

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **20 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
with confidential *ex parte* Prosecution and Defence only Annexes I and II

**Public redacted version of Defence application to exclude the evidence of or recall
Witness MLI-OTP-P-0547, 15 August 2022, ICC-01/12-01/18-2295-Conf**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

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

The Office of the Prosecutor

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

Counsel for the Defence

Melinda Taylor
Felicity Gerry QC

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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
Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. The Defence respectfully requests Trial Chamber X to exclude the evidence of Witness MLI-OTP-P-0547 (“Witness P-0547”) pursuant to Articles 64(2) and (9), 67(1)(b), (e) and (2) and 69(4) and (7) of the Rome Statute (‘Statute’). Exclusion 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.¹
2. Enquiries have elicited information which makes this a proper application, albeit at this late stage.
3. The issues in this trial include the following:
 - a. Were women raped and/or forced to marry during the period indicted at all and, if so, by whom and to what extent was this known by Mr Al Hassan?
 - b. Were the women who gave evidence on behalf of the Prosecution victims of such events, or do they fall within the category of false accounts identified by investigators?
 - c. If such events are found to have occurred, particularly given the background of false complaint found by investigators, can it be shown that they were committed in the context of a widespread and systematic attack on the civilian population?
4. In this trial, significant prejudice to the Defence has arisen from five factors which go directly to the above issues: (i) excruciatingly late and conflicting disclosure of significant material relating to the identity of Witness P-0547; (ii) the denial of access to material necessary to expose potentially serious falsehood, including evidence going to veracity, reliability, and credibility of Witness P-0547; (iii) where the late disclosure and denial of access to material, taken together, impacts on the assessment of the evidence of Witness P-0547; (iv) where only partial cross-examination has occurred before the account of Witness P-0547 was certified; and (v) where the late disclosure and denial of access to exculpatory material, taken together, impacts on the assessment of other witness evidence.

¹ *Rutaganda*, ICTR-96-3-A, [Judgement](#), 26 May 2003, para. 271 (cutting line of inquiry); *Krajišnik*, IT-00-39-T, [Decision on Cross-Examination of Milorad Davodovic](#), 15 December 2005, paras. 8-9 (limitations to cross-examination).

5. The untimely disclosure and denial of access to material has circumvented the Defence's ability to (i) properly investigate Witness P-0547 and her connection to other victims and witnesses; (ii) diligently prepare and tailor its cross-examination; (iii) elicit evidence from Witness P-0547 in respect of the issues in the trial and that would necessarily have impacted her testimony; (iv) place before the Trial Chamber material which may well enable the Trial Chamber to properly assess the credibility of Witness P-0547 and (v) place before the Trial Chamber material to enable the Trial Chamber to properly assess the possibility of false testimony and/or collusion between victims and witnesses, particularly where accounts bear concerning similarities and there is a background of false information.
6. As a result of the late disclosure and denial of access to material, not only has the Trial Chamber been prevented from hearing the testimony of Witness P-0547 in full and accurately assessing her credibility, but Mr Al Hassan's right to a fair trial under the Statute has been violated.
7. Given the multiple failures to respect Mr Al Hassan's fair trial rights and the consequential effect on the Trial Chamber's truth-seeking function, there are no other remedies that can cure this prejudice.
8. In the alternative, the Defence for Mr Al Hassan respectfully requests Trial Chamber X to recall Witness P-0547 pursuant to Articles 64(2), 67 (1)(e), and 69(3) of the Statute, Rule 140(2)(b) of the Rules of Procedure and Evidence, and Regulation 43 of the Regulations of the Court. This would allow the Defence to complete its deferred cross-examination of Witness P-0547.
9. Witness P-0547 thus far has described the following: (i) Being whipped for being improperly covered;² (ii) being detained with three other unidentified women at the BMS in a room with a broken door (which she heard had been broken by another unidentified woman with mental health problems);³ (iii) [REDACTED];⁴ (iv) attending and celebrating weddings of other women about whom there was some confusion as to

² [ICC-01/12-01/18-T-151-CONF-ENG](#), p.19, line 25 – p.20, line 11, p.22, line 2 – p.25, line 13.

³ [ICC-01/12-01/18-T-151-CONF-ENG](#), p.25, line 14 – p.30, line 13; [ICC-01/12-01/18-T-152-CONF-ENG](#), p.3, line 17 – p.6, line 16; [ICC-01/12-01/18-T-153-CONF-ENG](#), p.4, line 19 – p.5, line 6.

⁴ [REDACTED]

identity;⁵ and (v) making her complaint in Bamako after interacting with other unidentified women and news agencies.⁶

10. If the alternative course is followed, it is submitted that there is **good cause** to recall Witness P-0547: The **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.
11. Recalling Witness P-0547 to complete the Defence’s cross-examination may potentially remedy both failures. Alternatively, it would give an opportunity to consider whether exclusion of the evidence of Witness P-0547 is justified.

II. Level of confidentiality

12. Pursuant to regulation 23bis(1) of the Regulations of the Court, the Defence files this application and its accompanying annexes as confidential, because they contain sensitive information regarding witnesses and refers to confidential documents. The Defence will file a public redacted version in due course.

III. Applicable Law

13. Article 64(2) of the Rome Statute deals with the obligation to provide for a fair trial.

Applicable law on exclusion

14. Article 69(7) prevents the Chamber from relying on evidence in circumstances where the evidence has been “obtained by means of a violation of the Statute or internationally recognised human rights” and either the “violation casts substantial doubt on the reliability of the evidence” or the “admission of evidence would be antithetical to and

⁵ [ICC-01/12-01/18-T-152-CONF-ENG](#), p.18, lines 14-15, p.21, line 24 – p.22, line 4, p.36, line 6 – p.38, line 17.

⁶ [ICC-01/12-01/18-T-152-CONF-ENG](#), p.29, line 11 – p.30, line 7, p.34, line 19 – p.35, line 8.

would seriously damage the integrity of the proceedings”. It is well-established 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. Examples of such obstruction include late, partial or non-disclosure, destruction of related evidence, and restraints imposed by third parties (for confidentiality or security reasons).

15. When disclosure violations occur, the determination of a suitable remedy falls within the Chamber's inherent power and responsibility to secure justice and ensure a fair trial for the Accused.⁷ At the *ad hoc* tribunals, Chambers have found that a large number of remedial options are available such as “recalling relevant prosecution witnesses for further cross-examination, allowing the Defence teams to call additional defence witnesses, excluding relevant parts of the prosecution evidence, drawing necessary inferences from the exculpatory material, dismissing charges touched upon by the exculpatory material, and ordering a stay of proceeding.”⁸
16. The relevant Prosecutor’s disclosure obligations must also be read in conjunction with their investigative duty to search for exculpatory information:⁹ 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.¹⁰

⁷ See Krstić [Appeals Judgment](#), para. 39: “The disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal, and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached”.

⁸ *Ndindiliyimana et al.*, ICTR-00-56-T, [Decision on Defence motions Alleging Violation of the Prosecutor’s Disclosure Obligations Pursuant to Rule 68](#), 22 September 2008, para. 61; *Bizimungu et al.*, ICTR-99-50-T, [Judgement and Sentence](#), 30 September 2011, para. 143; See also *Sesay et al.*, SCSL-04-15-T, [Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TFI-141](#), 26 October 2005, paras. 35-36; *Orić*, IT-03-68-T, [Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules](#), 13 December 2005, para. 35; [Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68](#), 27 October 2005, p.5; *Rwamakuba*, ICTR-98-44C-T, [Decision on the Defence Motion Regarding Will-Say Statements](#), 14 July 2005, para. 6.

⁹ Article 54(1)(a) of the Statute.

¹⁰ [ICC-01/04-01/06-1486](#), paras. 41-41, 46-47; [ICC-01/05-01/13-1202](#), para. 12; [ICC-01/09-01/11-1655-Red](#), paras. 37-39; [Privy Council Review of Intercept as Evidence Report of 30 January 2008 Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty](#), p.43: “The State must not be able to ‘cherry pick’ material so as to give itself an unjust advantage over the defendant. This could for example happen if investigators can choose to intercept evidentially only those lines they believe will yield incriminating material, while protecting other product from disclosure that contained exculpatory material. If cherry picking was suspected, the defence could apply to the judge to stop the trial on abuse of process grounds.”

17. Although prosecutorial misconduct can be an aggravating factor, it is not necessary to demonstrate bad faith or misconduct to trigger exclusion.¹¹ Similarly, legitimate restraints imposed by third parties or entities can also trigger exclusion if such restraints are incompatible with the Chamber's duty to secure a fair and adversarial trial.¹² The conduct of the witness can also trigger grounds for exclusion: if the witness has colluded with other witnesses or individuals for the purpose of adducing incriminating evidence against the defendant, it would be antithetical to the integrity of the proceedings for the Chamber to rely on impacted testimony and evidence.¹³

Applicable law on recall

18. Pursuant to Article 64(6), in performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11; (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute; (c) Provide for the protection of confidential information; (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties; (e) Provide for the protection of the accused, witnesses and victims; and (f) Rule on any other relevant matters.
19. 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.¹⁴ At the *ad hoc* tribunals, in assessing good cause, it has been held that a Chamber should

¹¹ *Brima et al.*, SCSL-04-16-PT, [Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process Due to Serious Infringement of Principles of Nullem Crimen Sine Lege and Non-Retroactivity as to Several Counts](#), 31 March 2004, para. 26, fn. 32, citing *Toronto (City) v. C.U.P.E.*, 2003 SCC 63, para. 43.

¹² *Milutinović*, IT-05-87-AR73.1, [Decision on Interlocutory Appeal against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65^{ter} list](#), 20 April 2007, paras. 17-20.

¹³ *Kanyarukiga*, ICTR-02-78-A, [Judgment](#), 8 May 2012, para. 238.

¹⁴ See *Karadžić*, IT-95-5/18-T, [Decision on Accused's Motion to Recall Twelve Municipalities Witnesses](#), 20 January 2012, para. 9; [Decision on Accused's Motion to Recall Harry Konings for Further Cross-Examination](#), 11 February 2011, para. 8; *Nyiramasuhuko & Ntahobali*, ICTR-98-42-T, [Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY, for Additional Cross-Examination](#), 3 March 2006, para. 32; *Bagosora et al.*, ICTR-98-41-T, [Decision on the Defence Motion to Recall Prosecution Witness OAB for Cross-Examination](#), 19 September 2005, para. 2; [Decision on the Prosecution Motion to Recall Witness Nyanjwa](#), 29 September 2004, para. 6; *Gotovina et al.*, IT-06-90-T, [Decision on prosecution motion to recall Marko Rajčić](#), 24 April 2009, para. 10; *Kayishema and Ruzindana*, ICTR-95-1-T, [Decision on the Defence Motion for the Re-examination of Defence Witness DE](#), 1 August 1998, para. 14; *Brima et al.*, SCSL-04-16-T-425, [Decision on Joint Defence Motion for Leave to Recall Witness TF1-023](#), 25 October 2005, para. 16.

consider the purpose for recalling the witness as well as the applicant's justification for not eliciting the relevant evidence from the witness when he or she originally testified.¹⁵ Furthermore, Trial Chambers held that "the right to be tried without undue delay as well as concerns for judicial economy demand that a request to recall a witness "should not be granted lightly and only when the evidence is of significant probative value and not cumulative in nature". If the witness is to be recalled to show inconsistencies between the witness's testimony and his or her subsequent statements, the requesting party must demonstrate that prejudice was sustained due to its inability to put inconsistencies to the witness. The witness will not be recalled if there is no need for the witness's explanation of the inconsistency because it is minor, or its nature is self-evident".¹⁶

20. ICC Chambers have followed the general jurisprudence of the *ad hoc* tribunals on recalling witnesses.¹⁷ The *ad hoc* Trial Chambers were empowered, at any stage of the trial, to recall witnesses who had already given evidence to put questions to them as required in the interests of justice.¹⁸ They were, however, typically reticent to do so merely because a party had failed to ask those questions relevant or important to its case.¹⁹ Indeed, good cause to recall a witness will generally not be found if a party has thoroughly exercised its right to a thorough cross-examination or has otherwise waived that right but is still able to test the evidence in another way. The *Ntaganda* Chamber found that recall of a witness was unwarranted where the Defence had previously waived their right to cross-examination due to lack of preparedness attributable to personal reasons and also had other means at its disposal to challenge the subject matter of the evidence given by the witness.²⁰ In *Katanga and Ngudjolo*, the Chamber reminded the parties that recalling a witness was unnecessary where the parties "already

¹⁵ *Id.*

¹⁶ *Karadžić*, IT-95-5/18-T, [Decision on Accused's Motion to Recall Twelve Municipalities Witnesses](#), 20 January 2012, para. 9.

¹⁷ [ICC-01/05-01/08-2924-Red](#), para. 35; [ICC-01/05-01/08-3154-Red2](#), para. 27; [ICC-01/05-01/08-3186-Red](#), para.18; [ICC-01/04-02/06-1751-Red2](#), para. 10.

¹⁸ *Halilović*, IT-01-48-T, [Decision on Parties Requests Regarding Deposition Evidence of One Witness](#), 12 May 2005 ("CONSIDERING that the Trial Chamber at any stage of the trial can recall a witness, who has already given evidence, to put such questions to the witness as are required in the interest of justice").

¹⁹ *Halilović*, IT-01-48-T, [Decision on Parties Requests Regarding Deposition Evidence of One Witness](#), 12 May 2005 ("CONSIDERING that, in general, the Trial Chamber is reluctant to grant the recalling of a witness who has provided testimony by way of deposition for the reason that a party has failed to ask questions, which may prove important to its case").

²⁰ [ICC-01/04-02/06-1791-Red](#), 17 February 2017, paras. 12-13.

had the possibility to cross-examine that witness [...] on the knowledge that [the] specific witness might have”.²¹ (Neither of those situations are applicable in the present case.)

21. On the other hand, the *Orić* Chamber was very firm that a party’s inability to fully cross-examine a witness due to the other party’s failings would unfairly limit or deprive the cross-examining party of its right and found recall appropriate even if that evidence could be tested in other ways and through other witnesses.²² Specifically, where information relevant to the case²³ (and not only to the specific witness in question) is not disclosed in a timely manner prior to that witness’s testimony – even for reasons accepted by the Chamber²⁴ – the witness may be recalled to speak on issues related to the belatedly-disclosed information.²⁵ The *Halilović* Chamber also found it appropriate to recall a witness where it found that that witness “could have specific or unique knowledge as to [a] particular allegation in the Indictment” and where the witness’s evidence “may prove to be pivotal evidence in this case”.²⁶

IV. Procedural History Concerning the Evidence of Witness P-0547

22. Within the context of the Prosecution request to amend the charges to include additional incidents, the Prosecution disclosed first MLI-OTP-0078-1405, and then MLI-OTP-0078-1923, being investigators’ notes [REDACTED]:²⁷

[REDACTED]

²¹ [ICC-01/04-01/07-T-277-Red-ENG](#), p.47, lines 12-15.

²² *Orić*, IT-03-68-T, [Decision on Defence Motion to Recall a Witness](#), 30 November 2004, p.3 (“CONSIDERING that the information on the video can be used in the examination of future witnesses, but that it would be unfair to deprive the Defence of the possibility of further cross-examining Mr. Erić on matters on which he could have been cross-examined if the video had been made available to the Defence prior to his testimony [...] GRANTS the Motion”).

²³ *Orić*, IT-03-68-T, [Decision on Defence Motion to Recall a Witness](#), 30 November 2004, p.2 (“the video contains a number of interviews which are relevant to this case”) (emphasis added).

²⁴ *Orić*, IT-03-68-T, [Decision on Defence Motion to Recall a Witness](#), 30 November 2004, p.3 (“CONSIDERING that the Trial Chamber accepts the Prosecution’s explanation as to why the video was not disclosed to the Defence in a timely manner”).

²⁵ *Orić*, IT-03-68-T, [Decision on Defence Motion to Recall a Witness](#), 30 November 2004, p.3 (“HEREBY GRANTS the Motion and ORDERS THAT Mr. Slavisa Eric be called to re-appear before the Trial Chamber for further cross-examination”).

²⁶ *Halilović*, IT-01-48-T, [Decision on Parties Requests Regarding Deposition Evidence of One Witness](#), 12 May 2005.

²⁷ [REDACTED].

23. This investigator's note was the subject of correspondence and litigation in relation to the amendment request concerning P-0636. [REDACTED].²⁸ The Pre-Trial Chamber, in turn, found that the Prosecution had a proactive duty to correct erroneous factual assertions concerning its witnesses, and further, that:²⁹

le Procureur aurait dû divulguer, comme il le lui était demandé par la défense, [REDACTED], même si pour ce faire elle aurait eu à expurger une grande partie du document, pour ne laisser visible que la partie concernant ce témoin (la « Troisième erreur »). Si la défense pense que le Procureur a fourni à la Chambre des informations erronées, sur la base desquelles, de surcroît, la Chambre a confirmé [REDACTED] à l'encontre de l'accusé, il est plus que légitime pour la défense, en charge de défendre les intérêts de M. Al Hassan, de chercher à faire la lumière sur ce point. Il était du devoir du Procureur de l'y aider et de répondre à ses sollicitations. Il ne revient pas au Procureur d'essayer, ou en donner l'apparence, de soustraire à la connaissance de la défense une erreur du Bureau du Procureur, qui révélerait une négligence dans la mise en œuvre de ses obligations, au premier rang desquelles son obligation de loyauté envers la défense et envers la Chambre.

24. On 7 May 2020, pursuant to a disclosure request, the Prosecution sent the Defence a table linking the Malian complaint pseudonyms to the ICC pseudonyms: [REDACTED].³⁰

25. After the commencement of trial, the Defence again requested the Prosecution to disclose the original correspondence with [REDACTED]. The Prosecution again rejected this request and avowed that the Defence could and should rely on the information contained within MLI-OTP-0078-1405, MLI-OTP-0078-1923, and the Prosecution's Amendment to its further observations regarding its request for corrections and amendments concerning the Confirmation Decision (ICC-01-/12-01/18-823-Conf).³¹

26. The statement of [REDACTED] further refers to [REDACTED].³² Since [REDACTED] has not testified and the Defence has not received the original recordings of this

²⁸ [ICC-01/12-01/18-847-Conf](#), paras. 18-20.

²⁹ [ICC-01/12-01/18-888-Conf](#), para. 35.

³⁰ [REDACTED].

³¹ [ICC-01/12-01/18-1923-Conf-Exp-AnxB](#), p.2.

³² [REDACTED]. The evidence disclosed by the Prosecution uses both [REDACTED]. When this request refers directly to Prosecution documents, the spelling adopted in that document is used, but [REDACTED] is adopted in all other places given that it is consistent with the spelling used for the alleged father of this individual in multiple documents.

interview, it is not clear whether [REDACTED], or if this connection was made by the investigators who drafted the statement for signature.

27. On 26 October 2021, the Defence emailed the Prosecution to ask them to lift a redaction in the section of [REDACTED] statement concerning [REDACTED], on the grounds that it related directly to the testimony of P-0547.³³ The paragraph in question referred exclusively to [REDACTED]. The Prosecution disclosed a lesser redacted version,³⁴ thus underscoring the belief of the Defence that this information pertained to a Prosecution witness, namely P-0547.
28. P-0547 was called by the Prosecution from 26 to 28 October 2021.³⁵ She said her name is [REDACTED]. P-0547's examination-in-chief lasted two days, lasting just over four hours. She was questioned in relation to several crucial topics for this case, including forced marriage and rape.
29. The Defence began its cross-examination of Witness P-0547 on 27 October 2021. That same day, the Prosecution then lifted the redactions to the parents of [REDACTED] in the [REDACTED].³⁶ The names – [REDACTED] – correspond to the parents of P-0547 set out in MLI-OTP-0078-1923. The timing (during the testimony of Witness P-0547) appeared to further affirm the connection between this document and Witness P-0547.
30. The Defence included the [REDACTED] on its list of material for Witness P-0547, which was communicated to the Prosecution on 26 October 2021. The Prosecution did not challenge or query the inclusion of this item on grounds of relevance before the commencement of Defence cross-examination. Rather, at what became the very end of Defence cross-examination, at the point where the Defence attempted to put this document to Witness P-0547, the Prosecution intervened in the following manner:³⁷
[REDACTED]
31. The position conveyed by the Prosecution explicitly contradicted the information set out in MLI-OTP-0078-1923, namely that “P-0547 is the daughter of [REDACTED]”. The

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [ICC-01/12-01/18-T-151-CONF-ENG](#); [ICC-01/12-01/18-T-152-CONF-ENG](#); [ICC-01/12-01/18-T-153-CONF-ENG](#).

³⁶ [REDACTED].

³⁷ [REDACTED].

Prosecution's claim that the accounts were so different so as to put the Defence on notice that they were different persons was also at odds with the fact that:

- a. the Prosecution, [REDACTED] had referred to them as being the same person; and
- b. both P-0547/[REDACTED] and [REDACTED] gave very similar accounts, something which the Prosecution itself acknowledged in subsequent correspondence.³⁸

32. Article 71(g) of the Prosecutor's Code of Conduct specifies that the Prosecution shall "not deceive or knowingly mislead the Court, judge, counsel, or the Registry and take all necessary steps to correct an error or inaccuracy as soon as possible after it has been discovered". As soon as the Prosecution had reached a 'position' that [REDACTED] was not P-0547, this position should have been conveyed to the Defence and the Prosecution should have corrected the incorrect statements contained in MLI-OTP-0078-1923. Since this did not occur, the Defence had no prior notice as concerns this change in 'position', and consequently conducted its investigations and cross-examination preparation based on the Prosecution's prior avowal that P-0547 and [REDACTED] were the same person.³⁹ The tardy nature of this disclosure prevented the Defence from recalibrating its approach in its preparation for Witness P-0547. The Defence therefore indicated to the Chamber that [REDACTED].⁴⁰ After deliberating, the Chamber ruled that:⁴¹

[REDACTED]

33. The Trial Chamber consequently allowed the Defence to ask Witness P-0547 if she was known as [REDACTED], which she denied under oath, before insisting that the Defence move to other topics, without any further possibility to inquire about the identity of Witness P-0547 or her relationship with [REDACTED] or the account of [REDACTED] nor her connection to or collation of other witness accounts.

³⁸ [REDACTED]. The Defence notes in this regard that the account of [REDACTED], contained at [MLI-OTP-0024-2814](#) at 2829, states that [REDACTED] – a unique detail that also exists in [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

34. After the conclusion of the hearing, the Defence sought additional disclosure from the Prosecution. Rather than furnishing a clear and evidentially founded explanation as concerns when and how the Prosecution reached the position that Witness P-0547 and [REDACTED] were different persons, the Prosecution furnished contradictory and/or incorrect information, namely:

- a. the Prosecution repeated incorrect information set out in MLI-OTP-0078-1405 i.e. it averred that the names of the victims referred to in MLI-OTP-0078-1405 were not known to the Prosecution at the time they contacted [REDACTED],⁴² even though the Pre-Trial Chamber expressly found that the Prosecution had [REDACTED];⁴³
- b. in an email dated 3 November 2021, the Prosecution wrote that it had concluded that [REDACTED], but on 5 November 2021, the Prosecution wrote that [REDACTED];⁴⁴ and
- c. the Prosecution claimed that it had [REDACTED] was the same person as [REDACTED],⁴⁵ even though MLI-OTP-0078-1923 does exactly that.

35. Following these exchanges, the Prosecution disclosed late on Friday 12 November 2021 (with no contemporaneous accompanying letter or list), additional documentation suggesting that [REDACTED] are the same person, namely an email from [REDACTED] attesting to this fact.⁴⁶ Additional elements were also disclosed concerning P-0547's interaction with [REDACTED], not as a victim, but as someone who [REDACTED].⁴⁷ It would appear from this correspondence that the Prosecution did not attempt to conduct such checks with [REDACTED] before advancing its in-court position that [REDACTED] were different persons.

⁴² [REDACTED]

⁴³ [ICC-01/12-01/18-888-Conf](#), paras. 33, 37. According to its chain of custody, the Prosecution received the [REDACTED] in 2016.

⁴⁴ [REDACTED]

⁴⁵ [REDACTED]

⁴⁶ [MLI-OTP-0077-5163](#).

⁴⁷ [MLI-OTP-0077-5166](#), para. 3.

36. As things stand, if [REDACTED] are different persons, then there are grounds for concern as regards the circumstances in which [REDACTED] and the related risk of evidence contamination or fraudulent testimony.
37. Conversely, if they are the same person, then it is a matter of considerable concern that the Prosecution's unfounded objections led to the Defence being prevented from putting a prior account to Witness P-0547 during her testimony and from laying a foundation for drawing adverse conclusions regarding her credibility in light of her denials that she was the same person.⁴⁸
38. The timings were such that the Defence was also unable to investigate these issues through its cross-examination of other related witnesses, specifically [REDACTED], who were scheduled to testify *viva voce* after P-0547.
39. The Defence intended to cross-examine [REDACTED] to elicit further information concerning the circumstances of P-0547's inclusion in the [REDACTED],⁴⁹ potential contacts with other victims,⁵⁰ and P-0547's interactions with other persons who were likely to have been involved in the [REDACTED]. This includes [REDACTED], who acted as the interpreter for P-0547 during the [REDACTED] proceedings.⁵¹ An [REDACTED] also accompanied victims to and from [REDACTED].⁵² Notably at the time P-0547 testified and even afterward, OTP never confirmed to the Defence that [REDACTED] and acted as an intermediary for OTP or a victim association.⁵³ It is now apparent that [REDACTED] interpreted in [REDACTED] for several victims including [REDACTED],⁵⁴ [REDACTED],⁵⁵ [REDACTED],⁵⁶ [REDACTED].⁵⁷

⁴⁸ [REDACTED].

⁴⁹ In her statement, [REDACTED]. Given that she assumed that [REDACTED] and P-0547 were the same person, this raises the question as to whether she used materials related to [REDACTED] to prepare P-0547.

⁵⁰ According to [REDACTED], victims travelled together to and [REDACTED].

⁵¹ [MLI-OTP-0037-1576-R03](#).

⁵² See [MLI-OTP-0080-4648](#) at 4650.

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

40. The ability of the Defence to pursue such lines of inquiry was, however, frustrated since the evidence of [REDACTED] was submitted through Rule 68(2) rather than *viva voce*.⁵⁸
41. The Prosecution also decided not to call witness [REDACTED] who could have given evidence about who was identified as making a false complaint and may have been able to confirm whether this witness adopted another identity.⁵⁹ After attempts by the defence to contact this witness, he declined to meet.
42. [REDACTED],⁶⁰ the Defence had also planned to cross-examine [REDACTED] in relation to linkages between individuals and victims and the scope for evidence contamination/cross-pollination. Although [REDACTED] was listed as a *viva voce* witness for almost the entire duration of the Prosecution case, at the very end, [REDACTED]⁶¹ – [REDACTED].⁶² At the same time, the Prosecution belatedly disclosed [REDACTED]’s unwillingness to testify as a witness.⁶³ The Defence was therefore unable to pursue its planned inquiries through the cross-examination of [REDACTED] on such matters.
43. The testimony of [REDACTED] in relation to the identification of SGBV victims in Timbuktu does not assist the Defence or the Chamber to ascertain the truth in relation to the irregularities concerning P-0547’s account due to the fact that Prosecution failed to obtain documents that would enable the parties to either identify which individual victims were interviewed in Timbuktu by [REDACTED],⁶⁴ or cross-reference the accounts compiled by [REDACTED].
44. [REDACTED] also refused to disclose original unredacted stills of their meetings with victims in Timbuktu and have now pixelated the faces of interviewees, thus rendering recourse to a judicial order, futile.⁶⁵

⁵⁸ [REDACTED]

⁵⁹ [MLI-OTP-0074-1975](#).

⁶⁰ [REDACTED]

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [MLI-OTP-0082-0325-R01](#).

⁶⁴ Confidential Annex II.

⁶⁵ [MLI-OTP-0080-3577](#); [MLI-OTP-0080-3583](#).

45. Grounds for concern regarding the reliability of P-0547's account of being raped in the BMS are significantly heightened by:

- a. independent documentation concerning [REDACTED] role in collating evidence of SGBV violence in 2012, which records that [REDACTED];⁶⁶
- b. the recent disclosure of P-0547's victim application,⁶⁷ in which she has provided an approximate date that materially differs from the evidence she provided [REDACTED] and during her sworn evidence the Trial Chamber.⁶⁸

46. Thus far, the witness has denied being known as [REDACTED].⁶⁹ This does not explain why the available documentary evidence suggests she has (or may have) represented herself as such to [REDACTED] and/or judicial authorities [REDACTED].

47. The practical reality is that the Defence is left in a position where the type of material usually available to test the evidence of a witness is not available and has either been withheld or only partially disclosed.

V. The prejudice to Mr Al Hassan

48. The Defence is restricted from testing Witness P-0547 and precluded from calling evidence of false complaints which is the very evidence that goes to the heart of the issues in the trial. It is highly unlikely that such issues can be resolved by Bar Table motions.

49. The disclosure of some identity information was extraordinarily late, being during Defence cross-examination of the very witness in dispute. The Defence has therefore been precluded from pursuing probative lines of inquiry for reasons beyond its control. The Defence did not have all the information about the identity of Witness P-0547 when it cross-examined her, which has seriously prejudiced its approach to cross-examination.

50. The disclosed statements and investigator notes do not satisfy the Defence's right to information. As confirmed by [REDACTED], individuals in Timbuktu are often known

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ In her testimony, P-0547 provided several details that are incompatible with the alleged [REDACTED].

⁶⁹ [ICC-01/12-01/18-T-153-CONF-ENG](#), p.35, lines 3-19.

by different names or nicknames. For this reason, the ability of the Defence to confront witnesses in person is of increased importance as it is only through such interactions (and the use of photos and videos) that the Defence can verify the actual identity of persons referred to in written records and then prepare cross-examination accordingly.

51. The change to information provided and the denial of access to material that may enable verification or otherwise means that the inclusion of Witness P-0547 significantly unbalances the trial in favour of the Prosecution, without recourse for the testing of that evidence or its links to the other victims. It denies Mr Al Hassan a fair trial unless the evidence of Witness P-0547 is excluded.
52. Taking into account the procedural and investigative history, the testimony of P-0547 should be excluded as a remedial measure. Late disclosure – during cross-examination – of crucial information concerning Witness P-0547 on the stand hindered the Defence’s ability properly to question her. It was not sufficient to put to the witness, as suggested by the Prosecution,⁷⁰ questions about her name and the names of her parents. The Defence had the right to investigate about the conflation of identities and similarities in the narratives of P-0547’s testimony and [REDACTED], and the consequences of the issues with identity.
53. As set out above, this prejudice was compounded by the Prosecution’s decision to submit [REDACTED] evidence through Rule 68(2), even though the Chamber had previously underscored [REDACTED] nature and contents of her statement, [REDACTED], it [was] more appropriate to hear her testimony entirely *viva voce*.⁷¹ Although the Prosecution is entrusted as an independent minister of justice to investigate and collect exculpatory evidence, it failed to take timely steps to secure access to the unredacted ‘rushes’ of [REDACTED] with victims. Notwithstanding its close relationship with [REDACTED], it did not take steps to collect relevant information concerning the identity of individuals that were interviewed [REDACTED], and which would have allowed the Defence to chart the content and progress of victims’ accounts and thus identify any changes that might have been prompted by exposure to extrinsic information. In essence, the Defence was denied access to exculpatory evidence which is directly linked to the impossibility to cross-examine P-0547 in a meaningful manner.

⁷⁰ [REDACTED].

⁷¹ [REDACTED].

Had the Defence known the existence of additional details concerning the similar account signed under a different name, it would have formulated its questions differently, would have had a different purpose and approach to this Witness and some additional questions as to her credibility.

54. Overall, fairness dictates that her testimony should be excluded by the Trial Chamber.

VI. The potentials arising from recalling Witness P-0547

55. In the alternative, the recall of Witness P-0547 may be a potential partial avenue available to the Defence to be able to shed light on the material discrepancies although it is highly unsatisfactory that this would be during the Defence case.

56. The evidence the Defence seeks to elicit may have considerable probative value. It is not cumulative of other evidence in the trial record.

57. By affording the Defence time to investigate this Witness and allowing cross-examination to cease on 28 October 2021, there is a reasonable expectation that the Witness could be recalled.

58. The Prosecution has relied on P-0547 to substantiate serious charges against the Accused; the Defence has identified lines of inquiry that strike at the heart of the reliability of her account; the Defence has not been able to pursue these lines of inquiry due to reasons beyond its control; and the Defence does not possess any further feasible means for pursuing these inquiries.

59. The potential cross-examination might reveal the circumstances in which her complaint was taken, to include why it is recorded that she also had the name [REDACTED], and any contact she has had / coordination she has made with other victims or potential victims, including [REDACTED] and those assessed as giving false accounts. Because she has given some evidence on encounters with others in camps and watching news items, this may also lead to further cross-examination on her account. It is notable that thus far she has given no details about the allegation of rape, nor the women she was

detained with. The Defence underlines that during the evidence given by this Witness, the Defence accepted she was describing sexual intercourse but not that it happened.⁷²

60. Following the conclusion of her evidence, the Trial Chamber issued notice under Regulation 55 that they could rely on Witness P-0547's evidence to requalify the charges to include additional charges of other inhumane acts (count 2) and cruel treatment (count 4).⁷³ In the light of the above, this notice may well be premature.

61. The lines of inquiry proposed are significantly probative to the reliability of the account of Witness P-0547: It is understood the Prosecution asserts that P-0547 is not [REDACTED] (who the Prosecution alleges is witness [REDACTED] from whom no evidence was obtained or led).⁷⁴ The Chamber has nonetheless accepted into evidence a written account from [REDACTED] that asserts that they are the same person.⁷⁵

62. The Trial Chamber is rightly concerned to examine the truth of complaints. However, thus far it has praised Witness P-0547 for her courage⁷⁶ and told her the Defence was not suggesting she was lying.⁷⁷ Cross examination may reveal clearer context such as how the name [REDACTED] was recorded, whether the evidence of P-0547 can be believed or indeed whether she has lied under oath, as well as assessing any inference that this Witness has adopted a story, or improper coordination in complaints.

63. If, as the Prosecution suggests, these are two separate people, then cross-examination may assist the Trial Chamber as to whether there is a risk of copying accounts which raises issues as to reliability, credibility, potentially profound dishonesty and thus reasonable doubt. Cross-examination on her role in gathering evidence and training witnesses, her interactions with [REDACTED] and her role in coordinating other victims, including whether she has ever met [REDACTED], may also impact on the Trial Chamber's acceptance of other witness evidence.

⁷² [ICC-01/12-01/18-T-152-CONF-ENG](#), p.13, lines 14-25.

⁷³ [ICC-01/12-01/18-1897](#), para. 15.

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [ICC-01/12-01/18-T-152-CONF-ENG](#), p.10, lines 15-17, p.63, lines 8-9.

⁷⁷ [ICC-01/12-01/18-T-153-CONF-ENG](#), p.7, lines 8-14.

64. In these circumstances, the fairness of the proceedings demands that Witness P-0547 be recalled for the purpose of providing the Defence with a genuine opportunity to cross-examine her 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].
- 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.

65. There is no prejudice to the Prosecution or LRVs in an application to recall. If the application is granted, the Defence would seek for D-0547 to be recalled during the month of September. It is not likely that her testimony would exceed a half day and as such, the Defence does not anticipate any delay as concerns the current calendar.

VII. Relief requested

66. For the foregoing reasons, the Defence respectfully requests Trial Chamber X to:

- **EXCLUDE** the evidence of Witness P-0547; and /or,
- **GRANT** the recall of Witness P-0547.



Melinda Taylor
Counsel for Mr. Al Hassan



Felicity Gerry QC
Co-Counsel for Mr. Al Hassan

Dated this 20th Day of October 2022
At The Hague, The Netherlands