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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

With confidential Annex A

**Public redacted version of
'Prosecution response to "Second Defence Rule 68(2)(b) Application",
(ICC-01/12-01/18-2256-Conf)',
27 June 2022, ICC-01/12-01/18-2270-Conf**

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Mr Karim A. A. Khan QC
 Mr Mame Mandiaye Niang
 Mr Gilles Dutertre

Counsel for the Defence

Ms Melinda Taylor

Legal Representatives of the Victims

Mr Seydou Doumbia
 Mr Mayombo Kassongo
 Mr Fidel Luvengika Nsita

Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for
Victims****The Office of Public Counsel for the
Defence****States' Representatives****Amicus Curiae****REGISTRY**

Registrar

Mr Peter Lewis

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other**

Introduction

1. The Prosecution opposes the Defence request to introduce under rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”) the statement/transcripts and associated material related to Defence Witnesses D-0245 and D-0534 (“Defence Request”).¹ They should testify under 68(3) of the Rules so that they may be cross-examined on relevant issues.
2. D-0245’s evidence goes beyond background information and touches upon key aspects of the Defence’s case, which the Prosecution contests. It also contains several unsubstantiated assertions. [REDACTED]
[REDACTED] As such, D-0245’s evidence should not be tendered into evidence until its reliability has been properly tested through cross-examination.
3. While much of D-0534’s evidence relates to background information, such as the activities and objectives of the *Congrès pour la justice dans l’Azawad* (CJA), [REDACTED]
[REDACTED], it also contains information going to the acts and conduct of the Accused, specifically his membership in Ansar Dine and the Islamic Police in Timbuktu in 2012. It also relates to issues that are materially in dispute in the case. Further, contrary to what is stated by the Defence,² D-0534’s evidence, which consists of a transcript of a read-back of his statement, rather than a signed statement, does not contain sufficient indicia of reliability, even of a formal nature.
4. Should the Chamber decide to grant the Defence Request, very limited weight, if any, should be afforded to the evidence of D-0245 and D-0534.

Confidentiality

5. This filing is classified as confidential, pursuant to regulation 23*bis* (2) of the Regulations of the Court (“Regulations”). Indeed, it responds to the Defence Request which was filed confidentially and because it refers to other documents which are

¹ ICC-01/12-01/18-2256-Conf.

² ICC-01/12-01/18-2256-Conf, p. 8, para. 29.

currently subject to the same classification. The Prosecution will file a public redacted version of this document in due course.

Submissions

A. D-0245

6. D-0245 should be called to testify pursuant to rule 68(3) of the Rules so that he may be subject to cross-examination.

(i) *D-0245's evidence relates to issues that are materially in dispute and of sufficient significance³ /or uncorroborated by other evidence*

7. D-0245's evidence touches upon issues that are materially in dispute and of significance, in particular, whether the Accused may raise the defence of duress under article 31(1)(d) of the Rome Statute ("Statute") and mistake of law/facts under article 32 of the Statute.

8. For example:

- D-0245 claims that the Touaregs had no choice but to flee from Timbuktu or join the ranks of the "groups" in February 2012 when the rebellion started.⁴ However, this claim is in fact contradicted by evidence that is already on the record which indicates that there were Touaregs who remained in Timbuktu during the relevant time period without joining the armed groups.⁵ [REDACTED]
- D-0245 also claims that in April 2012, "*les gens vaquaient à leurs occupations, il ne semblait pas y avoir de crainte, les gens portaient au marché, ils menaient leurs activités.*"⁷ However, this claim is contradicted by the abundant evidence on the

³ ICC-01/12-01/18-2241, para. 15.

⁴ MLI-D28-0006-4141-R01 at 4144, para. 18.

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⁶ MLI-D28-0006-4141-R01 at 4144, para. 25.

⁷ MLI-D28-0006-4141-R01 at 4146, para. 35.

record demonstrating that the locals, especially women, lived in a climate of fear and found it difficult to continuing their normal activities..⁸

(ii) *The interests of justice require D-0245 to testify viva voce and to be cross-examined*

9. D-0245's evidence contains unsubstantiated assertions and is internally inconsistent. As such, it has very limited probative value and weight and are unreliable.

10. More generally, the interests of justice are best served by calling D-0245 to testify *viva voce* under rule 68(3) of the Rules so that the Prosecution may cross-examine him on various issues relevant to the reliability of his statement and his credibility.

Potential bias

11. [REDACTED]⁹ [REDACTED]
 [REDACTED]¹⁰
 [REDACTED]
 [REDACTED]¹¹ [REDACTED]
 [REDACTED]
 [REDACTED]. He also states that [REDACTED], there were many victims of rebellions and assassinations in the 90s.¹² The Prosecution should be afforded an opportunity to cross-examine him on any potential issues of bias.

D-0245's statement contains unsubstantiated assertions

12. In addition to the assertions referred to in paragraphs 8 and 9 above, D-0245 makes a number of unsubstantiated assertions in his statement. As such, these will have very little weight or probative value. For instance:

⁸ See e.g. P-0547: T-151-CONF-ENG ET, p. 14, l. 12-p.15, l. 9; P-0608: T-154-CONF-ENG ET, p. 13, l. 13-23.

⁹ MLI-D28-0006-4141-R01 at 4146, para. 41.

¹⁰ MLI-D28-0006-4141-R01 at 4146, para. 41; see also ICC-01/12-01/18-2256-Conf, p. 4, para. 8.

¹¹ MLI-D28-0006-4141-R01 at 4146, para. 41; see also ICC-01/12-01/18-2256-Conf, p. 4, para. 8.

¹² MLI-D28-0006-4141-R01 at 4143, para. 12.

- D-0245 affirms that he does not know any judge who worked in Northern Mali.¹³ However, he speaks of corruption issues within the traditional justice system, interactions between the traditional justice system with *cadis*, the role of *cadis* and a preference to consult religious leaders, without explaining what the basis of his knowledge is for these assertions he makes; and
- D-0245 claims that there were reprisals against the “*teints clairs*” in 2013 and that even mass graves were discovered,¹⁴ again, without explaining the basis of his knowledge.

D-0245’s statement is inherently inconsistent and unclear

13. D-0245’s statement is internally inconsistent and unclear in relation to his activities in March-April 2012 [REDACTED]

[REDACTED]

14. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED],¹⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹⁶

15. [REDACTED]

[REDACTED].¹⁷ [REDACTED]

[REDACTED].¹⁸ [REDACTED]

[REDACTED]

¹³ MLI-D28-0006-4141-R01 at 4143, para. 13.

¹⁴ MLI-D28-0006-4141-R01 at 4146, para. 40.

¹⁵ MLI-D28-0006-4141-R01 at 4144, para. 22.

¹⁶ MLI-D28-0006-4141-R01 at 4144-4145, paras 23, 25.

¹⁷ MLI-D28-0006-4141-R01 at 4144, para. 21.

¹⁸ MLI-D28-0006-4141-R01 at 4145, para. 30.

[REDACTED]¹⁹ [REDACTED]
[REDACTED]²⁰ [REDACTED]
[REDACTED]
[REDACTED].

16. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²¹ [REDACTED]
[REDACTED]
[REDACTED]²² [REDACTED]
[REDACTED]²³

17. More generally, his time line and activities in the period relevant to the charges is hard to understand - [REDACTED]
[REDACTED]
[REDACTED]²⁴ [REDACTED]
[REDACTED]
[REDACTED]²⁵ it is also unclear where he went or whom he talked to during his stay in

¹⁹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁰ MLI-D28-0006-4141-R01 at 4147-4150.
²¹ MLI-D28-0006-4141-R01 at 4145, para. 34.
²² MLI-D28-0006-4141-R01 at 4145, para. 34.
²³ MLI-D28-0006-4141-R01 at 4146, para. 34.
²⁴ MLI-D28-0006-4141-R01 at 4145, para. 31.
²⁵ MLI-D28-0006-4141-R01 at 4145, para. 33.

Timbuktu in April 2012. D-0245's statement also makes no mention of what he did for the rest of 2012 after returning to [REDACTED].

Other issues potentially affecting the reliability of D-0245's evidence or his credibility

18. Additionally, the Prosecution raises the following issues that potentially impact upon the reliability of D-0245's evidence and/or his credibility:²⁶

- The attendance record lists two A.1 redactions (place of interview) for the date of [REDACTED] yet there is no indication of the person who attended the interview on that day;²⁷
- The statement was signed by an intermediary whose name or identity was redacted under redaction code A.5 (code for intermediaries).²⁸ The pseudonym attributed to this person is MLI-D28-P-0089. According to the information disclosed to the Prosecution, this same person, whose name was redacted under redaction code A.5, also signed [REDACTED]s,²⁹ [REDACTED]s,³⁰ and [REDACTED]s³¹ statements. Additionally, MLI-D28-P-0089 also signed [REDACTED]s statement, although the redaction code used in this instance is A.4 (code for investigators).³² The Prosecution has sought to clarify this matter *inter partes* but has been unsuccessful.³³ The Prosecution requests that the Defence be ordered to lift the redactions to the name of MLI-D28-P-0089 in D-0245's statement. In any event, as such, the Prosecution should be given an opportunity to cross-examine D-0245 on any potential issue of contamination; and
- [REDACTED]³⁴ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁵ [REDACTED]

²⁶ See ICC-01/12-01/18-2228-Conf, para. 19.

²⁷ MLI-D28-0006-4141-R01 at 4141.

²⁸ MLI-D28-0006-4141-R01 at 4141.

²⁹ MLI-D28-0006-3342-R01 at 3342.

³⁰ MLI-D28-0006-4181-R01 at 4181.

³¹ MLI-D28-0006-4212-R01 at 4212.

³² MLI-D28-0003-2340-R01 at 2342.

³³ Email from the Prosecution to the Defence on 17 June 2022 at 16:52.

³⁴ MLI-D28-0006-4141-R01 at 4141.

³⁵ Emails from the Prosecution to the Defence on 17 June 2022 at 16:52 and 27 June 2022 at 11:50.

[REDACTED]

[REDACTED].

B. D-0534

19. D-0534 should be called to testify pursuant to rule 68(3) of the Rules so that his credibility and the reliability of his evidence can be properly tested through cross-examination.

(i) D-0534's evidence goes to acts and conduct of the Accused and touches upon issues that are materially in dispute and of significance

20. A large part of P-0534's evidence relates to the CJA, [REDACTED], objectives and the Accused's role therein, and the circumstances of the Accused's arrest, which is of no relevance to the charges.

21. However, D-0534's evidence also goes to the acts and conduct of the Accused, specifically his membership in Ansar Dine, and touches upon issues that are materially in dispute in the case and of significance. For example:

- D-0534 claims that: [REDACTED] *Al Hassan je comprends pourquoi il a pu rejoindre Ansar Dine en 2012. Parce que c'est une façon d'exister pour eux, il n'y avait pas d'autres choix"*;³⁶
- D-0534 further claims that: *"Pour rester au Nord du Mali avant l'arrivée de Serval, il fallait être avec les terroristes, parce que soit on te tue ou bien tu déposes les armes. Les jeunes gens n'avaient pas d'autre choix que de prendre leurs armes"*;³⁷ and
- In relation to the Accused's motivation/intent, D-0534 also affirms that [REDACTED]

22. The reliability of these assertions is questionable given that: (i) he never [REDACTED]
[REDACTED]³⁹ (ii) [REDACTED]⁴⁰,

³⁶ MLI-D28-0006-4188-R01 at 4198, l. 2-3.

³⁷ MLI-D28-0006-4188-R01 at 4190, l. 22-24.

³⁸ MLI-D28-0006-4188-R01 at 4198, l. 27-28.

³⁹ MLI-D28-0006-4188-R01 at 4197, l. 30-31.

⁴⁰ MLI-D28-0006-4188-R01 at 4197, l.12-13.

and (iii) [REDACTED] what he did in 2012.⁴¹ [REDACTED]

[REDACTED].⁴²

23. Additionally, [REDACTED],⁴³ any information concerning D-0534's occupation, role and location before and during the period relevant to the charges has been redacted in his transcripts,⁴⁴ and the Prosecution request for lifting of those redactions⁴⁵ has been rejected by the Defence.⁴⁶ Therefore, it is impossible to ascertain the basis of his evidence. The Prosecution must thus be afforded an opportunity to question D-0534. The Prosecution also requests the Chamber to order the Defence to lift redactions in relation to D-0534's occupation and location in 2012.⁴⁷

(ii) The interests of justice require D-0543 to testify viva voce and be cross-examined

24. [REDACTED]
[REDACTED].⁴⁸ [REDACTED]
[REDACTED].⁴⁹ [REDACTED]
[REDACTED],⁵⁰ [REDACTED]. The Prosecution should be afforded an opportunity to cross-examine him on any issues of potential bias and contamination.

(iii) P-0534's evidence lacks indicia of reliability

25. P-0534's evidence lacks sufficient indicia of reliability even of a formal nature as required by the Chamber to satisfy the rule 68(2) requirements:⁵¹

⁴¹ MLI-D28-0006-4188-R01 at 4197, l. 31.

⁴² MLI-D28-0006-4188-R01 at 4197, l. 31-32.

⁴³ MLI-D28-0006-4188-R01 at 4188, l. 18.

⁴⁴ MLI-D28-0006-4188-R01 at 4189, ll. 27-28, 4191, l. 29, 4192, ll. 1, 10, 12; MLI-D28-0006-4204-R01 at 4204, ll. 30-31

⁴⁵ Emails from the Prosecution to the Defence on 17 June 2022 at 16:52 and 23 June 2022 at 11:00.

⁴⁶ Emails from the Defence to the Prosecution on 22 June 2022 at 17:34 and 23 June 2022 at 11:50.

⁴⁷ [REDACTED]

⁴⁸ MLI-D28-0006-4188-R01 at 4197, l. 12.

⁴⁹ MLI-D28-0006-4188-R01 at 4197, l. 12-13.

⁵⁰ MLI-D28-0006-4188-R01 at 4188, l. 14.

⁵¹ See e.g. ICC-01/12-01/18-2241, para. 19; ICC-01/12-01/18-2114-Red, para. 39.

- The title of MLI-D28-0006-4188-R01 is “*Transcription de la déclaration du témoin MLI-D28-P-0534*”. Yet, instead of a transcript of an interview, the text appears to be the read-back of a pre-existing statement as also indicated by the sentence “*Donc on commence la lecture de la déclaration*”.⁵² The Prosecution requested that the actual statement be disclosed but the Defence replied that “there was no statement disclosed or to be disclosed”;⁵³
- The read-back of MLI-D28-0006-4188-R01 started at 11h24 [REDACTED]⁵⁴ and at the end of each paragraph, D-0534 was asked to confirm whether the text corresponded to his testimony and whether it was true and correct to best of his knowledge and beliefs. The Witness answered “yes” in relation to all paragraphs. However, on the same day, only one hour after the read-back of MLI-D28-0006-4188-R01 had ended, a second session started [REDACTED].⁵⁵ During this second session, D-0524 corrected four paragraphs which he had confirmed the veracity of only a few minutes earlier and a first addendum MLI-D28-0006-4206-R01, was generated to record these corrections;⁵⁶ and
- A further contact between the Defence team and D-0534 took place [REDACTED] [REDACTED]⁵⁷ during which the witness appeared to have clarified his current profession and location, and expressed concerns related to his security.⁵⁸ In the second addendum transcribing this contact, MLI-D28-0006-4204-R01, no explanation is provided as to when and why the witness contacted the Defence team after the read-back of MLI-D28-0006-4188-R01 [REDACTED].

Conclusion

26. For the foregoing reasons, the Prosecution requests that the Chamber reject the Defence Request and that D-0245 and D-0534 instead be called to testify, at least under rule 68(3) of the Rules so that they are subject to cross-examination. Should the

⁵² MLI-D28-0006-4188-R01 at 4188, l. 8.

⁵³ Email from the Defence to the Prosecution on 22 June 2022 at 17:34.

⁵⁴ MLI-D28-0006-4188-R01 at 4188, l.6.

⁵⁵ MLI-D28-0006-4206-R01 at 4206, l. 2.

⁵⁶ The paragraphs in question are 5, 25 34 and 39.

⁵⁷ MLI-D28-0006-4204-R01 at 4204, l. 3.

⁵⁸ MLI-D28-0006-4204-R01 at 4204, l. 30- 4205, l.16.

Chamber nevertheless decide to grant the Defence Request, very limited weight, if any, should be afforded to the evidence of D-0245 and D-0534.

27. Moreover, the Prosecution requests that the Chamber require the Defence to lift redactions in relation to: (i) the full names of D-0089 and D-0245's father in D-0245's statement; and (ii) D-0534's occupation and location in 2012 in D-0534's transcripts.



Karim A. A. Khan QC, Prosecutor

Dated this 27th day of June 2022

At The Hague, The Netherlands.