

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **24 August 2022**

Date of submission:

4 October 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 'Prosecution response to "Defence application to exclude the evidence of or recall Witness MLI-OTP-P-0547" (ICC-01/12-01/18-2295-Conf)', 24 August 2022, ICC-01/12-01/18-2301-Conf

Source: Office of the Prosecutor

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

Court to:

The Office of the Prosecutor

Mr Karim A. A. Khan QC
Mr Mame Mandiaye Niang
Mr Gilles Dutertre

Counsel for the Defence

Ms Melinda Taylor
Ms Felicity Gerry QC

Legal Representatives of the Victims

Mr Seydou Doumbia
Mr Mayombo Kassongo
Mr Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section Other

I. Introduction

1. Trial Chamber X (“Chamber”) should dismiss the Defence application to exclude the evidence of or recall Witness MLI-OTP-P-0547.¹
2. There is no good cause to recall Witness P-0547. There has been no violation of the Accused’s right to a fair trial nor his right to examine the witness’ against him, as alleged by the Defence.² Contrary to the Defence allegations,³ information related to P-0547 and ██████████ was disclosed to the Defence sufficiently in advance of her cross-examination. Thus, the Defence had the opportunity to investigate and properly cross-examine the Witness, including to explore any linkage between the two persons, and P-0547’s interactions with NGOs or other victims. Furthermore, the Defence still has the possibility during its ongoing presentation of evidence to challenge her evidence, and address any issue regarding her identity or allegations concerning contamination.
3. In any event, given Witness P-0547’s clear and categorical answer that ██████████ ██████████ is not her name,⁴ recalling her is unlikely to help the Defence achieve its stated goal of exploring “the linkage between her identity and that of one ██████████ ██████████, and the consequences of that linkage”.⁵ Instead, there is a real risk of re-traumatising P-0547, who is a vulnerable witness.⁶ All for no valid justification.
4. There is also no basis to exclude P-0547’s evidence under article 69(7) of the Statute. The Defence has failed to demonstrate that P-0547’s evidence, provided before the Chamber under oath, was obtained “by means of” any violation of the Statute or internationally recognised human rights, as required by article 69(7) of the Statute.

¹ ICC-01/12-01/18-2295-Conf (“Defence Application”).

² *See e.g.* Defence Application, para. 6, 10.

³ *See e.g.* Defence Application, para. 4.

⁴ ██████████

⁵ Defence Application, para. 10.

⁶ ██████████
██████████
██████████
██████████

In any case the alleged violation would not have any impact on the reliability of her evidence, or the integrity of the proceedings.

II. Confidentiality

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“Regulations”), this response is filed confidentially because the Defence Application was filed with this classification. A public redacted version will be filed in due course.

III. Applicable law

Standard for recalling a witness

6. In line with the standard adopted by the *ad hoc* tribunals, the Trial Chambers in *Ntaganda* and *Bemba* have held that “in determining whether there are sufficient grounds to recall a witness, the Chamber shall consider whether *good cause* to recall the witness has been demonstrated”.⁷ Judicial economy demands that recall should only be granted in “the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature” (emphasis added).⁸

Standard for exclusion of evidence

7. According to the standard for exclusion of evidence under article 69(7) of the Statute, which has been clearly established by this Chamber,⁹ the chapeau of article 69(7) of the Statute requires “not only a breach of the Statute or internationally recognised human rights but also, and importantly, a causal link between the violation and the gathering of the evidence.”¹⁰ The second step is to consider whether: (i) the “violation casts substantial doubt on the reliability of the evidence” under article 69(7)(a) of the Statute; or the “admission of the evidence would be

⁷ ICC-01/04-02/06-1791-Red, para. 10; ICC-01/05-01/08-3186-Red, para. 18; ICC-01/05-01/08-3154-Red2, para. 27; ICC-01/05-01/08-2924-Red, para. 35.

⁸ ICC-01/04-02/06-1791-Red, para. 10; ICC-01/05-01/08-3186-Red, para. 18; ICC-01/05-01/08-3154-Red2, para. 27; ICC-01/05-01/08-2924-Red, para. 35.

⁹ ICC-01/12-01/18-1475-Conf, para. 30-37. *See also* ICC-01/12-01/18-2114-Conf, para. 16.

¹⁰ ICC-01/12-01/18-1475-Conf, para. 33.

antithetical to and would seriously damage the integrity of the proceedings” under article 69(7)(b) of the Statute.¹¹ The 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.”¹²

IV. Submissions

A. There is no good cause to recall Witness P-0547

i. The Defence had the relevant information and full opportunity to investigate and properly cross-examine P-0547

8. According to the Defence, the purpose for recalling P-0547 is to “explore the linkage between her identity and that of one [REDACTED], and the consequences of that linkage”.¹³ However, the Defence already had the opportunity to explore this and other relevant issues during its cross-examination of Witness P-0547. It would therefore be improper now to recall the Witness so that the Defence can question her anew on matters that were already broached or that should have been broached by the Defence the first time around. It had ample time to prepare for the cross-examination of this witness and to identify the topics that would be broached and the manner in which this would be done. The Defence must now live with its strategic decisions/choices.

9. The Defence had sufficient information and was alerted to the issue of the possible conflation/difference of identities between [REDACTED] and P-0547, prior to the start of P-0547’s testimony on 26 October 2021:¹⁴

¹¹ ICC-01/12-01/18-1475-Conf, para. 31.

¹² ICC-01/12-01/18-1475-Conf, para. 34.

¹³ Defence Application, para. 10.

¹⁴ See also ICC-01/12-01/18-1958-Conf, para. 10.

- In May 2015, the Prosecution collected [REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED], containing a summary of the accounts provided to [REDACTED] by dozens of victims, including a victim [REDACTED].¹⁵ [REDACTED] was disclosed to the Defence without redactions in July 2018;
- In August 2016, the Prosecution collected the *procès-verbal d'audition de partie civile* taken by a Malian investigating judge ("*procès-verbal*"), according to which a victim [REDACTED] was interviewed on [REDACTED]
[REDACTED]. This *procès-verbal* refers [REDACTED] [REDACTED] which is P-0547's name, indicating that [REDACTED] was the person interviewed that day.¹⁶ It was disclosed in October 2018 without redactions to P-0547's name;
- Having identified several victims described in [REDACTED] including [REDACTED], as potential witnesses, the Prosecution sought from [REDACTED] information available in the [REDACTED] records about them in August and September 2016;¹⁷
- In September 2016, [REDACTED] provided personal background information regarding a victim whom she described as "the daughter of [REDACTED]
[REDACTED]".¹⁸ In accordance with the prior discussions with [REDACTED],¹⁹ the Prosecution then sought [REDACTED]'s assistance in contacting this victim and received P-0547's name from [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED] However, the Prosecution observes that these are not the names of the parents provided by P-0547 at the time of her interview with the Prosecution, but instead the names of the parents of the individual [REDACTED].

19 [REDACTED]

██████████ once the plan materialised.²⁰ These facts were communicated to the Defence in investigation notes, MLI-OTP-0078-1405, MLI-OTP-0078-1923, MLI-OTP-0080-3524, disclosed in March, May 2020 and July 2021, respectively;

- In January 2017, the Prosecution interviewed P-0547, and her statement was disclosed in September 2018, without redactions to her name, that is ██████████.²¹
- In May and July 2019, the Prosecution interviewed ██████████
██████████
██████████²² ██████████
described the accounts of ██████████,
whom she claimed to have met ██████████
██████████
██████████.²³
- Shortly after, in August 2019, the Prosecution received from ██████████
██████████ ██████████ ██████████, which appears
to summarise information provided by a victim named ██████████
during an interview conducted by ██████████.²⁴
- The Prosecution identified a number of differences between the information related to ██████████, in ██████████ and ██████████ statement, on the one hand, and the accounts of P-0547 in her statement and her Malian *procès-verbal*, on the other hand. These differences relate not only to personal details

20 ██████████
21 ██████████
22 ██████████
23 ██████████
24 ██████████

such as their names, the identification documents,²⁵ the names of their parents,²⁶ and the date/year of birth²⁷ but also the accounts relating to their victimisation, such as the timing of the incident,²⁸ the perpetrators,²⁹ and the person who intervened to secure their release;³⁰

- In light of these differences, from the moment the Prosecution first disclosed [REDACTED] statement³¹ and [REDACTED] [REDACTED]³² in February and March 2020, respectively, it applied redactions to the identifying information of [REDACTED] and [REDACTED] under a different pseudonym, [REDACTED], signalling its belief that the victim described in these documents was different from P-0547. The reference to [REDACTED] [REDACTED] in paragraph 118 of [REDACTED] statement nevertheless remained unredacted,³³
- On 30 June 2021, having realised the inadvertent disclosure in paragraph 118, the Prosecution lifted redactions to other passages containing

²⁵ P-0547's identification document recorded on her statement [REDACTED] is [REDACTED] while [REDACTED] s identification document recorded [REDACTED] is [REDACTED]

²⁶ The names of parents recorded in P-0547's statement [REDACTED] are [REDACTED] and [REDACTED] and those recorded in the *procès-verbal* [REDACTED] are [REDACTED] and [REDACTED]. In contrast, the names of parents recorded in [REDACTED] are: [REDACTED] and [REDACTED].

²⁷ P-0547's date of birth recorded in her statement [REDACTED] and the *procès-verbal* (MLI-OTP-0037-1576-R03, p. 1576) is [REDACTED] while the date of birth recorded in [REDACTED] is [REDACTED].

²⁸ P-0547 stated in her statement [REDACTED] that she was arrested during or around Ramadan while [REDACTED] indicates that her arrest occurred on the day when women organised a protest against the imprisonment of women.

²⁹ P-0547 indicated in her statement [REDACTED] that she could only see the eyes of the man who raped her while [REDACTED] identified the man who raped her as "Boubacar", nicknamed "Ferraouna", or "pharaon". See also [REDACTED] statement, [REDACTED] para. 115, stating that : "[REDACTED] a dit qu'elle savait qu'il s'appelait Boubacar et était surnommé Firaouna".

³⁰ P-0547 indicated in her statement [REDACTED] and the *procès-verbal* [REDACTED] that the "chef de quartier" intervened with other notables to secure her release while [REDACTED] [REDACTED] indicated that "Oummar ould Hamma" called to secure her release. See also [REDACTED] statement, [REDACTED], para. 116, stating that: "[REDACTED] a été libérée après que son mari ait fait intervenir [REDACTED] lequel a appelé [REDACTED] le djihadiste Oumar Ould HAMHA".

³¹ The first redacted version, [REDACTED] was disclosed on 17 February 2020.

³² The first redacted version, [REDACTED] was disclosed on 10 March 2020.

³³ [REDACTED].

identifying information of [REDACTED] in [REDACTED] statement;³⁴ and

- On 29 September 2021, in view of the upcoming testimony of P-0547, the Prosecution also disclosed a lesser redaction version of [REDACTED], from which the redactions to her identifying information, including her name, date of birth, number of ID card, family situation, and place of residence, were lifted.³⁵ In the disclosure list, it was clarified that these redactions were lifted because “it could potentially be relevant to P-0547”.³⁶

10. Overall, the Defence was alerted sufficiently in advance of P-0547’s testimony that P-0547 and [REDACTED] could be two different persons.

11. On 26 October 2021, after the conclusion of the first day of P-0547’s testimony and the receipt of the list of material for the Defence, which included [REDACTED]³⁷ the Prosecution communicated to the Defence *via* email the names of [REDACTED]’s parents recorded in [REDACTED], and the names of P-0547’s parents recorded in her statement and the Malian *procès-verbal* in order to provide additional details that distinguished the two individuals.³⁸

12. During the examination-in-chief, on 26 and 27 October 2021, P-0547 gave additional details that differentiated her account from the one of [REDACTED]. P-0547 stated that the community leaders from the neighbourhood had come to beg for her release and [REDACTED].³⁹ According to [REDACTED], [REDACTED] was released through the intervention of Oumar Ould Hamaha because [REDACTED].

³⁴ [REDACTED] disclosed in Trial INCRIM package 135 on 30 June 2021.

³⁵ [REDACTED] disclosed in Trial INCRIM package 149 on 29 September 2021.

³⁶ ICC-01/12-01/18-1976-Conf-AnxA, p. 2.

³⁷ Email from the Defence on 26 October 2021 at 15:27.

³⁸ Email from the Prosecution to the Defence on 26 October 2021 at 23:09. Further lesser redacted versions of these documents were officially disclosed in Trial INCRIM package 153 on 27 October 2021. *See* Email from the Prosecution to the Defence on 27 October 2021 at 10:49.

³⁹ ICC-01/12-01/18-T-152-CONF-ENG CT, p. 15, l. 15-23, [REDACTED].

15. The Defence also questioned Witness P-0547 regarding her knowledge of WILDAF members, including [REDACTED] and [REDACTED],⁴⁶ whether she had spoken to other people before going to Bamako,⁴⁷ whether she heard about other people's experiences at "sensibilisation meetings" she attended after the departure of the armed groups;⁴⁸ and whether she received any assistance from organisers of these meetings.⁴⁹
16. In all, the Defence had ample opportunity and time to question the Witness on whether [REDACTED] was indeed P-0547 or if her accounts may have been influenced by others, for example, by asking if she had met any of [REDACTED] including [REDACTED] or [REDACTED],⁵⁰ or asking more questions about any contact she may have had with other victims or potential victims, as it now proposes to do.⁵¹ However, it chose not to do so during its cross-examination of P-0547. Nor did the Defence ask for additional time to prepare before starting its cross-examination on 27 October 2021,⁵² after receiving the names of P-0547's parents and those of [REDACTED]'s parents the day before.
17. In any event, given the clear and categorical answers already provided by P-0547 during her testimony, recalling her is unlikely to serve the Defence's stated purpose of exploring "the linkage between her identity and that of one [REDACTED], and the consequences of that linkage".⁵³

⁴⁶ ICC-01/12-01/18-T-153-CONF-ENG CT2, p. 27, l. 25 - p. 28, l. 12.

⁴⁷ ICC-01/12-01/18-T-153-CONF-ENG CT2, p. 31, l. 11-16.

⁴⁸ ICC-01/12-01/18-T-153-CONF-ENG CT2, p. 14, l. 25 - p. 16, l. 20.

⁴⁹ ICC-01/12-01/18-T-153-CONF-ENG CT2, p. 16, l. 21 - p. 20, l. 13.

⁵⁰ Contrary to the Defence allegation in para. 39 of the Defence Application, the Prosecution confirmed that [REDACTED] by lifting redactions to his names in [REDACTED] statement, [REDACTED] disclosed in Trial INCRIM package 163 on 21 December 2021. *See* ICC-01/12-01/18-2179-Conf-AnxA, p. 2.

⁵¹ Defence Application, para. 59.

⁵² The Defence cross-examination started on 27 October 2021 at 12:42. *See* ICC-01/12-01/18-T-152-CONF-ENG CT, p. 36, l. 2.

⁵³ Defence Application, para. 10.

ii. There is no prejudice to the Defence or violation of its rights

18. Contrary to the Defence allegations,⁵⁴ there is no prejudice to, or violation of, the Accused's right to a fair trial.
19. The Prosecution never stated that P-0547 and [REDACTED] were the same person. Quite the contrary, the Prosecution used a different pseudonym for [REDACTED], and as detailed above, the Defence had relevant information and full opportunity to investigate and properly cross-examine P-0547, including on the issue of the possible conflation/difference of identities, at the time of her testimony.
20. As acknowledged by the Defence,⁵⁵ there is a lack of clarity as to the identity of [REDACTED].
21. Further, as discussed in detail in the Prosecution response to the Defence request for leave to appeal the Third Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court, dated 19 November 2021,⁵⁶ there is likely to be a confusion or good faith mistake on the part of [REDACTED] in relation to the identities of [REDACTED], [REDACTED] and P-0547.
22. In any event, the Defence is still in a position to challenge P-0547's testimony and address issues regarding her identity or potential contamination during its ongoing presentation of evidence, including by calling its own witness or tendering documentary evidence.⁵⁷ In fact, D-0514, whom the Defence is calling to testify in

⁵⁴ See e.g., Defence Application, para. 48-54.

⁵⁵ Defence Application, para. 36.

⁵⁶ See also ICC-01/12-01/18-1958-Conf, para. 14.

⁵⁷ See e.g. ICC-01/04-02/06-1791-Red, para. 12, in which Trial Chamber VI dismissed the Defence request to recall a Prosecution witness on the grounds, *inter alia*, that the Defence is still in a position to challenge the witness' testimony and address relevant issues during its presentation of evidence.

September 2022, claims [REDACTED]

[REDACTED].⁵⁸

23. The Defence suggests that additional cross-examination of P-0547 on “her role in gathering evidence and training witnesses, her interactions with [REDACTED] and her role in coordinating other victims”, may impact on the Chamber’s assessment of other witness evidence.⁵⁹ This argument is entirely speculative. There is no indication in P-0547’s testimony that she had any role in gathering evidence or training witnesses.
24. The Prosecution also recalls that P-0547 is a vulnerable witness, who was granted special measures under rule 88 of the Rules.⁶⁰ She testified that when she thinks of what happened, she gets headaches,⁶¹ and complained of headaches during the last day of her testimony.⁶² Recalling P-0547 might expose her to an undue risk of re-traumatisation.
25. For the reasons above, there is no good cause for recalling P-0547. Nor are there any compelling circumstances where the evidence of significant probative value and not of a cumulative nature may be obtained through her recall.

B. There is no basis to exclude P-0547’s evidence

26. The Defence’s submissions regarding the exclusion of P-0547’s evidence are short and unsubstantiated.⁶³ The request fails to meet the strict conditions under article 69(7) of the Statute.

⁵⁸ [REDACTED].

⁵⁹ See e.g. Defence Application, para. 6, 63.

⁶⁰ [REDACTED]

⁶¹ ICC-01/12-01/18-T-152-CONF-ENG CT, p. 30, l. 12-17.

⁶² ICC-01/12-01/18-T-153-CONF-ENG CT, p. 3, l. 4-6.

⁶³ Defence Application, para. 51-54.

27. Firstly, as discussed above, there has been no violation of the Accused's right to a fair trial or the right to examine the witness against him, as alleged by the Defence.⁶⁴
28. Secondly, the Defence fails to establish any causal link between the alleged violation and P-0547's evidence, which was provided under oath before the Chamber, and tested by the Parties.
29. Finally, even assuming *arguendo* that there was a causal link between the alleged violation and the gathering of the evidence, it has no impact on the reliability of P-0547's evidence. As discussed above, the Defence had the opportunity to cross-examine P-0547, including to explore "the possibility of false testimony and/or collusion between victims".⁶⁵ It also retains the possibility to challenge P-0547's evidence (or that of other witnesses) during its presentation of evidence. The admission of P-0547 would not cause any serious damage to the integrity of the proceedings.

IV. Conclusion

30. For the reasons set out above, the Defence Application should be dismissed.



Karim A. A. Khan QC, Prosecutor

Dated this 24th of August 2022

At The Hague, The Netherlands

⁶⁴ See e.g. Defence Application, para. 6, 10.

⁶⁵ Defence Application, para. 10.