

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/12-01/18  
Date: 2 February 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-0231 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**

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****Victims and Witnesses Unit**

Nigel Verrill

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

Registry Legal Office

**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’) and Rule 68(1) and (2)(b) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on the introduction into evidence of the prior recorded testimony of D-0231 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 16 September 2022, and as envisaged under Rule 74(8) of the Rules, the Office of the Prosecutor (the ‘Prosecution’) advised the Chamber that the testimony of D-0231 may raise issues with respect to self-incrimination (the ‘Rule 74 Request’).<sup>2</sup> The Defence indicated that it supports the provision of Rule 74 assurances.<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.<sup>4</sup>
4. On 16 December 2022, the Chamber granted an extension until 11 January 2023 for the finalisation of a Rule 68(2)(b) request for D-0231.<sup>5</sup>
5. On 23 January 2023, the Chamber granted a further extension until 23 January 2023 for the filing of a Rule 68(2)(b) request for D-0231.<sup>6</sup>

---

<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 16 September 2022 at 16:25.

<sup>3</sup> Email dated 21 September 2022 at 17:33.

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

<sup>5</sup> 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-Red, para. 9.

<sup>6</sup> Decision on Defence request for extension of time, ICC-01/12-01/18-2455, para. 22.

6. On the same date, the Defence filed a request seeking to introduce into evidence the prior recorded testimony of D-0231 (MLI-D28-0006-9149-R01) pursuant to Rule 68(2)(b) of the Rules (the ‘Request’).<sup>7</sup>
7. On 26 January 2023, the Prosecution filed its response to the Request (the ‘Response’).<sup>8</sup>

## II. Analysis

8. 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>9</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.

### *1. Acts and conduct of the accused*

9. In relation to the first prong of the test, both parties agree that the prior recorded testimony of D-0231 partly goes to the acts and conduct of the accused but that the remainder can be introduced excluding these references.<sup>10</sup> The Chamber finds that aspects of D-0231’s evidence does indeed touch upon ‘acts and conduct of the accused’ as previously defined,<sup>11</sup> particularly where the witness refers to the role Mr Al Hassan allegedly played within the group.<sup>12</sup> However, considering that these discrete references are not inseparable from the rest of the prior recorded

---

<sup>7</sup> Defence Rule 68(2)(b) application for Witness D-0231, ICC-01/12-01/18-2457-Conf.

<sup>8</sup> Prosecution response to “Defence Rule 68(2)(b) application for Witness D-0231”, ICC-01/12-01/18-2459-Conf.

<sup>9</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.

<sup>10</sup> Request, ICC-01/12-01/18-2457-Conf, para. 17; Response, paras 5-8.

<sup>11</sup> D-0511 Decision, ICC-01/12-01/18-2241, para. 8.

<sup>12</sup> MLI-D28-0006-9149-R01 at 9155-9156.

testimony, the Chamber will proceed to the discretionary factors under Rule 68(2)(b)(i) of the Rules.

## 2. *Discretionary factors under Rule 68(2)(b)(i) of the Rules*

10. The Defence submits that the testimony of D-0231 is ‘relevant and probative, and falls within the scope of acceptable Rule 68(2)(b) evidence’. After summarising the evidence of D-0231, the Defence explains that the testimony is cumulative and/or corroborative of other evidence on the case record.
11. The Prosecution submits that the prior recorded testimony of D-0231 should not be introduced. It avers that D-0231’s testimony goes to issues that are of significance and are materially in dispute and that introduction of the testimony would not serve the interests of justice.
12. The Chamber finds unmeritorious the Prosecution submission that the Request should be rejected as D-0231 must testify *viva voce*, notably on other facts described in the witness summary for D-0231 but which are not discussed in D-0231’s statement.<sup>13</sup> As reflected in the Chamber’s previous determination, the relevant consideration under Rule 68(2)(b) of the Rules is whether a testimony which was previously recorded may, in light of its content and significance to the case, be introduced in writing without it being tested in court.<sup>14</sup> The purpose of a determination under Rule 68(2)(b) of the Rules is not whether a person should be called to testify before the Chamber to elicit evidence not covered by the prior recorded testimony.<sup>15</sup> Indeed, ‘if the Chamber were to decide not to allow the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of

---

<sup>13</sup> Response, ICC-01/12-01/18-2459-Conf, para. 15.

<sup>14</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. 11 referring to Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red (the ‘Ongwen Decision’), paras 7, 47. See also Trial Chamber I, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Decision on the “Prosecution’s consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088”, 6 June 2017, ICC-02/11-01/15-950-Red (the ‘Gbagbo Decision’), para. 21.

<sup>15</sup> D-0534 Decision, ICC-01/12-01/18-2277, para. 11.

a certain witness [...], this would not result in an obligation on the part of the [calling party] to call that witness at trial, but only that the prior recorded testimony of that witness could not be relied upon in the proceedings.<sup>16</sup>

13. However, as noted by the Prosecution in the first part of the Response, the Chamber observes that D-0231 discusses a case of two siblings who had allegedly committed *zina*, which appears to refer to the case of [REDACTED] (the ‘Incident’), a charged incident under counts 1, 2, 3, 4, 5 and 6. In particular, D-0231 provides testimony on the manner in which a complaint was filed and the role [REDACTED] played in processing said complaint.<sup>17</sup> D-0231 also adds that the sentence in the case was not executed.<sup>18</sup> The Chamber considers that this relates to materially disputed facts, within the meaning of Rule 68(2)(b)(i) of the Rules.
14. In this context, it is useful to recall that references to victims of charged incidents do not *per se* bar the introduction into evidence of a prior recorded testimony pursuant to Rule 68(2)(b) of the Rules but may militate against introduction depending on the particular circumstances.<sup>19</sup> With respect to the Incident, the Chamber firstly notes that, similar to the case of P-0130, the alleged victims of the incident have not been called to testify and only a limited number of *viva voce* witnesses provided testimony on the Incident.<sup>20</sup> The Chamber also notes that, according to his prior recorded testimony, D-0231 was [REDACTED].<sup>21</sup> This necessarily increases the importance of D-0231’s related evidence.
15. Further, it is also relevant that the Chamber issued notice pursuant to Regulation 55(2) of the Regulations of the Court that the legal characterisation of the facts and circumstances in relation to the Incident may be subject to change to include

---

<sup>16</sup> *Onghwen* Decision, ICC-02/04-01/15-596-Red, para. 7 (n. 18); *Gbagbo* Decision, ICC-02/11-01/15-950-Red, para. 21.

<sup>17</sup> MLI-D28-0006-9149-R01 at 9154-9155.

<sup>18</sup> MLI-D28-0006-9149-R01 at 9155.

<sup>19</sup> 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 (the ‘P-0130 Decision’), para. 10.

<sup>20</sup> See P-0130 Decision, ICC-01/12-01/18-2124-Conf, para. 10.

<sup>21</sup> MLI-D28-0006-9149-R01 at 9155.

Mr Al Hassan's responsibility under Article 25(3)(a) of the Statute.<sup>22</sup> In reaching this conclusion, the Chamber determined, *inter alia*, that 'there is a possibility that ultimately the evidence could demonstrate that Mr Al Hassan's alleged participation in the flogging [in relation to the Incident] was of such a nature as to meet the constitutive elements of direct participation under Article 25(3)(a) of the Statute'.<sup>23</sup> Accordingly, by stating that the sentence in the case was not enforced, D-0231's evidence necessarily negates Mr Al Hassan's alleged participation and contribution with respect to the Incident. The Chamber considers that this reflects a significant increase in the degree to which the relevant issues are disputed.

16. In light of the fact that D-0231 touches upon materially disputed issues that are of significance, the Chamber considers that the introduction of his prior recorded testimony, at this stage of the proceedings, without having it tested in court, would be unduly prejudicial. The Chamber is also mindful of the findings of the Appeals Chamber that 'a trial chamber should take into account the exceptional nature of [Rule 68] as a whole in the interpretation and application of the individual criteria in rule 68 of the Rules' and that the Chamber's discretion under the provision must be exercised in light of its overarching duty to ensure fairness.<sup>24</sup> Accordingly, the Chamber considers that, in exercising its discretion under Rule 68(2)(b) of the Rules, the Request must be rejected.

---

<sup>22</sup> Second Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court, 20 September 2021, ICC-01/12-01/18-1739-Conf (the 'Regulation 55 Decision'), paras 27-41.

<sup>23</sup> Regulation 55 Decision, ICC-01/12-01/18-1739-Conf, para. 39.

<sup>24</sup> *Al Hassan* OA4 Judgment, ICC-01/12-01/18-2222, paras 80-81.

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

**REJECTS** the Request; and

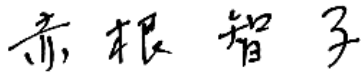
**DECLARES** the Rule 74 Request moot.

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 Thursday, 2 February 2023

At The Hague, The Netherlands