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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 ‘Prosecution response to “Defence application to call Witnesses MLI-D28-P-0020, MLI-D28-P-0025, MLI-D28-P-0500, MLI-D28-P-0501 and MLI-D28-P-0502 as experts and to introduce their reports and associated materials into evidence under rule 68(3)” (ICC-01/12-01/18-2197-Conf)’,
22 April 2022, ICC-01/12-01/18-2205-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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Introduction

1. The Prosecution objects to the proposed testimony of Defence witnesses MLI-D28-P-0020 (“D-0020”), MLI-D28-P-0025 (“D-0025”), and MLI-D28-P-0502 (“D-0502”) on topics that usurp the Chamber’s role or goes beyond their expertise,¹ and introduction of their respective reports under rule 68(3), *inter alia*, for the following reasons:

- (i) Defence Witness D-0020 is not suitably qualified as an expert to testify or comment in her report on the areas as expounded;
- (ii) Their testimony and respective reports are not necessary or appropriate for the proper assessment of the in-court testimony of [REDACTED] or the Accused’s transcripts of interview, or the transcripts of interviews with [REDACTED] by the Office of the Prosecutor (“OTP”).
 - a. D-0020’s report and D-0025 Second Report will not assist the Chamber’s assessment of the reliability of the Accused’s OTP interview transcripts or the evidence of other witnesses because the Chamber has already found these reports to be unreliable and of little if no weight;
 - b. [REDACTED] OTP interview transcripts are not relevant because he testified *viva voce* and his interview transcripts were not introduced into evidence. It is not correct that his interview transcripts were repeatedly used to refresh his memory. The Defence already questioned him extensively during cross-examination regarding his detention conditions at the time of the OTP interview and any impact on the credibility of the information he provided to the OTP;
- (iii) The scope of reports of D-0020, D-0025³, and D-0502, and of their proposed testimony impermissibly cover issues that usurp the role of the Trial Chamber and/or go beyond

¹ ICC-01/12-01/18-2197-Conf (“Defence Request”).

² In addition to the Accused (P-0398), [REDACTED] mentioned by the Defence in paragraph 30 of their filing, D-0025’s second report relates to [REDACTED], whose prior recorded testimony and associated material has been introduced pursuant to rule 68(2)(c) of the Rules. See [REDACTED]
[REDACTED]
[REDACTED]

³ The Prosecution contests the admission of all three reports of D-0025, under rule 68(3). The Prosecution contests the second report of D-0025 MLI-D28-0003-0031 (“Second Report”) because of serious reliability issues and its lack of relevance as regards [REDACTED]. In this report she purports to analyse the OTP interview transcripts, biographical and security questionnaires and medical examination reports of the Accused and [REDACTED]. The Prosecution further contests the submission of Witness’s First report MLI-D28-0002-0500 (“First Report”) under rule 68(3) in so far as she usurps the role of the Chamber by assessing the credibility of the Accused and due to the impact on reliability of the report as D-0025 was not given all of the relevant materials or information (potential alternative causes of his injuries); and the third report MLI-D28-0003-2059 (“Third Report”) in so far as it is interconnected with the First report, as it attempts to respond to criticisms of the First Report.

2. The Prosecution also contests the expertise of Defence Witness MLI-D28-P-0500 (“D-0500”). Based on the information available, D-0500, a plastic surgeon, does not appear to have specific expertise in determining the likely causes of different types of skin lesions. Moreover, the Prosecution observes that his reports regarding five of the six witnesses assessed would have no probative value because he confirms that he could not make any definitive assessment as he did not personally examine them. In light of the limited nature of his analysis and opinions, his reports and any oral testimony are unlikely to assist the Chamber in assessing the credibility of accounts provided by [REDACTED].

3. Last, the Prosecution does not contest the expertise of Defence Witness MLI-D28-P-0501 (“D-0501”), or submission of his report under rule 68(3) of the Rules. However, as detailed below, it has concerns with the methodology adopted and limited value of the report.

4. Should the Chamber decide to grant the Defence Request in respect of any of the proposed experts, the Prosecution proposes that the examination-in-chief should be significantly reduced from what is suggested by the Defence, given the limited reliability and relevance of their evidence.⁶

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

⁶ See e.g. ICC-01/12-01/18-1756, para. 22 in which the Chamber strongly encouraged the parties to focus proposed testimony on “topics of greatest relevance to the proceedings and on truly contentious issues, relating to the confirmed charges against the Accused”.

Applicable Law

6. According to the Chamber's decision on the Prosecution's proposed expert witnesses, in order to determine whether the testimony of a witness and his or her report may be introduced as expert evidence, the Chamber must consider whether: "(i) the witness is an expert as defined above; (ii) the testimony in the subject area of expertise would be of assistance to the Chamber; (iii) the content of the report and/or the anticipated testimony falls within the area of expertise of the witness; and (iv) the content of the report and/or the anticipated testimony does not usurp the functions of the Chamber as the ultimate arbiter of fact and law".⁷ For example, the Chamber rejected the Prosecution's request to tender the reports of P-0661, who conducted psychiatric examination of Prosecution witnesses after their in-court testimony, finding that his proposed evidence usurps the function of the Chamber.⁸ The Chamber stressed that it is for it to assess the testimony of fact witnesses, notably in terms of their credibility and accounts of victimisation.⁹ Chambers in previous cases have also decided that expert witnesses may be struck from the witness list prior to testifying if, for example, their anticipated testimony is irrelevant or goes solely to factual and/or legal matters which usurp the functions of the Chamber.¹⁰

7. Moreover, while expert witnesses "are ordinarily afforded wide latitude to offer opinions within their expertise", they are still under the obligation to testify within the "utmost neutrality and objectivity".¹¹

Submissions

A. Defence witnesses D-0020, D-0025, and D-0502

(a) D-0020 does not have the requisite expertise to provide the findings as requested in her proposed topics for testimony

8. The Prosecution contests that D-0020 has the requisite expertise to opine on the areas for her proposed testimony.

⁷ ICC-01/12-01/18-989-Red, para. 16.

⁸ ICC-01/12-01/18-1844, para. 6.

⁹ ICC-01/12-01/18-1844, para. 6.

¹⁰ ICC-01/05-01/13-1622, para. 9. *See also* ICC-01/04-02/06-1159, para. 22-23, deciding not to permit the Prosecution to call its proposed expert as an expert witness, nor to tender her report into evidence on the grounds, *inter alia*, that the proposed areas of testimony fall within the Chamber's own competence and are matters upon which the parties can make submissions at the relevant time.

¹¹ ICC-01/12-01/18-989-Red, para. 16.

9. In addition to being formulated in an impermissibly leading and non-neutral manner, her proposed topics for testimony are:¹²

- “Whether Mr Al Hassan exhibited symptoms that are consistent with the psychological *sequelae* of someone who has experienced torture/CIDT [*cruel, inhuman or degrading Treatment or Punishment*] in detention and/or uncontrollable stress;
- The likely *extent and severity* of the *sequelae* he experienced during his detention in Bamako.”

10. However, there is no indication in her *curriculum vitae* (CV), that D-0020 has the necessary expertise to make such a forensic assessment of an individual’s “psychological sequelae” consistent with torture/CIDT in detention, and the likely extent and severity of that sequelae, for the purposes of criminal proceedings as an expert witness.

11. Although the Defence claims in its request that D-0020 “has conducted substantial post-doctoral and clinical research on the areas of PTSD and trauma” (citing her CV),¹³ it is not apparent from her CV that she has conducted any such research. Instead the “post-doctoral fellow” description in her CV is limited to assessment, evaluation and treatment services for adults and children at an Anxiety Disorders Clinic, ADHD Clinic, and Infant and Early Childhood Development Clinic.¹⁴ None of her publications that she lists cover the topics proposed. The only publications listed that she has written (as a co-author) related to trauma are unrelated to the topics on which she is being called to testify: namely, “[t]raumatic stress in adolescents anticipating parental death”, “managing traumatic stress in children anticipating parental death”; and “traumatic experiences and psychological distress among an urban refugee population”. She lists various one-off presentations she has given related to trauma, but none with reference to the specific topics proposed for her testimony, and none which indicate that she would have the necessary expertise to expound on such topics.¹⁵

12. Instead, according to D-0020’s CV, as provided, her experience appears largely composed of providing psychological treatment, with assessment and evaluation, as a clinical psychologist, including to survivors of alleged torture. Indeed, she was first commissioned by the Defence to provide assistance with the Accused’s alleged treatment needs whilst in ICC detention.

¹² Defence Request, p.7, para.13.

¹³ Defence Request, p.9, para.16. See MLI-D28-0003-1624.

¹⁴ D-0020 CV: MLI-D28-0003-1624, p.1626.

¹⁵ D-0020 CV: MLI-D28-0003-1624, pp.1630-1647.

13. Whilst she has apparently been an “*evaluator/consultant*” for Defence teams previously in US cases involving Guantanamo prisoners (“including psychological testing, interview and observation”) and in Federal District court cases,¹⁶ there is no indication in her CV as to whether she has ever testified, and if so on what topics she testified and if she did so as an expert – or instead as an “*evaluator/consultant*” - or that she has the requisite expertise to give her expert opinion on any of the specific topics as proposed by the Defence for her ICC testimony.

14. Moreover, there is no mention in her CV that she has any prior experience, let alone expertise, in assessing “uncontrollable stress”. Indeed, D-0502 claims in relation to himself (albeit with no supporting references): “[w]ith respect to uncontrollable stress and eyewitness memory, my colleagues and I have conducted the largest research controlled studies on the impact of uncontrollable stress on human memory and cognition. I am recognised as a leader in my field for this *unique and seminal work. No other research group has direct experience or more expertise on what is known about how stress exposure affects human memory*”.¹⁷

15. The Prosecution further queries whether D-0020 has the necessary neutrality and objectivity required of an ICC expert,¹⁸ as evidenced by the Chamber’s own prior findings regarding her resort to speculation and mischaracterisation of the facts.¹⁹ There also appear to be a number of advocacy-related presentations she has given, that raise questions as to her neutrality, and suitability as an objective expert witness. For instance, she lists in her CV a presentation she co-presented as titled: “*Human Rights Abuses: Impunity and Advocacy: The View from Guantanamo and The Hague*”.²⁰

(b) *The proposed testimony and reports of D-0020, D-0025 and D-0502 cover issues and conclusions that seek to usurp the role of the Trial Chamber as the ultimate arbiter of fact and law*

16. Contrary to what the Defence states, the proposed testimony and related reports of Defence witnesses D-0020, D-0025 and D-0502 impermissibly seek to usurp the Chamber’s role and/or go beyond their stated areas of expertise in doing so.

¹⁶ D-0020 CV: MLI-D28-0003-1624, p.1626.

¹⁷ D-0502’s Report, MLI-D28-0005-9967-R01, p.9969.

¹⁸ See e.g. ICC-01/04-02/06-1159, para.9 (ICTY, Mladic Decision on Expert Witness, para. 9, making reference to The Prosecutor v. Ferdinand Nahimana et al, ICTR-99-52-A, Appeals Judgment, 28 November 2007, para. 199).

¹⁹ ICC-01/12-01/18-1009-Conf (“Termination Request Decision”), p.48, para.107.

²⁰ D-0020: MLI-D28-0003-1624, p.1637.

17. First, both Defence witnesses D-0020 and D-0025 in respective reports seek to give their expert opinion as to whether the Accused was credible and reliable in the information he gave regarding his experiences of alleged torture. This is clearly an attempt to usurp the role of the Chamber, who makes the ultimate findings of credibility or reliability of any evidence in a holistic manner.

Witness D-0020

18. Defence Witness D-0020 attempts to make a number of conclusions or factual findings that usurp the role of the Chamber, and that go well beyond her own expertise in doing so. For instance:

- She states in her report that her findings, and that of D-0025 were consistent, referring to her “*conclusion as to his clinical credibility and lack of malingering, feigning or exaggerating his experiences*”;²¹
- She opines that the Accused was a victim of “torture” during his imprisonment in Mali, referring to the definition under the Torture Convention.²² She further opines: “Mr Al Hassan’s experience in multiple locations in Mali over eleven months involved the purposeful infliction of pervasive, systematic, brutal methods of psychological and physical torture by authorities who had him in custody”.²³ D-0020 then goes on to list her factual findings as to the “several ways in which Mr Al Hassan was tortured during his imprisonment”.²⁴ To the extent this alleged torture is of any relevance, it remains squarely only for the Chamber to make such factual findings.

Witness D-0025

19. In her First report, D-0025 exceeds the parameters of her expertise and usurps the Chamber’s role by opining that: “there was no exaggeration or embellishment of his [the Accused’s] account. The history, examination findings and timeline are all clinically congruent - I therefore find no indication of fabrication of the physical findings.”²⁵ She also usurps the Chamber’s role in her Second report by purporting to assess the credibility of the information in the OTP interview transcripts of the Accused and of other Prosecution witnesses.²⁶

Witness D-0502

²¹ D-0020’s Report, MLI-D28-0002-0535, p.0569.

²² D-0020’s Report, MLI-D28-0002-0535, p.0583. Referring to the UN Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”).

²³ Defence Request, p. 4, para.5.

²⁴ D-0020’s Report, MLI-D28-0002-0535, p.584.

²⁵ MLI-D28-0002-0500, p.0521, para. 96. Dated 18 May 2020.

²⁶ MLI-D28-0003-0031. Dated 12 June 2020.

20. D-0502 is also asked to make factual findings that usurp the fact-finding role of the Chamber in both his written report and the topics proposed for his oral testimony, namely regarding the reliability of information provided by the Accused and [REDACTED] during their OTP interviews:

- The Defence asserts that he is being called to testify about [REDACTED]
[REDACTED] In particular, the Defence proposes that D-0502's oral testimony cover, *inter alia*:

- [REDACTED]

- [REDACTED]

- In his written report D-0502 responds to the two following Defence questions:

- [REDACTED]

- [REDACTED]

21. These two sets of questions for his written report and proposed testimony - in addition to being posed impermissibly in an extremely leading and non-neutral manner - inevitably require this Defence witness to usurp the Chamber's fact-finding role as he is asked for his opinion on the validity - or reliability - of the OTP interview transcripts of the Accused and [REDACTED] and the credibility of [REDACTED].

22. Indeed, this is reflected in his report, when after stating that [REDACTED]

[REDACTED]

²⁷ Defence Request, p.4, para.5. *See also* p.7, para.12.

²⁸ Defence Request, p.7, para.12.

²⁹ D-0502's Report, MLI-D28-0005-9967-R01, p.9969.

23. D-0502 proposed testimony regarding [REDACTED] credibility is inappropriate and moot at this stage. The assessment of the Witness' credibility falls squarely within the Chamber's remit. The Prosecution does not seek to tender [REDACTED] Interview transcripts into evidence as he has already testified under oath before the Trial Chamber. The Defence had the opportunity to cross-examine [REDACTED] and what, if any effect, these may have had on the information he provided during his interview with the Prosecution.³² In fact, the Defence questioned [REDACTED] extensively on these issues over the course of two days of hearings until the Chamber indicated that it was already sufficiently informed.³³

24. Contrary to what the Defence asserts, D-0502's proposed testimony sharply contrasts with [REDACTED] who, although she did not in the end testify, was asked, in general terms and within the parameters of her expertise, to provide expert evidence on [REDACTED]

(c) The reports of D-0020, D-0025 and D-0502 have important reliability issues and are not necessary or appropriate for submission under rule 68(3) of the Rules

Witnesses D-0020 and D-0025

25. D-0020's Report or D-0025's Second Report³⁵ should not be submitted under rule 68(3) of the Rules, for the Chamber's assessment of the reliability of the Accused's OTP interview transcripts, because the Chamber has already found the same reports to be of little or no weight because of reliability issues in prior litigation: namely, the Defence request for termination of the proceedings,³⁶ and, request to exclude the Accused's OTP transcripts of interview under article 69(7) of the Statute.³⁷

26. When deciding to allow the introduction of the OTP interview transcripts under article 69(7) of the Statute, the Chamber "afforded no weight in [its Article 69(7) Decision] to the

³⁰ D-0502's Report, MLI-D28-0005-9967-R01, p.9969.

³¹ D-0502's Report, MLI-D28-0005-9967-R01, p.9973.

³² [REDACTED]

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ D-0025's Second Report, MLI-D28-0003-0031.

³⁶ ICC-01/12-01/18-1009-Conf ("Termination Request Decision"), p.46, para.106 to p.49, para.111.

³⁷ ICC-01/12-01/18-1475-Conf ("Article 69(7) Decision"), p.21, para.48.

consultants' analysis and conclusions”, as it relied on its own holistic assessment of the material at hand, and because (referring to both D-0020 and D-0025):

“the consultants had only analysed a portion of Mr Al Hassan’s interview record selected by the Defence, rather than the entire record as disclosed to the Defence. The Chamber observed that there were significant gaps in the extracts provided, that missing extracts were critical to assessing the dynamic that existed between Mr Al Hassan and the Prosecution during the interview process, and that *the issue impacted on the reliability of the reports.*”³⁸

27. Further, in its Termination Request Decision, the Chamber concluded that part of D-0020’s commentary, relevant also to a number of her conclusions, was “*based on speculation or mischaracterisation of the record*”.³⁹ The Chamber made a similar finding in relation to D-0025’s Second Report.⁴⁰

28. In spite of being aware that the Chamber found issues with the reliability of these reports of D-0020 and D-0025, so that little if no weight would be attributed to them, the Defence did not attempt to remedy any of the identified failings. For instance, the Defence did not address the gaps in analysis identified by the Chamber by providing full extracts of all OTP interview transcripts of the Accused to D-0020 and D-0025, so that they could update their reports. Instead, the Defence submitted the same, flawed reports for introduction under rule 68(3) of the Rules. Since the Chamber has already found the reports lacking in reliability, they should be disallowed.

29. With respect to D-0025’s Second Report, the same methodological issues exist in respect of her analysis regarding [REDACTED] which is based on non-official translations of excerpts of BSQ transcripts and OTP interview transcripts selected by the Defence.⁴¹ In addition, while D-0025 was provided with the reports of Prosecution Expert P-

³⁸ ICC-01/12-01/18-1475-Conf (“Article 69(7) Decision”), p.21, para.48.

³⁹ ICC-01/12-01/18-1009-Conf (“Termination Request Decision”), p.48, para.107.

⁴⁰ ICC-01/12-01/18-1009-Conf (“Termination Request Decision”), p.48, para.108, footnote 212: “[...] See similarly Dr Cohen’s conclusion that ‘interviewers are in effect contributing to the psychological pressure on the witnesses, who appear to assume that the interviewers have the power to relieve their conditions’: Second Cohen Report, MLI-D28-0003-0031 at 0032, para. 3.”

⁴¹ D-0025’s Second Report, MLI-D28-0003-0031, p. 0045-0057.

Witness D-0502

33. The report of D-0502 is also fundamentally flawed in terms of the methodology adopted, so that if it is accepted - no weight should be afforded to it. It is based solely on a review of the OTP interview transcripts or security assessments of the Accused and the transcript of in-court testimony of [REDACTED] without any apparent direct access to, or assessment of, the Accused or [REDACTED] himself, or access to other records relevant to their detention in Mali. No explanations are given in the Defence Request or in D-0502's report, as to why no in-person examination was conducted. In any event, it is apparent from the "in-person" evaluations of the Accused by D-0020 and D-0025, that both were prepared to accept without any question the self-serving accounts of the Accused.

34. Instead, D-0502's Report is based on speculation, mischaracterisation of the record, and/or lack of proper developed analysis.

35. [REDACTED]

[REDACTED]

[REDACTED]

Rather, a holistic consideration of Mr Al Hassan's interview record is necessary for the assessment required by the present decision."

⁵¹ D-0502's Report, MLI-D28-0005-9967-R01, p.9967, fn.1.

⁵² D-0502's Report, MLI-D28-0005-9967-R01, p.9969.

⁵³ D-0502's Report, MLI-D28-0005-9967-R01, p.9971.

⁵⁴ D-0502's Report, MLI-D28-0005-9967-R01, p.9969.

⁵⁵ D-0502's Report, MLI-D28-0005-9967-R01, p.9970.

38. A number of examples exemplify this flawed approach. Indeed, amongst the example of stresses D-0502 listed to which the Accused was exposed are: [REDACTED]

[REDACTED]

39. Similarly, as regards [REDACTED] an example of “uncontrollable stress”, which would then impact on the accuracy or reliability of memories, is that [REDACTED]

[REDACTED]

40. D-0502 speculates when he concludes based solely on the general description of alleged stresses that each individually identified “stress” amounts to *uncontrollable* stress thereby impacting on the accuracy or reliability of memories.

41. D-0502 further mischaracterises the record when he describes alleged bias on the part of the OTP investigators who questioned the Accused or [REDACTED] [REDACTED]

[REDACTED]

42. Moreover, D-0502 is extremely selective in his description of the exchanges regarding [REDACTED]

[REDACTED]

⁵⁶ D-0502’s Report, MLI-D28-0005-9967-R01, p.9971.

⁵⁷ D-0502’s Report, MLI-D28-0005-9967-R01, p.9972.

⁵⁸ D-0502’s Report, MLI-D28-0005-9967-R01, p.9973.

⁵⁹ D-0502’s Report, MLI-D28-0005-9967-R01, p.9982.

43. This mischaracterisation of the record indicates that the proposed expert witness D-0502 does not have the necessary neutrality or objectivity to qualify as an expert witness before the Court.

44. Another example of D-0502's flawed methodology is that he concludes in general terms, based on the OTP interview transcripts alone, and without any direct assessment of the Accused

(d) The Defence impermissibly attempts to introduce the Accused's unsworn, untested evidence through D-0020 and D-0025

45. The Defence claims that "[t]he purpose of setting out Mr Al Hassan's account is *not to assert that it is true, but to verify the consistency of his account and reactions to the psychological sequelae of someone who experiences treatment of the kind described in his account. The Chamber is not receiving Mr Al Hassan's account into evidence, but rather Dr Porterfield's detailed evaluation as concerns the consistency of this account and his reactions with specific psychological sequelae*".⁶⁴ However, contrary to the Defence's claims a careful reading of the first 33 pages of D-0020's Report, shows that this is not a brief description of the Accused's alleged experiences recounted to D-0020 for the purposes of her psychological assessment. It is in effect an unsworn, and untested statement from the Accused, which the Defence is attempting to impermissibly introduce as evidence.

46. Even if the first 33 pages were excluded, the entire Report of D-0020 is based on the Accused's detailed assertion of the "facts". Moreover, D-0020's own assertion that she found the Accused "clinically credible", and unquestioning reliance upon his account throughout her

⁶⁰ MLI-OTP-0051-0967, p. 0975-0984, l. 257-550, in which the Accused was shown the video MLI-OTP-0018-0693 and confirmed that the persons who flogged two individuals seen in the video were Abou Zhar and himself.

⁶¹ D-0502's Report, MLI-D28-0005-9967-R01, p.9982.

⁶² D-0502's Report, MLI-D28-0005-9967-R01, p.9982.

⁶³ D-0502's Report, MLI-D28-0005-9967-R01, p.9977.

⁶⁴ Defence Request, p.11, para.18.

Report indicates quite the contrary – that she, and the Defence, are asserting that the account is true.

47. Similarly, in her First Report regarding the physical examination of the Accused,⁶⁵ D-0025 analysed the [REDACTED]

[REDACTED] There is little if any weight that can be attributed to her report, because her analysis is accordingly premised on the accounts the Accused provided during her meetings with him, which are detailed in 11 out of her 26-page⁶⁷ Report.

48. In the Article 69(7) Decision, the Chamber already found that it was unable to rely on the Accused's account as reported by the Defence consultants (i.e. D-0020 and D-0025) and the Panel of Experts to make any findings with respect to his subjective state of mind at the relevant time or its impact on his ability to give a statement.⁶⁸ The Accused should not be entitled to give unsworn testimony through the Reports of D-0020 and D-0025. Instead, this evidence of the Accused must be introduced, if at all, directly through the Accused and subject to cross-examination.

49. In addition, there can be little if any weight attributed to the reports of D-0020 and D-0025 because the description provided to D-0020 and D-0025 by the Defence and the Accused regarding his past pointedly excluded any information as to his involvement in armed groups' activities. In particular, the Prosecution observes the following:

- A document provided by the Defence to D-0020 and D-0025, entitled "Chronology of events during the detention of Mr Al Hassan", entirely omits any information regarding what happened between his second wedding in 2012 and his arrest by the French Barkhane forces on 21 April 2017;⁶⁹
- In D-0020's Report, the 33-page description of the Accused's experiences contains no information as to his role or activities during the period between his marriage to his second wife in 2012 and his arrest in April 2017;⁷⁰
- [REDACTED]

⁶⁵ D-0025's First Report, MLI-D28-0002-0500.

⁶⁶ Defence Request, para. 27-29.

⁶⁷ This excludes her CV, an excerpt from the Istanbul Protocol and body diagrams at p. 0526-0534.

⁶⁸ ICC-01/12-01/18-1475-Conf, para. 70.

⁶⁹ MLI-D28-0003-1649.

⁷⁰ D-0020's Report, MLI-D28-0002-0535, p. 0538-0539.

[REDACTED] These descriptions are in clear contradictions to his own statement to the OTP investigators⁷² and other evidence before the Chamber.⁷³ [REDACTED]

[REDACTED]

50. Given the flawed and biased basis of their analysis, D-0020's Report and D-0025's First Report⁷⁵ are unlikely to assist the Chamber in assessing the evidence weight of the Accused's interview record. In this regard, the Prosecution recalls that when it sought to introduce into evidence the reports of P-0598 and P-0661 as relevant to the voluntary nature of the Accused's interviews and the reliability of this evidence,⁷⁶ the Chamber was not convinced that the introduction into evidence of these reports was necessary for the determination of the truth.⁷⁷ Given that the reports of P-0598 and P-0661 constituted counter-expertise in relation to D-0025's First Report and D-0020's Report, respectively, the same conclusion is warranted for the latter Reports.

51. Finally, if granted the possibility of testifying as expert witnesses, the Prosecution submits that they should only be granted leave to testify only on those topics clearly within their areas of expertise and that do not usurp the Chamber's role. Moreover, the projected times for their testimony under rule 68(3), or not, is still too excessive and should be significantly reduced.

B. Defence Witness D-0500

52. Based on the information available, the Prosecution contests that D-0500, a plastic surgeon, has specific expertise in determining the likely causes of different types of skin

⁷¹ See D-0025's First Report, MLI-D28-0002-0500, p. 0503.

⁷² See e.g. MLI-OTP-0051-1257 p. 1286-1288, l. 966-1034, describing his role at the Islamic Police, including drafting reports and organising its work; MLI-OTP-0051-1067, p.1078, l. 352-368, noting that at the time of his arrest, "*J'étais le responsable d'une base militaire*".

⁷³ With respect to the Accused's role in 2012, see e.g. P-0150, ICC-012/12-01/18-T-090-CONF-ENG ET, p. 53, l. 12 – p. 54, l. 3 ; P-0626, ICC-012/12-01/18-T-142-CONF-ENG ET, p. 29, l. 9 – p. 33, l. 5; ICC-01/12-01/18-T-144-CONF-ENG ET, p. 81, l. 2 – p. 83, l. 9; P-0582, MLI-OTP-0062-3641, p. 3654-3655, l. 459-465; MLI-OTP-0062-4012, p. 4035, l. 755-758. With respect to the Accused's role at the time of his arrest, see, e.g. P-1086, ICC-01/12-01/18-T-144-CONF-ENG ET, p. 50, l. 15 – p. 55, l. 5.

⁷⁴ D-0025's First Report, MLI-D28-0002-0500, p. 0523, para. 101.

⁷⁵ Given that D-0025's Third Report explains the methodology and findings related to her First Report, this conclusion applies to both Reports.

⁷⁶ ICC-01/12-01/18-1215-Conf, para. 5.

⁷⁷ ICC-01/12-01/18-1508, para. 31.

lesions, in particular, those caused by floggings which were the subject of his Reports on Prosecution witnesses [REDACTED]

53. The synopsis of D-0500's work included in his Reports indicates that he prepares around 250 medical reports per annum, including on the assessment of scarring from alleged torture in light of the "Istanbul convention for torture" for asylum and immigration cases.⁷⁸ However, the synopsis does not specify how many of these reports fall under this category of cases, or the other categories related to accidental injury and medical negligence cases. In addition, in D-0500's 27-page CV,⁷⁹ no reference is made to any experience related to torture or determination of causes of scarring. In fact, his CV shows that his main speciality relates to "Cleft Lip and Palate and Velopharyngeal Function".⁸⁰

54. D-0500 was asked to assess "whether the appearance of the scar is consistent with the account given" by Prosecution witnesses who testified before the Chamber, on the basis of the photographs of scars and brief excerpts of court hearing transcripts selected by the Defence.⁸¹ The mission effectively required P-0500 to make findings concerning the credibility of each of the witnesses and their accounts on the basis of their testimony, a task that falls outside the scope of his stated expertise as a plastic surgeon.

55. In any event, D-0500's analysis are largely inconclusive given that he did not conduct physical examinations of any of the Prosecution witnesses concerned. With respect to [REDACTED] D-0500 explicitly concluded that "the only way that the scars could be properly assessed, and the accounts verified or not, would be physical examination of the witness."⁸² With respect to [REDACTED] he opined that he could not comment as he had not spoken to the witness and there was apparently no visible scarring.⁸³ Regarding [REDACTED] based [REDACTED]

[REDACTED] In light of the limited nature of his analysis and conclusions, his Reports and any oral testimony are unlikely to assist the Chamber in its determination of facts. Moreover, the Prosecution observes that

⁷⁸ See e.g. MLI-D28-0006-2722-R01, p. 2724.

⁷⁹ MLI-D28-0005-8372-R01.

⁸⁰ MLI-D28-0005-8372-R01, p. 8379-8384.

⁸¹ See e.g. P-0500's Report on [REDACTED].

⁸² [REDACTED]

⁸³ D-0500's Report on [REDACTED].

⁸⁴ D-0500's Report on [REDACTED].

not all relevant materials were provided to D-0500 for his assessment, including relevant videos

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56. For the same reasons above, should the Chamber authorise the Defence to call D-0500 *viva voce* as an expert and introduce his Reports and associated material pursuant to rule 68(3) of the Rules, 1 ¼ hours proposed by the Defence for its examination-in-chief appears excessive.

C. Defence Witness D-0501

57. The Prosecution does not object to D-0501's qualification as an expert in signature and handwriting examination, or the submission of his Report⁸⁶ pursuant to rule 68(3) of the Rules.

59. Given the limited nature of the issues the Defence proposes to cover during his testimony,⁸⁸ the Prosecution suggests that the Defence's examination-in-chief should be more limited than 1 ¾ hours proposed by the Defence.

D. Introduction of associated material

60. The Prosecution notes that with respect to D-0020 and D-0025, and D-0500 the Defence is omitting to seek the introduction of the items that were provided to their proposed experts for their analysis, which have not yet been formally submitted into evidence.⁸⁹

⁸⁵ See MLI-OTP-0060-9511.

⁸⁶ D-0501's Report, MLI-D28-0005-9928-R01.

⁸⁷ See P-0620 and P-0621's report, MLI-OTP-0064-0175, p. 0179-0182, listing the documents analysed.

⁸⁸ Defence Request, para. 41.

⁸⁹ With respect to D-0501 and D-0502, the items they analysed have already been formally submitted.

⁹⁰ D-0025's Third Report, MLI-D28-0003-2059.

⁹¹ MLI-OTP-0078-7628-R01.

⁹² MLI-OTP-0078-7628-R01, p.7641.

[REDACTED] it would not be possible for the Chamber to understand its content and assess its probative value.

62. Similarly, the “List of Evidence Relied on” by P-0500⁹³ includes many items which are not yet formally submitted, including photographs of scars analysed by P-0500 in his reports.⁹⁴

63. The Prosecution accordingly requests that should the Chamber allow the introduction of the contested reports of D-0020, D-0025, and D-0500 under rule 68(3) of the Rules, all items referred to therein which are yet to be formally submitted should also be introduced into evidence in order to assist with a full understanding of the reports and an assessment of their probative value.

Conclusion

64. For the foregoing reasons, the Prosecution respectfully requests the Chamber to reject the Defence Request in respect of D-0020, D-0025, D-0502 and D-0500.

65. Should the Chamber decide to grant the Defence Request in respect of any of the proposed experts, the Prosecution requests the Chamber to: (i) limit the number of hours for the examination-in-chief by the Defence; and (ii) allow the introduction into evidence under rule 68(3) of the Rules of all material relied upon by the relevant expert(s) that has not been formally submitted, provided the conditions are met in Court for introduction of the main report.



Karim A. A. Khan QC, Prosecutor

Dated this 22nd day of April 2022

At The Hague, The Netherlands.

⁹³ MLI-D28-0006-3004.

⁹⁴ Among the items listed in [REDACTED]