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No. **ICC-01/12-01/18**
Date: **30 January 2023**

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 introduction into evidence of the prior recorded testimony of D-0008, D-0611 and D-0627 pursuant to Rule 68(2)(c) of the Rules and the Defence's request for reconsideration of the decision rejecting the introduction into evidence of D-0146's prior recorded testimony 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**

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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), (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 introduction into evidence of the prior recorded testimony of D-0008, D-0611 and D-0627 pursuant to Rule 68(2)(c) of the Rules and the Defence’s request for reconsideration of the decision rejecting the introduction into evidence of D-0146’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules’.

I. Procedural history

1. On 22 July 2022, the Chamber authorised the introduction into evidence of the prior recorded testimony of D-0611 pursuant to Rule 68(2)(b) of the Rules (the ‘D-0611 Decision’).¹
2. On 17 October 2022, the Chamber authorised the introduction into evidence of the prior recorded testimony of D-0146 and D-0627 pursuant to Rule 68(2)(b) of the Rules (the ‘D-0627 Decision’).²
3. On 26 October 2022, the Chamber authorised the introduction into evidence of the prior recorded testimony of D-0008 pursuant to Rule 68(2)(b) of the Rules.³
4. On 16 December 2022, the Chamber issued a decision, *inter alia*, setting 16 January 2023 as the deadline for any request pursuant to Rule 68(2)(c) of the Rules and rejecting the Defence’s request for the introduction into evidence of

¹ 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, ICC-01/12-01/18-2288.

² 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.

³ 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-01/12-01/18-2388.

the prior recorded testimony of D-0146 pursuant to Rule 68(2)(c) of the Rules (the ‘Impugned Decision’).⁴

5. On 16 January 2023, the Defence filed a request for the introduction into evidence of the prior recorded testimony of D-0008, D-0611 and D-0627 pursuant to Rule 68(2)(c) of the Rules and reconsideration of the Impugned Decision to the extent that it relates to D-0146 (the ‘Request’).⁵
6. On 23 January 2023, in accordance with the time limit set by the Single Judge,⁶ the Prosecution responded to the Request, submitting that it should be rejected in full (the ‘Response’).⁷
7. The parties submissions are discussed below to the extent necessary.

II. Analysis

A. Rule 68(2)(c) request

8. Pursuant to Rule 68(2)(c) of the Rules, and as set out in its prior decisions,⁸ 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

⁴ 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, ICC-01/12-01/18-2445-Conf-Exp.

⁵ Defence Rule 68(2)(c) application for Witnesses D-0008, D-0146, D-0611 and D-0627, ICC-01/12-01/18-2452-Conf-Exp.

⁶ Email dated 16 January 2023 at 17:06.

⁷ Prosecution response to “Defence Rule 68(2)(c) application for Witnesses D-0008, D-0146, D-0611 and D-0627”, ICC-01/12-01/18-2454-Conf.

⁸ Impugned Decision, ICC-01/12-01/18-2445-Red, paras 9-13; 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.

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. D-0611 and D-0627

9. The Defence justifies the Request with respect to D-0611 and D-0627 on the basis that it is unable to reach both witnesses given the security situation in the areas in which they reside.⁹ The Defence refers in this regard to the negative security assessment conducted by the Registry and the Chamber's determination with respect to D-0002.¹⁰ Noting that the statements of those witnesses were taken when the Registry had approved funding of Defence missions to the areas in which D-0611 and D-0627 reside, the Defence submits that the necessity for measures under Article 56 of the Statute could not have been anticipated.¹¹
10. While noting that the significant redactions in the confidential redacted version of the Request render it impossible for the Prosecution to assess the Defence's allegations, the Prosecution argues that the Defence fails to explain why it could not organise the certification for both witnesses at an earlier stage, when they could still be contacted.¹² Further, the Prosecution avers that the Defence should have taken measures under Article 56 of the Statute due to the precarious security situation in Mali and the difficulties in contacting witnesses residing in Timbuktu.¹³
11. Having considered the specific circumstances of the two witnesses as a whole, the Chamber is satisfied that both witnesses are unavailable to testify *viva voce*. As noted in the Request and discussed further on an *ex parte* basis,¹⁴ the Defence has no means in its possession to contact D-0611 and D-0627 without sending its resource person on mission in order to physically establish contact. The Chamber also notes that the Defence has been actively looking into other means of contacting the witness, without the need to the resource person to travel to their

⁹ Request, ICC-01/12-01/18-2452-Conf-Red, paras 6-7.

¹⁰ Request, ICC-01/12-01/18-2452-Conf-Red, paras 8-11.

¹¹ Request, ICC-01/12-01/18-2452-Conf-Red, para. 16.

¹² Response, ICC-01/12-01/18-2454-Conf, paras 23-27.

¹³ Response, ICC-01/12-01/18-2454-Conf, para. 28.

¹⁴ ICC-01/12-01/18-T-212-CONF-EXP-ENG ET, p. 8.

areas, but has not succeeded.¹⁵ It accordingly appears to the Chamber that, if both witnesses were to testify *viva voce*, the Defence would need to first conduct a mission in order to inform the witnesses of the relevant logistical arrangements. In this regard, it is of direct relevance that the Registrar has determined that the relevant areas are unsecure and no mission can be facilitated.¹⁶ On the basis of this conclusion of the Registrar, it would appear that it is impossible for the Defence to establish contact with both witnesses, without sending its resource person to the relevant areas in direct contravention of the Registrar's security assessment. Accordingly, and while the Chamber accepts that the security assessment may be subject to change in the future, the Chamber concludes that there are significant challenges which cannot be overcome for putting in place logistical arrangements for D-0611 and D-0627 to testify in a reasonable time frame that would not unduly delay the present trial proceedings. For these reasons, the Chamber is satisfied that D-0611 and D-0627 are unavailable, within the meaning of Rule 68(2)(c) of the Rules.

12. Turning to whether the necessity of measures under Article 56 of the Statute could not have been anticipated, the Chamber recalls its previous determination that the obligation to preserve 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.¹⁷ The Chamber also rejects the Prosecution's argument that the security situation in Mali or Timbuktu was in and of itself sufficient to obligate the Defence to take Article 56 measures. Against this background, the Chamber finds the Defence's aforementioned explanation acceptable and considers that this requirement is satisfied with respect to D-0611 and D-0627.

¹⁵ ICC-01/12-01/18-T-212-CONF-EXP-ENG ET, p. 9.

¹⁶ See Decision on Defence request for judicial review of the Registrar's decision concerning expenses incurred for the purpose of taking Rule 68(2)(b)(ii) declarations and related matters, email dated 13 January 2023 at 22:23 (confidential redacted version sent to the Prosecution and LRVs on 18 January 2023 at 09:45).

¹⁷ Impugned Decision, ICC-01/12-01/18-2445-Red, para. 31.

13. The Chamber has previously determined that the prior recorded testimony of both witnesses bear sufficient indicia of reliability and that they do not go to the acts and conduct of the accused.¹⁸ In relation to D-0611, the Chamber acknowledges that while it had taken into account the procedure under Rule 68(2)(b)(iii) in its previous decision, this would no longer apply if D-0611's evidence were to be introduced pursuant to Rule 68(2)(c) of the Rules. Nonetheless, having considered the other factors listed in the D-0611 Decision,¹⁹ the Chamber is satisfied that the prior recorded testimony bears sufficient indicia of reliability of a formal nature, for the purpose of the present determination.

2. *D-0008*

14. The Defence submits that D-0008 is unwilling to participate in the certification process, as required under Rule 68(2)(b) of the Rules, due to his position as [REDACTED] and presumably as [REDACTED].²⁰ In the Defence's view, D-0008 [REDACTED].²¹ The Defence accordingly submits that D-0008 is unavailable in the sense that his participation in the certification process cannot be secured for reasons beyond the Defence's control.²²
15. The Prosecution opposes the Request. Citing the previous determination of the Chamber, it argues that a witness's simple refusal to provide the declaration required under Rule 68(2)(b)(ii) of the Rules is insufficient to conclude that he is unavailable within the meaning of Rule 68(2)(c) of the Rules.²³ Based on the current status of D-0008, the Prosecution also notes that the witness is clearly reachable.²⁴ Finally, the Prosecution disputes the Defence's position that D-0008 [REDACTED].²⁵

¹⁸ D-0611 Decision, ICC-01/12-01/18-2288, paras 12, 15-16; D-0627 Decision ICC-01/12-01/18-2378, paras 6, 11.

¹⁹ D-0611 Decision, ICC-01/12-01/18-2288, paras 15-16.

²⁰ Request, ICC-01/12-01/18-2452-Conf-Red, paras 19-20.

²¹ Request, ICC-01/12-01/18-2452-Conf-Red, para. 21.

²² Request, ICC-01/12-01/18-2452-Conf-Red, para. 21.

²³ Response, ICC-01/12-01/18-2454-Conf, paras 17, 19.

²⁴ Response, ICC-01/12-01/18-2454-Conf, para. 18.

²⁵ Response, ICC-01/12-01/18-2454-Conf, para. 20.

16. At the outset, the Chamber finds useful to recall its previous determination that ‘the inability to obtain [a declaration under Rule 68(2)(b)(ii) of the Rules] 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.’²⁶
17. In the same vein, the Chamber considers that the Defence being unable to secure D-0008’s participation in the certification process is not a sufficient basis to conclude that the witness is unavailable. The Chamber observes that, according to the Request, the alleged inability to obtain a declaration is based on D-0008’s lack of understanding of the certification process and/or his unwillingness to participate in the certification procedure. However, neither such reasons necessitates the conclusion that D-0008 is ‘unavailable to testify’, as required by the provision. Indeed, as noted by the Prosecution, given that the witness can be contacted by the Defence and resides in an accessible area within Mali, the Chamber fails to see how D-0008 can be considered unavailable. As the Chamber has received no indication as to the measures taken by the Defence to compel D-0008 to testify, the Chamber considers it unnecessary to address the remainder of the arguments concerning D-0008’s [REDACTED]. Accordingly, the Chamber rejects the Defence’s request to introduce into evidence the prior recorded testimony of D-0008 pursuant to Rule 68(2)(c) of the Rules.

B. Request for reconsideration (D-0146)

18. The Defence requests reconsideration of the Impugned Decision on the basis that D-0146’s request to have the certification process conducted in Europe or [REDACTED] cannot be considered as a mere preference but is rather a consideration based on his professional activities and travel prospects.²⁷
19. The Prosecution opposes this part of the Request arguing that it constitutes a mere repetition of arguments already rejected by the Chamber.²⁸ The Prosecution also

²⁶ Impugned Decision, ICC-01/12-01/18-2445-Red, para. 24.

²⁷ Request, ICC-01/12-01/18-2452-Conf-Red, para. 33.

²⁸ Response, ICC-01/12-01/18-2454-Conf, paras 10-12.

reiterates that insufficient attempts have been made to assist D-0146 in conducting a remote certification.²⁹

20. The Chamber recalls that it has the power to exceptionally reconsider its decisions if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.³⁰ New facts and arguments arising since the decision was rendered may be relevant to this assessment.³¹ Nonetheless, a request for reconsideration, being an exceptional remedy, cannot be used as an attempt to re-litigate points which have already been made before the Chamber.³²
21. The Chamber notes, at the outset, that a large part of the Defence's arguments, including those relating to the alleged repercussion on the witness's future travel prospects, were already considered and rejected by the Chamber in issuing the Impugned Decision.³³ In the Chamber's view, save for expressing its disagreement with the Chamber's conclusion, the Defence fails to demonstrate why reconsideration is warranted on the basis of these arguments. Absent compelling reasons to do otherwise, the Chamber considers it unnecessary to revisit them in the present decision.
22. It is noted that the Defence also argues that there appear to be other reasons related to D-0146's current position that may explain his refusal to participate in a process in [REDACTED].³⁴ Given that the Request merely makes reference to D-0146's [REDACTED], it is impossible for the Chamber to assess the veracity of the Defence's assertion that D-0146's current position is one that [REDACTED]. In any event, even if the Chamber were to accept this argument, the Chamber considers that this does not sufficiently explain why D-0146 cannot visit the neighbouring countries for the limited purpose of obtaining a visa to travel to the Netherlands.

²⁹ Response, ICC-01/12-01/18-2454-Conf, para. 14.

³⁰ 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, para. 11.

³¹ 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, para. 11.

³² Decision on Defence request for reconsideration of Decision on requests related to the submission into evidence of Mr Al Hassan's statements, 23 November 2022, ICC-01/12-01/18-2414, para. 7.

³³ See Request, ICC-01/12-01/18-2452-Conf-Red, paras 26-32.

³⁴ Request, ICC-01/12-01/18-2452-Conf-Red, para. 33.

23. For these reasons, the Chamber finds that the Defence failed to demonstrate that reconsideration of the Impugned Decision is warranted.
24. The Defence requests, in the alternative, ‘leave pursuant to Regulation 35(2) to tender a chain of custody affidavit from the Defence concerning the circumstances in which the exhibits were collected and the chain of custody form created.’³⁵ Considering that no such form is presently available to the Chamber, it is impossible to assess whether the introduction into evidence of the said affidavit should be authorised or whether the requirements under Regulation 35 of the Regulations are met. The Chamber also notes that, save for its reference to Regulation 35 of the Regulations, the Request fails to sufficiently justify the late submission of the aforementioned affidavit or to cite the specific legal basis through which it seeks to tender the affidavit. The Chamber further recalls its determination in response to an *ex parte* request for clarification regarding this issue, notably that ‘irrespective of its label, any such document prepared for the purpose of proving facts related to the chain of custody of D-0146’s evidence in the present case would be testimonial in nature. In line with appellate jurisprudence, testimonial material may be introduced into evidence only through the exceptions stipulated in the legal framework of the Court, most notably Rule 68 of the Rules of Procedure and Evidence.’³⁶ Accordingly, the Chamber rejects this part of the Request.

³⁵ Request, ICC-01/12-01/18-2452-Conf-Red, para. 38.

³⁶ Email dated 20 January 2023 at 11:27.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PARTIALLY GRANTS the Request;

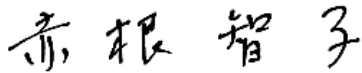
AUTHORISES the introduction into evidence of the prior recorded testimony of D-0611 and D-0627 pursuant to Rule 68(2)(c) of the Rules; and

REJECTS the remainder of the Request.

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, 30 January 2023

At The Hague, The Netherlands