the completion of his testimony and the until after the entire testimony has been reviewed and redacted as appropriate).

²⁷ ICC-01/12-01/18-1402-Conf-Anx.

²⁸ ICC-01/12-01/18-1402-Conf-Anx, para. 2.

²⁹ ICC-01/12-01/18-1402-Conf-Anx, para. 13, referring also to para. 6.

³⁰ ICC-01/12-01/18-789-AnxA, para. 79.

³¹ ICC-01/12-01/18-1111-Red, para. 7.

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.”³²

23. Partial introduction of prior recorded testimony under Rule 68(2)(b) is a possibility already foreseen in the Chamber’s Directions on the conduct of proceedings.³³ This approach has been adopted by other ICC Chambers.³⁴

24. As generally required in all instances of introduction of prior recorded testimony under rule 68, this introduction must also not be prejudicial to or inconsistent with the rights of the accused.³⁵ 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) is to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.³⁶

25. Thus, Trial Chamber IX has held that “the purpose of a determination under Rule 68(2)(b) of the Rules is not whether a person shall testify at trial, but whether the information provided by a witness in a prior recorded testimony can be introduced without the need that the witness appears live at trial and be subject to questioning by the participants.”³⁷

26. When such situations are identified and in accordance with the criteria set out in rule 68(2)(b), 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.³⁸

V. Submissions

A. It is necessary to file another application under rule 68(2)(b) for P-0113

³² ICC-01/12-01/18-1588-Conf, para. 9 (footnote omitted), citing ICC-02/04-01/15-596-Red, paras 11-12 and ICC-01/04-02/06-1667-Red, para. 11.

³³ ICC-01/12-01/18-789-AnxA, para. 79.

³⁴ ICC-02/04-01/15-596-Red, para. 60, 105, 216.

³⁵ ICC-01/12-01/18-1111-Red, para. 7.

³⁶ ICC-01/12-01/18-1111-Red, para. 7.

³⁷ ICC-02/04-01/15-711, para. 10. *See also* ICC-02/04-01/15-596-Red, para. 7, 47.

³⁸ ICC-01/12-01/18-1111-Red, para. 7, citing *inter alia* ICC-01/12-01/18-789-AnxA, para.34(i) and 34(ii).

27. The Majority dismissed the First P-0113 Request, “without prejudice to the Prosecution filing another application pursuant to Rule 68(2) of the Rules for this witness at a later stage, if considered necessary.”³⁹

28. In the Prosecution’s submission, it is necessary at this stage to file another application pursuant to rule 68(2), and in particular under rule 68(2)(b). This is because P-0113 is firmly unwilling to testify *viva voce*, even under rule 68(3) and with the Prosecution requesting additional in-court protective measures. It is therefore necessary for the Chamber to grant this Second P-0113 Request so as to receive into evidence the parts of P-0113’s prior recorded testimony and associated material that the Prosecution is applying to submit under rule 68(2)(b).

29. In the First P-0113 Request, the Prosecution explained that P-0113 consented to his prior recorded testimony and associated material being introduced into evidence, but was unwilling to appear before the Chamber.⁴⁰ As justification for his unwillingness to appear before the Chamber P-0113 referred to his expressed concerns about [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴¹

30. In the Decision on First P-0113 Request, the Majority found that (i) it preferred to receive P-0113’s evidence *viva voce*,⁴² pursuant to rule 68(3); and (ii) regarding P-0113’s reported unwillingness to testify *viva voce*, implementing protective measures *vis-à-vis* the public may address P-0113’s concerns.⁴³ The Majority invited the Prosecution to explore with P-0113 the possibility of holding his testimony entirely in closed session (delaying the public broadcast of his testimony and publication of transcripts until his testimony is reviewed and

³⁹ ICC-01/12-01/18-1402-Conf-Red, para. 12. *See also* p. 14.

⁴⁰ First P-0113 Request, para. 7. *See also* para. 17.

⁴¹ [REDACTED] g [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. *See also* [REDACTED]

⁴² ICC-01/12-01/18-1402-Conf-Red, para. 12.

⁴³ ICC-01/12-01/18-1402-Conf-Red, para. 14.

redacted) and if warranted revert back to the Chamber for it to consider further these additional in-court protective measures.⁴⁴

31. [REDACTED] 2021 – after the Prosecution filed the First P-0113 Request but before the Chamber rendered the Decision on it – the Prosecution contacted P-0113 to discuss the possibility of introducing his prior recorded testimony and associated material under rule 68(3) and of requesting that his testimony be given in closed session. P-0113 reiterated that while the evidence that he had previously provided could be used, he would not testify in court irrespective of the conditions in which his testimony would be given.⁴⁵ It was in the context of this conversation – reiterating his agreement for his prior recorded testimony to be used as evidence, as well as his unwillingness to testify in court – that he stated, referring to testifying in court: [REDACTED]

[REDACTED]⁴⁶ While P-0113's agreement for his evidence to be used remains clear, in light of P-0113's reaction regarding public or non-public hearings, the Prosecution considers that there is no basis for further pursuing the possibility of voluntary *viva voce* testimony by P-0113.

32. Given P-0113's persistent unwillingness to testify *viva voce*, even under rule 68(3) and with the Prosecution requesting additional in-court protective measures, it is necessary at this stage to file another application pursuant to rule 68(2)(b), in order for the Chamber to receive into evidence the parts of P-0113's prior recorded testimony and associated material that the Prosecution is applying to submit.

33. While the Majority considered that rule 68(3) was more appropriate to introduce P-0113's prior recorded testimony, and preferred to receive P-0113's testimony *viva voce* under that rule,⁴⁷ it did not foreclose the applicability of rule 68(2)(b).⁴⁸ The Majority found that given the content and scope of P-0113's prior recorded testimony, at that stage, it preferred to

⁴⁴ ICC-01/12-01/18-1402-Conf-Red, para. 16.

⁴⁵ [REDACTED]

⁴⁶ [REDACTED]

⁴⁷ See ICC-01/12-01/18-1402-Conf-Red, para. 12-13.

⁴⁸ ICC-01/12-01/18-1402-Conf-Red, para. 12 (“without prejudice to the Prosecution filing another application pursuant to Rule 68(2)” (emphasis added)).

receive his testimony *viva voce* under rule 68(3).⁴⁹ At the present stage, the situation is characterised by the following factors:

- P-0113 has reiterated unwillingness to testify *viva voce* even under rule 68(3) and with the Prosecution requesting additional in-court protective measures;
- the partial submission of P-0113's prior recorded testimony (excluding parts going to Mr Al Hassan's acts and conduct) renders its content and scope admissible under rule 68(2)(b); and
- additional witness testimony received since the First P-0113 Request and since the Decision on First P-0113 Request, in particular [REDACTED], further demonstrates that P-0113's prior recorded testimony is of a cumulative or corroborative nature, additionally militating in favour of the Chamber's exercise of discretion to authorise its introduction under rule 68(2)(b).

34. In the Prosecution's submission, given these factors including that the criteria under rule 68(2)(b) are met, the Chamber should authorise the introduction of P-0113's prior recorded testimony and associated material as described below under rule 68(2)(b).

B. The prior recorded testimony of P-0113 should be introduced into evidence pursuant to rule 68(2)(b)

35. P-0113 has consented to his statement and associated material being introduced into evidence but does not wish to appear before the Chamber, even under rule 68(3) and with the Prosecution requesting additional protective measures. As justification for this unwillingness, P-0113 referred to his expressed concerns about [REDACTED]

[REDACTED]⁵⁰

36. In this context, given that the partial introduction of P-0113's prior recorded testimony meets the criteria under rule 68(2)(b), the Chamber should authorise such introduction and the introduction into evidence of the material associated to it as described below.

a. P-0113's statement constitutes "prior recorded testimony" in the sense of rule 68

⁴⁹ ICC-01/12-01/18-1402-Conf-Red, para. 12.

⁵⁰ [REDACTED].

37. The term “previously recorded testimony” includes written statements and transcripts of interviews taken pursuant to rules 111 and 112, respectively.⁵¹

b. P-0113’s prior recorded testimony goes to proof of matters other than Mr Al Hassan’s acts and conduct

38. [REDACTED]
[REDACTED]⁵²

39. [REDACTED]
[REDACTED]. As mentioned above, however, the Prosecution will not seek to introduce ten paragraphs and the last two sentences of paragraph 105 of P-0113’s statement which go to Mr Al Hassan’s acts and conduct and/or matters so proximate to Mr Al Hassan as to require their exclusion.⁵³ these include paragraph 68 and the last two sentences of paragraph 105, which Judge Prost identified in her Partially Dissenting Opinion as containing information which ought to be excluded from submission under rule 68(2)(b) because it went to proof of the acts and conduct of Mr Al Hassan.⁵⁴

40. The remaining portions of P-0113’s prior recorded testimony, which concern proof of matters other than Mr Al Hassan’s acts and conduct⁵⁵, can be introduced through rule 68(2)(b) as well as its associated material as described below.

41. In these remaining parts of P-0113’s statement, the latter recalls that until 2012, there was much commercial activity in Timbuktu.⁵⁶ He then describes how in January 2012 hostilities started in neighbouring regions, leading the civil and military authorities to abandon the city on 31 March 2012.⁵⁷ He discusses how the attack on Timbuktu on 1 April

⁵¹ See ICC-01/09-01/11-1938-Red-Corr, para. 30-33.

⁵² [REDACTED]
⁵³ [REDACTED]
[REDACTED]
[REDACTED]

⁵⁴ ICC-01/12-01/18-1402-Conf-Anx, para. 4. [REDACTED]
[REDACTED]
[REDACTED]

⁵⁵ The expression “acts and conduct of the accused” within the meaning of rule 68(2) is indeed limited to the personal actions and omissions of the accused. Accordingly, evidence relating to the acts and conduct of other persons which could be attributed to the accused by reason of the mode of liability charged, may be submitted under rule 68(2)(b); see ICC-01/12-01/18-1588-Conf, para. 9 and See ICC-01/12-01/18-1588-Conf, para. 9; ICC-02/04-01/15-596-Red, para. 11.

⁵⁶ [REDACTED]
⁵⁷ [REDACTED]

2012 unfolded, and the various armed groups involved in the attack and subsequent occupation.⁵⁸ He points out how Ansar Dine occupied all buildings of the State in the city of Timbuktu, to use them as offices or lodgings for their men, including the *Banque malienne de solidarité* (“BMS”), the *Hôtel La Maison*, the Governor’s Residence, the *Service des domaines*, the Regional Assembly, etc.⁵⁹

42. P-0113 recounts that the *Service des domaines* was used as Abou Zeid’s lodging for a time. The BMS was first used by the Islamic police before it moved to the *Gouvernorat*. When the police moved, the *Brigade des Mœurs* established themselves at the BMS. The *Hôtel La Maison* served as the tribunal.⁶⁰

43. P-0113 also explained the relationship between the different armed groups involved in the attack and occupation of Timbuktu, such as how the MNLA and Ansar Dine first cohabited. The local population complained of MNLA abuses. Ansar Dine kicked the MNLA out of the city of Timbuktu.⁶¹

44. P-0113 further described the work of the various organs established by the occupiers in Timbuktu: the Islamic police,⁶² *Brigade des Mœurs*,⁶³ and Islamic tribunal.⁶⁴ As regards the Islamic tribunal, P-0113 observed that the tribunal issued decisions leading to the sanctions imposed during the occupation.⁶⁵

45. P-0113 [REDACTED],⁶⁶
[REDACTED],⁶⁷ [REDACTED],⁶⁸ [REDACTED],⁶⁹ [REDACTED].⁷⁰

46. [REDACTED]
[REDACTED]
[REDACTED]

58 [REDACTED].
59 [REDACTED].
60 [REDACTED].
61 [REDACTED].
62 [REDACTED].
63 [REDACTED] 5.
64 [REDACTED].
65 [REDACTED].
66 [REDACTED].
67 [REDACTED].
68 [REDACTED].
69 [REDACTED].
70 [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED].⁷¹ [REDACTED]

[REDACTED].⁷² [REDACTED]

[REDACTED].

47. [REDACTED]

[REDACTED],⁷⁴ P-0113 described arrest and detention⁷⁵ and floggings,⁷⁶ as well as one incident of stoning,⁷⁷ amputation⁷⁸ and execution.⁷⁹ He also heard of one case of rape by a member of the Islamic police or *Brigade des Mœurs* and after the occupation learned that there had been other rapes during the occupation.⁸⁰

48. P-0113 also describes Timbuktu as the religious capital of Mali, where the Djingareyber, Sankoré and Sidi Yahia mosques are several centuries old and part of UNESCO world heritage.⁸¹ He recounts how the occupiers first prevented access to the mausoleums, and later destroyed several of them.⁸² He explains the religious and cultural value these mausoleums had for the local population.⁸³

c. The prior recorded testimony has sufficient indicia of reliability

49. The Chamber has previously recalled the Appeals Chamber's ruling that, in their assessment of indicia of reliability under rule 68(2)(b)(i), trial chambers are not obliged to consider factors beyond formal requirements.⁸⁴

50. P-0113's prior recorded testimony is a statement obtained by the Prosecution in the ordinary course of its investigations in Mali, was signed by the witness and the investigators

71 [REDACTED]

72 [REDACTED]

73 [REDACTED]

74 [REDACTED]

75 [REDACTED]

76 [REDACTED]

77 [REDACTED]

78 [REDACTED]

79 [REDACTED]

80 [REDACTED]

81 [REDACTED]

82 [REDACTED]

83 [REDACTED]

⁸⁴ ICC-01/12-01/18-1413, para. 15 (citing ICC-02/11-01/15-744 OA8, para. 3, 103-104).

conducting the interview, was given voluntarily and was declared to be accurate by P-0113 at the time of giving it.⁸⁵

51. Accordingly, and particularly in line with the submission system adopted in this case, P-0113's prior recorded testimony bears sufficient indicia of reliability of formal nature and is sufficiently believable and coherent as to make it suitable for introduction under rule 68(2)(b).⁸⁶

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

52. P-0113's prior recorded testimony is relevant to charges of persecution (count 13), directing attacks against protected objects (count 7), torture (counts 1 and 3), other inhumane acts (count 2), cruel treatment (count 4), outrages upon personal dignity (count 5), and rape (counts 11 and 12), and to the contextual elements of crimes against humanity and war crimes.

53. P-0113's prior recorded testimony has probative value. In his statement, P-0113 describes the situation in Timbuktu before and during the occupation of Timbuktu, and the roles of the various armed groups and the main actors from these groups with whom he interacted. He also describes incidents of violence he witnessed or heard about, including the destruction of mausoleums, floggings and amputation. His statement and associated material relate to matters which he observed first-hand or learned about as a resident of Timbuktu [REDACTED]

e. Additional rule 68(2)(b)(i) factors militate in favour of introducing P-0113's prior recorded testimony under rule 68(2)(b)

54. Rule 68(2)(b)(i) provides a non-exhaustive list of factors that the Chamber shall bear in mind in exercising its discretion, but which are not mandatory pre-conditions for the applicability of rule 68(2)(b).⁸⁷ The rule 68(2)(b)(i) factors outlined below militate in favour of introducing the parts of P-0113's prior recorded testimony sought for submission.

i. P-0113's evidence is of a cumulative or corroborative nature

⁸⁵ [REDACTED]

⁸⁶ See ICC-01/12-01/18-1413, para. 15 (in the context of rule 68(2)(c)).

⁸⁷ ICC-02/04-01/15-596-Red, para. 6.

55. P-0113's evidence is of a cumulative or corroborative nature, in that other witnesses will give or have given testimonies about the situation in occupied Timbuktu, and the armed groups and institutions created by them as well as the main actors from these groups with whom P-0113 interacted. Other witnesses will describe or have described incidents of violence they witnessed or heard about, including the destruction of mausoleums, floggings and amputation.

56. In her Partially Dissenting Opinion, Judge Prost considered that the evidence of P-0113 raised many topics already covered by the evidence of P-0114 and also concerning the (at the time) expected evidence [REDACTED].⁸⁸ Indeed, witnesses' testimony in this case, in particular [REDACTED], further demonstrates that P-0113's prior recorded testimony is of a cumulative or corroborative nature, additionally militating in favour of the Chamber's exercise of discretion to authorise its introduction under rule 68(2)(b).

Contextual elements of crimes against humanity and war crimes

57. In addition to other elements described below, P-0065⁸⁹ testified about armed groups involved in the attack and occupation of Timbuktu. [REDACTED] P-0114 gave evidence regarding how the attack and occupation of Timbuktu by the armed groups came about.⁹⁰

Directing attacks against protected objects (count 7)

58. The testimony of [REDACTED],⁹¹ P-0114,⁹² P-0064,⁹³ and P-0431,⁹⁴ and expected testimony of P-0004,⁹⁵ along with video evidence,⁹⁶ provide evidence of the destruction of the mausoleums and/or their value as cultural heritage to both the local population and/or the

⁸⁸ [REDACTED]

⁸⁹ [REDACTED]

⁹⁰ See, e.g., Statement of P-0114, [REDACTED]. See, e.g., [REDACTED]

⁹¹ See, e.g., [REDACTED]

⁹² See, e.g., Statement of P-0114, [REDACTED]

⁹³ See, e.g., Expert report of P-0064, [REDACTED]. Expert report of P-0064, [REDACTED]

⁹⁴ See, e.g., [REDACTED]

⁹⁵ See, e.g., Statement of P-0004, [REDACTED]

⁹⁶ See, for example, [REDACTED].

international community. [REDACTED]

[REDACTED]⁹⁷

Torture (counts 1 and 3), other inhumane acts (count 2), cruel treatment (count 4) and outrages upon personal dignity (count 5)

59. P-0565⁹⁸ and P-0557⁹⁹ testified about having been flogged. P-0595¹⁰⁰ provided evidence of amputation. [REDACTED] that fornicators were whipped and a thief's hand amputated, in Timbuktu by the jihadists between April 2012 and 2013.¹⁰¹

Rape (counts 11 and 12)

60. P-0602¹⁰² and P-0636¹⁰³ testified about the rapes they endured, and P-0570 also provided evidence about this.¹⁰⁴

61. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁰⁵

Persecution (count 13)

62. P-0602,¹⁰⁶ P-0570¹⁰⁷ and P-0565,¹⁰⁸ for instance, gave evidence regarding how they personally suffered under the newly imposed persecutory rules imposed by the armed groups during their occupation of Timbuktu. P-0065 described how the armed groups imposed a dress code upon women, requiring that their entire bodies be covered, whereas before the

⁹⁷ See, e.g., [REDACTED]

⁹⁸ [REDACTED]

⁹⁹ [REDACTED]

¹⁰⁰ See, e.g., Statement of P-0595, [REDACTED].

¹⁰¹ See, e.g., [REDACTED]

¹⁰² [REDACTED]

¹⁰³ [REDACTED]

¹⁰⁴ See, e.g., Statement of P-0570, [REDACTED]. See also [REDACTED]

¹⁰⁵ See, e.g., [REDACTED]

¹⁰⁶ See, e.g., [REDACTED]

¹⁰⁷ See, e.g., Statement of P-0570, [REDACTED]

¹⁰⁸ See, e.g., [REDACTED]

occupation women could dress as they wished.¹⁰⁹ [REDACTED]

[REDACTED]

[REDACTED].¹¹⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹¹¹ [REDACTED]

[REDACTED].¹¹² In

his statement, P-0004¹¹³ describes women being imprisoned for not being covered or going out at night. P-0114¹¹⁴ testified about rules detailing what was not allowed and punishment for violating those rules. P-0557 testified how men could no longer wear long trousers, because if they did they would be apprehended and beaten.¹¹⁵

[REDACTED]

63. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. P-0114¹¹⁶ and P-0004¹¹⁷ [REDACTED] and provide/ will provide [REDACTED]. They also provide/ will provide evidence on members of the armed groups [REDACTED] or knew of, including Adama, Abou Zeid, Iyad Ag Ghaly, Houka Houka and Mohamed Moussa.¹¹⁸ P-0065 testified [REDACTED].¹¹⁹ P-

¹⁰⁹ See, e.g., [REDACTED]

¹¹⁰ See, e.g., [REDACTED]

¹¹¹ See, e.g., [REDACTED]

¹¹² See e.g., [REDACTED]

¹¹³ Statement of P-0004, [REDACTED].

¹¹⁴ [REDACTED] Statement of P-0114, [REDACTED]

¹¹⁵ See, e.g., [REDACTED]

¹¹⁶ See, e.g., Statement of P-0114, [REDACTED]

¹¹⁷ See, e.g., Statement of P-0004, [REDACTED]

¹¹⁸ See, e.g., Statement of P-0114, [REDACTED]

[REDACTED] See, e.g., Statement of P-0004, [REDACTED]

¹¹⁹ See, e.g., [REDACTED]

0654 testified regarding the establishment [REDACTED]

[REDACTED]¹²⁰

64. [REDACTED]

[REDACTED]¹²¹ [REDACTED]

[REDACTED]¹²²

Islamic Police, *Hesbah* and Islamic tribunal

65. Other witnesses have provided evidence relating to the roles of the various organs established by the armed groups in Timbuktu: Islamic police, *Hesbah* and Islamic tribunal. P-0065, for instance, testified on the roles of these three organs on the basis of events he witnessed first-hand.¹²³ [REDACTED]

[REDACTED]¹²⁴

[REDACTED]¹²⁵

[REDACTED]¹²⁶

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

66. 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.

67. Introducing into evidence the prior recorded testimony of P-0113 under rule 68(2)(b) would advance the interests of justice by allowing the introduction of parts of his statement

¹²⁰ [REDACTED]

¹²¹ See, e.g., [REDACTED]

¹²² [REDACTED]

¹²³ See, e.g., [REDACTED]

¹²⁴ [REDACTED]

¹²⁵ [REDACTED]

¹²⁶ [REDACTED]

and associated material into evidence in the present case, to which he consents, without requiring his appearance before the Chamber. As discussed above, the determinative issue under rule 68(2)(b) is whether information provided in a prior recorded testimony can be introduced without the need for the witness's appearance before the Chamber and being subject to questioning by the participants.

68. The interests of justice in this case include expeditiousness and judicial economy as well as the Chamber's truth seeking role. The Chamber's role in the search for the truth militates in favour of receiving the evidence of P-0113, as described above, under rule 68(2)(b).

f. Introduction into evidence of the prior recorded testimony causes no undue prejudice to Mr Al Hassan

69. As required under rule 68(1), the introduction into evidence pursuant to rule 68(2)(b) of P-0113's prior recorded testimony "would not be prejudicial to or inconsistent with the rights of the accused".

70. The inability to cross-examine P-0113 on his evidence, and the admission of the evidence at this stage of the proceedings, does not deprive Mr Al Hassan of his right and opportunity to challenge the evidence:

- The Defence retains the possibility to cross-examine other *viva voce* witnesses on the basis of information contained in the prior recorded testimony of P-0113, lead contradictory evidence during the Defence case, or—to the extent that it may eventually be uncorroborated or discrepancies exist with any other evidence—address the prior recorded testimony and advance arguments on the weight to be attributed to the prior recorded testimony;
- In addition, the absence of cross-examination may be considered in the Chamber's ultimate assessment of the weight and probative value to be accorded to the evidence;¹²⁷
- Furthermore, since P-0113's evidence as described above goes to proof of matters other than Mr Al Hassan's acts and conduct, and is essentially of a cumulative and

¹²⁷ See ICC-01/12-01/18-1402-Conf-Anx, para. 7. See also ICC-01/12-01/18-1588-Conf, para. 29 and ICC-01/12-01/18-1413, para. 18 (in the context of rule 68(2)(c)).

corroborative nature, granting the Second P-0113 Request would not be unduly prejudicial to Mr Al Hassan's fair trial rights.

C. Brief description of the associated material

71. Listed in section I of Annex A are the parts of P-0113's witness statement which the Prosecution seeks to submit under rule 68(2)9b).

72. Listed in section II of Annex A is material necessary to understand P-0113's prior recorded testimony. The associated material includes nine videos and two photographs that P-0113 was shown during his interview, along with transcripts and translations thereof.¹²⁸

73. Of these, the Prosecution does not seek the submission into evidence under rule 68(2)(b) of eight videos (and associated transcripts and translations) and one photograph which have been formally submitted already, but requests that they appear as "Related to Witness MLI-OTP-P-0113" in E-court. These items appear listed in section II.A of Annex A.

74. The Prosecution seeks the submission under rule 68(2)(b) of one video¹²⁹ (and its transcript and translation) and one photograph¹³⁰ that have not been submitted yet (they also appear in the List of Material of Witness P-0654 and have been used with Witness P-0654¹³¹). Other associated material sought for submission under rule 68(2)(b) are [REDACTED]

[REDACTED]
[REDACTED],¹³² a letter dated [REDACTED]
[REDACTED]¹³³ and its English translation,¹³⁴ and [REDACTED]
[REDACTED].¹³⁵ These items appear listed in section II.B of Annex A.

75. Annex A also contains a table in section III which lists material relevant to P-0113's prior recorded testimony not formally submitted and which the Prosecution does not seek to

¹²⁸ [REDACTED]

¹²⁹ [REDACTED]

¹³⁰ [REDACTED]

¹³¹ See [REDACTED]
[REDACTED]. See [REDACTED]

¹³² [REDACTED]

¹³³ [REDACTED]

¹³⁴ [REDACTED]

¹³⁵ [REDACTED]

introduce into evidence under rule 68(2)(b). This consists of [REDACTED],¹³⁶ and [REDACTED]
[REDACTED],¹³⁷ as well as a video [REDACTED] shown to P-0113 and
commented upon in his prior recorded testimony [REDACTED]
[REDACTED] but which is not in the Prosecution List of Evidence.¹³⁸ The Prosecution also does not
seek to introduce into evidence the investigation notes recording P-0113's unwillingness to
appear in this case,¹³⁹ as they are relevant only in relation to this application. The Prosecution
also does not seek to introduce one investigation note into evidence, [REDACTED]
[REDACTED]
[REDACTED].¹⁴⁰

D. Provision of certified declaration for P-0113

76. The Prosecution requests that the Chamber authorise the introduction into evidence under rule 68(2)(b) of the prior recorded testimony of P-0113 and associated material as described above on a conditional basis pending the submission of this witness's certified declaration.

VI. Conclusion

77. For the foregoing reasons, the Prosecution requests that, pending submission of his certified declaration, the Chamber conditionally authorise the introduction into evidence of P-0113's prior recorded testimony and associated material as described above.



Karim A. A. Khan QC, Prosecutor

Dated this 9th December 2021

At The Hague, The Netherlands

¹³⁶ [REDACTED]

¹³⁷ [REDACTED]

¹³⁸ In the First P-0113 Request, the Prosecution had not sought to submit photograph [REDACTED] (which was shown to P-0113 and commented upon in his prior recorded testimony, [REDACTED]). The Prosecution is seeking to submit it now as it was authorised by the Chamber to add it to the Prosecution List of Evidence (see [REDACTED])

¹³⁹ [REDACTED]

¹⁴⁰ [REDACTED].