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**No. ICC-01/12-01/18
Date: 21 September 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 application to exclude the evidence of or recall P-0547

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

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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 Articles 64(2) and (9), 67(1)(b), (e) and (2), and 69(3), (4) and (7) of the Rome Statute (the ‘Statute’), Rules 140(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’), and Regulation 43 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on Defence application to exclude the evidence of or recall P-0547’.

I. Procedural history

1. On 6 July 2018, the Office of the Prosecutor (the ‘Prosecution’) disclosed a civil party complaint to the Defence.¹ The complaint, filed before Malian authorities in March 2015 by a coalition of NGOs,² contained a summary of the accounts of various alleged victims of the ‘occupation’ of Timbuktu, [REDACTED].³
2. On 18 September 2018, the Prosecution disclosed a witness statement to the Defence for a witness named [REDACTED] (or ‘P-0547’) who alleged that [REDACTED] during the ‘occupation’ of Timbuktu; in this disclosed statement, taken 21-22 January 2017, the witness’s name was not redacted.⁴ A lesser-redacted version of the statement, disclosed on 27 October 2021 during the course of the P-0547’s in-court testimony, lifted the redactions on the names of the witness’s parents, [REDACTED].⁵
3. On 18 October 2018, the Prosecution disclosed a *procès verbal d’audition de partie civile* (‘*procès verbal*’) to the Defence.⁶ This *procès verbal*, taken by a

¹ See Annex A to the Deuxième communication par le Bureau du Procureur d’éléments de preuve à charge divulgués à la Défense, 6 July 2018, ICC-01/12-01/18-68-Conf-AnxA, p. 26 (Pre-Confirmation INCRIM package 02); MLI-OTP-0024-2814. The complaint was disclosed without redactions.

² [REDACTED].

³ MLI-OTP-0024-2814, [REDACTED].

⁴ See Annex A to the Quinzième communication du Bureau du Procureur concernant la divulgation d’éléments de preuve à charge, 11 September 2018, ICC-01/12-01/18-120-Conf-AnxA, p. 9 (Pre-Confirmation INCRIM package 15); MLI-OTP-0039-0861-R01, p. 0861.

⁵ See Annex A to the Cent cinquante-troisième communication du Bureau du Procureur concernant la divulgation d’éléments de preuve à charge, 8 November 2021, ICC-01/12-01/18-1902-Conf-AnxA, p. 2 (Trial INCRIM package 153); MLI-OTP-0039-0861-R03, p. 0861.

⁶ See Annex A to the Dix-septième communication du Bureau du Procureur concernant la divulgation d’éléments de preuve à charge, 19 October 2018, ICC-01/12-01/18-158-Conf-AnxA, p. 9 (Pre-Confirmation INCRIM package 17); MLI-OTP-0037-1576-R01.

Malian investigating judge subsequent to the above-mentioned complaint, refers to [REDACTED] and mentions [REDACTED].⁷ On 10 March 2020, the Prosecution disclosed a lesser-redacted version of the document, notably disclosing additional information pertaining to the alleged victim's domicile and her husband's name.⁸ The Prosecution subsequently disclosed another lesser-redacted version of the document on 27 October 2021 during the course of P-0547's testimony, lifting redactions previously applied to the names of [REDACTED] parents, recorded as [REDACTED].⁹

4. On 17 February 2020, the Prosecution disclosed [REDACTED] witness statement to the Defence.¹⁰ In the statement, taken in May and July 2019, [REDACTED] discussed the accounts of various victims, including that of an alleged victim named '[REDACTED]'; the Prosecution redacted various information in this document but this information regarding the name of the victim was not redacted.¹¹ A lesser-redacted version, disclosed to the Defence on 30 June 2021, largely lifted the redactions related to this alleged victim account, including frequent references to [REDACTED].¹² Another lesser-redacted version, disclosed to the Defence on 26 October 2021 during the course of the P-0547's testimony, lifted other redactions.¹³
5. On 10 March 2020, the Prosecution disclosed a document to the Defence titled *Grille de recueil de témoignages de victime/ témoins* (the 'Grille'); the document, received from [REDACTED] summarises an alleged victim's account of her [REDACTED] during the 'occupation' in Timbuktu.¹⁴ A lesser-redacted version

⁷ MLI-OTP-0037-1576-R01, pp. 1576-1578.

⁸ See Annex A to the Cinquante-neuvième communication du Bureau du Procureur concernant la divulgation d'éléments de preuve à charge, 12 March 2020, ICC-01/12-01/18-655-Conf-AnxA, p. 3 (Pre-Trial INCRIM package 59); MLI-OTP-0037-1576-R02, pp. 1576-1578.

⁹ See Annex A to the Cent cinquante-troisième communication du Bureau du Procureur concernant la divulgation d'éléments de preuve à charge, 8 November 2020, ICC-01/12-01/18-1902-Conf-AnxA, p. 2 (Pre-Trial INCRIM package 153); MLI-OTP-0037-1576-R03, pp. 1576 and 1578.

¹⁰ [REDACTED].

¹¹ [REDACTED]. Many of the details provided [REDACTED] statement are similar to P-0547's account in her witness statement and in the Bamako statement, while some details are divergent.

¹² [REDACTED].

¹³ [REDACTED]. See also [REDACTED] for the most recent lesser-redacted version of this document.

¹⁴ See Annex A to the Cinquante-neuvième communication du Bureau du Procureur concernant la divulgation d'éléments de preuve à charge, 12 March 2020, ICC-01/12-01/18-655-Conf-AnxA, p. 8 (Pre-Trial INCRIM package 59); MLI-OTP-0071-0534-R01.

of the document, disclosed on 29 September 2021, lifted redactions to the name of the victim [REDACTED].¹⁵ Another lesser-redacted version of the document, disclosed on 27 October 2021 during the course of P-0547's testimony, lifted redactions to the name of the victim's parents, [REDACTED].¹⁶

6. On 4 May 2020, the Prosecution disclosed an investigative note to the Defence; in this note, the Prosecution states that in 2016 it had sought information from [REDACTED] in relation to [REDACTED].¹⁷ The Prosecution further disclosed another investigative note to the Defence on 10 May 2020, which stated that in September 2016 the Prosecution obtained information from [REDACTED] that P-0547 is the daughter of [REDACTED].¹⁸
7. P-0547 testified before the Chamber from 26-28 October 2021.¹⁹ In the course of her testimony, the witness was questioned about, *inter alia*, her identity,²⁰ her domicile,²¹ her family relationships,²² details of her [REDACTED],²³ the conditions of her release,²⁴ her interactions with certain NGOs and with the Malian investigating judge, including in relation to her exposure to other alleged victims' account of their experience in Timbuktu during the armed groups' control of the city.²⁵

¹⁵ See Annex A to the Cent quarante-neuvième communication du Bureau du Procureur concernant la divulgation d'éléments de preuve à charge, 23 November 2021, ICC-01/12-01/18-1976-Conf-AnxA, p. 2 (Trial INCRIM package 149); MLI-OTP-0071-0534-R02.

¹⁶ See Annex A to the Cent cinquante-troisième communication du Bureau du Procureur concernant la divulgation d'éléments de preuve à charge, 8 November 2021, ICC-01/12-01/18-1902-Conf-AnxA, p. 2 (Trial INCRIM package 153); MLI-OTP-0071-0534-R03.

¹⁷ See Annex A to the Soixante-treizième communication du Bureau du Procureur concernant la divulgation d'éléments de preuve à charge, 8 May 2020, ICC-01/12-01/18-793-Conf-AnxA, p. 8 (Pre-Trial INCRIM package 73); MLI-OTP-0078-1405. The Chamber notes that [REDACTED].

¹⁸ See Annex A to the Soixante-quinzième communication du Bureau du Procureur concernant la divulgation d'éléments de preuve à charge, 13 May 2020, ICC-01/12-01/18-808-Conf-AnxA, p. 7 (Pre-Trial INCRIM package 75); MLI-OTP-0078-1923-R01, p. 1924, para. 10.

¹⁹ See Transcript of hearing, 26 October 2021, ICC-01/12-01/18-T-151-ENG ('T-151'); Transcript of hearing, 27 October 2021, ICC-01/12-01/18-T-152-ENG ('T-152'); Transcript of hearing, 28 October 2021, ICC-01/12-01/18-T-153-ENG ('T-153').

²⁰ T-151, pp. 5; T-153, pp. 35.

²¹ T-151, pp. 6.

²² T-151, pp. 6.

²³ [REDACTED].

²⁴ T-152, pp. 15-17; T-153, pp. 8-11.

²⁵ T-152, pp. 33-35; T-153, pp. 11-12, 15-20, 27-28, 30-31, 39-40.

8. As noted above, the Chamber recalls that on 26 and 27 October 2021, during the course of the witness's testimony but before the last day of the Defence questioning, the Prosecution disclosed to the Defence several lesser-redacted versions of previously disclosed documents.²⁶ These lesser-redacted versions primarily lifted redactions to the identity of parents of the alleged victim.²⁷
9. The Chamber notes the extensive discussions between the parties and with the Chamber in relation to witness's identity:

MS SUTHERLAND: Q. [12:01:43] Madam Witness, it's correct, isn't it, that you are also known by the name [REDACTED]? [...]

MS YAMAGUCHI: [12:01:56] Sorry to interrupt. Yesterday we disclosed a lesser-redacted version of the same document which contains names of her parents from which the redactions to the names of her --the parents of [REDACTED] are lifted. We suggest that the Defence uses that version instead of R02 version. [...]

MR DUTERTRE: [12:02:46] Mr President, Honourable Judges, the position of the Prosecution is that this document relates to an entirely different person than the witness. As you can see on this document[s] interior, from the date of birth, from the names of the parents, father, mother, and from the story that is written into it -- so I will advise that Defence should first explore in general questions, what are the names of her parents, date of birth and so on, so that we establish that it is or not related to her and whether she is also called by that name. Because (Interpretation) here, the cart's being put before the horse (Speaks English) and it's a fast ball, and it's not fair to the witness and it's not going to help the Chamber. [...]

MS SUTHERLAND: [12:03:46] Mr President, first of all, I don't think it's necessary to -- well, we didn't receive this disclosure until the middle of our cross-examination, which is itself inappropriate. We have a -- while it's not signed, it has been confirmed by another Prosecution witness on whom I believe they intend to rely, that this does relate exactly to her. And that is Defence tab 11. That's [REDACTED]. [...]

MR DUTERTRE: [12:04:35] Mr President, our submission is that in this document [...]

MR DUTERTRE: [12:04:49] -- that the Defence just mentioned, there might be indeed a confusion between two different persons. But the bottom line is, we should elicit from this witness when she was born, what are the names of her parents, and what is her own name, by which name she is usually known, and then we can know whether this document that the Defence wanted to use is related to

²⁶ [REDACTED]. See also [REDACTED] for the most recent lesser-redacted version of this document; Annex A to the Cent cinquante-troisième communication du Bureau du Procureur concernant la divulgation d'éléments de preuve à charge, 8 November 2021, ICC-01/12-01/18-1902-Conf-AnxA, p. 2 (Trial INCRIM package 153); MLI-OTP-0037-1576-R03, pp. 1576 and 1578; MLI-OTP-0039-0861-R03, p. 0861; MLI-OTP-0071-0534-R03.

²⁷ The Chamber notes that the names [REDACTED] appear to have first been disclosed to the Defence in these documents.

this witness and whether it is fair to put it to her as coming from her. Whether or not another witness may be confusing, but two different persons is another story.

MS SUTHERLAND: [12:05:45] Mr President, this is the -- the other witness referred to is the witness who's provided the link to these witnesses for the Prosecution. So for the Prosecution to be disavowing themselves of this and changing what essentially is their case theory as presented to us in the middle of our cross-examination has a manifest impact on our ability to prepare. And this is -- our understanding was that the Prosecution's case was that this is the same person. I've asked her directly if that is a name that she is known by. The fact that it -- it relates -- the document relates to her has been confirmed by another witness who was there and was involved. So -- and also, the divergence between names, that's something that is very common in Timbuktu. We can't rely on that. We can't rely on birth dates, any of these things. [...]

PRESIDING JUDGE MINDUA: [12:07:36] (Interpretation) Put your question, Ms Sutherland, and we'll see what happens.

MS SUTHERLAND: Q. [12:07:41] Madam Witness, are you also known by the name [REDACTED]?

A. [12:07:51] [REDACTED]? Is that my name? I would like to ask, is -- this [REDACTED] is this a name or what is it?

Q. [12:08:25] It's the name that's given on the front of this document, and another witness has confirmed that this relates to you.

A. [12:09:08] My name is [REDACTED], and my children call me [REDACTED] or [REDACTED] (phon). If not, the other name isn't my name.

Q. [12:09:28] Well, Madam Witness, this story bears a remarkable resemblance to yours, except that it says that this person was taken to the prison des femmes.

PRESIDING JUDGE MINDUA: [12:09:46] (Interpretation) Prosecutor.

MR DUTERTRE: [12:09:47] (Interpretation) Yes, Mr President, Honourable Judges. The question was put. The answer was given very clearly. The witness says, "It's not my name." In addition to which the names of her parents, mother and father on this document are different than the ones we have on the witness statement as well as the date of birth and the story. So I think there is no reason to continue on that document.

PRESIDING JUDGE MINDUA: [12:10:22] Ms Sutherland, I think the question has been answered already, and we can move on.

MS TAYLOR: [12:10:40] Mr President, I understand that you are addressing this as an issue of asked and answered or that you've received a response. But we haven't yet addressed the fact -- the very large fact that the Prosecution did not disclose key information to us in a timely manner and this has fundamentally impacted on our ability to investigate these allegations. Now, we were entitled to proceed on the basis of the linkages which my colleague, Ms Sutherland, referred to. If the Prosecution believed that there was any inaccuracies or any issues, that should have been disclosed to us in a timely manner. We have not been able to investigate because we have relied on details furnished by the Prosecution. Now, this impacts fundamentally on our ability to investigate this account. It's not just a

matter of putting a question as to whether this witness recognises this name or whether this is the same person. Because if it indeed two separate persons, then that's a complete issue that we should have been entitled to investigate. That would have impacted upon on our preparation; it would have impacted on our cross-examination. This cannot be ameliorated with just allowing us to put one question to this witness. Now, I'm raising this because I do consider this is an issue that may require us to recall this witness so that we can actually investigate how it is that there's two individuals who have furnished very similar accounts and for which there's a person who believes that they're the same person. Now, that's something we should have been entitled to investigate before this witness testified. So I am concerned that this Chamber is driving us to conclude our cross-examination when we have been deprived of a right to do so in an effective manner.

PRESIDING JUDGE MINDUA: [12:12:28] Okay. Thank you very much, Ms Taylor. Two questions. The first one is about this document. The question has been put to the witness, and the answer is no. She is not the person referred here. That is the first question. The second one is about your complaint regarding the procedure, whether you should recall this witness or not because, according to you, the disclosure has not been done properly before. For the second question, I think you can write, but now, the question -- the answer by the witness is negative and we should stop because it is time -- we have time constraints as well.

MS TAYLOR: [12:13:14] Thank you, Mr President. If I may just mention, the Prosecutor's case that these are different persons was based on indicia that was redacted. Those indicia has been lifted and the Prosecutor has advanced the case that it's because the family details are different. Now, for us to actually investigate and respond to the Prosecutor's -- the witness's claim that she's a different person, we would actually have to know every single detail about her family. We would have to know the names of her parents, the names of her siblings, the birth dates (Overlapping speakers) [...]

PRESIDING JUDGE MINDUA: [12:13:45] Ms Taylor, you want to do it now? We did it yesterday already.

MS TAYLOR: [12:13:50] We don't have, I think, a full family hierarchy of this witness. Now, basically this is highlighting why this is impacting on us. It's not a matter of simply relying on a response from the witness because obviously the Defence is entitled to challenge the correctness of that response. The Defence can't do that if it's ambushed, taken by surprise and not given the necessary ammunition to do so. So I am concerned about the assumption that this is something we can just put to the witness with one question and move on. We can't.[...]

MS TAYLOR:[12:14:31] Mr Witness -- sorry. Mr President, I'm raising it because I do believe that we would have to investigate this and we -- I'm raising it because there's a risk that we will have to recall this witness. We cannot conclude our cross-examination under the current circumstances. [...]

PRESIDING JUDGE MINDUA: [12:21:47] (Interpretation) Court is in session. The Chamber has deliberated. The decision is that for this particular document, obviously, this problem has arisen as a surprise to the Chamber as well and this witness cannot help, at least for the moment. If the Defence would like to investigate, this is not the time nor appropriate place to do so. But the Defence can take up contacts with the Office of the Prosecutor to continue with the

investigations. That's the first point. Furthermore, we're not going to go back over this issue. We will put it aside for the moment. If the Defence has other questions, we can continue for another five minutes, approximately, with a view to stopping this cross-examination because I remind everyone the witness's and -- the witness unit has said that this witness is tired and has a headache. Now, the last problem is that of the concern of Ms Taylor or of the Defence on the subject of possible continuation of cross-examination with Madam Witness, whether about recalling her or not. The Chamber is available for submissions -- written submissions from the Defence in this regard. That is the decision of the Chamber. Now, Ms Sutherland, if you have other questions, you have approximately five minutes in order to put them.²⁸

10. On 12 November 2021, the Prosecution disclosed several documents related to [REDACTED] identity to the Defence,²⁹ including a communication in which a [REDACTED] stated that [REDACTED] and [REDACTED] were the same person.³⁰
11. On 10 March 2022, the Prosecution disclosed P-0547's victim application, dated 27 January 2022, to the Defence.³¹
12. On 15 August 2022, the Defence filed an application to exclude P-0547's evidence or to, in the alternative, recall her (the 'Defence Request').³²
13. On 24 August 2022, the Prosecution filed its response to the Defence Request (the 'Prosecution Response'),³³ submitting that the Chamber dismiss the Defence Request.³⁴

²⁸ T-153, pp. 32-39 (Conf).

²⁹ See Annex A to the Cent quatre-vingt-onzième communication du Bureau du Procureur concernant la divulgation d'éléments de preuve relevant de la règle 77, 29 November 2021, ICC-01/12-01/18-2007-Conf-AnxA, p. 1 (Trial Rule 77 package 191); MLI-OTP-0077-5166 ([REDACTED]); MLI-OTP-0077-5162 ([REDACTED], noting her birth date as [REDACTED] and listing her parents as [REDACTED] and [REDACTED]; MLI-OTP-0077-5163-R01 [REDACTED] and that [REDACTED] were the same person. [REDACTED]).

³⁰ MLI-OTP-0077-5163-R01 at 5164.

³¹ See Annex A to the Deux cent neuvième communication du Bureau du Procureur concernant la divulgation d'éléments de preuve relevant de la règle 77, 5 April 2022, ICC-01/12-01/18-2193-Conf-AnxA, p. 2 (Trial Rule 77 package 209); MLI-OTP-0080-4981-R01.

³² Defence application to exclude the evidence of or recall Witness MLI-OTP-P-0547, 15 August 2022, ICC-01/12-01/18-2295-Conf, with two confidential *ex parte* Prosecution and Defence only Annexes. The Legal Representative requested and on 23 August 2022 received access to the two annexes to the Defence Request, now classified as confidential, pursuant to an order of the Single Judge.

³³ Prosecution response to 'Defence application to exclude the evidence of or recall Witness MLI-OTP-P-0547', 24 August 2022, ICC-01/12-01/18-2301-Conf.

³⁴ Prosecution Response, para. 30.

14. On 26 August 2022, the Legal Representative of the Victims (the ‘Legal Representative’) filed its response to the Defence Request (the ‘LRV Response’),³⁵ submitting that the Chamber dismiss the Defence Request.³⁶

II. Classification of relevant filings

15. The Chamber notes that all relevant submissions are currently classified as ‘confidential’ and finds it appropriate for public redacted versions thereof to be put on the record on the case. Deadlines are set below for this process to be completed. The Chamber will issue a public version of the present decision.

III. Submissions and analysis

A. Exclusion of P-0547’s testimony

16. The Chamber notes that the Defence requests that the Chamber exclude P-0547’s evidence pursuant to Articles 64(2) and (9), 67(1)(b), (e) and 2, and 69(4) and (7) of the Statute.³⁷ The Defence submits that ‘[e]xclusion is an appropriate remedy because the circumstances have prevented the Defence from testing key aspects of her account and where there is a knock-on effect to the fairness of the trial’.³⁸ The Defence also submits that ‘the threshold for exclusion may be met in circumstances where the ability of the Defence to confront a witness or challenge core aspects of his or her credibility has been obstructed’.³⁹ According to the Defence, disclosure violations⁴⁰ are an example of such obstruction and the obstruction may be remedied by various means, including excluding relevant parts of the Prosecution evidence and recalling relevant witnesses for further cross-examination.⁴¹ The Defence further submits that along with prosecutorial misconduct, restraints imposed

³⁵ Réponse des Représentants légaux des victimes relative à ‘Defense application to exclude the evidence of or recall Witness MLI-OTP-P-0547’, 26 August 2022, ICC -01/12-01/18-2306-Conf, para. 11.

³⁶ LRV Response, p. 7.

³⁷ Defence Request, ICC-01/12-01/18-2295-Conf, para. 1.

³⁸ Defence Request, ICC-01/12-01/18-2295-Conf, para. 1.

³⁹ Defence Request, ICC-01/12-01/18-2295-Conf, para. 14.

⁴⁰ The Defence argues that the relevant disclosure obligations must ‘also be read in conjunction with their investigative duty to search for exculpatory information: this duty is violated if the Prosecution ‘cherry-picks’ incriminating evidence from a source while failing to secure access to information that is likely to cast doubt on the reliability of the selected incriminating materials’. Defence Request, ICC-01/12-01/18-2295-Conf, para. 16.

⁴¹ Defence Request, ICC-01/12-01/18-2295-Conf, paras 14-15.

by third parties may also trigger exclusion as can the witness's own conduct.⁴²

17. The Defence further submits that untimely disclosure and denial of access to material circumvented the Defence's ability to: (i) properly investigate the witness and her connection to other witnesses;⁴³ (ii) prepare and tailor its cross-examination;⁴⁴ (iii) elicit evidence from the witness in respect of the issues in the trial and that would necessarily have impacted her testimony;⁴⁵ (iv) place before the Chamber material which may well enable the Trial Chamber to properly assess P-0547's credibility and to properly assess the possibility of false testimony and/or collusion between victims and witnesses.⁴⁶ The Defence submits that the Chamber has been prevented from hearing P-0547's testimony in full and to accurately assess her credibility and that Mr Al Hassan's right to a fair trial has been violated.⁴⁷ The Defence submits that there are no other remedies to cure the prejudice and the Chamber should exclude P-0547's evidence.⁴⁸
18. The Prosecution argues that there is no basis to exclude P-0547's evidence, submitting that the request fails to meet the strict conditions under Article 69(7) of the Statute.⁴⁹ The Prosecution submits that: (i) there has been no violation of the accused's right to a fair trial or the right to examine the witness against him;⁵⁰ (ii) that the Defence fails to establish any causal link between the alleged violation and P-0547's evidence⁵¹ and (iii) that even if there was a causal link between the violation and the gathering of evidence,

⁴² Defence Request, ICC-01/12-01/18-2295-Conf, para. 17 (in relation to the restraints imposed by the third party, the Defence submits that a restraint that is incompatible with the Chamber's duty to secure a fair and adversarial trial can trigger exclusion. Regarding the witness's own conduct, the Defence submits that if the witness has colluded with other witnesses or individuals in order to adduce incriminating evidence against the accused, relying on the impacted testimony and evidence would be antithetical to the integrity of the proceedings).

⁴³ Defence Request, ICC-01/12-01/18-2295-Conf, paras 4-5, 38-54.

⁴⁴ Defence Request, ICC-01/12-01/18-2295-Conf, paras 5, 49-54.

⁴⁵ Defence Request, ICC-01/12-01/18-2295-Conf, paras 5, 49-54.

⁴⁶ Defence Request, ICC-01/12-01/18-2295-Conf, paras 5, 49-54.

⁴⁷ Defence Request, ICC-01/12-01/18-2295-Conf, paras 6, 10, 49-54.

⁴⁸ Defence Request, ICC-01/12-01/18-2295-Conf, paras 7, 48-54.

⁴⁹ Prosecution Response, ICC-01/12-01/18-2301-Conf, para. 26. See Prosecution Response, ICC-01/12-01/18-2301-Conf, paras 27-29.

⁵⁰ Prosecution Response, ICC-01/12-01/18-2301-Conf, para. 27.

⁵¹ Prosecution Response, ICC-01/12-01/18-2301-Conf, para. 28.

it has no impact on the reliability of P-0547's evidence.⁵² The Prosecution also submits that myriad differences between documents related to [REDACTED] led it to conclude that the two were different persons and thus different pseudonyms were assigned to the two and the redactions, later lifted, were initially applied.⁵³

1. Alleged violation of Defence rights and prejudice to the Defence

19. Regarding the Defence allegations of prejudice to Mr Al Hassan,⁵⁴ the Chamber is mindful of its obligation, pursuant to Article 64(2) of the Statute, to provide for a fair and expeditious trial, conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Further, the Chamber is mindful of the rights of the Defence guaranteed under Article 67 of the Statute and Article 69(4) of the Statute's provision on the admissibility of evidence in light of the probative value of the evidence and any prejudice its introduction may cause to a fair trial and the fair evaluation of the witness's testimony.
20. Having considered the records of the proceedings, most notably the disclosures effected by the Prosecution (discussed above) and the in-court testimony of P-0547 – including her cross-examination by the Defence – the Chamber finds that the accused's fair trial rights have not been violated nor does the inclusion of her evidence in the record cause prejudice to the Defence in the present case.
21. The Chamber considers that the Prosecution erred in not disclosing lesser-redacted versions of all relevant documents to the Defence more expeditiously. However, this error is mitigated by the fact that the Prosecution disclosed ample information in advance of P-0547's testimony, and in advance to the Defence examination. Despite receiving lesser-redacted versions of several documents during the witness's examination, which did reveal new details about the names of the alleged victim's parents, the case record makes clear that the Defence still possessed the relevant information to prepare to effectively cross-examine P-

⁵² Prosecution Response, ICC-01/12-01/18-2301-Conf, para. 29.

⁵³ Prosecution Response, ICC-01/12-01/18-2301-Conf, para. 9.

⁵⁴ Defence Request, ICC-01/12-01/18-2295-Conf, paras 48-54.

0547 about issues related to her identity, to the intermediaries she interacted with and any possible collusion with other witnesses. Indeed, the Defence did question the witness in this regard.⁵⁵

22. Further, the Chamber considers that the possible divergence in certain aspects of her account and details about her identity are apparent in the materials the Prosecution disclosed in advance of the witness's testimony.⁵⁶ The Chamber accordingly finds that, notwithstanding the late disclosure during the course of P-0547's cross-examination and the Prosecution's allegations regarding [REDACTED], the Defence was in the position to fully test and seek clarifications from P-0547 on the matters it now alleges it was not able to adequately prepare for or fully explore with her in court.
23. As to the Defence's submissions that its inability to question [REDACTED] ensured that it could not pursue its lines of inquiries with these other witnesses,⁵⁷ the Chamber notes that evidence in relation to the NGOs collection of evidence, interaction with witnesses and interviewing of alleged victims as well as other witnesses' knowledge of P-0547 are already in the record of the case.⁵⁸ The Defence may also apply to submit other relevant evidence into the record. Further, the Defence is still amid its presentation of evidence and can adduce evidence in relation to its allegations and present its arguments as to the weight that should be placed on P-0547's testimony in the Article 74 decision in light of the case record. As the Prosecution notes,⁵⁹ D-0514 is scheduled to testify in relation to,

⁵⁵ See T-153, pp. 11-12, 15-20, 27-28, 30-31, 35, 39-40.

⁵⁶ See MLI-OTP-0024-2814 (civil party complaint, initially disclosed on 6 July 2018); MLI-OTP-0039-0861-R01 (P-0547's witness statement, initially disclosed on 18 September 2018); MLI-OTP-0037-1576-R01 (*procès verbal*, initially disclosed on 18 October 2018); MLI-OTP-0037-1576-R02 (lesser redacted version of the *procès verbal*, disclosed on 10 March 2020); [REDACTED]; MLI-OTP-0071-0534-R01 (*Grille*, initially disclosed on 10 March 2020); MLI-OTP-0071-0534-R02 (lesser redacted version of the *Grille*, disclosed on 29 September 2021); MLI-OTP-0078-1405 (investigative note, initially disclosed on 4 May 2020); MLI-OTP-0078-1923-R01 (investigative note, initially disclosed on 10 May 2020).

⁵⁷ See Defence Response, ICC-01/12-01/18-2295-Conf, paras 38-42, 53. The Chamber notes that [REDACTED].

⁵⁸ See for example MLI-D28-0004-7042; [REDACTED] evidence as well as the evidence of P-0114, P-0520, P-0538, P-0602, P-0610, P-0636, P-0641 and V-0002.

⁵⁹ Prosecution Response, ICC-01/12-01/18-2301-Conf, para. 22.

inter alia, his knowledge of P-0547 and her husband during the relevant period [REDACTED].⁶⁰

24. Considering the foregoing, the Chamber finds that there has been no violation of the accused's fair trial rights nor is his defence prejudiced by the continued inclusion of P-0547's evidence in the record of the case.

2. *Exclusion pursuant to Article 69(7)*

25. Regarding Article 69(7) of the Statute, the Chamber incorporates by reference the applicable legal framework for the exclusion of a witness's testimony pursuant to Article 69(7) of the Statute.⁶¹ The Chamber recalls its holding that the *chapeau* of Article 69(7) requires an initial inquiry into whether the evidence at issue was 'obtained by means of a violation of [the] Statute or internationally recognised rights'.⁶² This also requires 'a causal link between the violation and the gathering of the evidence'.⁶³
26. The Chamber notes its previous holding that as the Defence is the party seeking the exclusion of evidence, it bears the burden to show a 'real risk' that P-0547's evidence was obtained through a violation of the Statute or internationally recognised human rights.⁶⁴
27. Considering the allegations at hand, the Chamber considers that the first consideration of Article 69(7) is not met in the present circumstances.

⁶⁰ See MLI-D28-0006-3104, paras 12-13, 15. The Chamber notes that [REDACTED]. See Prosecution Response, ICC-01/12-01/18-2301-Conf, para. 9 at p. 6.

⁶¹ 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, 14 February 2022, ICC-01/12-01/18-2114, (a public redacted version was filed on 17 March 2022) ('Second Article 69(7) Decision'), para. 16; Decision on requests related to the submission into evidence of Mr Al Hassan's statements, 17 May 2021, ICC-01/12-01/18-1475-Conf (a public redacted version was filed on 20 May 2021) ('First Article 69(7) Decision'), paras 30-35, 37-45.

⁶² Second Article 69(7) Decision, ICC-01/12-01/18-2114, para. 16. See First Article 69(7) Decision, ICC-01/12-01/18-1475-Conf, paras 30-37.

⁶³ First Article 69(7) Decision, ICC-01/12-01/18-1475-Conf, para. 33.

⁶⁴ Second Article 69(7) Decision, ICC-01/12-01/18-2114, para. 17; First Article 69(7) Decision, ICC-01/12-01/18-1475-Conf, para. 38.

28. Regardless of its allegations of a potential disclosure violation, or a lack of clarity as to the Prosecution's position on whether [REDACTED] are the same person,⁶⁵ the Defence fails to show any causal link between the alleged violations and obtainment of P-0547's evidence. There is simply no evidence that the witness's evidence was obtained by the means of an alleged disclosure violation or the Prosecution's alleged unclear position on the witness's identity. The witness testified at length over a course of three days, the Defence was given an opportunity to test the evidence presented and did so. While it was eventually estopped from continuing a line of questioning after the witness refuted the Defence's supposition about her identity,⁶⁶ this did not taint the witness's testimony, nor did it create a causal link between her testimony and the alleged violations within the meaning of Article 69(7) of the Statute.
29. Noting its submissions as to the consequence of alleged violations,⁶⁷ the remedy the Defence seeks is beyond the scope of Article 69(7), which imparts a strict standard for the exclusion of evidence. Rather, the Defence's submissions speak to the evidentiary weight the Chamber may ultimately attach to P-0547's evidence in its final assessment once the entirety of the case record is before the Chamber. This is an assessment the Chamber reserves for its consideration in the final judgment pursuant to Article 74 of the Statute.
30. Considering the above, the Chamber finds that there is no cause to exclude P-0547's evidence under Article 69(7) of the Statute.

B. Recall of P-0547 for further cross-examination

31. As an alternative to its request to exclude P-0547's testimony, the Defence requests that the Chamber recall P-0547 for further cross-examination pursuant to Articles 64(2), 67(1)(e) and 69(3) of the Statute, Regulations 140(2)(b) of the Rules and Regulation 43 of the Regulations.⁶⁸ The Defence submits that recalling P-0547 would allow the Defence to 'complete' its cross-

⁶⁵ See Prosecution Response, ICC-01/12-01/18-2301-Conf, paras 31-37.

⁶⁶ See para. 9 above.

⁶⁷ See Defence Request, ICC-01/12-01/18-2295-Conf, paras 14-17, 45, 50-54.

⁶⁸ Defence Request, ICC-01/12-01/18-2295-Conf, paras 8, 55-65.

examination and give the Chamber an opportunity to consider whether excluding P-0547's testimony is justified.⁶⁹ According to the Defence, the fairness of the proceedings necessitates permitting the Defence to cross-examine the witness on:

a. The reliability, accuracy, and credibility of her own account, to include her adoption of the story of another / her adoption of a false identity, her knowledge of [REDACTED] / witness [REDACTED].

b. Her description of events involving others, particularly the people at the BMS and the marriages which were celebrated has not yet been the subject of cross examination in such a way as to reveal whether it was she and/or [REDACTED] at those events.

c. Her role in the collection of complaints, some of which were assessed as false.⁷⁰

32. The Prosecution argues that there is no good cause to recall P-0547 because (i) the Defence had the relevant information and the full opportunity to investigate and properly cross-examine P-0547⁷¹ and (ii) there is no prejudice to the Defence or violations of its rights.⁷²

33. The Legal Representative submits that the Defence Request should be rejected, arguing, *inter alia*, that the Defence is attempting to re-open a means to search for information on an apparent collusion of alleged witnesses to manufacture false statements concerning alleged forced marriages during the 'occupation' of Timbuktu.⁷³ The Legal Representative further submits that as the witness is a dual status vulnerable witness who has expressed clear fears for herself and her family, re-calling her would bring attention to her and her family and subjecting her to further questioning would have a deleterious impact on her wellbeing.⁷⁴

⁶⁹ Defence Request, ICC-01/12-01/18-2295-Conf, para. 11.

⁷⁰ Defence Request, ICC-01/12-01/18-2295-Conf, para. 64. See Defence Request, para. 10 ('[t]he **purpose** for recalling Witness P-0547 is to explore the linkage between her identity and that of one [REDACTED], and the consequences of that linkage. This goes to both the credibility of Witness P-0547 and the possibility of false testimony and/or collusion between victims, against a background where investigators have found evidence of false testimonies. The **justification** for recalling Witness P-0547 would be to enable Mr Al Hassan to exercise his right to fully examine the witness against him where this right has been regrettably restricted')(emphasis in original).

⁷¹ Prosecution Response, ICC-01/12-01/18-2301-Conf, paras 8-17.

⁷² Prosecution Response, ICC-01/12-01/18-2301-Conf, paras 18-25.

⁷³ LRV Response, para. 11.

⁷⁴ LRV Response, paras 19-20.

34. The Chamber concurs with the *Ntaganda* and *Bemba* Trial Chambers' decisions which articulated the standard for recalling a witness, holding 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'.⁷⁵ Further, 'judicial economy demands that recall should be granted only in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature'.⁷⁶
35. Considering the procedural history and the fulsome evidence already on the record in relation to the witness, the Chamber does not deem it necessary to recall P-0547 for further cross-examination.
36. As stated above, the Defence had the opportunity to examine the witness fully and had access to sufficient material to prepare an examination on the issues it now seeks to explore further. The Chamber also notes that the Defence did raise questions relating to the avenues it now seeks to explore further. That the Defence did not explore P-0547's intersection with [REDACTED] in relation to these issues further is also a function of the witness's response when she was questioned about this name.⁷⁷ Recalling the witness will not elucidate the Chamber further.

⁷⁵ *The Prosecutor v. Ntaganda*, Public redacted version of Decision on Defence request for recall of Witness P-0290, 17 February 2017, ICC-01/04-02/06-1791-Red, para. 10; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of 'Decision on "Defence request for recall of Witness P-178"', 11 December 2014, ICC-01/05-01/08-3186-Red, para. 18; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Second Redacted version of 'Decision on "Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169"' (ICC-01/05-01/08-3138-Conf-Red) and "Defence Urgent Submissions on the 5 August Letter (ICC-01/05-01/08-3139-Conf)" of 2 October 2014', 11 December 2014, ICC-01/05-01/08-3154-Red2, para. 27; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of Decision on "Defence Motion concerning 'Information on contacts [of] Witnesses 169 and 178 with other witnesses'", 11 December 2014, ICC-01/05-01/08-2924-Red, para. 35.

⁷⁶ *The Prosecutor v. Ntaganda*, Public redacted version of Decision on Defence request for recall of Witness P-0290, 17 February 2017, ICC-01/04-02/06-1791-Red, para. 10; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of 'Decision on "Defence request for recall of Witness P-178"', 11 December 2014, ICC-01/05-01/08-3186-Red, para. 18; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Second Redacted version of 'Decision on "Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169"' (ICC-01/05-01/08-3138-Conf-Red) and "Defence Urgent Submissions on the 5 August Letter (ICC-01/05-01/08-3139-Conf)" of 2 October 2014', 11 December 2014, ICC-01/05-01/08-3154-Red2, para. 27; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of Decision on "Defence Motion concerning 'Information on contacts [of] Witnesses 169 and 178 with other witnesses'", 11 December 2014, ICC-01/05-01/08-2924-Red, para. 35.

⁷⁷ The Chamber recalls that when asked if she was also known as [REDACTED], P-0547 responded 'the other name isn't my name'. See T-153, p. 35.

37. In line with the Legal Representative's submissions, the Chamber considers that despite concluding a full examination of P-0547, the Defence now seeks to acquire more time to rethread grounds it either already explored during P-0547's testimony or had the information to investigate in the first instance. Indeed, despite receiving lesser-redacted versions of certain documents during P-0547's testimony, the Defence did not raise the issue of the potential need for additional questioning until the last 30 minutes of its examination and did so in relation to an issue about the identity of the witness. Divergence in details related to the identity of the witness were present in the record disclosed to the Defence in advance of the testimony and the Defence was in a position to prepare in relation to these issues regardless of the Prosecution's intervention. The facts at issues do not create the **most compelling circumstances** that the legal framework requires to justify the Chamber recalling P-0547.
38. The Chamber also recalls its above discussion that the inclusion of P-0547's testimony does not prejudice the defence or violate the accused's fair trial rights. The Chamber is of the same view in relation to its decision to not recall the witness.
39. In this context, the Chamber again notes that the Defence can present its arguments as to P-0547's credibility, as well as the reliability and probative value of her accounts, in relation to the Chamber's consideration of her evidence in the decision pursuant to Article 74 of the Statute. Further, the Defence may choose to apply to submit further evidence into the record for the Chamber's consideration.⁷⁸ The already submitted evidence are also available for the Chamber's consideration in this regard.
40. The Chamber also notes that Prosecution's allegations about the identity of the witness, the witness's response about her identity, the extent to which the underlying issues and arguments could and/or were effectively put to P-0547

⁷⁸ See MLI-OTP-0077-5166; MLI-OTP-0077-5162; MLI-OTP-0077-5163-R01 (the materials regarding P-0547's identity, disclosed on 12 November 2021) and MLI-OTP-0080-4981-R01 (the witness's victim application, disclosed on 20 March 2022).

during the course of her testimony are all factors which the Chamber will consider in its ultimate assessment of P-0547's evidence.

41. Considering the above, the Chamber finds that recalling P-0547 is not warranted in the present circumstance.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

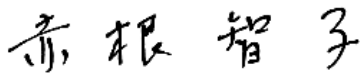
REJECTS the Defence Request; and

ORDERS the parties and participants to file the public redacted version of their related filings no later than two weeks after the notification of the present decision.

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 this Wednesday, 21 September 2022

At The Hague, The Netherlands