

**Cour
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**International
Criminal
Court**

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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

Public Redacted Version of “Defence request for leave to reply to ‘Prosecution consolidated response to Defence challenges under article 69(7) regarding the prior recorded testimony of P-0605 and P-0582’”, 11 February 2022, ICC-01/12-01/18-2111-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:

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I. Introduction

1. On 21 January 2022, the Defence filed its response (“Response regarding P-0605”)¹ to the ‘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’.² On 28 January 2022, the Defence filed its response (“Response regarding P-0582”)³ to ‘Prosecution application under rule 68(2)(c) of the Rules to introduce into evidence the prior recorded testimony and associated material of Prosecution Witness MLI-OTP-P-0582’.⁴ On 7 February 2021, the Prosecution filed a consolidated response (“Prosecution Response”) to Defence challenges under article 69(7) regarding the prior recorded testimony of P-0605 and P-0582.⁵
2. Pursuant to Regulation 24(5) of the Regulations of the Court, the Defence for Mr Al Hassan respectfully requests the leave of the Chamber to reply to the Prosecution Response with respect to four critical issues, namely (i) the Prosecution’s citation of new cases to impermissibly limit the scope of the voluntariness inquiry; (ii) the Prosecution’s astonishing assertion that P-0605’s [REDACTED]; (iii) the Prosecution’s argument that there was “no evidence” that P-0605 was aware of [REDACTED]; and (iv) the tension between the Prosecution’s position that the witnesses had no inducement to meet with OTP, and the Prosecution’s acknowledgement that [REDACTED] resulted from their OTP interviews.

II. Confidentiality

3. Pursuant to Regulation 23bis (2) of the Regulations of the Court, this request for leave to reply is filed confidentially because it responds to a filing of the same classification. The Defence will file a public redacted version in due course.

III. Submissions

4. Pursuant to Regulation 24(5) of the Regulations of the Court, the Defence for Mr. Al Hassan respectfully seeks leave to reply to the Prosecution Response in relation to (i) the Prosecution’s citation of new cases to limit the scope of the voluntariness inquiry; (ii) the

¹ [ICC-01/12-01/18-2089-Conf.](#)

² [ICC-01/12-01/18-1995-Conf-Red.](#)

³ [ICC-01/12-01/18-2095-Conf.](#)

⁴ [ICC-01/12-01/18-2014-Conf-Red.](#)

⁵ [ICC-01/12-01/18-2105-Conf.](#)

Prosecution's misapprehension that P-0605's [REDACTED]; (iii) the Prosecution's argument that there was "no evidence" that P-0605 was aware of [REDACTED]; and (iv) the tension between the Prosecution's position that the witnesses had no inducement to meet with OTP, and the Prosecution's acknowledgement that [REDACTED] resulted from their OTP interviews.

5. These issues all arise directly and solely from the Prosecution Response, and could not have been anticipated by the Defence at the time of submitting its Request.

(i) The Prosecution's citation of new cases to limit the scope of the voluntariness inquiry

6. In explaining the applicable standard for determining voluntariness, the Prosecution cited the 2 September 1997 decision by Chambers at the International Criminal Tribunal for the former Yugoslavia in *Delalić*, as well as the 12 December 2016 decision by Trial Chamber I for the Special Tribunal on Lebanon.⁶ The two decisions were cited as providing "useful guidance"⁷ for the Trial Chamber's "fact specific determination, considering the interviews as a whole."⁸ Yet the Prosecution chose to highlight only the factors in those decisions that favor its position here, rather than conducting full analyses of the cases. The Prosecution's framing effectively limits the Trial Chamber's inquiry to an exhaustive list of factors, including "be[ing] forced to attend the interview," whether the witnesses' statements were "internally consistent [and] comprehensive," whether "counsel for the interviewee was present," and whether there was "coercion, force or fraud, or oppressive conduct which [...] has sapped the free will of the suspect [...]"⁹ The *Delalić* decision, which did not contend with [REDACTED] among its facts, specifically stated that the factors to be considered in a voluntariness inquiry "cannot be exhausted,"¹⁰ and offered examples of additional conditions that would bear on the voluntariness analysis of P-0605 and P-0582's interviews.¹¹ Similarly, the STL decision, which recognizes that there is "obvious trauma"¹² to a witness [REDACTED], relied on a representation by Prosecution investigators that they "would not have proceeded" if they had suspected abuse of the witness in the initial

⁶ Response, [ICC-01/12-01/18-2105-Conf](#), para. 6, citing [2 September 1997 Delalić Decision](#) and [12 December 2016 STL Decision](#).

⁷ Response, [ICC-01/12-01/18-2105-Conf](#), para. 6.

⁸ Response, [ICC-01/12-01/18-2105-Conf](#), para. 5.

⁹ Response, [ICC-01/12-01/18-2105-Conf](#), para. 6.

¹⁰ [2 September 1997 Delalić Decision](#), para. 66.

¹¹ [2 September 1997 Delalić Decision](#), para. 67.

¹² [REDACTED].

interviews. The Defence should have the opportunity to provide detailed analyses of these cases for the Trial Chamber, including additional legal reasoning from the chambers that was excluded from the Prosecution's Response.

(ii) The Prosecution's denial that P-0605's [REDACTED]

7. The Prosecution acknowledges that P-0605 was [REDACTED] interviewed [REDACTED] in May 2018.¹³ [REDACTED]. [REDACTED]¹⁴ and [REDACTED]. It is therefore astonishing that the Office of the Prosecutor at the International Criminal Court would argue that P-0605 was not subjected [REDACTED]. Seminal caselaw [REDACTED]¹⁵ and [REDACTED]¹⁶ finds [REDACTED], respectively. Both courts have found [REDACTED].¹⁷ Moreover, human rights bodies such as the United Nations Human Rights Committee have found [REDACTED].¹⁸ P-0605's [REDACTED]. The Defence has good cause to present fulsome legal support to rebut this unexpected argument from the Prosecution.

(iii) The Prosecution's argument that there was "no evidence" that P-0605 was aware of [REDACTED]

8. The Prosecution acknowledges that [REDACTED], as reflected in his [REDACTED].¹⁹ The Prosecution also acknowledges that [REDACTED]²⁰ - in short, [REDACTED]. The plain evidence that P-0605 was aware of [REDACTED]. It is so unlikely as to be preposterous that P-0605 would not be sensible of [REDACTED], and unforeseeable that the Prosecution would advance such an argument. Moreover, on 7 February 2022, after the filing of the Response, the Prosecution produced an updated version²¹ of P-0605's investigation note [REDACTED]²², containing new details regarding P-0605's fear [REDACTED]. Notably, this note includes a statement by P-0605: [REDACTED].²³

¹³ Response, [ICC-01/12-01/18-2105-Conf](#), para. 12.

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ Response, [ICC-01/12-01/18-2105-Conf](#), para. 20.

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

9. The Defence is justified in seeking to provide the Trial Chamber with additional facts regarding the widespread knowledge that [REDACTED] in Mali; expanding on the statistics briefly set forth by the Defence in its Response regarding P-0605, on the [REDACTED];²⁴ and supplementing the record with previously undisclosed information regarding P-0605 [REDACTED] during OTP interviews.

(iv) Contradictions in the Prosecution’s position regarding the impact of interventions [REDACTED] on inducement to testify

10. The Prosecution maintains its position that they took no actions that could be characterized as inducements to the witnesses. However, they acknowledge that [REDACTED].²⁵ Very shortly thereafter, [REDACTED].²⁶ They acknowledge agreeing [REDACTED]²⁷ They also acknowledge “promptly” taking steps to [REDACTED].²⁸ In dismissing any effects of these actions, the Prosecution argues that “adopting measures required by the applicable law of the ICC cannot be considered ‘improper inducement’.”²⁹ The critical analysis lies not in whether these enumerated actions by OTP were improper, but what the impact was of those episodic actions on witnesses [REDACTED]. The Prosecution’s informing of the witnesses that [REDACTED], was negated by the witnesses’ observations – or even perception [REDACTED]. The Defence must be allowed to respond to the Prosecution’s novel argument, which ignores how the *witnesses* would have understood the capacity of the OTP to [REDACTED], and whether that psychological effect impacted the voluntariness of their statements.

IV. Conclusion

11. At the time of filing the Responses regarding P-0605 and P-0582, the Defence could not have reasonably anticipated the new information and erroneous arguments set forth by the Prosecution in their Response. On the basis of the good cause established *supra*, the Defence respectfully requests the Trial Chamber **GRANT LEAVE TO REPLY** on the following issues: (i) the appropriate scope of the voluntariness inquiry for P-0605 and P-0582; (ii) the proper categorization of P-0605’s [REDACTED]; (iii) the clear coercive

²⁴ Response Regarding P-0605, [ICC-01/12-01/18-2089-Conf](#), fn. 30.

²⁵ Response, [ICC-01/12-01/18-2105-Conf](#), para. 31.

²⁶ [REDACTED].

²⁷ Response, [ICC-01/12-01/18-2105-Conf](#), para. 26.

²⁸ Response, [ICC-01/12-01/18-2105-Conf](#), para. 27.

²⁹ Response, [ICC-01/12-01/18-2105-Conf](#), para. 28.

effects on P-0605 of [REDACTED]; and (iv) the coercive impact on witnesses of the OTP interviews conducted [REDACTED].



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Dated this 11th Day of February 2022
At The Hague, The Netherlands