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**International
Criminal
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August 2021

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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

With Confidential Annex A

Public Redacted Version of “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’”, 21 July 2021, ICC-01/12-01/18-1595-Conf

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

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

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I. Introduction

1. On 13 July 2021, Trial Chamber X ('the Chamber') issued its 'Decision on the introduction into evidence of P-0570's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules' ('Impugned Decision'),¹ authorising the introduction of P-0570's witness statement and associated material into evidence pursuant to Rule 68(2)(c). Therein, the Chamber held, *inter alia*, that in assessing whether the introduction of prior recorded testimony is prejudicial to or inconsistent with the rights of the accused it 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.² The Chamber held, in the context of 'inconsistencies', 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.'³
2. Pursuant to Article 82(1)(d) of the Statute, the Defence hereby seeks leave to appeal the impugned decision in relation to the following Two Issues:

The First Issue: 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 Second Issue: 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.

¹ ICC-01/12-01/18-1588.

² ICC-01/12-01/18-1588, para. 10.

³ ICC-01/12-01/18-1588, para. 27.

II. Confidentiality

3. Pursuant to Regulation 23(*bis*)(2) of the Regulations of the Court, the Defence files this Request confidentially because it refers to a decision and material so classified. A public redacted version will be filed in due course.

III. Response Schedule

4. The Defence notes the Chamber's recent suspension of the applicable time limits falling between 23 July 2021 and 15 August 2021.⁴ In view of the sharp time-constraints dictated by Rule 155(1), the Defence respectfully requests that response times pursuant to Regulation 34 of the Regulations of the Court be maintained in the interests of fairness and equality of arms in the litigation of this important matter.

IV. Submissions

The Issues arise from the Impugned Decision

5. The Appeals Chamber has held that '[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.'⁵
6. Both issues arise squarely from the Impugned Decision and their resolution is essential for the determination of the matters arising in the judicial causes under consideration, namely the introduction of P-0570's prior recorded testimony.
7. Prior recorded testimony may be introduced pursuant to Rule 68(2)(c) only if the Chamber is satisfied that P-0570 is unavailable, the necessity of Article 56 measures could not be anticipated, *and* that the prior recorded testimony has sufficient indicia of reliability. Rule 68(1) precludes the introduction of prior recorded testimony where such would be prejudicial to or inconsistent with the rights of the accused.

⁴ Annex A.

⁵ Situation in the Democratic Republic of the Congo, [ICC-01/04-168](#), para. 9.

The First Issue

8. Whether the Chamber can rely on other evidence to resolve intrinsic inconsistencies in evidence introduced under Rule 68(2)(c) arises from the Impugned Decision and necessitates appellate consideration.
9. In the Impugned Decision, the Chamber noted that ‘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”’.⁶ On this point, the Chamber found 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.’⁷
10. This conclusion presupposes that there is other evidence that either has or will be called by the Prosecution that is capable of addressing the specific facts in dispute. This is because while the Chamber enjoys ‘broad discretion in assessing inconsistencies within the evidence and in deciding whether corroboration is necessary (...) while testimonies need not be identical in all aspects, they must confirm, even if in different ways, the same fact’ (emphasis added).⁸
11. The Impugned Decision does not, however, elucidate which items or type of evidence would be capable of speaking to these intrinsic inconsistencies. The Prosecution has not identified other witnesses of fact concerning this incident. P-0570 has not provided sufficient information concerning the date or identity of the alleged perpetrators to allow for further inquiry on this point as concerns their presence at a particular location on a particular date. Given the number of groups operating in Timbuktu in and around 2012, the alleged location of these alleged instances [REDACTED] is of central importance. An allegation [REDACTED] in one location cannot fairly or logically be considered either cumulative or corroborative of an allegation [REDACTED] in another. Whether or not [REDACTED] has absolutely no bearing on the truth or falsity of P-0570’s claim that [REDACTED]. Critically, the Impugned Decision does not identify any other evidence that would be able to

⁶ Impugned Decision, para. 24.

⁷ Impugned Decision, para. 27.

⁸ Ntaganda, [ICC-01/04-02/06-1715-Red](#), para. 18.

increase either the probative value or reliability of P-0570's prior recorded testimony, nor the Prosecution's suggested interpretation thereof.⁹

12. In circumstances in which the Defence is prevented from cross-examining P-0570, the prejudicial impact of introducing testimony that is materially in dispute militates against its introduction.¹⁰ Rule 68(1) requires the Chamber to assess the nature and degree of such prejudice before allowing its introduction. Rule 68(2)(c) further conditions the introduction of such evidence on a positive assessment 'that the prior recorded testimony has sufficient indicia of reliability.' The plain text of this rule does not permit the Chamber to conduct this assessment after the statement has been introduced into evidence. Rule 68(1) in conjunction with Rule 68(2)(c) requires the Chamber to issue a reasoned opinion as to prejudice and the sufficiency of the indicia of reliability before deciding whether to introduce the statement into evidence. In order to resolve these matters by reference to other items of evidence or the record as a whole, the Chamber must set out more than a hypothetical possibility that unidentified items of evidence could resolve issues of reliability or alleviate the prejudice to the Defence.
13. The Chamber's findings on this critical point are nonetheless confined to the brief assertion that 'other witnesses have given or are expected to give testimony of similar facts, such as P-0636, P-0547 and P-0542':¹¹ the Impugned Decision is completely silent on the question as to if and how these 'similar' testimonies are capable of addressing the reliability issues identified by the Defence in connection with the alleged factual allegations that are unique to P-0570.
14. As previously found by the Appeals Chamber, presumed corroboration relates only to evidentiary weight, which is a relative assessment.¹² It does not and cannot contribute to assessments of inherent reliability of individual items of evidence. In their separate opinion (as part of the majority) to the Bemba Appeals Judgment, Judges Van den Wyngaert and Morrison held:

⁹ ICC-01/12-01/18-819-Conf-AnxA, para. 154, fn 511.

¹⁰ ICC-01/12-01/18-1267-Conf. *See also*: Katanga and Ngudjolo, [ICC-01/04-01/07-2362](#), paras 27-28 and 33-34; Kilolo, [ICC-01/05-01/13-1481-Red-Corr.](#) para. 21; Kilolo, [ICC-01/05-01/13-1478-Red-Corr.](#) para. 33; Ongwen, [ICC-02/04-01/15-596-Red.](#) para. 15.

¹¹ Impugned Decision, para. 39.

¹² Ntaganda, [ICC-01/04-02/06-2666-Red.](#) para. 630.

[H]olistic fact-finding should not be an excuse or a reason for making findings beyond a reasonable doubt on the basis of a collection of weak evidence. When the Appeals Chamber says that the Trial Chamber must analyse the evidence holistically, all this means is that the evidentiary weight of individual items of evidence should not be determined in isolation, but rather in conjunction with other relevant evidence. It is also true that the credibility and evidentiary weight of specific items of evidence is not determinative. What matters is how strong and convincing the totality of the relevant evidence in relation to a particular fact is. That said, analysing evidence holistically cannot cure the weakness of individual items of evidence and a number of weak arguments for a proposition do not and cannot ever combine into a strong reason for accepting it.¹³

15. The Chamber's indication that it will consider any allegation [REDACTED] to constitute corroborative evidence of any other, despite the confusion lying over all of them, thus raises an issue as to whether the Chamber can rely on evidence that does not concern the same facts to resolve intrinsic inconsistencies in prior recorded testimony introduced under Rule 68(2)(c).

The Second Issue

16. In considering whether the introduction of P-0570's prior recorded testimony 'is neither prejudicial nor inconsistent with the rights of Mr Al Hassan,' the Chamber held 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.'¹⁴ The Chamber provided no explanation or reasoning as to how or in what manner, these supposedly corroborative or cumulative items would ameliorate the prejudice caused to the Defence by the absence of an opportunity to cross-examine the witness in relation to intrinsic as opposed to extrinsic inconsistencies.
17. The only available safeguard to cure intrinsic inconsistencies in a witness' prior recorded testimony is examination.¹⁵ Accordingly, if the only person capable of addressing the issues in dispute is the witness herself, then this is an issue that must be

¹³ Bemba, [ICC-01/05-01/08-3636-Anx2](#), para. 15.

¹⁴ Impugned Decision, para. 33.

¹⁵ Ntaganda, [ICC-01/04-02/06-1715-Red](#), para. 15, finding that internal consistency is a relevant factor for consideration in respect of Article 68(2).

identified and addressed in connection with the Chamber's assessment of the prejudicial impact of the introduction of the statement.¹⁶

18. By resorting to alleged 'cumulative or corroborative nature' as a counterweight to prejudice and the stark infringement of Mr Al Hassan's fundamental right to examine the evidence against him on matters that are materially in dispute, the Impugned Decision raises an issue as to which factors a Chamber may take into account in making an assessment pursuant to Rule 68(2)(c). This issue requires prompt adjudication by the Appeals Chamber in order that the parties and participants may proceed with a clear understanding of which material is in evidence.

The Issues affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and an immediate resolution of the issues by the Appeals Chamber may materially advance the proceedings

a. The fairness and expeditiousness of proceedings or the outcome of the trial

19. The parameters for the introduction of prior recorded testimony in circumstances in which the Defence is not permitted to cross-examine its author raise fundamental issues of fairness. The extent to which the Chamber may rely on extrinsic material to assess the intrinsic reliability of such testimony is a core matter of permissible evidential interpretation and thus fundamental to these trial proceedings. Similarly, the extent to which the Chamber may rely on extraneous factors in considering whether the inherently prejudicial and fundamental-rights infringing introduction of prior recorded testimony pursuant to Rule 68(2)(c) is sufficiently counterbalanced invokes fundamental principles of fairness.
20. The absence of clarity as to the specific manner in which the evidential record as a whole, or particular items of evidence, may be capable of addressing and resolving the intrinsic inconsistencies identified by the Defence affects Mr Al Hassan's right to notice as concerns the case which is being put against him. Examination in chief serves the important purpose of providing notice as to the Prosecution's case concerning the relevance of alleged facts known to the witness, including by reference to exhibits that may be put to the witness. Cross-examination allows the Defence to be

¹⁶ Ongwen, [ICC-02/04-01/15-596-Red](#), para. 45 *et seq.*

heard in relation to these specific issues in dispute and to put its case to the witness. In contrast, the Chamber's presaged intent to address fundamental issues of reliability in the judgment itself will deprive the Defence 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.

21. Prompt determination of these fundamental issues will clarify the evidential bases on which the trial may continue. Swift resolution will enable the parties and Chamber to focus their witness examinations and arguments appropriately, thus streamlining the proceedings. The retention of improper evidence in the case will lead to unnecessary litigation and unduly burden the proceedings, including at the Article 74 decision stage.
22. Since the material in question goes to matters that are relevant to the charges and are very much materially in dispute, both issues threaten to affect the outcome of the trial. In considering whether an issue may affect the outcome of the trial, the Appeals Chamber has stipulated that it is incumbent upon the Chamber to 'ponder the possible implications of a given issue being wrongly decided.'¹⁷
23. In this way, the Two Issues affect the fair and expeditious conduct of the proceedings as well as, potentially, the outcome of the trial.

b. Immediate resolution by the Appeals Chamber may materially advance the proceedings

24. Issues concerning the fairness of the trial proceedings and the extent of the protections afforded by Rule 68(2)(c) of the Statute should be resolved immediately in order to avoid the miscarriage of justice that could result from proceeding upon violations of core rights.
25. Determining whether 'an immediate resolution by the Appeals Chamber *may* materially advance the proceedings' requires only the possibility that it will. Given their significance, an immediate decision by the Appeals Chamber on the Two Issues would materially advance the proceedings by 'removing doubts about the correctness'

¹⁷ [ICC-01/04-168](#), para. 13.

of the Chamber's resolution of these two Issues, and further 'map (...) a course of action along the right lines' thereby providing 'a safety net for the integrity of the proceedings.'¹⁸ The Appeals Chamber's authoritative determination of these issues would '[rid] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.' For those reasons, immediate resolution by the Appeals Chamber may materially advance the proceedings, thus satisfying the requirements of Article 82(1)(d).

V. Relief Sought

26. For the reasons set out herein, the Defence for Mr Al Hassan respectfully requests that the Trial Chamber **GRANT LEAVE TO APPEAL** in relation to the Two Issues.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 21st Day of July 2021
At The Hague, The Netherlands

¹⁸ Situation in the Democratic Republic of the Congo, [ICC-01/04-168](#), para. 15.