



Original: English

**No. ICC-01/12-01/18
Date: 6 December 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

**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’**

To be notified in accordance with Regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other
Appeals Chamber**

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

I. Procedural history

1. On 15 November 2021, the Chamber, by majority, issued its ‘Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules’ (the ‘Impugned Decision’).¹ Judge Kimberly Prost appended a dissenting opinion (the ‘Dissenting Opinion’).²
2. On 22 November 2021, 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 four issues: (i) 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’ (the ‘First Issue’); (ii) 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 (the ‘Second Issue’); (iii) 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’ (the ‘Third Issue’); and (iv) whether the ‘corroboration’ criterion in rule 68(2)(b)(i) only

¹ ICC-01/12-01/18-1924.

² ICC-01/12-01/18-1924-Anx.

³ 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”, ICC-01/12-01/18-1966.

favours the admissibility of qualifying evidence if it is *entirely* corroborative or cumulative (the ‘Fourth Issue’).

3. On 26 November 2021, the Defence filed its response to the Request.⁴

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

A. The First and Second Issues

5. The Chamber considers that the First Issue constitutes an ‘appealable issue’. In the Impugned Decision, the Majority found that excluding the excerpts identified by the Prosecution would not, with respect to the prior recorded testimony of P-0113, be sufficient to conform with the requirement that it ‘goes to proof of a matter other than the acts and conduct of the accused’. The Majority reached this conclusion, from which Judge Prost dissented, by interpreting Rule 68(2)(b) of the Rules as permitting the introduction of prior recorded testimony only ‘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.’⁶
6. The Chamber notes the arguments made by the Defence that the Prosecution mischaracterises the Impugned Decision by submitting that the Majority introduced a new criteria, namely that references to the acts and conduct must also be capable of being detached from their context.⁷ The Chamber understands the core of the First Issue as pertaining to the manner in which the ‘acts and conduct’ requirement should be interpreted and applied, and in particular whether, in doing so, the Majority erred in finding that excluding the excerpts

⁴ 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”’, ICC-01/12-01/18-1999.

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 Impugned Decision, ICC-01/12-01/18-1924, paras 13-14. *See contra* Dissenting Opinion, ICC-01/12-01/18-1924-Anx, para. 4.

⁷ Response, ICC-01/12-01/18-1999, para. 5.

identified by the Prosecution from P-0113's prior recorded testimony would not suffice as they cannot be detached from their context. Having accordingly defined the contours of the First Issue, the Chamber is satisfied that it arises from the Impugned Decision.

7. With regard to the Second Issue, the Chamber notes that the Impugned Decision refers to the fact 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',⁸ which informs the 'cautious and stringent assessment' conducted by the Majority. Noting that this 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 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, the Chamber considers that the Second Issue, as formulated, constitutes an appealable issue arising from the Impugned Decision.
8. The Chamber considers that, with respect to the First and Second Issues, the remainder of the cumulative requirements of Article 82(1)(d) of the Statute are also satisfied. Indeed, whether the Majority's interpretation of Rule 68(2)(b) of the Rules, which lead it to conclude that P-0113's evidence may not be relied upon during the present proceedings, was correct is a matter that affects the fair and expeditious conduct of the proceedings. An immediate resolution by the Appeals Chamber at this stage would ensure that 'the proceedings follow the right course',⁹ by clarifying the scope of evidence the Chamber may consider in carrying out its truth seeking functions.¹⁰
9. For these reasons, the Chamber deems it appropriate to grant the leave to appeal sought with respect to the First and Second Issues.

⁸ Impugned Decision, ICC-01/12-01/18-1924, para. 18. *See contra* Dissenting Opinion, ICC-01/12-01/18-1924-Anx, paras 7-8.

⁹ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 15.

¹⁰ The Chamber notes this is distinguishable from its approach in its Decision on Defence requests for leave to appeal two decisions related to the submission into evidence of Mr Al Hassan's statements, 24 June 2021, ICC-01/12-01/18-1542, at para. 26, noting that here the matter concerns *exclusion* of the evidence of P-0113 from the Chamber's ultimate consideration.

B. The Third and Fourth Issues

10. In the Impugned Decision, the Majority conducted a holistic assessment of the discretionary criteria under Rule 68(2)(b)(i) of the Rules, concluding that taken as a whole, they play against the introduction of P-0113's prior recorded testimony. The Third and Fourth Issues are not 'appealable issues' as the Prosecution extracts individual components of the Majority's assessment and merely expresses its disagreement with them by misrepresenting the findings in the Impugned Decision.
11. With respect to the Third Issue, contrary to the arguments put forward by the Prosecution, the Impugned Decision did not conclude that the interests of justice criterion pertains 'only residually to the truth-seeking functions'.¹¹ Rather, the Majority merely emphasised that the truth seeking functions of the Chamber cannot serve as the sole and overarching justification for introducing evidence that is otherwise prejudicial to the accused.¹² Furthermore, the Chamber agrees with the Defence¹³ that the Prosecution's argument that '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' is highly speculative and without any merit.
12. The Chamber observes, in relation to the Fourth Issue, that the Impugned Decision did not require that, for the corroboration criterion under Rule 68(2)(b)(i) of the Rules to favour introduction of a prior recorded testimony, 'the entirety of the statement [must] be corroborative or cumulative'.¹⁴
13. Accordingly, it is unnecessary to address the remainder of the cumulative requirements of Article 82(1)(d) of the Statute and the Request is dismissed in relation to the Third and Fourth Issues.

¹¹ Request, ICC-01/12-01/18-1966, para. 25.

¹² Impugned Decision, ICC-01/12-01/18-1924, paras 18-19.

¹³ Response, ICC-01/12-01/18-1999, para. 14.

¹⁴ Request, ICC-01/12-01/18-1966, para. 31.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

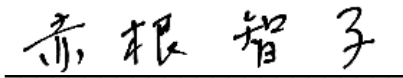
GRANTS the leave to appeal with respect to the First and Second Issues; and

REJECTS the remainder of 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 Monday, 6 December 2021

At The Hague, The Netherlands