

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/12-01/18
Date: 28 June 2022**

TRIAL CHAMBER X

**Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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***

Confidential

Decision on Defence request seeking Rule 74 assurances for D-0529 and D-0111

Pursuant to TCX's instruction dated 17.08.2022, this document is reclassified as Public

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Karim A. A. Khan
Nazhat Shameem Khan
Mame Mandiaye Niang

Counsel for the Defence

Melinda Taylor

Legal Representatives of Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Esteban Peralta Losilla
Pieter Vanaverbeke

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

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TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 64(2), 64(7), 68 and 93(2) of the Rome Statute (the 'Statute'), Rules 74 and 87 of the Rules of Procedure and Evidence (the 'Rules'), and Regulation 20 of the Regulations of the Court (the 'Regulations'), issues the following decision.

I. Procedural history and submissions

1. On 24 June 2022, and on behalf of these witnesses, the Defence requested that the Chamber give assurances under Rule 74(3)(c) of the Rules to D-0529 and D-0111 (the 'Request') and, in this context, made submissions on the application of Rule 74, notably on the provision of any necessary legal advice.¹
2. On 26 June 2022, within the time limit set by the Single Judge,² the Office of the Prosecutor (the 'Prosecution') provided its submissions in response to the Request (the 'Response').³ The Prosecution argues that the Court must ensure that the provisions with respect to self-incrimination are implemented for both D-0529 and D-0111 and should do so sufficiently in advance of their testimony. The Prosecution argues that in-court protective measures are insufficient and do not replace Rule 74 assurances and related legal assistance. In light of the content and scope of the accounts he provided so far, and because of the risk of prosecution by States other than Mali, the Prosecution also argues that a counsel should be appointed for D-0111 without delay.
3. On 27 June 2022, the Defence sent an email seeking leave to reply to address the specific situation of D-0529 and the Prosecution's suggestion that closed session may be necessary to address evidence of an incriminating nature (the 'Leave to Reply Request').⁴

¹ Email dated 24 June 2022 at 13:32.

² Email dated 24 June 2022 at 11:50.

³ Email dated 27 June 2022 at 11:21.

⁴ Email dated 27 June 2022 at 11:43.

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II. Analysis

4. From the outset, the Chamber considers that it will not be assisted by further submissions and accordingly dismisses the Leave to Reply Request.
5. The Chamber recalls that pursuant to Rule 74(3)(a) of the Rules, the default rule is that witnesses may object to making any statement that might tend to incriminate him or her.⁵ Consequently, assurances under Rule 74 are in a way an exception to this rule that enables the Chamber to require a witness to answer self-incriminatory questions provided certain conditions are met.
6. In light of the factors listed under Rule 74(5) of the Rules, given the nature of D-0529 and D-0111's expected testimony, particularly their respective alleged role at the time, and having had regard to the views expressed by the parties, the Chamber considers it necessary to provide Rule 74(3)(c) assurances to both D-0529 and D-0111. In line with the requirements of this provision, and to allow these two witnesses to testify without fear of the consequences of possible self-incrimination, the Chamber hereby assures D-0529 and D-0111 that the evidence provided in response to potentially self-incriminatory questions which could be asked during the course of his upcoming testimony: (i) will be kept confidential and will not be disclosed to the public or any State; and (ii) will not be used either directly or indirectly against him in any subsequent prosecution by the Court, except under Articles 70 and 71 of the Statute, which govern offences against the Court should they be untruthful in testifying. The Chamber further recalls that, pursuant to its prior decision,⁶ any answer from D-0529 or D-0111 which would allow for their identification will also be kept confidential.
7. Although the Chamber will address D-0529 and D-0111 directly when they appear in court, the Chamber finds it appropriate to ensure legal assistance is made available to them prior to and during their respective testimony. In the interests of fairness especially with respect to the witnesses and to facilitate the

⁵ Confidential redacted version of Decision on in-court protective measures and Rule 74 assurances for P-0150, 12 May 2021, ICC-01/12-01/18-1474-Conf-Red, para. 32. *See also* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Request for Rule 74 Assurances for P-40, 6 December 2017, ICC-02/04-01/15-1096, para. 6.

⁶ Third Decision on in-court protective measures for witnesses called by the Defence, 15 June 2022, ICC-01/12-01/18-2255-Red.

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efficiency of the proceedings the Chamber considers it important for D-0529 and D-0111 to be duly informed in advance of the present assurances, as well as the exceptions provided for in Articles 70 and 71 of the Statute, and for them to receive any related necessary legal assistance in the context of the implementation of the present decision. Accordingly, the Chamber finds it appropriate to instruct the Counsel Support Section (the 'CSS') to proceed and appoint counsels for both D-0529 and D-0111 pursuant to Rule 74 of the Rules.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Leave to Reply Request;

GRANTS the Request;

PROVIDES assurances pursuant to Rule 74(3)(c) of the Rules as specified in paragraph 6 of the present decision; and

DIRECTS the Registry to appoint Rule 74 counsels for D-0529 and D-0111.

Done in both English and French, the English version being authoritative.

Judge Antoine Kesia-Mbe Mindua

Presiding Judge

Judge Tomoko Akane

Judge Kimberly Prost

Dated this Tuesday, 28 June 2022

At The Hague, The Netherlands