

**Cour  
Pénale  
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**International  
Criminal  
Court**

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No.: **ICC-01/12-01/18**

Date: **24 May 2022**

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**2 June 2022**

**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 application under Rule 68(3) to introduce Witness D-0272 statement and associated exhibit into evidence and for examination of this Witness” (ICC-01/12-01/18-2229-Conf-Red)’, 24 May 2022, ICC-01/12-01/18-2231-Conf**

**Source:** Office of the Prosecutor

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

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**Detention Section**

**Victims Participation and Reparations  
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## Introduction

1. The Prosecution leaves to the Chamber's discretion whether the statement of D-0272 should be submitted under rule 68(3) of Rules of Procedure and Evidence ("Rules") rather than entirely by *viva voce* testimony, as requested by the Defence.<sup>1</sup> However, the Prosecution submits that D-0272 must at minimum testify under 68(3) of the Rules rather than his statement being submitted under rule 68(2)(b) of the Rules so that he is subject to cross-examination.
2. As the Defence confirms, Defence Witness D-0272 is [REDACTED].<sup>2</sup> Although D-0272 was not present during the relevant period of the charges, his account relates to the acts and conducts of the Accused. [REDACTED] and his proposed testimony is said to be interconnected to other upcoming Defence Witnesses [REDACTED] as well as other charges in the case.
3. Additionally, the Prosecution refers to the Chamber's first decision regarding the Defence request to submit evidence under rule 68(3) in which the Chamber indicated that the parties' submissions, including those challenging the reliability and relevance, will be duly considered as part of the Chamber's ultimate assessment.<sup>3</sup> In this context, the Prosecution raises its initial concerns regarding the weight to be attributed to D-0272's statement because of issues regarding lack of reliability.

## Confidentiality

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

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<sup>1</sup> ICC-01/12-01/18-2229-Conf-Red-Conf-AnxA.

<sup>2</sup> ICC-01/12-01/18-2229-Conf-Red, paras 9, 13.

<sup>3</sup> See ICC-01/12-01/18-2206-Conf, para. 17.

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

### Submissions

*A. D-0272's account relates to the acts and conducts of the Accused and upcoming testimony of other Defence witnesses.*

5. The Prosecution submits that D-0272's statement must at minimum be submitted pursuant to rule 68(3) of the Rules, if not entirely elicited *viva voce* (and cannot be submitted under rule 68(2)(b) of the Rules), because his account must be subject to cross-examination.

6. First, although D-0272 was not in Timbuktu at the relevant period of the charges,<sup>4</sup> his statement relates to the acts and conduct of the Accused. It is also relevant to the account of future Defence witnesses who claim that they are connected to Prosecution Witnesses and purports to be relevant to Victim V-0001's testimony.

7. D-0272 states that after he left Timbuktu in 2012, he remained in contact with some people in Timbuktu.<sup>5</sup> D-0272's account is that after he left, [REDACTED] had a problem with someone trying to steal one of his belongings. [REDACTED]

[REDACTED]. D-0272 states that he was not in direct contact with the Accused at that time, and that [REDACTED]. D-0272 states that [REDACTED] the problem was eventually solved.<sup>6</sup>

8. [REDACTED]  
[REDACTED].<sup>7</sup> [REDACTED]  
[REDACTED].<sup>8</sup>

<sup>4</sup> [REDACTED].

<sup>5</sup> ICC-01/12-01/18-2229-Conf-Red, para. 11.

<sup>6</sup> [REDACTED].

<sup>7</sup> [REDACTED].

<sup>8</sup> [REDACTED].

9. D-0272's account regarding the Accused during the period relevant to the charges is based on what [REDACTED] told him and on the interactions that D-0272 had with

[REDACTED].<sup>9</sup> [REDACTED]  
[REDACTED].<sup>10</sup> [REDACTED]  
[REDACTED]  
[REDACTED].<sup>11</sup>

10. D-0272's account also purports to be relevant to the Accused's state of mind prior to or during events in 2012. D-0272 claims that in 2012, the Accused was not a radical but simply joined the groups because this was what many people did at that time.<sup>12</sup>

11. According to the Defence, D-0272's account is also stated to be inconsistent with V-0001's testimony concerning her forced marriage to an Islamist and that D-0272 will allege that V-0001 accepted to marry him.<sup>13</sup> In contrast, V-0001 testified that she did not want to get married,<sup>14</sup> but the man came to her house with seven other armed men, handed money to her mother, and abducted her.<sup>15</sup>

12. Finally, the Defence claims that D-0272's statement will address issues relevant to the charge of passing of sentences (count 6) and that in this regard, claims that he will be corroborated by D-0219, D-0511, D-0539 and D-0540.<sup>16</sup> Out of these witnesses, only D-0540 is expected to testify *viva voce*, whereas the statements of the other three

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<sup>9</sup> [REDACTED]  
[REDACTED].  
<sup>10</sup> [REDACTED].  
<sup>11</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
<sup>12</sup> [REDACTED]  
[REDACTED].

<sup>13</sup> ICC-01/12-01/18-2229-Conf-Red, para. 12. The text of the paragraph refers to D-0242 instead of D-0272 but the reference in the footnotes is to D-0272's statement so it is clearly a typographical error.

<sup>14</sup> T-168-Conf-ENG ET, p. 36, l. 9 - p. 39, l. 8.

<sup>15</sup> T-168-Conf-ENG ET, p. 41, l. 16 - p. 43, l. 3.

<sup>16</sup> ICC-01/12-01/18-2229-Conf-Red, para. 10.

witnesses are being requested to be submitted pursuant to rule 68(2) of the Rules.<sup>17</sup> Moreover, the Defence states that this relates to the defence of mistake of law/facts.<sup>18</sup>

***B. Lack of indicia of reliability and limited probative value or weight of D-0272's statement***

13. The Prosecution submits that D-0272's statement is of limited probative weight and that little if any weight should be ultimately accorded to it.

14. First, as the Defence concedes, D-0272's statement is of peripheral value, because D-0272 was not present in Timbuktu during the period relevant to the charges.<sup>19</sup> His statement largely addresses events prior to 2012<sup>20</sup> and after 2012.<sup>21</sup>

15. Second, the Prosecution raises the following concerns regarding indicia of lack of reliability of the statement:<sup>22</sup>

- The attendance record of the statement lists four persons present during the interview including the witness and an intermediary. The signatures of all four persons are repeated on each of the seven pages of the statement. However, on two pages, the initials of what seems to be a fifth person attending the interview are indicated as [REDACTED].<sup>23</sup> It is unclear who this person is and what his/her role was during the interview; and
- The Defence should be required to provide a pseudonym for the intermediary who signed the statement but whose name or identity was redacted under redaction code A.5 (intermediary code).<sup>24</sup> This pseudonym is necessary for the Prosecution so that it can assess who are the individuals who attended D-0272's interview and potentially those of other Defence witnesses, and whether there is any potential issue of contamination that must be addressed during the D-0272's cross-examination. [REDACTED]

<sup>17</sup> [REDACTED].

<sup>18</sup> ICC-01/12-01/18-2229-Conf-Red, para. 10.

<sup>19</sup> ICC-01/12-01/18-2229-Conf-Red, para. 9.

<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

<sup>22</sup> See ICC-01/12-01/18-2228-Conf, para. 19.

<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

[REDACTED]. On this basis, the  
Prosecution requests that the B.2 code be lifted [REDACTED]  
[REDACTED]  
[REDACTED].

### Conclusion

16. For the foregoing reasons, the Prosecution leaves to the Chamber's discretion whether D-0272's statement is submitted pursuant to rule 68(3) of the Rules, but submits that he must be subject to cross-examination. Moreover, the Prosecution requests that the Chamber require the Defence to provide the pseudonym of the intermediary whose identity was redacted under code A.5 and the full name of D-0272's mother whose identity was redacted under code B.2.



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Karim A. A. Khan QC, Prosecutor

Dated this 24<sup>th</sup> day of May 2022

At The Hague, The Netherlands