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No. ICC-01/12-01/18

Date: 10 March 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

Decision on Prosecution request for leave to appeal ‘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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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 Article 82(1)(d) 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 Prosecution request for leave to appeal “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

1. On 21 February 2022, the Chamber, by majority, issued its ‘Decision on the introduction into evidence of P-0130’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules’ (the ‘Impugned Decision’).¹ Judge Kimberly Prost appended a dissenting opinion.²
2. On 28 February 2022, the Office of the Prosecutor (the ‘Prosecution’) filed a request (the ‘Request’)³ seeking leave to appeal the Impugned Decision with respect to the following two issues: (i) 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) (the ‘First Issue’); and (ii) whether the availability of the witness to testify is a legally permissible factor under Rule 68(2)(b)(i) (the ‘Second Issue’).
3. On 3 March 2022, the Defence filed its response to the Request.⁴

¹ ICC-01/12-01/18-2124-Conf (public redacted version filed on the same date).

² ICC-01/12-01/18-2124-Anx.

³ 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”, ICC-01/12-01/18-2131.

⁴ 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”’, ICC-01/12-01/18-2134.

II. Analysis

4. The Chamber incorporates by reference the legal framework applicable to the assessment of requests for leave to appeal pursuant to Article 82(1)(d) of the Statute.⁵
5. With respect to the First Issue, the Chamber notes that a nearly identical issue arising from the Chamber's decision on the introduction into evidence of P-0113's prior recorded testimony has been certified for appeal and is currently pending before the Appeals Chamber.⁶ Noting that the First Issue pertains to the interpretation of the provision and does not raise any specific questions *vis-à-vis* P-0130's evidence, the Chamber considers that immediate resolution by the Appeals Chamber of this nearly identical question would not materially advance the proceedings.
6. Turning to the Second Issue, the Chamber recalls while the Majority indicated that a witness's hesitation, preference or subjective fear to testify cannot be a 'decisive factor',⁷ it did not, contrary to the arguments advanced by the Prosecution, take the position that the witness's availability was an integral part of its assessment of the criteria under Rule 68(2)(b)(i) of the Rules. Rather, the Impugned Decision rejected the Prosecution's request for introduction into evidence of P-0130's prior recorded testimony after holistically assessing the discretionary factors under Rule 68(2)(b)(i) of the Rules, finding *inter alia* 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' and that 'to introduce P-0130's evidence without affording the Defence an opportunity to question the witness would disproportionately and unfairly impact Defence rights'.⁸ The Chamber is thus of the view that the single component of the Majority's findings

⁵ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', 9 April 2020, ICC-01/12-01/18-734, para. 12.

⁶ Decision on Prosecution request for leave to appeal 'Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules', 6 December 2021, ICC-01/12-01/18-2034. The second issue certified for appeal was 'whether considering Rule 68(2)(b) as 'a deviation from the general principle of orality' in Article 69(2) required an assessment which was not only cautious but 'stringent'—in the sense that admissibility is 'exceptional' and must be 'further limited' by a broad reading of the criteria specified in the rule itself in order to protect the rights of the accused'

⁷ Impugned Decision, ICC-01/12-01/18-2124-Red, para. 12.

⁸ Impugned Decision, ICC-01/12-01/18-2124-Red, paras 10-11.

extracted by the Prosecution does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and immediate resolution by the Appeals Chamber would not materially advance the proceedings.

7. Accordingly, it is unnecessary to consider the remaining requirements under Article 82(1)(d) of the Statute and the Request is dismissed.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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 Thursday, 10 March 2022

At The Hague, The Netherlands