

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **04 July 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 with Confidential Annex A

Public redacted version of “Defence Request for leave to reply to ‘Prosecution Responses to “First Defence Rule 68(2)(b) Application” and “Defence application under Rule 68(3) to introduce Witness D-0554, D-0516 and D-0512 statements into evidence and for examination of these Witnesses”” (ICC-01/12-01/18-2216-Conf ; ICC-01/12-01/18-2220-Conf)”, 16 May 2022, ICC-01/12-01/18-2225-Conf

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

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. The Defence seeks leave to file a combined reply to the Prosecution's Rule 68(2) and (3) responses in order to:
 - a. Correct erroneous factual assertions that the Defence could not have anticipated in its original submissions;
 - b. Confirm that the individuals who translated the statements for Defence witnesses were vetted, selected and appointed by the Registry translation services for the purpose of providing interpretation in the specific language combinations used during these interviews;
 - c. Address issues raised by the Prosecution concerning the modalities of certain interviews that were conducted remotely, for reasons beyond the control of the Defence; and
 - d. Address issues concerning translation that can be resolved by *inter partes* agreements.

II. Level of confidentiality

2. Pursuant to regulation 23bis(1) of the Regulations of the Court, the Defence files this submission and its accompanying annexe as confidential because they contain confidential information including information regarding Defence witnesses, in addition to referring to filings classified as confidential. The Defence will file a public redacted version in due course.

III. Submissions

3. The Proposed Evidence satisfies the requirements of Rule 68(3) because each 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 their agreement to the introduction of the Rule 68(3) statements and to confirm that they accurately reflect what each have said. The Defence will additionally conduct a direct examination amounting to 8,5 hours to clarify and contextualise their evidence.

A. Factually erroneous claims

4. In its Rule 68(2) response, the Prosecution claimed that:

- The statement of D-0511 was translated from English to Arabic,¹ even though the statement was in fact read and signed in Arabic;
- D-0539 was interviewed in English and French, whereas the interpretation took place between members of the Defence and not between the Defence and the witness (the witness was questioned and responded in French);
- Songhai was used throughout the interviews with D-0553,² whereas the cover-page makes clear that Songhai was only used on the [REDACTED], since the Defence made a Songhai interpreter available to the witness on this date as an added precaution, although the witness indicated that it was not necessary as he was perfectly fluent in French;
- D-0511 had only signed the first and last page (even though the disclosed statement has his signature at the bottom of each page);
- [REDACTED] should have signed the statement of P-0539 (even though the statement clearly indicates that he was not present the day it was signed);

5. In the Rule 68(3) response, the Prosecution has:

- Conflated the distinct role of resource persons with that of intermediaries;³
- Made unfounded assertions concerning the role of the Defence resource person and the sequence concerning the finalization and signature of the statements of D-0516 and D-0512;⁴ and
- Made erroneous characterisations of P-0639's evidence.⁵

6. These are not claims that the Defence could have predicted in its original applications. It would also be contrary to the interests of justice for the Chamber to reach its determination without the benefit of a full and accurate account of these interviews.

¹ [ICC-01/12-01/18-2216-Conf](#), para. 18.

² [ICC-01/12-01/18-2216-Conf](#), para. 18.

³ [ICC-01/12-01/18-2220-Conf-Corr](#), para. 13.

⁴ [ICC-01/12-01/18-2220-Conf-Corr](#), paras. 1-13. See also, Confidential Annex A, Investigation note, MLI-D28-0006-4838-R01.

⁵ [REDACTED].

There is therefore good cause to allow the Defence to submit a reply for the purpose of addressing and rectifying any erroneous assumptions or claims.

B. The presence and participation of Registry vetted and appointed interpreters

7. In relation to interviews that were not conducted in French, the Defence was assisted by interpreters, assigned by the Registry interpretation and translation services, for the purpose of interpreting to and from the specific language combinations used in these interviews. If leave to reply is granted, the Defence will be in a position to file email correspondence confirming such appointments. Since these individuals are selected and appointed by the Registry, the Defence is entitled to assume that they are qualified to interpret to and from the language combination in question.

C. Remote interviews

8. The Court cannot erect procedural requirements that the Defence does not have the means and capacity to fulfill. Due to the COVID-19 pandemic, the Defence only had a limited opportunity to conduct *in situ* investigations. Certain witnesses were also unwilling to travel to a location that would have permitted an in person interview. In order to meet the deadlines imposed by the Chamber, the Defence [REDACTED].
9. The Prosecution responses raise various technical issues that go to the heart of the ability of the Defence to conduct investigations in this case. This includes the presence of the Defence resource person during certain interviews, the absence of specific time stamps, and the delay between the date of signature in the location of the witness, and the date when Defence members in The Hague received the electronic copy and were able to print and add their signatures.⁶
10. Several ‘requirements’ specified by the Prosecution are not required by the plain text of Rule 111:⁷ for example, Rule 111 does not require the submitting party to include an attestation from the interpreter and the reference to the need to include signatures by the ‘person who records and conducts the interview’ (emphasis added) suggests that

⁶ [REDACTED].

⁷ [ICC-01/12-01/18-2216-Conf](#), paras. 19, 20; [ICC-01/12-01/18-2220-Conf-Corr](#), paras. 8, 12, 35, 36.

signatures are required from the persons who were present on the day that the evidence was recorded (i.e. finalized in signed form) rather than any and all preceding introductory or screening interviews.⁸ These issues will arise in connection with future Defence applications. There is therefore good cause to allow the Defence to be heard in relation to the importance of interpreting this provision in a manner that takes into account the distinct and different disclosure obligations of the Defence and the particularities of this case.

11. In terms of the latter element, if granted leave to reply, the Defence will provide contextual information concerning the special requirements of D-516, [REDACTED].⁹
12. The Defence will also address the particular challenges that arise in connection with the need to finalise statements from individuals, who are located in remote or difficult to travel to areas. [REDACTED]. Defence statements filed in other cases also do not include the specific time of the interviews.¹⁰ As indicated in the initial application, if the Chamber considers these details to be necessary, the Defence can furnish these details to the Chamber in its reply.

D. Issues concerning translation that can be resolved by *inter partes* agreements

13. For D-0511, the authentic version of his statement is the original version in Arabic (which was signed by the witness). Errors in the English translation do not undermine the reliability of the original signed statement since first, the witness read and signed the Arabic original and second, D-0511 is fully proficient in Arabic. The translation does not constitute the authentic version of the ‘evidence’ but is simply a related item that can be corrected and updated during the proceedings.
14. The Defence has reviewed the issues raised by the Prosecution as concerns the English translation and is willing to file a corrected version of this translation.

⁸ If granted leave to reply, the Defence will further demonstrate that the Prosecution Rule 68(3) Response has mis-cited ICC case law, including [ICC-01/09-01/11-1938-Corr-Red2](#).

⁹ [REDACTED].

¹⁰ See for example, *Ntaganda*, [ICC-01/04-02/06-2397-AnxA](#) [ICC-01/04-02/06-2397-AnxB](#) – which Trial Chamber VI accepted into evidence ([ICC-01/04-02/06-2402](#), fn. 76 and [ICC-01/04-02/06-2442](#), fn. 16). See also [MLI-OTP-0038-0020](#) (Defence statements taken by the Al Mahdi Defence, which were entered into evidence in that case).

15. There is, however, good cause to grant the Defence leave to reply to this issue so that the Defence can apprise the Chamber as concerns the procedural and legal situation concerning Defence translations: specifically, if leave to reply is granted, the Defence will:

- adduce correspondence with the Registry, which confirmed that the Defence cannot request STIC to prepare official transcripts or translations of Defence evidence; and
- set out ICC case law concerning the procedure that applies in case a party challenges the accuracy of translations prepared by the other party, and the overarching emphasis on resolving such issues through *inter-partes* discussions.¹¹

IV. Relief Sought:

16. For the foregoing reasons, the Defence respectfully requests Trial Chamber X to **GRANT** the present Request for leave to reply to Prosecution responses to Defence application pursuant to Rule 68(2) and Rule 68(3).



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 4th Day of July 2022
At The Hague, The Netherlands

¹¹ See for example, *Ntaganda*, Transcript, [ICC-01/04-02/06-T-34-Red-ENG](#), 20 October 2015, pp.28-30; [ICC-01/04-02/06-T-50-Red2-ENG](#) p. 72; *Ongwen*, Transcript, [ICC-02/04-01/15-T-122-Red-ENG](#), pp. 2-3.