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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 consolidated response to Defence challenges under article 69(7) regarding the prior recorded testimony of P-0605 and P-0582”, 7 February 2022, ICC-01/12-01/18-2105-Conf

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Court to:

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I. Introduction

1. The Office of the Prosecutor (“OTP” or the “Prosecution”) opposes¹ the Defence’s challenges under article 69(7) of the Statute² to exclude from the record the prior recorded testimony and associated material (the “Evidence”) of MLI-OTP-P-0605 (“P-0605”) and MLI-OTP-P-0582 (“P-0582”), which the Prosecution seeks to introduce pursuant to rule 68(2)(c) of the Rules.³

2. The Defence has failed to establish a “real risk” that the Evidence of P-0605 and P-0582 was obtained by means of torture or cruel, inhuman or degrading treatment (“CIDT”). The Defence does not claim that the Prosecution subjected P-0605 and P-0582 to torture/CIDT but rather that they were subject to torture/CIDT by ██████████

██████████ The Defence’s arguments are essentially speculative, and fail to show that there is a causal link between any alleged torture/CIDT suffered by P-0605 and P-0582 and their Evidence. The record is clear that the Evidence of P-0605 and P-0582 was obtained in a voluntary interview process. In addition, their Evidence is reliable and its admission would not be antithetical to or seriously damage the integrity of the proceedings.

3. Accordingly, Trial Chamber X (the “Chamber”) should reject the Defence challenges under article 69(7) of the Statute and allow the introduction of the Evidence of P-0605 and P-0582 pursuant to rule 68(2)(c) of the Rules.

II. Applicable standards

4. The Chamber has already established clear standards governing article 69(7) challenges in its decision on requests related to the submission into evidence of the

¹ The OTP files this response confidentially pursuant to regulation 23bis(2) because the response refers to other documents that are subject to the same classification.

² ICC-01/12-01/18-2089-Conf (“Defence filing on P-0605”) and ICC-01/12-01/18-2095-Conf (“Defence filing on P-0582”).

³ See ICC-01/12-01/18-1995-Conf-Exp (“Application on P-0605”) and ICC-01/12-01/18-2014-Conf-Exp (“Application on P-0582”), to be collectively referred to as “Applications”.

Accused's statements ("Decision on the Accused's statements").⁴ As the party challenging the admissibility of evidence pursuant to article 69(7) of the Statute, the Defence must show a "real risk" that the evidence in question was obtained by means of torture or CIDT.⁵

5. As noted by the Chamber in its Decision on the Accused's statements, the exclusion of evidence under article 69(7) of the Statute can be "triggered by human rights violations occurring outside the framework of the Statute and independently of the Court".⁶ However, where the evidence in question was collected directly by the Prosecution, and not by the authorities who are alleged to have breached the Statute or the international human rights standards, an assessment under article 69(7) of the Statute must focus on the investigative activities of the Prosecution which generated the evidence.⁷ Such an analysis may include consideration of the general context in which the evidence was gathered and interaction with, or influence of other authorities, but only to the extent that they are relevant to the gathering of the specific evidence by the Prosecution.⁸ The central issues are "what measures, if any, the ICC Prosecution put in place to ensure that any possible violations arising from the surrounding context and circumstances did not impact on, or facilitate, their evidence gathering process".⁹ The Chamber must examine the conditions under which the evidence was obtained, which is a "fact specific determination, considering the circumstances of the interviews as a whole".¹⁰

6. The practice of other international tribunals may provide useful guidance to the Chamber in making this determination. In assessing the voluntariness of a statement

⁴ ICC-01/12-01/18-18-1475-Conf, para. 28-38.

⁵ Decision on the Accused's statements, para. 38. See also [Othman v. United Kingdom](#), para.263, 272-280, 282, 285; [El Haski v. Belgium](#), para.86-88 and fn.14; [31 December 2015 ECCC Decision](#), para.52; [5 February 2016 ECCC Decision](#), para.33; [12 December 2016 STL Decision](#), fn.20.

⁶ Decision on the Accused's statements, para. 39.

⁷ Decision on the Accused's statements, para. 42.

⁸ Decision on the Accused's statements, para. 42.

⁹ Decision on the Accused's statements, para. 45.

¹⁰ Decision on the Accused's statements, para. 45.

given to international investigators by a witness who claimed to have been mistreated by domestic authorities, Trial Chamber I of Special Tribunal for Lebanon (“STL”) considered that the witness “had not been forced to attend the interview, nor threatened, nor offered any inducements or promises, and that its content was true to the best of his knowledge and recollection”.¹¹ The STL Chamber also considered “the way [the witness] had been treated by the [...] investigators before and after the interview”, and whether the witness’s statements are “internally consistent” and “comprehensive”.¹² In turn, Chambers at the International Criminal Tribunal for the former Yugoslavia have emphasised the importance of ensuring that the interviewee understood his rights,¹³ whether counsel for the interviewee was present,¹⁴ and whether the statements were induced by “coercion, force or fraud, or oppressive conduct which [...] has sapped the free will of the suspect [...]”.¹⁵

III. The Defence has failed to establish a real risk that the Prosecution obtained the Evidence of P-0605 and P-0582 by means of torture/CIDT

7. The Defence fails to establish that there is a “real risk” that the Evidence of P-0605 and P-0582 was given as a consequence of, or resulted from, the effects of torture/CIDT. Their arguments are based on misrepresentations on facts and/or speculation.

8. As described in the Applications, the Prosecution took steps to ensure that its evidence gathering process afforded to P-0605 and P-0582 the necessary rights and protections, and safeguarded the product of the interview, pursuant to the applicable law under the Statute.¹⁶

¹¹ [12 December 2016 STL Decision](#), para.45, *see also* para.42.

¹² [12 December 2016 STL Decision](#), para.45-46.

¹³ [2 September 1997 Delalić Decision](#), para.62.

¹⁴ [2 September 1997 Delalić Decision](#), para.51.

¹⁵ [2 September 1997 Delalić Decision](#), para.66; [19 January 2006 Martić Decision](#), para.9.

¹⁶ Decision on the Accused’s statements, para. 45.

9. At no point in the interviews with P-0605 or P-0582 did the OTP investigators make any promise or inducements to obtain or sustain his cooperation with the OTP.

10. The totality of the circumstances of the interviews show that the Evidence of P-0605 and P-0582 was given voluntarily.

P-0605

11. The Defence alleges that P-0605 [REDACTED]

[REDACTED]¹⁷ However, the Defence fails to show a causal link between [REDACTED] and the OTP interview. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹⁸

(a) The Defence [REDACTED]

12. The Defence [REDACTED]

[REDACTED]¹⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁰ [REDACTED]

[REDACTED]

[REDACTED]²¹ [REDACTED]

[REDACTED]²² [REDACTED]²³

¹⁷ Defence filing on P-0605, para. 4.

¹⁸ See *contra* Defence filing on P-0605, para. 6.

¹⁹ See Defence filing on P-0605, para. 3-5.

²⁰ [REDACTED].
²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

(b) [REDACTED]

13. As described in paragraph 59 of the Application on P-0605, [REDACTED]

14. P-0605 was interviewed by the OTP on [REDACTED] For the purpose of the OTP interview, [REDACTED] [REDACTED]²⁴ and the interview was conducted in the presence only of the two OTP investigators, his article 55 counsel and a [REDACTED] interpreter.²⁵ At the beginning of the interview, OTP investigators explained to P-0605 that [REDACTED]

[REDACTED]²⁶ [REDACTED]

[REDACTED]²⁷

(c) P-0605 was afforded and made use of his rights under article 55(2) and rule 112

15. The OTP interview of P-0605 was conducted in full conformity with the Statute and internationally recognised human rights, which he effectively made use of when providing his Evidence. As described in detail in the Application, the interview record shows that OTP investigators explained to P-0605 the context of the interview and his article 55(2) rights, confirmed his understanding of these rights and his opportunity to confer with counsel, and asked him about [REDACTED].²⁸

²⁴ See e.g. [REDACTED]

²⁵ See e.g. [REDACTED]

²⁶ [REDACTED]

²⁷ See e.g. [REDACTED]

²⁸ Application on P-0605, para.56-58, and citations therein.

16. In particular, the OTP investigators asked P-0605 detailed questions about his health, security and [REDACTED] in his initial security assessment,²⁹ and in the course of the interview and follow-up meetings.³⁰ The OTP investigators also systematically asked P-0605 whether he had any issues to raise.³¹ In response, P-0605

[REDACTED]³²

[REDACTED]

[REDACTED]³³

17. The fact that P-0605 reported these allegations and made these complaints shows that P-0605 felt free to speak in his OTP interview and was not labouring under the effects of any alleged torture/CIDT.³⁴

(d) There was no “improper inducement” as alleged by the Defence

18. In response to the complaints [REDACTED] raised by P-0605, the OTP told him that [REDACTED]

[REDACTED].³⁵ The fact that the Prosecution took measures pursuant to its obligation to protect the well-being of witnesses under article 68(1) of the Statute can in no way be considered “improper inducement”, as alleged by the Defence.³⁶

19. The Defence further argues that [REDACTED] [REDACTED] formed an incentive for P-0605 to provide testimony which would be helpful to the Prosecution.³⁷ This argument is unfounded

²⁹ See e.g. [REDACTED]

³⁰ See e.g. [REDACTED]

³¹ [REDACTED]

³² [REDACTED]

³³ See e.g. [REDACTED]

³⁴ [Bundesgerichtshof, 3 StR 573/09](#).

³⁵ Application, para. 59, and citations therein.

³⁶ Defence filing on P-0605, para. 7.

³⁷ Defence filing on P-0605, para. 7.

and purely speculative. The Prosecution simply employed the safeguards required by the applicable law of the ICC, which it would adopt in any article 55 interviews.

20. The Defence further suggests that P-0605 [REDACTED]

[REDACTED].³⁸ However, [REDACTED]

[REDACTED].³⁹ [REDACTED]

[REDACTED].⁴⁰ [REDACTED]

P-0582

21. The Defence alleges that the Evidence of P-0582 was tainted by [REDACTED]

[REDACTED].⁴¹ However, once again, the Defence fails to show a causal link between the alleged torture and CIDT [REDACTED]

[REDACTED] and the OTP interview, [REDACTED]

[REDACTED].

³⁸ Defence filing on P-0605, para. 7.

³⁹ [REDACTED].

⁴⁰ *Contra* Defence filing on P-0605, para. 7.

⁴¹ Defence filing on P-0582, para. 6.

(a) [REDACTED]

22. As described in paragraph 52 of the Application on P-0582, [REDACTED]
[REDACTED]
[REDACTED].

23. P-0582 was interviewed by the OTP [REDACTED]
[REDACTED]⁴² For each interview session, [REDACTED]
[REDACTED],⁴³ [REDACTED]
[REDACTED]
[REDACTED].⁴⁴ His interview was conducted in the presence only
of the two OTP investigators, his article 55 counsel and a [REDACTED] interpreter.⁴⁵

24. In contrast, [REDACTED]⁴⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁴⁷

⁴² On [REDACTED], the OTP also met him to discuss procedural matters.

⁴³ See e.g. [REDACTED].

⁴⁴ See [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 4, l. 6-7.

⁴⁵ See e.g. [REDACTED]
[REDACTED]
[REDACTED].

⁴⁶ Defence filing on P-0582, para.8-9.

⁴⁷ [REDACTED]
[REDACTED]
[REDACTED]

(b) P-0582 was afforded and made use of his rights under article 55(2) and rule 112

25. The OTP interview of P-0582 was conducted in full conformity with article 55 of the Statute, rule 112 of the Rules and internationally recognised human rights. As described in detail in the Application on P-0582, P-0582 was reminded of his rights throughout the course of his interview, including the possibility to confer with his counsel at any time he deemed necessary.⁴⁸

26. The OTP investigators asked P-0582 detailed questions about his health, security and [REDACTED] during the security assessments, which were regularly updated.⁴⁹ The OTP investigators also systematically asked him whether he had any issues to raise,⁵⁰ which he did.⁵¹ The OTP [REDACTED]
[REDACTED].⁵²

27. In addition, [REDACTED]
[REDACTED],⁵³ [REDACTED]
[REDACTED]
[REDACTED].⁵⁴ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁵⁵ [REDACTED]

⁴⁸ Application on P-0582, para.53, and citations therein.

⁴⁹ See e.g. [REDACTED]

⁵⁰ See e.g. [REDACTED]

⁵¹ See e.g. [REDACTED]

⁵² See e.g. [REDACTED]

⁵³ [REDACTED]

⁵⁴ [REDACTED]

⁵⁵ [REDACTED]

[REDACTED]⁵⁶ [REDACTED]

[REDACTED]⁵⁷ [REDACTED]

[REDACTED]⁵⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁹ The next meeting on [REDACTED] did not involve a substantive interview, but only an update regarding the ongoing procedures.⁶⁰ [REDACTED]

[REDACTED]

[REDACTED]⁶¹

(c) There was no “improper inducement” as alleged by the Defence

28. The Defence alleges that [REDACTED] [REDACTED] can constitute “improper inducement” to testify.⁶² As discussed above in relation to P-0605,⁶³ adopting measures required by the applicable law of the ICC cannot be considered “improper inducement”.

29. The Defence also suggests that [REDACTED] [REDACTED] [REDACTED]⁶⁴ This is based on a pure speculation.

[REDACTED]

⁵⁶ Defence filing on P-0582, para. 7.

⁵⁷ [REDACTED]

⁵⁸ [REDACTED]

⁵⁹ [REDACTED]

⁶⁰ [REDACTED]

⁶¹ [REDACTED]

⁶² Defence filing on P-0582, para. 9.

⁶³ See above paragraph 19.

⁶⁴ Defence filing on P-0582, para. 9.

[REDACTED] 65 [REDACTED]

[REDACTED]

[REDACTED] 66 [REDACTED]

[REDACTED] 67 [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] 68 [REDACTED]

[REDACTED] 69 [REDACTED]

[REDACTED]

[REDACTED] 70

30. Throughout the course of the interview, the Prosecution made it clear to P-0582 that [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 71 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 72

65 [REDACTED]

66 *See e.g.* [REDACTED]

[REDACTED]

67 [REDACTED]

68 [REDACTED]

69 [REDACTED]

70 [REDACTED]

71 [REDACTED]

72 [REDACTED]

31. [REDACTED]

[REDACTED]⁷³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷⁴ [REDACTED]

[REDACTED]

[REDACTED]⁷⁵

32. Similarly, the Defence allegation that [REDACTED]

[REDACTED]

is both speculative and based on a misrepresentation of the facts.⁷⁶ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷³ Defence filing on P-0582, para. 9.

⁷⁴ [REDACTED]

⁷⁵ [REDACTED]

⁷⁶ Defence filing on P-0582, para. 9.

⁷⁷ [REDACTED]

⁷⁸ [REDACTED]

33. [REDACTED]

[REDACTED]⁷⁹ [REDACTED]

[REDACTED]⁸⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸² Further, the fact that the Prosecution continued to take measures to protect the health of P-0582, as required by article 68(1) of the Statute, cannot be considered as “inappropriate inducement”, as alleged by the Defence.⁸³ Nor do such efforts have any relevance to the voluntary nature of P-0582’s interview conducted in [REDACTED]⁸⁴

IV. Alleged violations do not cast substantial doubt on the reliability of the evidence

34. In any event, alleged violations of the Statute or internationally recognised human rights do not cast substantial doubt on the reliability of the Evidence of P-0605 and P-0582.⁸⁵

35. As discussed in the Applications, the reliability and accuracy of the Evidence of P-0605 and P-0582 can be inferred from its content, the procedure used for its collection, and its voluntariness.⁸⁶ In the course of the OTP interviews, there was no indication

⁷⁹ [REDACTED]

⁸⁰ Defence filing on P-0582, para. 34.

⁸¹ [REDACTED]

⁸² [REDACTED]

[REDACTED]

⁸³ Defence filing on P-0582, para. 34.

⁸⁴ See *contra* Defence filing on P-0582, para. 34.

⁸⁵ [Lubanga Bar Table Decision](#), para.40, indicating that a violation does not affect the reliability of the evidence if, absent the violation, the content of the evidence would have been the same.

⁸⁶ Application on P-0605, para. 54-61; Application on P-0582, para. 47-55.

that either P-0605 or P-0582 lacked the cognitive functions necessary to be interviewed and to provide reliable evidence. Their evidence is clear and internally consistent.⁸⁷

36. The Defence allegations regarding the lack of reliability of the Evidence of P-0605 and P-0582 are based on speculations or misrepresentation of facts.

37. For example, the Defence suggests that it was “inherently unlikely” that the Accused would have shared with P-0605 information about his role in Timbuktu

[REDACTED]⁸⁸ However, P-0605 clearly explained that [REDACTED]

[REDACTED]⁸⁹ [REDACTED].

38. The Defence further suggests that [REDACTED]

[REDACTED]

[REDACTED]⁹⁰ In fact, P-0605 clarified that [REDACTED]

[REDACTED]⁹¹ and that [REDACTED]

[REDACTED]

[REDACTED]⁹²

39. The Defence’s claim that the OTP employed leading questions during its interview with P-0582 is similarly unfounded. For example, the Defence argues that when showing a photograph of a person, the OTP investigator asked P-0582: “*Est-ce que lui, ce n’est pas Al HASSAN?*”⁹³ However, the transcript⁹⁴ and the audio-recording⁹⁵ of the

⁸⁷ Application on P-0605, para. 60; Application on P-0582, para. 55.

⁸⁸ Defence filing on P-0605, para. 16.

⁸⁹ [REDACTED]

⁹⁰ Defence filing on P-0605, para. 17.

⁹¹ [REDACTED]

⁹² [REDACTED]

⁹³ Defence filing on P-0582, para. 24.

⁹⁴ [REDACTED]

⁹⁵ [REDACTED]

relevant passage make it clear that this was in fact P-0582's comment, as interpreted by the [REDACTED] interpreter.

40. Contrary to the Defence's allegations,⁹⁶ P-0582 was clear about the distinction between the terms "*commissaire*" and "*directeur*" and the Accused's position as "*commissaire*" throughout the interview. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁷ [REDACTED]

[REDACTED]

[REDACTED]⁹⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁹ The OTP investigators simply followed P-0582's clear evidence on this point, and there was nothing inappropriate about associating "Al Hassan" with the term "*commissaire*" in their questioning.¹⁰⁰

41. Further, as detailed in the Applications, the Evidence of P-0605 and P-0582 is, for the most part, corroborated by multiple different, stand-alone, evidence, which is already on the record of the case, including contemporaneous documentary evidence, videos, reports, and testimony from insider, crime-base, and overview witnesses (including eye-witnesses) as well as the Accused's own statements.¹⁰¹

⁹⁶ Defence filing on P-0582, para. 23.

⁹⁷ [REDACTED]

⁹⁸ [REDACTED]

⁹⁹ [REDACTED]

¹⁰⁰ *Contra* Defence filing on P-0582, para. 23.

¹⁰¹ See Application on P-0605, para. 68-70 and citations therein; Application on P-0582, para. 58-60 and citations therein.

V. Admitting the Evidence would not be antithetical to or seriously damage the integrity of the proceedings

42. According to the Decision on the Accused's statements, factors that may guide the Chamber in assessing the seriousness of the damage to the integrity of the proceedings under Article 69(7)(b) of the Statute include: (i) the nature and gravity of the violation; (ii) whether the rights violated related to the accused; and (iii) the Prosecution's degree of control over the evidence gathering process or power to prevent the improper or illegal activity.¹⁰²

43. Because there is no causal link between any alleged torture/CIDT and the Evidence of P-0605 and P-0582, and the Prosecution had very limited power to prevent any such treatment, its admission would not be antithetical to or seriously damage the integrity of the proceedings.¹⁰³

VI. Conclusion

44. For the reasons set out above, the Prosecution requests the Chamber to reject the Defence challenges under article 69(7) of the Statute and grant the introduction of the Evidence of P-0605 and P-0582 pursuant to rule 68(2)(c) of the Rules.



Karim A. A. Khan QC, Prosecutor

Dated this 7th day of February 2022
At The Hague, The Netherlands.

¹⁰² Decision on the Accused's statements, para. 34.

¹⁰³ Decision on the Accused's statements, para. 72.