



Original: **French**

No.: **ICC-01/12-01/18**

Date: **7 January 2022**

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding Judge
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Rosario Salvatore Aitala
Judge Gocha Lordkipanidze

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
THE PROSECUTOR *v.* AL HASSAN AG ABDOUL AZIZ AG MOHAMED
AG MAHMOUD**

Public Document

**Response to the Prosecutor's Appeal Brief against the "Decision on second
Prosecution request for the introduction of P-0113's evidence pursuant to
Rule 68(2)(b) of the Rules" (ICC-01/12-01/18-2075)**

Source: Legal Representatives of Victims

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

Office of the Prosecutor

Mr Karim A. A. Khan QC

Ms Helen Brady

Counsel for the Defence

Ms Melinda Taylor

Ms Kirsty Sutherland

Legal Representatives of Victims

Mr Seydou Doumbia

Mr Mayombo Kassongo

Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. On 15 November 2021, Trial Chamber X (“Chamber”) issued the “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules”.¹ The Chamber rejected, by majority, the Prosecutor’s second request to adduce evidence under rule 68(2)(b) of the Rules of Procedure and Evidence.
2. On 22 November 2021, the Prosecutor requested leave to appeal the Decision.²
3. On 6 December 2021, the Trial Chamber granted in part the Prosecutor’s request.³
4. On 15 December 2021, the Appeals Chamber set 7 January 2022 as the deadline for the Legal Representatives of Victims (“LRV”) to file observations.⁴
5. On 17 December 2021, the Prosecutor filed his appeal brief.⁵

¹ ICC-01/12-01/18-1924.

² “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.

³ “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’”, ICC-01/12-01/18-2034.

⁴ “Decision on the Defence request for extension of time”, ICC-01/12-01/18-2074-Conf.

⁵ “Prosecution’s Appeal against the ‘Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules’”, ICC-01/12-01/18-2075 (“Appeal Brief”).

II. OBSERVATIONS

(1) First ground of appeal: the Chamber's majority erred in law in its assessment of whether the prior recorded testimony went to the accused's acts and conduct.

6. The LRVs are convinced by the Prosecutor's arguments with regard to the test of the "acts and conduct" of the accused concept under rule 68(2)(b). As the Prosecutor contends, they consider that those terms do not have a denotation that can encompass the acts and omissions of other individuals that are ascribable to the accused under the relevant mode of liability. That argument is buttressed by the authorities cited, making it feasible to consider that P-0113's knowledge of the acts and conduct of people other than the accused – members of the Islamic Police, for example – is not excluded under rule 68(2)(b) and are therefore admissible. As the Prosecutor has stated, the fact that there are authorities in which it has been held that the events described by some witnesses – while they cannot be considered acts and conduct of the accused – are so crucial to the Prosecutor's evidence that they cannot be admitted without cross-examination. That jurisprudence, were it to be followed by Chambers, would not however constitute a dispensation from the proper application of the criteria pertaining to the definition of "acts and conduct" of the accused.⁶
7. In that respect, the Prosecutor rightly finds fault with the reasoning of the Chamber's majority, which appears not to have analysed the core of the prior recorded testimony "as going to the acts and conduct of Mr Al-Hassan but only as being proximate to them".⁷

⁶ Appeal Brief, para. 18.

⁷ Appeal Brief, para. 19.

8. Further, the LRVs agree with the Prosecutor's analysis of the prejudicial consequences arising from the majority's conflation of the assessment of the "acts and conduct" criteria and the issue of whether a prior recorded testimony can be admitted in part. There is no denying that, in such a hypothesis ("[i]n requiring that any passage going to the acts and conduct of the accused must be capable of being 'detached from its context'"), the majority would be setting an inapplicable and subjective standard that is inconsistent with the objective nature of the "acts and conduct" test.⁸
9. Lastly, the LRVs subscribe to the arguments set out by the Prosecutor regarding the lack of justification for the majority's reasoning on account of a risk of prejudice to the Defence (see below).

(2) Second ground of appeal: the Chamber's majority erred in law by considering that article 69(2) requires Chambers to restrict their discretionary power beyond the plain terms of rule 68(1) and (2)(b)

10. The LRVs concur with the Prosecutor to maintain that there is no basis for considering that the Chambers should exercise their discretionary power under rule 68 in such a manner as to go beyond the standards laid down by the rule itself, under the pretext that it is required of them by rule 69(2).
11. In the intention of the drafters of the instruments applicable before the Court, there is nothing to suggest that the entire mechanism for protection of the defence's rights, introduced under the paragraphs of rule 68, was seen as being potentially inadequate so as to warrant the Chamber's ability to restrict its discretionary power when making a ruling pursuant to those provisions. Nor

⁸ Appeal Brief, para. 24, *in fine*.

is there jurisprudence that might have established such a *lacuna*, with regard to the protection of the defence's rights, in the system introduced by rule 68.

12. The Prosecutor's conclusion on the reasoning of the majority in that respect must be followed:

While the reasoning of the Majority is ambiguous, and further clouded by its error in determining which parts of P-0113's testimony went to the acts and conduct of Mr. Al Hassan, the tenor of the reasoning in the Decision illustrates its undue hesitancy in this case.⁹

13. To conclude, the LRVs concur with the Prosecutor's request that the issue of admissibility of P-0113's prior recorded testimony be remanded to the Chamber for fresh determination.

⁹ Appeal Brief, para. 46.

FOR THESE REASONS,

May it please the Chamber to admit these observations.

[signed]

Mr Seydou Doumbia

[signed]

Mr Mayombo Kassongo

[signed]

Mr Fidel Nsita Luvengika

Legal Representatives of Victims

Dated this 7 January 2022,

At Bamako, Mali and The Hague, Netherlands