

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **31 August 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 Defence Rule 68(3) application for Witness D-0544, ICC-01/12-01/18-2305-Conf, 26 August 2022

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

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

The Office of the Prosecutor

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

Counsel for the Defence

Melinda Taylor
Felicity Gerry QC

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
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
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit
Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. Pursuant to Rule 68(3) of the Rules of Procedure and Evidence ('Rules'), the Defence respectfully requests Trial Chamber X to allow the Defence to (i) introduce into evidence Witness D-0544's statement; (ii) conduct a brief supplementary examination of this Witness.
2. The Defence estimates that it will require 1 ½ hours to examine D-0544 from original 4 hours,¹ thus reducing the extent of in-court time expended in the examination of witnesses.² The proposed statement is also relevant and cumulative of other Defence evidence and satisfy the requirements of Rule 68(3).
3. The Defence previously submitted a Rule 68(2)(b) application for Witness D-0544 which was rejected by the Chamber, finding that: "it is more appropriate in this instance that the witness testifies *viva voce* so that all issues can be fully explored through questioning by the parties and participants and, as warranted, the Chamber itself." However, the Chamber indicated that this determination was without prejudice to any subsequent application under Rule 68(3).³ The Defence now submits such application with respect to D-0544.
4. The Defence is aware that it is introduced less than 30 days prior to the start of the scheduled testimony of the Witness. The Defence apologises for this oversight, due to its focus during the recess on scheduling the upcoming witnesses, it had not realised that D-0544 was to testify *viva voce* instead of through Rule 68(3). The Defence had intended to and now submits this Rule 68(3) application in order to ensure expeditious proceedings. No prejudice arises for the Prosecution as the witness will still be present in court and available for cross-examination. The Prosecution has also indicated its openness that this witness testified pursuant to Rule 68(3).⁴
5. Furthermore, the Defence respectfully requests Trial Chamber X to order a shortened response time to this application, given D-0544's upcoming testimony.

¹ [ICC-01/12-01/18-2152-Conf-Anx1](#).

² See [ICC-01/12-01/18-1756](#), para. 14; [ICC-01/12-01/18-T-171-ENG](#), p.11, line 25 – p.12, line 7.

³ [ICC-01/12-01/18-2288](#), para. 11.

⁴ [ICC-01/12-01/18-2280-Conf](#), para. 7.

II. Level of confidentiality

6. Pursuant to regulation 23bis(1) of the Regulations of the Court, the Defence files this application as confidential, because it contains sensitive information regarding a Defence witness and refers to confidential documents. The Defence will file a public redacted version in due course.

III. Applicable law

7. The Defence incorporates by reference the applicable legal framework and jurisprudence as set out in its previous applications under Rule 68(3).⁵

IV. Submissions

*The statement of D-0544 fulfills the requirements of Rule 68(3)*⁶

8. D-0544 is a fact witness. [REDACTED] before 2012 and was present in Timbuktu during the events. His evidence is short and focused on very discrete points, and he does not provide information on key factual aspects of the case.
9. D-0544 gives evidence about Mr Al Hassan's good temperament⁷ and about two incidents for which Mr Al Hassan provided his help. In the first incident, Mr Al Hassan helped to protect houses and personal goods against theft.⁸ In the second, he provided his assistance with [REDACTED].⁹
10. To the extent that D-0544 testifies about Mr Al Hassan's assistance to him and other members of the population, the Defence submits that any prejudice caused by his statement being admitted through Rule 68(3) is remedied by the fact that the Prosecution will be afforded an opportunity to cross-examine him on any issues that might affect the reliability of his anticipated evidence and his overall credibility.

⁵ [ICC-01/12-01/18-2208-Conf-Red](#), paras. 5-7; [ICC-01/12-01/18-2229-Conf-Exp](#), para. 7.

⁶ MLI-D28-0006-3342-R01.

⁷ MLI-D28-0006-3342-R01 at 3344-3345, paras. 14, 21.

⁸ MLI-D28-0006-3342-R01 at 3345-3346, paras. 16-18.

⁹ [REDACTED].

11. Furthermore, D-0544 explains that he knows nothing about Mr Al Hassan's work at the Islamic police in 2012.¹⁰ Therefore, his prior recorded testimony consists principally in explaining Mr Al Hassan's willingness to help in difficult situations, and his good character in general. It is corroborated by evidence from Defence witnesses that have or will testify *viva voce*.¹¹
12. The Witness has no information about the groups, and does not recall anything in particular about their arrival in Timbuktu, nor is he able to describe the MNLA, Ansar Dine or the Arab militias.¹² In view of the fact that D-0544 does not testify on issues that concern charged incidents, and of the fact that his evidence concerns peripheral issues, the Defence submits that Rule 68(3) is the more appropriate and time-saving manner form to receive it.
13. The Defence estimates that it will require in total 1 ½ hours for the examination-in-chief of D-0544, instead of the 4 hours initially envisaged, for the formalities associated with the introduction into evidence of his statement and to conduct a succinct supplementary examination. The Defence would elicit specific evidence on [REDACTED] Mr Al Hassan, the process for compiling his statement, and the context of the incidents described in his statement.
14. The Proposed Evidence satisfies the requirements of Rule 68(3) because the Witness will be (i) present in court; (ii) available for cross-examination by the Prosecution and questioning by the Legal Representatives of Victims and Trial Chamber X; and (iii) able to confirm his agreement to the introduction of the Rule 68(3) statement and to confirm that it accurately reflects what he has said.

There are exceptional reasons to vary the 30 deadline and issue an immediate decision

15. The Defence was ordered to prepare a new calendar of witnesses during the judicial recess.¹³ In order to comply with the Chamber's directive to avoid gaps in case a witness finished earlier, the Defence brought the testimonial dates of P-0544 forwards, so as to ensure the availability of a witness after P-0605 and before the two vacated days in the

¹⁰ MLI-D28-0006-3342-R01 at 3345, paras. 15, 20.

¹¹ D-0605, D-0312, and D-0147.

¹² MLI-D28-0006-3342-R01 at 3344, paras. 8-11.

¹³ [ICC-01/12-01/18-2289](#).

subsequent week. In light of the fact that these recent arrangements were made during the judicial recess (a time when Defence resources were fully deployed to the reorganisation of the calendar), the Defence was not able to submit this application within the usual 30 day deadline. The content of this application does not introduce any new information that was not in the Rule 68(2) application: the Chamber and parties are fully informed of the issues at stake and as such, no prejudice stems from the late submission of this application.

16. The Witness preparation session is currently scheduled for 27 August 2022 so as to ensure that the Witness will be available to testify as soon as P-0605's finishes. It will be necessary for the Defence to notify the Witness during the session as to whether the Rule 68(3) procedure will apply: this will also impact on particular logistical issues concerning the calendar and [REDACTED]. In these exceptional circumstances, the Defence further respectfully requests an expedited resolution of the application.

V. Relief requested

17. For the foregoing reasons, the Defence respectfully requests Trial Chamber X to:

- **GRANT** the present Rule 68(3) request and **ALLOW** the introduction of the proposed statement of Witness D-0544; and
- **ORDER** a shorter deadline for the parties and participants to file responses, if any, to the present application.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 31st Day of August 2022
At The Hague, The Netherlands