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No. ICC-01/12-01/18

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TRIAL CHAMBER X

Before: Judge Kimberly Prost, Single Judge

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 redactions applied to medical documents related to P-0570 and
disclosure of information related to Prosecution intermediary P-0572**

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

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**Unrepresented Applicants for
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**Victims Participation and Reparations
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Other

Judge Kimberly Prost, acting as Single Judge on behalf of Trial Chamber X of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Article 54(3)(f), 64, 67(2), 68(3) of the Rome Statute (the ‘Statute’), Rules 77 and 81(2) and (4) of the Rules of Procedure and Evidence (the ‘Rules’), and pursuant to her ‘Decision on the evidence disclosure protocol and other related matters’,¹ issues the following decision.

1. On 29 April 2021, following a disagreement which could not be resolved *inter partes*, the Defence seized the Chamber via email² requesting that the Chamber order the Office of the Prosecution (the ‘Prosecution’): (i) to lift redactions applied to exhibit MLI-OTP-0078-9982 (respectively, the ‘Exhibit’ and the ‘First Request’); and (ii) to respond to questions asked by the Defence in relation to Prosecution intermediary P-0572, the individual who provided the Exhibit to the Prosecution, and to disclose P-0572’s name in the event that he or she is a person of interest in the case (the ‘Second Request’).
2. On 4 May 2021, as instructed by the Single Judge, the Prosecution filed on the record justifications for the contested redactions, together with an unredacted copy of the Exhibit, and provided its response to the Second Request.³
3. On 7 May 2021, in line with the deadline set by the Single Judge,⁴ the Legal Representatives of Victims (the ‘LRVs’)⁵ and the Defence⁶ provided their respective responses.

¹ 30 December 2019, ICC-01/12-01/18-546 (‘Decision on the Evidence Disclosure Protocol’).

² Email from the Defence to the Chamber on 29 April 2021 at 12:10 (with prior *inter partes* email exchanges contained in an attachment).

³ Prosecution’s request to retain redactions on one item related to Prosecution Witness MLI-OTP-P-0570 and to the identity of Prosecution intermediary MLI-OTP-P-0572, ICC-01/12-01/18-1462-Conf (the ‘Prosecution Submissions’) with one confidential, *ex parte*, annex (only available to the Prosecution).

⁴ Email from the Single Judge to the parties and participants dated 5 May 2021 at 14:32. On this occasion, the Single Judge also notified the Legal Representatives of Victims of abovementioned *ex parte* email rulings and email submissions.

⁵ Observations à la requête de l’Accusation sollicitant le maintien d’une expurgation relative au témoin MLI-OTP-P-0570 et de l’expurgation de l’identité de l’intermédiaire MLI-OTP-P-0572 (ICC-01/12-01/18-1462-Conf), ICC-01/12-01/18-1465-Conf.

⁶ Defence Response to ‘Prosecution’s request to retain redactions on one item related to Prosecution Witness MLI-OTP-P-0570 and to the identity of Prosecution intermediary MLI-OTP-P-0572’, ICC-01/12-01/18-1466-Conf (with two confidential annexes).

4. At the outset, the Single Judge refers to the applicable law and principles set out in her decision of 27 March 2020⁷ and recalls that factors that must be addressed when considering whether to authorise the non-disclosure of certain information pursuant to Rule 81(2) and (4) of the Rules are: (i) the existence of an ‘objectively justifiable’ risk to the safety of the person concerned (Would disclosure of the particular information *to the Defence* endanger the person’s security?); (ii) the necessity of the measure (Would non-disclosure of the information eliminate or reduce that risk? Is the measure the least intrusive possible?); and (iii) the proportionality of the measure in the light of the rights of the suspect and a fair and impartial trial. The Single Judge also considers it worth recalling, from the outset, that once materiality has been established, the burden is on the Prosecution to establish that specific restrictions on disclosure are warranted.⁸
5. The Single Judge notes that the Exhibit is a compilation of medical documents which are submitted by the Prosecution in support of its allegation that P-0570 is unavailable to testify orally for medical reasons which, in turn, supports its application for P-0570’s prior recorded testimony to be introduced into evidence pursuant to Rule 68(2)(c) of the Rules.⁹ The Single Judge therefore notes that, while these medical documents are not themselves being submitted into evidence, the Chamber’s finding on P-0570’s alleged unavailability, eventually relying upon these documents, together with related experts’ evidence,¹⁰ will determine whether or not to introduce P-0570’s evidence under Rule 68(2)(c).
6. Turning to the information sought to be disclosed, the Single Judge notes that a first series of contested redactions were applied to the Exhibit pursuant to category B.1. under the Evidence Disclosure Protocol. It is recalled that redactions under this category are authorised pursuant Rule 81(4) of the Rules

⁷ Confidential Redacted Version of Decision on the Prosecution requests concerning the variation of protective measures for screened individuals P-0105, P-0120, P-0129, P-0140 and P-0154, ICC-01/12-01/18-684-Conf-Red, paras 11-17.

⁸ Decision on the Evidence Disclosure Protocol, ICC-01/12-01/18-546, para. 16.

⁹ Prosecution application under rule 68(2)(c) to introduce into evidence the prior recorded testimony and associated material of Prosecution Witness MLI-OTP-P-0570, 1 April 2021, ICC-01/12-01/18-1408-Conf.

¹⁰ For the purpose of the present decision, the Single Judge does not find it necessary to discuss the related parties submissions further.

and cover '[r]ecent contact information of witnesses, insofar as necessary to protect the safety of the witness'.¹¹ The Single Judge observes that the bulk of the information redacted as B.1. is not strictly speaking 'contact information' of P-0570. As acknowledged by the Prosecution,¹² the information redacted includes [REDACTED]. The Single Judge further notes that, while this information is redacted from some medical documents contained in the Exhibit, it was inadvertently left unredacted from other medical documents contained therein.¹³ Effectively, this means that the Defence is already on notice of P-0570's current country of residence and, in the view of the Single Judge, this fact must be taken into consideration in its assessment of the necessity of maintaining the contested redactions.

7. The Single Judge notes that another series of contested redactions were applied to the Exhibit pursuant to category B.3. of the Evidence Disclosure Protocol. Redactions under this category are also authorised pursuant to Rule 81(4) of the Rules, but cover '[i]dentifying and contact information of "other persons at risk as a result of the activities of the Court" ("innocent third parties")', insofar as necessary to protect their safety'.¹⁴ The Single Judge observes that, as submitted by the Prosecution,¹⁵ the information redacted is indeed limited to [REDACTED] mentioned in the above paragraph.
8. In relation to these B.3. redactions, the Single Judge refers back to her directions that redactions pursuant to this category are 'only justified when they concern individuals who are of no relevance to a known issue in the case'.¹⁶ As of the moment the Prosecution provided notice that P-0570's evidence was being submitted pursuant to Rule 68(2)(c) of the Rules, it is understood that information relating to the circumstances which rendered her unavailable to testify became of relevance to the case. According, the Single Judge is of the view that redactions to [REDACTED] – to the extent that the underlying medical documents are being

¹¹ Decision on the Evidence Disclosure Protocol, ICC-01/12-01/18-546, para. 12.

¹² Prosecution Submissions, ICC-01/12-01/18-1462-Conf, para. 16.

¹³ See MLI-OTP-0078-9982, at 9990 and 9991.

¹⁴ Decision on the Evidence Disclosure Protocol, ICC-01/12-01/18-546, para. 12.

¹⁵ Prosecution Submissions, ICC-01/12-01/18-1462-Conf, para. 16.

¹⁶ Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546, para. 22.

relied upon by the Prosecution to establish that she is unavailable to testify – are no longer covered by category B.3.

9. Nonetheless, and particularly since the Prosecution submits that all remaining redactions to the Exhibit should be maintained because of existing risks existing to P-0570's – as opposed to [REDACTED]'s – safety,¹⁷ the Single Judge will assess the necessity and appropriateness of these redactions on that basis, i.e. outside the framework of the abovementioned categories.
10. Concerning P-0570's personal circumstances, the Single Judge refers back to the detailed considerations which resulted in the Chamber authorising delayed disclosure of her identity to the Defence.¹⁸ Notably, the Single Judge recalls that, in this context, the Chamber acknowledged the 'specific profile and vulnerability of this witness' as well as the then '[REDACTED]'.¹⁹ The Single Judge is of the view that these considerations remain valid for the present assessment and she is satisfied that, to protect the safety of P-0570, and in line with the standard justification for B.1. redactions, there are objective risks which justify withholding from the Defence information revealing her current contact details.
11. The Single Judge however recalls that some of the information redacted from the Exhibit reveal only the country and/or the city where P-0570 lives, but not her address as such. The Single Judge also notes that, as observed above, the Defence is already on notice of P-0570's country of residence due to inadvertent disclosure of information from the Exhibit.
12. The Single Judge further notes the Defence's submission that, with the current redactions, it is prevented from effectively challenging P-0570's alleged

¹⁷ Prosecution Submissions, ICC-01/12-01/18-1462-Conf, para. 19 ('Disclosing the information redacted under categories B.1 and B.3 in the [Exhibit] would amount to disclosing P-0570's current location and therefore it would constitute an "objectively justifiable risk" to her safety, which could not be overcome by less restrictive measures.') See also, Defence Response, ICC-01/12-01/18-1466-Conf, para. 5 ('the Prosecution has failed to establish that [REDACTED] in question are 'other persons at risk' and that B.3 redactions are necessary to protect the safety of such person').

¹⁸ Decision on the Prosecution request for delayed disclosure of the identities of Witnesses P-0538, P-0542, P-0553, P-0570, P-0574, and P-0603, 15 April 2020, ICC-01/12-01/18-741-Conf-Exp, paras 34-36; Second Decision on the Prosecution request for delayed disclosure of the identities of Witnesses P-0542, P-0570, and P-0603, 8 May 2020, ICC-01/12-01/18-794-Conf-Exp (the 'Second Delayed Disclosure Decision'), paras 20-23.

¹⁹ Second Delayed Disclosure Decision, ICC-01/12-01/18-794-Conf-Exp, para. 23

unavailability because it can neither verify nor challenge the medical documents' authenticity and reliability.²⁰

13. In light of the above, the Single Judge is of the view it has not been established that disclosure of the particular information ([REDACTED]) would endanger P-0570 and therefore finds that the redactions sought to be maintained are not justified as they would not eliminate or mitigate the existing risks to P-0570's safety. Accordingly, the First Request is partly granted. The Single Judge hereby orders the Prosecution to lift redactions previously applied to the Exhibit under B.1. and B.3. where they were applied to withhold the fact that P-0570 [REDACTED].²¹ The Single Judge specifies that redactions applied to P-0570's contact details as such, i.e. where her personal address is mentioned on the medical forms, should remain as they are not sought to be lifted and are further fully covered by the standard justification under B.1.
14. Turning to the Defence request seeking that the Prosecution be ordered to provide information related to intermediary P-0572, the Single Judge notes that the Defence seeks to confirm: (i) whether or not the name or identity of P-0572 has come up in the proceedings so far; and (ii) whether P-0572 is associated or involved with [REDACTED].
15. The Single Judge takes note of the Prosecution submission that P-0572 is an intermediary and that facilitating contacts between the witnesses and the Prosecution falls within the remit of the assigned tasks.²² The Single Judge further notes that the Prosecution submits non-disclosure of P-0572's identifying information is justified pursuant to Rule 81(2) of the Rules because 'disclosure may prejudice further or ongoing investigations'.²³ In this regard, it is noted that the Prosecution argues that 'disclosure of [intermediaries]' identity implies grave consequences to their own security but also their families and other persons in contact with the Prosecution' and that, consequently, 'disclosure is likely to have a chilling effect on the willingness of persons to offer assistance in the future,

²⁰ Defence Response, ICC-01/12-01/18-1466-Conf, paras 6, 9.

²¹ Redactions should accordingly be lifted for the Defence to receive disclosure of [REDACTED].

²² Prosecution Submissions, ICC-01/12-01/18-1462-Conf, para. 26.

²³ Prosecution Submissions, ICC-01/12-01/18-1462-Conf, para. 21.

thus impairing the [Prosecution]’s ability to conduct investigations in difficult areas.’²⁴

16. The Single Judge further agrees with the Prosecution that, contrary to the Defence’s allegation, the fact that P-0572 handed over to the Prosecution medical documents related to P-0570 does not in itself constitute a reason to disclose his or her identity. In the view of the Single Judge, such a finding would be inconsistent with the adoption of categories A.5. and A.6. as part of the Evidence Disclosure Protocol, authorising redactions to identifying information of intermediaries, as well as leads and sources, on the basis of standard justifications.
17. The Single Judge notes the Defence submission that various witnesses [REDACTED].²⁵ In this regard, the Single Judge considers that the Defence provides no evidence in support of its claim that certain organisations, associations and intermediaries may have ‘contaminated’ the evidence of victims in this case.²⁶ In the view of the Single Judge, and without more, the Defence pointing to ‘inaccuracies’ and ‘contradictions’ in the evidence of P-0570 does not suffice to show the materiality of a source or intermediary who was in contact with her.
18. In light of the above, the Single Judge finds that the *prima facie* materiality of the information sought by the Defence in relation to P-0572, including concerning P-0572’s role as a Prosecution intermediary and potential interactions with certain individuals or organisations, has not been established. Accordingly, having found that the information sought is not disclosable, the Defence’s Second request is dismissed.²⁷

²⁴ Prosecution Submissions, ICC-01/12-01/18-1462-Conf, para. 32.

²⁵ Defence Response, ICC-01/12-01/18-1466-Conf, para. 14.

²⁶ Defence Response, ICC-01/12-01/18-1466-Conf, para. 14.

²⁷ The Single Judge notes that, in the context of the prior *inter partes* exchanges (see footnote 1 above), and notably in relation to P-0572, redactions applied to documents MLI-OTP-0078-1923 and MLI-OTP-0049-0047-R03 were discussed by the parties. In light of the information sought to be disclosed, and the scope of the related redactions applied, the Single Judge specifies that review of unredacted versions of these documents was not needed in order to pronounce on the Second Request. Further, as the Defence did not seek that the Single Judge review the necessity of any further specific related redactions, and the Prosecution therefore did not put on the record its distinct justifications for it, the Single Judge does not entertain the Defence submissions in response that P-0570 is a person of relevance because of the fact

19. As regards the potential prejudice arising, the Single Judge reiterates the Prosecution's obligation to assign a unique pseudonym for any persons whose identity is redacted,²⁸ notably sources and intermediary. In the view of the Single Judge, this measure allows the Defence to trace the individual's appearance across the evidence in order to be able to assess any risk of collusion and accordingly ensures that related redactions remain proportionate.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the First Request, in parts;

ORDERS the Prosecution to lift redactions applied to the Exhibit in accordance to paragraph 13 above; and

DISMISSES the Second Request.

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



Judge Kimberly Prost, Single Judge

Dated this Wednesday, 12 May 2021

At The Hague, The Netherlands

that [REDACTED] (Defence Response, ICC-01/12-01/18-1466-Conf, para 22 relying on Decision on the Evidence Disclosure Protocol, ICC-01/12-01/18-546, para. 22 and footnote 19).

²⁸ Pre-Trial Chamber I, Décision relative au système de divulgation et à d'autres questions connexes, 16 May 2018, ICC-01/12-01/18-31, para. 30.