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**International  
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Court**

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**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**

**Public redacted version of  
'Prosecution response to "Defence Rule 68(2)(b) and Rule 68(3) applications"  
(ICC-01/12-01/18-2276-Conf)', 14 July 2022, ICC-01/12-01/18-2280-Conf**

**Source:** Office of the Prosecutor

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## Introduction

1. The Prosecution opposes the Defence request to introduce the evidence of D-0544 and D-0611 under rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”).<sup>1</sup> They should testify entirely *viva voce*, or at a minimum under rule 68(3) of the Rules so that the Prosecution has the opportunity to cross-examine them on relevant issues.
2. A large part of the statement of D-0544 (“D-0544’s Statement”)<sup>2</sup> goes to the acts and conduct of the Accused. It also relates to issues that are materially in dispute and of significance for the Chamber’s eventual determination of the charges.<sup>3</sup>
3. With respect to D-0611, the Defence seeks to introduce a transcript of the read-back of his statement (“D-0611’s Transcript”)<sup>4</sup>, which was conducted by phone.<sup>5</sup> There is no indication in D-0611’s Transcript that the Defence took any steps to properly verify his identity during the main interview or read-back.<sup>6</sup> D-0611’s Transcript accordingly lacks indicia of reliability even of a formal nature.
4. The Prosecution leaves to the Chamber’s discretion whether the statement of D-0093 (“D-0093’s Statement”)<sup>7</sup> and the transcript of the read-back of the statement of D-0240 (“D-0240’s Transcript”)<sup>8</sup> and associated material should be submitted under rule 68(3) of the Rules.<sup>9</sup> However, both D-0093 and D-0240 must at a minimum testify under rule 68(3) of the Rules, rather than their evidence being submitted in written under rule 68(2)(b) of the Rules. Their evidence goes to the Accused’s role and conduct as a member of the armed groups that occupied Timbuktu in 2012-2013. Both witnesses also discuss issues that are materially in dispute, such as the existence of sexual violence during the occupation of Timbuktu in 2012-2013, and forced marriages

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<sup>1</sup> ICC-01/12-01/18-2276-Conf (“Defence Application”).

<sup>2</sup> MLI-D28-0006-3342-R01.

<sup>3</sup> ICC-01/12-01/18-2241, para. 15; ICC-01/12-01/18-2277, para. 10.

<sup>4</sup> MLI-D28-0006-4287-R01.

<sup>5</sup> MLI-D28-0006-4287-R01, p. 4288, l. 3-6.

<sup>6</sup> MLI-D28-0006-4287-R01, p. 4288, l. 7-9; p. 4289, l. 22-23.

<sup>7</sup> MLI-D28-0006-4212-R01.

<sup>8</sup> MLI-D28-0006-4222-R01.

<sup>9</sup> ICC-01/12-01/18-2276-Conf.

between local women and members of the armed groups. The Prosecution must thus be provided with an opportunity to cross-examine them in court.

5. Should the Chamber decide to grant the Defence Application in respect of any of the four Defence Witnesses, little, if any, weight should be afforded to their evidence in light of the reliability issues detailed below.

### **Confidentiality**

6. This filing is classified as confidential, pursuant to regulation 23bis(2) of the Regulations of the Court ("Regulations"), because it responds to the Defence Application which was filed confidentially and because it refers to other documents which are currently subject to the same classification. The Prosecution will file a public redacted version of this document in due course.

### **Submissions**

#### **D-0544**

7. The Prosecution submits that D-0544 should testify entirely *viva voce*, or at a minimum pursuant to rule 68(3) of the Rules because his account must be subject to cross-examination.

*1) D-0544's evidence goes to acts and conduct of the Accused and/or touches upon issues that are materially in dispute and of significance*

8. D-0544 appears to have been present in Timbuktu during the entire period relevant to the charges and had multiple interactions with the Accused.<sup>10</sup> In fact, a large part of his six-page statement relates to the acts and conduct of the Accused. For example, D-0544 describes how the Accused helped him protect his family and other civilians'

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<sup>10</sup> MLI-D28-0006-3342-R01, p. 3344, para. 12, p. 3345, para. 16-22, p. 3346, para. 24.





necessary steps to confirm the Witness' identity so that it is clearly established on the record. This is a basic requirement, without which the integrity of the process before the Court would be put into question.

17. In the present case, there is no sufficient confirmation at all as to the identity of the person who spoke with the Defence. D-0611's Transcript, which consists of a transcript of a read-back of his statement, fails to indicate the basis on which the Witness' identity has been properly averred:

- D-0611's Transcript indicates that the read-back process was conducted by phone, with all members of the Defence and the interpreter present in the Hague while the witness was in a confidential location;<sup>24</sup>
- The passage relating to D-0611's personal details reads that "ID number: will be provided to the Defence later";<sup>25</sup>
- While the Defence claims that it was in possession of a copy of D-0611's [REDACTED] [REDACTED] at the time of the interview but was unable to read the number,<sup>26</sup> it is unclear why D-0611, who would presumably be in possession of the original [REDACTED], did not read out the number for the Defence;
- In fact, there is no indication in D-0611's Transcript that the Defence took any steps during the read-back to properly verify that the person on the other end of the line was indeed D-0611;<sup>27</sup> and
- It is also unclear from D-0611's Transcript whether any member of the Defence team met D-0611 in person during the interview before the read-back of the statement on [REDACTED].<sup>28</sup>

18. Additionally, D-0611's Transcript suggests that the process of reading back his statement was complicated by the use of three languages,<sup>29</sup> particularly when D-0611

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through, a copy be sent to him by secure electronic means for him to sign, scan, and send back. These options were authorised by the Single Judge [REDACTED] and notified to the Prosecution [REDACTED].

<sup>24</sup> MLI-D28-0006-4287-R01, p. 4288, l. 3-6.

<sup>25</sup> MLI-D28-0006-4287-R01, p. 4289, l. 22-23.

<sup>26</sup> Email from the Defence on 7 July 2022 at 11:52.

<sup>27</sup> MLI-D28-0006-4287-R01, p. 4288, l. 7-9; p. 4289, l. 22-23.

<sup>28</sup> MLI-D28-0006-4287-R01, p. 4291, l. 1-4; p. 4294, l. 1-3.

<sup>29</sup> The Defence counsel would speak in English, which is interpreted into [REDACTED] by the interpreter, while D-0611's answers and clarifications were interpreted from [REDACTED] in most instances.

had clarifications to make.<sup>30</sup> It also appears to have been interrupted multiple times by telephone connection issues,<sup>31</sup> which could explain why some of the passages in the transcript are quite unclear.<sup>32</sup>

## 2) *Limited probative value or weight of D-0611's Transcript*

19. D-0611's Transcript is of limited probative value and little, if any, weight should be accorded to it.

20. First, D-0611, who works [REDACTED],<sup>33</sup> was in his village, [REDACTED],<sup>34</sup> during the period relevant to the charges.<sup>35</sup> According to D-0611, the MNLA (*Mouvement National pour la Libération de l'Azawad*) was present in his area for several months, following which the *Mujahideen* would come and go.<sup>36</sup> D-0611's Transcript mainly covers background information that is of limited relevance to the charges, such as the marginalisation of the north,<sup>37</sup> the killings of Touaregs in the past rebellions,<sup>38</sup> the use of *cadis* in his area,<sup>39</sup> the establishment of CJA (*Congrès pour la justice dans l'Azawad*) [REDACTED]<sup>40</sup> [REDACTED]<sup>41</sup> and [REDACTED]<sup>42</sup>

21. Second, D-0611 makes a number of unsubstantiated assertions in his statement:

- In relation to the Malian state justice system, D-0611 claims that: "If you went to a state judge, you would have to pay money to the judge: if someone killed someone, the state judge would free them if they paid enough money to the judge. Everyone knew that the State justice system was corrupt."<sup>43</sup> In light of

<sup>30</sup> See e.g. MLI-D28-0006-4287-R01, p. 4305, l. 24 – p. 4308, l. 21.

<sup>31</sup> See e.g. MLI-D28-0006-4287-R01, p. 4299, l. 17-27; p. 4304, l. 12-19; p. 4305, l. 3-12.

<sup>32</sup> See e.g. MLI-D28-0006-4287-R01, p. 4298, l. 16 – p. 4299, l. 8.

<sup>33</sup> MLI-D28-0006-4287-R01, p. 4290, l. 16.

<sup>34</sup> MLI-D28-0006-4287-R01, p. 4295, l. 26.

<sup>35</sup> MLI-D28-0006-4287-R01, p. 4301, l. 25-27.

<sup>36</sup> MLI-D28-0006-4287-R01, p. 4302, l. 12-13, p. 4304, l. 9-10.

<sup>37</sup> MLI-D28-0006-4287-R01, p. 4299, l. 6-13.

<sup>38</sup> MLI-D28-0006-4287-R01, p. 4300, l. 21-26.

<sup>39</sup> MLI-D28-0006-4287-R01, p. 4296, l. 13 – p. 4297, l. 23.

<sup>40</sup> MLI-D28-0006-4287-R01, p. 4309, l. 16 – p. 4311, l. 19.

<sup>41</sup> MLI-D28-0006-4287-R01, p. 4312, l. 5 – p. 4314, l. 12.

<sup>42</sup> MLI-D28-0006-4287-R01, p. 4317, l. 1 – p. 4321, l. 11.

<sup>43</sup> MLI-D28-0006-4287-R01, p. 4298, l. 1. 7-13.



his statement that that he had no interactions with the Malian authorities before 2012 and that there were no state judges in his area,<sup>44</sup> the basis for these allegations is totally unclear; and

- D-0611 claims that after the departure of the MNLA from his area, “[t]he Mujahideen appointed some locals to secure the post, but it was just a ploy for the locals – a way to survive.”<sup>45</sup> Yet, during the read-back, he also added that “*c’est en tout cas c’est ça que je pense*”,<sup>46</sup> indicating that this was only his opinion. When asked to confirm if it is true and correct to the best of his knowledge and belief, he replied that: “Yes... *En tout cas aussi longtemps que je me rappelle, c’est correct.*”<sup>47</sup> Overall, his evidence on this point is ambiguous and without clear basis.

22. Should the Chamber decide to grant the introduction of D-0611’s Transcript under rule 68(2)(b) of the Rules, little, if any, weight should be accorded this evidence.

### D-0093

23. The Prosecution leaves to the Chamber’s discretion whether D-0093’s Statement<sup>48</sup> should be submitted under rule 68(3) of the Rules, but stresses that he must at a minimum testify under rule 68(3) of the Rules, rather than his Statement being submitted under rule 68(2)(b) of the Rules.

***1) D-0093’s evidence goes to acts and conduct of the Accused and/or touches upon issues that are materially in dispute and of significance***

24. D-0093 is [REDACTED] and had direct interactions with members of the armed groups, [REDACTED] during the period relevant to the charges.<sup>49</sup> His evidence goes to the acts and conduct of the Accused. [REDACTED]

<sup>44</sup> MLI-D28-0006-4287-R01, p. 4295, l. 1. 24-26.

<sup>45</sup> MLI-D28-0006-4287-R01, p. 4305, l. 1. 1-2.

<sup>46</sup> MLI-D28-0006-4287-R01, p. 4305, l. 1. 13.

<sup>47</sup> MLI-D28-0006-4287-R01, p. 4305, l. 1. 20-23.

<sup>48</sup> MLI-D28-0006-4212-R01.

<sup>49</sup> See e.g. MLI-D28-0006-4212-R01, p. 4214, para. 10, p. 4215, para. 15-18.

[REDACTED]

[REDACTED]<sup>50</sup>

25. D-0093's Statement also relates to issues that are materially in dispute, such as the forced nature of marriages between local women and members of the armed groups, and the occurrence of sexual violence during the period relevant to the charges. For example:

- D-0093 claims that he remembers a woman from [REDACTED] who married an *islamist*; she allegedly told D-0093 that she was in love with the *islamist* and gave her consent and that her parents accepted the marriage;<sup>51</sup> and
- D-0093 further claims that he never [REDACTED] [REDACTED] with sexual violence, and that he does not recall having seen any complaint of sexual violence [REDACTED] [REDACTED].<sup>52</sup>

2) *Lack of indicia of reliability and limited probative value or weight of D-0093's Statement*

26. D-0093's Statement is of limited probative value and little, if any, weight should be accorded to it.

27. D-0093 makes a number of assertions without clarifying the basis of his knowledge. For example:

- D-0093 speaks of an "*association*" consisting of locals who met *islamists* to discuss issues between the local population and the *islamists* and claims that: "*Les Islamistes ne faisaient rien sans informer cette association, et si cette association ne comprenait pas quelque chose, ils allaient appeler leur chef et faire une réunion pour trouver une solution*".<sup>53</sup> [REDACTED]

<sup>50</sup> MLI-D28-0006-4212-R01, p. 4216, para. 25-26.

<sup>51</sup> MLI-D28-0006-4212-R01, p. 4219, para. 42.

<sup>52</sup> MLI-D28-0006-4212-R01, p. 4219, para. 41.

<sup>53</sup> MLI-D28-0006-4212-R01, p. 4217-4218, para. 32.

[REDACTED]; and

- D-0093 claims that: *“Hamed Moussa est devenu chef de la Police Islamique. Il était à la BMS. C’était après que Adama ait quitté la Police Islamique et que Al Hassan était au Gouvernorat.”*<sup>54</sup> Bearing in mind that the evidence clearly establishes that Mohamed Mousa was not the head of the Islamic Police but of the *Hesbah*, it is unclear how he learned about the changes in the leadership of the Islamic Police, or the locations where Mohamed Moussa and the Accused were based.

28. There are also issues of potential bias and contamination. [REDACTED]

[REDACTED]<sup>55</sup>  
 As mentioned above, according to D-0093’s Statement, it was D-0544 who spoke well of the Accused and who told him that the Accused helped liberate persons arrested by Mohamed Moussa.<sup>56</sup> According to the metadata of both D-0544’s Statement and D-0093’s Statement, an intermediary whose name is redacted under the pseudonym D-0089 was present at the interviews of both D-0544 and D-0093 and signed their statements.<sup>57</sup> Further, D-0093’s Statement indicates that the intermediary D-0089 was the only person from the Defence team who conducted D-0093’s interview on the first day, [REDACTED].<sup>58</sup>

#### D-0240

29. The Prosecution leaves to the Chamber’s discretion whether D-0240’s Transcript should be submitted under rule 68(3) of the Rules, but stresses that he must at a minimum testify under rule 68(3) of the Rules, rather than his Transcript being submitted under rule 68(2)(b) of the Rules.

<sup>54</sup> MLI-D28-0006-4212-R01, p. 4216, para. 23.

<sup>55</sup> MLI-D28-0006-4212-R01, p. 4214, para. 14.

<sup>56</sup> MLI-D28-0006-4212-R01, p. 4216, para. 24.

<sup>57</sup> MLI-D28-0006-3342, p. 3347; MLI-D28-0006-4212-R01, p. 4221.

<sup>58</sup> MLI-D28-0006-4212-R01, p. 4212, listing only one name redacted under A.5 for the date of 18 July 2020 under the category *“Personnes ayant mené les entretiens”*.

1) *D-0240's evidence goes to acts and/or conduct of the Accused and touches upon issues that are materially in dispute and of significance*

30. First, D-0240 was present in Timbuktu from [REDACTED] for approximately two months, [REDACTED].<sup>59</sup> During that period, he claims that he had direct interactions with members of the armed groups, including [REDACTED] and the Accused.<sup>60</sup> For example, D-0240 went to the BMS when he heard that the *islamists* had taken [REDACTED] which had been found [REDACTED] after the departure of the MNLA, because they thought that it belonged to the MNLA.<sup>61</sup> He was initially received by an Arabic speaking man, but when D-0240 told to others that he was looking for [REDACTED], the Accused came over because he heard D-0240's name and questioned D-0240 about [REDACTED].<sup>62</sup> The Arabic speaking man and the Accused then had a discussion, which D-0240 presumes to be about his status, [REDACTED] clarified that D-0240 [REDACTED].<sup>63</sup>

31. Second, D-0240's evidence also relates to issues that are materially in dispute, namely, the forced nature of marriages between local women and members of the armed groups in 2012-2013, the credibility of witnesses and victims who testified in court and the procedure before the Islamic Tribunal. For example:

- D-0240 claims that he knows [REDACTED] and that she told him that she had accepted to marry an *islamist*.<sup>64</sup> [REDACTED]

[REDACTED]

[REDACTED].<sup>65</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>66</sup> [REDACTED]

<sup>59</sup> MLI-D28-0006-4222-R01, p. 4229, l. 29-34.

<sup>60</sup> See e.g. MLI-D28-0006-4222-R01, p. 4226, l. 6-18; p. 4232, l. 18 – p. 4233, l. 29.

<sup>61</sup> MLI-D28-0006-4222-R01, p. 4232, l. 26 – p. 4233, l. 3.

<sup>62</sup> MLI-D28-0006-4222-R01, p. 4233, l. 4-15.

<sup>63</sup> MLI-D28-0006-4222-R01, p. 4233, l. 16-20.

<sup>64</sup> MLI-D28-0006-4222-R01, p. 4234, l. 12 – p. 4235, l. 4.

<sup>65</sup> MLI-D28-0006-4222-R01, p. 4235, l. 10-12.

<sup>66</sup> MLI-D28-0006-4222-R01, p. 4235, l. 28-31.

- [REDACTED]
- [REDACTED]<sup>67</sup> and
- D-0240 was [REDACTED] concerning [REDACTED]

2) *Lack of indicia of reliability and limited probative value or weight of D-0240's Transcript*

32. D-0240's Transcript is of limited probative value and little, if any, weight should be accorded to it.

33. [REDACTED]  
[REDACTED] he does not have [REDACTED] relationship with the Accused.<sup>70</sup> D-0240 [REDACTED]  
[REDACTED]  
[REDACTED]<sup>71</sup> [REDACTED]<sup>72</sup> [REDACTED]  
[REDACTED].

34. D-0240's account regarding [REDACTED] marriage which he characterised as consensual,<sup>73</sup> is clearly contradicted [REDACTED]  
[REDACTED]<sup>74</sup> [REDACTED]  
[REDACTED]<sup>75</sup>

35. [REDACTED]  
[REDACTED]

<sup>67</sup> MLI-D28-0006-4222-R01, p. 4238, l. 20-22.

<sup>68</sup> MLI-D28-0006-4222-R01, p. 4230, l. 23 – p. 4231, l. 19.

<sup>69</sup> MLI-D28-0006-4222-R01, p. 4231, l. 21 – p. 4232, l. 2.

<sup>70</sup> MLI-D28-0006-4222-R01, p. 4225, l. 3-6.

<sup>71</sup> MLI-D28-0006-4222-R01, p. 4226, l. 9-10.

<sup>72</sup> MLI-D28-0006-4222-R01, p. 4229, l. 6-7.

<sup>73</sup> MLI-D28-0006-4222-R01, p. 4235, l. 2-3.

<sup>74</sup>

<sup>75</sup>

[REDACTED] <sup>76</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] <sup>77</sup> [REDACTED]

[REDACTED] <sup>78</sup> [REDACTED]

[REDACTED]

[REDACTED] <sup>79</sup> In any event, D-0240's evidence regarding [REDACTED] marriage with an *islamist* is entirely based on what [REDACTED] allegedly told him, rather than what he himself witnessed, and is unreliable.

36. In addition, his relationship with key members of the groups and his previous employment with the Defence raise issues regarding potential bias:

- D-0240's accounts indicate that during the occupation of 2012, he benefited from the assistance of [REDACTED] and the Accused, [REDACTED] [REDACTED]. In addition to the incident regarding [REDACTED] described above, D-0240 [REDACTED] [REDACTED] [REDACTED] [REDACTED] <sup>80</sup> [REDACTED] [REDACTED] <sup>81</sup> and [REDACTED]
- [REDACTED] [REDACTED] <sup>82</sup> [REDACTED] [REDACTED] [REDACTED] <sup>83</sup> [REDACTED]

<sup>76</sup> MLI-D28-0006-4222-R01, p. 4236, l. 6-8.

<sup>77</sup> [REDACTED]

<sup>78</sup> [REDACTED]

<sup>79</sup> [REDACTED]

<sup>80</sup> MLI-D28-0006-4222-R01, p. 4230, l. 6-7.

<sup>81</sup> MLI-D28-0006-4222-R01, p. 4230, l. 8-10.

<sup>82</sup> MLI-D28-0006-3000.

<sup>83</sup> MLI-D28-0006-4222-R01, p. 4237, l. 32 – p. 4238, l. 1.

## Conclusion

37. For the foregoing reasons, the Prosecution requests the Chamber to dismiss the rule 68(2)(b) request regarding D-0544 and D-0611 and decide that they should testify entirely *via voce* or at a minimum under rule 68(3) of the Rules.

38. The Prosecution leaves to the Chamber's discretion regarding the rule 68(3) request to introduce D-0093's Statement and D-0240's Transcript.

39. Should any of the four Defence Witnesses be called to testify under rule 68(3) of the Rules, the Prosecution requests the Chamber to grant it two hours (for each) to cross-examine Witnesses D-0093, D-0544 and D-0611 and two hours and a half to cross-examine D-0240.



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Karim A. A. Khan QC, Prosecutor

Dated this 14<sup>th</sup> day of July 2022

At The Hague, The Netherlands