



Original: English

No. ICC-01/12-01/18

Date: 17 March 2022

Date of original: 2 March 2022

TRIAL CHAMBER X

Before:

Judge Antoine Kesia-Mbe Mindua, Presiding Judge

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 redacted version of

**Decision on Defence requests for leave to appeal the Decision on the introduction
into evidence of the prior recorded testimony of P-0605 and P-0582
pursuant to Rule 68(2)(c) of the Rules**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Karim A. A. Khan
Nazhat Shameem Khan
Mame Mandiaye Niang

Counsel for the Defence

Melinda Taylor

Legal Representatives of Victims

Seydou Doumbia
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

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

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following decision.

I. Procedural history and submissions

1. On 14 February 2022, the Chamber issued the ‘Decision on the introduction into evidence of the prior recorded testimony of P-0605 and P-0582 pursuant to Rule 68(2)(c) of the Rules’ in which it authorised the introduction into evidence of the prior recorded testimony of P-0605 and P-0582 and related material pursuant to Rule 68(2)(c) of the Rules (the ‘Impugned Decision’).¹ The Chamber also notably dismissed in this decision Defence requests for exclusion of P-0605’s and P-0582’s evidence pursuant to Article 69(7) of the Statute.²
2. On 21 February 2022, the Defence filed a request for leave to appeal the Impugned Decision on the following three issues (the ‘Defence Request’):³
 - ‘whether the Chamber erred by misinterpreting the nexus requirement of Article 69(7) in relation to the information collected by P-0605 [REDACTED]’ (‘First Issue’);
 - ‘whether the Chamber erred by placing the burden of establishing the torture nexus on the Defence in circumstances where the Defence has been afforded no opportunity to question or elicit evidence from P-0605 and P-0582 or the Prosecution investigators concerning the circumstances of the interviews’ (‘Second Issue’); and
 - ‘whether the Chamber failed to properly assess and weigh the impact on Mr Al Hassan’s fair trial rights of submitting incriminating evidence from P-0582 in written form, in circumstances where the Defence has not been able to cross examine [REDACTED]’ (‘Third Issue’).

¹ ICC-01/12-01/18-2114-Conf.

² Impugned Decision, ICC-01/12-01/18-2114-Conf., paras 13-22.

³ Defence request for leave to appeal ‘Decision on the introduction into evidence of the prior recorded testimony of P-0605 and P-0582 pursuant to Rule 68(2)(c) of the Rules’, ICC-01/12-01/18-2126-Conf.

3. On 25 February 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its response, opposing the Defence Request (the ‘Prosecution Response’).⁴ The Prosecution submits that none of the three issues are appealable issues arising from the Impugned Decision within the meaning of Article 82(1)(d) of the Statute.⁵ The Prosecution further submits that, in any event, the issues fail to meet the remaining criteria under Article 82(1)(d) of the Statute.⁶

II. Analysis

4. The Chamber incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Statute as set out in previous decisions.⁷ In particular, the Chamber recalls that as regards the possibility to grant leave to appeal pursuant to Article 82(1)(d) of the Statute, the following criteria shall be fulfilled: (a) the matter must be an ‘appealable issue’; (b) the issue at hand is one that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (c) an immediate resolution by the Appeals Chamber may materially advance the proceedings.
5. In relation to the First Issue, at the outset the Chamber recalls that it made no findings in the Impugned Decision about the circumstances of [REDACTED] and accordingly notes that part of the premise of the First Issue does not arise from the Impugned Decision.
6. The Chamber further recalls that in its initial response to the Prosecution’s P-0605 Rule 68(2)(c) application, the Defence had argued that reliance on information Mr Al Hassan conveyed to P-0605 [REDACTED] in itself fulfilled the nexus requirement of Article 69(7) of the Statute.⁸ The Chamber found in the

⁴ Prosecution response to Defence request for leave to appeal the “Decision on the introduction into evidence of the prior recorded testimony of P-0605 and P-0582 pursuant to Rule 68(2)(c) of the Rules”, ICC-01/12-01/18-2128-Conf.

⁵ Prosecution Response, ICC-01/12-01/18-2128-Conf, paras 5-14.

⁶ Prosecution Response, ICC-01/12-01/18-2128-Conf, paras 15-24.

⁷ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, ICC-01/12-01/18-734.

⁸ 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 (‘Defence P-0605 Response’), paras 3-4.

Impugned Decision that the circumstances in which P-0605 obtained the information which he subsequently shared with the ICC Prosecution went ‘beyond the scope’ of the assessment in the Impugned Decision under Article 69(7) of the Statute.⁹ Specifically, the Chamber found that ‘these circumstances relate to the source and the reliability of discrete accounts of P-0605, which are to be considered by the Chamber in its ultimate assessment of P-0605’s evidence, as opposed to its introduction’.¹⁰ The Chamber further found that to the extent that the Defence sought the exclusion of P-0605’s prior recorded testimony because of the circumstances of and lack of reliability of the information he obtained in the context of his interactions with Mr Al Hassan, this argument was ‘irrelevant to the present assessment or moot as a result of the Chamber’s findings in the Decision on Mr Al Hassan’s Statements’.¹¹ On the basis that the Defence raises the issue of whether the Chamber committed an error of law by failing to take into consideration: (i) that the ‘tainted circumstances’ under which P-0605 obtained the information from Mr Al Hassan [REDACTED]; and (ii) that the due process protections extended by the Prosecution to P-0605 ‘were not capable of attenuating or erasing the original source of taint that applied [REDACTED]’,¹² the Chamber notes that the First Issue represents no more than a mere disagreement with aforementioned findings of the Chamber. The First Issue does not therefore represent an appealable issue.

7. Turning to the Second Issue, the Chamber observes that it represents a re-litigation of previously settled matters. The Chamber has already dismissed virtually identical Defence arguments in its Decision on Defence requests for leave to appeal two decisions related to the submission into evidence of Mr Al Hassan’s statements.¹³ In addition, to the extent which the Second Issue raises the

⁹ Impugned Decision, ICC-01/12-01/18-2114-Conf, para. 22.

¹⁰ Impugned Decision, ICC-01/12-01/18-2114-Conf, para. 22.

¹¹ Impugned Decision, ICC-01/12-01/18-2114-Conf, para. 22.

¹² Defence Request, ICC-01/12-01/18-2126-Conf, para. 6 and generally paras 4-5.

¹³ See Defence Request, ICC-01/12-01/18-2126-Conf, paras 7-10; Defence request for leave to appeal ‘Decision on requests related to the submission into evidence of Mr Al Hassan’s statements’, 24 May 2021, ICC-01/12-01/18-1498-Conf (corrigendum filed on 25 May 2021, ICC-01/12-01/18-1498-Conf-Corr; public redacted version filed on 27 May, ICC-01/12-01/18-1498-Corr-Red), paras 3-9; Decision on Defence requests for leave to appeal two decisions related to the submission into evidence of Mr Al Hassan’s statements, ICC-01/12-01/18-1542, para. 14.

matter of the Defence being afforded no opportunity to question Prosecution investigators concerning the circumstances of the interviews with P-0605 and P-0582, the Chamber observes, as noted by the Prosecution,¹⁴ that this argument was not raised by the Defence in its initial responses to the Prosecution Rule 68(2)(c) applications in relation to these two witnesses.¹⁵ The Chamber considers that the Second Issue is not an appealable issue.

8. In relation to the Third Issue, the Chamber notes that the central Defence argument – whether the Chamber gave insufficient weight to the unique aspects of P-0582’s testimony and the inability of the Defence to elicit evidence through cross-examination from someone in the same unique position as him – overlooks key aspects of the Chamber’s reasoning in the Impugned Decision. The Chamber specifically recognised in the Impugned Decision the particular importance of P-0582 as a Prosecution witness, noting expressly that [REDACTED].¹⁶ The Chamber further fully assessed the potential prejudice to the accused arising from the introduction of P-0582’s evidence, notably finding that it did not consider that the accused was unfairly impacted by the introduction sought under Rule 68(2)(c) of the Rules or that the unavailability of P-0582 for cross-examination made it impossible for the Defence to investigate and address the matters raised in the evidence.¹⁷ The Chamber also recalled in the Impugned Decision that the absence of cross-examination was a factor which would be considered in the Chamber’s ultimate assessment of the probative value and weight, if any, to be attributed P-0582’s material.¹⁸ Noting that the Third Issue misconstrues and merely represents a disagreement with the Chamber’s findings, the Chamber considers that the Third Issue is not an appealable issue.

9. Given the Chamber’s conclusions above, it is not necessary to address the remainder of the cumulative criteria of Article 82(1)(d).

¹⁴ Prosecution Response, ICC-01/12-01/18-2128-Conf, para. 11.

¹⁵ Defence P-0605 Response, ICC-01/12-01/18-2089-Conf; Réponse de la Défense à ‘Confidential Redacted Version of “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” (ICC-01/12-01/18-2014-Conf-Exp)’, 28 January 2022, ICC-01/12-01/18-2095-Conf.

¹⁶ Impugned Decision, ICC-01/12-01/18-2114-Conf, para. 47.

¹⁷ Impugned Decision, ICC-01/12-01/18-2114-Conf, para. 51 and generally paras 47-52.

¹⁸ Impugned Decision, ICC-01/12-01/18-2114-Conf, para. 39.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

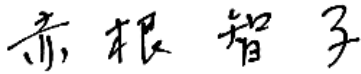
REJECTS the Defence Request.

Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua

Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated 2 March 2022

At The Hague, The Netherlands