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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-0544, D-0611, D-0093 and D-0240 pursuant to Rule 68(2)(b) and (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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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), (2)(b) and (3) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on the introduction into evidence of the prior recorded testimony of D-0544, D-0611, D-0093 and D-0240 pursuant to Rule 68(2)(b) and (3) of the Rules’.

I. Procedural history

1. On 5 July 2022, the Defence filed an application to introduce into evidence the prior recorded testimony of witnesses D-0544¹ and D-0611² pursuant to Rule 68(2)(b) and D-0093³ and D-0240⁴ pursuant to Rule 68(3) of the Rules (the ‘Request’).⁵
2. On 14 July 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Request (the ‘Response’),⁶ submitting that D-0544 should be required to testify *viva voce* as his testimony largely relates to the acts and conduct of the accused and/or issues that are materially in dispute and that D-0611’s prior recorded testimony lacks indicia of reliability. With respect to D-0093 and D-0240, the Prosecution defers to the Chamber regarding the submission of their prior recorded testimony pursuant to Rule 68(3).
3. On 18 July 2022, the Defence filed a request seeking leave to reply to the Request (the ‘Leave to Reply Request’).⁷

¹ MLI-D28-0006-3342-R01.

² MLI-D28-0006-4287-R01.

³ MLI-D28-0006-4212-R01.

⁴ MLI-D28-0006-4222-R01 and associated exhibit MLI-D28-0006-3002-R01.

⁵ Defence Rule 68(2)(b) and Rule 68(3) applications, ICC-01/12-01/18-2276-Conf, with a confidential annex.

⁶ Prosecution response to “Defence Rule 68(2)(b) and Rule 68(3) applications” (ICC-01/12-01/18-2276-Conf), ICC-01/12-01/18-2280-Conf.

⁷ Defence request for leave to reply to “Prosecution response to “Defence Rule 68(2)(b) and Rule 68(3) applications” (ICC-01/12-01/18-2276-Conf)” (ICC-01/12-01/18-2280-Conf), ICC-01/12-01/18-2281-Conf.

4. On 20 July 2022, in accordance with the time limit set by the Single Judge,⁸ the Defence filed its reply (the 'Reply').⁹
5. The parties' submissions are discussed below to the extent necessary. As the probative value and weight, if any, of the prior recorded testimony will be assessed by the Chamber in its Article 74 Judgment having regard to the evidence as a whole, submissions pertaining to the probative value and weight will in principle not be addressed in the present decision.

II. Analysis

A. D-0544 and D-0611 (Rule 68(2)(b) of the Rules)

6. With respect to the applicable law, the Chamber refers to its prior decision setting out the relevant framework and relevant considerations.¹⁰ The Chamber notably 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.
7. Concerning the first assessment to be conducted, 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 which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged.¹¹ Prior recorded

⁸ Email dated 18 July 2022 at 14:42.

⁹ Defence reply to "Prosecution response to "Defence Rule 68(2)(b) and Rule 68(3) applications" (ICC-01/12-01/18-2276-Conf)" (ICC-01/12-01/18-2280-Conf), ICC-01/12-01/18-2287-Conf-Exp (confidential redacted version filed on the same date; with four confidential *ex parte* annexes).

¹⁰ 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.

¹¹ D-0511, D-0539 and D-0553 Decision, ICC-01/12-01/18-2241, para. 8.

testimony that *disprove* the acts and conduct of the accused are equally inadmissible under this provision.¹²

8. The Defence submits that D-0544 gives evidence about Mr Al Hassan's good temperament and about two incidents for which Mr Al Hassan provided his help, and adds that his evidence is duplicative and does not concern a charged event.¹³ Specifically with respect to the assistance provided, the Defence avers that this evidence does not go to the acts and conduct of the accused as D-0544 explains that he does not know anything about Mr Al Hassan's work at the Islamic Police in 2012 and principally aims at explaining the good character of the accused in general, which is corroborated by other witnesses.¹⁴
9. The Chamber notes as a preliminary matter that, in the context of the first assessment under Rule 68(2)(b) of the Rules, a prior recorded testimony going to the acts and conduct of the accused may not be introduced into evidence irrespective of whether it is repetitive or corroborative of other evidence.¹⁵ The Chamber also considers that, while a prior recorded testimony describing the good character of the accused is not *per se* inadmissible under Rule 68(2)(b) of the Rules, it is appropriate to distinguish between character evidence which also evidences the acts and conduct of the accused, and consequently is inadmissible under Rule 68(2)(b) of the Rules, and that which does not relate to the acts and conduct of the accused.¹⁶
10. The Chamber has assessed the evidence of D-0544 in light of the charges in the present case and notes that Mr Al Hassan is alleged to be responsible for the charged crimes *inter alia* by virtue of the functions and powers he allegedly

¹² See similarly ICTR, Trial Chamber II, *The Prosecutor v. Casimir Bizimungu et al.*, Decision on Justin Mugenzi's motion to admit transcript extracts of General Romeo Dallaire's evidence in the *Ndindilyama* proceedings, 4 November 2008, para. 24.

¹³ Request, ICC-01/12-01/18-2276-Conf, para. 8.

¹⁴ Request, ICC-01/12-01/18-2276-Conf, para. 9.

¹⁵ See similarly ICTR, Trial Chamber II, *The Prosecutor v. Casimir Bizimungu et al.*, Decision on Jérôme-Clément Bicamumpaka's motion for the statement of the deceased witness, Faustin Nyagahima, to be accepted as evidence, 30 May 2007, para. 10.

¹⁶ See similarly ICTY, Trial Chamber II, *The Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Decision partially granting Stojan Župljanin's motion for admission of evidence pursuant to Rule 92 *bis*, 21 July 2011, para. 26.

exercised within the Islamic Police and his alleged participation in the general oppression and abridgment of the freedoms of the civilian population of Timbuktu.¹⁷ In the view of the Chamber, to the extent that D-0544's prior recorded testimony relates to the accused's role and capacity within the armed groups, it goes to the acts and conduct of the accused within the meaning of Rule 68(2)(b) of the Rules.¹⁸ The Chamber notes in particular that D-0544 describes Mr Al Hassan's role and functions during the relevant time period *vis-à-vis* the civilian population and members of the armed groups, notably by referring to the accused's ability to intervene in situations of arrests or property issues.¹⁹ In this regard, the Defence's arguments regarding D-0544's lack of knowledge as to the accused's role in the Islamic Police is not determinative as the correct test under Rule 68(2)(b) is whether the prior recorded testimony in question can be *used to prove* the accused's acts and conduct.²⁰ For the aforementioned reasons, the Chamber considers that parts of D-0544's prior recorded testimony pertain to the acts and conduct of Mr Al Hassan and may not be introduced into evidence pursuant to Rule 68(2)(b) of the Rules.

11. The Chamber recalls that Rule 68(2)(b) of the Rules does not foreclose the possibility of partial admission of the statement, excluding parts going to the acts and conduct of the accused.²¹ The ultimate decision as to the appropriateness of admitting only parts of a statement is discretionary and depends on the particular circumstances.²² As mentioned above, the prior recorded testimony is short and provides evidence on Mr Al Hassan's character based on two incidents. Given that the details regarding these two incidents, which must be excluded, are not 'incidental' in nature and constitute the core of D-0544's testimony, the Chamber

¹⁷ See Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 8 November 2019 (original on 30 September 2019), ICC-01/12-01/18-461-Conf-Corr, *inter alia* paras 963-964, 992, 997.

¹⁸ See similarly 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 18-20; ICTY, Trial Chamber, *The Prosecutor v. Radovan Karadžić*, Decision on Prosecution motion for admission of Milan Tupajić's evidence in lieu of viva voce testimony pursuant to Rule 92 *bis*, 24 May 2012, para. 15 referring to Transcript of 29 June 2005, T-15472 lines 3-9.

¹⁹ MLI-D28-0006-3342-R01 paras 13-18, 24.

²⁰ *Al Hassan* OA4 Judgment, ICC-01/12-01/18-2222, para. 54 (emphasis added).

²¹ *Al Hassan* OA4 Judgment, ICC-01/12-01/18-2222, para. 49.

²² *Al Hassan* OA4 Judgment, ICC-01/12-01/18-2222, para. 51.

considers that the parts of D-0544's prior recorded testimony going to the accused's acts and conduct are inseparable from the rest.²³ Accordingly, the Chamber considers that it is more appropriate in this instance that the witness testifies *viva voce* so that all issues can be fully explored through questioning by the parties and participants and, as warranted, the Chamber itself. For these reasons, the Chamber rejects the introduction into evidence of D-0544's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules. The present determination is without prejudice to any subsequent application under Rule 68(3) with respect to D-0544.

12. With respect to D-0611, the Chamber is satisfied that his prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused and will accordingly proceed to the discretionary 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.
13. The Chamber observes that, as acknowledged by both parties,²⁴ D-0611's evidence mainly relates to background information, notably referring to the situation in the north of Mali, including events experienced by D-0611's family, the justice system before the time period relevant to the charges, the *Congrès pour la justice dans l'Azawad*, as well as the arrest of Mr Al Hassan.
14. The Prosecution challenges the formal indicia of reliability of D-0611's prior recorded testimony, on the basis that the Defence failed to take steps to ensure that the witness's identity was clearly established on the record and to verify that the person speaking over the phone was indeed D-0611. The Prosecution also argues that no explanation has been provided as to why D-0611 could not provide the NINA card number at the time of the taking of the testimony and the prior

²³ *Al Hassan* OA4 Judgment, ICC-01/12-01/18-2222, para. 50 citing 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. 13.

²⁴ Request, ICC-01/12-01/18-2276-Conf, para. 12; Response, ICC-01/12-01/18-2280-Conf, para. 20.

recorded testimony merely states that the number ‘will be provided to the Defence later.’²⁵

15. The Chamber recalls that the Single Judge has previously authorised the taking of a statement in a fully remote manner, provided that the Defence allows the witness to confirm their identity and the truthfulness of the statement’s contents.²⁶ The Chamber also observes that in the prior recorded testimony at hand, the witness confirmed its truthfulness as well as his identity, as read out by the Defence.²⁷ With respect to the Prosecution’s aforementioned challenges, the Chamber notes that in the Reply, the Defence explains: (i) the steps taken to verify D-0611’s identity; (ii) that a Defence personnel was present when the initial statement was taken on the day before it was finalised and read back to D-0611, as transcribed in the prior recorded testimony subject to the present request; (iii) the reasons for proceeding with the taking of the statement in a fully remote manner; and (iv) the reasons for not being able to provide the NINA card number at that point in time.²⁸ The Chamber further recalls that Rule 68(2)(b)(ii) and (iii) of the Rules specifies that any prior recorded testimony introduced under Rule 68(2)(b) must be accompanied by a certified declaration and lays out the conditions thereof. Notably, Rule 68(2)(b)(iii) of the Rules stipulates that the person witnessing the declaration must verify in writing, amongst other things, that the person making the declaration is the person identified in the prior recorded testimony and was informed that if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony.
16. In the view of the Chamber, the information provided by the Defence in the Reply, the contents of the prior recorded testimony of D-0611, as well as the aforementioned procedure are sufficient to conclude that the prior recorded testimony at hand has formal indicia of reliability for the purpose of the

²⁵ MLI-D28-0006-4287-R01 at 4289.

²⁶ Email dated 31 March 2022 at 16:25, provided to the Prosecution and the LRVs on 7 July 2022 at 12:34.

²⁷ MLI-D28-0006-4287-R01 at 4288-4289

²⁸ Reply, ICC-01/12-01/19-2287-Conf-Exp, paras 6-12. The NINA card of D-0611 is annexed to the Reply. *See* ICC-01/12-01/18-2287-Conf-Exp-Anx4.

Chamber's determination under Rule 68(2)(b) of the Rules. Accordingly, the Chamber considers that requiring D-0611 to testify orally before the Chamber is unnecessary and authorises the introduction into evidence of his prior recorded testimony pursuant to Rule 68(2)(b) of the Rules.

B. D-0093 and D-0240 (Rule 68(3) of the Rules)

17. 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 Rules²⁹ and the Directions on the conduct of proceedings.³⁰
18. The Chamber notes the Defence's submission that the evidence of D-0093 and D-0240 are contextual and cumulative, being corroborated by other *viva voce* witnesses.³¹ The Chamber also notes that the Defence requests two hours (instead of nine hours) and two and three quarter hours (instead of seven hours), respectively, for the supplementary examination of D-0093 and D-0240, should introduction pursuant to Rule 68(3) be granted.³²
19. The Chamber also notes that the Prosecution does not oppose the Rule 68(3) Requests, but insists on the necessity to cross-examine both D-0093 and D-0240.³³ In addition, it submits that the statements go to the acts and conduct of the accused and lack necessary indicia of reliability.³⁴ Should the Chamber grant the Defence's Rule 68(3) applications, the Prosecution requests two hours to examine D-0093 and two and a half hours to examine D-0240.³⁵
20. The Chamber is satisfied that introduction into evidence of D-0093's and D-0240's prior recorded testimony will expedite the proceedings, while at the same time protecting their fairness. Accordingly, the Chamber authorises the

²⁹ 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.

³⁰ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, paras 63-70.

³¹ Request, ICC-01/12-01/18-2276-Conf.

³² Request, ICC-01/12-01/18-2276-Conf, para. 4.

³³ Response, ICC-01/12-01/18-2280-Conf, paras 23, 29.

³⁴ Response, ICC-01/12-01/18-2280-Conf, para. 24.

³⁵ Response, ICC-01/12-01/18-2280-Conf, para. 39.

introduction of D-0093's and D-0240's prior recorded testimony into evidence as well as one associated exhibit of D-0240 pursuant to Rule 68(3) of the Rules.

21. Bearing in mind the object and purpose of this provision, its previous determination on this matter³⁶ and the topics proposed to be covered in the supplementary examination, the Chamber considers it appropriate to allocate one and a half hours for the Defence's examination of D-0093, two hours for the Prosecution's examination of D-0093, one and a half hours for the Defence's examination of D-0240 and two and a half hours for the Prosecution's examination of D-0240.

³⁶ 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-Red, para. 8.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PARTIALLY GRANTS the Request;

AUTHORISES, subject to the receipt of the certified declaration, the introduction of the prior recorded testimony of D-0611 (MLI-D28-0006-4287-R01) into evidence;

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 declaration;

AUTHORISES, subject to the relevant procedural pre-requisites being satisfied when the witnesses appear in Court, introduction of the prior recorded testimony of D-0093 and D-0240 and an associated exhibit, as referred to in footnotes 3 and 4 of the present decision, into evidence pursuant to Rule 68(3) of the Rules;

REJECTS the remainder of the Request; and

INSTRUCTS the parties to file public redacted versions of the Request, the Response, the Leave to Reply Request and the Reply by Thursday, 1 September 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 Friday, 22 July 2022

At The Hague, The Netherlands