



Original: English

**No. ICC-01/12-01/18
Date: 16 August 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 Defence request for leave to appeal the ‘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 Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following decision.

1. On 13 July 2021, the Chamber issued the ‘Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules’ (the ‘Impugned Decision’).¹
2. On 21 July 2021, the Defence filed a request for leave to appeal the Impugned Decision (the ‘Request’)² on the following two issues:
 - Whether the Chamber erred in finding that it can rely on other evidence that does not concern the same incident or facts to resolve intrinsic inconsistencies in evidence introduced under Rule 68(2)(c) (the ‘First Issue’); and
 - Whether the Chamber abused its discretion in finding that the introduction of intrinsically inconsistent prior recorded testimony under Rule 68(2)(c) was not prejudicial to or inconsistent with the rights of the accused where core aspects of P-0570’s testimony are materially in dispute and uncorroborated, and the absence of cross-examination prevents the Defence from eliciting further evidence or clarification in relation to such inconsistencies and the credibility of the witness (the ‘Second Issue’).
3. On 23 July 2021, the Prosecution filed its response, opposing the Request (the ‘Response’).³
4. The Chamber incorporates by reference the applicable legal framework for granting leave for interlocutory appeals as set out in its previous decisions.⁴ In particular, the Chamber recalls that as regards the possibility to grant leave to

¹ ICC-01/12-01/18-1588-Conf.

² Defence request for leave to appeal ‘Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules’, ICC-01/12-01/18-1595-Conf (with one confidential annex).

³ Prosecution response to “Defence Request for Leave to Appeal ‘Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules’”, ICC-01/12-01/18-1609-Conf.

⁴ 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.

appeal pursuant to Article 82(1)(d) of the Statute, the following criteria shall be fulfilled: (a) the matter must be an ‘appealable issue’; (b) the issue at hand is one that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (c) an immediate resolution by the Appeals Chamber may materially advance the proceedings.

5. The Chamber finds that, in discussing the two identified Issues, the Defence merely disagrees with the Chamber’s assessment and conclusions, and essentially reiterates arguments previously raised which were considered by the Chamber in issuing the Impugned Decision. The Chamber is also of the view that some of the arguments of the Defence misrepresent the Impugned Decision, notably where it: (i) assumes the Chamber itself concluded that there were ‘intrinsic inconsistencies’ in P-0570’s statement;⁵ or (ii) suggests that the Chamber did not issue a reasoned opinion as to the potential prejudice or the existence of sufficient indicia of reliability in the Impugned Decision.⁶ In addition, the Chamber considers that the resolution of the First Issue is not essential for the determination of the question under consideration (the introduction of P-0570’s material into evidence), as opposed to the weight, if any, to be attributed to this evidence in the Chamber’s decision under Article 74 of the Statute. For the above reasons, the First and Second Issues do not constitute ‘appealable issues’ arising from the Impugned Decision.
6. Although it is unnecessary to consider any further the remaining criteria under Article 82(1)(d) of the Statute, the Chamber will address two additional points raised by the Defence.
7. First, concerning the Defence contention that it ‘is deprived of its right to notice as to potential links between evidence considered to be related to this witness with a view to putting its case across before the judgment is issued’,⁷ the Chamber reiterates that in assessing and giving weight to P-0570’s statement, it may

⁵ Request, ICC-01/12-01/18-1595-Conf, notably paras 17-19, *compare with* Impugned Decision, ICC-01/12-01/18-1588-Conf, paras 27 and 29.

⁶ Request, ICC-01/12-01/18-1595-Conf, para. 12, *compare with* Impugned Decision, ICC-01/12-01/18-1588-Conf, paras 29 and 41.

⁷ Request, ICC-01/12-01/18-1595-Conf, para. 20.

ultimately rely on any other relevant and probative evidence on the record, for example relevant details concerning certain locations in Timbuktu which may inform the Chamber's finding on the place of P-0570's detention. The Defence thus simply misunderstands, or disagrees with, the Chamber's intended approach whereby 'individual items of evidence are not to be determined in isolation, but rather in conjunction with other relevant evidence.'⁸

8. Second, the Chamber is unpersuaded by the Defence submission that immediate resolution of the Issues by the Appeals Chamber would materially advance the proceedings. Indeed, and as pointed out by the Prosecution,⁹ issues related to any reliance by the Chamber on P-0570's evidence in its final judgment may be raised as part of an appeal pursuant to Article 81 of the Statute and, as such, an immediate resolution of the First and Second Issues is not required.
9. As the requirements under Article 82(1)(d) of the Statute are not met, the Request is dismissed.

⁸ See Request, ICC-01/12-01/18-1595-Conf, paras 14-15, 20.

⁹ Response, ICC-01/12-01/18-1609-Conf, para. 20.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

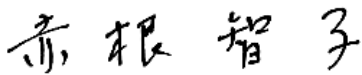
REJECTS the Request; and

INSTRUCTS the Prosecution and the Defence to respectively file public redacted versions of the Request and the Response.

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 Monday 16 August 2021
At The Hague, The Netherlands