

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**
Date: **21 January 2022**
Date of submission: **2**
March 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 response to ‘Confidential Redacted Version of
“Prosecution application under rule 68(2)(c) of the Rules to introduce into evidence
the prior recorded testimony of Prosecution Witness MLI-OTP-P-0605”
(ICC-01/12-01/18-1995-Conf-Exp)”, 21 January 2022, ICC-01/12-01/18-2089-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
James Stewart

Counsel for the Defence

Melinda Taylor
Michiel Pestman

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. Introduction¹

1. On 25 November 2021, the Prosecution filed its request under Rule 68(2)(c) to introduce P-0605's prior recorded testimony² ('Request'). By the Request, the Prosecution seeks to submit transcripts³ and AV recordings⁴ of its interviews with P-0605 [REDACTED].
2. The Defence requests the exclusion of the evidence the subject of the Request pursuant to Article 69(7). The Request should further be rejected on a separate and sufficient basis for the Prosecution's failure to establish P-0605's unavailability for the purposes of Rule 68(2)(c), and on the basis of the prejudice it will cause to rights as enshrined in the Statute, including the right to examine witnesses called by the Prosecution, the fairness of the trial and the fair evaluation of P-0605's evidence.⁵ The introduction of the prior recorded testimony of P-0605, a person whose knowledge of the events of 2012 is entirely based on hearsay, unreliable and untested sources, and [REDACTED], pursuant to Rule 68(2)(c) would deprive Mr Al Hassan of an opportunity to cross-examine important evidence, including evidence concerning his acts and conduct, which is *prima facie* unreliable. The scope of the Request is furthermore inappropriate as it omits important exculpatory information relevant to Defence lines of argument.

II. Submissions

The Defence requests the exclusion of P-0605's testimony pursuant to Article 69(7)

3. P-0605's testimony should be excluded pursuant to Article 69(7). The Defence recalls its submissions regarding the burden which falls upon the Prosecution, once Article 69(7) issues are raised by the Defence, to demonstrate that issues under Article 69(7) do not preclude the submission of its evidence.⁶ The Defence recalls the Chamber's findings in its previous decision on Article 69(7) that the Defence must establish that there is a 'real risk' that the evidence in question was obtained by torture,⁷ that exclusion of evidence pursuant to Article 69(7) may be triggered by human rights violations occurring outside the

¹ Pursuant to Regulation 23bis(2) of the Regulations of the Court, the present response is filed confidentially because it responds to a filing of the same classification. This response is submitted pursuant to the deadline set by the Single Judge on 25 November 2021: Annex A.

² [ICC-01/12-01/18-1995-Conf-Red](#).

³ [ICC-01/12-01/18-1995-Conf-AnxA](#), pp. 2-3, lns 1-12.

⁴ [ICC-01/12-01/18-1995-Conf-AnxA](#), p. 3, lns 13-14.

⁵ *Statute*, Articles 64(2) and 67(1), especially Article 67(1)(e). These factors are relevant to the Chamber's consideration: *Gicheru*, [ICC-01/09-01/20-235-Red](#), paras 7-8; *Bemba*, [ICC-01/05-01/08-1386](#), para. 78; *Ntaganda*, [ICC-01/04-02/06-1029](#), paras 14-15; *Ruto & Sang*, [ICC-01/09-01/11-1938-Red-Corr](#), paras 65, 150.

⁶ The Defence incorporates by reference the submissions and citations in [ICC-01/12-01/18-1346-Conf](#), paras 2-3, and fns 2-17.

⁷ [ICC-01/12-01/18-1475-Conf](#), para. 38.

framework of the Statute, independently of the Court and by actors other than the ICC Prosecution,⁸ and that there must be a causal link between the violation and the gathering of the evidence.⁹ It is not necessary to demonstrate that the evidence resulted from the violation nor does the *chapeau* violation need to occur at the same time of collection, provided it triggers ‘detrimental effects’ satisfying either Article 69(7)(a) or (b).¹⁰ This formulation is consistent with leading precedents concerning the ‘continuing effects’ of torture or prior mistreatment.¹¹ The nexus requirement can be satisfied by any of: (i) P-0605’s [REDACTED] and its impact on the content of P-0605’s evidence; (ii) the unavailability of P-0605’s evidence [REDACTED]; and (iii) improper inducements affecting P-0605.

4. *First*, at the heart of P-0605’s testimony is [REDACTED]. These interactions (if they in fact occurred) happened when [REDACTED]. There is no contemporaneous examination of P-0605’s physical or psychological state at the time these interactions allegedly occurred, there is no information concerning the circumstances in which this information was imparted [REDACTED] and if the Prosecution’s request is satisfied, there will be no opportunity to question P-0605 [REDACTED]. The Prosecution’s reliance on information [REDACTED] fulfils the nexus requirement of Article 69(7) and requires the exclusion of P-0605’s evidence.
5. P-0605 gives an account of [REDACTED].¹² P-0605 indicated that [REDACTED].¹³ P-0605 indicated [REDACTED].¹⁴ He described in detail [REDACTED].¹⁵ P-0605 has further described [REDACTED].¹⁶ [REDACTED] are recognised as [REDACTED] amounting to torture¹⁷ and CIDT¹⁸ under international human rights law. Notably, [REDACTED] constitutes [REDACTED] and [REDACTED].¹⁹ P-0605’s description of

⁸ [ICC-01/12-01/18-1475-Conf](#), para. 39 and fns. 73-74.

⁹ [ICC-01/12-01/18-1475-Conf](#), paras 40-41 and 45: ‘the relevant question ... is whether the ICC Prosecution obtained the Statements by means of a violation of the Statute or internationally recognised human rights.’

¹⁰ [ICC-01/05-01/13-2170-Corr2-Red](#), para. 18: ‘facts must demonstrate both a violation and (...) detrimental effect’.

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

[REDACTED] is corroborated by [REDACTED],²⁰ [REDACTED],²¹ and [REDACTED] testimony.²²

6. *Second*, the Prosecution has filed this request because, by its own admission,²³ it is unable to obtain testimony from P-0605 [REDACTED]. This indicates that the Prosecution was only able to obtain P-0605's evidence because [REDACTED]. In line with this Court's jurisprudence,²⁴ the Prosecution's reliance on these [REDACTED] circumstances constitutes a sufficient nexus for exclusion.
7. *Third*, P-0605's testimony is impacted by improper inducement²⁵ in three ways. The Prosecution relies at length on the safeguards employed in their interviews with P-0605, including their 'open, constructive and respectful manner'.²⁶ It is precisely this [REDACTED] which formed an incentive for P-0605 to provide testimony which would be helpful to the Prosecution.²⁷ Further, the Prosecution reminds P-0605 that [REDACTED]²⁸ and [REDACTED].²⁹ Finally, P-0605 would have been aware of the risk that [REDACTED],³⁰ a risk borne out by the fact that he was eventually [REDACTED].³¹ Chambers of the ICTR have consistently indicated the need for caution when hearing the testimony of [REDACTED] has been applied [REDACTED].³² This Court and its predecessors have also noted that the fact that a person [REDACTED] does not make the witness's evidence unreliable *per se* but requires careful consideration and the taking of appropriate caution in evaluating their testimonies.³³ Furthermore, the academic literature has noted the risk [REDACTED].³⁴ In the premises of these above three issues, the Defence requests exclusion of P-0605's evidence pursuant to Article 69(7), subject to paragraph 45 *infra*, and submits that these matters, even if the Chamber is not minded to exclude this

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [ICC-01/12-01/18-1995-Conf-Red](#), paras 5, 23-31.

²⁴ [ICC-01/05-01/13-2275-Red](#), paras 332-333. [REDACTED].

²⁵ ICTY, [Haradinaj](#), paras 45-47; *R v Thomas* [\[2006\] VSCA 165](#), paras 73-74, 85; ICTY, *Martić*, [Appeals Judgment](#), para. 64; SCSL, [Sesay](#), para. 43.

²⁶ ICC-01/12-01/18-1995-Conf-Red, paras 55-58.

²⁷ *Thomas* [\[2006\] VSCA 165](#), paras 73-78; [United States v. Karake](#), 443 F. Supp. 2d 8 (D.D.C. 2006), para. 140.

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [ICC-01/12-01/18-1995-Conf-Red](#), para. 27.

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

evidence, are relevant to the Chamber's appreciation of the reliability and integrity of this evidence.

The Prosecution have failed to establish P-0605's unavailability to the requisite standard

8. Rule 68(2)(c) applies only where the prior recorded testimony 'comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally.' The Prosecution have failed to establish that, due to obstacles that cannot be overcome with reasonable diligence, P-0605 is unavailable to testify orally.
9. *First*, the Prosecution have failed to discharge their burden of establishing why it was not possible to obtain P-0605's evidence through Article 56, or schedule his testimony at the beginning of trial. The Prosecution relies upon the fact that [REDACTED],³⁵ [REDACTED].³⁶ The Prosecution indicates that it 'had no choice but to abandon its intention to call [P-0605] among the first witnesses in the trial' due to the COVID-19 pandemic,³⁷ but this is inconsistent with contemporaneous findings of the Chamber that, notwithstanding the impact of the COVID-19 pandemic, the parties were still able to, and required to, comply with the Chamber's timetable for the case with only limited extensions.³⁸ Given that the Prosecution were aware of [REDACTED],³⁹ and had the capacity to quickly obtain information concerning this possibility,⁴⁰ the Prosecution were under a duty to act in a diligent manner to take steps to address this risk in a manner consistent with the rights of the accused.
10. *Second*, there is insufficient evidence of unavailability connected with [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [ICC-01/12-01/18-1995-Conf-Red](#), para. 17.

³⁸ [ICC-01/12-01/18-786-Conf](#), para. 44: 'the Chamber is firmly committed to ensuring fair and expeditious proceedings, even in the face of this unprecedented global situation. Concretely at this stage, the pandemic has only resulted in the moving of the final deadline for disclosure by one month, and the deadline for the Trial Brief by 18 days. The Chamber previously rejected requests for blanket extensions of all deadlines in the case [...] All other deadlines [...] remain, at this stage, unchanged. In addition, disclosure and written litigation have been continuing robustly throughout the closure of the Court's physical premises. In concrete terms therefore, the Defence submission that 'key aspects of the proceedings have ground to a halt' are without merit and are a manifest distortion of the current state of the proceedings. [...] at this stage, the general submission that significant delays to the proceedings will be engendered as a result of COVID-19, are premature'; [ICC-01/12-01/18-940-Conf](#), rejecting a Defence request to adjourn the start of the trial; [ICC-01/12-01/18-968](#), para. 28: 'While the Chamber had due regard to the difficulties caused by the COVID-19 pandemic [...], it nonetheless found that requiring the Prosecution to submit all applications for in-court protective measures was the appropriate way forward. The Chamber's opinion in this regard has not changed.'

³⁹ [REDACTED].

⁴⁰ [REDACTED].

[REDACTED].⁴¹ [REDACTED].⁴² [REDACTED].⁴³ [REDACTED].⁴⁴ [REDACTED]⁴⁵
[REDACTED].⁴⁶ [REDACTED].

11. Furthermore, [REDACTED],⁴⁷ [REDACTED].⁴⁸ [REDACTED].

12. In all the events, the Prosecution has failed to establish the unavailability of P-0605 to the requisite standard, and on this basis, the Request should be rejected.

P-0605's prior recorded testimony lacks sufficient indicia of reliability and its introduction into evidence would be unduly prejudicial

13. The admission of untested witness evidence in the form of a prior recorded testimony requires sufficient counterbalancing factors to permit a fair and proper assessment of the reliability of that evidence.⁴⁹ Rule 68(2)(c)(i) requires prior recorded testimony to have sufficient indicia of reliability. Whilst the Chamber is not obliged to consider factors beyond formal requirements in its assessment of indicia of reliability, neither is the Chamber precluded from considering other factors, where necessary and appropriate.⁵⁰

14. In the present case, there are a number of manifest and obvious issues in relation to P-0605's prior recorded testimony which cast serious doubt on the reliability of his evidence:

- a. *first*, P-0605 provides evidence of information [REDACTED]; and
- b. *second*, P-0605's evidence is heavily reliant on hearsay: he was not present in Timbuktu in 2012 and testifies to receiving information from others about the events of 2012 after the fact, as well as following information reported in news media about the events of 2012 and [REDACTED].

15. *First*, it is fundamentally unfair for the Chamber to admit the evidence of an alleged insider witness who claims to [REDACTED] and to have received hearsay evidence from the accused without providing the Defence any opportunity to cross-examine this witness, given the 'special caution' which Courts have traditionally taken when dealing with such evidence,⁵¹ which 'is inherently unreliable, in view of the personal advantage which such

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ *Al-Khawaja and Tahery v. United Kingdom*, para. 147; *Schatschaschwili v. Germany*, especially paras 107, 125.

⁵⁰ *Gbagbo and Blé Goudé*, [ICC-02/11-01/15-744](#), para. 104.

⁵¹ [REDACTED].

witnesses think they may obtain by providing information to the authorities.’⁵² These principles are not confined to ‘where duress has been used against the accused or where the will of the accused has been directly overborne in some way’; violation of the accused’s right to silence in the absence of these factors can lead to breaches of the right to fair trial.⁵³

16. Of particular note in the jurisprudence is where certain of the facts that were alleged to have been obtained by the witness from the [REDACTED] accused have already been a matter of public knowledge or can otherwise be discovered.⁵⁴ P-0605 [REDACTED] has revealed a knowledge of the events of 2012 and [REDACTED] by virtue of his following of the news and public discussion in Bamako.⁵⁵ The allegations in his evidence that Mr Al Hassan was involved with the Islamic Police in Timbuktu, and that there were foreigners in the Islamic Police, do not betray any special knowledge which must have been obtained from Mr Al Hassan; instead, these are matters that P-0605 could have learned about in the ordinary course of events. [REDACTED].⁵⁶ Furthermore, P-0605 states that Mr Al Hassan imported this information to him [REDACTED],⁵⁷ a claim which seems inherently unlikely [REDACTED]. P-0605 also provides no explanation of *why* Mr Al Hassan would have shared this information with him. In such circumstances, it appears inherently unlikely that Mr Al Hassan would have given this information to P-0605, a stranger. In the premises of all of the above, it is of fundamental importance that the Defence be given an opportunity to cross-examine P-0605 concerning the conditions under which Mr Al Hassan allegedly provided him this information, and any perceptions of inducement he had when providing the Prosecution with the information.
17. *Second*, P-0605 has indicated that the information he provided the Prosecution is heavily based on hearsay and other untested sources. P-0605 indicated that he was aware of [REDACTED].⁵⁸ P-0605’s claim that [REDACTED] appears to be *prima facie* unlikely, given his other evidence [REDACTED]. In such circumstances, P-0605’s knowledge about the case against Mr Al Hassan can only have derived from [REDACTED]. It is fundamental

⁵² [REDACTED].

⁵³ [Allan v. United Kingdom](#), paras. 36, 44, 50, 52-53, 55.

⁵⁴ [Benedetto \[2003\] UKPC 27](#), paras 39-43; [Pringle \[2003\] UKPC 9](#), para. 27; [Hudson \[2011\] NZSC 51](#), para. 33: ‘By one means or another they may well be able to learn enough about suspected offending and a defendant’s possible role in that offending to provide apparently plausible detail’.

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

that the Defence have an opportunity to cross-examine P-0605 on the basis of his knowledge, and the extent of this knowledge, given the claims he makes about Mr Al Hassan's acts and conduct.

18. Many of the individuals about whom P-0605 is testifying are individuals whose evidence the Defence has no opportunity to test, including Iyad Ag Ghaly, [REDACTED],⁵⁹ [REDACTED]⁶⁰ [REDACTED]⁶¹ [REDACTED]⁶² [REDACTED],⁶³ [REDACTED]⁶⁴, and [REDACTED].⁶⁵ P-0605's testimony concerning his interactions with these individuals, and the information that they supposedly imparted to him, therefore cannot be tested without the Defence being given an opportunity to question P-0605.

19. Furthermore, oftentimes these interactions are related through multiple levels of hearsay: for example, P-0605 describes being told by [REDACTED] that [REDACTED].⁶⁶ Similarly, P-0605 recounts a conversation with Iyad Ag Ghaly had with [REDACTED].⁶⁷ These conversations are impossible to investigate or verify and supposedly go to the motives and activities of the groups.

20. P-0605 also speaks about hearing information through the press [REDACTED].⁶⁸ Specifically, P-0605 says that he heard allegations of forced marriages between local people and members of the groups [REDACTED].⁶⁹ P-0605 says that he had heard [REDACTED].⁷⁰ that there were [REDACTED],⁷¹ that [REDACTED],⁷² and that [REDACTED].⁷³ P-0605 learnt of [REDACTED]⁷⁴ and said that [REDACTED]⁷⁵ [REDACTED].

21. P-0605 says that these allegations [REDACTED].⁷⁶ P-0605 added that he also was

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

searching information out [REDACTED].⁷⁷ In total, it appears clear that P-0605's knowledge and understanding of the events of 2012 has been greatly impacted by public testimony which is untested and unreliable due to its anonymous and informal nature.

22. Despite the fact that P-0605 has no personal knowledge of the events of 2012, he repeatedly in his testimony puts forward his opinion on responsibility for the events: [REDACTED].⁷⁸ P-0605 also told the Prosecution that he believed or speculated [REDACTED].⁷⁹

P-0605's prior recorded testimony goes to proof of Mr Al Hassan's acts and conduct

23. According to Rule 68(2)(c)(ii), 'the fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it'. The term 'acts and conduct' refers to actions of the accused which are described in the charges brought against him or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged.⁸⁰ This includes testimony that – although not explicitly mentioning the accused – is tendered to prove the acts and conduct of the accused.⁸¹ According to Trial Chamber VI, 'this factor relates principally to the fair trial rights of the accused and his right to examine the witnesses testifying as to his acts and conduct.'⁸² In assessing the prejudicial impact of the testimony of Mr Al Hassan, the Chamber should consider whether the references are of a 'peripheral' or 'discrete' nature, or conversely are of significance to the case.⁸³
24. P-0605's testimony discusses a wide array of matters and events which go beyond 'background' information;⁸⁴ all aspects of his testimony are materially in dispute. The Chamber has previously dismissed a Rule 68(2) Request for the submission of prior recorded testimony of such a nature, finding that the Defence ought to be afforded the opportunity to cross-examine the witness.⁸⁵

25. The Prosecution relies on P-0605's prior recorded testimony to charge Mr Al Hassan with

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ Ongwen, [ICC-02/04-01/15-596-Red](#), para. 12.

⁸¹ Bemba et al, [ICC-01/05-01/13-1430](#), para. 8; Ongwen, [ICC-02/04-01/15-596-Red](#), fn. 26; Bemba et al, [ICC-01/05-01/13-1430](#), para. 8.

⁸² Ntaganda, [ICC-01/04-02/06-2242-Red](#), para. 54.

⁸³ [ICC-02/04-01/15-596-Red](#), para. 13; Ongwen, [ICC-02/04-01/15-1294](#), para. 5; Gbagbo and Blé Goudé, [ICC-02/11-01/15-950-Red](#), para. 72 (considerations applicable to Rule 68(2)(b) applications are applicable to Rule 68(2)(c) applications *mutatis mutandis*).

⁸⁴ [ICC-01/12-01/18-1402-Conf-Red](#), para. 12.

⁸⁵ [ICC-01/12-01/18-1402-Conf-Red](#), paras 12-13.

[REDACTED],⁸⁶ as well as [REDACTED].⁸⁷ In its Trial Brief, the Prosecution repeatedly refers to P-0605's evidence in relation [REDACTED],⁸⁸ and relies on P-0605's prior recorded testimony [REDACTED].⁸⁹ Notably, the Prosecution, in relying on P-0605's evidence for the allegation of forced marriage, misstates the content of P-0605's evidence: P-0605 does not positively state as the Prosecution claim that [REDACTED], but rather simply says that he heard human rights groups describe these marriages as forced but that Mr Al Hassan had indicated that there were no forced marriages, and he had stopped his inquiries there.⁹⁰

26. The information which P-0605 provides regarding Mr Al Hassan and his acts and conduct is as follows:

- a. That Mr Al Hassan was a Tamasheq and [REDACTED];⁹¹
- b. That Mr Al Hassan had told P-0605 that he had been the *commissaire* in Timbuktu;⁹²
- c. That Mr Al Hassan's [REDACTED];⁹³
- d. That Mr Al Hassan addressed as his chief Iyad Ag Ghaly, or if he could not find him, Abou Zeid and Yahya Abou-Al Hammam;⁹⁴
- e. That Mr Al Hassan said that there were other people in the police, and that the majority of them were foreigners;⁹⁵
- f. [REDACTED];⁹⁶ and
- g. [REDACTED].⁹⁷

27. P-0605's allegations, relied upon to establish Mr Al Hassan's criminal responsibility for the charged crimes, are by no means 'peripheral' or 'discrete'. They are at the heart of the Prosecution's case against Mr Al Hassan, in terms of both Mr Al Hassan's individual criminal responsibility and the alleged charged incidents of forced marriage. Allowing such allegations to be admitted into evidence without any possibility for the Defence to question

⁸⁶ Witness Summary of P-0605, [ICC-01/12-01/18-740-Conf-AnxB](#), p. 956.

⁸⁷ Witness Summary of P-0605, [ICC-01/12-01/18-740-Conf-AnxB](#), p. 957.

⁸⁸ Trial Brief, [ICC-01/12-01/18-819-Conf-AnxA](#), paras 250 and 268 and fns 814 and 897.

⁸⁹ Trial Brief, [ICC-01/12-01/18-819-Conf-AnxA](#), para. 121 and fn. 389.

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² [REDACTED].

⁹³ [REDACTED].

⁹⁴ [REDACTED].

⁹⁵ [REDACTED].

⁹⁶ Witness Summary of P-0605, [ICC-01/12-01/18-740-Conf-AnxB](#), p. 958.

⁹⁷ Trial Brief, [ICC-01/12-01/18-819-Conf-AnxA](#), para. 250 and fn. 814 and para. 268 and fn. 897; Witness Summary of P-0605, [ICC-01/12-01/18-740-Conf-AnxB](#), p. 958.

and challenge their author would be antithetical to Mr Al Hassan's right to examine or have examined the witnesses against him,⁹⁸ and would therefore cause him undue prejudice.

The absence of corroborative evidence supporting the untested witness testimony renders the admission of P-0605's prior recorded testimony unduly prejudicial

28. Furthermore, P-0605's prior recorded testimony is inconsistent and uncorroborated. To admit such evidence without the ability for the Defence to test it through cross-examination would be prejudicial and affect the fairness of the trial. The ICTY found that 'absent any corroborative evidence, it would be unsafe to rely on evidence of [...] a witness who was unable to return to the Tribunal for cross-examination because of ill-health.'⁹⁹ The ICTY also noted that where testimony relates to central issues in the case:

[T]he lack of cross-examination would mean that the probative value of the testimony is substantially outweighed by the Accused's right to a fair trial, unless the Chamber is satisfied as to the reliability of the witness's testimony with there also being strong corroboration from other witnesses as to the central allegations.¹⁰⁰

29. The Appeals Chamber in Ntaganda held that:

[T]he extent to which a prior recorded statement is corroborated by other evidence is also important in determining the weight to be accorded to it and this must be carefully assessed in light of the full evidentiary record and in relation to the issue(s) to be determined.¹⁰¹

Even when assessed in light of the evidentiary record as a whole, there is not only an absence of corroborating evidence, but rather contradictory evidence. P-0605's assertions cannot, therefore, be found to be sufficiently probative.

30. The existence of corroboration on some or all aspects also does not exempt the Chamber from the obligation to exclude the statement if (i) the statement is being relied upon to establish – to a significant degree – a disputed fact that would result in a conviction for a particular incident or incidents, and (ii) the necessary indicia of reliability are missing or the Defence is unduly handicapped as a result of its inability to test key aspects of the evidence.¹⁰² Not only is Witness P-0605's evidence not corroborated by other evidence in

⁹⁸ [Rome Statute](#), Article 67(1)(e).

⁹⁹ ICTY, [Haradinaj](#), para. 9, citing [Brdanin](#), fns 944 and 2261.

¹⁰⁰ ICTY, [Haradinaj](#), para. 10.

¹⁰¹ [ICC-01/04-02/06-2666-Red](#), para. 630.

¹⁰² [Schatschaschwili v. Germany](#), para. 116: 'Given that the Court's concern is to ascertain whether the proceedings as a whole were fair, it must review the existence of sufficient counterbalancing factors not only in cases in which the evidence given by an absent witness was the sole or decisive basis for the applicant's conviction but also in those cases where, following its assessment of the domestic courts' evaluation of the weight of the evidence [...], it finds it unclear whether the evidence in question was the sole or decisive basis but is nevertheless satisfied that it carried significant weight and that its admission may have handicapped the defence. The extent of

this case, but it is actively contradicted by P-0605 himself and other witnesses in this case.

31. *First*, P-0605's evidence regarding Mr Al Hassan being the '*commissaire*' is particularly unreliable and inconsistent. P-0605 indicates that his description of the responsibilities of the *commissaire* was based on [REDACTED]¹⁰³ and that Mr Al Hassan did not tell him [REDACTED].¹⁰⁴ Similarly, P-0605 says that he does not know how the Islamic Police was organised and that Mr Al Hassan only told him that he was there as the representative of the chiefs; that he was called the *commissaire* but that in reality, it was the chiefs who were the knowledgeable people in charge who took the decision, being Abou Zeid and Yahya Abou-Al Hammam.¹⁰⁵ P-0605 indicated that he did not know why Mr Al Hassan was appointed the *commissaire* in Timbuktu, but the Prosecution repeatedly asked him the question until he speculated about the reasons, [REDACTED].¹⁰⁶

32. *Second*, P-0605 claims that in the course of his handling of police matters, when necessary, Mr Al Hassan would seek advice and instructions from the top leaders in Timbuktu, such as Abou Zeid and Yahya Abou Al-Hammam.¹⁰⁷ This allegation is directly contradicted by P-0605's testimony above concerning Mr Al Hassan's role but is also contradicted by the testimony of Witness [REDACTED] who testified:¹⁰⁸

[REDACTED].

33. *Third*, the Prosecution argue that the testimony of [REDACTED] supports the position in P-0605's evidence that Mr Al Hassan joined the armed groups at the beginning of the occupation.¹⁰⁹ In fact, in cross-examination, [REDACTED] conceded that [REDACTED] could have been in early July 2012, not April.¹¹⁰

34. *Fourth*, P-0605 says that [REDACTED],¹¹¹ whereas [REDACTED] testified that [REDACTED].¹¹²

the counterbalancing factors necessary in order for a trial to be considered fair will depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair.'

¹⁰³ [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ [REDACTED].

¹⁰⁶ [REDACTED].

¹⁰⁷ [REDACTED].

¹⁰⁸ [REDACTED].

¹⁰⁹ [ICC-01/12-01/18-1995-Conf-Red](#), para. 68 citing [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ [REDACTED].

¹¹² [REDACTED].

35. Allowing this prior recorded testimony to be admitted into evidence without any possibility for the Defence to question and challenge their author would be antithetical to Mr Al Hassan's right to examine or have examined the witnesses against him,¹¹³ and would therefore cause him undue prejudice.

P-0605's prior recorded testimony raises live and important issues in the case and their introduction into evidence would be unduly prejudicial

36. According to Trial Chamber VII, the following factors are relevant: whether the evidence 'relates to issues that are not materially in dispute', 'is central to the allegations or the case', and 'is purportedly corroborative.'¹¹⁴ This is consistent with jurisprudence relating to Rule 68(2)(b), which prohibits the use of that mechanism to introduce evidence pertaining to live and important issues in the case.¹¹⁵

37. The Prosecution proposes to rely on P-0605's prior recorded testimony to advance the following live and important issues in its case, namely:

- a. the [REDACTED];¹¹⁶
- b. that [REDACTED];¹¹⁷
- c. the [REDACTED] in Mr Al Hassan;¹¹⁸ and
- d. the [REDACTED].¹¹⁹

38. These allegations in P-0605's prior recorded testimony have all been relied upon by the Prosecution to underpin issues that are central to the case and are materially in dispute. The Prosecution does not appear to have made any effort to identify other individuals who could testify in respect of these allegations in lieu of P-0605.

If P-0605's prior recorded testimony is accepted for submission pursuant to Rule 68(2)(c), the Defence will be deprived of an opportunity to question the witness concerning defence lines of argument

39. Included in P-0605's prior recorded testimony is information which would be relevant to the Defence case, but which was not sufficiently elicited in full exculpatory manner by the

¹¹³ [Rome Statute](#), Article 67(1)(e).

¹¹⁴ *Bemba et al*, [ICC-01/05-01/13-1481-Red-Corr](#), para. 21.

¹¹⁵ *Katanga & Ngudjolo*, [ICC-01/04-01/07-2362](#), paras 27-28, 33-34; *Ongwen*, [ICC-02/04-01/15-596-Red](#), paras 214-215.

¹¹⁶ [REDACTED].

¹¹⁷ [REDACTED].

¹¹⁸ Trial Brief, [ICC-01/12-01/18-819-Conf-AnxA](#), para. 121 and fn. 389 citing [REDACTED]. See *supra* paras 31-33.

¹¹⁹ Trial Brief, [ICC-01/12-01/18-819-Conf-AnxA](#), para. 250 and fn. 814 and para. 268 and fn. 897, citing [REDACTED].

Prosecution, contrary to their obligations under the Statute.¹²⁰

40. *First*, P-0605 describes, at the request of the Prosecution investigators,¹²¹ [REDACTED] as reported to P-0605 by Mr Al Hassan. [REDACTED].¹²² These details are consistent with Mr Al Hassan's description of [REDACTED].¹²³ Further information which P-0605 can give regarding [REDACTED], could corroborate the account which Mr Al Hassan has given regarding [REDACTED].

41. *Second*, P-0605 raised with the Prosecution the issue of discrimination [REDACTED]:¹²⁴ [REDACTED].

42. This appears to be a reference to anti-Touareg discrimination in Mali, but was not further explored by the Prosecution in questioning P-0605.

43. *Third*, P-0605 testifies to working with Iyad Al Ghaly and [REDACTED] but notably does not allege that Mr Al Hassan was working with these groups at that time, referring instead to [REDACTED].¹²⁵ *Fourth*, P-0605 reports that Mr Al Hassan told him that the allegations [REDACTED]¹²⁶ and that [REDACTED]¹²⁷ These denials, particularly Mr Al Hassan's, are probative as concerns Mr Al Hassan's lack of knowledge of any alleged forced marriages.

The scope of the prior recorded testimony is inappropriate, as it omits information which has significant implications for the reliability of P-0605's evidence

44. The Prosecution have not included in the scope of the Request seven investigators' notes which go to P-0605's [REDACTED].¹²⁸ The Prosecution have further failed to include in the Request the [REDACTED] regarding P-0605,¹²⁹ the transcript of [REDACTED],¹³⁰ and the [REDACTED].¹³¹ This evidence provides corroborating information concerning [REDACTED] P-0605. These documents are therefore relevant to the Defence case [REDACTED], and the Chamber's determination of the truth, and their omission by the

¹²⁰ [Rome Statute](#), Article 54(1)(a).

¹²¹ [REDACTED].

¹²² [REDACTED].

¹²³ [REDACTED].

¹²⁴ [REDACTED].

¹²⁵ [REDACTED].

¹²⁶ [REDACTED].

¹²⁷ [REDACTED].

¹²⁸ [REDACTED].

¹²⁹ [REDACTED].

¹³⁰ [REDACTED].

¹³¹ [REDACTED].

Prosecution is inappropriate.

The evidence of torture and CIDT in P-0605's evidence should be accepted for submission as evidence of [REDACTED] and the way in which evidence was obtained by the Prosecution [REDACTED]

45. Article 15 of the Convention against Torture provides that 'any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.' Consistently with these principles, the evidence provided by P-0605 [REDACTED] cannot be relied upon by this Chamber pursuant to Article 69(7) as argued above. However, the corollary of this principle is that the evidence he provides about his alleged torture can be relied upon by this Chamber in an adjectival sense as relevant to their appreciation of the evidence [REDACTED]. The evidence that P-0605 provides on these issues is relevant to [REDACTED] and the way in which the Prosecution obtained evidence [REDACTED] in full knowledge of [REDACTED].

III. Relief Sought

46. The Defence respectfully requests that the Chamber **REJECT** the Request. In the event that the Chamber grants the Request in full, the impugned material identified herein cannot be afforded significant or any evidential weight. Conversely, exculpatory aspects of P-0605's prior recorded testimony deserve full weight because the Prosecution had an opportunity to question the witness and would suffer no prejudice.¹³²



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 21st Day of January 2022
At The Hague, The Netherlands

¹³² See generally regarding the power of the Chamber to rely on certain parts of a witness' testimony while rejecting other parts: ICTR, *Setako*, [Appeals Judgement](#), para. 48; ICTY, *Haradinaj*, [Appeals Judgement](#), para. 201. See regarding the Chamber's duty to take steps to cure any prejudice arising from the unavailability of exculpatory evidence including by making inferences of fact in favour of the Defence: *Lubanga*, [ICC-01/04-01/06-1644](#), paras 35, 57-58; ICTR, *Bizimungu et al*, [Judgement](#), para. 176.