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Date: 9 June 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 into evidence of D-0511, D-0539, and D-0553's prior
recorded testimony 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**

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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, 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.

I. Procedural history and submissions

1. On 29 April 2022, within the time limit set by the Single Judge,¹ the Defence filed an application notably seeking to introduce the prior recorded testimony (the ‘Statements’),² and associated exhibits,³ of witnesses D-0511, D-0539, and D-0553 into evidence pursuant to Rule 68(2)(b) of the Rules (the ‘Main Request’).⁴ The Defence submits that the abovementioned material complies with the requirements of Rule 68(2)(b) of the Rules in the sense that it: (i) does not relate to the charged acts and conduct of the accused; (ii) fulfils formal indicia of reliability; (iii) is cumulative or corroborative of oral testimony; (iv) relates to background information; and (v) is such that the interests of justice are best served by their introduction. In addition, the Defence seeks that the Chamber authorises late addition to its List of Evidence of the French translation of an item already appearing on this List (the ‘Related Request’).⁵
2. On 11 May 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the above (the ‘Response’),⁶ submitting that the Main Request should be rejected and referring, instead, to the alternate procedure under Rule 68(3) of the Rules.⁷ The Prosecution opposes the Main Request because: (i) the

¹ Transcript of hearing on 6 April 2022, ICC-01/12-01/18-T-171-ENG ET, page 9.

² For D-0511: MLI-D28-0005-9310-R01 (Arabic original) and MLI-D28-0006-2629-R01 (English translation); for D-0539: MLI-D28-0005-9317-R01; and for D-0553: MLI-D28-0005-9325-R01.

³ For D-0511: MLI-D28-0005-8820 (Arabic original) and MLI-D28-0005-8491 (French translation); and for D-0553: MLI-D28-0005-8901.

⁴ First Defence Rule 68(2)(b) Application, ICC-01/12-01/18-2209-Conf, with a confidential annex.

⁵ Request, ICC-01/12-01/18-2209-Conf, paras 17-18, 43, seeking to add item MLI-D28-0005-8491 to the List, which is the French translation of MLI-D28-0005-8820.

⁶ Réponse de l’Accusation à la Requête de la défense intitulée « First Defence Rule 68(2)(b) Application », ICC-01/12-01/18-2216-Conf.

⁷ Response, ICC-01/12-01/18-2216-Conf, paras 5, 25, 33.

Statements submitted go to acts and conduct of the accused;⁸ and also because: (ii) the evidence of D-0511, D-0539, and D-0553 go beyond background information and touch upon key aspects of the Defence's case, which it contests;⁹ (iii) the Statements submitted do not have sufficient indicia of reliability;¹⁰ (iv) the Defence's submission that the Statements are consistent and corroborative of the evidence on the record are inaccurate;¹¹ and (v) it is in the interest of justice that D-0511, D-0539, and D-0553 be called to testify *viva voce*.¹²

3. On 16 May 2022, the Defence filed a request seeking the Chamber's authorisation to reply, notably, to the Response (the 'Request to Reply').¹³ The Defence seeks to be permitted to make additional submissions with respect to claims contained in the Response related the recording of the Statements and relevant interpretation and translation issues, as well as to make available to the Chamber details regarding the circumstances of Defence investigations and related challenges.

II. Analysis

4. From the outset, the Chamber notes that the Related Request is uncontested and finds it appropriate to authorise the discrete addition sought by the Defence to its List of Evidence. Accordingly, and as requested, item MLI-D28-0005-8491 has been considered for introduction into evidence below.
5. Turning to the Request to Reply, the Chamber considers that its assessment of the requirements and relevant factors under Rule 68(2)(b) of the Rules will not be assisted by further submissions from the Defence on the identified issues. The Defence's Request to Reply is therefore rejected. The Chamber however takes note of the Defence's proposal to furnish additional relevant details regarding,

⁸ Response, ICC-01/12-01/18-2216-Conf, paras 10-12.

⁹ Response, ICC-01/12-01/18-2216-Conf, paras 21-25.

¹⁰ Response, ICC-01/12-01/18-2216-Conf, paras 13-20.

¹¹ Response, ICC-01/12-01/18-2216-Conf, paras 30-32.

¹² Response, ICC-01/12-01/18-2216-Conf, paras 26-29.

¹³ 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.

amongst other things, the Statements' gathering process¹⁴ and its related submission that a 'full and accurate account' of the relevant interviews is warranted and in the interest of justice. Noting the outcome of the present decision, *i.e.* that D-0511, D-0539, and D-0553 will not be appearing in court, the Chamber indicates that the Defence should seek to submit any such complementary material or information by way of a bar table motion together with, as appropriate, corresponding requests seeking late addition of this material to the Defence's List of Evidence.

6. With respect to the Main Request, the Chamber refers to its prior decisions setting out the relevant legal framework. It stresses 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.¹⁵
7. The Chamber further 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.¹⁶
8. Concerning the first assessment to be conducted, and in line with the Court's jurisprudence,¹⁷ the Chamber notes that the expression 'acts and conduct of the accused' within the meaning of Rule 68(2)(b) of the Rules refers to those actions of the accused which are described in the charges brought against him or her or

¹⁴ See *e.g.* Request to Reply, ICC-01/12-01/18-2225-Conf, paras 7, 14, 15 (first bullet).

¹⁵ Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules, ICC-01/12-01/18-1402-Red2, 26 March 2021, 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.

¹⁶ 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, 81.

¹⁷ 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. 12; and *The Prosecutor v. Bosco Ntaganda*, Public redacted version of 'Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68', 2 December 2016, ICC-01/04-02/06-1667-Conf, ICC-01/04-02/06-1667-Red, paras 11-12.

which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged. This is consistent with the main purpose of such assessment, which is to protect the accused's rights to confront and examine in court a person making direct allegations against him or her. The Chamber also notes the Appeals Chambers' finding that, while the assessment must be carried out in light of the exceptional nature of Rule 68 of the Rules, trial chambers must also be careful not to apply this concept in a manner that may defeat the objective of Rule 68 of the Rules or that may inhibit written testimony that is limited to contextual elements of crimes or background information.¹⁸

9. The Chamber notes that the Statements submitted are being relied upon by the Defence to contest some Prosecution allegations as well as establish other facts and circumstances supporting the Defence's case. As discussed in greater detail below, the Statements mainly relate to background information, events occurring before and after the period of the charges, and/or general knowledge and impressions of Mr Al Hassan. The Chamber considers that, while the Statements refer to the accused, no parts thereof, notably those identified in the Response,¹⁹ consist of 'acts and conduct' as defined above.²⁰ The Statements are therefore not inadmissible under Rule 68(2)(b) of the Rules.
10. In the exercise of its discretion, the Chamber will now consider the factors under Rule 68(2)(b)(i) of the Rules. It is recalled that these factors are not mandatory pre-conditions for the introduction of prior recorded testimony under Rule 68(2)(b) of the Rules.²¹
11. Generally, and in light of the submissions contained in the Response, the Chamber notes that it is inherent to the Defence case to dispute the facts and

¹⁸ *Al Hassan* OA4 Judgment, ICC-01/12-01/18-2222, para. 55.

¹⁹ Response, ICC-01/12-01/18-2216-Conf, paras 10-12.

²⁰ The Chamber is notably of the view that the references to Mr Al Hassan in D-0553's evidence do not qualify as 'acts and conduct' within the meaning of Rule 68(2) of the Rules (*Contra*: Response, ICC-01/12-01/18-2216-Conf, para. 12 referring to MLI-D28-0005-8901, paras 32, 43, 46-48). This is consistent with the interpretation and application of this provision by TC IX when introducing Defence evidence (Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 2 July 2018, ICC-02/04-01/15-1294, paras 7, 9).

²¹ 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. 6.

circumstances as charged, as well as advance alternate narratives and evidence that supports its own case. This cannot, in and of itself, foreclose the Defence from submitting evidence according to Rule 68(2)(b) of the Rules. The Chamber must bear this in mind when conducting its assessment of the Rule 68(2)(b)(i) factors.

12. The Chamber notes that D-0511's statement relates mainly to the objectives and activities of the MNLA as well as its interactions with the Malian State and other groups, including Ansar Dine. In his evidence, D-0511 describes the customs and practices of the Touareg and Arab communities in Timbuktu, notably arranged marriages and the role of traditional justice. D-0511 also provides accounts of the arrival and departure of Ansar Dine from Timbuktu, and relevant impact on the local population.
13. With respect to D-0539, the Chamber notes that his evidence mainly concerns the persecution of the Arabs and Touareg, the living conditions and justice system in the North of Mali before 2012, as well as local customs and rules. D-0539 also describes the situation in Timbuktu after the arrival of the armed groups in 2012, the impact on the local population, and provides evidence about marriages between locals and members of the armed groups, which he states were contracted after the relevant women and their families provided their consent.
14. Turning to D-0553's statement, the Chamber notes that it mainly covers sociocultural norms in Timbuktu before 2012, the arrival of armed groups and their impact in Timbuktu, and the acceptance of Islam by the population of Timbuktu. D-0553 also provides evidence concerning a meeting in the presence of Iyad Ag Ghaly and Abou Zeid, and gives his opinion and general perception of Mr Al Hassan's responsibility and guilt.
15. The Chamber notes the Prosecution's submission that the Statements relate to key aspects of the Defence case, that it contests many of the witnesses' accounts as described in the Statements, and that the latter are inconsistent with evidence on the record on these issues. Simple disagreement expressed by either party will not suffice and the Chamber shall consider whether the prior recorded testimony relates to matters which are soundly and conceivably disputed between the

parties, and are crucial, or of at least sufficient significance for the Chamber's eventual determination of the charges against the accused in its judgment under Article 74 of the Statute. In doing so, the Chamber will objectively assess – irrespective of the parties' own assertions – the degree to which a prior recorded testimony potentially impacts on material matters actually contested in the proceedings.²²

16. Further, the Chamber recalls that the relevant consideration for the present adjudication is whether other testimony has been provided or will be received on 'similar facts'; it is accordingly not required that the accounts submitted accord in every detail.²³
17. The Chamber notes that the Statements mainly cover topic which have already been discussed by other (Prosecution) witnesses in court, notably P-0004, P-0150, and P-0065, and that the evidence of D-0511, D-0539, and D-0553 is in large part corroborative of evidence already on the record. The Chamber further observes that other Defence witnesses have or are expected to testify in-court on the topics discussed in the Statements.²⁴ This is notably the case for the facts and circumstances underlying the affirmative defences and issues arising from Article 32 of the Statute. Particularly as regards these facts and circumstances, the Chamber observes that the relevant accounts from D-0511, D-0539, and D-0553 are not unique but instead concern circumstances and background information which the Chamber understands can be described by and discussed with many other equally informed individuals. Finally, the Chamber recalls that the probative value and weight, if any, of the relevant accounts of absent witnesses will be assessed by the Chamber in its Article 74 Judgment having had regard to the evidence as a whole, notably the (absence of) corroboration and/or

²² 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. 15.

²³ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b), 12 January 2017, ICC-01/04-02/06-1715-Red, para. 14.

²⁴ See List of Defence Witnesses, 25 March 2022, ICC-01/12-01/18-2152-Conf-Anx1, together with the Defence Witness Summaries disclosed, a courtesy copy of which was provided by the Defence via email on 28 March 2022 at 15:39. The Chamber further notes the recent oral testimony of D-0512 and D-0272.

cumulative nature of the evidence, as well as the fact that the evidence was not tested orally.

18. The Chamber further notes the Prosecution’s related submission that, because the Statements are being relied upon by the Defence to support its affirmative defences, the Statements concern important issues which are materially in dispute, therefore rendering the cross-examination of D-0511, D-0539, and D-0553 necessary.²⁵ The Chamber observes that, in the case at hand, and beyond the general statement that it disagrees with the defences for which notice was provided, the Prosecution identified no specific accounts from D-0511, D-0539 or D-0553 which were particularly important in relation to these contested aspects of the Defence’s case nor explained their respective significance for the Chamber’s eventual determination of the charges. Recalling its above observation that other Defence witnesses are expected to provide evidence relating to the same circumstances as well as describe similar facts, the Chamber finds that the Statements do not, *prima facie*, appear crucial for the underlying factual and legal issues in dispute. Further, while the Chamber acknowledges that the MNLA’s activities and access to the city during the period of the charges is a contested matter of relative importance for the case,²⁶ potential impact of D-0511’s relevant accounts is limited notably since they are in part cumulative of the accounts of other witnesses who testified in court.²⁷
19. The Chamber is also satisfied that the Statements bear sufficient indicia of reliability of a formal nature and recalls that it is not required to consider factors beyond formal requirements in the context of its determination under Rule 68(2)(b) of the Rules.²⁸ In particular, the Chamber notes that the Statements are signed and dated, were obtained by the Defence during the course of its investigations, and that the three witnesses declared that the Statements were true

²⁵ Response, ICC-01/12-01/18-2216-Conf, paras 22-25.

²⁶ See Response, ICC-01/12-01/18-2216-Conf, para. 22.

²⁷ Notably P-0065, P-0654, P-1086.

²⁸ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, 1 November 2016, ICC-02/11-01/15-744 OA8, paras 3, 103-104.

and accurate.²⁹ In line with this Chamber's approach to evidence,³⁰ the Chamber finds that the Prosecution's arguments in this respect, including that the Statements do not meet all the requirements under Rule 111 of the Rules, do not prevent their introduction into evidence as prior recorded testimony³¹ but will be duly considered as part of the Chamber's ultimate assessment of reliability and weight, if any.

20. Finally, the Chamber considers that requiring D-0511, D-0539, and D-0553 to appear before the Chamber to testify, even relying on the procedure pursuant to Rule 68(3) of the Rules, would unnecessarily prolong the proceedings. The interests of justice are accordingly best served by granting the Application, an outcome which, in light of all the above considerations, the Chamber finds is consistent with the fairness of the proceedings and equality of arms. Accordingly, the Chamber authorises the introduction into evidence of the Statements and associated exhibits discussed therein pursuant to Rule 68(2)(b) of the Rules, subject to the receipt of the required certified declarations.
21. As a final point, the Chamber recalls its prior direction for the Defence to submit a second round of Rule 68(2) applications by 30 May 2022³² and notes that no such applications were submitted after the Main Request was filed on 29 April 2022. The Chamber stresses the importance of timely adjudication of Rule 68(2) applications for the efficient conduct of the proceedings. To assist, the Chamber finds it appropriate to set a new deadline to 4 July 2022 for the Defence to file some of its prospected Rule 68(2) applications. By that same deadline, the

²⁹ Noting that the original version of D-0511's testimony - the one which is signed and dated - is the Arabic version, and that D-0511 declared to speak and read Arabic, the Chamber considers that issue related to its translation to a working language of the court need not be considered at this stage (*see* Response, ICC-01/12-01/18-2216-Conf, para. 19). Parties are directed to liaise and, if warranted, a corrected version of the translation of D-0511's statement may be submitted at a later stage.

³⁰ ICC-01/12-01/18-789-AnxA, paras 27-34.

³¹ The Chamber recalls that Rule 111 of the Rules regulates the collection of evidence by the Prosecution and, accordingly, that statements gathered by the Defence need not meet all the formal requirements under Rule 111 to be found admissible as prior recorded testimony under Rule 68 of the Rules (*see* 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, 18 May 2022, ICC-01/12-01/18-2228-Conf, paras 11-12).

³² Decision on Defence's request seeking an extension of time for certain disclosures and addition of other material to its List of Evidence, 22 April 2022, ICC-01/12-01/18-2204, para. 9, referring notably to D-0245 and D-0534.

Defence is also instructed to put on the record an updated version of its List of Witnesses, specifying its remaining witnesses, the estimated duration of their testimonies, and its intention to rely on the Rule 68(2) or (3) procedure, if any.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Second Request and hereby **AUTHORISES** the Defence to add item MLI-D28-0005-8491 to its List of Evidence;

REJECTS the Request to Reply;

GRANTS the Main Request;

AUTHORISES, subject to the receipt of the certified declarations, the introduction into evidence of the prior recorded testimony of D-0511, D-0539, and D-0553, as well as their associated exhibits, as referred to in footnotes 2 and 3 above;

INSTRUCTS the Registry to reflect in the record's metadata the introduction of the relevant material under Rule 68(2)(b) upon filing of the certified declarations;

ORDERS the Defence to file public redacted version of its Request to Reply (ICC-01/12-01/18-2225-Conf) within three weeks of notification of the present decision; and

INSTRUCTS the Defence to file some of its Rule 68(2) applications by 4 July 2022 as well as an updated version of its List of Witnesses.

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, 9 June 2022

At The Hague, The Netherlands