

1 International Criminal Court
2 Appeals Chamber
3 Situation: Republic of Mali
4 In the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
5 Mahmoud - ICC-01/12-01/18
6 Presiding Judge Luz del Carmen Ibáñez Carranza
7 Interlocutory Appeals Judgement - Courtroom 3
8 Friday, 13 May 2022
9 (The hearing starts in open session at 11.01 a.m.)
10 THE COURT USHER: [11:01:49] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:02:34] Good morning. Could the
14 court officer please call the case.
15 THE COURT OFFICER: [11:02:41] Good morning, Madam President.
16 This is the situation in the Republic of Mali, in the case of The Prosecutor versus
17 Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, case number
18 ICC-01/12-01/18.
19 And for the record, we are in open session.
20 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:03:01] I am Judge Luz del Carmen
21 Ibáñez Carranza, presiding in this appeal arising from the case of The Prosecutor v.
22 Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud. My fellow judges in this
23 appeal are Judge Piotr Hofmański, Judge Solomy Balungi Bossa, Judge Rosario
24 Salvatore Aitala and Judge Gocha Lordkipanidze.
25 May I ask the parties to introduce themselves for the record, please, starting with the

1 Defence.

2 MS TAYLOR: [11:03:43] Good morning, Madam President. Good morning to all
3 my colleagues in and around the courtroom. The Defence for Mr Al Hassan is
4 represented today by Ms Haneen Ghali and myself, Melinda Taylor. Thank you
5 very much.

6 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:03:57] Thank you very much.
7 Office of the Prosecutor, please.

8 MS REGUÉ: [11:04:02] Good morning, your Honour, everybody. The Prosecution
9 is represented today by Mr Matthew Cross, appeals counsel, and myself, Meritxell
10 Regué, appeals counsel.

11 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:04:11] Thank you very much.
12 Legal Representative of Victims, please.

13 MS GOFFIN: [11:04:19](Interpretation) Good morning, Madam President. Good
14 morning, colleagues. The victims are represented by Madam Anouk Kermiche,
15 Carla Boglioli and myself, Julie Goffin.

16 PRESIDING JUDGE IBÁÑEZ CARRANZA: [11:04:31](Interpretation) Thank you.
17 (Speaks English) Thank you very much.

18 For the record, I note that Mr Al Hassan is not present in the courtroom. He's
19 represented by his counsel.

20 Today, the Appeals Chamber will deliver its judgment in the appeal of Mr Al Hassan
21 against the decision of Trial Chamber X entitled "Decision on second Prosecution
22 request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the
23 Rules".

24 This is a non-authoritative summary of the Appeals Chamber's written judgment in
25 the appeal. The latter will be notified after this hearing.

1 I will first briefly outline the procedural history of this appeal.

2 On 16 December 2020, the Prosecution filed an application before the Trial Chamber
3 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence (the "Rules")
4 seeking to introduce into evidence the prior recorded testimony of Witness P-0113
5 and associated material.

6 On 26 March 2021, the majority of the Trial Chamber, Judge Prost dissenting in part,
7 rejected, without prejudice, the Prosecutor's request. The Prosecution filed a second
8 application requesting admission of the same testimony and associated material.

9 On 15 November 2021, the majority of the Trial Chamber, Judge Prost dissenting,
10 rejected the Prosecution's second request, finding that the introduction of Witness
11 P-0113's prior recorded testimony would be prejudicial to the rights of the accused.

12 On 22 November 2021, the Prosecution filed a request for leave to appeal the
13 impugned decision, raising four issues. The Defence filed the response to the
14 Prosecutor's request on 26 November 2021, submitting the issues raised are not
15 appealable under Article 82(1)(d) of the Statute.

16 Having granted leave to appeal the impugned decision only with respect to the first
17 and second issues, the Prosecution filed its appeal brief on 17 December 2021, and the
18 Defence and Victims filed their responses on 7 January 2022.

19 Under the first ground of appeal, the Prosecution submits that the Trial Chamber
20 erred in regarding "all testimony which did not go to the acts and conduct of the
21 accused, but instead related to the acts and the conduct of third parties [...] as if it
22 were evidence of the acts and conduct of the accused." In this regard, the Prosecutor
23 submits that the analysis should focus on the ordinary meaning of the phrase "acts
24 and conduct of the accused". This is the "personal acts and omissions of the accused,
25 which are described in the charges against him or her or which are otherwise relied

1 upon to establish his or her criminal responsibility for the [...] charge[s]."

2 The Prosecution also contends that the Trial Chamber committed a legal error when it
3 confused the "Chamber's discretionary power (to admit prior recorded testimony in
4 part) with the purely legal question of which parts of the prior recorded testimony
5 (if any) actually went to the acts and conduct of the accused."

6 Regarding the second ground of appeal, the Prosecution submits that the Trial
7 Chamber improperly took the view that the principle of orality in Article 69(2) and
8 the right of the accused to confront a witness in Article 67(1)(e) of the Statute require a
9 stringent assessment of the requirements for the introduction of prior recorded
10 testimony under Rule 68(2)(b) of the Rules.

11 The Prosecution notes that the Court has described Rule 68 of the Rules as an
12 exception to the principle of orality, but argues that the Trial Chamber nonetheless
13 erred in fettering its discretion beyond the plain terms of Rule 68(1) and (2)(b) of the
14 Rules.

15 I will address these grounds of appeal in turn.

16 Regarding the first ground of appeal, the Appeals Chamber first explains the
17 operation of the Court's regime governing the admission of prior recorded testimony
18 in the absence of a witness. It notes that when a Chamber receives an application
19 from a party relying on Rule 68(2)(b) of the Rules, the Chamber must first determine
20 whether the prior recorded testimony in question relates to "proof of a matter other
21 than the acts and conduct of the accused". In the second stage, the Chamber must
22 turn its mind to the factors in Rule 68(2)(b)(i) of the Rules, as well as any other factors
23 that are relevant under the circumstances. If the Chamber answers the question
24 under the first stage in the negative, it cannot advance to the second stage of the
25 analysis under Rule 68(2)(b)(i) of the Rules.

1 The Appeals Chamber, however, observes that instead of rejecting the admission of
2 the whole statement, the Chamber may find it appropriate to admit parts of the
3 statement that relate to proof of a matter other than the acts and conduct of the
4 accused.

5 The ultimate decision as to the appropriateness of admitting only parts of a statement
6 is discretionary and depends upon the circumstances before the Chamber.

7 The Appeals Chamber finds that, as a matter of law, what constitutes prior recorded
8 testimony going to proof of the acts and conduct of the accused under Rule 68(2)(b) of
9 the Rules may depend upon the nature of the charges in each case. Testimony used
10 to prove the accused's acts and conduct may indeed describe the acts and the conduct
11 of the accused directly, or it may, for example, describe acts and conduct of
12 individuals in an organisation that the accused was an integral member of, or of
13 individuals over whom he or she had authority. Depending upon the nature of the
14 allegations, the latter testimony may still fall into the category of evidence that may be
15 used, together with other evidence, to prove acts and conduct of the accused.

16 The Appeals Chamber emphasises that proceeding by way of partial admission may
17 in some cases be, in principle, an efficient method of preserving a fair trial for the
18 accused while still meeting the legislative objective behind Rule 68 of the Rules.

19 When the question of partial admission arises in the litigation, the Trial Chamber may
20 evaluate the statement with a view to identifying whether there are significant parts
21 of the statement concerned that may not be used to prove the accused's acts and
22 conduct. If a Chamber considers partial admission at this stage, it should give clear
23 reasons as to why the presence of the testimony relating to the acts and conducts of
24 the accused renders partial admission inappropriate.

25 In the present case, the Appeals Chamber finds that the Trial Chamber did not

1 provide sufficient reasons for its determination under Rule 68(2)(b) of the Rules. The
2 Trial Chamber determined that some limited parts of the statement do, in fact, relate
3 to the acts and conduct of Mr Al Hassan. However, that "key aspects of [other parts
4 of] the narrative" may "concern [...] the criminal responsibility of the accused"
5 generally is not itself sufficient to bar admission pursuant to Rule 68(2)(b) of the Rules.
6 Nor is it enough that the testimony sought to be introduced goes to the very core of
7 P-0113's evidence.

8 The Appeals Chamber finds that the prevailing interest inherent in Rule 68(2)(b) of
9 the Rules is not that the Trial Chamber ought to preserve the substance of the
10 narrative in the statement. And the threshold for the admissibility of prior recorded
11 testimony is not avoided because partial admission would cause those parts of the
12 narrative to be distorted or detached from their context.

13 The Appeals Chamber, however, finds, by majority, that even if the Trial Chamber
14 had not erred, the outcome of the impugned decision would have been the same.
15 That is, the error does not materially affect the decision as a whole or, in particular,
16 the conclusion reached by the Trial Chamber under Rule 68(2)(b)(i) of the Rules.
17 Therefore, the Appeals Chamber, by majority, finds that it would not be appropriate
18 to interfere with the impugned decision on this basis.

19 The Appeals Chamber, Judge Ibáñez dissenting, thus rejects the first ground of
20 appeal.

21 Regarding the second ground of appeal, the Appeals Chamber observes that one of
22 the fundamental fair trial guarantees in proceedings at this Court is the right to
23 confront a witness about his or her testimony under Rule 67(1)(e) of the Statute.
24 Nevertheless, the right to confront a witness, as also recognised in human rights law,
25 is not absolute. Article 69(2) of the Statute recognises that in some cases a Chamber

1 may receive testimony other than in-court personal testimony, to the extent that the
2 Statute and Rules so allow. Rule 68(2) of the Rules provides that a party may apply
3 to introduce prior recorded testimony in the absence of a witness.

4 While the Appeals Chamber, by majority, recognises that the aim of this rule - namely,
5 facilitating expeditious trial proceedings - are legitimate, it must be emphasised that
6 this constitutes a limitation on the right to confront a witness as described above,
7 substantially restricting an internationally recognised and fundamental fair trial right.

8 In the view of the Appeals Chamber, by majority, if not applied with due care, Rule
9 68 of the Rules may create tension with the right to confront a witness and the
10 broader principle of equality of arms.

11 It follows that Rule 68 of the Rules must be treated as an exception to the principle of
12 orality in Article 69(2) of the Statute, and a Trial Chamber should take into account
13 the exceptional nature of that rule as a whole in the interpretation and application of
14 the individual criteria in Rule 68 of the Rules. In this regard, the Appeals Chamber
15 observes that the rights spelled out in Article 68 of the Statute constitute minimum
16 guarantees. Any rule derogating from these minimum fair trial guarantees warrants
17 interpretation in a restrictive manner.

18 Also, it may become apparent to a Chamber that even once the criteria in Rule 68 of
19 the Rules are satisfied, there are other reasons why the nature of the prior recorded
20 testimony still threatens the fairness of the proceedings should the witness not
21 appear for cross-examination. This eventuality is accounted for in part by the words
22 "*inter alia*" in Rule 68(2)(b)(i) of the Rules, suggesting that there may be other factors,
23 in addition to those listed, that a Chamber must consider in its overarching duty to
24 address the fairness of the accused of admitting prior recorded testimony in the
25 absence of a witness. This is also accounted for in the *chapeaux* in Rule 68(1) and (2)

1 of the Rules, which set the preconditions for the introduction of prior recorded
2 testimony in the absence of a witness, both stating the Chamber "may" allow the
3 introduction of previously recorded testimony if the factors listed in Rule 68 are
4 satisfied.

5 Given the dangers inherent in admitting, without cross-examination, a written
6 witness statement for the purpose of supporting a party's case, in particular the case
7 of the Prosecution, a Chamber must carefully assess the criteria in Rule 68(2)(b) of the
8 Rules as well as any other criteria that may be relevant to adequately mitigate the
9 prejudice to the accused.

10 The important takeaway is that the Chamber's overarching duty to ensure compliance
11 with the accused's procedural rights requires a careful analysis of all relevant factors
12 for and against the admission of prior recorded testimony in the absence of a witness.

13 Therefore, the Appeals Chamber finds that the Trial Chamber was correct in
14 considering that recourse to Rule 68 of the Rules "requires the conduct of a cautious
15 and stringent assessment, notably to ensure that the introduction of written testimony
16 is not prejudicial to or inconsistent with the rights of the accused".

17 Finally, the Prosecution further alleges the Trial Chamber erred in law when
18 considering that Article 69(2) of the Statute requires a Chamber to fetter its discretion
19 beyond the plain terms of Rule 68(1) and (2) itself. However, the Appeals Chamber,
20 by majority, Judge Ibáñez dissenting, can find no indication that the Trial Chamber
21 misapplied Rule 68(2)(b) of the Rules in this manner. The Trial Chamber considered
22 the importance of the prior recorded testimony and then assessed the impact of the
23 admission of the testimony on the rights of the accused. And even after finding
24 against partial introduction of the evidence based on the foregoing, it in any event
25 reinforced this conclusion with its analysis of the factors listed in Rule 68(2)(b) of the

1 Rules.

2 The Appeals Chamber finds, by majority, that the approach taken by the Trial
3 Chamber fully comports with the discretion granted to a Chamber by virtue of
4 Rule 68 of the Rules as a whole. Thus, the Appeals Chamber sees no reason to
5 conclude that the Trial Chamber misapplied it.

6 The Appeals Chamber, Judge Ibáñez dissenting, rejects the Prosecution's second
7 ground of appeal.

8 Main points of Judge Ibáñez's dissent.

9 I will now summarise the main points of my dissenting opinion, which are further
10 elaborated in the dissenting opinion attached to this judgment.

11 As to the finding of a legal error under the first ground of appeal, as mentioned
12 earlier, the Appeals Chamber, by majority, found that the Trial Chamber -- the
13 Appeals Chamber found that the Trial Chamber did not provide sufficient reasons for
14 its determination under Rule 68(2)(b) of the Rules. In my view, the lack of reasoning
15 reveals that no proper assessment was made. In my view, this constitutes the real
16 error of law in this case.

17 Also, it is my view that the Trial Chamber should have first examined what
18 paragraphs of the prior recorded testimony go indeed to the acts and conduct of the
19 accused, and which do not. Only after conducting this mandatory assessment was
20 the Trial Chamber entitled to go to the discretionary elements contained under
21 Rule 68(2)(b)(i). In my view, this error of law had a material impact on the decision
22 and its outcome, which is further elaborated in my dissenting opinion attached to this
23 judgment. Consequently, I would have granted this first ground of appeal and
24 remanded the issue to be considered anew for the Trial Chamber.

25 With regard to the second ground of appeal, while I note the accused's right to

1 cross-examine a witness, this particular fair trial right is not affected in this case. The
2 introduction of prior recorded testimony is not an exception to cross-examination as
3 such, as the prior recorded testimony is another type of evidence lawfully allowed in
4 the legal framework of the Rome Statute. For the same reason, the principle of
5 equality of arms is not affected here.

6 Finally, with regard to the Appeals Chamber's finding that there is no indication that
7 the Trial Chamber misapplied Rule 68(2)(b) of the Rules, I consider the Trial Chamber
8 did misapply Rule 68(2)(b)(i) of the Rules. Thus, I also should have granted this
9 second ground of appeal and remanded the issue to be considered and assessed
10 anew.

11 This brings us to the end of the summary of the Appeals Chamber's judgment.

12 I would like to thank now the court reporters, interpreters and other Registry staff for
13 their valuable assistance today for holding this hearing. Thank you.

14 The hearing is adjourned.

15 THE COURT USHER: [11:27:50] All rise.

16 (The hearing ends in open session at 11.27 a.m.)