



Original: English

No. ICC-01/12-01/18

Date: 11 August 2021

Date of original: 13 July 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 redacted version of

**Decision on the introduction into evidence of P-0570's prior recorded testimony
pursuant to Rule 68(2)(c) of the Rules**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Karim A. A. Khan
James Stewart

Counsel for the Defence

Melinda Taylor

Legal Representatives of Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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 Articles 56, 64(2) and (9)(a), 67(1) and 69(2) and (3) of the Rome Statute (the ‘Statute’) and Rule 68(2)(c) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following decision.

I. Procedural history

1. On 6 May 2020, the Chamber issued its ‘Decision on the conduct of proceedings’,¹ which relevantly instructed the Office of the Prosecutor (the ‘Prosecution’) to file any applications pursuant to Rule 68(2) of the Rules no later than by the end of the year 2020.²
2. On 14 December 2020, the Single Judge issued a ruling in which she clarified that the time limit to file applications under Rule 68(2) or (3) of the Rules for P-0570 did not exclude later applications ‘if and when the circumstances to support it should arise’.³
3. On 1 April 2021, the Prosecution filed a request seeking to introduce into evidence P-0570’s prior recorded testimony and associated material pursuant to Rule 68(2)(c) of the Rules (the ‘Request’).⁴
4. On that same day, and in line with the Chamber’s prior decision authorising delayed disclosure of P-0570’s identity,⁵ the Single Judge granted a Defence

¹ ICC-01/12-01/18-789, with one public and two confidential annexes.

² Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 79-80.

³ Email from the Single Judge to parties and participants at 8:52. *See also* Prosecution urgent request for variation of the time limit to file rule 68 application for MLI-OTP-P-0570, 27 November 2020, ICC-01/12-01/18-1165-Conf-Exp; Email from the Single Judge to the parties and participants on 30 November 2020 at 9:09; Defence Response to ‘Confidential redacted version of the “Prosecution urgent request for variation of the time limit to file rule 68 application for MLI-OTP-P-0570”, 27 November 2020, ICC-01/12-01/18-1165-Conf-Exp’, 10 December 2020, ICC-01/12-01/18-1198-Conf.

⁴ Prosecution application under rule 68(2)(c) to introduce into evidence the prior recorded testimony and associated material of Prosecution Witness MLI-OTP-P-0570, ICC-01/12-01/18-1408-Conf (with confidential Annex A). The material sought to be introduced is listed in sections I and II of ICC-01/12-01/18-1408-Conf-AnxA (pp. 2-9).

⁵ Second Decision on the Prosecution request for delayed disclosure of the identities of Witnesses P-0542, P-0570, and P-0603, 8 May 2020, ICC-01/12-01/18-794-Conf-Exp (the ‘Delayed Disclosure Decision’).

request seeking that the deadline for its response to the Request be set to 45 days after disclosure of P-0570's identity or 21 May 2021.⁶

5. On 21 May 2021, the Legal Representatives of victims (the 'LRVs') filed their response to the Request,⁷ notably submitting that the Prosecution demonstrated that all the Rule 68(2)(c) requirements were met.
6. On 25 June 2021, after the Single Judge granted a number of further requests seeking extension of the relevant time limit,⁸ the Defence filed its response, opposing the Request (the 'Response').⁹
7. The parties' submissions are discussed below in the analysis where relevant. The Chamber is also of the view that, while these submissions were filed as 'confidential', public-redacted version thereof should be prepared and filed on the record.¹⁰ Upon receipt, the Chamber will issue a public version of the present decision.

II. Analysis

8. Pursuant to Rule 68(2)(c) of the Rules, and as set out in its prior decision,¹¹ the Chamber may allow the introduction of the previously recorded testimony of a witness who is not present before it when the following three requirements are met: (i) the prior recorded testimony comes from a person who has died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally; (ii) the necessity of measures under Article

⁶ Email from the Single Judge to parties and participants at 17:09.

⁷ Réponse à la requête de l'Accusation fondée sur la Règle 68(2)(c) relativement au témoin P-0570 (ICC-01/12-01/18-1408-Conf), ICC-01/12-01/18-1494-Conf (the 'LRVs Response').

⁸ These requests and decisions were mainly founded on issues related to the disclosure of information related to P-0570 and Prosecution intermediary P-0572 (emails from the Single Judge to parties and participants on 15 June 2021 at 11:39; on 28 May 2021 at 9:19; on 25 May at 15:55; and on 29 April 2021 at 12:10).

⁹ Defence response to 'Prosecution application under rule 68(2)(c) to introduce into evidence the prior recorded testimony and associated material of Prosecution Witness MLI-OTP-P-0570', ICC-01/12-01/18-1547-Conf, with one confidential *ex parte*, available to the Defence and the Prosecution only, annex.

¹⁰ The Chamber also notes that the annex to the Response, filed *ex parte*, Prosecution and Defence only, is a chain of email which was already sent to the LRVs. Accordingly, the Chamber instructs its reclassification to 'confidential'.

¹¹ Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, ICC-01/12-01/18-1413 (the 'First Decision under Rule 68(2)(c)').

56 of the Statute could not have been anticipated; and (iii) the prior recorded testimony has sufficient indicia of reliability.

9. Rule 68(2)(c)(ii) also provides that the fact that the prior recorded testimony goes to proof of acts and conduct of the accused may be a factor against its introduction, or part of it. The Chamber is of the view that, in line with the jurisprudence of this Court,¹² the expression ‘acts and conduct of the accused’ within the meaning of Rule 68(2) of the Rules must be interpreted in its plain natural meaning, i.e. as referring to the personal actions and omissions of the accused as opposed to the acts and conduct of other persons which could be attributed to the accused by reason of the mode of liability charged.
10. Further, as generally required in all instances of introduction of prior recorded testimony under Rule 68 of the Rules, this introduction must not be prejudicial to or inconsistent with the rights of the accused. In this assessment, the Chamber may take into account a number of factors such as: (i) whether the evidence relates to issues that are materially in dispute; (ii) whether the evidence provides background information or is central to core issues in the case; or (iii) whether the evidence is cumulative or corroborative of other evidence.¹³
11. Finally, the Chamber recalls that the full consideration of the standard evidentiary criteria for material introduced into evidence, in particular in terms of its relevance and probative value, is deferred to its eventual deliberation for its judgment.¹⁴

¹² See Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red, paras 11-12; and Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of ‘Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68’, 2 December 2016, ICC-01/04-02/06-1667-Conf, 27 February 2017, ICC-01/04-02/06-1667-Red, para. 11

¹³ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, para. 78.

¹⁴ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, paras 34(i) and (ii).

A. Whether P-0570 is unavailable to testify orally

12. The Prosecution submits that P-0570 is unavailable to testify orally because she ‘is afflicted by a severe medical condition [REDACTED]’.¹⁵ In support, the Prosecution notably provides medical documentation purportedly related to P-0570’s medical condition, as well as two related medical expert reports, including one of P-0598, a professor of forensic medicine who conducted a remote examination of P-0570 in [REDACTED].¹⁶
13. The LRVs submit, on the basis of the information in their possession, that it is undeniable that P-0570 is not able to testify due to her health condition.¹⁷
14. The Defence submits that P-0570’s unavailability to testify has not been demonstrated to the requisite standard, arguing that all material relied upon by the Prosecution is either inadmissible, unreliable, or at best insufficient to support the relevant Prosecution’s allegations.¹⁸
15. The Chamber first observes that the medical documentation provided in support of the Request is, as submitted by the Defence,¹⁹ in parts difficult to read.²⁰ The Chamber was however able to read most of these documents and understand their contents. The Chamber notes that these documents indicate that P-0570 was [REDACTED]. Notably, a [REDACTED] referring to P-0570 by name, which is signed and dated, records that P-0570 [REDACTED]. This document mentions [REDACTED].²¹
16. The Chamber notes the Defence submission that these documents are inadmissible or unreliable because they were obtained by Prosecution intermediary P-0572, who the Defence submits is ‘tainted’ [REDACTED].²² In

¹⁵ Request, ICC-01/12-01/18-1408-Conf, para. 4.

¹⁶ Request, ICC-01/12-01/18-1408-Conf, paras 12-19. The Chamber recalls that it allowed the introduction of P-0598’s evidence, albeit on the medical situation of other individuals, as expert material in the present case. *See* Decision on Prosecution’s proposed expert witnesses, 5 August 2020 (public redacted version notified on 21 October 2020), ICC-01/12-01/18-989-Red, paras 37-39).

¹⁷ LRVs Response, ICC-01/12-01/18-1494-Conf, p.3

¹⁸ Response, ICC-01/12-01/18-1547-Conf, paras 6-11.

¹⁹ Response, ICC-01/12-01/18-1547-Conf, paras 7, 9.

²⁰ *See* MLI-OTP-0078-9982.

²¹ MLI-OTP-0078-9982, at 9987 (in French in the original: [REDACTED]).

²² Response, ICC-01/12-01/18-1547-Conf, para. 8.

this regard, the Chamber observes that the record points to P-0572 having obtained these documents following a request to do so by Prosecution investigator.²³ In the absence of evidence suggesting that P-0572 acted beyond her role as Prosecution intermediary in this context, and with no information which would otherwise raise a doubt on these documents' authenticity, the Chamber finds no basis in the Defence suggestion that, because they were obtained by P-0572 in 'unknown and undocumented circumstances', the medical document's provenance undermines their reliability as 'genuine medical records'.²⁴

17. Accordingly, upon careful review of the content of these documents, and having considered them in light of the other material submitted by the Prosecution as discussed below, the Chamber is of the view that the information provided by the Prosecution is sufficiently probative to be relied upon in its assessment of P-0570's unavailability pursuant to Rule 68(2)(c) of the Rules.
18. The Chamber further refers to P-0598's professional opinion regarding P-0570's [REDACTED] condition, which is informed by both his reading of the above medical documentation and an examination of the witness conducted via video-link in [REDACTED].²⁵ Forensic doctor P-0598 explains that P-0570 '[REDACTED]'.²⁶ The Chamber notes P-0598's observation that, at the time of this examination, P-0570 still appeared [REDACTED].²⁷ The Chamber further notes that, while P-0598 acknowledges that the examination conducted had

²³ Request, ICC-01/12-01/18-1408-Conf, para. 14; MLI-OTP-0077-3947, at 3948; and MLI-OTP-0078-9981.

²⁴ Response, para. 9. The Chamber recalls that the Defence sought and received disclosure of intermediary P-0572's identity (*see* Second decision on the disclosure of information related to Prosecution intermediary P-0572, 19 May 2021, ICC-01/12-01/18-1487-Conf; and Third Decision of the Single Judge on the disclosure of information related to Prosecution intermediary P-0572, by email from the Single Judge, 24 May 2021, at 14:17), as well as [REDACTED] (*see* Decision on redactions applied to medical documents related to P-0570 and disclosure of information related to Prosecution intermediary P-0572, 12 May 2021, ICC-01/12-01/18-1473-Conf-Red). The Chamber therefore observes that the Defence had a meaningful opportunity to investigate and raise these matters in the context of its Response.

²⁵ The Chamber notes the Defence's submission regarding P-0598's prior involvement in this case (Response, ICC-01/12-01/18-1547-Conf, para. 10) but fails to see how this prior engagement or any alleged 'inconsistency between his approaches', as argued by the Defence, would impact the present assessment with respect to the Request.

²⁶ MLI-OTP-0077-4194, at 4198.

²⁷ MLI-OTP-0077-4194, at 4197.

limitations and did not allow for a full clinical assessment of P-0570, he nonetheless found himself in the position to conclude that '[REDACTED] must persist [TRANSLATION]'.²⁸ P-0598 explains in this regard that, while he could not test P-0570's [REDACTED], he nonetheless noticed [REDACTED].²⁹ Having recalled this, the Chamber disagrees with the Defence's suggestion that P-0598's conclusions are 'entirely speculative'.³⁰ Accordingly, the Chamber sees no reason to doubt or disregard P-0598's conclusion that P-0570 is not apt to travel or appear before the Court for a testimony.³¹ The Chamber also takes note and relies upon P-0598's further conclusion that it appears no improvement of P-0570's condition can be expected.³²

19. Finally, the Chamber notes that P-0590, a former member of the Prosecution's Forensic Science Section, reviewed the documentation available and provided a report which is submitted by the Prosecution as forensic medical evidence in support of P-0570's unavailability.³³ The Defence notably submits that P-0590 merely hypothesises that P-0570 [REDACTED] and advises that [REDACTED] may need additional support during interviews.³⁴ While her report is exclusively based on the medical documentation available, the Chamber observes that P-0590 reaches conclusions which are consistent with that of P-0598. Indeed, P-0590 is of the view that: (i) 'necessary support may be required to [REDACTED]'; and (ii) 'consideration should be made to [REDACTED] of the individual'.³⁵ In the view of the Chamber, although this expertise does not in itself establish P-0570's medical condition, when evaluated together with other material and information provided by the Prosecution, including P-0598's report, it assists the Chamber in its determination of P-0570's unavailability to testify pursuant to Rule 68(2)(c) of the Rules.
20. In light of the above, the Chamber is satisfied that the Prosecution has sufficiently established the fact that P-0570 suffers from a reported medical condition which

²⁸ MLI-OTP-0077-4194, at 4198, 4199.

²⁹ MLI-OTP-0077-4194, at 4198.

³⁰ Response, ICC-01/12-01/18-1547-Conf, para. 10.

³¹ MLI-OTP-0077-4194, at 4199.

³² MLI-OTP-0077-4194, at 4198, 4199.

³³ MLI-OTP-0077-2911.

³⁴ Response, ICC-01/12-01/18-1547-Conf, para. 10.

³⁵ MLI-OTP-0077-2911, at 2914.

impacts [REDACTED]. On that basis, and having had regard to the nature of her expected evidence, the Chamber is satisfied that P-0570 is currently unavailable to testify orally due to obstacles which cannot be overcome with reasonable diligence, within the meaning of Rule 68(2)(c) of the Rules.

B. Whether the necessity of measures under Article 56 of the Statute could have been anticipated

21. Submitting that there were no indications of medical issues that could have prevented P-0570 from being able to testify when she gave her statement, the Prosecution reports that it did not anticipate the need to take measures under Article 56 of the Statute.³⁶ The Prosecution further informs that it only discovered that P-0570 had medical issues at the end of [REDACTED].³⁷ The Defence makes no specific submissions in this regard.
22. On the basis of the information before the Chamber discussed above, which establishes a health-related incident [REDACTED], the Chamber finds that the Prosecution sufficiently establishes that the necessity of measures under Article 56 of the Statute could not reasonably have been anticipated prior to that incident.

C. Whether P-0570's prior recorded testimony has sufficient indicia of reliability

23. The Prosecution seeks to introduce into evidence the prior recorded testimony of P-0570, in the form of a witness statement and annexes thereto (a photograph, a sketch and a consent form), together with the associated material (photographs and an investigation note). The Prosecution argues that this material has sufficient indicia of reliability and, in this regard, refers to the relevant circumstances in which it arose, formal requirements, as well as its content, which the Prosecution submits is internally consistent and corroborated by the evidence of other witnesses.³⁸
24. The Defence is of the view that P-0570's prior recorded testimony is 'unreliable', submitting amongst other things that her evidence is internally inconsistent and

³⁶ Request, ICC-01/12-01/18-1408-Conf, paras 20-21.

³⁷ Request, ICC-01/12-01/18-1408-Conf, para. 21 referring to MLI-OTP-0077-3947, at 3947.

³⁸ Request, ICC-01/12-01/18-1408-Conf, paras 22-29, 33.

largely uncorroborated.³⁹ In this regard, the Defence refers notably to P-0570's account of the alleged incident regarding P-1460 which the Defence submits is 'wholly uncorroborated'.⁴⁰ The Defence also identified a number of what it terms 'manifest and obvious inconsistencies' which it argues can only be resolved through cross-examination and/or demonstrate P-0570's unreliability on key details: (i) P-0570's account on the character, ethnic origin and appearance of [REDACTED]; (ii) the date of P-0570's alleged detention; (iii) the age of P-0552; and (iv) whether or not P-0570 told her story to anyone before her interview with the Prosecution.⁴¹ The Defence relatedly submits that, when prompted by investigators, P-0570 was 'unable to explain [these inconsistencies], which casts universal doubt on her reliability as a witness'.⁴² Finally, the Defence points to the fact that P-0570 refers to the 'BDM' as the place where she was detained, while the Prosecution states that she was taken to the 'BMS'.⁴³ In this regard, the Defence argues that both the location and the description of the building are inconsistent or simply too vague to assume that P-0570 was detained at the BMS and submits that another reasonable inference is that she was detained at the BDM.⁴⁴

25. Noting that the Court 'remains denied the audio-recording', the Defence also takes issue with the interpretation provided during the interview of P-0570 and submits that this necessarily impacts her statement's reliability.⁴⁵ Moreover, the Defence avers that, without verbatim transcript of the interview of P-0570, it cannot ascertain the manner in which information was elicited from her.⁴⁶
26. The Chamber notes that P-0570's prior recorded testimony consists mainly of a 26-page statement obtained by Prosecution investigators and given voluntarily in the presence of a qualified Songhaï interpreter, who the witness declared she understood perfectly. It is further noted that P-0570 signed her statement in the

³⁹ Response, ICC-01/12-01/18-1547-Conf, paras 12-13, 21

⁴⁰ Response, ICC-01/12-01/18-1547-Conf, para. 25.

⁴¹ Response, ICC-01/12-01/18-1547-Conf, paras 29, 32.

⁴² Response, ICC-01/12-01/18-1547-Conf, para. 32.

⁴³ Response, ICC-01/12-01/18-1547-Conf, para. 29.

⁴⁴ Response, ICC-01/12-01/18-1547-Conf, paras 30-31.

⁴⁵ Response, ICC-01/12-01/18-1547-Conf, para. 28.

⁴⁶ Response, ICC-01/12-01/18-1547-Conf, para. 28.

presence of the investigators and, on that occasion, attested that: (i) she understood that her statement could be used in the context of proceedings before the Court; and (ii) confirmed the veracity of its content.⁴⁷ The Chamber takes no issue with the format of her written testimony and emphasises that translated statements, like hers, are regularly admitted into evidence by this and other chambers of this Court.

27. The Chamber further observes that P-0570's statement often specifies her source of knowledge as regards the main events discussed therein.⁴⁸ Having had due regard to the four claims of the witness which the Defence identifies as 'outlandish',⁴⁹ the Chamber finds that the Defence fails to explain how P-0570's evidence on these discrete issues would in any way impact the reliability of her evidence as a whole, most notably the events she reports to have experienced herself. The Chamber also finds that the 'obvious inconsistencies', identified by the Defence and recalled above, do not make her testimony so manifestly unbelievable or incoherent so as to render it unsuitable for introduction under Rule 68(2)(c)(i) of the Rules. In particular, the Chamber notes that the issue raised by the Defence of whether or not it is a reasonable conclusion to draw from P-0570's evidence that her place of detention was the 'BDM', can only be assessed holistically in light of all evidence submitted.
28. Finally, the Chamber recalls the Appeals Chamber's ruling that, in their assessment of indicia of reliability under Rule 68(2)(b)(i) of the Rules, trial chambers are not obliged to consider factors beyond formal requirements.⁵⁰ The Chamber is of the view that this finding equally applies to the assessment of indicia of reliability for prior recorded testimony sought to be introduced under Rule 68(2)(c).⁵¹

⁴⁷ MLI-OTP-0049-0047, at 0073.

⁴⁸ MLI-OTP-0049-0047.

⁴⁹ Response, ICC-01/12-01/18-1547-Conf, para. 26.

⁵⁰ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, ICC-02/11-01/15-744 OA8, paras 3, 103-104.

⁵¹ See First Decision under Rule 68(2)(c), ICC-01/12-01/18-1413, para 15.

29. In light of the aforementioned considerations, the Chamber is satisfied that the Request establishes that P-0570's prior recorded testimony bears sufficient indicia of reliability of formal nature. The Chamber recalls in this regard that the absence of cross-examination is a factor which will be considered in the Chamber's ultimate assessment of the probative value and weight, if any, to be attributed this material,⁵² especially where inconsistencies are identified. Similarly, the extent to which a prior statement is corroborated by other evidence is also important in determining the weight to be accorded to it in the final judgment.⁵³
30. Turning to the associated material, the Chamber notes that the Prosecution seeks to introduce: (i) the pictures of places and people which were shown to P-0570 when the Prosecution took her statement; and (ii) an investigation note.⁵⁴
31. The Defence argues that the Prosecution has not demonstrated that introduction of these associated material under Rule 68(2)(c) would not be unduly prejudicial.⁵⁵ The Defence submits that P-0570 did not create, edit or handle the pictures submitted, but that they were simply shown to her for the purpose of demonstrating her visual recognition of certain persons and places.⁵⁶ The Defence avers that, without a cross-examination, it is unable to test the witness' recognition, seek clarification regarding the source of her knowledge or confront her where she failed to recognise persons and places.⁵⁷
32. In line with its prior decision,⁵⁸ the Chamber is not convinced by the argument from the Defence. The Chamber observes that P-0570 was shown all photographs submitted as associated material and that she discussed their content during her interview with the Prosecution. Accordingly, and in the absence of specific reasons not to do so, the Chamber considers that the associated material identified

⁵² See First Decision under Rule 68(2)(c), ICC-01/12-01/18-1413, para 18.

⁵³ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, ICC-01/04-02/06-2666-Red (the '*Ntaganda* Appeal Judgment'), para. 630, referred to in Response, ICC-01/12-01/18-1547-Conf, para. 22.

⁵⁴ Request, ICC-01/12-01/18-1408-Conf, paras 3 and 26.

⁵⁵ Response, ICC-01/12-01/18-1547-Conf, paras 40-42.

⁵⁶ Response, ICC-01/12-01/18-1547-Conf, para. 41.

⁵⁷ Response, ICC-01/12-01/18-1547-Conf, para. 41.

⁵⁸ First Decision under Rule 68(2)(c), ICC-01/12-01/18-1413, para. 18.

by the Prosecution can be introduced into evidence via this witness pursuant to Rule 68(2)(c), where they were not already formally submitted via another witness.

D. Other relevant factors and consideration of any potential prejudice

33. The Prosecution argues that the introduction of P-0570's evidence under Rule 68(2)(c) of the Rules is neither prejudicial nor inconsistent with the rights of Mr Al Hassan. In this regard, it notably submits that P-0570's statement does not go to his acts and conduct⁵⁹ and that it is of a cumulative or corroborative nature with the evidence of other witnesses whose (expected) testimony also relates to instances of rape in detention.⁶⁰
34. The Defence submits that introduction of P-0570's evidence pursuant to Rule 68(2)(c) causes prejudice to Mr Al Hassan's fair trial rights, notably the right to examine witnesses called by the Prosecution.⁶¹ The Defence submits that her testimony goes to proof of Mr Al Hassan's acts and conduct,⁶² discusses a wide array of matters and events which go beyond background information, and that 'all aspects of her testimony are materially in dispute'.⁶³ For the Defence, key allegations from P-0570's statement are uncorroborated by any other evidence.⁶⁴ The Defence further argues that, because the prior recorded testimony submitted is in the form of a written statement, *i.e.* a summary prepared by the Prosecution as opposed to a full recording of interview, the Court will never be able to make a fair and proper assessment of the reliability of P-0570's prior testimony.⁶⁵
35. The Defence further argues that the assessment of the reliability of P-0570's prior recorded testimony 'requires exploration of her direct knowledge under cross-examination', notably because the 'potential cross-pollination' with other victims' accounts was not assessed by the investigators during P-0570's

⁵⁹ Request, ICC-01/12-01/18-1408-Conf, para. 30.

⁶⁰ Request, ICC-01/12-01/18-1408-Conf, para. 33.

⁶¹ Response, ICC-01/12-01/18-1547-Conf, *inter alia* paras 2, 37-39.

⁶² Response, ICC-01/12-01/18-1547-Conf, paras 14-17

⁶³ Response, ICC-01/12-01/18-1547-Conf, paras 3, 19-20.

⁶⁴ Response, ICC-01/12-01/18-1547-Conf, paras 3, 19-20.

⁶⁵ Response, ICC-01/12-01/18-1547-Conf, para. 13. *See also*, paras 28, 35.

interview.⁶⁶ The Defence also submits that, since Mr Al Hassan has no personal knowledge of P-0570 or her detention, it cannot seek instructions with regard to the facts of her prior recorded testimony and, accordingly, only cross-examination would have allowed the Defence to address specific issues of inconsistency and reliability.⁶⁷

36. Moreover, the Defence submits that delayed disclosure of P-0570's identity and identifying information until 1 April 2021 has: (i) prevented Defence investigation of P-0570 and P-1460's charged incidents during the investigation stage of the proceedings;⁶⁸ (ii) 'steeply inhibited (or totally precluded) [its] ability to question appropriately other witnesses that have or could have provided relevant testimony';⁶⁹ and (iii) denied its effective possibility to challenge P-0570's credibility and reliability, and thus denied counterbalancing safeguards.⁷⁰
37. For the Defence, there is thus no remedy for the prejudice arising from the introduction of P-0570's prior recorded testimony under Rule 68(2)(c) and admission of this evidentiary material in the abovementioned circumstances would contravene fundamental fair trial rights.⁷¹
38. From the outset, the Chamber recalls that Rule 68(2)(c) of the Rules provides one exception which the Chamber can retain to receive the testimony of a witness by way of means other than in-court testimony. It is limited to cases where witnesses are unavailable to testify orally, such as for P-0570, and only to be authorised where such introduction is neither prejudicial to nor inconsistent with the rights of the accused.
39. The Chamber notes that, pursuant to the relevant legal framework,⁷² the fact that P-0570's testimony concerns matters that are materially in dispute need not bar its introduction under Rule 68(2)(c). It is merely one of the factors which the

⁶⁶ Response, ICC-01/12-01/18-1547-Conf, paras 38-39, referring to [REDACTED].

⁶⁷ Response, ICC-01/12-01/18-1547-Conf, para. 34.

⁶⁸ Response, ICC-01/12-01/18-1547-Conf, para. 33.

⁶⁹ Response, ICC-01/12-01/18-1547-Conf, para. 36, referring to [REDACTED].

⁷⁰ Response, ICC-01/12-01/18-1547-Conf, para. 36.

⁷¹ Response, ICC-01/12-01/18-1547-Conf, para. 36.

⁷² See above paragraph 8-10.

Chamber may take into account in the exercise of its discretion under the relevant provision. The Chamber further notes that P-0570's statement does not go to the acts and conduct of the accused and that, while some of her evidence goes beyond background information, most of it is of a cumulative or corroborative nature. In this regard, and as identified by the Prosecution,⁷³ the Chamber refers to the fact that other witnesses have given or are expected to give testimony of similar facts, such as P-0636, P-0547 and P-0542.⁷⁴

40. The Chamber further notes that the Defence raises many issues in relation to the introduction of P-0570's material which it submits would affect the fairness of the proceedings. The Chamber however finds that most of the remaining submissions from the Defence relate to the probative value of P-0570's material or the Defence's effective opportunity to challenge it. While the Chamber acknowledges that its prior decision authorising delayed disclosure of P-0570's identity necessarily impacted Defence ability to investigate and address these matters so far, the Chamber considers that its prior finding in this regard still stands. Indeed, the Chamber is of the view that 'the potential prejudice to Defence preparations is reduced as there [was] already substantive information available to investigate'.⁷⁵ Further, the Chamber notes that the Defence is now, and since 1 April 2021, fully able to obtain and submit evidence to challenge P-0570's evidence and credibility, and that other individuals may equally be in a position to provide the Defence with information regarding the contested issues it wishes to investigate. In any event, the Chamber recalls that full consideration of this material's probative value will be conducted during the Chamber's deliberation for its judgment and that it is also on this occasion that the Chamber will attribute weight, if any, to this evidence. In the view of the Chamber, it is therefore also at that stage that the Chamber will have to assess the extent of the counterbalancing factors necessary, as such a determination will notably depend on the weight of the evidence of the absent witness. In this regard, the Chamber recalls that the

⁷³ Request, ICC-01/12-01/18-1408-Conf, paras 27-29, 33.

⁷⁴ Transcripts of hearings on 15 and 16 March 2021, ICC-01/12-01/18-T-071-Conf-ENG ET and ICC-01/12-01/18-T-072-Conf-ENG ET (P-0636); and Witnesses Summaries, 15 April 2020, ICC-01/12-01/18-740-Conf-AnxB, pp. 722-723 (P-0542), 725-727 (P-0547).

⁷⁵ Delayed Disclosure Decision, ICC-01/12-01/18-794-Conf-Red, para. 25.

‘prior recorded testimony must not form the sole or decisive basis for the conviction for a particular crime as such’.⁷⁶

41. Based on the information currently before it, and having found that the issues raised by the Defence do not have the capacity to prejudice the Chamber’s fair assessment of the evidence at hand, the Chamber considers that the *prima facie* probative value of this material outweighs potential prejudice that admission may cause to a fair trial. Accordingly, the Chamber dismisses the Defence argument that the introduction under Rule 68(2)(c) of the Rules is incompatible with Mr Al Hassan’s fair trial rights or unduly prejudicial.

E. Conclusion

42. In light of the above, having found that all the procedural requirements are satisfied, and since the introduction sought is neither prejudicial nor inconsistent with Mr Al Hassan’s rights, the Chamber grants the Request and authorises the Prosecution to introduce into evidence the prior recorded testimony of P-0570 and associated material, pursuant to Rule 68(2)(c) of the Rules.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request;

AUTHORISES, pursuant to Rule 68(2)(c) of the Rules, the introduction into evidence of the prior recorded testimony of P-0570 and associated material, as identified in footnote 4 above (apart from MLI-OTP-0022-0465, MLI-OTP-0022-0473, MLI-OTP-0022-0475, MLI-OTP-0022-0478, MLI-OTP-0043-0034, MLI-OTP-0022-0480, MLI-OTP-0022-0482, MLI-OTP-0022-0488, MLI-OTP-0048-0789, MLI-OTP-0022-0471, and MLI-OTP-0048-0729, which were already been formally submitted into evidence);

ORDERS the Registry to reflect in the eCourt metadata the introduction of the relevant material;

⁷⁶ *Ntaganda* Appeal Judgment, ICC-01/04-02/06-2666-Red, paras 16, 629-630.

ORDERS the Prosecution to file a public redacted version of the Request no later than three weeks after notification of the present decision;

ORDERS the Defence and the LRVs to file public redacted versions of their respective responses no later than two weeks after notification of the public redacted version of the Request; and

ORDERS the Registry to reclassify to ‘confidential’ the annex to the Response (ICC-01/12-01/18-1547-Conf).

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 13 July 2021

At The Hague, the Netherlands