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No. ICC-01/12-01/18

Date: 6 July 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 the prior recorded testimony of
D-0534 and D-0245 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

1. On 15 June 2022, the Defence filed an application under Rule 68(2)(b) of the Rules to introduce into evidence the prior recorded testimony¹ and associated exhibits² of witnesses D-0534 and D-0245 (the ‘Request’).³
2. On 27 June 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its response (the ‘Response’),⁴ submitting that the Request should be rejected and referring, instead, to the alternate procedure under Rule 68(3) of the Rules.
3. On 28 June 2022, the Defence responded to the Prosecution’s request for the lifting of redactions contained in the Response.⁵

II. Analysis

4. With respect to the applicable law, the Chamber refers to its prior decision setting out the relevant framework and relevant considerations.⁶
5. The Chamber notes that D-0534 provides background evidence, including of the specific situation and treatment of the Tuareg population, as well as information concerning the creation, objectives, and functioning of various groups, notably

¹ For D-0534: MLI-D28-0006-4188-R01 and its two addendums MLI-D28-0006-4204-R01 and MLI-D28-0006-4206-R01; for D-0245: MLI-D28-0006-4141-R01.

² For D-0534: MLI-D28-0005-9966; and for D-0245: the 88 photographs listed at pages 2-3 of Annex 1 to the Request.

³ Second Defence Rule 68(2)(b) Application, ICC-01/12-01/18-2256-Conf, with a confidential annex.

⁴ Prosecution response to “Second Defence Rule 68(2)(b) Application”, (ICC-01/12-01/18-2256-Conf), ICC-01/12-01/18-2270-Conf.

⁵ Email dated 28 June 2022 at 09:50.

⁶ 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, D-0539 and D-0553 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.

the *Congrès pour la justice dans l’Azawad* (‘CJA’). D-0534’s statement also discusses his knowledge of and interactions with Mr Al Hassan and provides evidence regarding his arrest and detention.

6. With respect to D-0245, the Chamber notes that his statement mainly covers the situation in the North of Mali prior to and during 2012, including the absence of State services and the discrimination against the Tuareg population. D-0245’s evidence also relates to his travel to and the living conditions in the refugee camps. He further describes his experiences in Timbuktu and in Gao in 2012, including in relation to the activities of Ansar Dine and the MNLA.
7. Concerning the first assessment to be conducted, the Prosecution submits that D-0534’s prior recorded testimony goes to the acts and conduct of the accused, notably his membership in Ansar Dine, citing three excerpts of his prior recorded testimony.⁷ The Chamber agrees with the Prosecution that, to the extent that D-0534’s evidence goes to Mr Al Hassan’s participation in Ansar Dine and related state of mind,⁸ they pertain to the acts and conduct of the accused and may not be introduced into evidence pursuant to Rule 68(2) of the Rules.⁹ With respect to the remaining parts identified by the Prosecution, the Chamber observes that they are general in nature, referring to the alleged situation in the north of Mali during the relevant time period, and as such need not be excluded. Considering that only two discrete parts go to the acts and conduct of the accused, the Chamber is satisfied that the remainder of the prior recorded testimony of D-0534 is suitable for introduction pursuant to Rule 68(2)(b) of the Rules.
8. 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. The Chamber also recalls that the probative value and weight, if any, of the prior recorded testimony will be assessed by the Chamber

⁷ Response, ICC-01/12-01/18-2270-Conf, paras 21-22 *referring to* MLI-D28-0006-4188-R01 at 4190, 4198.

⁸ MLI-D28-0006-4188-R01 at 4198, lines 2-3, 27-28.

⁹ *See also* ICTY, Appeals Chamber, *The Prosecutor v. Stanislav Galić*, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, IT-98-29-AR73.2, para. 11.

in its Article 74 Judgment having had regard to the evidence as a whole, notably the (absence of) corroboration and/or cumulative nature of the evidence, as well as the fact that the evidence was not tested orally. Accordingly, submissions pertaining to the probative value and weight, for example those regarding inconsistencies or lack of clarity of the evidence, will in principle not be addressed in the present decision.

9. The Chamber notes that the prior recorded testimony of D-0245 and D-0534 mainly cover topics which have already been discussed by other witnesses in court, notably P-0065, P-0654 and P-1086. In addition, the Chamber finds that the relevant accounts from D-0534 and D-0245 are not unique but instead concern circumstances and background information which can be described by and discussed with many other equally informed individuals.
10. The Chamber further notes the Prosecution's related submission that, because the evidence submitted is being relied upon by the Defence to support its affirmative defences, it concerns important issues which are materially in dispute, therefore rendering the cross-examination of D-0245 necessary.¹⁰ The Chamber recalls that the fact that a prior recorded testimony may potentially be relied upon in the context of an affirmative defence does not *per se* bar the introduction into evidence of said prior recorded testimony pursuant to Rule 68(2)(b) of the Rules.¹¹ The Chamber further observes that, in the case at hand, the Prosecution identified no specific accounts from D-0245 or D-0534 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, beyond pointing out alleged contradictions with evidence already on the case record. The Chamber accordingly finds that D-0245's and D-0534's prior recorded testimony does not, *prima facie*, appear crucial for the underlying factual and legal issues in dispute.

¹⁰ Response, ICC-01/12-01/18-2270-Conf, paras 7-8.

¹¹ See D-0511, D-0539 and D-0553 Decision, ICC-01/12-01/18-2241, para. 18; 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, para. 7.

11. Furthermore, the Chamber notes that the Prosecution submits that it is in the interest of justice to have both D-0245 and D-0534 testify in court, essentially alluding that it wishes to elicit further evidence from both witnesses on related facts as well as the witnesses' links with the accused.¹² The Chamber emphasises that the relevant consideration under Rule 68(2)(b) of the Rules is not whether a person shall be called to testify before the Chamber to elicit evidence not covered by the prior recorded testimony, but 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.¹³ In this respect, while the arguments advanced by the Prosecution may be relevant to the eventual probative value or weight of the prior recorded testimony, the Chamber remains unconvinced that the additional information identified by the Prosecution is so essential that it warrants the witnesses' in-court appearance.
12. Finally, the Chamber is also satisfied that the material submitted bears sufficient indicia of reliability of a formal nature. In conducting this assessment, the Chamber did not find it necessary to consider factors beyond formal requirements.¹⁴ With respect to the Prosecution's challenges to D-0534's prior recorded testimony on the basis of its format,¹⁵ the Chamber recalls that the Single Judge has previously authorised the Defence to conduct the taking and certification of prior recorded testimony in a fully remote manner, including by preparing a transcript of the witness confirming the truthfulness of the statement.¹⁶ Noting further that D-0534 confirmed the contents of the statement that was read back to him and that he understands that it will be used in the present proceedings,¹⁷ the Chamber is satisfied that the transcript constitutes a 'prior recorded testimony' as defined in its previous decision.¹⁸ Given that what is being

¹² Response, ICC-01/12-01/18-2216-Conf, paras 7-17, 24.

¹³ See 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, paras 7, 47.

¹⁴ See 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-Conf, para. 28.

¹⁵ Response, ICC-01/12-01/18-2270-Conf, para. 25.

¹⁶ Email decision dated 31 March 2022 at 15:30.

¹⁷ MLI-D28-0006-4188-R01 at 4202-4203.

¹⁸ 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, ICC-01/12-01/18-2228-Conf, para. 12.

introduced pursuant to Rule 68(2)(b) of the Rules is the transcript itself, the Chamber also takes no issue in the context of the present determination that an ‘actual statement’¹⁹ was not disclosed.

13. In light of the above, and having found that no prejudice arises, the Chamber considers that requiring D-0534 and D-0245 to testify orally before the Chamber is unnecessary and accordingly grants the Request. The Chamber therefore authorises the introduction into evidence of the materials pursuant to Rule 68(2)(b) of the Rules, subject to the exclusion identified in paragraph 7 above and the receipt of the required certified declarations.
14. With respect to the Prosecution’s request for the lifting of discrete redactions to D-0245’s and D-0534’s prior recorded testimony,²⁰ the Chamber notes the additional information provided by the Defence by way of email²¹ and considers that the Request is moot, save for redactions applied to the name of D-0089 and the occupation and location of D-0534. Concerning D-0089 and the use of different redaction codes, the Chamber notes the Defence’s explanation that this is a result of different roles played by this individual.²² In light of this, and absent any further justifications, the Chamber finds that the Prosecution failed to establish that identifying information of D-0089, which is covered by standard redactions under the redaction protocol,²³ warrants disclosure. Turning to contested redactions in D-0534’s prior recorded testimony,²⁴ which concerns the occupation and location of D-0534 in and around 2012, the Chamber notes that the information covered appears to fall outside A.1 redactions as authorised under the redaction protocol. In any event, the Chamber agrees with the Prosecution that this information is relevant for the parties, and ultimately the Chamber, to assess D-0534’s basis of knowledge and any potential issues relevant to the standard evidentiary criteria. While the Chamber notes the Defence’s submission

¹⁹ Response, ICC-01/12-01/18-2270-Conf, para. 25.

²⁰ Response, ICC-01/12-01/18-2270-Conf, paras 18, 23.

²¹ Email dated 28 June 2022 at 09:50.

²² Email dated 28 June 2022 at 09:50.

²³ Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546, para. 12.

²⁴ MLI-D29-0006-4188-R01 at 4189 lines 27-28, 4191 line 29, 4192 lines 1, 10, 12; MLI-D28-0006-4204-R01 at 4204 lines 30-31.

that the redactions were requested by D-0534 due to security concerns, it observes that in the relevant part of his prior recorded testimony, D-0534 expresses his general concern regarding possible dissemination of identifying information in Mali²⁵ and that the Chamber has no information in its possession leading to the conclusion that disclosing the contested information to the parties and participants would have undue security implications. Accordingly, the Chamber instructs the Defence to lift the contested redactions in D-0534's prior recorded testimony.

²⁵ MLI-D28-0006-4204 at 4205, lines 3-6.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request;

AUTHORISES, subject to the receipt of the certified declarations and the exclusion identified in paragraph 7 above,²⁶ the introduction into evidence of the prior recorded testimony of D-0534 and D-0245, as well as their associated exhibits, as referred to in footnotes 1 and 2 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;

INSTRUCTS the Defence to lift the contested redactions identified in paragraph 14 of the present decision; and

ORDERS the Defence to file public redacted versions of its Request within three weeks of notification of the present decision and the Prosecution of the Response within two weeks of notification of the public redacted version 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 Wednesday, 6 July 2022

At The Hague, The Netherlands

²⁶ MLI-D28-0006-4188-R01 at 4198, lines 2-3, 27-28.