



Original: English

No. ICC-01/12-01/18

Date: 27 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

**Decision on the introduction of D-0272's prior recorded testimony pursuant to
Rules 68(3) 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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Defence****States Representatives***Amicus Curiae***REGISTRY****Registrar**

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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*, pursuant to Articles 64(2), 67(1)(c) and (e), and 69(2) of the Rome Statute, Rule 68(1) and (3) of the Rules of Procedure and Evidence (the ‘Rules’), and Regulation 35(2) of the Regulations of the Court (the ‘Regulations’) issues the present decision.

I. Procedural history

1. On 6 May 2020, the Chamber issued its ‘Directions on the conduct of proceedings’, in which the Chamber, *inter alia*, adopted the procedure for the introduction into evidence of prior recorded testimony pursuant to Rule 68(3) of the Rules.¹
2. On 22 September 2021, the Chamber decided that the procedure for a Rule 68(3) application set out in its Directions on the conduct of proceedings will remain applicable, *mutatis mutandis*, with the deadline for the Defence being 30 days prior to the start of the scheduled testimony of the relevant witness.²
3. On 25 April 2022, as instructed, the Office of the Prosecutor (the ‘Prosecution’) submitted via email time estimates for its examination of Defence witnesses.³
4. On 10 May 2022, the Chamber directed the Defence to review its witness schedule for June 2022 in order to accommodate the changes in standard procedures made by the Registry for witnesses testifying remotely.⁴
5. On 17 May 2022, the Defence submitted an adjusted witness schedule for June 2022.⁵ The testimony of witness D-0272 was subsequently scheduled to begin on 8 June 2022.⁶

¹ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 62-65.

² Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence, 22 September 2021, ICC-01/12-01/18-1756, para. 15.

³ Email from the Prosecution on 25 April 2022 at 22:29.

⁴ Email from the Chamber, 10 May 2022, at 13:58.

⁵ Email from the Defence, 17 May 2022, at 15:10.

⁶ Email from the Chamber, 18 May 2022, at 10:20.

6. On 18 May 2022, the Defence filed an application seeking to introduce the prior recorded testimony of witness D-0272⁷ and one associated exhibit⁸ into evidence pursuant to Rule 68(3) of the Rules (the ‘Application’).⁹
7. On 24 May 2022, the Prosecution filed its response to the Application (the ‘Response’).¹⁰

II. Applicable law

8. 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 Rules,¹¹ as well as the Directions on the conduct of proceedings.¹²
9. 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.

III. Submissions and Chamber’s determination

10. From the outset, and having regard to Regulation 35(2) of the Regulations, the Chamber finds it appropriate to entertain the Application even if filed outside the standard time limit as the relevant circumstances were outside the Defence’s control due to adjustments in the witness schedule for June 2022.

⁷ MLI-D28-0006-4181-R01.

⁸ MLI-D28-0006-4180.

⁹ Defence application under Rule 68(3) to introduce Witness D-0272 statement and associated exhibit into evidence and for examination of this Witness, 18 May 2022, ICC-01/12-01/18-2229-Conf-Exp (with one annex, ICC-01/12-01/18-2229-Conf-AnxA, and one confidential redacted version, ICC-01/12-01/18-2229-Conf-Red, filed that same date).

¹⁰ Prosecution response to “Defence application under Rule 68(3) to introduce Witness D-0272 statement and associated exhibit into evidence and for examination of this Witness” (ICC-01/12-01/18-2229-Conf-Red), 24 May 2022, ICC-01/12-01/18-2231-Conf.

¹¹ 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.

¹² Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 63-65.

11. The Chamber notes the Defence's submission that: (i) the witness's statement is short and contextual, because D-0272 was not present in Timbuktu during the period of the alleged charges,¹³ (ii) proceeding under Rule 68(3) of the Rules is more expeditious while providing the opportunity to the parties to test the testimony in Court;¹⁴ (iii) the associated exhibit is relevant to D-0272's prior recorded testimony;¹⁵ and that (iv) should the Application be granted, the Defence estimates it will need one hour and 15 minutes for its examination (instead of four hours without Rule 68(3) of the Rules).¹⁶
12. The Chamber also notes that the Prosecution does not oppose the Application, but insists on the necessity to cross-examine D-0272.¹⁷ In addition, it submits that D-0272's statement goes to the acts and conduct of the accused and lacks necessary indicia of reliability.¹⁸
13. The Chamber is satisfied that introduction into evidence of D-0272's prior recorded testimony will expedite the proceedings, while at the same time protecting their fairness. Accordingly, particularly as the procedure will ensure that issues related to D-0272's account of Mr Al Hassan's state of mind can be addressed in court, the Chamber authorises the introduction of D-0272's statement and one associated exhibit pursuant to Rule 68(3) of the Rules.
14. Bearing in mind the object and purpose of this provision and the topics proposed to be covered in the supplementary examination,¹⁹ the Chamber considers it appropriate to allocate, as requested, one hour and 15 minutes for the Defence's examination in-chief, and two hours for the Prosecution's cross-examination.
15. The Chamber further notes the Prosecution's request regarding certain redactions in D-0272's prior recorded testimony.²⁰ The Chamber recalls that the system

¹³ Application, ICC-01/12-01/18-2229-Conf-Red, para. 9.

¹⁴ Application, ICC-01/12-01/18-2229-Conf-Red, para. 9.

¹⁵ Application, ICC-01/12-01/18-2229-Conf-Red, para. 12.

¹⁶ Application, ICC-01/12-01/18-2229-Conf-Red, paras 2, 13.

¹⁷ Response, ICC-01/12-01/18-2231-Conf, para. 1.

¹⁸ Response, ICC-01/12-01/18-2231-Conf, paras 2-3, 5-15.

¹⁹ Application, ICC-01/12-01/18-2229-Conf-Red, para. 13.

²⁰ Response, ICC-01/12-01/18-2231-Conf, paras 15-16.

adopted concerning disagreements related to the disclosure of evidence²¹ applies *mutatis mutandis* to challenges by the Prosecution.²² Accordingly, should it consider it necessary to maintain the contested redactions, the Defence is to provide its submissions justifying the particular redactions by Monday, 30 May 2022. As to the absence of a pseudonym for the A.5 code used in D-0272's prior recorded testimony, the Chamber considers the parties should first attempt to resolve this *inter partes* and seise the Chamber only if necessary.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

GRANTS the Application;

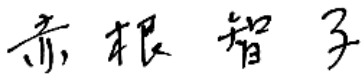
AUTHORISES, subject to the relevant procedural pre-requisites being satisfied when D-0272 appears in Court, introduction into evidence of D-0272's prior recorded testimony (MLI-D28-0006-4181-R01) and the associated exhibit (MLI-D28-0006-4180) pursuant to Rule 68(3) of the Rules; and

ORDERS the Defence to file a public redacted version of the Application within two weeks of notification of the present decision and the Prosecution of the Response within one week of notification of the public redacted version of the Application.

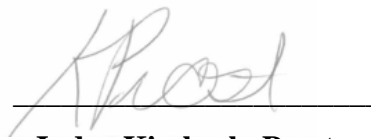
Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated this Friday, 27 May 2022

At The Hague, The Netherlands

²¹ Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546, para. 16 referring to *Décision relative au système de divulgation et à d'autres questions connexes*, 16 May 2018, ICC-01/12-01/18-31, paras 30-31.

²² Fifth decision on matters related to the conduct of proceedings, ICC-01/12-01/18-1756, para. 19.