

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**
Date: **3 March 2022**

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

**Defence response to ‘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: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Victims Participation and
Reparations Section**

Other

I. Introduction

1. The Prosecution's request for leave to appeal¹ the Majority's decision² to reject the Prosecution's Rule 68(2) application to submit the prior recorded testimony of P-0130 ('Request') is without merit and should be rejected in its entirety.

II. Submissions

2. The first issue duplicates a matter that is pending before the Appeals Chamber.³ Certification would trigger unnecessary litigation and delays. If the Prosecution's P-0113 appeal⁴ is successful, the Prosecution can apply to the Trial Chamber for reconsideration. If it is rejected, a further identical appeal would serve no purpose.
3. The second issue identified by the Prosecution does not arise from the Decision. The Majority addressed P-0130's availability⁵ after first considering the discretionary criteria set out in Rule 68(2)(b)(i), and concluding that several factors militated against its admission.⁶ The issue of availability played no role in the Majority's conclusion that it was:⁷

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.

4. Indeed, whereas the Prosecution has claimed that the Majority erred by taking into consideration 'availability' issues within the framework of Rule 68(2)(b), the opposite is true. The Chamber found that in circumstances where the Prosecution has failed to satisfy the Rule 68(2)(b) criteria for admission, the Prosecution cannot rely on arguments concerning the alleged 'unavailability' of the witness without satisfying the criteria set out in Rule 68(2)(c), which is the *lex specialis* as concerns witnesses who cannot testify due to 'unavailability'.⁸

¹ [ICC-01/12-01/18-2131](#).

² [ICC-01/12-01/18-2124-Red](#).

³ [ICC-01/12-01/18-2131](#), paras 5-10; [ICC-01/12-01/18-2075](#), paras 31-47.

⁴ [ICC-01/12-01/18-2075](#).

⁵ [ICC-01/12-01/18-2124-Red](#), para. 12.

⁶ [ICC-01/12-01/18-2124-Red](#), paras 9-11.

⁷ [ICC-01/12-01/18-2124-Red](#), para. 11.

⁸ [ICC-01/12-01/18-2124-Red](#), para. 12.

5. Put simply, if the Prosecution claims that a witness is unavailable to testify, they must satisfy the test for unavailability enumerated by Rule 68(2)(c). If they are unable to satisfy this test, then the Prosecution must fulfil the criteria that applies to Rule 68(2)(b). It is not permissible to create a hybrid provision, comprised of a diluted version of either the Rule 68(2)(b) criteria or the Rule 68(2)(c) unavailability test. There is, therefore, no appealable issue that arises from the manner in which the Majority reached its conclusion that the Prosecution had failed to satisfy the Rule 68(2)(b) criteria.
6. Finally, given that the Prosecution has closed its case⁹ (and indeed, attempted to do so before the Decision was issued¹⁰), appellate intervention would not materially advance the proceedings. P-0130's statement encompasses a range of incidents and allegations that would necessitate investigation and the production of further witnesses during the Defence case. Given that the Defence has very little time to finalise its list of witnesses and evidence for the Defence case, the Defence has done so by reference to the Prosecution evidence that has been submitted into the record. In order to avoid issues of self-incrimination, it is also imperative that the content of the Prosecution's case against Mr Al Hassan is crystallised before the Defence files its list of witnesses and evidence. Appellate intervention would introduce a significant degree of uncertainty and undermine the ability of the Defence to finalise critical preparation at this juncture.

III. Relief sought

7. The Defence respectfully requests that Trial Chamber X **REJECT** the Request.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 3rd Day of March 2022
At The Hague, The Netherlands

⁹ [ICC-01/12-01/18-2127](#), disposition.

¹⁰ [ICC-01/12-01/18-2110-Red](#).