

**Cour
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**International
Criminal
Court**

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No.: **ICC-01/12-01/18**
Date: **26 November 2021**

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 Second
Prosecution request for the introduction of P-0113’s evidence pursuant to Rule
68(2)(b) of the Rules”’**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

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I. Introduction

1. For the reasons stated in this Response, the Defence respectfully requests that the Chamber dismiss the Prosecution's '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"' ('Request').¹ By the Decision, the Majority found that the introduction of P-0113's evidence through Rule 68(2)(b) would be prejudicial in a way that could not be mitigated through the Chamber's ultimate evaluation of the evidence at a later stage, and must therefore be rejected.²
2. The Prosecution's Request follows two unsuccessful attempts to introduce P-0113's statement and associated material into evidence through Rule 68(2)(b) due to P-0113's consistent 'very firm' decision not to testify.³ The Request purports to identify four appealable issues (collectively, 'Issues'). None of the four issues identified by the Prosecution meets the criteria for certification for appeal pursuant to Article 82(1)(d). The proposed Issues would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Nor would an immediate resolution by the Appeals Chamber materially advance the proceedings. The Request must accordingly be dismissed.

II. Submissions

The Issues do not constitute appealable issues under Article 82(1)(d) of the Statute

3. It is well established that an 'issue' for the purposes of Article 82(1)(d) 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 party seeking leave to appeal under Article 82(1)(d) must identify a discrete legal or factual issue arising from the impugned decision. This notwithstanding, the Request seeks to rely on an assertion that its identified issues are of 'general importance for the conduct of the Court's

¹ ICC-01/12-01/18-1966.

² ICC-01/12-01/18-1924, para. 19.

³ ICC-01/12-01/18-1207-Conf, para. 17, citing MLI-OTP-0078-9949 and ICC-01/12-01/18-1727-Conf, para. 3.

⁴ [ICC-01/04-168](#), para. 9.

proceedings as a whole’; that a matter might be of general importance to ICC proceedings has been found to be irrelevant to the criteria demanded by Article 82(1)(d).⁵

(i) *The First Issue is not an appealable issue arising from the Decision*

4. The Prosecution articulates its ‘first proposed issue’ thus: *Whether the exclusion of evidence going to the “acts and conducts of the accused” in rule 68(2)(b) means that any reference to such acts and conduct must not only be “peripheral and discreet” but also capable of being “detached from their context.”*
5. In defining its First Issue, the Prosecution has mischaracterised the Majority’s findings at paragraphs 13 to 16 of the Decision. These merely and completely appropriately apply the criteria set out by Rule 68(2)(b)(i). There is no lack of clarity. Nor can it be argued that this introduces any degree of uncertainty as to the factual and legal analysis to be undertaken by a Trial Chamber considering the legality of the introduction of evidence through Rule 68(2)(b). The Majority has not introduced an additional criterion: ‘peripheral and discreet’ references are intrinsically ‘able to be detached from their context.’ That references cannot be constitutes an indication that they are neither peripheral nor discreet.
6. The Prosecution’s semantic contortion is a thin veil for a simple disagreement with the Majority’s finding that the excision of 10 paragraphs and two additional sentences of P-0113’s 173 paragraph statement would not be sufficient to satisfy the conditions of Rule 68(2)(b). The Majority noted that limited references to the acts and conduct of the accused do not *per se* bar the introduction of prior recorded testimony through Rule 68(2)(b).⁶ In assessing whether P-0113’s prior recorded testimony, however, the Majority agreed with the Defence that, when looked at in its entirety, the references to the accused’s alleged acts and conduct are numerous, significant to the Prosecution’s case and go to the ‘very core’ of P-0113’s testimony.⁷ In this regard, the Majority emphasised that P-0113’s prior recorded testimony goes well beyond merely ‘background’ information and is woven through with information proximate to the accused’s alleged acts and conduct as well as information pertaining to facts that are materially in dispute.

⁵ [ICC-02/04-01/05-20-US-Exp](#), paras 16-21.

⁶ Decision, para. 13.

⁷ Decision, para. 14, citing ICC-01/12-01/18-1811-Conf, para. 39.

7. The First Issue should therefore be dismissed for entirely failing to meet the criteria for leave to appeal pursuant to Article 82(1)(d).

(ii) *The Second Issue is not an appealable issue arising from the Decision*

8. The Prosecution articulates its ‘second proposed issue’ thus: *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.*
9. At the outset, it is noted that the Prosecution misrepresents what the Majority in fact held by failing to consider its reference to the overriding provision of Rule 68(1), which provides, in absolute terms, that the introduction of previously recorded testimony is prohibited where ‘prejudicial to or inconsistent with the rights of the accused.’⁸ Of course this must be applied ‘stringently’. To hold otherwise would be to invite a ‘loose’ approach to the application of a fundamental fair trial safeguard, which would, in view of the clear language of Rule 68(1), not be consistent with the intention of the drafters.
10. Fundamentally, the Prosecution has purported to have identified a distinction which does not exist. A ‘stringent’ application of a rule would in any event be less liberal or ‘extensive’ than the mandated ‘cautious’ approach. It is difficult to see how any Chamber could be considered to have erred in law by applying a rule as mandated both by the rule and Article 69(2) of the Statute. To argue otherwise would be to seek the ‘loose’ application of a clearly articulated rule and accompanying rudimentary principles.
11. The Prosecution has, further, ignored apposite jurisprudential precedent of this Court, in which Trial Chamber I specified: (i) that even Rule 68(3) applications invite ‘a relatively more stringent procedure’;⁹ and (ii) that even in the event that conditions for the introduction of prior recorded testimony under Rule 68(2)(b) are met, ‘the Chamber must not automatically allow the introduction of the prior recorded testimony, but must determine whether this is appropriate in the particular circumstances’ bearing in mind that

⁸ ICC-01/12-01/18-1924, para. 18.

⁹ [ICC-02/11-01/15-573-Red](#), para. 9.

such introduction is prohibited where this would be prejudicial to or inconsistent with the rights of the accused.¹⁰

12. The Second Issue is merely a disagreement the Majority's clear Decision and should also be dismissed for failing to meet the criteria for leave to appeal.

(iii) *The Third Issue is not an appealable issue arising from the Decision*

13. The Prosecution articulates its 'third proposed issue' thus: *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"*.
14. This is a blatant mischaracterisation of the Decision. As conceded by the Prosecution, the Majority noted the prevailing relevance of the Chamber's truth-seeking functions. It did not relegate this to a 'residual' consideration. To the contrary, the Majority explicitly considered the extent to which prior recorded testimony 'which contains evidence which is uncorroborated' and 'which goes to crucial and highly contested matters' can be considered to contribute to the Chamber's truth-seeking function where the opposing party is unable to examine the witness against him.¹¹ Notwithstanding that the Majority *did* elaborate upon the value of P-0113's material to its truth-seeking function, the Prosecution's claim that had the Majority 'adopted a different view of the "interests of justice" criterion, it could have reached a different conclusion on the admissibility of the statement' is entirely speculative.
15. Contrary to the view expressed in the Dissenting Opinion, the 'interests of justice' is not a blanket principle that permits the admission of all potentially relevant material.¹² The Chamber's truth-seeking function is not served by simply adding material to the case file. This is especially the case where such material cannot be properly tested through the court process, and the admission of which is precluded by virtue of the prejudice occasioned.
16. The Prosecution is again simply disagreeing with the Majority's conclusion. Further, in circumstances in which both judicial economy and the Chamber's truth-seeking functions

¹⁰ [ICC-02/11-01/15-573-Red](#), para. 10.

¹¹ Decision, para. 18.

¹² ICC-01/12-01/18-1924-Anx, paras 11-12.

were explicitly considered as components of the ‘interests of justice’, no appellate decision could be considered essential for determination of matters already comprehensively covered by the Decision. The Third Issue should also be dismissed for failing to satisfy the criteria for leave to appeal.

(iv) *The Fourth Issue is not an appealable issue arising from the Decision*

17. The Prosecution articulates its ‘fourth proposed issue’ thus: *Whether the “corroboration” criterion in rule 68(2)(b)(i) only favours the admissibility of qualifying evidence if it is “entirely corroborative or cumulative”.*

18. This again misstates the Majority’s findings through an uncomfortable contortion. At no point did the Majority aver that prior recorded testimony could satisfy the requirements of Rule 68(2)(b)(i) only when ‘entirely corroborative or cumulative.’ Instead, contrary to the Prosecution’s misrepresentation, the Majority observed that P-0113’s evidence ‘is not entirely corroborative or cumulative in nature’ and, separately and distinctly, that P-0113’s evidence was not *per se* rendered corroborative or cumulative merely because other witnesses provide testimony on a certain issue. This demonstrates that the Majority paid close attention to the degree to which P-0113’s prior recorded testimony was and was not corroborative and/or cumulative when viewed within the context of the case.

19. The Prosecution’s Fourth Issue is merely a disagreement with the Decision and should be dismissed accordingly. In any event, assuming for the sake of argument that the Fourth Issue is indeed an issue within the meaning of Article 82(1)(d), its resolution is not essential for the determination of matters arising in the Decision.

The Issues do not meet the remaining criteria under Article 82(1)(d) of the Statute

(i) *None of the Issues significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial*

20. The Prosecution has failed to articulate how each of the Issues significantly affects the fair and expeditious conduct of the proceedings. The Prosecution makes a blanket assertion that the overall fairness of the proceedings can be satisfied only if the Prosecution is permitted to present its case entirely as it wishes, including when material is found to be inadmissible for failing to meet the criteria set out in the legal framework

of the Court and being unduly prejudicial.¹³ This argument cannot stand up to any logical scrutiny. The unfairness would by definition arise from admitting material that does not satisfy the criteria demanded by the exceptional vehicle of Rule 68, and is prohibited due to its incurable prejudice to the accused.

21. Additionally, while Rule 68 may serve to streamline the proceedings in certain circumstances, the Prosecution does not demonstrate how the admission of P-0113's prior recorded testimony would do anything other than unduly burden the case file at the very latest stage of the Prosecution's case. It is its exclusion that better serves the expeditiousness of the proceedings by removing excess inadmissible material at the appropriate point as mandated by the Rules.

22. As previously noted, reference to matters that the Prosecution considers to be of 'general importance for the conduct of the Court's proceedings as a whole' are irrelevant to the criteria demanded by Article 82(1)(d).¹⁴ The Prosecution's arguments in this regard should be dismissed in their entirety.¹⁵

23. The Prosecution has also failed to provide any argument as to how the Issues significantly affect the outcome of the trial. Again, the Prosecution simply makes a blanket assertion that only by placing no limit on the material that it may choose for the presentation of its case can it be ensured that the Chamber is furnished with the material it needs to determine the truth.¹⁶ This assertion is clearly inconsistent with the intention of the drafters of Article 69 and Rule 68, and should be disregarded.

(ii) *Immediate resolution of the Issues would not materially advance the proceedings*

24. For all the reasons herein, the immediate resolution of the Issues is immaterial to the progress of the proceedings. The uncertainty arising from appellate proceedings at this very late stage of the Prosecution's case would instead materially *impede* the proceedings.

¹³ Request, para. 35.

¹⁴ [ICC-02/04-01/05-20-US-Exp](#), paras 16-21.

¹⁵ Request, para. 39.

¹⁶ Request, para. 40.

III. Relief Sought

25. For all of the reasons expounded herein, the Defence respectfully requests the Trial Chamber **DISMISS** the Prosecution 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” in its entirety.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 26th Day of November 2021
At The Hague, The Netherlands