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**No. ICC-01/12-01/18  
Date: 16 December 2022**

**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-0246 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-0246 pursuant to Rule 68(2)(b) of the Rules’.

## **I. Procedural history**

1. On 29 August 2022, the Chamber instructed the Defence to file any remaining Rule 68(2) applications by 24 October 2022.<sup>1</sup>
2. On 28 November 2022, the Single Judge issued an email decision, in which she decided that any request for the late introduction into evidence of prior recorded testimony must be submitted by 12 December 2022 at the latest.<sup>2</sup>
3. On 7 December 2022, the Defence filed a request seeking to introduce into evidence the prior recorded testimony of D-0246 (MLI-D28-0006-9124-R01) pursuant to Rule 68(2)(b) of the Rules (the ‘Request’).<sup>3</sup>
4. On 12 December 2022, in accordance with the time limit set by the Single Judge, the Office of the Prosecutor filed its response to the Request (the ‘Response’).<sup>4</sup>
5. The parties’ submissions are discussed below to the extent necessary.

## **II. Analysis**

### **A. Regulation 35(2)**

6. The Chamber recalls that D-0246 was initially expected to testify *viva voce* and that it only crystallised on 24 November 2022 that he would not be able to do so,

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<sup>1</sup> Sixth decision on matters related to the conduct of proceedings: end of Defence case, potential rebuttal/rejoinder evidence, and closure of evidence, ICC-01/12-01/18-2308, para. 4.

<sup>2</sup> Email dated 28 November 2022 at 16:25.

<sup>3</sup> Defence Rule 68(2)(b) application for Witness D-0246, ICC-01/12-01/18-2432-Conf.

<sup>4</sup> Réponse de l’Accusation à la Requête de la Défense intitulée « Defence Rule 68(2)(b) application for Witness D-0246 », ICC-01/12-01/18-2438-Conf.

for reasons discussed in confidential email communications.<sup>5</sup> In these circumstances, the Chamber is satisfied that the Defence was unable to file the Request within the deadline for the filing of Rule 68(2) requests for reasons outside its control, within the meaning of Regulation 35(2) of the Regulations. Accordingly, the Chamber grants the Defence's request for variation of the time limit and authorises the Defence to add MLI-D28-0006-9124-R01 to its list of evidence.

#### **B. Rule 68(2)(b)**

7. 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.<sup>6</sup> 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 68(2)(b)(i) of the Rules as well as any other factors that are relevant under the circumstances to ensure a fair trial.
8. The prior recorded testimony of D-0246 covers, *inter alia*, the situation in the North of Mali before 2012, including the presence of Al Qaeda, the justice system and the role of cadis, provision of fuel and medicine during the relevant time period, activities of journalists during the relevant time period, organisations involved in the peace process as well as the intervention by the Barkhane forces. In addition, D-0246 makes several references to Mr Al Hassan, which will be discussed further below in relation to the 'acts and conduct' requirement.

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<sup>5</sup> See Email from the Defence dated 24 November 2022 at 17:07 and the email chain contained therein. The prior recorded testimony of D-0246 was also taken on 24 November 2022.

<sup>6</sup> 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 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 (the '*Al Hassan* OA4 Judgment'), paras 48, 55, 81.

*1. Acts and conduct of the accused*

9. The Chamber recalls that the expression ‘acts and conduct of the accused’ within the meaning of Rule 68(2)(b) of the Rules refers to those actions of the accused which are described in the charges brought against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged.<sup>7</sup> Prior recorded testimony that disprove the acts and conduct of the accused are equally inadmissible under this provision.<sup>8</sup> Under Rule 68(2)(b) of the Rules, a prior recorded testimony going to the acts and conduct of the accused may not be introduced into evidence irrespective of whether it is repetitive or corroborative of other evidence.<sup>9</sup>
10. Applying this definition, the Chamber has previously determined that a witness’s evidence concerning ‘the accused’s role and capacity within the armed groups’<sup>10</sup> or his ‘participation in Ansar Dine and related state of mind’<sup>11</sup> pertain to the acts and conduct of the accused and may not be introduced into evidence pursuant to Rule 68(2) of the Rules. It is also established that, while a prior recorded testimony describing the good character of the accused is not *per se* inadmissible under Rule 68(2)(b) of the Rules, such evidence which also evidences the acts and conduct of the accused, may not be introduced pursuant to Rule 68(2)(b) of the Rules.<sup>12</sup>
11. Turning to the Prosecution’s arguments in the Response, the Chamber cannot subscribe to the broad interpretation of the requirement advanced by the Prosecution, whereby any evidence related to an affirmative defence would fall within the concepts of ‘acts and conduct of the accused.’<sup>13</sup> To the contrary, the

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<sup>7</sup> D-0511 Decision, ICC-01/12-01/18-2241, para. 8.

<sup>8</sup> Decision on the introduction into evidence of the prior recorded testimony of D-0544, D-0611, D-0093 and D-0240 pursuant to Rule 68(2)(b) and (3) of the Rules, 22 July 2022, ICC-01/12-01/18-2388 (the ‘D-0544 Decision’), para. 7.

<sup>9</sup> D-0544 Decision, ICC-01/12-01/18-2288, para. 9.

<sup>10</sup> Decision on the introduction into evidence of the prior recorded testimony of D-0219 and D-0312 pursuant to Rule 68(2)(b) of the Rules, 21 September 2022, ICC-01/12-01/18-2343, para. 7.

<sup>11</sup> 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 (the ‘D-0534 Decision’), para. 7.

<sup>12</sup> D-0544 Decision, ICC-01/12-01/18-2288, para. 9.

<sup>13</sup> Response, ICC-01/12-01/18-2438-Conf, para. 9.

Chamber has repeatedly emphasised that the fact that a prior recorded testimony may potentially be relied upon in the context of an affirmative defence does not *per se* bar the introduction into evidence of said prior recorded testimony pursuant to Rule 68(2)(b) of the Rules.<sup>14</sup> That being said, where a prior recorded testimony relates to an affirmative defence by virtue of it evidencing the accused's acts and conduct, as defined above, including his motivations, it may not be introduced pursuant to Rule 68(2)(b) of the Rules. Given that paragraphs 16 and 18 of the prior recorded testimony concern Mr Al Hassan's views towards extremism as well as his motivation for remaining in Timbuktu in 2012, the Chamber considers that they go to the acts and conduct of the accused.

12. The Prosecution also avers that paragraphs 20 to 31, where the witness refers to a trip by a journalist, goes to the acts and conduct of the accused, in the sense that it demonstrates the role the accused played in allowing the journalist to report from Timbuktu. The Chamber observes that, while the witness indeed refers to contacts with the accused relating to the journalist's visit, D-0246 explains that he had done so as he trusted Mr Al Hassan's advice,<sup>15</sup> rather than referring to Mr Al Hassan's role during the relevant time period. In this regard, the Chamber also notes the Defence's submissions that D-0246's evidence concerning the journalist relates, *inter alia*, to the ability of the journalist to report from Timbuktu during the relevant time period, as compared with the situation in Gao, as well as the alleged burning of the manuscripts.<sup>16</sup> Accordingly, the Chamber does not consider that the witness's evidence concerning the journalist goes, in its entirety, to the acts and conduct of the accused. Nonetheless, the Chamber is of the view that specific instances where D-0246 refers to the ability of Mr Al Hassan to make decisions, whether the accused was armed during the relevant time period or Mr Al Hassan's acts concerning an attack against the airport goes to the acts and conduct of the accused.<sup>17</sup>

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<sup>14</sup> D-0534 Decision, ICC-01/12-01/18-2277, para. 10; D-0511 Decision, ICC-01/12-01/18-2241, para. 18. *See also* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 2 July 2018, ICC-02/04-01/15-1294, para. 7.

<sup>15</sup> MLI-D28-0006-9124-R01, para. 23.

<sup>16</sup> Request, ICC-01/12-01/18-2432-Conf, paras 16-17.

<sup>17</sup> MLI-D28-0006-9124-R01, paras 29-31.

13. For the aforementioned reasons, the Chamber considers that paragraphs 16, 18, 23 and 29 to 31 of D-0246's prior recorded testimony go to the acts and conduct of the accused and may not be introduced into evidence pursuant to Rule 68(2)(b) of the Rules. The Chamber is satisfied that other references to Mr Al Hassan, notably concerning his actions after the charged period, do not fall within the aforementioned definition of 'acts and conduct of the accused'.
14. Referring to the Chamber's previous determination on the matter, the Prosecution submits that the Chamber should reject the Request on the basis that references going to the acts and conduct of the accused are inseparable from the rest of D-0246's prior recorded testimony. The Chamber recalls that Rule 68(2)(b) of the Rules does not foreclose the possibility of partial admission of the statement, excluding parts going to the acts and conduct of the accused.<sup>18</sup> The ultimate decision as to the appropriateness of admitting only parts of a statement is discretionary and depends on the particular circumstances.<sup>19</sup> As summarised above at paragraph 8, the prior recorded testimony of D-0246 covers several other topics which, in the view of the Chamber, are not inseparable from the discrete paragraphs going to the acts and conduct of the accused. The Chamber will accordingly proceed to the discretionary factors under Rule 68(2)(b)(i) of the Rules.

## *2. Discretionary factors under Rule 68(2)(b)*

15. The Defence submits that the testimony of D-0246 mostly provides background and context for the Prosecution evidence and that it has been the consistent approach of the Chamber to admit evidence relating to background information through Rule 68(2)(b) of the Rules.<sup>20</sup> The Defence also adds that the statement has sufficient indicia of reliability as it was obtained voluntarily and was read back to the witness in a language he understands.<sup>21</sup>

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<sup>18</sup> *Al Hassan* OA4 Judgment, ICC-01/12-01/18-2222, para. 49.

<sup>19</sup> *Al Hassan* OA4 Judgment, ICC-01/12-01/18-2222, para. 51.

<sup>20</sup> Request, ICC-01/12-01/18-2432-Conf, para. 20.

<sup>21</sup> Request, ICC-01/12-01/18-2432-Conf, para. 20.

16. The Prosecution submits that several statements in the prior recorded testimony of D-0246 are without foundation and speculative and vague, and argues that he should cross examine the witness.<sup>22</sup> The Prosecution also argues that the evidence of D-0246 is not corroborative or cumulative and that the Defence failed to demonstrate that it is in the interests of justice to authorise the introduction into evidence of D-0246's prior recorded testimony.
17. Consistent with the approach it has adopted with respect to the submission of evidence, matters relating to the relevance and probative value of the evidence will, in principle, be dealt with as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.<sup>23</sup> For this reason, the Chamber considers it unnecessary to address the substance of the Prosecution's submissions concerning the foundation and source of D-0246's evidence, which relate to the weight and probative value.
18. Having considered the parties' submissions, the Chamber is of the view that the prior recorded testimony, with the exclusion identified above, mainly relates to background information. While parts of D-0246's prior recorded testimony indeed relate to matters that are of significance of the case, including the justice system, the Chamber notes that it has already heard several other witnesses on these issues. Noting that the Prosecution fails to cite to any specific part of D-0246's evidence in this context, the Chamber finds unmeritorious the Prosecution's submissions that the prior recorded testimony of D-0246 is not corroborative or cumulative in nature.
19. Finally, the Chamber is also satisfied that the prior recorded testimony of D-0246 bears sufficient indicia of reliability of a formal nature. Accordingly, the Chamber considers it appropriate to grant the Request, with the exception of discrete paragraphs in the prior recorded testimony of D-0246 going to the acts and conduct of the accused.

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<sup>22</sup> Response, ICC-01/12-01/18-2438-Conf, paras 17-20.

<sup>23</sup> 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, ICC-01/12-01/18-2378, para. 10.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

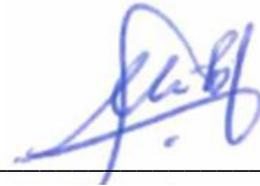
**GRANTS** the Request;

**AUTHORISES** the Defence to the add MLI-D28-0006-9124-R01 to its list of evidence;

**AUTHORISES**, subject to the receipt of the certified declaration, the introduction into evidence of the prior recorded testimony of D-0246, with the exception of discrete parts going to the acts and conduct of the accused, as identified in paragraph 13 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 Friday, 16 December 2022

At The Hague, The Netherlands