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No.: ICC-01/12-01/18
Date: 28 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

Request for Leave to Appeal the “Decision on the introduction into evidence of P-0130’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules”

Source: Office of the Prosecutor

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Introduction

1. The Prosecution sought the admission of prior recorded testimony by witness P-0130 under rule 68(2)(b) of the Rules of Procedure and Evidence. By majority, the Trial Chamber dismissed this application¹—but the reasoning of the majority and the minority suggests a repetition of the significant divide in their understanding of the applicable law. The existence of such a divide was recently acknowledged by the Chamber, unanimously, in certifying issues for appeal arising from a previous decision under rule 68(2)(b).² Since the Appeals Chamber has not yet issued judgment in that appeal, the Prosecution respectfully seeks certification of two issues arising from the Decision, which also relate to the issues previously certified. If the Trial Chamber concurs, the Prosecution will request the Appeals Chamber to join these issues to those already under its consideration, and to render a single consolidated judgment.

Submissions

2. The Chamber should grant leave to appeal two proposed issues arising from the Decision. They significantly affect the fair and expeditious conduct of the proceedings, and favour immediate resolution by the Appeals Chamber, including to ensure that the Chamber receives all the evidence to which it is legally entitled, in order to discover the truth.
3. More generally, and even accepting that this is not dispositive if the test under article 82(1)(d) is not met,³ at least some of the issues arising from the Decision may also be said to be of general importance for the conduct of the Court’s proceedings as a whole. Consequently, prompt clarification of the legal matters raised by the Decision will favour judicial economy, proper case management, and the efficiency of the Court’s trial processes overall.

Two issues arise from the Decision and should be certified for appeal

4. Two issues arise from the Decision, for which the Prosecution seeks certification to appeal. As the Court has consistently required, “an appealable issue must be ‘an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion’.”⁴ The proposed issues each satisfy this requirement.

¹ See ICC-01/12-01/18-2124-Red (“[Decision](#)”); ICC-01/12-01/18-2124-Anx (“[Dissenting Opinion](#)”).

² See ICC-01/12-01/18-2034 (“[Certification Decision](#)”), paras. 2, 7-9; ICC-01/12-01/18-1924 (“[P-0113 Decision](#)”).

³ See e.g. [ICC-01/04-01/06-1557](#), para. 25; [ICC-02/04-01/05-20](#), para. 21, [ICC-01/04-135-tEN](#), para. 21; [ICC-01/04-01/06-1191](#), para. 11; ICC-01/05-01/08-1169, para. 25.

⁴ See e.g. [ICC-01/04-168 OA3](#), para. 9.

First proposed issue: the nature of the rule 68(2)(b) assessment

5. The first proposed issue is:

Whether considering rule 68(2)(b) as “a deviation from the general principle of orality” in article 69(2) can be relevant to the Chamber’s interpretation and weighing of the relevant factors under rule 68(2)(b)(i).

6. This issue is an identifiable subject or topic arising from the Decision, and its resolution is “essential for the determination of matters arising under the judicial cause under examination”.⁵

7. Citing a key passage of the P-0113 Decision,⁶ the Majority made a general statement as to the nature of the assessment that it considered to be legally required. It stated:

[T]he Majority recalls 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 weigh the relevant factors under Rule 68(2)(b)(i) of the Rules in light of the said nature of the provision.*⁷

8. Reading this statement together with the authorities cited, the Prosecution understands the Majority to have made clear that it again adopted the principle espoused in the P-0113 Decision—to the effect that the nature of rule 68(2)(b) as a “deviation” from article 69(2) means that “recourse to [rule 68(2)(b)] requires the conduct of a cautious and stringent assessment”.⁸ This is confirmed by Judge Prost’s dissenting opinion, in which she noted her disagreement with this characterisation of rule 68, and emphasised that in her view “the introduction of prior recorded testimony in accordance with the Rules should [not] be viewed as exceptional.”⁹

9. The Chamber previously, and unanimously, certified this same issue for appeal when it arose in the P-0113 Decision, observing that:

[T]his consideration is a source of disagreement within the Majority and Minority opinions, which is moreover at the very core of the Majority’s conclusion that the

⁵ [ICC-01/04-168 OA3](#), para. 9. See also [ICC-01/04-01/10-443](#), p. 4; [ICC-01/09-02/11-275](#), para. 11; [ICC-01/09-02/11-211](#), para. 12; [ICC-01/04-01/10-288](#), p. 6.

⁶ [Decision](#), para. 8 (fn. 19, citing [P-0113 Decision](#), para. 18).

⁷ [Decision](#), para. 8 (emphasis added).

⁸ [P-0113 Decision](#), para. 18.

⁹ [Dissenting Opinion](#), para. 3.

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.¹⁰

10. For the same reasons, the Chamber should on this occasion certify the proposed issue for appeal. While the Decision proceeds to analyse various discretionary factors under rule 68(2)(b)(i) in determining whether P-0130's prior recorded testimony is admissible,¹¹ the emphasised text above expressly acknowledges that these factors were 'interpreted and weighed' based on the Majority's view (in the P-0113 Decision) that rule 68(2)(b) must only be applied stringently, cautiously, and exceptionally.¹² As such, any error in this regard—which has already been endorsed as an issue significantly affecting the fair and expeditious conduct of the proceedings, for which immediate resolution by the Appeals Chamber would materially advance the proceedings¹³—would materially affect the Majority's reasoning in the Decision.

Second proposed issue: the relevance of availability to testify as a factor under rule 68(2)(b)(i)

11. The second proposed issue is:

Whether the availability of the witness to testify is a legally permissible factor under rule 68(2)(b)(i).

12. This Second Issue is an identifiable subject or topic arising from the Decision, and its resolution was essential for the matters presented for judicial determination.¹⁴ In particular, this issue formed an integral part of the Majority's assessment of the criteria under rule 68(2)(b)(i);¹⁵ if the Majority had not considered that it could take account of this factor, the overall weighing of the factors in its discretionary assessment under rule 68(2)(b)(i) would have been materially altered.

13. The Majority recalled that P-0130 is "*not* unavailable to testify", and continued:

[T]he 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.

¹⁰ [Certification Decision](#), para. 7.

¹¹ [Decision](#), paras. 9-13; [Dissenting Opinion](#), paras. 4-9.

¹² *See above* para. 7 (quoting [Decision](#), para. 8, citing [P-0113 Decision](#), para. 18).

¹³ [Certification Decision](#), para. 8.

¹⁴ *See above* fn. 5.

¹⁵ [Decision](#), paras. 12-13.

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

14. In this fashion, while the Majority may be correct in asserting that the reluctance of a witness to testify is not as a matter of law *overriding* in the rule 68(2)(b)(i) assessment, it also appears to have assumed that the reverse is true—that the *availability* of a witness (in the sense of the non-applicability of rule 68(2)(c)) is a factor which can be taken into account in denying a rule 68(2)(b) request. This is logically and legally erroneous. The fact that an alternative gateway for admissibility in rule 68—rule 68(2)(c)—is closed does not mean that rule 68(2)(b) must be closed also. The different requirements of the two provisions amply illustrate that they are intended to apply to different types of circumstances. Indeed, there may well be occasions when a witness is not unavailable for the purpose of rule 68(2)(c), and yet the admissibility of that witness’ prior recorded testimony under rule 68(2)(b) is not only legally possible but desirable in the interests of justice. Neither of the authorities cited by the Majority—which concern the applicability of rule 68(2)(c) and (d), not (b)—suggests anything to the contrary.¹⁶ Indeed, considerations under these provisions—including the exhaustion of reasonable alternatives by the Prosecution—are not material under rule 68(2)(b).

15. This interpretation is further confirmed by the Dissenting Opinion, in which Judge Prost stated that the availability or otherwise of a witness is not a “pertinent” factor under rule 68(2)(b).¹⁷ In Judge Prost’s view, the Chamber’s obligations under article 68, and its more general obligations to determine the truth through the conduct of the trial proceedings, must necessarily weigh against such an approach.

16. Consequently, the Second Issue again identifies a significant legal question which not only underpinned the reasoning of the Majority but is also of wider relevance for this case and the Court as a whole. It was essential for the resolution of the Decision, since if the Majority

¹⁶ See ICC-01/04-02/06-1325 (“[Ntaganda Rule 68\(2\)\(c\) Decision](#)”), paras. 9-11 (declining to characterise a reluctant witness, whom the Chamber had decided not to summon, as “unavailable” for the purpose of rule 68(2)(c)); ICC-01/09-01/20-247-Red (“[Gicheru Rule 68\(2\)\(d\) Decision](#)”), para. 27 (declining to receive evidence under rule 68(2)(d) in circumstances when the Chamber considered that the Prosecution had not used all reasonable measures to try and secure the witness’ attendance at trial).

¹⁷ [Dissenting Opinion](#), para. 8.

had adopted a different view of the definition of the “interests of justice” criterion, it could have reached a different conclusion on the admissibility of the statement.

The proposed issues significantly affect the fair and expeditious conduct of the proceedings

17. Each of the proposed issues significantly affects the fair and expeditious conduct of the proceedings, for similar reasons. Furthermore, the Chamber has already—and unanimously—recognised that an issue very similar to one of the proposed issues warranted certification for appeal.¹⁸

18. The proposed issues significantly affect the fair conduct of the proceedings because they directly affect the ability of the parties to present their case, and the ability of the Chamber to determine the truth based on its independent assessment of all the relevant evidence. In this case, the Chamber declined to admit P-0130’s testimony because of the Majority’s reasoning identified in the two proposed issues. While it also took into account other factors, the weight it assigned to those factors was informed by the Majority’s view of the two proposed issues.

19. The proposed issues also significantly affect the expeditious conduct of the proceedings because the use of rule 68(2)(b) is a key part of the toolbox created by the Assembly of States Parties for ensuring an expeditious trial. As previously recognised, the Majority’s interpretation of the two facets of rule 68(2)(b) identified in the proposed issues—if correct—is likely to increase the numbers of witnesses required to testify *viva voce* or at least under rule 68(3) in cases before this Court, with all the attendant consequences for the duration of the proceedings. Conversely, if the Majority’s interpretation were wrong, and rule 68(2)(b) grants more latitude than understood in the Decision, then the potential for enhancing the pace of the proceedings may be significant. This is especially noteworthy at a time when the Court as a whole is urged to consider how it may further enhance the expeditious conduct of its proceedings, consistent with the essential dictates of a fair trial.

The proposed issues significantly affect the outcome of the trial

20. For similar reasons, the proposed issues significantly affect the outcome of the trial. By limiting the ability of the parties to present their case, the two issues affect the body of evidence available to the Chamber in order to determine the truth and thereby arrive at a proper verdict.

¹⁸ [Certification Decision](#), para. 8.

Immediate resolution of the proposed issues by the Appeals Chamber may materially advance the proceedings

21. Immediate resolution by the Appeals Chamber of the proposed issues not only may but *will* materially advance the proceedings, in the sense that it will ensure that the trial proceeds on the correct path with regard to the receipt of evidence under rule 68(2)(b). This will not only ensure that the Chamber receives the prior recorded testimony of P-0130, if it is established that this was not regarded as admissible due to legal error, but also potentially of other witnesses if their prior recorded testimony does not meet the stringent criteria set out by the Majority in the Decision. Alternatively, if the Appeals Chamber confirms the approach of the Majority, this may streamline further litigation on these issues, and guide the parties in the best way to present their cases.

22. In addition, given the close overlap between the proposed issues and those already certified for appeal arising from the P-0113 Decision, further certification of the issues arising from this Decision will materially advance the proceedings by bringing them directly within the scope of the Appeals Chamber's forthcoming judgment. This may contribute to procedural economy, in the event that the Appeals Chamber identifies any legal error.

Conclusion

23. For the reasons above, the Trial Chamber is respectfully requested to certify the proposed issues for appeal.



Karim A. A. Khan QC, Prosecutor

Dated this 28th day of February 2022

At The Hague, The Netherlands