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Original: **English** No.: **ICC-01/12-01/18**
Date: **22 November 2021**

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 second Prosecution request for the introduction of P-0113's evidence 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 a statement by witness P-0113 as prior recorded testimony under rule 68(2)(b) of the Rules of Procedure and Evidence, following the witness' persistent unwillingness to testify *viva voce*. By majority, the Trial Chamber dismissed this application[1]—but the difference between the reasoning of the majority and the minority suggests a significant divide in their understanding of the applicable law. In this context, and with a view to clarifying the contours of this important procedure for the benefit of this case and the Court as a whole, the Prosecution respectfully seeks certification to appeal the four issues arising from the Decision.

Submissions

2. The Chamber should grant leave to appeal four 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, 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.

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

4. Four 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'."[2] The proposed issues each satisfy this requirement.

First proposed issue: the definition of evidence going to "acts and conduct of the accused"

5. The first proposed issue is:

[1] *See* ICC-01/12-01/18-1924 ("Decision"); ICC-01/12-01/18-1924-Anx ("Dissenting Opinion").
[2] *See e.g.* ICC-01/04-168 OA3, para. 9.

> Whether the exclusion of evidence going to the "acts and conduct of the accused" in rule 68(2)(b) means that any reference to such acts and conduct must not only be "peripheral and discrete" but also capable of being "detached from their context".

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".[3]

7. Notwithstanding the identification by the Prosecution of 10 paragraphs (and 2 sentences) from the 173-paragraph statement which it was accepted go to the acts and conduct of Mr Al Hassan,[4] and which should therefore be excluded if the statement were admitted under rule 68(2)(b), the majority of the Trial Chamber found that:

> [I]ntroduction of […] prior recorded testimony pursuant to Rule 68(2)(b) of the Rules is only permissible where reference to the acts and conduct of the accused is peripheral and discrete, i.e. not of significance to the case or of limited importance and does not constitute the core of the testimony sought to be introduced.[5]

8. The Majority considered that even the limited passages of the statement going to Mr Al Hassan's acts and conduct nonetheless constituted the "core" of the testimony because they "are part of a larger section in which P-0113 provides evidence regarding key aspects of the narrative concerning the criminal responsibility of the accused, such as the role of the Islamic police and the interactions in between the various groups."[6]

9. The Majority further opined that it was necessary to treat the identified paragraphs as part of a larger section because the approach proposed by the Prosecution (excluding certain excerpts "while retaining the remainder") would "distort the substance of the narrative of P-0113's evidence, taken as a whole", and require adopting a "piecemeal approach to the witness's evidence" which it considered "inapposite".[7] This was notwithstanding the

[3] 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.
[4] Dissenting Opinion, para. 5.
[5] Decision, para. 13.
[6] Decision, para. 14.
[7] Decision, para. 14.

Majority's acceptance in principle that prior recorded testimony may be admitted in part under rule 68(2)(b).[8]

10. Finally, when concluding that "P-0113's evidence touches on a significant range of materially disputed issues" (for the purpose of assessing the criteria under rule 68(2)(b)(i)), the Majority again acknowledged that it also placed "great importance" on the proximity of the "core" of the statement to matters going to Mr Al Hassan's "acts and conduct", "particularly keeping in mind the mode of liability under which Mr Al Hassan is charged".[9]

11. Based on this reasoning, therefore, there can be no doubt that the Majority's view of the definition of evidence going to "acts and conduct of the accused" directly informed its decision not to admit the statement under rule 68(2)(b). This understanding pervaded not only the assessment of the threshold question concerning "acts and conduct" *per se*, but also the assessment of the discretionary factors under rule 68(2)(b)(i).[10] On its face, the Majority's interpretation seems to have exceeded the prior jurisprudence of the Court on this point.[11]

12. Consequently, resolution of this issue is essential in determining whether and on what basis rule 68(2)(b) was applicable to the statement. This is further confirmed by the Dissenting Opinion, in which Judge Prost stated that "the expression 'acts and conduct of the accused' should be narrowly construed" and indicated that she disagreed with the view of the Majority in this respect,[12] and that the "limited" passages to be excluded would not "distort the narrative of P-0113's evidence."[13]

13. The proposed issue is no mere disagreement with the outcome of the Decision, but rather goes to the content of the law governing the Trial Chamber's assessment of what constitutes evidence going to the "acts and conduct of the accused" for the purpose of rule 68(2)(b). This question is thus ripe for the adjudication of the Appeals Chamber, in order to harmonise the

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[8] Decision, para. 13; Dissenting Opinion, para. 3.
[9] Decision, para. 16.
[10] Decision, para. 15.
[11] *See e.g.* ICC-01/04-02/06-2666-Red ("*Ntaganda* Appeal Judgment"), para. 629 ("there is no legal impediment to prior recorded testimony admitted pursuant to rule 68(2) […] being relied upon to establish individual criminal acts in circumstances in which they are not the direct acts of the accused", provided that "reliance on such evidence [is] not prejudicial to or inconsistent with the rights of the accused", having regard in particular to the dictum of the ICTY Appeals Chamber that "'a conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation of at trial"). *See also e.g.* paras. 628, 630-631. *Cf.* ICC-02/04-01/15-1294 ("*Ongwen* Defence Decision"), para. 5; ICC-02/04-01/15-596-Red ("*Ongwen* Decision"), para. 13.
[12] Dissenting Opinion, para. 4.
[13] Dissenting Opinion, para. 5.

practice of the Court between cases, and to provide greater certainty for all Parties and participants on this important matter.

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

14. The second proposed issue is:

> 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.

15. This Second Issue is likewise an identifiable subject or topic arising from the Decision, and its resolution was also essential for the matters presented for judicial determination.[14]

16. When considering whether the criteria in rule 68(2)(b)(i) militated in favour of the admissibility of the statement,[15] and having set outs its view of those criteria,[16] 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 emphasises 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, in line with the accused's rights to examine the witnesses testifying against him, and that recourse to this provision requires the conduct of a cautious *and stringent* assessment, notably to ensure that the introduction of written testimony is not prejudicial to or inconsistent with the rights of the accused.[17]

17. It was on the basis of this standard that the Majority then concluded (in the next paragraph) that the admission of the statement under rule 68(2)(b), in whole or part, "would be prejudicial in a way which the Majority considers could not be mitigated during the Chamber's ultimate evaluation of the evidence at a later stage", and therefore inappropriate.[18]

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[14] *See above* fn. 3.
[15] Decision, para. 15.
[16] *See* Decision, paras. 16-18.
[17] Decision, para. 18 (emphasis added).
[18] Decision, para. 19.

18. In articulating this standard, the Majority appears to have ventured beyond the authorities on which it relied.[19] In neither *Bemba* nor *Ruto and Sang* did the Appeals Chamber suggest that the admission of evidence under rule 68(2)(b) should be subject to an elevated or particularly exacting level of scrutiny, but only emphasised that the assessment was to be carried out with caution.[20]

19. Likewise, while the *Yekatom and Ngaissona* Trial Chamber did express concern at the prospect of receiving the preponderance of Prosecution testimonial evidence in that case through rule 68,[21] it still did not consider it appropriate to "impose limitations on the number of prior recorded testimonies to be introduced [...] in the abstract."[22] Arguably, that Trial Chamber apprehended the potential for (in its view) too much of the Prosecution case to be presented through rule 68—with attendant risks for the "principle of publicity"—precisely because it recognised that the rule 68(2)(b) criteria were not stringent as a matter of law and might well be satisfied in a large proportion of cases.

20. Judge Prost also understood the Majority to have "proposed" that the application of rule 68(2)(b) should be "limited" further than required under the Statute, with attendant risks to the truth-seeking function of the Court.[23] In her view, rule 68(2)(b) should not "be viewed as exceptional but rather simply as a different form of evidence authorised under the legislative scheme of this hybrid system",[24] in which the rights of the accused are adequately protected by the criteria set out in the rule itself.[25] Giving an "overly broad meaning" to the discretionary factors "would confine the application of Rule 68(2)(b) [...] to very technical matters or background information, contrary to the intention of the drafters of this provision."[26] The Appeals Chamber has likewise noted the potential utility of prior recorded testimony, for example in proving "individual criminal acts in cases of mass criminality."[27]

21. Adopting such a strict approach to the test established in rule 68(2)(b) plainly led the Majority to reach the conclusion that it did, and pervaded its entire reasoning. As such, it is

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[19] *See* Decision, para. 18 (fn. 29: citing ICC-01/09-01/11-2024 OA10 ("*Ruto and Sang* Appeal Judgment"), paras. 84-85; ICC-01/05-01/08-1386 OA5 OA6 ("*Bemba* Appeal Judgment"), para. 78; ICC-01/14-01/18-685 ("*Yekatom and Ngaissona* Decision"), paras. 30, 32).
[20] *Ruto and Sang* Appeal Judgment, para. 85; *Bemba* Appeal Judgment, para. 78.
[21] *Yekatom and Ngaissona* Decision, para. 32.
[22] *Yekatom and Ngaissona* Decision, para. 33.
[23] Dissenting Opinion, para. 9. *See also* paras. 8, 12.
[24] Dissenting Opinion, para. 8.
[25] Dissenting Opinion, para. 9.
[26] Dissenting Opinion, para. 9.
[27] *Ntaganda* Appeal Judgment, para. 628.

obvious that the Second Issue was essential to the resolution of the Decision. Indeed, at least this aspect of the Decision also seems to raises a question of general importance, extending beyond the particular evidence of P-0113. This approach merits prompt appellate review, to ensure that this and other cases proceed on the right course.

Third proposed issue: the definition of the "interests of justice" criterion

22. The third proposed issue is:

> Whether the "interests of justice" criterion in rule 68(2)(b)(i) refers primarily to considerations of "judicial economy", and only residually to "truth seeking functions".

23. Again, this Third Issue is an identifiable subject or topic arising from the Decision, and its resolution was essential for the matters presented for judicial determination.[28] In particular, this issue—together with the proposed fourth issue—formed an integral part of the Majority's assessment of the criteria under rule 68(2)(b)(i).[29]

24. The Majority rejected the Prosecution submission that "the interests of justice are best served by the introduction of the testimony as it would assist the Chamber in the search for the truth."[30] While conceding that "the Chamber's truth seeking functions are of course of relevance", the Majority gave three reasons for not giving weight to this factor. Two of them—the degree to which the statement is corroborative or cumulative of other evidence, and goes to "crucial and highly contested matters"[31]—simply repeat its assessment of other rule 68(2)(b)(i) criteria,[32] and therefore cannot be understood to shed light on the Majority's view of the definition of the "interests of justice" as a distinct criterion. The third reason, following a summary of the (non-exhaustive) factors identified by the *Ongwen* Trial Chamber,[33] was that

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[28] *See above* fn. 3.
[29] Decision, para. 15.
[30] Decision, para. 18.
[31] Decision, para. 18 ("the fact that a witness is unwilling to testify before the Court cannot in itself be sufficient to shift the balance in favour of introducing under Rule 68(2)(b) […] a prior recorded testimony which *contains evidence which is uncorroborated*, and *which goes to crucial and highly contested matters*", emphasis added).
[32] *See below* paras. 28-32 (concerning the proposed fourth issue); *above* paras. 5-13 (concerning the proposed first issue).
[33] Decision, para. 18 ("'interests of justice' are better served by the introduction in writing of a prior recorded testimony when such introduction would, *inter alia*, safeguard the expeditiousness of the proceedings, streamline the presentation of evidence, focus live testimony on those topics of greatest relevance to the proceedings, minimise cumulative in-court testimony, save resources of the institution which may rather be utilised for other purposes, and/or avoid witnesses having to travel in order to appear in court", citing *Ongwen* Decision, para. 16).

"the Prosecution has failed to determine that the case at hand is one where introduction of evidence pursuant to this provision would *contribute to judicial economy*".[34]

25. The necessary implication of this reasoning is that the Majority understood the "interests of justice" criterion in rule 68(2)(b)(i) to pertain primarily, even if not exclusively, to the Chamber's own assessment of judicial economy (since indeed some of the factors to which it referred were satisfied in this case), and only residually to the truth-seeking functions which the Chamber acknowledged but did not elaborate upon.

26. This interpretation is further confirmed by the Dissenting Opinion, in which Judge Prost disputes that "efficiency of the proceedings is the sole or central consideration" under this criterion. Rather, "in light of the Chamber's truth finding responsibility," Judge Prost considered that it was "equally, if not more significant", for the Chamber to have "all relevant evidence before it". She further opined that "such considerations of the interests of justice are of paramount importance amongst the discretionary factors under Rule 68(2)(b) […], considering that the remainder of the factors can be duly taken into account by the Chamber during its eventual deliberation".[35]

27. Consequently, the Third 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 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.

Fourth proposed issue: the definition of the "corroboration" criterion

28. The fourth proposed issue is:

> Whether the "corroboration" criterion in rule 68(2)(b)(i) only favours the admissibility of qualifying evidence if it is "*entirely* corroborative or cumulative".

29. This Fourth Issue is an identifiable subject or topic arising from the Decision, and its resolution was essential for the matters presented for judicial determination.[36] Like the Third

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[34] Decision, para. 18.
[35] Dissenting Opinion, para. 11. *See also* para. 12.
[36] *See above* fn. 3.

Issue, it formed an integral part of the Majority's assessment of the criteria under rule 68(2)(b)(i).[37]

30. The Majority succinctly rejected the possibility that the statement is of a cumulative or corroborative nature, because "P-0113's prior recorded testimony is not *entirely* corroborative or cumulative in nature".[38] In this regard, it added that "the mere fact that other Prosecution witnesses provided testimony on a certain issue does not *per se* render P-0113's evidence on that issue corroborative or cumulative."[39]

31. The impression that the Majority required the entirety of the statement to be corroborative or cumulative is reinforced by Judge Prost's acknowledgement merely of "discrete excerpts where P-0113's statement may lack […] corroboration—or even be contradictory to other evidence to be adduced or on the record".[40]

32. The Fourth Issue thus identifies a legal assumption, supported by no reasoning or authority and apparently departing from the approach of other chambers,[41] which seems to have affected the Majority's consideration of the 'corroboration/cumulation' criterion of rule 68(2)(b)(i). As such, it was essential for the resolution of the Decision, since if the Majority had adopted a different view on this matter—to which it also referred in the context of the interests of justice—it could have reached a different conclusion on the admissibility of the statement. The broader relevance of this approach to corroboration merits prompt appellate review, to ensure that this and other cases proceed on the right course.

All four proposed issues should be certified for appeal

33. It is necessary to certify for appeal *all four* of the proposed issues, in light of their different scope, and their interlocking impact on the outcome of the Decision. Only by considering all four of these issues can the Appeals Chamber engage with the full reasoning of the majority of the Trial Chamber in the Decision.

[37] Decision, para. 15.
[38] Decision, para. 17 (emphasis added).
[39] Decision, para. 17.
[40] Dissenting Opinion, para. 10.
[41] Concerning the general approach to corroboration, *see e.g.* *Ntaganda* Appeal Judgment, para. 672; ICC-02/11-01/15-1400 ("*Gbagbo and Blé Goudé* Appeal Judgment"), paras. 357-358.

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

34. Each of the proposed issues significantly affects the fair and expeditious conduct of the proceedings, for similar reasons.

35. 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, by majority, declined to admit P-0113's testimony because of the Majority's reasoning identified in the four proposed issues.

36. As the circumstances of P-0113's attitude to the Court show, the Chamber's decision under rule 68(2)(b) will not always be a simply matter of the *means* by which the evidence of a witness will be heard, whether as prior recorded testimony or *viva voce*—rather, in some cases (and notwithstanding the other mechanisms available under the Statute and Rules), such decisions will make the difference as to whether the evidence is heard at all.

37. Furthermore, by adopting the stringent approach identified in the four issues proposed for appeal, the Majority appears to have restricted its practical ability to admit prior recorded testimony even in part, depriving itself of the potential value of this evidence in assessing the context of other witness testimony presented at trial. As Judge Prost observed, professional judges are well placed to make appropriate use of this evidence, and indeed may be particularly accustomed to this holistic and nuanced approach in cases (such as this one) where the 'submission' regime is adopted for the receipt of documentary evidence.

38. 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.

39. Irrespective whether P-0113 will in fact testify, the Majority's interpretation of the four 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 this case and potentially others, 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

40. For similar reasons, the proposed issues significantly affect the outcome of the trial. Irrespective whether P-0113 ultimately testifies, by limiting the ability of the parties to present their case, the four issues affect the body of evidence available to the Chamber in order to determine the truth and thereby arrive at a proper verdict.

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

41. 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-0113, 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.

Conclusion

42. 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 22nd day of November 2021

At The Hague, The Netherlands