

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**

Date: **7 July 2022**

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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 with confidential Annex 1

Public Redacted Version of Second Defence Rule 68(2)(b) Application, ICC-01/12-01/18-2256-Conf, 15 June 2022

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules'), the Defence for Mr Al Hassan respectfully requests Trial Chamber X to admit into evidence Witness D-0245 and Witness D-0534's statements and related materials ('the Rule 68(2)(b) materials').¹
2. The Rule 68(2)(b) materials are relevant and cumulative of other Defence evidence (oral testimony) and satisfy the requirements of Rule 68(2)(b). They were prepared in a reliable manner, and their introduction will occasion no prejudice to a fair resolution of the issues as their content provide background information which does not relate to the charged acts and conduct of the accused.

II. Level of confidentiality

3. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Defence files this application and its accompanying annex as confidential, because it contains sensitive and confidential information regarding the witnesses. The Defence will file a public redacted version in due course.

III. Applicable law

4. In its Fifth decision on the conduct of proceedings, Trial Chamber X encouraged the Defence to consider the use of Rule 68(2)(b) of the Rules to limit the extent of in-court time expended in the examination of witnesses.²
5. Pursuant to Rule 68(2)(b) of the Rules, the Chamber may allow the introduction of the previously recorded testimony of a witness who is not present before the Chamber when that prior recorded testimony goes to proof of "a matter other than the acts and conduct of the accused."
6. Evidence concerning the background of the defendant, which might be relevant to potential defences (or mitigation) are not considered as 'acts and conduct' of the

¹ Annex A.

² [ICC-01/12-01/18-1756](#), para. 14.

accused evidence,³ nor does evidence from Defence witnesses concerning general impressions of the defendant,⁴ or ‘good character’ evidence.⁵ ICC Trial Chambers have also accepted evidence, through Rule 68(2)(b), concerning the general policy or objectives of organisations.⁶

7. This Chamber has found in previous instances that the decision of whether to introduce a prior recorded testimony pursuant to Rule 68(2)(b) of the Rules is a discretionary one, the purpose being to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.⁷

IV. Submissions

*The statement and related materials of D-0245*⁸

8. D-0245 is a context and chain of custody witness. [REDACTED].⁹ He was present in Timbuktu in 2012, but fled to [REDACTED] after the start of the rebellion.
9. D-0245 gives evidence about the discrimination against the Tuareg population in the North of Mali (including Timbuktu), both before and after 2012, as well as the lack of resources and basic services (education, hospital, justice) or the fact that they are incompatible with the nomadic way of life. He explains that all the past rebellions follow from these harsh conditions and that a lot of persons lost their lives, including in his family.¹⁰
10. Most specifically, D-0245 describes the corruption of the state justice and the reliance in the North on a system based on traditional judges and Cadis. He testifies that in these communities, people have more faith in religious leaders and it is easier for the population to accept their judgments, which gives them a greater weight.¹¹

³ [ICC-02/04-01/15-1294](#), para. 7.

⁴ [ICC-02/04-01/15-1294](#), para. 9.

⁵ [ICC-01/05-01/13-1857](#), para. 12.

⁶ [ICC-02/04-01/15-1294](#), paras. 15-16.

⁷ See, e.g. [ICC-01/12-01/18-1402-Conf-Red](#).

⁸ See statement MLI-D28-0006-4141-R01. The Defence is also seeking the admission of related exhibits: [REDACTED].

⁹ [REDACTED].

¹⁰ MLI-D28-0006-4141-R01 at 4142-4143, paras. 8-12.

¹¹ MLI-D28-0006-4141-R01 at 4143, paras. 13-16.

11. This is relevant to the charges of persecution and the underlying Prosecution argument that Ansar Dine sought to impose and apply ‘new rules’ that were not accepted by the local population. It is also relevant to defences of mistake of law/fact. It is corroborated by the oral evidence of Prosecution witnesses [REDACTED],¹² [REDACTED],¹³ P-0643,¹⁴ P-0654,¹⁵ and P-0160.¹⁶
12. D-0245 was in Timbuktu when the rebellion started, around the beginning of February 2012, and he took refuge in [REDACTED].¹⁷ He explains that the Tuaregs had no choice to flee or to join the ranks of the groups. During his exile he passed through [REDACTED] where he brought his family afterwards. He describes the journey as very risky and harsh, and the conditions of life at [REDACTED] camp very difficult.¹⁸
13. This part of Witness D-0245’s testimony is relevant to the defence of duress but consists, however, in background information that does not require him to testify *viva voce*.
14. In March 2012, D-0245 [REDACTED], to travel to Timbuktu [REDACTED].¹⁹
15. He returned to Timbuktu in April 2012, going through Gao. [REDACTED]. He stayed in Timbuktu for two days, [REDACTED] occupied by Ansar Dine members but he did not have any interactions with them.²⁰
16. D-0245 returned to Timbuktu in 2013 after the arrival of Serval. He was almost the only “*teint clair*” in Timbuktu when he returned, due to the exodus of the Arab and Tuareg population.
17. D-0245’s evidence does not touch upon matters regarding the acts and conduct of Mr Al Hassan or key factual aspects of the case. His prior recorded testimony is detailed,

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [ICC-01/12-01/18-T-083-CONF-ENG](#), pp. 52-53, 57-68.

¹⁵ [ICC-01/12-01/18-T-133-CONF-ENG](#), pp. 51-53.

¹⁶ [ICC-01/12-01/18-T-067-CONF-ENG](#), pp. 33-43.

¹⁷ Several Prosecution witnesses testified on previous waves of ethnic cleansing of Touaregs that gave rise to exile, see P-1086, [ICC-01/12-01/18-T-122-CONF-ENG](#), p.5, line 8 – p.6, line 4; [REDACTED]; [ICC-01/12-01/18-T-050-CONF-ENG](#), p.21, line 1 – p.22, line 7.

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ MLI-D28-0006-4141-R01 at 4144-4145, paras. 29-35.

probative and reliable and consists in explaining the broader context around the alleged charges. It is repetitive of evidence already on the record from Prosecution witnesses, and is corroborated by evidence from Defence witnesses.²¹

18. D-0245's statement bears sufficient indicia of reliability. It was obtained voluntarily, and the witness confirmed that the statement was read back to him in French, a language he perfectly understands, and was true to the best of his knowledge.
19. The Defence further seeks to admit into evidence D-0245's [REDACTED]. [REDACTED] have been identified and explained by the witness in its prior recorded testimony. They are relevant to [REDACTED].

*The statement and related materials of D-0534*²²

20. D-0534 is a fact witness. He is from [REDACTED]. He was [REDACTED].
21. D-0534 gives evidence to the context in the North of Mali before 2012. He describes Tuaregs as being marginalized people who could not expect to receive anything from the central state and who had generally little or no relationship with the Malian state. Many Tuaregs lived a nomadic existence by supporting themselves through their animals, which were sometimes seized by the government. According to D-0534, these conditions meant that communities of the North were vulnerable to the influence of terrorists. D-0534 also explains that in 2012, there was no other choice but to join the groups or risk being killed.²³
22. D-0534's evidence is relevant to the defence of necessity/duress as Mr Al Hassan's role in the Islamic Police in 2012 must be viewed in light of the totality of circumstances that existed at the time. D-0534's prior recording testimony contextualises this role, and is also corroborated by Prosecution and Defence witnesses.²⁴

²¹ See e.g. *viva voce* evidence of D-0211, D-0243, D-0529 and D-0540, and prior recorded testimonies of D-0219, D-0511, D-0534 and D-0539.

²² MLI-D28-0006-4188-R01 and its two addendums MLI-D28-0006-4204-R01 and MLI-D28-0006-4206-R01. The Defence is also seeking the admission of related exhibit [REDACTED].

²³ MLI-D28-0006-4188-R01 at 4189-4190.

²⁴ See above fns. 17, 21.

23. D-0534 also testifies about the fact that tribe members did not have confidence in the Malian justice system. Generally, in cases that involved the state system, people with money would win. It is for this reason that they preferred to solve their problems by going to see an Imam or a Cadi. This traditional form of justice also helped to maintain order and avoid any tensions or problems within the community.²⁵ This is relevant to the charges of persecution and the underlying Prosecution argument that Ansar Dine sought to impose and apply ‘new rules’ that were not accepted by the local population.²⁶
24. D-0534 describes an encounter in August 2012 during which he was subjected to death threats because he was a Tuareg and there was a sentiment that Tuaregs were against the Malian state. As a result, he fled to [REDACTED] with his family. He describes difficult living conditions in the camp.²⁷ This part of his testimony is also relevant to the defence of duress as developed above.²⁸
25. D-0534 testifies about the [REDACTED]. D-0534 explains that when the CJA was created, Hama Ag Mahmoud and Alghabass Ag Mohamed Ahmed were its political and military leaders respectively. [REDACTED].²⁹
26. D-0534’s prior recorded testimony details [REDACTED]³⁰ [REDACTED], does not touch upon key elements of the case. Furthermore, even if D-0534 testifies about Mr Al Hassan joining the CJA in 2016, he explains that he knows nothing about Mr Al Hassan’s work at the Islamic police in 2012.³¹ D-0534 only testifies as to Mr Al Hassan’s good temperament and [REDACTED].
27. D-0534’s also describes contacts and cooperation between [REDACTED] Mr Al Hassan was the CJA representative at the Er Interjeft post. [REDACTED].³²
28. Mr Al Hassan’s membership of CJA, as well as the circumstances of his arrest, are corroborated by the testimony of P-0186.³³ D-0627,³⁴ D-0628,³⁵ and [REDACTED]

²⁵ MLI-D28-0006-4188-R01 at 4189-4191.

²⁶ And corroborated by Prosecution witnesses, *see* para. 11 above.

²⁷ MLI-D28-0006-4188-R01 at 4192.

²⁸ *See* para. 22.

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ MLI-D28-0006-4188-R01 at 4197-4198.

³² [REDACTED].

³³ [ICC-01/12-01/18-T-122-CONF-ENG](#), p.49, line 11 to p.50, line 17; p. 54, line 20 – p.55, line 5.

D-0611³⁶ also corroborate that particular aspect of D-0534's statement. Furthermore, D-0534's evidence on this point relates to issues that do not concern charged incidents. It does not therefore require testing in Court, as the Chamber previously indicated that consideration of the standard evidentiary criteria is deferred to its eventual deliberation for its judgment.³⁷ Therefore, no prejudice arises from its admission through Rule 68(2)(b)

29. D-0534's statement bears sufficient indicia of reliability. It was obtained voluntarily, read back to him in French, and the witness confirmed that each information given was the truth and correct to the best of his knowledge and memory.
30. The Defence further seeks to admit into evidence [REDACTED]. The document has been identified and explained by the witness in its prior recorded testimony.³⁸ It is relevant to the context and related to the contents of the statement. Furthermore, the document does not pertain to specific factual allegations.

V. Relief requested

31. For the foregoing reasons, the Defence respectfully requests Trial Chamber X to **GRANT** the present Rule 68(2) request and **ADMIT** Witness D-0245 and Witness D-0534's statements and related materials into evidence.



Melinda Taylor

³⁴ MLI-D28-0006-3101.

³⁵ MLI-D28-0003-2049.

³⁶ MLI-D28-0006-4287-R01, at 4309-4319.

³⁷ [ICC-01/12-01/18-789-AnxA](#), para. 34(i) and (ii).

³⁸ [REDACTED].

Counsel for Mr. Al Hassan

Dated this 7th Day of July 2022
At The Hague, The Netherlands