



Original: English

**No. ICC-01/12-01/18
Date: 21 February 2022**

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 redacted version of

**Decision on the introduction into evidence of P-0130's prior recorded testimony
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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Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
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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 the introduction into evidence of P-0130’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules’.

I. Procedural history and submissions

1. On 30 November 2021, the Office of the Prosecutor (the ‘Prosecution’) filed the ‘Prosecution application under rule 68(2)(b) of the Rules to introduce into evidence MLI-OTP-P-0130’s prior recorded testimony and associated material’ (the ‘Request’).¹ P-0130 is the [REDACTED].² In light of P-0130’s unwillingness to testify in person,³ the Prosecution requests the introduction of P-0130’s prior recorded testimony (the ‘Statement’)⁴ together with its annexes and associated material (the ‘Associated Material’) pursuant to Rule 68(2)(b) of the Rules.
2. The Prosecution submits that P-0130’s evidence is relevant to all the crimes charged in this case, and to the contextual elements of crimes against humanity and war crimes.⁵ It submits that the vast majority of the Statement concerns proof of matters other than the acts and conduct of the accused and that references to the acts and conduct of the accused, which it does not seek to introduce into evidence,⁶ has no impact upon the ability to appreciate the overall narrative of P-0130’s evidence.⁷ The Prosecution avers that the Statement has *prima facie* probative value and that Rule 68(2)(b)(i) factors militate in favour of

¹ ICC-01/12-01/18-2013-Conf-Exp (with one confidential annex). The material sought to be introduced is listed in Section I of ICC-01/12-01/18-2013-Conf-AnxA with the Request being limited to exhibits which are not already recognised as formally submitted.

² Request, ICC-01/12-01/18-2013-Conf-Red, para. 2.

³ Request, ICC-01/12-01/18-2013-Conf-Red, paras 7, 21-23.

⁴ MLI-OTP-0041-0528-R02.

⁵ Request, ICC-01/12-01/18-2013-Conf-Red, paras 2-6, 26.

⁶ Request, ICC-01/12-01/18-2013-Conf-Red, paras 32-33. *See also* ICC-01/12-01/18-2013-Conf-AnxA, pp. 3-4.

⁷ Request, ICC-01/12-01/18-2013-Conf-Red, paras 27-31, 34-39.

introduction, given that P-0130's evidence is of a cumulative or corroborative nature and its introduction into evidence is in the interests of justice.⁸ It further submits that introduction into evidence of the Statement causes no undue prejudice to the accused.⁹

3. On 21 January 2022, having benefited from an extension of time,¹⁰ the Defence filed its response to the Request (the 'Response').¹¹ The Defence opposes the introduction of P-0130's evidence pursuant to Rule 68(2)(b) of the Rules. Firstly, the Defence argues that key parts of the Statement relate to the acts and conduct of Mr Al Hassan. In particular, it submits that paragraph 68 of the Statement refers to the acts and conduct of the accused and accordingly, the entire section to which this paragraph belongs to cannot be submitted pursuant to Rule 68(2)(b) of the Rules.¹² Further, the Defence submits that Rule 68(2)(b)(i) factors militate against the introduction of P-0130's evidence, contending that the Statement pertains to live and important issues in the case and is not of a cumulative or corroborative nature.¹³ The Defence also challenges the reliability of P-0130's evidence,¹⁴ and argues that it would be prejudiced by not being able to examine the witness.¹⁵ Regarding the associated materials, the Defence opposes their introduction into evidence *inter alia* on the basis that the Prosecution 'failed to demonstrate with sufficient specificity and probative value that each of the associated materials are admissible under Rule 68(2)(b) and Article 69(4) of the ICC Statute'.¹⁶

⁸ Request, ICC-01/12-01/18-2013-Conf-Red, paras 42-59.

⁹ Request, ICC-01/12-01/18-2013-Conf-Red, paras 60-61.

¹⁰ Email from the Chamber dated 8 December 2021 at 14:49. *See also* Defence Regulation 35 Request for Extension of Time to File Rule 68 Responses relating to Witnesses P-0130 and P-0590, 8 December 2021, ICC-01/12-01/18-2059-Conf, with two confidential annexes.

¹¹ Defence response to 'Confidential Redacted Version of "Prosecution application under rule 68(2)(b) of the Rules to introduce into evidence MLI-OTP-P-0130's prior recorded testimony and associated material"' (ICC-01/12-01/18-2013-Conf-Exp)', ICC-01/12-01/18-2090-Conf.

¹² Response, ICC-01/12-01/18-2090-Conf, paras 5-10.

¹³ Response, ICC-01/12-01/18-2090-Conf, paras 11-20.

¹⁴ Response, ICC-01/12-01/18-2090-Conf, paras 21-32.

¹⁵ Response, ICC-01/12-01/18-2090-Conf, paras 33-40.

¹⁶ Response, ICC-01/12-01/18-2090-Conf, paras 42.

II. Analysis

4. The Chamber refers to its 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.¹⁷
5. The Chamber 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 presence of limited references to the acts and conduct of the accused in a prior recorded testimony does not *per se* bar its introduction under Rule 68(2)(b) of the Rules, where such references can be excluded, as foreseen by the Chamber’s directions on the conduct of proceedings.¹⁸
6. With regard to the Statement, the Chamber considers that with the exclusion of limited references, the remainder goes to proof of a matter other than the acts and conduct of the accused.
7. Nevertheless, the Majority, Judge Kimberly Prost dissenting, considers that the introduction into evidence of the Statement pursuant to Rule 68(2)(b) of the Rules must be rejected in light of the discretionary factors under that provision.
8. At the outset, the Majority recalls that 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 and that, in the exercise of its discretion, the Chamber must interpret and

¹⁷ Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-1402-Red2, 26 March 2021, 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.

¹⁸ Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules, 15 November 2021, ICC-01/12-01/18-1924 (the ‘P-0113 Decision’), para. 13; P-0113 Dissent, ICC-01/12-01/18-1924-Anx, para. 3.

weight the relevant factors under Rule 68(2)(b)(i) of the Rules in light of the said nature of the provision.¹⁹

9. The Majority notes that, as acknowledged by the Prosecution, the Statement covers a wide array of topics that are of relevance to the case. Keeping in mind the charges brought against the accused and mode of liability under which he is charged, the Majority notes that the core of P-0130's evidence pertains to matters of particular importance to the case, including the role of the Islamic police in enforcing rules,²⁰ its relationship with other organs of the groups,²¹ and alleged instances of abuses committed during the relevant time period.²² Accordingly, the Majority finds that most of P-0130's evidence goes beyond mere 'background' information and touches upon matters which are materially in dispute in this case.
10. With respect to the cumulative or corroborative nature of P-0130's evidence, while acknowledging that the relevant consideration is whether other testimony has been provided on 'similar facts' and that it is not required that the accounts accord in every detail,²³ the Majority notes that a not insignificant part of P-0130's Statement contains evidence of alleged abuses that are unique or not similar to other facts of the case. In this regard, the Majority observes that the Statement includes reference to several individuals who appear to be named victims of charged incidents. While such references do not *per se* bar the introduction into evidence of a prior recorded testimony, the Majority is of the view that in the case at hand this militates against the introduction into evidence of the Statement pursuant to Rule 68(2)(b) of the Rules. That is mainly because the victims of certain such incidents mentioned by P-0130 ended up not testifying in person before the Chamber. The Majority notably refers to the incident related to P-0580 and specifically recalls that, at the end of last year, the latter was

¹⁹ P-0113 Decision, ICC-01/12-01/18-1924, para. 18; Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on Prosecution's Request to Admit Prior Recorded Testimony Under Rule 68(2)(d), ICC-01/09-01/20-247-Red (the '*Gicheru* Rule 68(2)(d) Decision'), para. 22.

²⁰ Statement, MLI-OTP-0041-0528-R02, paras 92-94, 99-100.

²¹ Statement, MLI-OTP-0041-0528-R02, paras 92-94, 99-100.

²² Statement, MLI-OTP-0041-0528-R02, paras 74-112, 121, 124

²³ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b), 12 January 2017, ICC-01/04-02/06-1715-Red, para. 14.

withdrawn from the Prosecution's List of witnesses. This necessarily increases in importance P-0130's related evidence. Accordingly, and while acknowledging that the core of P-0130's evidence may be of a cumulative or corroborate nature, the Majority is of the view that, in the specific circumstances, a last-minute decision to introduce P-0130's evidence without affording the Defence an opportunity to question the witness would disproportionately and unfairly impact Defence rights.²⁴

11. The Majority further stresses that P-0130 was present in Timbuktu during the relevant time period, interacting with the members of the armed groups and alleged victims of abuses. The Majority however observes that his basis of knowledge for important factual allegations are often not included in his Statement. This is an essential concern for the Majority and, in these circumstances, the Majority considers it inapposite to introduce P-0130's prior recorded testimony without eliciting further evidence on how and when he obtained his information on materially disputed issues, including charged incidents. The Majority therefore considers that P-0130's in-court appearance is necessary to the eventual assessment of his evidence and, as a result, the determination of the truth.
12. Finally, the Majority recalls that P-0130 is *not* unavailable to testify. In this regard, the Majority considers that it cannot accept that a witness's hesitation, preference or subjective fear becomes the decisive factor – under the cover of interest of justice – in its assessment of whether or not it is appropriate to rely on Rule 68(2)(b) of the Rules. When the allegation before the Chamber is that a witness is not available to testify orally, then the Prosecution ought to meet the Rule 68(2)(c) requirements. These are not met in the case of P-0130 and, in the view of the Majority, his 'unwillingness' to testify cannot be determinative in the

²⁴ In its List of Remaining witnesses filed on 3 November 2021 (ICC-01/12-01/18-1878-Conf-AnxA), the Prosecution still referred to P-0130 as a 'viva voce' witness and did not provide on this occasion, and before the testimony of P-0642, an indication that it would seek to introduce its evidence under Rule 68(2)(b). Notably, the Majority observes that, had such notice been provided, the Defence would have known that its cross-examination of P-0642 a week later was its last opportunity to question a witness regarding the victimisation of P-0580 on the stand during the course of the Prosecutions' case (see T-157).

Chamber's Rule 68(2)(b) assessment, as this would completely circumvent the Rule 68(2)(c) procedure and requirements.²⁵

13. In light of the above, having considered the Rule 68(2)(b)(i) factors, the Majority concludes that the introduction of the Statement, without affording the Defence the possibility to test the witness's evidence via cross-examination, would be unduly prejudicial. Accordingly, the Majority considers that, in exercising its discretion under Rule 68(2)(b) of the Rules, the Request must be dismissed.
14. Turning to the Associated Material, while they cannot be introduced together with the Statement under Rule 68(2)(b) of the Rules, the Chamber finds it appropriate to recognise their submission into evidence nonetheless pursuant to the approach it adopted.²⁶ The Chamber notes that the Associated Material is comprised of nine videos contained in an annex to the statement and their transcripts and translations, a document annexed to the Statement and its translation as well as a photograph.²⁷ The Chamber is satisfied that these items are not testimonial in nature and bear sufficient relevance to the case. In exercising its discretion, the Chamber has had due regard to the arguments raised by the Defence. However, the Chamber considers that the arguments raised do not constitute a bar to the introduction into evidence of the associated exhibits, but are more appropriate to be considered as part of the Chamber's ultimate assessment of all evidence at the time of its Article 74 Judgment.

²⁵ See 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 Witness P-0039, ICC-01/04-02/06-1325, paras 9-11. See also *Gicheru* Rule 68(2)(d) Decision, ICC-01/09-01/20-247-Red, para. 27.

²⁶ ICC-01/12-01/18-789-AnxA, paras 27-34; Decision on Prosecution application submitting 30 exhibits into evidence, 28 January 2022, ICC-01/12-01/18-2097, para. 8. The Chamber notes the Prosecution's recent indication that, depending on the outcome of its pending Rule 68(2) applications, it may seek to introduce its evidence through other means. See Notice of the end of the Prosecution's presentation of evidence, 11 February 2022, ICC-01/12-01/18-2110-Conf, para. 3.

²⁷ MLI-OTP-0050-0254; MLI-OTP-0041-0604; MLI-OTP-0041-0606; MLI-OTP-0041-0607; MLI-OTP-0078-5986; MLI-OTP-0041-0608; MLI-OTP-0041-0609; MLI-OTP-0041-0610; MLI-OTP-0078-1339; MLI-OTP-0078-1341; MLI-OTP-0041-0611; MLI-OTP-0041-0613; MLI-OTP-0041-0614; MLI-OTP-0041-0424; MLI-OTP-0041-0573 and MLI-OTP-0041-0577.

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

REJECTS the Request; and

UNANIMOUSLY

AUTHORISES the introduction into evidence of the Associated Material, specified at footnote 27 of the present decision; and

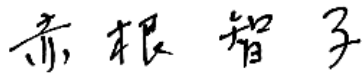
INSTRUCTS the Registry to reflect in the eCourt metadata the introduction of the aforementioned items.

Judge Kimberly Prost appends a partially 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, 21 February 2022

At The Hague, The Netherlands