



Original: English

**No. ICC-01/12-01/18
Date: 21 September 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-0219 and D-0312 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**

Karim A. A. Khan
 Nazhat Shameem Khan
 Mame Mandiaye Niang

Counsel for the Defence

Melinda Taylor

Legal Representatives of Victims

Seydou Doumbia
 Mayombo Kassongo
 Fidel Luvengika Nsita

Legal Representatives of Applicants**Unrepresented Victims****Unrepresented Applicants for
Participation/Reparations****The Office of Public Counsel for Victims****The Office of Public Counsel for the
Defence****States Representatives*****Amicus Curiae*****REGISTRY****Registrar**

Peter Lewis

Counsel Support Section**Victims and Witnesses Unit**

Nigel Verrill

Detention Section**Victims Participation and Reparations
Section****Other**

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 on the introduction into evidence of the prior recorded testimony of D-0219 and D-0312 pursuant to Rule 68(2)(b) of the Rules’.

I. Procedural history

1. On 2 September 2022, the Defence filed an application to introduce into evidence the prior recorded testimony of witnesses D-0219¹ and D-0312,² together with 18 associated exhibits,³ pursuant to Rule 68(2)(b) of the Rules (the ‘Request’).⁴
2. On 13 September 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Request (the ‘Response’),⁵ submitting that (i) while minimal weight should be afforded to D-0219’s prior recorded testimony and the associated material should be found as lacking reliability, it does not object to their introduction into evidence; and (ii) D-0312’s prior recorded testimony should not be introduced into evidence pursuant to Rule 68(2)(b) of the Rules as it goes to the acts and conduct of the accused and relates to issues that are materially in dispute and of significance for the Chamber’s eventual determination of the charges.
3. The parties’ submissions are discussed below to the extent necessary. As the probative value and weight, if any, of the prior recorded testimony and associated exhibits will be assessed by the Chamber in its Article 74 Judgment, submissions

¹ MLI-D28-0006-5593-R01.

² MLI-D28-0006-5584-R01.

³ For D-0219: MLI-D28-0006-3005; MLI-D28-0006-3006; MLI-D28-0006-3007; MLI-D28-0006-3022; MLI-D28-0006-5575; MLI-D28-0006-3010; MLI-D28-0006-3027; MLI-D28-0006-3110; MLI-D28-0006-3112; MLI-D28-0006-3113; MLI-D28-0006-3115; MLI-D28-0006-3116; MLI-D28-0006-3117; MLI-D28-0006-3121; MLI-D28-0006-3124; MLI-D28-0006-3147; MLI-D28-0006-3150; and MLI-D28-0006-3155.

⁴ Defence Rule 68(2)(b) applications for Witnesses D-0219 and D-0312, ICC-01/12-01/18-2328-Conf, with a confidential annex.

⁵ Prosecution response to “Defence Rule 68(2)(b) applications for Witnesses D-0219 and D-0312” (ICC-01/12-01/18-2328-Conf), ICC-01/12-01/18-2339-Conf.

pertaining to probative value, relevance or weight of the material submitted are not addressed in the present decision.

II. Analysis

4. With respect to the applicable law, the Chamber refers to its prior decision setting out the relevant framework and considerations.⁶ 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.

1. *D-0312*

5. Concerning the first assessment to be conducted, the Defence submits that neither prior recorded testimony subject to the Request goes to the acts and conduct of the accused.⁷ Particularly with respect to D-0312, and the reference to a debt situation in his prior recorded testimony, the Defence avers that D-0312 does not give evidence on Mr Al Hassan’s role or position within the Islamic police and in fact confirms that he does not know Mr Al Hassan’s position or the structure of the police.⁸ Accordingly, the Defence submits that the Chamber can and should rely on D-0312’s perception of the utility of particular services provided by the Islamic Police to the local population and the manner in which these services were provided, without entering the territory of the charged acts and conduct in this case.⁹

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.

⁷ Request, ICC-01/12-01/18-2328-Conf, para. 2.

⁸ Request, ICC-01/12-01/18-2328-Conf, para. 27.

⁹ Request, ICC-01/12-01/18-2328-Conf, para. 27.

6. Referring to the Chamber's previous determination on the first assessment under Rule 68(2)(b) of the Rules, the Prosecution submits that D-0312's proffered evidence regarding a case of debt that was allegedly resolved by the accused, acting in his capacity as a member of the Islamic Police, clearly touches upon the acts and conduct of the accused.¹⁰
7. The Chamber refers to its previous determination on this matter, in which it notably found that a prior recorded testimony goes to the acts and conduct of the accused to the extent that it 'relates to the accused's role and capacity within the armed groups' and can be used to prove relevant underlying facts.¹¹ With respect to the prior recorded testimony at hand, the Chamber also observes that the decision on the confirmation of charges describes Mr Al Hassan's role as a mediator in cases concerning debt, a fact relied upon by Pre-Trial Chamber I when confirming Mr Al Hassan's responsibility under Article 25(3)(d) of the Statute.¹² Accordingly, in the view of the Chamber, the part of D-0312's prior recorded testimony which discusses Mr Al Hassan's involvement in a debt situation and his role within the organisation¹³ goes to the acts and conduct of the accused.
8. 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.¹⁴ Considering that the aforementioned reference to the acts and conduct of the accused is only a discrete part of D-0312's prior recorded testimony, which is not inseparable from the rest, the Chamber finds it appropriate to consider partial admission of the remainder of D-0312's prior recorded testimony. The Chamber will accordingly proceed to the discretionary factors under Rule 68(2)(b)(i) of the Rules. It is nonetheless recalled that these

¹⁰ Response, ICC-01/12-01/18-2339-Conf, paras 21-25.

¹¹ 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, 22 July 2022, ICC-01/12-01/18-2288 (the 'D-0544, D-0611, D-0093 and D-0240 Decision'), paras 7, 9-10.

¹² Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 8 November 2019, ICC-01/12-01/18-461-Conf-Corr, paras 728, 963, 989, 1004, 1006.

¹³ MLI-D28-0006-5584-R01 at 5592, lines 1-13.

¹⁴ *Al Hassan* OA4 Judgment, ICC-01/12-01/18-2222, para. 49.

factors are not mandatory pre-conditions for the introduction of prior recorded testimony under Rule 68(2)(b) of the Rules.¹⁵

9. With evidence going to the acts and conduct of the accused being excluded, D-0312 testifies *inter alia* about: (i) the *cadi* system and justice system before 2012; (ii) the arrival of the groups and the meeting at Hotel Bouctou with the leadership and other notables; (iii) the case of P-1707 who was allegedly arrested by the police for being suspected of theft; (iv) the creation of the Islamic tribunal at the Hotel La Maison; and (v) the perception of Adama, who was the commissioner, as well as of Mr Al Hassan.
10. With respect to D-0312, the Prosecution firstly submits that he must testify *viva voce* as he provides evidence on the case of P-1707, in which the accused is implicated through the testimony of P-0641.¹⁶ The Prosecution also submits that D-0312's prior recorded testimony broaches key aspects of the case which are materially in dispute.¹⁷ In particular, the Prosecution refers to D-0312's evidence on a meeting held at the Hotel Bouctou, filming of a propaganda video for Ansar Dine, establishment of the Islamic Police, of which Adama was the *premier commissaire*, and establishment of the Islamic tribunal.¹⁸ The Prosecution also contends that D-0312 purports to have direct knowledge of key members of the groups and that this militates against granting this part of the Request.¹⁹
11. At the outset, the Chamber recalls that when evaluating whether a prior recorded testimony relates to issues that are materially in dispute or of significance to the case, it 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.²⁰ In doing so, the Chamber will objectively assess – irrespective of the parties' own

¹⁵ D-0511, D-0539, and D-0553 Decision, ICC-01/12-01/18-2241, para. 10.

¹⁶ Response, ICC-01/12-01/18-2339-Conf, paras 26-29.

¹⁷ Response, ICC-01/12-01/18-2339-Conf, paras 32-34.

¹⁸ Response, ICC-01/12-01/18-2339-Conf, paras 35, 37.

¹⁹ Response, ICC-01/12-01/18-2339-Conf, para. 36.

²⁰ D-0511, D-0539, and D-0553 Decision, ICC-01/12-01/18-2241, para. 15.

assertions – the degree to which a prior recorded testimony potentially impacts on material matters actually contested in the proceedings.²¹ The Chamber also considers it useful to recall that it is inherent to the Defence case to dispute the facts and circumstances as charged, as well as advance alternate narratives and evidence that supports its own case and that this cannot, in and of itself, foreclose the Defence from submitting evidence pursuant to Rule 68(2)(b) of the Rules.²²

12. As noted by the Prosecution, D-0312 testifies that P-1707 was brought to the BMS, after being arrested by the police on suspicion of theft, where he stayed for two hours and was then released by Adama.²³ The Chamber observes that beyond summarising P-0641's evidence on this topic, the Prosecution fails to demonstrate how his and D-0312's accounts give rise to 'irreconcilable positions' on the case of P-1707,²⁴ particularly with respect to the involvement of the accused. To the contrary, D-0312 states that he does not know who arrested P-1707 and that, apart from Adama, he does not know who else from the groups was present at the BMS when P-1707 was there.²⁵ The Chamber further notes that Pre-Trial Chamber I found that the evidence presented by the Prosecution was insufficient to establish the facts related to the case of P-1707 to the requisite standard.²⁶
13. While the Chamber acknowledges that D-0312's prior recorded testimony relates, in part, to matters that are of significance to the case, particularly where the witness discusses the meeting held at Hotel Bouctou, it notes that other witnesses, notably P-0150 and P-0641, have already discussed these matters before the Chamber. As such, the Chamber considers that the potential impact of D-0312 not being examined in court on these matters is limited. Furthermore, and with respect to the remainder of the topics identified in the Response, the Chamber

²¹ D-0511, D-0539, and D-0553 Decision, ICC-01/12-01/18-2241, para. 15.

²² D-0511, D-0539, and D-0553 Decision, ICC-01/12-01/18-2241, para. 11.

²³ Response, ICC-01/12-01/18-2339-Conf, para. 27.

²⁴ Response, ICC-01/12-01/18-2339-Conf, para. 31.

²⁵ MLI-D28-0006-5584-R01 at 5590-5591.

²⁶ See Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf, avec une annexe confidentielle contenant la liste complète des charges confirmées à l'encontre de l'accusé, ICC-01/12-01/18-767-Conf-Anx, 1 May 2020, ICC-01/12-01/18-767-Conf-Corr, para. 57.

considers that the Prosecution has failed to substantiate how the relevant accounts of D-0312 are of such significance that testing this evidence in court is warranted.

14. The Chamber is also satisfied that the prior recorded testimony of D-0312 has sufficient indicia of reliability of a formal nature and that the interests of justice are best served by its introduction pursuant to Rule 68(2)(b) of the Rules as it would reduce the extent of in-court time by six hours.²⁷ Accordingly, and since the Chamber finds it unnecessary to require D-0312 to testify orally, the Chamber authorises the introduction into evidence of his prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, with the exception of discrete parts of D-0312's prior recorded testimony going to the acts and conduct of the accused.

2. D-0219

15. With respect to D-0219, the Chamber is satisfied that his prior recorded testimony goes to proof of matters other than the acts and conduct of the accused.
16. As regards the second assessment, the Chamber observes that D-0219's evidence mainly relates to background information and/or issues that are not materially in dispute. Indeed, D-0219 testifies about: (i) the situation and treatment of Azawad communities; (ii) the presence of Al Qaeda in the north of Mali before 2012; (iii) the establishment of MNA, MNLA and Ansar Dine; (iv) crimes allegedly committed by the Malian armed forces; (v) the justice system after the withdrawal of the Malian authorities from the north in 2012; (vi) the creation of the MIA (*Mouvement islamique de l'Azawad*) and the HCUA (*Haut Conseil pour l'Unité de l'Azawad*); and (vii) interactions and negotiations between Ansar Dine and representatives of Mali and third States. Considering this content, the fact that the Prosecution does not oppose this part of the Request and finding that the prior recorded testimony has sufficient indicia of reliability, the Chamber considers it unnecessary to require D-0219 to testify orally before the Chamber.

²⁷ Annex 1 to the Defence submission of its list of witnesses, ICC-01/12-01/18-2152-Conf-Anx1, p. 3.

17. The Chamber accordingly authorises the introduction into evidence of D-0219's prior recorded testimony, together with the 18 associated exhibits – which are all discussed in his statement –, pursuant to Rule 68(2)(b) of the Rules.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PARTIALLY GRANTS the Request;

AUTHORISES, subject to the receipt of the certified declaration, the introduction into evidence of the prior recorded testimony of D-0219, together with associated exhibits, and of D-0312, as identified in footnotes 1 to 3 of the present decision, with the exception of discrete parts of D-0312's prior recorded testimony going to the acts and conduct of the accused as identified in footnote 13 of the present decision; and

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

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, 21 September 2022

At The Hague, The Netherlands