



**Original: English**

**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 redacted version of**

**Decision on the Defence's request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules**

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

Karim A. A. Khan  
 Nazhat Shameem Khan  
 Mame Mandiaye Niang

**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**

Pieter Vanaverbeke

**Victims and Witnesses Unit**

Nigel Verrill

**Detention Section****Victims Participation and Reparations Section****Other**

**TRIAL CHAMBER X** of the International Criminal Court (the ‘ICC’), 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) and (c) 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 Defence’s request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules’.

## **I. Procedural history**

1. On 17 and 26 October 2022, the Chamber authorised the introduction into evidence of the prior recorded testimony of D-0146<sup>1</sup> and D-0002,<sup>2</sup> respectively, pursuant to Rule 68(2)(b) of the Rules.
2. On 10 November 2022, and in response to a request from the Defence, the Single Judge convened a meeting with the Defence and the relevant registry sections to discuss logistical issues concerning the taking of accompanying declarations pursuant to Rule 68(2)(b)(ii) of the Rules.<sup>3</sup>
3. 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 and that the Rule 68(2)(b)(ii) declarations must be taken by 13 December 2022.<sup>4</sup>
4. On 12 December 2022, the Defence filed an omnibus request concerning witnesses whose Rule 68(2)(b)(ii) declarations are yet to be taken (the ‘Request’).<sup>5</sup> In particular, the Defence requests the Chamber to: (i) grant an

---

<sup>1</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.

<sup>2</sup> Decision on the Defence request pursuant to Regulation 35 regarding D 0002, D 0003, D-0004 and D-0008 and on the introduction of their prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-2378 (the ‘D-0002 Decision’).

<sup>3</sup> See email dated 5 November 2022 at 12:59.

<sup>4</sup> Email dated 28 November 2022 at 16:25.

<sup>5</sup> Defence request for an extension of time for the purpose of certification of the remaining Rule 68(2) witnesses, ICC-01/12-01/18-2440-Conf-Exp.

extension for obtaining the Rule 68(2)(b)(ii) declarations; (ii) grant a seven-day extension to contact D-0008 and D-0539; and (iii) authorise the introduction into evidence of D-0002's and D-0146's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules.<sup>6</sup>

5. On the same date, the Defence filed a request seeking an extension until at least 29 December 2022 for the filing of the Rule 68(2)(b) request concerning D-0231 (the 'D-0231 Request').<sup>7</sup>
6. On 13 December 2022, the Office of the Prosecutor (the 'Prosecution') filed its response to the D-0231 Request (the 'D-0231 Response'),<sup>8</sup> indicating that it defers to the Chamber. The Prosecution also makes submissions on the substance of D-0231's prior recorded testimony, which the Chamber does not consider necessary to address in the present decision.
7. On 14 December 2022, in accordance with the time limit set by the Single Judge,<sup>9</sup> the Prosecution filed its response to the request for the introduction into evidence of D-0146's and D-0002's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules (the 'Response').<sup>10</sup> Given their nature, and in particular the fact that the relevant discussions have been done *ex parte*, the Chamber considers it appropriate to exceptionally issue the present decision without receiving responses on the other aspects of the Request.
8. On 15 December 2022, the Single Judge convened an *ex parte* status conference with the Defence and the relevant sections of the Registry to discuss pending logistical issues related to the taking of Rule 68(2)(b)(ii) declarations and possible ways forward<sup>11</sup>

---

<sup>6</sup> Defence request for an extension of time for the purpose of certification of the remaining Rule 68(2) witnesses, ICC-01/12-01/18-2440-Conf-Exp.

<sup>7</sup> Application for an extension of time to file Defence Rule 68(2)(b) application for Witness D-0231, ICC-01/12-01/18-2441-Conf-Exp.

<sup>8</sup> Email dated 13 December 2022 at 12:12.

<sup>9</sup> Email dated 13 December 2022 at 14:58.

<sup>10</sup> Prosecution response to Defence Request to introduce into evidence the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules.

<sup>11</sup> See ICC-01/12-01/18-T-212-CONF-EXP-ENG.

## II. Analysis

### A. Extension concerning D-0231

9. The Chamber notes that the Defence seeks a two-week extension solely for the purpose of re-confirming the contents of the statement with D-0231, as the sound quality of the initial recording obtained was extremely poor. Having considered the submissions made, the Chamber is satisfied that the extension sought is due to reasons outside the Defence's control, within the meaning of Regulation 35(2) of the Regulations. The Chamber is also mindful that 29 December 2022 falls within the judicial recess and considers it more appropriate to grant an extension until **Wednesday, 11 January 2023**.
10. Noting that the Prosecution has already made submissions on the merits in the D-0231 Response and that the prior recorded testimony of D-0231 is already available to the parties,<sup>12</sup> the Chamber decides that any response to the Defence's request for the introduction into evidence of D-0231's prior recorded testimony should be filed by **Monday, 16 January 2023**.
11. As previously instructed, the Chamber expects the Defence to proceed with the taking of D-0231's Rule 68(2)(b)(ii) declaration without waiting for the Chamber's decision on the introduction into evidence of his prior recorded testimony.<sup>13</sup>

### B. The Rule 68(2)(b)(ii) declarations

12. The Chamber notes that the Defence requests an extension of time to obtain accompanying declarations pursuant to Rule 68(2)(b)(ii) and submits that it is 'reasonably confident that with more time (and the potential use of remote certifications), it will be able to obtain certifications.'<sup>14</sup>
13. At the outset, the Chamber recalls that it has previously outlined the general principles guiding the taking of the accompanying declarations pursuant to Rule 68(2)(b)(ii) of the Rules as follows:

---

<sup>12</sup> ICC-01/12-01/18-2441-Conf-AnxA.

<sup>13</sup> See email dated 16 November 2022 at 16:21.

<sup>14</sup> Request, ICC-01/12-01/18-2440-Conf-Red, para. 28.

The Chamber reiterates that it will be vigilant in ensuring that the certifications are in compliance with the legal requirements essential to ensure the accuracy and reliability of the evidence. At the same time the Chamber recognizes that flexibility in the process for gathering the certifications is necessary in the circumstances. However, the overarching principle is that the process must be reasonable taking into account the circumstances of the witness, the logistics, including the timeframes and resource requirements, the reliability of the process with reference to the applicable certification criteria and security for all concerned including the witnesses, court staff and the Defence team. As was clearly indicated at the meeting by the Single Judge, having weighed these considerations the Chamber has determined that certifications to be carried out in [REDACTED] will be at [REDACTED]. While the Chamber takes into consideration the points raised by the Defence, some of which were already canvassed at the meeting, the decision on this point remains unchanged. In striking a reasonable balance, not all preferences of a witness can be acceded to.<sup>15</sup>

14. While determining that in-person certifications [REDACTED] are to be carried out at the [REDACTED], the Chamber has not only supported, but encouraged the use of AVL, including during the Prosecution's presentation of evidence, to facilitate the taking of Rule 68(2)(b)(ii) declarations in a cost-effective manner.<sup>16</sup> Accordingly, provided that they are in line with the principles outlined above, the Chamber considers that remote certifications may and should be used by the calling party.<sup>17</sup>
15. The possible options for remote certifications have been discussed in detail during the status conference. Particularly with respect to the Defence's proposal to conduct remote certifications from [REDACTED], the Chamber notes the Registry's position that the suggested remote certification might be a better option from the view point of witness security.<sup>18</sup> Provided that the Registry remains satisfied with the security aspect of the proposal and that the technical arrangements are such that would allow the certifying officer to comply with the requirements under Rule 68(2)(b)(iii) of the Rules, the Chamber considers that the proposal submitted by the Defence for the remote certification constitutes a

---

<sup>15</sup> Email dated 16 November 2022 at 16:21. *See also* ICC-01/12-01/18-T-212-CONF-EXP-ENG RT, pp. 3-4.

<sup>16</sup> ICC-01/12-01/18-T-212-CONF-EXP-ENG RT, p. 16.

<sup>17</sup> *See* ICC-01/12-01/18-T-212-CONF-EXP-ENG RT, p. 16. As indicated by the Single Judge, the Chamber considers that remote certification refers to 'a process whereby through the use of technology certification can be completed as it would be in the case of in-person process simply without the physical presence in the same place'. Accordingly, this should entail a visual two-way interaction that would allow the certifying officer to take the declaration in line with the requirements under Rule 68(2)(b)(iii) of the Rules.

<sup>18</sup> ICC-01/12-01/18-T-212-CONF-EXP-ENG RT, p. 21.

reasonable option for the taking of Rule 68(2)(b) declarations from [REDACTED]. In the same vein, as indicated by the Single Judge,<sup>19</sup> the Chamber also considers that the Defence's proposal with respect to D-0219, whereby D-0219 will give the Rule 68(2)(b)(ii) declaration remotely [REDACTED], is an acceptable solution.

16. The Chamber also considers that the Defence must put in place a contingency plan, and welcomes the Defence's assurance that it has already [REDACTED], as a contingency plan, on 16 January 2023. The Chamber recognises that the planning for the taking of these declarations have required close cooperation between the Defence and the Registry and encourages the continuous good faith efforts, both on the part of the Defence and the relevant sections of the Registry. In this regard, the Chamber urges the Registry to continue engaging with the Defence with a view to providing all reasonable assistance to the Defence, particularly where the latter goes on mission accepting responsibility.<sup>20</sup> While it is primarily for the calling party, with the assistance of the Registry, to obtain Rule 68(2)(b)(ii) declarations, the Chamber remains available should there be procedural issues requiring its intervention.<sup>21</sup>
17. Having duly considered all these parameters as well as the Defence's submissions with respect to all of the witnesses subject to the Request, and the views of the Registry, the Chamber decides that any outstanding accompanying declaration pursuant to Rule 68(2)(b)(ii) of the Rules must be **filed by Monday, 23 January 2023**.
18. The Chamber notes the Defence's indication that it may submit requests pursuant to Rule 68(2)(c) of the Rules for some of the witnesses whose Rule 68(2)(b)(ii) declarations are yet to be taken. The Chamber decides that any such request should be submitted by **Monday, 16 January 2023** at the latest. Further, any such

---

<sup>19</sup> ICC-01/12-01/18-T-212-CONF-EXP-ENG RT, p. 25.

<sup>20</sup> See ICC-01/12-01/18-T-212-CONF-EXP-ENG RT, pp. 12-14.

<sup>21</sup> The Chamber observes in this regard that the Request mentions that '[o]n Tuesday, 29 November, the Defence brought [an issue related to the payment of costs] to the Trial Chamber to try to obtain a remedy, but received no response.' Request, ICC-01/12-01/18-2440-Conf-Red, para. 23. The Chamber notes for the record that it has received no such request from the Defence.

request must be sufficiently motivated, in line with the requirements of the provision as set out below in section II-D of the present decision.

### **C. Extension concerning D-0008 and D-0539**

19. In the Request, the Defence also requests a seven-day extension to (i) establish contact with D-0539; and (ii) obtain D-0008's consent to participate in the taking of a Rule 68(2)(b)(ii) declaration. In light of the Chamber's conclusion in section II-B above, granting an extension for obtaining Rule 68(2)(b)(ii) declarations, until 23 January 2023, and for the filing of Rule 68(2)(c) requests, until 16 January 2023, the Chamber considers that the requests for seven-day extensions concerning D-0008 and D-0539 are moot.

### **D. Rule 68(2)(c) Request for D-0146 and D-0002<sup>22</sup>**

20. Pursuant to Rule 68(2)(c) of the Rules, and as set out in its prior decisions,<sup>23</sup> 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 56 of the Statute could not have been anticipated; and (iii) the prior recorded testimony has sufficient indicia of reliability. 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.

#### *1. Whether the witnesses are unavailable to testify orally*

21. At the outset, the Chamber considers it useful to address the concept of unavailability within the meaning of Rule 68(2)(c) of the Rules. Under the

---

<sup>22</sup> While the relief sought section of the Request seeks authorisation to introduce D-0002 and D-0539's prior recorded testimony pursuant to Rule 68(2)(c) of the Request, the Chamber has understood from the main body of the Request that the Defence is in fact requesting an extension of time with respect to D-0539, before proceeding with a Rule 68(2)(c) Request. The Chamber has also understood from the main body of the Request that the Defence is also requesting the Chamber's authorisation to introduce D-0146's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules.

<sup>23</sup> Decision on the introduction into evidence of P-0570's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 13 July 2021, ICC-01/12-01/18-1588-Red, paras 8-11; 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, para. 6.



provision, a witness may be unavailable, *inter alia*, due to ‘obstacles that cannot be overcome with reasonable diligence’. This is in contrast with Rule 92 *quater* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, which limits the use of the provision to a person who ‘has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally’. The report of the ICC Assembly of States Parties’ Working Group on Lessons Learnt (the ‘WGLL Report’) indeed states that the current text was preferred in order to cover other situations that may arise, in particular where it is not possible to secure or to reach a witness, although that witness could, with reasonable diligence, be traced, such as those in detention.<sup>24</sup> The WGLL Report also explains that the expression ‘insurmountable obstacles’ was not adopted due to concerns that it may import too high a standard into Rule 68(2)(c) of the Rules.<sup>25</sup> Accordingly, the Chamber agrees with Trial Chamber VII that ‘the term “unavailable” in Rule 68(2)(c) of the Rules must be interpreted broadly’,<sup>26</sup> in the sense that the provision must be interpreted to cover a broad range of situations that may arise in the Court’s work as a permanent institution, including those relating to physical or mental conditions which render a witness unavailable to testify.<sup>27</sup>

22. Nonetheless, the Chamber underscores that Rule 68(2)(c) of the Rules must also be construed in light of the other provisions of the Statute and Rules, most notably the other sub-provisions under Rule 68(2). It is particularly worth noting that, unlike Rule 68(2)(b) of the Rules, Rule 68(2)(c) does not require the submission of an accompanying declaration; nor does it bar the introduction of prior recorded testimony going to the acts and conduct of the accused. Such differences reflect the fact that the two sub-provisions deal with different sets of witnesses: while sub-rule (c) deals with ‘unavailable’ witnesses, which places an additional burden on the calling party, sub-rule (b) deals with witnesses who may be called to testify

---

<sup>24</sup> Working group on lessons learnt, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), ICC-ASP/12/37/Add.1 Annex II.A, para. 39.

<sup>25</sup> WGLL Report, ICC-ASP/12/37/Add.1 Annex II.A, para. 39.

<sup>26</sup> Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on ‘Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence’, 12 November 2015, ICC-01/05-01/13-1481-Red-Corr, para. 16.

<sup>27</sup> WGLL Report, ICC-ASP/12/37/Add.1 Annex II.A, para. 39.

but whom the calling party elects not to call to testify *viva voce* due to the nature of their testimony.<sup>28</sup> It follows that the unavailability requirement must be interpreted in a manner that would properly reflect the different standards contained in the two sub-rules and that would not reduce Rule 68(2)(c) to a loophole to circumvent the procedural requirements under Rule 68(2)(b) of the Rules.

23. The Chamber also underscores that a witness's simple unwillingness to testify, or refusal to provide the declaration required under Rule 68(2)(b)(ii) of the Rules, is not sufficient to conclude that said witness is 'unavailable' within the meaning of Rule 68(2)(c) of the Rules.<sup>29</sup>
24. In light of the above, the Chamber is unable to adopt the interpretation advanced by the Defence, that witnesses with respect to whom the calling party 'has exhausted all available avenues to obtain the certifications within the time allocated by the Chamber and through the mechanisms that were available' would *ipso facto* fall within the scope of Rule 68(2)(c) of the Rules.<sup>30</sup> While reasons hampering the acquisition of the accompanying declaration under Rule 68(2)(b)(ii) of the Rules may indeed, depending on the specific circumstances, be of relevance in assessing whether the requirements under Rule 68(2)(c) are met, the Chamber is of the view that the inability to obtain said declaration cannot in and of itself be sufficient to demonstrate unavailability and justify the conversion of Rule 68(2)(b) witnesses into Rule 68(2)(c) witnesses.
25. Turning to D-0146, the Defence submits that it has exhausted all measures to obtain the certification, as D-0146 is unwilling to participate in the certification process unless it occurs in Europe or [REDACTED].<sup>31</sup> The Defence argues that the Chamber should take into account the limited nature of D-0146's evidence

---

<sup>28</sup> WGLL Report, ICC-ASP/12/37/Add.1 Annex II.A, para. 40.

<sup>29</sup> See Decision on the introduction into evidence of P-0130's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, 21 February 2022, ICC-01/12-01/18-2124-Conf, para. 12. See also Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039, 19 May 2016, ICC-01/04-02/06-1325, para. 9.

<sup>30</sup> Request, ICC-01/12-01/18-2440-Conf-Red, paras 18-20.

<sup>31</sup> Request, ICC-01/12-01/18-2440-Conf-Exp, para. 42.

and the fact that he resides in a non-State party in concluding that Rule 68(2)(c) of the Rules applies in his case.<sup>32</sup>

26. The Chamber is unconvinced that D-0146 is unavailable, within the meaning of Rule 68(2)(c) of the Rules. The Chamber notes that the witness has been offered multiple options for the taking of his Rule 68(2)(b)(ii) declaration,<sup>33</sup> but nonetheless continues to insist on having the declaration taken in other countries he prefers. As recalled above, the Chamber does not accept that such preferences of a witness amount to the witness being unavailable; nor does it consider D-0146's assertion that travelling to certain countries 'could negatively impact his future travel prospects' as amounting to an obstacle that cannot be overcome with reasonable diligence. Further, the Chamber notes that both the Registry<sup>34</sup> and the Prosecution<sup>35</sup> have assured that they stand ready to provide further technical assistance for the purpose of obtaining D-0146's Rule 68(2)(b)(ii) declaration. In light of the above, the Chamber rejects the introduction into evidence of D-0146's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules. The present determination is without prejudice to the Defence's subsequent efforts to obtain D-0146's accompanying declaration pursuant to Rule 68(2)(b)(ii) of the Rules.
27. With respect to D-0002, the Defence recalls that it met with D-0002, via D-0950, in December 2019 but that the witness subsequently left Bamako and D-0950 has recently confirmed that he has no means to contact D-0002.<sup>36</sup> The Defence submits that, given D-0002's location, there also does not appear to be any reasonable prospect of obtaining a certification without exposing D-0002 or Defence resource persons to a significant and disproportionate level of risk.<sup>37</sup>
28. The Prosecution submits that it is difficult to assess the veracity of the Defence's submissions, due to the redactions applied, but observes that there is no indication

---

<sup>32</sup> Request, ICC-01/12-01/18-2440-Conf-Red, para. 42.

<sup>33</sup> See ICC-01/12-01/18-T-212-CONF-EXP-ENG RT, pp. 26-27.

<sup>34</sup> ICC-01/12-01/18-T-212-CONF-EXP-ENG RT, p. 27.

<sup>35</sup> Response, ICC-01/12-01/18-2442-Conf, para. 14.

<sup>36</sup> Request, ICC-01/12-01/18-2440-Conf-Red, para. 51.

<sup>37</sup> Request, ICC-01/12-01/18-2440-Conf-Red, para. 53.

that the Defence has explored any means, other than through D-0950, to contact D-0002.<sup>38</sup>

29. The Chamber notes that D-0950, through whom the Defence had previously contacted D-0002, indicated that he ‘had no solutions for establishing contact given the insecurity in the area’.<sup>39</sup> In assessing the particular circumstances of D-0002, the Chamber has placed great weight on the fact that D-0002 is presumed to be in [REDACTED] – an area of very high instability near [REDACTED].<sup>40</sup> While the Chamber has indeed not been presented with information as to whether the Defence has attempted to contact D-0002 by means other than through D-0950, the Chamber infers from the high level of insecurity in the area that any such attempts would be futile and / or pose significant risks to the security of persons associated with the Defence. The Chamber also observes that even if D-0002 could be reached in the following months, the insecurity in the area presents significant challenges for putting in place logistical arrangements for D-0002 to testify in a reasonable time frame that would not unduly delay the present trial proceedings. Accordingly, the Chamber is satisfied, on the basis of the information presented, that D-0002 is unavailable, within the meaning of Rule 68(2)(c) of the Rules.

*2. Whether Article 56 measures could not be anticipated*

30. The Defence does not advance specific submissions on this requirement with respect to D-0002. The Prosecution, for its part, submits that the Defence failed to apply for Article 56 measures because of its own negligence.<sup>41</sup> The Prosecution contends that, had the Defence properly followed up with D-0002 after the initial contact, it would have been in a position to take appropriate measures for the preservation of his evidence.<sup>42</sup>

---

<sup>38</sup> Response, ICC-01/12-01/18-2442-Conf, para. 9.

<sup>39</sup> Request, ICC-01/12-01/18-2440-Conf-Red, para. 51.

<sup>40</sup> Request, ICC-01/12-01/18-2440-Conf-Exp, para. 51.

<sup>41</sup> Response, ICC-01/12-01/18-2442-Conf, para. 7.

<sup>42</sup> Response, ICC-01/12-01/18-2442-Conf, para. 8.

31. As set out in its previous decision, the Chamber considers that the *raison d'être* of this requirement is to avoid introducing evidence through Rule 68(2)(c) of the Rules when measures under Article 56 of the Statute would have been a viable alternative at an earlier stage.<sup>43</sup> In this regard, the Chamber notes that while Article 56 of the Statute is addressed to the Prosecution, measures under the provision are equally available to the Defence.<sup>44</sup> However, such measures are to be construed more as a 'right' of the accused, rather than an 'obligation' to resort to them.<sup>45</sup> As explained by Trial Chamber VI, 'in the context of a criminal trial, in which the Prosecution is tasked with bringing incriminating evidence against the accused, the obligation to preserve such evidence when presented with a "unique investigative opportunity" to do so, and where there is a danger that such evidence may be later unavailable for the purposes of trial, cannot be said to apply with equal potency to the Defence as to the Prosecution'.<sup>46</sup> The Chamber considers that this difference in the parties' obligations must inform the interpretation and application of the requirement under Rule 68(2)(c) of the Rules.
32. Turning to the case at hand, the Chamber is not persuaded that the information before it demonstrates that the Defence was aware in 2019 that it would lose contact with D-0002 during its presentation of evidence. Given the difference in the parties' obligations to utilise Article 56 of the Statute, as outlined above, the Chamber is not convinced that the Defence should have resorted to Article 56 of the Statute after their initial interview with D-0002. Furthermore, noting the security situation in the area, the Chamber is also of the view that the measures envisaged under Article 56 of the Statute would have very likely been ineffective, after the departure of D-0002 from Bamako. For these reasons, the Chamber is satisfied that this requirement under Rule 68(2)(c)(i) of the Rules is met in the present circumstances.

---

<sup>43</sup> Decision on the introduction into evidence of the prior recorded testimony of P 0605 and P-0582 pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18-2114-Conf, para. 31.

<sup>44</sup> Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on Defence requests related to the continuation of the confirmation proceedings, 14 February 2014, ICC-02/11-01/11-619, para. 37.

<sup>45</sup> Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on certain requests related to the admission of the prior recorded testimony of Witness D-0080, 22 February 2018, ICC-01/04-02/06-2242-Red (the '*Ntaganda* Rule 68(2)(c) Decision'), para. 36.

<sup>46</sup> *Ntaganda* Rule 68(2)(c) Decision, ICC-01/04-02/06-2242-Red, para. 36.

### 3. *Other factors under the provision*

33. In assessing the Rule 68(2)(b)(i) factors in the D-0002 Decision, the Chamber found, *inter alia*, that D-0002's prior recorded testimony bears sufficient indicia of reliability and that it does not go to the acts and conduct of the accused.<sup>47</sup> The Chamber sees no reason to depart from this conclusion in the present decision. The Chamber is also unable to discern any other basis to conclude that the introduction of D-0002's prior recorded testimony into evidence pursuant to Rule 68(2)(c) of the Rules would be unduly prejudicial.
34. Accordingly, the Chamber authorises the introduction of D-0002's prior recorded testimony into evidence pursuant to Rule 68(2)(c) of the Rules.

#### **E. Defence withdrawal of witnesses**

35. The Chamber notes that on 12 December 2022, the Defence formally informed the Chamber of its intention to withdraw all remaining witnesses not currently subject to Rule 68(2) requests.<sup>48</sup> The Chamber takes note of the reasons cited therein and confirms that these witnesses are formally withdrawn.

---

<sup>47</sup> D-0002 Decision, ICC-01/12-01/18-2388-Conf, para. 18.

<sup>48</sup> Application to withdraw the evidence of Defence witnesses D-0147, D-0616, D-0530, D-0528 and P-0140, ICC-01/12-01/18-2436-Conf-Exp.

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

**GRANTS** the D-0231 Request;

**DECIDES** that any request for the introduction into evidence of D-0231's prior recorded testimony must be submitted by Wednesday, 11 January 2023, and responses thereto by Monday, 16 January 2023;

**PARTIALLY GRANTS** the Request;

**DECIDES** that any remaining accompanying declarations, as required under Rule 68(2)(b)(ii) of the Rules, must be filed by Monday, 23 January 2023;

**DECIDES** that any request under Rule 68(2)(c) of the Rules must be submitted by Monday, 16 January 2023;

**AUTHORISES** the introduction into evidence of the prior recorded testimony of D-0002 pursuant to Rule 68(2)(c) of the Rules;

**REJECTS** the introduction into evidence of the prior recorded testimony of D-0146 pursuant to Rule 68(2)(c) of the Rules; and

**TAKES NOTE** of the Defence's withdrawal of D-0147, D-0616, D-0530, D-0528 and D-0140.

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