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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) applications for Witnesses D-0219 and D-0312" (ICC-01/12-01/18-2328-Conf)', 13 September 2022, ICC-01/12-01/18-2339-Conf

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Introduction

1. The Prosecution leaves to the Chamber's discretion whether the statement of D-0219 ("D-0219's Statement")¹ and associated material should be submitted under rule 68(2)(b) of the Rules of Procedure and Evidence ("Rules").²
2. However, the Prosecution submits that minimal weight should be afforded to D-0219's Statement and associated material because the Witness's basis for knowledge regarding important matters is not explained and much of the proffered evidence relates to matters that fall outside of the geographical, temporal and factual scope of the charges. Further, the documents sought to be admitted as associated material do not bear sufficient indicia of reliability as D-0219 does not provide any explanation related to their provenance.
3. It is important to recall that according to the Witness he was in Timbuktu for only two days in █████ 2012. Consequently, his allegations regarding the role of the Hesbah, the Islamic Police and the Islamic Tribunal must be scrutinized with caution.
4. With respect to D-0312, the Prosecution opposes the Defence's request to introduce into evidence the transcript of the read-back of his statement ("D-0312's Transcript")³ under rule 68(2)(b) of the Rules. The transcript does not meet the requirements set by rule 68(2)(b) of the Rules as it goes to the acts and conducts of the Accused and relates to issues that are materially in dispute and of significance for the Chamber's eventual determination of the charges. In the interest of justice, D-0312 should therefore testify entirely *viva voce* so that, *inter alia*, the Prosecution has the opportunity to cross-examine him on relevant issues.

¹ MLI-D28-0006-5593-R01.

² ICC-01/12-01/18-2328-Conf+Anx1 ("Defence Application").

³ MLI-D28-0006-5584-R01.

Confidentiality

5. This filing is classified as confidential, pursuant to regulation 23bis(2) of the Regulations of the Court ("Regulations"), because it responds to the present 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-0219

6. The Prosecution leaves to the Chamber's discretion whether D-0219's Statement and associated material⁴ should be submitted under rule 68(2)(b) of the Rules but submits that, should the Chamber grant the Defence Application, little to no weight should be given to both. D-0219's Statement and documents present reliability issues, and contain information that in some cases have no direct relevance to the charges nor probative value.

1) Lack of indicia of reliability of D-0219's Statement

7. Contrary to the Defence allegation that D-0219's Statement was prepared in a reliable manner and has sufficient indicia of reliability,⁵ the process concerning the statement taking is unclear in relation to the following matters:

- according to the attendance record, the interview took place on [REDACTED] [REDACTED]. However, D-0219 states that the statement was read back to him for the first time on the [REDACTED].⁶ It is unclear why the statement was then apparently re-read and signed two days later [REDACTED] [REDACTED] 2022 and not on the day of the first read-back of the statement;⁷

⁴ MLI-D28-0006-5593-R01.

⁵ ICC-01/12-01/18-2328, p. 3, para. 2, p. 9, para. 9.

⁶ MLI-D28-0006-5593-R01 at 5594, para. 5.

⁷ MLI-D28-0006-5593-R01 at 5605.

- Also, D-0219 states that the first meeting with the Defence team, in the presence of his counsel, occurred [REDACTED]. He was then “*virtuellement*” in contact with two members of the Defence team.⁸ D-0219 indicates that the information in paragraphs 8 to 66 was provided to the Defence [REDACTED].
Aside from the typographical error concerning the number of the paragraphs contained in the statement,⁹ it is noteworthy that almost the entirety of the statement was taken “*virtuellement*” with no indications regarding the manner in which the Defence team and the witness interacted;
- Further, although the attendance record lists the members of Defence teams who conducted the interview with the Witness, it does not indicate who exactly participated on which dates.

2) *D-0219’s Statement contains information that is irrelevant or lacks probative value*

8. The Defence itself acknowledges that D-0219 “is not acquainted with what happened during the charged period specifically”¹⁰ and that his “evidence [...] does not relate to charged incidents”.¹¹

9. As a matter of fact, D-0219 is very vague as to where he was based during the relevant period of the charges. Presumably he was mostly in the [REDACTED] region¹² but he also states that in June 2012 he was in [REDACTED].¹³ D-0219 also states being between [REDACTED] and [REDACTED] at the end of 2012.¹⁴ In any event, during the vast majority of the relevant period of the charges, the Witness was therefore physically outside of Timbuktu.

⁸ MLI-D28-0006-5593-R01 at 5594, para. 5. Incidentally, the Prosecution notes that D-0219’s counsel mentioned in this paragraph did not sign the statement.

⁹ MLI-D28-0006-5593-R01 in fact contains 65 and not 66 paragraphs.

¹⁰ ICC-01/12-01/18-2328-Conf, p. 4, para. 10.

¹¹ ICC-01/12-01/18-2328-Conf, p. 6, para. 15.

¹² MLI-D28-0006-5593-R01 at 5595, para. 8: “[REDACTED]”, at 5599, para. 43 : “[REDACTED]”.

¹³ MLI-D28-0006-5593-R01 at 5601, para. 56.

¹⁴ MLI-D28-0006-5593-R01 at 5602, para. 57.

10. More specifically, D-0219 states that he was in Timbuktu for only two days in [REDACTED] 2012, i.e. very early on.¹⁵ He does not indicate why he went there, nor what he did or who he was in contact with. Consequently, the reliability of his evidence regarding the role of the Hesbah, the Islamic Police and the Islamic Tribunal is questionable.

11. Additionally, D-0219 makes a number of unsubstantiated statements concerning the role of Ansar Dine in Timbuktu in 2012 which by his own admission are based on his opinion only, for example:

- *“Je crois¹⁶ que si Ansar Dine n’avait pas collaboré avec Al Qaida à Tombouctou, la population de Tombouctou aurait souffert plus, en souffrant d’atrocités comme celles commises à Gao”;*¹⁷
- *“À Tombouctou je croire¹⁸ que la présence de Al Qaida a affecté leur approche, et dans certains cas, cela a amené à une interprétation plus stricte. Si Al Qaida disait qu’il faut que tu brises quelque chose, comme un mausolée par exemple, il fallait le faire”.*¹⁹

12. Moreover, D-0219 claims to have joined Ansar Dine in 2012,²⁰ therefore the reliability of any of his evidence regarding the armed group’s objectives and actions should also be subject to caution and should not be given much credence, particularly when it is self-serving, contrary to the evidence on the record, or aims to absolve the armed group of any criminal responsibility. This is the case for example when he alleges that Ansar Dine’s objective was to protect the local population,²¹ that it was against rapes and forced marriages and that he never heard of anyone being promised a woman if he joined Ansar Dine.²²

¹⁵ MLI-D28-0006-5593-R01 at 5599, para. 30.

¹⁶ Highlighted by the Prosecution.

¹⁷ MLI-D28-0006-5593-R01 at 5599, para. 35.

¹⁸ Highlighted by the Prosecution.

¹⁹ MLI-D28-0006-5593-R01 at 5601, para. 51.

²⁰ MLI-D28-0006-5593-R01 at 5598, para. 32.

²¹ MLI-D28-0006-5593-R01 at 5598, para. 33, at 5601, para. 55.

²² MLI-D28-0006-5593-R01 at 5599, paras 36-39.

13. For the rest, D-0219's Statement focuses exclusively on events outside the geographical, temporal or factual scope of the charges. Further, the vast majority of the statements he makes are unsubstantiated.

14. Paragraphs 9 to 22 in fact relate to the Azawad community before 2012 and negotiations with the Malian State ; paragraphs 23 to 27 concern the presence of Al Qaida/AQMI in the north of Mali before 2012. These alleged facts predate the charges and are largely unsubstantiated.

15. Additionally, D-0219 explains being directly involved in only two of the events that he relates: [REDACTED]

[REDACTED]²³ in 2009 and [REDACTED]
[REDACTED]
[REDACTED].²⁴

16. The rest of the statement covers events which, while being contemporaneous to the time period of the charges, are geographically and factually unrelated to the charges in the present case. In fact, they do not relate to incidents or events that allegedly occurred in Timbuktu but mostly Kidal and Gao²⁵ and other locations.²⁶ Specifically, paragraphs 28 to 31 concern the establishment of the MNA; paragraphs 42-46 concern crimes committed by the FAMA against the civilian population in 2012; and paragraphs 55 to 66 concern the establishment of the MIA and HCUA leading up to events occurred in 2015.

17. Moreover, here again in the above paragraphs, D-0219 makes a number of unsubstantiated and general statements. For example, P-0219 does not explain what his basis of knowledge is in relation to the evolution from MNA into MNLA,²⁷ the names of the leaders of FAMA and their respective allegiances to military groups,²⁸ or the basis for his assertion that certain officers of the Malian army deserted the army to

²³ MLI-D28-0006-5593-R01 at 5597, para. 22.

²⁴ MLI-D28-0006-5593-R01 at 5597, para. 26.

²⁵ See for instance MLI-D28-0006-5593-R01 at 5599-5600, paras 35, 43, 48-49; at 5601, para. 51 (first two sentences).

²⁶ See for instance MLI-D28-0006-5593-R01 at 5601, para. 56, at 5602, para. 57.

²⁷ MLI-D28-0006-5593-R01 at 5598, paras 28-29.

²⁸ MLI-D28-0006-5593-R01 at 5599, para. 42.

join Ansar Dine “*par affinité avec ses chefs*”.²⁹ D-0219 also states that “*Tout au long de l’année 2012, il n’y a jamais eu d’hostilités entre le MNLA et Ansar Dine*”.³⁰ This is a rather vague statement which is contradicted by the evidence on the record – including the evidence provided by Defence witnesses.³¹

18. Last, the Defence’s assertion that D-0219 described “the political and legal vacuum that existed in Timbuktu at the time of the arrival of Ansar Dine”³² is nowhere to be found in D-0219’s statement. The only instances in which D-0219 mentions Timbuktu during the relevant period of the charges are the ones listed above and none relates to the Defence’s allegation.

3) No relevance nor probative value of the documents sought to be admitted as associate material to D-0219’s Statement

19. Firstly, with the exception of one document,³³ the documents which the Defence is seeking to submit as associated material to D-0219’s Statement³⁴ either substantially pre-date³⁵ or post-date the relevant period of the charges.³⁶

20. Secondly, D-0219 does not explain how he came to be in possession of these documents nor what their source is. Additionally, this material includes unsigned copies³⁷ of peace agreements³⁸ and other unsigned documents concerning the MNLA and HCUA.³⁹ This impacts on the reliability and probative value of such documents.

²⁹ MLI-D28-0006-5593-R01 at 5600, para. 46.

³⁰ MLI-D28-0006-5593-R01 at 5601, para. 54.

³¹ P-0004: ICC-01/12-01/18-T-0164-ENG-ET, p. 37, l.19 to p.38, l.12 ; P-0065: ICC-01/12-01/18-T-037-ENG-CT,p.14,l.5-12 ; P-0150: ICC-01/12-01/18-T-089-ENG-CT,p.22,l.7-13, ICC-01/12-01/18-T-092-ENG-CT,p.6,l.16-19 ; P-0646: ICC-01/12-01/18-T-078-ENG-CT,p.14, ll.10-18 and MLI-OTP-0012-0207; P-1086: ICC-01/12-01/18-T-121-ENG-ET,p.29, l.17-31 to p.31, l.10 ; D-0243, MLI-D28-0006-3053 at 3054, para. 7.

³² ICC-01/12-01/18-2328-Conf, p. 4, para. 8.

³³ MLI-D28-0006-5575.

³⁴ ICC-01/12-01/18-2328-Conf-Anx.1, p.1.

³⁵ MLI-D28-0006-3005, MLI-D28-0006-3006 both dated 1958; MLI-D28-0006-3007 dated 1991; MLI-D28-0006-3022 dated 2006.

³⁶ MLI-D28-0006-5593-R01 at 5603, para. 65.

³⁷ MLI-D28-0006-3007.

³⁸ MLI-D28-0006-3022.

³⁹ MLI-D28-0006-3117, MLI-D28-0006-3121 and MLI-D28-0006-3124.

D-0312

21. Contrary to what is argued by the Defence, Witness D-0312's evidence relates to the acts and conducts of the Accused and should therefore not be submitted through rule 68(2)(b). The Witness should therefore testify *viva voce* so that the Prosecution can cross-examine him on the alleged incident with a view to determining its reliability.

22. The Prosecution recalls that in its last decision on rule 68(2)(b) of the Rules, the Chamber reminded the parties that in assessing whether the requirements of the rule are met, the Chamber first determines whether the prior recorded testimony relates to proof of a matter other than the acts and conducts of the Accused and second, assesses 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.⁴⁰

23. The Chamber in fact found that since the Accused is alleged to be responsible for the charged crimes by virtue of the functions and powers he allegedly exercised within the Islamic Police, the extent to which a witness's evidence relates to the Accused role and capacity within the armed groups goes to the acts and conducts of the Accused within the meaning of rule 68(2)(b) of the Rules. More specifically, the Chamber stated that a witness's lack of knowledge as to the Accused's role within the Islamic Police does not impact on the test as to whether the prior recorded testimony can be used to prove the Accused's acts and conducts.⁴¹ Finally, the Chamber stated that when incidents concerning the acts and conducts of the Accused are not incidental in nature and cannot be separated from the rest of the witness's testimony, this precludes the possibility of partial admission of the statement under rule 68(2)(b) of the Rules.⁴²

24. The Prosecution thus submits that the transcript of the read-back of D-0312's statement ("D-0312's Transcript")⁴³ does not meet the requirements set by rule 68(2)(b) of the Rules and therefore opposes the Defence's request to introduce it into evidence under this rule.

⁴⁰ ICC-01/12-01/18-2288, p. 4., para. 6.

⁴¹ ICC-01/12-01/18-2288, p. 5-6, para. 10.

⁴² ICC-01/12-01/18-2288, p. 6-7, para. 11.

⁴³ MLI-D28-0006-5584-R01.

1) D-0312's evidence goes to the acts and conducts of the Accused

25. 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 Police⁴⁴ clearly touches upon the acts and conducts of the Accused as defined by the Chamber above.⁴⁵ The Prosecution should therefore be afforded the possibility of testing the reliability of the Witness's claims through cross-examination.

2) The evidence regarding the case of ██████████

26. The Prosecution submits that the *viva voce* testimony of the Witness would also be warranted given that his proffered evidence also touches upon the case of ██████████ ██████████, in which the Accused is implicated through the testimony of Witness P-0641.⁴⁶ This would permit the Prosecution to question the Witness on this matter and assess the reliability of his evidence.

27. According to D-0312, ██████████ worked at ██████████ ██████████ and was arrested by the police because he was thought to have stolen some equipment ██████████. The man was brought to the BMS by the police, where he stayed for two hours and was then released by Adama.⁴⁷

28. As the Defence Application recalls this is the same event which P-0641 testified about (P-1707 being ██████████).⁴⁸

29. Although D-0312 does not implicate the Accused in this incident, P-0641 testified that he was told that it was the Accused together with a young Arab named Lamine who arrested ██████████.⁴⁹ According to P-0641's testimony, the Accused was Lamine's boss and, without the Accused, Lamine could not have arrested ██████████.⁵⁰ P-0641 testified that ██████████ spent the night in the BMS with the Accused who threatened to

⁴⁴ MLI-D28-0006-5584-R01 at 5591, line 33 to p.5592, l.11.

⁴⁵ See para. 23.

⁴⁶ ICC-01/12-01/18-T-137-ET-CONF, p. 36, l. 6 to p. 37, l.7.

⁴⁷ MLI-D28-0006-5584-R01 at 5590, l.28 to p.5591, l.14.

⁴⁸ ICC-01/12-01/18-2328, para. 26, p.8-9 ; as to P-0641's testimony, see ICC-01/12-01/18-T-137-ET-CONF, p. 19, l.3 to 21, l.13; p.22, l.12 to 24, l.13; p.27, l.3 to p.28, l.10; p.35, l.12 to 37, l.18.

⁴⁹ ICC-01/12-01/18-T-137-ET-CONF, p.21, l.1 ; p.27, l.20 ; p.28, l.6.

⁵⁰ ICC-01/12-01/18-T-137-ET-CONF, p. 28, ll.6-7.

amputate his hand had he not confessed the theft he was accused of.⁵¹ P-0641 confirmed during his testimony the part of his statement which was read to him where he had stated that the Accused interrogated ██████ about the theft and threatened to cut his hand with a knife.⁵²

30. The Defence Application refers to the litigation between the parties before the Chamber relating to whether or not this incident could be elicited from P-0641 during his testimony.⁵³ However, it omits to recall that, in the context of the litigation, it stated that the incident “pertaining to P-1707 concerns allegations concerning the acts and conducts of Mr Al Hassan” and as such could not be put to P-0641.⁵⁴

31. Overall, given the irreconcilable positions of D-0312 and P-0641 on the key role played by the Accused in this incident, the interests of justice are best served if D-0312 testifies *viva voce*.

3) D-0312's Transcript does not meet the requirements set by rule 68(2)(b)(i)

32. Pursuant to rule 68(2)(b)(i), among the factors which the Chamber should consider in determining whether a prior recorded testimony could be introduced under rule 68(2)(b) are the fact that the prior recorded testimony relates to issues that are not materially in dispute, goes to background information or is such that the interests of justice are best served by its introduction under this rule.

33. The Prosecution submits that D-0312's Transcript does not comply with any of these requirements and disagrees with Defence submission that D-0312's prior recorded testimony does not touch upon key factual aspects of the case.⁵⁵ D-0312's Transcript is concise but, contrary to what Defence states, is certainly not limited in scope.⁵⁶

⁵¹ ICC-01/12-01/18-T-137-ET-CONF, p. 21, ll.11-12 ; p.22, ll. 17-19 ; p.27, ll.10-15.

⁵² ICC-01/12-01/18-T-137-ET-CONF, p. 36, l. 6 to p. 37, l.7.

⁵³ ICC-01/12-01/18-2328, p. 8-9, para. 26.

⁵⁴ Email sent on 22 September 2021 at 10h48.

⁵⁵ ICC-01/12-01/18-2328, p. 8, para. 24.

⁵⁶ ICC-01/12-01/18-2328, p. 8, para. 25.

34. Indeed, D-0312's Transcript broaches key aspects of the case which are materially in dispute between the parties.

35. D-0312 [REDACTED],⁵⁷ he describes the arrival of the groups in Timbuktu in 2012⁵⁸ and states [REDACTED] [REDACTED] [REDACTED] [REDACTED] representatives of the groups such as Iyad Ag GHALY, Abou Zeid, Sanda Ould BOUMAMA and local notables [REDACTED] [REDACTED].⁵⁹ D-0312 himself describes this as an important meeting⁶⁰ which lasted over three days⁶¹ and during which the topics discussed were "comment les femmes devaient se comporter, l'interdiction d'alcool, des cigarettes, du fait que les femmes ne peuvent plus marcher sans porter un voile sur leur tête".⁶² D-0312 also describes the filming of what he describes as Ansar Dine propaganda by the Al Jazeera team [REDACTED].⁶³

36. D-0312 also purports to have direct knowledge of key members of the groups. He states that he knew [REDACTED] long before the groups arrived and that he spoke to him about the intentions of the groups [REDACTED] [REDACTED].⁶⁴ He also allegedly has direct knowledge of [REDACTED]'s interaction with the local population and the fact that after [REDACTED] [REDACTED] moved to the Sans-fil neighbourhood with [REDACTED].⁶⁵

37. Additionally, D-0312 speaks of the establishment of the Islamic Police of which he says Adama was the "*premier commissaire*" and of the Islamic Tribunal,⁶⁶ and last the role of cadis in Timbuktu.⁶⁷

⁵⁷ MLI-D28-0006-5584-R01 at 5587, l.16.

⁵⁸ MLI-D28-0006-5584-R01 at 5587, l.29 to 5588, l.17.

⁵⁹ MLI-D28-0006-5584-R01 at 5588, ll.18-30.

⁶⁰ MLI-D28-0006-5584-R01 at 5588, l.31.

⁶¹ MLI-D28-0006-5584-R01 at 5588, l.25.

⁶² MLI-D28-0006-5584-R01 at 5588, l.34 to 5589, l.2.

⁶³ MLI-D28-0006-5584-R01 at 5590, ll.8-12.

⁶⁴ MLI-D28-0006-5584-R01 at 5590, ll.21-24.

⁶⁵ MLI-D28-0006-5584-R01 at 5589, l.31 to 5590, l.4.

⁶⁶ MLI-D28-0006-5584-R01 at 5591, ll.17-23.

⁶⁷ MLI-D28-0006-5584-R01 at 5587, ll.22-27.

38. All of the above touch upon important aspects of the case which are materially disputed between the parties.

39. In the end, the interests of justice are best served if D-0312 testifies *viva voce* so that the Prosecution has the opportunity to fully test D-0312's credibility through his cross-examination.

Conclusion

40. For the foregoing reasons, the Prosecution leaves to the Chamber's discretion the decision regarding the introduction of D-0219's Statement under rule 68(2)(b) of the Rules.

41. The Prosecution requests the Chamber to dismiss the rule 68(2)(b) request regarding D-0312's Transcript and to decide that he should testify entirely *viva voce*.



Karim A. A. Khan KC, Prosecutor

Dated this 13th day of September 2022

At The Hague, The Netherlands