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**International
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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 “Corrigendum to ‘Prosecution response to “Defence application under Rule 68(3) to introduce Witness D-0554, D-0516 and D-0512 statements into evidence and for examination of these Witnesses (ICC-01/12-01/18-2208-Conf-Red)”, 12 May 2022, ICC-01/12-01/18-2220-Conf-Corr

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Introduction

1. During the Status Conference held on 6 April 2002, the Single Judge ordered the Defence to submit by 30 April 2022 an application pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (“the Rules”) concerning Witnesses MLI-D28-0511 (“D-0511”), MLI-D28-D-0516 (“D-0516”), MLI-D28-D-0539 (“D-0539”), MLI-D28-0553 (D-0553”) and MLI-D28-D-0554 (“D-0554”).¹
2. On 29 April 2022, the Defence filed two separate requests, one seeking the introduction into evidence of D-0511’s, D-0539’s and D-0553’s statements under rule 68(2)(b) of the Rules² and another one, addressed in the present submissions, requesting the introduction into evidence of D-0554’s, D-0516’s and D-0512’s statements pursuant to rule 68(3) of the Rules.³
3. The Prosecution is in principle amenable to the use of rule 68(3) of Rules as it favours the efficiency and expeditiousness of the proceedings.
4. However the Prosecution objects to the introduction into evidence of D-0516’s and D-0512’s statements as they fail to meet the standard requirements under rule 68(3). The statements do not satisfy the formalities required in rule 111, and contain new accounts that are internally inconsistent and contradict the evidence on the record. The evidence of these witnesses should therefore be heard entirely *viva voce* so that the Chamber can fully appreciate its reliability.
5. Witness D-0554 should also testify *viva voce*. His statement does not meet the requirements of rule 111 of the Rules either, and is not corroborative of evidence that is already on the record. In this regard, the Defence mischaracterises Prosecution evidence in relation to Mohamed Moussa and Ansar Dine.

Confidentiality

6. This filing is classified as confidential, pursuant to regulation 23*bis* (2) of the Regulations of the Court (“Regulations”), because it responds to the Defence Request

¹ ICC-01/12-01/18-T-171 ET, p. 7, ll 9-16, p.9, ll 17-23.

² ICC-01/12-01/18-2209-Conf+Conf-AnxA.

³ ICC-01/12-01/18-2208-Conf-Red+Conf-AnxA.

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.

Applicable Law

7. The only requirements set by rule 68(3) of the Rules for the introduction of prior recorded testimony are that, upon the Chamber's approval of this procedure, the witness is present in court, does not object to the introduction into evidence of the prior recorded testimony and the parties have an opportunity to examine the witness. Contrary to what is suggested by Defence, the fact that the statement of a witness does not relate to the acts and conduct of the Accused is not a pre-requisite under rule 68(3) of the Rules.⁴

8. In order to meet the factual threshold for introducing a prior recorded testimony under rule 68 of the Rules, evidence of sufficient specificity and probative value must be provided.⁵ An assessment of the probative value of the prior recorded testimony includes an assessment of its reliability; a non-exhaustive list of indicators of indicia of reliability that includes:

- the presence of a qualified interpreter during the interview;
- the absence of manifest inconsistencies;
- whether the evidence is corroborated by other evidence;⁶
- the fact that the prior recorded testimony is signed by the witness as well as two investigators conducting the interview⁷ and initialled on each page by the witness, investigators and the interpreter;
- a signed 'Witness Acknowledgment' as to its voluntariness, truthfulness and potential use in proceedings before the Court; and
- a signed 'Interpreter Certification' that indicates that the Interpreter was qualified to interpret in the language; that the witness understood the language

⁴ ICC-01/12-01/18-2208-Conf-Red, para. 27.

⁵ ICC-01/09-01/11-1938-Corr-Red2, paras 37, 63.

⁶ ICC-01/09-01/11-1938-Corr-Red2, para. 65.

⁷ ICC-01/09-01/11-1938-Corr-Red2, paras 66, 85, 115, 132.

spoken; that the interpreter translated the statement in the presence of the witness and that the witness acknowledged that the facts and matter set out in the statement are true and accurate.⁸

9. This essentially reflects Rule 111 of the Rules,⁹ which provides that the record of formal statements must be signed by “the person who records and conducts the questioning and by the person who is questioned” and shall note “the date, time and place of, and all persons present during the questioning”. It must also indicate when “someone has not signed the record” as well as the reasons for this. These requirements are mandatory¹⁰ as they are designed to ensure that the written record accurately reflects the witness's questioning.¹¹

Submissions

A. Defence witness D-0516

(a) The statement lacks formal indicia of reliability.

10. D-0516's statement presents a number of issues concerning requisite formalities, which do not meet the standard of rule 111 of the Rules and lacks indicators of indicia of reliability as listed above.

11. First, although the cover page of the statement indicates that the interview lasted [REDACTED]¹² the specific duration of the interview for each day is not specified. This is important information since the witness was interviewed over [REDACTED] but the length of the statement is [REDACTED] pages long, including the procedural parts.

12. Second, as mentioned above, pursuant to rule 111 of the Rules, all persons attending the questioning should sign the statement, and any exception requires an explanatory note. The attendance record regarding the interview of D-0516 shows that, other than the witness, [REDACTED] persons were present at different dates, including an

⁸ ICC-01/09-01/11-1938-Corr-Red2, para. 144.

⁹ ICC-01/09-01/11-1938-Corr-Red2, para. 33.

¹⁰ ICC-01/04-01/07-475 OA, 13 May 2008, para. 91.

¹¹ ICC-01/05-01/08-2012-Conf, 15 December 2011, para. 144.

¹² [REDACTED]

intermediary¹³ and an interpreter.¹⁴ The witness and the intermediary signed the statement and initialled all pages. Each page of the statement also bears the initials [REDACTED].¹⁵ However, not all attendees have signed the statement: the other persons listed in the attendance record have neither signed nor explained why they did not sign the statement, making it unclear as to what exactly was their role during the interview.

13. Third, it is concerning to see that the said intermediary, whose name is unjustifiably redacted, apparently participated in the witness' Interview. This would be in contravention of Annex I of the *Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries* ("Intermediaries' Guidelines"), which sets the tasks that an intermediary can be assigned with. In relation to the investigations, this Annex states that an intermediary may simply "assist a party or participant to conduct investigations by identifying evidentiary leads and/or) witnesses and facilitating contact with (potential) witnesses".¹⁶ These tasks are clearly distinct from attending interviews with witnesses that, according to the Intermediaries' Guidelines, are not within the remit of an intermediary.

14. Further, although the interview was conducted in [REDACTED],¹⁷ the attendance record indicates that the interpreter was only present on one of the [REDACTED] days, and was oddly absent [REDACTED] when, according to Defence, "the statement was signed more accurately" and "the witness requested that a change be made to her statement".¹⁸ In fact, according to the attendance record no one attended the interview on [REDACTED] [REDACTED].

¹³ [REDACTED]

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ <https://www.icc-cpi.int/sites/default/files/GRCI-Eng.pdf>.

¹⁷ [REDACTED]

¹⁸ ICC-01/12-01/18-2208-Conf-Red, para. 23, fn 32.

15. Last but not least, the statement does not contain the Interpreter's certification at the end of the statement attesting that the statement was read back to the witness in a language which she understood. As indicated above, this is indicative, amongst other matters, of the witness's acceptance that the prior recorded testimony is true and accurate.¹⁹ In the absence of a signed certification by the witness that the statement was read out to her in a language that she understood, the mere assertion by Defence that this was the case²⁰ is insufficient.

(b) Lack of factual indicia of reliability.

16. Contrary to what the Defence states,²¹ D-0516's testimony is not duplicative of many aspects of P-0610's own evidence. It is in fact manifestly inconsistent with P-0610's testimony [REDACTED].

17. [REDACTED].²² [REDACTED]
[REDACTED]
[REDACTED].

18. [REDACTED],²³ P-0610 stated under oath that she did not want to get married to the Islamist but that she was afraid and had no choice.²⁴ P-0610 testified that her mother was equally unhappy but told her that she had to accept the marriage, otherwise the Islamists would harm them.²⁵

19. [REDACTED],²⁶ P-0610 testified that [REDACTED]
[REDACTED].²⁷ [REDACTED]
[REDACTED]. P-0610 states instead that the Islamists gave it to P-0610's elder brother.²⁸

¹⁹ ICC-01/09-01/11-1938-Corr-Red2, para. 144.

²⁰ ICC-01/12-01/18-2208-Conf-Red, para. 23.

²¹ ICC-01/12-01/18-2208-Conf-Red, para. 24.

²² [REDACTED]
²³ [REDACTED].

²⁴ ICC-01/12-01/18-T-158-CONF-ENG ET, p. 20, ll 12-18, p. 28, ll 14-18.

²⁵ T-158-CONF-ENG ET, p. 20, ll 21-25 ; p. 23, l. 12-p. 24, l. 2, p. 28, l. 9-13.

²⁶ [REDACTED]
²⁷ [REDACTED].

²⁸ ICC-01/12-01/18-T-158-CONF-ENG ET, p. 36, l. 2-3.

20. Moreover, P-0610 testified that she was raped during the first night of the marriage. She stated that when she went back home the day after, she did not talk to her mother about what had happened²⁹ and that she did not see her Islamist husband or hear from him again.³⁰ [REDACTED]

[REDACTED].³¹

Witness D-0512

(a) The statement lacks formal indicia of reliability.

21. The requirements set by rule 111 of the Rules as well as indicators of reliability indicated above are equally not met in D-0512's statement.

22. First, in relation to time, the witness was interviewed over [REDACTED] days, yet there is no indication regarding the duration of the interview each day.³²

23. Second, as in D-0516's case, the attendance record shows a number of issues. Other than the witness, [REDACTED] persons are recorded as having attended the interview on different dates including [REDACTED] intermediaries,³³ [REDACTED],³⁴ and an interpreter.³⁵ However, out of the [REDACTED] persons present, only [REDACTED] signed and initialled the pages of the statement, while the interpreter initialled all pages. However, the attendance record indicates that [REDACTED] was not present on each day of the interview,³⁶ so it is unclear who questioned the witness when he was not there. The remaining [REDACTED] persons have neither signed nor initialled the pages of the statement, nor is there an explanation note as to why they did not sign. The role of different persons present at the interview is therefore unclear.

²⁹ ICC-01/12-01/18-T-158-CONF-ENG ET, p. 38, l.16 to p. 43, l.23.

³⁰ ICC-01/12-01/18-T-158-CONF-ENG ET, p. 44, l. 7-14.

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁶ [REDACTED] did not attend the interview on [REDACTED].

24. Further, the Prosecution reiterates that the [REDACTED] intermediaries should not have been present during the interview as this contravenes the Intermediaries' Guidelines.³⁷

25. Finally, although the interview was conducted in [REDACTED]³⁸ the attendance record indicates that the interpreter was only present on [REDACTED] days out of [REDACTED].³⁹ Also, as in the case of D-0516's statement, D-0512's statement is missing the Interpreter's Certification signed by the witness whereby she confirms that the statement was read out to her in a language that she understood.

(b) Lack of factual indicia of reliability.

26. Defence alleges that D-0512's evidence will be corroborated by Defence witnesses who have yet to testify⁴⁰ and is "responsive" to Prosecution evidence.⁴¹ In fact D-0512's statement is manifestly inconsistent with the evidence of Prosecution witnesses who have already testified or whose prior recorded testimony was submitted under rule 68(2)(c) of the Rules. [REDACTED]

27. [REDACTED]⁴² [REDACTED]⁴³ [REDACTED]
 [REDACTED]⁴⁴ [REDACTED]
 [REDACTED]⁴⁵ [REDACTED]⁴⁶ [REDACTED]
 [REDACTED]⁴⁷

³⁷ [REDACTED]
³⁸ [REDACTED]
³⁹ [REDACTED]

⁴⁰ ICC-01/12-01/18-2208-Conf-Red, paras 29, 31-32.

⁴¹ ICC-01/12-01/18-2208-Conf-Red, para. 32.

⁴² [REDACTED]
⁴³ [REDACTED]
⁴⁴ [REDACTED]
⁴⁵ [REDACTED]
⁴⁶ [REDACTED]
⁴⁷ [REDACTED]

28. [REDACTED]
[REDACTED].⁴⁸

This is however in contradiction with P-0610's testimony.

29. [REDACTED]
[REDACTED]:

- [REDACTED]
[REDACTED].⁴⁹
[REDACTED]
[REDACTED].⁵⁰
- [REDACTED]
[REDACTED].⁵¹ [REDACTED]
[REDACTED].⁵² [REDACTED].⁵³
- [REDACTED]
[REDACTED].⁵⁴ [REDACTED].⁵⁵

30. [REDACTED]
[REDACTED].⁵⁶ [REDACTED]
[REDACTED]
[REDACTED].⁵⁷

31. Further, as indicated by the Defence, D-0512's account contradicts P-0570's evidence that was submitted under rule 68(2)(c) of the Rules.⁵⁸ [REDACTED]
[REDACTED].⁵⁹ [REDACTED]

48 [REDACTED]
[REDACTED].

49 [REDACTED].

50 [REDACTED].

51 [REDACTED].

52 [REDACTED].

53 [REDACTED].

54 [REDACTED].

55 [REDACTED].

56 [REDACTED].

57 [REDACTED].

⁵⁸ ICC-01/12-01/18-2208-Conf-Red, para. 33.

⁵⁹ [REDACTED].

[REDACTED]⁶⁰ are radically different from P-0570's evidence [REDACTED]

[REDACTED].⁶¹

32. [REDACTED]

[REDACTED].⁶² [REDACTED]

[REDACTED].⁶³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁶⁴ [REDACTED]

[REDACTED].⁶⁵ [REDACTED]

[REDACTED].⁶⁶

33. [REDACTED]

[REDACTED]

[REDACTED].⁶⁷ [REDACTED]

[REDACTED]

[REDACTED].⁶⁸

Witness D-0554

(a) The statement lacks formal indicia of reliability.

34. The Prosecution disagrees with the Defence that D-0554's statement contains formal indicia of reliability.⁶⁹

60 [REDACTED]
61 [REDACTED]
62 [REDACTED]
63 [REDACTED]
64 [REDACTED]
65 [REDACTED]
66 [REDACTED]
67 [REDACTED]
68 [REDACTED]

⁶⁹ ICC-01/12-01/18-2208-Conf-Red, para. 17.

35. The [REDACTED] days during which the witness was interviewed are recorded on the cover page of the statement.⁷⁰ However the specific duration of the interview for each day is not indicated. This is contrary to the requirements set in rule 111 of the Rules.

36. Equally, the statement does not comply with rule 111 of the Rules in relation to the signatures of people present during the questioning. Although the witness and [REDACTED] signed and initialled each page of D-0554's statement, it is not signed by counsel, Melinda Taylor, who attended the interview on one day, nor it is explained why she has not signed it.⁷¹

(b) Mischaracterisation of Prosecution evidence

37. The Defence contends that D-0554's statement should be introduced into evidence under rule 68(3) of the Rules because it is cumulative and corroborative of Prosecution *viva voce* witnesses and other items of evidence.⁷²

38. The Prosecution disagrees with Defence in relation to the following points.

39. [REDACTED]
[REDACTED]
[REDACTED].⁷³ [REDACTED]
[REDACTED]
[REDACTED].⁷⁴

40. [REDACTED]
[REDACTED]. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁷⁰ [REDACTED]

⁷¹ [REDACTED].

⁷² ICC-01/12-01/18-2208-Conf-Red, para. 10.

⁷³ ICC-01/12-01/18-2208-Conf-Red, para. 14.

⁷⁴ ICC-01/12-01/18-2208-Conf-Red, para. 14, fn. 15.

[REDACTED]⁷⁵ [REDACTED]
[REDACTED].

41. [REDACTED] witness P-0004 never stated that the local population did not have to pay for electricity but rather that “each family would give money”, and that “ it was the crisis committee that looked into this, collecting money from the population. And Ansar Dine would provide its contribution to make up the shortfall for us to be able to have the necessary fuel”.⁷⁶ Similarly, P-0065 stated that Ansar Dine provided support in relation to electricity only occasionally.⁷⁷

42. Defence also refers to the testimony of Prosecution witness P-0004 and P-0984 in support of the fact that the local population wrongly conflated Mohamed Moussa with the Islamic Police, because he worked at the BMS.⁷⁸

43. However, the portion of P-0004’s testimony referred to by the Defence⁷⁹ omits relevant parts of his transcripts and is taken out of context. When read in its entirety, it is clear that the Defence mischaracterises what P-0004 said regarding the role of Mohamed Moussa in connection with the Islamic Police.⁸⁰

44. In the case of witness P-0984, there was no conflation regarding Mohamed Moussa and the Islamic police. Rather P-0984 testified that if women were arrested for not being dressed correctly, they would be taken to the Islamic Police⁸¹ and then he gave an example of one woman who was arrested by Mohamed Moussa.⁸²

45. [REDACTED]

[REDACTED]⁸³ [REDACTED]. [REDACTED]

[REDACTED]

[REDACTED].

⁷⁵ [REDACTED]
[REDACTED].

⁷⁶ ICC-01/12-01/18-T-166-CONF-ENG, p. 76, l.13, ll 18-20.

⁷⁷ ICC-01/12-01/18-T-050-CONF-ENG-ET, p.56, ll 14-16 : “*sometimes* [emphasis added] it was Ansar Dine who, who provided the necessary supply, fuel for the water and electricity plants, even in the absence of funding by the ICRC”.

⁷⁸ ICC-01/12-01/18-2208-Conf-Red, para. 16, fns 20, 22.

⁷⁹ ICC-01/12-01/18-2208-Conf-Red, para. 16, fn. 20.

⁸⁰ ICC-01/12-01/18-T-166-CONF-ENG-ET, p. 90, l. 14 to p.92, l.12; ICC-01/12-01/18-T-166-CONF-ENG-ET, p. 92, l. 23 to p. 95, l. 20.

⁸¹ ICC-01/12-01/18-T-068-CONF-ENG-ET, p. 58, ll 9-11.

⁸² ICC-01/12-01/18-T-068-CONF-ENG-ET, p. 58, ll 18-19.

⁸³ [REDACTED].

Conclusion

46. For the foregoing reasons, the Prosecution respectfully requests that the Chamber reject the Defence Request in respect of D-0516 and D-0512. The Prosecution leaves the decision concerning D-0554 to the Chamber's discretion.



Karim A. A. Khan QC, Prosecutor

Dated this 12th day of May 2022

At The Hague, The Netherlands.