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No. ICC-01/12-01/18

Date: 18 May 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 Defence request for the introduction into evidence of the prior
recorded testimony of D-0512, D-0516 and D-0554 pursuant to Rule 68 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(2), 67(1) and 69(2) of the Rome Statute (the ‘Statute’) and Rule 68(1), (2)(b) and (3) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on Defence request for the introduction into evidence of the prior recorded testimony of D-0512, D-0516 and D-0554 pursuant to Rule 68 of the Rules’.

I. Procedural history

1. On 6 May 2020, the Chamber issued its directions on the conduct of proceedings, notably adopting a procedure for applications pursuant to Rule 68(3) of the Rules.¹
2. On 22 September 2021, the Chamber rendered a further decision on the conduct of proceedings, notably providing additional directions with regard to the Defence’s presentation of evidence.²
3. On 6 April 2022, the Single Judge held an *inter partes* status conference to assist in the preparation and efficient conduct of the Defence’s presentation of evidence.³
4. On 29 April 2022, the Defence filed a request seeking the introduction into evidence of the prior recorded testimony of D-0512, D-0516 and D-0554 pursuant to Rule 68 of the Rules (the ‘Request’ and the ‘Statements’, respectively).⁴
5. On 11 May 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Request (the ‘Response’).⁵

¹ ICC-01/12-01/18-789-AnxA, para. 63.

² Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence, ICC-01/12-01/18-1756, paras 7-22.

³ Transcript of hearing on 6 April 2022, ICC-01/12-01/18-T-171-CONF-ENG ET.

⁴ Defence application under Rule 68(3) to introduce Witnesses D-0554, D0516 and D-0512 statements into evidence and for examination of these Witnesses, ICC-01/12-01/18-2208-Conf-Exp (with one confidential annex; confidential redacted version filed on the same date.)

⁵ Prosecution response to “Defence application under Rule 68(3) to introduce Witness D-0554, D-0516 and D-0512 statements into evidence and for examination of these Witnesses” (ICC-01/12-01/18-2208-Conf-Red), ICC-01/12-01/18-2220-Conf-Corr (corrigendum filed on 12 May 2022).

6. On 16 May 2022, the Defence filed a request for leave to reply to the Response (the ‘Leave to Reply Request’).⁶

II. Applicable law

7. The Chamber incorporates by reference the applicable legal framework as set out in its earlier decisions on the introduction of prior recorded testimonies under Rule 68(3) of the Rules⁷ and the Directions on the conduct of proceedings.⁸ For the procedure under Rule 68(3) of the Rules, it is recalled that this provision allows the Chamber to authorise introduction of prior recorded testimony when: (i) the witness is present before the Chamber; (ii) the witness does not object to the introduction of his or her prior recorded testimony; and (iii) both parties and the Chamber have the opportunity to examine the witness.
8. In this respect, the Chamber reiterates that it expects the calling party to streamline its questioning considerably when introduction of the previously recorded testimony is allowed under Rule 68(3) of the Rules.⁹ This is particularly the case with Defence fact witnesses as, unlike the Prosecution, the statements sought to be introduced were obtained recently and it is accordingly expected that any supplementary questioning by the calling party be limited to the technical requirements under the provision and other discrete lines of questioning. In accordance with this principle, the Chamber sets below an appropriate amount of time for such examination by the Defence as well as, having considered the estimates received on 25 April 2022,¹⁰ the amount of time allotted to the Prosecution for its cross-examination of each proposed witness. This is without prejudice to the Chamber adjusting these time allocation during the course of

⁶ Defence Request for leave to reply to ‘Prosecution Responses to “First Defence Rule 68(2)(b) Application” and “Defence application under Rule 68(3) to introduce Witness D-0554, D-0516 and D-0512 statements into evidence and for examination of these Witnesses”’ (ICC-01/12-01/18-2216-Conf ; ICC-01/12-01/18-2220-Conf), ICC-01/12-01/18-2225-Conf.

⁷ Decision on Prosecution’s requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, 5 August 2020, ICC-01/12-01/18-987-Red, paras 6-18.

⁸ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 63-70.

⁹ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 65.

¹⁰ Email from the Prosecution dated 25 April 2022 at 22:29.

relevant testimony should, for example, difficulties arise relating to consecutive interpretation.

9. The Chamber also recalls that the decision of whether to introduce a prior recorded testimony pursuant to Rule 68(2)(b) of the Rules is a discretionary one, and the entire purpose of this provision is to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.¹¹ 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, in the second stage, 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.¹²

III. Analysis

10. The Chamber considers that it will not be assisted by additional submissions on the topics identified by the Defence. The Leave to Reply Request is accordingly rejected, to the extent that it relates to the Request adjudicated in the present decision.
11. As a preliminary matter, the Chamber notes that the Prosecution challenges the formal indicia of reliability of the Statements *inter alia* on the basis that they fail to comply with the requirements of Rule 111 of the Rules. The Prosecution notably avers that not all persons present during the interviews have signed the Statements and that the specific duration of the interview for each day is not stated.¹³

¹¹ Decision on the introduction into evidence of P-0524’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, 21 February 2022, ICC-01/12-01/18-2125-Red (the ‘P-0524 Decision’), para. 4; Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules, 26 March 2021, ICC-01/12-01/18-1402-Red2, para. 9; Decision on the introduction of P-0598’s evidence pursuant to Rule 68(2)(b) of the Rules, 16 October 2020, ICC-01/12-01/18-1111-Red, para. 7.

¹² 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, 81.

¹³ Response, ICC-01/12-01/18-2220-Conf-Corr, paras 8-12, 21-23, 35-36.

12. The Chamber is unconvinced by the arguments put forward by the Prosecution as it considers that the formal record of questioning requirements in Rule 111 of the Rules do not apply to the Defence.¹⁴ In this regard, the Chamber notes that this provision, just like Rule 112 of the Rules, regulates the collection of evidence by (or on behalf of) the Prosecution and is intrinsically linked with its specific disclosure obligations as well as the accused's fair trial rights.¹⁵ Instead, what is required is that the Defence submits evidence which constitutes a 'prior recorded testimony' within the meaning of Rule 68(1) of the Rules.¹⁶ In accordance with the settled jurisprudence of the Court, a statement can be considered a prior recorded testimony suitable for introduction into evidence if the person providing the statement understands that he or she is providing information which may be relied upon in the context of legal proceedings, i.e. when an individual is being questioned in the capacity as a witness in the context of or in anticipation of legal proceedings.¹⁷
13. The Chamber also notes that the Prosecution contends, with respect to D-0512 and D-0516, that the presence of intermediaries during the interviews contravenes

¹⁴ See Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision on Defence's Request for Postponement of Trial Commencement, 8 August 2016, ICC-01/12-01/15-152-Red, para. 15 (n. 18). See similarly Appeals Chamber, *The Prosecutor v. Jean Pierre Bemba Gombo et al.*, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, para. 547. Rather than supporting the proposition that Rule 68 statements must comply with Rule 111 of the Rules, the *Ruto* decision cited by the Prosecution merely notes that the notion of 'prior recorded testimony' within the meaning of Rule 68 of the Rules *extends* to statements taken pursuant to Rule 111 and 112 of the Rules. See Trial Chamber V(A), *The Prosecutor vs. William Samoei Ruto and Joshua Arap Sang*, Public Redacted Version of Corrigendum: Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Conf-Corr, para. 33 cited in Response, ICC-01/12-01/18-2220-Conf-Corr, para. 9.

¹⁵ See similarly Appeals Chamber, *The Prosecutor vs. Abdallah Banda Abakaer Nourain*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", 21 February 2012, ICC-02/05-03/09-295, para. 27.

¹⁶ Under this provision, evidence in the form of 'previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony' may be introduced.

¹⁷ Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaïssona Defence Motion to Limit the Scope of P-2969's Evidence, 10 March 2021, ICC-01/14-01/18-907-Red, para. 11; 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, para. 9.

the Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries (the ‘Guideline’).¹⁸ The Chamber trusts that, pursuant *inter alia* to Article 7(4) of the Code of Professional Conduct for counsel, Defence counsel is exercising the requisite control and oversight over intermediaries.¹⁹ Further, the Chamber observes that the Annex to the Guideline, to which the Prosecution refers, is a non-exhaustive list of tasks that might be performed by intermediaries, which includes *inter alia* assisting Defence counsels in collecting evidence.²⁰ In any event, the Chamber recalls that the Prosecution will have an opportunity to question D-0512 and D-0516 in court on any relevant issue, including the extent to which the presence of intermediaries or resource persons affected the prior recorded testimony of the witnesses, if at all. Given that, accordingly, no prejudice would be incurred, the Chamber does not consider that the presence of intermediaries during the interviews is a factor it must take into account in adjudicating the present Request.

14. The Chamber’s individual assessment on the Statements are set out below. Bearing in mind the discretionary nature, the parties’ remaining arguments are discussed to the extent necessary.

A. D-0512

15. The Defence submits that the prior recorded testimony of D-0512 is relevant *inter alia* to the charged crimes, the activities of victims associations and the evidence of several Prosecution witnesses.²¹ In particular, the Defence acknowledges that D-0512’s account contradicts that of P-0570 and submits that nonetheless her prior recorded testimony is cumulative of other evidence on the case record.²² Should introduction pursuant to Rule 68(3) of the Rules be granted, the Defence

¹⁸ Response, ICC-01/12-01/18-2220-Conf-Corr, paras 13, 24.

¹⁹ See also Decision on the ‘Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant’, the ‘Dual Status Witness Protocol’, and related matters, ICC-01/12-01/18-674, para. 44.

²⁰ <https://www.icc-cpi.int/sites/default/files/GRCI-Eng.pdf>

²¹ Request, ICC-01/12-01/18-2208-Conf-Red, paras 27, 31-32.

²² Request, ICC-01/12-01/18-2208-Conf-Red, para. 33.

requests two and a quarter hours to question the witness,²³ otherwise estimating 8 hours without the use of Rule 68(3).²⁴

16. The Prosecution opposes the introduction into evidence of D-0512's prior recorded testimony. The Prosecution submits that D-0512's evidence is manifestly inconsistent with the evidence of Prosecution witnesses P-0570 and P-0610.²⁵ It further submits that D-0512 and D-0516 contradict each other, notably in relation to P-0610.²⁶ The Prosecution also challenges the formal indicia of reliability *inter alia* on the basis that, while the statement was only initialled by a Defence legal assistant, said legal assistant was not present for all interviews conducted with D-0512.²⁷
17. The Chamber notes that D-0512's evidence is potentially relevant to the charges of torture and other inhumane acts or cruel treatment (count 1 to 4), forced marriage (count 8), rape (count 11-12), and persecution (count 13) as well as several Prosecution witnesses including P-0570, P-0610, P-0622 and P-0639. As the Prosecution will have a full opportunity to examine the witness, the Chamber does not consider that the difference between the accounts of D-0512 and other witnesses would impact the fairness of the proceedings in any way, even if her prior recorded testimony were to be introduced into evidence pursuant to Rule 68(3) of the Rules.
18. The Chamber observes that, after the statement was read back by a qualified interpreter in a language she understands, D-0512 signed it, confirming its contents, that it was made voluntarily, and that she understood it could be used in the present proceedings.²⁸ Accordingly, the Chamber is satisfied that D-0512's statement is a prior recorded testimony suitable for introduction into evidence pursuant to Rule 68(3) of the Rules with sufficient indicia of reliability.

²³ Request, ICC-01/12-01/18-2208-Conf-Red, para. 35.

²⁴ ICC-01/12-01/18-2152-Conf-Anx1, p. 2.

²⁵ Response, ICC-01/12-01/18-2220-Conf-Corr, paras 27, 30-32.

²⁶ Response, ICC-01/12-01/18-2220-Conf-Corr, paras 28-29.

²⁷ Response, ICC-01/12-01/18-2220-Conf-Corr, para. 23.

²⁸ MLI-D28-0006-2611-R02 at 2622.

19. Considering that any remaining issues on the reliability of D-0512's evidence can be addressed during the examination of the witness, which will be taken account in assessing the ultimate reliability and probative value of the statement, the Chamber is satisfied that introduction into evidence of D-0512's prior recorded testimony will expedite the proceedings, while at the same time protecting their fairness. Accordingly, the Chamber authorises the introduction into evidence of D-0512's prior recorded testimony pursuant to Rule 68(3) of the Rules.
20. Bearing in mind the object and purpose of this provision and the topics proposed to be covered in the supplementary examination,²⁹ the Chamber considers it appropriate to allocate one hour for the Defence's examination and two and a half hours for the Prosecution's examination.

B. D-0516

21. According to the Defence, D-0516 has [REDACTED].³⁰ The Defence submits that her evidence relates to the circumstances surrounding the marriage of P-0610.³¹ Should introduction pursuant to Rule 68(3) of the Rules be granted, the Defence requests one and a half hours to question the witness,³² otherwise estimating 4 hours without the use of Rule 68(3).³³
22. The Prosecution opposes the introduction into evidence of D-0516's prior recorded testimony. The Prosecution challenges the 'factual indicia of reliability' of D-0516's testimony, raising discrepancies between the accounts of D-0516 and P-0610. The Prosecution submits that the statement also lack formal indicia of reliability in particular as: the Songhai interpreter was absent on the day the changes were made by D-0516 to her statement; the statement does not contain the interpreter's certification at the end of the statement; and there is no signed

²⁹ Request, ICC-01/12-01/18-2208-Conf-Red, para. 35.

³⁰ Request, ICC-01/12-01/18-2208-Conf-Red, para. 20.

³¹ Request, ICC-01/12-01/18-2208-Conf-Red, paras 19, 22.

³² Request, ICC-01/12-01/18-2208-Conf-Red, para. 26.

³³ ICC-01/12-01/18-2154-Conf-Anx1, p. 2.

certification by the witness that the statement was read out in a language she understood.³⁴

23. The Chamber observes that - contrary to what the Prosecution claims - after having the statement read back by an interpreter in Songhai, D-0516 confirmed its contents, that it was made voluntarily and that she understands that the statement could be used in the present proceedings.³⁵ Accordingly, the Chamber is satisfied that D-0516's statement is a prior recorded testimony suitable for introduction into evidence pursuant to Rule 68(3) of the Rules with sufficient indicia of reliability. With respect to the two hand written comments,³⁶ which are brief and limited in nature, the Chamber considers that they do not bar introduction of the statement as a whole under Rule 68(3) of the Rules. The Chamber observes that, in the Leave to Reply Request,³⁷ the Defence has indicated that it can produce further evidence on the material's reliability, including on the gathering process of D-0516's prior recorded testimony and, given that the both parties will be able to address related issues directly with D-0516 in court, no undue prejudice arises.
24. In light of the above, and considering this will contribute to the efficiency of the proceedings while ensuring also their fairness, the Chamber authorises the introduction into evidence of D-0516's prior recorded testimony pursuant to Rule 68(3) of the Rules.
25. Bearing in mind the object and purpose of this provision and the topics proposed to be covered with this witness who is illiterate,³⁸ the Chamber considers it appropriate to allocate one and a half hours for the Defence's examination and two hours for the Prosecution's examination.

³⁴ Response, ICC-01/12-01/18-2220-Conf-Corr, paras 14-15.

³⁵ MLI-D28-0006-2783-R01 at 2787.

³⁶ MLI-D28-0006-2783-R01 at 2786. *See also* Request, ICC-01/12-01/18-2208-Conf-Red, para. 23 (n. 32).

³⁷ ICC-01/12-01/18-2225-Conf.

³⁸ Request, ICC-01/12-01/18-2208-Conf-Red, para. 26.

C. D-0554

26. The Defence submits that the prior recorded testimony of D-0554 is relevant to the organisational objectives of the ‘Islamists’ and is cumulative and corroborative of Prosecution witnesses and other submitted evidence.³⁹ The Defence submits that the prior recorded testimony of D-0554 fulfils the criteria for submission under Rule 68(2) of the Rules but alternatively, and if the Chamber considers it necessary to hear D-0554, requests that her prior recorded testimony be introduced under Rule 68(3) of the Rules.⁴⁰
27. While ultimately deferring to the Chamber’s discretion,⁴¹ the Prosecution contests the Defence’s interpretation of the evidence elicited from other witnesses and, consequently, the corroborative nature of D-0554’s prior recorded testimony.⁴²
28. The Chamber notes that the prior recorded testimony of D-0554 is a 6-page document which encompasses *inter alia* the arrival of the armed groups, the assistance provided by the Islamists to the population, including to [REDACTED], as well as a paragraph on Mohamed Moussa.⁴³ It does not go to the acts and conduct of the accused.
29. Further, the Chamber observes that other evidence already on the record, as well as evidence expected to be provided by another Defence witness,⁴⁴ refers to the assistance and protection provided by the armed groups to the civilian population of Timbuktu, including by the provision of a ‘green number’.⁴⁵ While the evidence of D-0554 is more specific, particularly with respect to the assistance provided to [REDACTED], the Chamber is nonetheless satisfied that D-0554’s prior recorded testimony is largely cumulative or potentially corroborative of evidence already on the record. In any event, the Chamber recalls that the relevant

³⁹ Request, ICC-01/12-01/18-2208-Conf-Red, para. 10.

⁴⁰ Request, ICC-01/12-01/18-2208-Conf-Red, para. 10.

⁴¹ Response, ICC-01/12-01/18-2220-Conf, para. 46.

⁴² Response, ICC-01/12-01/18-2220-Conf, paras 39-43.

⁴³ MLI-D28-0006-2623-R01.

⁴⁴ D-0551.

⁴⁵ P-0004, P-0641, P-0152 and P-0654.

consideration is whether other testimony has been provided on ‘similar facts’ and that, accordingly, it is not required that the accounts accord in every detail.⁴⁶

30. The Chamber is also satisfied that D-0554’s prior recorded testimony has sufficient indicia of reliability of a formal nature. The witness declared that he made the statement voluntarily and that the statement that was read back to him in the French language was true to the best of his knowledge.⁴⁷ The other arguments raised by the Prosecution challenging the probative value of D-0554’s evidence need not be addressed at this stage, but will be considered as part of the Chamber’s ultimate assessment of all evidence.
31. Accordingly, the Chamber considers it unnecessary to have D-0554 testify in court and authorises the introduction into evidence of his prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, subject to the receipt of the required certified declaration.
32. The Chamber notes that D-0554 was scheduled to testify on 29 and 30 June 2022. Bearing in mind its previous directions on the scheduling of witnesses,⁴⁸ the Chamber instructs the Defence to make all reasonable efforts to find an alternative witness to testify on these dates and to inform all at the latest when providing the monthly schedule for the month of July 2022.

⁴⁶ P-0524 Decision, ICC-01/12-01/18-2125-Red, para. 11.

⁴⁷ MLI-D28-0006-2623-R01 at 2628.

⁴⁸ Email from the Chamber dated 8 April 2022 at 15:17.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Leave to Reply Request to the extent that it relates to the Request adjudicated in the present decision;

GRANTS the Request;

AUTHORISES the introduction into evidence of the prior recorded testimony of D-0512 (MLI-D28-0006-2611-R02) and D-0516 (MLI-D28-0006-2783-R01) pursuant to Rule 68(3) of the Rules, subject to the procedural pre-requisites under the rule being satisfied when the witnesses appear in court;

AUTHORISES the introduction into evidence of the prior recorded testimony of D-0554 (MLI-D28-0006-2623-R01) pursuant to Rule 68(2)(b) of the Rules, subject to the receipt of the required certified declaration; and

INSTRUCTS the parties to file public redacted versions of ICC-01/12-01/18-2208-Conf-Exp and ICC-01/12-01/18-2220-Conf-Corr by Friday, 3 June 2022.

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 Wednesday, 18 May 2022

At The Hague, The Netherlands