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**No. ICC-01/12-01/18
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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 the introduction into evidence of the prior recorded testimony of
D-0146, D-0524, D-0627 and D-0628 pursuant to Rule 68(2)(b) of the Rules**

To be notified in accordance with Regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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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 64, 67(1) and 69(2) of the Rome Statute (the ‘Statute’), Rule 68(1) and (2)(b) of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on the introduction into evidence of the prior recorded testimony of D-0146, D-0524, D-0627 and D-0628 pursuant to Rule 68(2)(b) of the Rules’.

I. Procedural history

1. On 27 September 2022, the Defence filed two requests to: (i) introduce into evidence the prior recorded testimony of witnesses D-0146,¹ together with nine associated exhibits,² D-0627,³ together with two associated exhibits,⁴ and D-0628,⁵ together with 61 associated exhibits,⁶ pursuant to Rule 68(2)(b) of the Rules as well as to add D-0627’s prior recorded testimony to the Defence’s list of evidence pursuant to Regulation 35 of the Regulations (the ‘First Request’);⁷ and (ii) introduce into evidence the prior recorded testimony of D-0524⁸

¹ MLI-D28-0005-9223, MLI-D28-0005-9227 and MLI-D28-0005-9231 as well as translations MLI-D28-0006-2760, MLI-D28-0006-2768 and MLI-D28-0006-2776.

² MLI-D28-0006-3316, MLI-D28-0006-3317, MLI-D28-0006-3321, MLI-D28-0006-3325, MLI-D28-0006-3331, MLI-D28-0006-3335, MLI-D28-0006-3318, MLI-D28-0006-3319 and MLI-D28-0006-3320.

³ MLI-D28-0006-5699-R01.

⁴ MLI-D28-0006-5717 and MLI-D28-0006-6017-R01.

⁵ MLI-D28-0003-2049-R01.

⁶ MLI-D28-0006-6019, MLI-D28-0006-5947, MLI-D28-0006-5948, MLI-D28-0006-5949, MLI-D28-0006-5950, MLI-D28-0006-5951, MLI-D28-0006-5952, MLI-D28-0006-5953, MLI-D28-0006-5954, MLI-D28-0006-5955, MLI-D28-0006-5956, MLI-D28-0006-5957, MLI-D28-0006-5958, MLI-D28-0006-5959, MLI-D28-0006-5960, MLI-D28-0006-5961, MLI-D28-0006-5962, MLI-D28-0006-5963, MLI-D28-0006-5964, MLI-D28-0006-5965, MLI-D28-0006-5966, MLI-D28-0006-5967, MLI-D28-0006-5968, MLI-D28-0006-5969, MLI-D28-0006-5970, MLI-D28-0006-5971, MLI-D28-0006-5972, MLI-D28-0006-5973, MLI-D28-0006-5974, MLI-D28-0006-5975, MLI-D28-0006-5976, MLI-D28-0006-5977, MLI-D28-0006-5978, MLI-D28-0006-5979, MLI-D28-0006-5980, MLI-D28-0006-5981, MLI-D28-0006-5982, MLI-D28-0006-5983, MLI-D28-0006-5984, MLI-D28-0006-5985, MLI-D28-0006-5986, MLI-D28-0006-5987, MLI-D28-0006-5988, MLI-D28-0006-5989, MLI-D28-0006-5990, MLI-D28-0006-5991, MLI-D28-0006-5992, MLI-D28-0006-5993, MLI-D28-0006-5994, MLI-D28-0006-5995, MLI-D28-0006-5996, MLI-D28-0006-5997, MLI-D28-0006-5998, MLI-D28-0006-5999, MLI-D28-0006-6000, MLI-D28-0006-6001, MLI-D28-0006-6002, MLI-D28-0006-6003, MLI-D28-0006-6004, MLI-D28-0006-6005 and MLI-D28-0006-5945.

⁷ Defence Rule 68(2)(b) applications for Witnesses D-0146, D-0627 and D-0628, ICC-01/12-01/18-2346-Conf.

⁸ MLI-D28-0006-4469-R01.

pursuant to Rule 68(2)(b) of the Rules and add it to the Defence’s list of evidence pursuant to Regulation 35 of the Regulations (the ‘Second Request’).⁹

2. On 4 October 2022, the Prosecution filed its response to the First Request (the ‘First Response’).¹⁰
3. On 6 October 2022, the Prosecution filed its response to the Second Request (the ‘Second Response’).¹¹

II. Analysis

4. As a preliminary matter, the Chamber notes the submissions advanced by the Defence in requesting the late addition of the prior recorded testimony of D-0627 and D-0524 to its list of evidence.¹² The Chamber is satisfied that there are sufficient reasons outside the Defence’s control justifying the delay and accordingly authorises the late addition of D-0627’s and D-0524’s prior recorded testimony to the Defence’s list of evidence pursuant to Regulation 35(2) of the Regulations.
5. With respect to the applicable law on Rule 68(2)(b) of the Rules, the Chamber refers to its prior decision setting out the relevant framework and considerations.¹³ The Chamber notably recalls that Rule 68(2)(b) of the Rules creates two incremental steps. The Chamber must: first, determine whether the prior recorded testimony in question relates to ‘proof of a matter other than the acts and conduct of the accused’; and second, assess the factors under Rule

⁹ Defence Rule 68(2)(b) application for Witness D-0524, ICC-01/12-01/18-2347-Conf

¹⁰ Prosecution response to “Defence Rule 68(2)(b) applications for Witnesses D-0146, D-0627 and D-0628” (ICC-01/12-01/18-2346-Conf), ICC-01/12-01/18-2367-Conf.

¹¹ Prosecution response to “Defence Rule 68(2)(b) application for Witness D-0524” (ICC-01/12-01/18-2347-Conf), ICC-01/12-01/18-2369-Conf.

¹² First Request, ICC-01/12-01/18-2346-Conf, para. 29; Second Request, ICC-01/12-01/18-2347-Conf, para. 13.

¹³ Decision on the introduction into evidence of D-0511, D-0539, and D-0553’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, 9 June 2022, ICC-01/12-01/18-2241 (the ‘D-0511, D-0539 and D-0553 Decision’), paras 6-8, 10-11, 15-16, 19, referring notably to Judgment on the appeal of the Prosecution against Trial Chamber X’s “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules”, 13 May 2022, ICC-01/12-01/18-2222, paras 48, 55, 81.

68(2)(b)(i) of the Rules as well as any other factors that are relevant under the circumstances to ensure a fair trial.

6. With respect to the four witnesses subject to the First and Second Requests, the Chamber is satisfied that their testimony go to proof of matters other than the acts and conduct of the accused.¹⁴ The Chamber will accordingly proceed to the discretionary factors under Rule 68(2)(b)(i) of the Rules. It is nonetheless recalled that these factors are not mandatory pre-conditions for the introduction of prior recorded testimony under Rule 68(2)(b) of the Rules.¹⁵

(a) D-0627 and D-0628

7. D-0627 and D-0628 both provide testimony on detention conditions and interrogations at the DGSE, including the treatment and conditions of Mr Al Hassan whilst being detained. The witnesses also testify, *inter alia*, about: (i) the judicial system before 2012; (ii) Mr Al Hassan's character; (iii) the *Congrès pour la justice dans l'Azawad* (the 'CJA'); (iv) arrests by the Barkhane forces; and (v) interviews conducted by the Prosecution. In addition to their prior recorded testimony, the Defence also seeks to introduce into evidence as associated exhibits: (i) an investigation note relating to the manner in which the taking of D-0627's evidence was conducted; (ii) a related email from the Single Judge of the Chamber; (iii) email from the Single Judge of the Chamber authorising the Defence's proposal on the manner in which D-0628's evidence will be taken, which notably involved the Court interpreters recording Tamasheq voice notes of each paragraph of D-0628's prior recorded testimony which would then be corrected or confirmed by the witness; (iv) 59 audio recordings sent in accordance with the aforementioned email; and (v) a note setting out information relevant to the process by which D-0628 confirmed the audio recordings and corrections made by the witness.

¹⁴ While the Prosecution submits that a discrete part of D-0628's prior recorded testimony goes to the acts and conduct of the accused, the Chamber notes that in the relevant part, D-0628, referring to MLI-OTP-0061-1634 at 1637, states that Mr Al Hassan was the base commander at the CJA and that he does not know if Mr Al Hassan was already working for the benefit of the Islamists. Considering the general nature of the reference and the relevant time frame, the Chamber is of the view that this part of D-0628's evidence does not go to the acts and conduct of the accused within the meaning of Rule 68(2)(b).

¹⁵ D-0511, D-0539, and D-0553 Decision, ICC-01/12-01/18-2241, para. 10.

8. In the Defence's view, the evidence of both witnesses are, amongst other things, relevant to the weight and reliability of evidence obtained from Mr Al Hassan.¹⁶ The Defence submits that the evidence of both witnesses are corroborated by other witnesses and that their prior recorded testimony bears sufficient indicia of reliability.¹⁷ It further submits that no undue prejudice is incurred as the Prosecution has had the opportunity to interview both witnesses in person.¹⁸
9. The Prosecution opposes the introduction of both prior recorded testimony, challenging their relevance and probative value. It contends, in particular, that the statements of the witnesses are only marginally relevant to the charges and that the alleged mistreatment of Mr Al Hassan does not relate to the timeframe during which the accused was interviewed by the Prosecution.¹⁹
10. The Chamber recalls the approach it has adopted with respect to the submission of evidence, whereby 'the Chamber will recognise the submission of items of evidence without a prior ruling on relevance and/or admissibility and will consider its relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.'²⁰ Against this background, the Chamber has found that matters relating to the relevance and probative value do not prevent the submission of a witness's evidence pursuant to Rule 68 of the Rules.²¹ The Chamber sees no reasons to depart from this approach and finds that the arguments raised by the Prosecution do not prevent the introduction into evidence of the prior recorded testimony of D-0627 and D-0628. For the purpose of the present assessment under Rule 68(2)(b) of the Rules, it suffices to note that the evidence of both witnesses may, on a *prima facie* basis, be relevant to assessing the reliability and probative value of other evidence on the case record.

¹⁶ First Request, ICC-01/12-01/18-2346-Conf, paras 23, 39.

¹⁷ First Request, ICC-01/12-01/18-2346-Conf, paras 24-26, 39-41.

¹⁸ First Request, ICC-01/12-01/18-2346-Conf, paras 27, 43.

¹⁹ First Response, ICC-01/12-01/18-2367-Conf, paras 7, 19.

²⁰ Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, para. 29.

²¹ See Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 26 January 2021, ICC-01/12-01/18-1267-Conf, paras 24, 31.

11. Having had regard to the submissions of both parties and the prior recorded testimony at hand, the Chamber is satisfied that the prior recorded testimony of D-0627 and D-0628 mainly relate to matters which do not form key factual aspects of the case against Mr Al Hassan. The Chamber is also satisfied that both prior recorded testimony bear sufficient indicia of reliability. In conducting this assessment, the Chamber did not find it necessary to consider factors beyond formal requirements.²² Accordingly, and since the Chamber finds it unnecessary to require D-0627 and D-0628 to testify orally, the Chamber authorises the introduction into evidence of the prior recorded testimony of D-0627 and D-0628 pursuant to Rule 68(2)(b) of the Rules.

(b) D-0146

12. The Defence submits that D-0146 explains the origin, source and chain of custody of three videos, one of which has already been submitted into evidence.²³ The nine associated exhibits comprise of the two remaining videos, their transcripts and translations as well as chain of custody forms.
13. The Prosecution opposes this part of the First Request, challenging the *prima facie* reliability of the videos and relevance of D-0146's prior recorded testimony. In addition to challenging their relevance, the Prosecution submits that the information contained in D-0146's prior recorded testimony is insufficient, particularly with respect to the manner in which the editing of the videos was done and the location of the filming.²⁴
14. The Chamber notes that the prior recorded testimony is limited in its scope, providing evidence on the chain of custody of three videos. In the Chamber's view, the Prosecution's submissions on whether the contents of D-0146's prior recorded testimony is sufficiently probative or relevant are better assessed during the ultimate assessment of all evidence. The Chamber is also satisfied that the prior recorded testimony submitted bears sufficient indicia of reliability of a formal nature. In this regard, the Chamber notes that associated exhibits need not

²² Decision on the introduction into evidence of the prior recorded testimony of D-0534 and D-0245 pursuant to Rule 68(2)(b) of the Rules, 6 July 2022, ICC-01/12-01/18-2277, para. 12.

²³ First Request, ICC-01/12-01/18-2346-Conf, para. 7.

²⁴ First Response, ICC-01/12-01/18-2367-Conf, paras 24-28.

independently qualify as prior recorded testimony²⁵ and as such considers misplaced the Prosecution's arguments challenging the introduction into evidence of the prior recorded testimony of D-0146 on the basis that the videos do not fulfil the Rule 68(2)(b)(i) factors. Accordingly, and since the Chamber finds it unnecessary to require D-0146 to testify orally, the Chamber authorises the introduction into evidence of the prior recorded testimony of D-0146.

(c) D-0524

15. D-0524 provides evidence on the activities and methodology of NGOs in Timbuktu after 2012, notably those concerning alleged victims of sexual violence. D-0524's evidence does not directly refer to any charged incident.
16. The Defence submits that D-0524's evidence is relevant to the case but does not relate to charged incidents, as it relates to the credibility of Prosecution evidence, is cumulative with the testimony of other witnesses and has sufficient indicia of reliability.²⁶ In this context, and relying on evidence already on the case record, the Defence also makes submissions in support of its arguments on the influence the NGOs had on the victims.²⁷
17. The Prosecution opposes the Second Request, challenging the probative value of D-0524's prior recorded testimony.²⁸ The Prosecution also avers that D-0524's evidence is cumulative to or corroborative of other evidence and takes issue with the Defence's interpretation of the evidence on the case record.²⁹
18. The Chamber considers that for the most part D-0524's prior recorded testimony relates to matters which are not related to the key factual aspects of the case, discussing the activities and methodology of NGOs. In line with the consistent approach of the Chamber, the arguments raised by the Prosecution on the probative value of D-0524's evidence will be considered as part of its ultimate assessment of all evidence. The Chamber is also satisfied that D-0524's prior

²⁵ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence, 19 June 2018, ICC-02/04-01/15-1288, para. 10.

²⁶ Second Request, ICC-01/12-01/18-2347-Conf, paras 11-12.

²⁷ Second Request, ICC-01/12-01/18-2347-Conf, para. 11.

²⁸ Second Response, ICC-01/12-01/18-2369-Conf, paras 11-19.

²⁹ Second Response, ICC-01/12-01/18-2369-Conf, paras 20-22.

recorded testimony bears sufficient indicia of reliability of a formal nature. Accordingly, and since the Chamber finds it unnecessary to require D-0524 to testify orally, the Chamber authorises the introduction into evidence of the prior recorded testimony of D-0524 pursuant to Rule 68(2)(b) of the Rules.

(d) Associated exhibits

19. The Chamber is also satisfied that the associated exhibits the Defence seeks to introduce into evidence are used in and / or necessary to understand the prior recorded testimony of the relevant witnesses. Accordingly, the Chamber authorises their introduction into evidence, together with the respective prior recorded testimony.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the First and Second Requests;

AUTHORISES the addition of the prior recorded testimony of D-0524 and D-0627 to the Defence's list of evidence;

AUTHORISES, subject to the receipt of the certified declarations, the introduction into evidence of the prior recorded testimony of D-0146, D-0524, D-0627 and D-0628, together with the relevant associated exhibits, as identified in footnotes 1 to 6 and 8 of the present decision; and

INSTRUCTS the Registry to reflect in the record's metadata the introduction of the relevant material under Rule 68(2)(b) of the Rules upon filing of the relevant certified declarations.

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 Monday, 17 October 2022

At The Hague, The Netherlands