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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
With two public annexes

**Public redacted version of ‘Decision on a Defence motion seeking disclosure of
Biographical and Security Questionnaires conducted by Prosecution
investigators with [REDACTED]’**

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

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Judge Kimberly Prost, acting as Single Judge of Trial Chamber X (the ‘Single Judge’ and the ‘Chamber’, respectively) 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 54(3)(f), 64(2), (3)(c) and (6), 67(2) and 68(1) of the Rome Statute (the ‘Statute’), Rule 77 and 81(4) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following decision.

I. Procedural history

1. On 17 March 2020, the Defence filed its ‘Defence Motion for Disclosure Order – Prosecution Biographical and Security Questionnaires’ (the ‘Defence Request’),¹ seeking that the Chamber orders the disclosure of all Biographical and Security Questionnaires (the ‘BSQs’) prepared in relation to [REDACTED] met by the Office of the Prosecutor (the ‘Prosecution’). The Defence argues that the BSQs themselves should be disclosed and submits that the disclosure of summaries of information deemed relevant by the Prosecution is not a viable alternative as they do not and cannot sufficiently encapsulate the exculpatory and material nature of the BSQs.² The Defence notably argues that the information sought is exculpatory and material to its preparations, especially with regard to [REDACTED].³
2. On 30 March 2020, the Prosecution filed its response to the Defence Request (the ‘Prosecution Response’),⁴ in which it opposes the measure sought. The Prosecution submits that disclosable information material to the preparation of the Defence has been extracted from the BSQs and disclosed to the Defence already by way of investigation notes containing such information⁵ and that, where warranted, supplementary notes are in the process of being prepared and will be disclosed on an ongoing basis before the disclosure deadline set by the

¹ ICC-01/12-01/18-667-Conf, with four confidential, *ex parte*, Defence, Registry and Prosecution only annexes.

² Defence Request, ICC-01/12-01/18-667-Conf, para. 2.

³ Defence Request, ICC-01/12-01/18-667-Conf, para. 2.

⁴ Prosecution’s response to Defence Motion for Disclosure Order – Prosecution Biographical and Security Questionnaires, notified on 31 March 2020, ICC-01/12-01/18-699-Conf, with four confidential annexes and one confidential, *ex parte*, annex, available only to the Prosecution and VWU.

⁵ Prosecution Response, ICC-01/12-01/18-699-Conf, para. 4.

Chamber.⁶ Arguing that these investigation notes ‘aptly and sufficiently encapsulate the information required’, the Prosecution contends that the Defence fails to demonstrate any other justification for the BSQs’ disclosure.⁷

3. On 3 April 2020, the Defence filed a first request seeking leave to reply to Prosecution Response,⁸ which was opposed by the Prosecution on 7 April 2020.⁹
4. On 8 April 2020, the Single Judge dismissed the above Defence request for leave to reply.¹⁰ This email decision is put on the record by way of Annex A to the present decision.
5. On 15 April 2020, the Defence submitted via email a second request for leave to reply to Prosecution Response,¹¹ which the Prosecution immediately opposed by way of an email sent in response.¹² The Defence sent an email later that day seeking the Chamber’s leave to reply to the Prosecution’s response to its second request for to reply.¹³ The Prosecution made further clarifying submissions in response via an email also sent on 15 April 2020.¹⁴
6. On 21 April 2020, the Single Judge dismissed both the second request for leave to reply and the Defence’s related request seeking leave to reply to a response to this request for leave to reply.¹⁵ The Single Judge finds it appropriate to put on the record, by way of Annex B to the present decision, both the submissions related to the Defence second request for leave to reply and her email decision.

⁶ This is notably the case where information needs supplementing because the Prosecution was previously authorised to withhold identifying information. See Prosecution Response, ICC-01/12-01/18-699-Conf, para. 4.

⁷ Prosecution Response, ICC-01/12-01/18-699-Conf, para. 4.

⁸ Defence request for leave to reply to “Prosecution’s response to Defence Motion for Disclosure Order – Prosecution Biographical and Security Questionnaires” – ICC-01/12-01/18-699-Conf, ICC-01/12-01/18-720-Conf, with three confidential, *ex parte*, annexes only available to the Prosecution and Defence.

⁹ Prosecution’s response to “Defence request for leave to reply to ‘Prosecution’s response to Defence Motion for Disclosure Order – Prosecution Biographical and Security Questionnaires’ – ICC-01/12-01/18-699-Conf”, ICC-01/12-01/18-730-Conf.

¹⁰ Email from the Chamber dated 8 April 2020 at 13:30.

¹¹ Email from the Defence dated 15 April 2020 at 9:35.

¹² Email from the Prosecution dated 15 April 2020 at 12:38.

¹³ Email from the Defence dated 15 April 2020 at 13:28.

¹⁴ Email from the Prosecution dated 15 April 2020 at 14:29.

¹⁵ Email from the Chamber dated 21 April 2020 at 16:11.

II. Applicable law

7. The Single Judge refers to the applicable law and principles set out in her decision of 27 March 2020.¹⁶
8. It is recalled that Rule 77 of the Rules provides for the Defence's entitlement to inspect *inter alia* any tangible objects material for the preparation of the Defence, 'subject to the restrictions on disclosure as provided for in the Statute as well as in [R]ule 81 and 82'.¹⁷ In accordance with this provision, and as well-established in the case law of the Court, non-disclosure shall be viewed as an exception, the overriding principle being that material falling under the scope of Rule 77 should be available for inspection in full.¹⁸
9. Pursuant to Article 68(1) of the Statute, the Chamber shall ensure the safety, physical, and psychological well-being of victims and witnesses. In doing so, the Chamber shall take all appropriate measures to safeguard their privacy and protection, while ensuring that such measures are consistent with the rights of the accused. It is recalled that the rights of the accused are enshrined in Article 67 of the Statute and also reflected in other relevant provisions.
10. Rule 81(4) of the Rules provides that the Chamber, on its own motion or at the request of the Prosecution, 'take the necessary steps to ensure the confidentiality of information [...] to protect the safety of witnesses and victims and members of their families'. These protections, which include restrictions on disclosure, have been extended by the Appeals Chamber to all individuals at risk on account of the activities of the Court.¹⁹

¹⁶ 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.

¹⁷ Rule 77 also mandates inspection rights for any material the Prosecution intends to use or objects obtained from or belonging to the accused person.

¹⁸ Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546, para. 9. *See also*, Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's request for non-disclosure in relation to document "OTP/DRC/COD-190/JCCD-pt", 27 May 2013, ICC-01/04-01/06-3031, para. 12.

¹⁹ Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475 (OA), para. 56.

11. Accordingly, and contrary to the Defence submissions, the Single Judge does not consider that the legislative regime or the jurisprudence limits the type of measures which can be used when a restriction of disclosure is justified pursuant to Article 68 or other relevant provisions. Any such measure, be it in the form of redactions, provision of a summary and/or of relevant extracts, or withholding of a disclosable item altogether, is permeable if it meets the applicable test, as detailed below, and is therefore considered necessary, appropriate, and proportionate by the Chamber on the basis of the set of facts before it.²⁰
12. The Single Judge recalls the factors that must be addressed when considering whether to authorise the non-disclosure of certain information pursuant to Rule 81(4) of the Rules: (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.²¹
13. It is clear from the relevant framework that the Chamber is required to ensure that the interests of the Defence are balanced with those of victims, witnesses, and individuals at risk on account of the activities of the Court.

²⁰ The Single Judge therefore does not see the decision of TC IX to be incompatible with this approach. Notably, in the precedent cited by the Defence, the BSQ in question, ordered to be provided to the Defence in full, was the record of an inadvertent contact by Prosecution investigators with a witness to be called by the Defence. See Defence Request, ICC-01/12-01/18-667-Conf, paras 7-8 *referring to* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request in Light of Prosecution Meeting and Interview with D-100, 12 September 2018, ICC-02/04-01/15-1335. The Single Judge also does not consider that the most recent decision of Trial Chamber IX on that matter contradicts this approach (Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Remedies in Light of Disclosure Violations, 22 April 2020, ICC-02/04-01/15-1734, paras 33-34). In that case, no specific security concerns were raised by the Prosecution to justify non-disclosure of the original items (see ICC-02/04-01/15-1723, paras 3-4). Accordingly, the Chamber considers the current situation to be meaningfully different.

²¹ Public redacted version of Decision on the Prosecution Request for Leave Not to Disclose the Identity of Witness MLI-OTP-P-0431, 27 November 2018, ICC-01/12-01/18-88-Conf-Exp-tENG, para. 12 and references cited therein.

III. Analysis

14. The material sought to be obtained by the Defence is the record²² of Prosecution investigators' interviews of [REDACTED] in Mali, or elsewhere, when biographical and security questionnaires were prepared based on their interviews. The Single Judge notes that, while the Defence refers to [REDACTED],²³ on the basis of the Prosecution's submissions, it is [REDACTED] who were contacted by the Prosecution during or after [REDACTED] in Mali and [REDACTED] elsewhere.²⁴
15. The Single Judge further notes that the Prosecution informs that the questioning for the preparation of the BSQs is conducted before the main interviews 'with the view to eliciting personal and security-related information'.²⁵ It submits that, accordingly, BSQs questioning is not intended to elicit information about the case, but instead information required to assess any security risks [REDACTED].²⁶ This questioning is mainly conducted to allow the Prosecution to comply with its protection obligations under Article 68(1) of the Statute.²⁷
16. The Single Judge therefore observes that, in principle, BSQs bear no connection to the events relevant to the charges and are of a purely personal and operational nature. They are the result of questioning on security-related matters and contain [REDACTED] that is not *per se* material or otherwise disclosable to the Defence. The Single Judge agrees with the Prosecution submission that they are of an exceptional character²⁸ and, accordingly, that they require particular attention from the Chamber as regards its protection obligations under Article 68(1) of the Statute.

²² The Single Judge clarifies that she does not understand the Defence Request to be limited to the audio-recording of these interviews, but instead understands that the Defence seeks to be provided with any record that is in the Prosecution's possession that reproduces the content of the interview, whether it is a transcript or an audio-recording.

²³ Defence Request, ICC-01/12-01/18-667-Conf, para. 20.

²⁴ Annex A to Prosecution Response, ICC-01/12-01/18-699-Conf-AnxA

²⁵ Prosecution Response, ICC-01/12-01/18-699-Conf, para. 3.

²⁶ Prosecution Response, ICC-01/12-01/18-699-Conf, para. 16.

²⁷ Prosecution Response, ICC-01/12-01/18-699-Conf, para. 3.

²⁸ Prosecution Response, ICC-01/12-01/18-699-Conf, para. 16.

17. The Single Judge however also agrees with the Defence that the assessment of ‘materiality’ under Rule 77 of the Rules is to be construed broadly,²⁹ but also emphasises that, as noted above, the Prosecution’s obligations under this provision are not unlimited. In any event, it is recalled that the fact that certain information contained in the BSQs of [REDACTED] falls under Rule 77 is not contested. 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.³⁰
18. The Single Judge further notes the Defence’s submission that, because the information sought comprises ‘evidence of elemental importance to Defence preparation’, it is inappropriate and contrary to the adversarial nature of the proceedings to rely on the Prosecution to recognise and adequately encapsulate material information in the form of summaries.³¹ The Single Judge recalls that the disclosure regime already entrusts the Prosecution with the responsibility to assess the disclosability of any and all information in its possession.³² Moreover, it is noted that relevant safeguards, such as the availability of the present judicial assessment, are in place to ensure the appropriateness and proportionality of exceptions to the rule of full disclosure. As such, the Defence submissions in this regard are misplaced and unconvincing.
19. Before turning to the merits of the Defence Request, the Single Judge recalls Pre-Trial Chamber I’s prior ruling on the preparation of investigation notes for the disclosure of material information contained in the BSQs of [REDACTED], where the approach of the Prosecution was found not abusive in the

²⁹ Defence Request, ICC-01/12-01/18-667-Conf, para. 5.

³⁰ Pre-Trial Chamber I, Decision on the Evidence Disclosure Protocol and Other Related Matters, 16 May 2018, ICC-01/12-01/18-31-tENG-Corr, para. 31.

³¹ Defence Request, ICC-01/12-01/18-667-Conf, paras 10, 13, 19.

³² Decision on witness preparation and familiarisation, 17 March 2020, ICC-01/12-01/18-666, para. 45. See also Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses”, ICC-01/04-02/06-1330 OA03, para. 23.

circumstances.³³ The Single Judge will now proceed to review the appropriateness of this approach at this stage of the proceedings.

(a) Whether there are objectively justifiable risks to the individuals' safety and security?

20. The Defence states that there is no reasonable justification for non-disclosure of the BSQs, notably arguing that the reasoning provided by PTC I on this issue no longer applies.³⁴ In this regard, it notably points to the fact that the Defence is now aware of the identity of [REDACTED] interviewed.³⁵
21. In the present decision, when conducting her assessment of potential risks, the Single Judge has examined the situation in light of the relevant general security situation in Mali. Importantly for the purposes of the present decision, the Single Judge recalls that information indicates that (i) the security situation in Mali continues to deteriorate;³⁶ (ii) the Malian government, the UN and international forces are themselves regularly targeted by extremist groups;³⁷ (iii) [REDACTED];³⁸ (iv) Al Qaeda aligned Jama'at Nusrat al-Islam wa al Muslimin ('JNIM') has a well-established history of taking ruthless action [REDACTED];³⁹ (v) risks [REDACTED] in Timbuktu city and the surrounding region,⁴⁰ and the security situation in the north continues to deteriorate and become increasingly complex;⁴¹ (vi) the security situation in Mali has a

³³ Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement de procédure et de preuve, 30 September 2019, ICC-01/12-01/18-460-Conf-Exp (the 'PTC I Decision'), para. 79

³⁴ Defence Request, ICC-01/12-01/18-667-Conf, para. 8 *referring to* PTC I Decision, ICC-01/12-01/18-460-Conf-Exp-Red, para. 79.

³⁵ Defence Request, ICC-01/12-01/18-667-Conf, para. 8 with Prosecution Response, ICC-01/12-01/18-699-Conf, fn 36.

³⁶ First Registry Report on the Security Situation in Mali, 31 January 2020, ICC-01/12-01/18-571-Conf (with confidential Annex I and confidential, *ex parte* Annex II, only available to the Registry) (the 'Registry Report'), para. 35.

³⁷ Registry Report, ICC-01/12-01/18-571-Conf, para. 20.

³⁸ Registry Report, ICC-01/12-01/18-571-Conf, para. 20.

³⁹ Registry Report, ICC-01/12-01/18-571-Conf, para. 30.

⁴⁰ Registry Report, ICC-01/12-01/18-571-Conf, para. 20.

⁴¹ Registry Report, ICC-01/12-01/18-571-Conf, para. 23.

significant impact on [REDACTED];⁴² and (vii) the capability of JNIM [REDACTED].⁴³

22. The Single Judge notes that [REDACTED] are [REDACTED] in Mali or elsewhere and that, noting their profile, [REDACTED]. Moreover, [REDACTED]. [REDACTED] of associated risks and, in the circumstances, whether it is recommended or even feasible to put in place even minimum mitigating protective measures.
23. In light of the above, and having had particular regard to the fact that [REDACTED], the Single Judge finds that disclosure to the Defence of [REDACTED] represents an objective risks to their safety and privacy.

(b) Whether the measure is necessary, the least intrusive possible, and proportional in the light of the rights of the accused and a fair and impartial trial

24. Noting the nature of these documents, the Single Judge agrees with the Prosecution that disclosing the BSQs themselves is exceptionally risky. The Single Judge finds that disclosure to the Defence of these documents, even in redacted form, represents unnecessary risks, [REDACTED]. Accordingly, while it is not contested that these BSQs contain information which falls within the scope of Rule 77 of the Rules, the Single Judge is of the view that the withholding of the original items is an appropriate and proportional measure, especially as the material information they contain is being extracted and disclosed to the Defence by way of investigation notes.
25. Indeed, applying redactions to BSQs does not sufficiently mitigate the existing risks associated with the potential dissemination of the highly sensitive information they contain, [REDACTED]. As such, the Single Judge considers that the lesser means proposed by the Defence, where it seeks that BSQs be provided in redacted form,⁴⁴ is not an appropriate remedy. In this regard, the Single Judge finds that potential consequences arising from disclosure and

⁴² Registry Report, ICC-01/12-01/18-571-Conf, para. 28.

⁴³ Registry Report, ICC-01/12-01/18-571-Conf, para. 39.

⁴⁴ Defence Request, ICC-01/12-01/18-667-Conf, paras 8, 22.

further dissemination of highly sensitive information [REDACTED] clearly outweighs the limited advantaged gained from disclosing the supplementary content of the BSQs which has been assessed as falling outside the scope of Rule 77 of the Rules.

26. The Single Judge now turns to the three specific arguments raised by the Defence in relation to the provision of summaries, namely that they are (i) insufficient; (ii) incomplete; and (iii) unadapted.
27. The Defence argues that the investigators notes disclosed so far fail to sufficiently summarise the exculpatory and/or material information contained within the BSQs.⁴⁵ The Single Judge is not convinced by the example provided by the Defence,⁴⁶ finds the remainder of the argument speculative, and considers that *inter partes* exchanges are the appropriate forum to address any such concern. The Single Judge further notes that, at the time of filing its response, the Prosecution was preparing addendums to the investigation notes already provided in order to disclose supplementary information to the Defence. Finally, it is noted that disclosure under Rule 77 is ongoing, and that the Prosecution has a duty to continue reviewing the material in its possession throughout the proceedings, notably as certain lines of Defence may become clearer and more precise.
28. Turning to the Defence argument about the lack of consistency in the investigation notes prepared,⁴⁷ the Single Judge finds that this matter was satisfactorily explained by the Prosecution. Details such as the date and location of interviews, or the identity of [REDACTED], were only included in the investigation notes prepared when the interviewee's identity was revealed to the Defence.⁴⁸ Accordingly, it is the Single Judge's understanding that these details, which appears to have been inconsistently included in some of the investigation notes, and excluded from others, can now be disclosed and are being included in the Prosecution's upcoming complementary disclosure via addendum to the

⁴⁵ Defence Request, ICC-01/12-01/18-667-Conf, paras 11-13.

⁴⁶ See Prosecution Response, ICC-01/12-01/18-699-Conf, paras 31-32.

⁴⁷ Defence Request, ICC-01/12-01/18-667-Conf, paras 14-15.

⁴⁸ Prosecution Response, ICC-01/12-01/18-699-Conf, paras 33-37.

investigation notes already prepared and disclosed. This Defence argument therefore has no bearing on the Single Judge's assessment of the necessity and appropriateness of the measure under consideration.

29. The Defence argues that the provision of investigation notes instead of the BSQs is not an appropriate solution as the information sought 'is of a nature that cannot feasibly be extracted and summarised'.⁴⁹ The Defence notably refers to the relevance of the context in which certain information is provided and suggests that, because of the use of code and subtle language, reliance on a summary is not adapted.⁵⁰ The Single Judge finds that the Defence's arguments on this point are speculative and clarifies that, to the extent possible, the Prosecution should attempt to reproduce the disclosable information with all relevant details and in a format which is as close to the original as possible. Further, insofar as context is included to allow the Defence to reasonably understand the excerpts, the Single Judge considers that there is no reason to doubt that, in the present circumstances, information falling under the materiality prong of Rule 77 can appropriately be provided to the Defence by way of summaries of relevant extracts.
30. Finally, and in assessing potential prejudice arising from the implementation of this measure, it does not appear that non-disclosure of the BSQs impacts on the Defence's ability to rely on the relevant information disclosed in the form of investigators notes. Arguments to this effect can hardly be assessed by the Chamber, notably because it has very little to no details about the upcoming Defence application relying on them. As such, and at this stage, these arguments are speculative and can only, in the abstract, be given little weight. The Single Judge however notes that her assessment on the existence of any prejudice is consistent with that of the Pre-Trial Chamber who ruled on 30 September 2019 that disclosure of information found in the BSQs via investigation notes was appropriate⁵¹ and further emphasises that the Defence is now in the possession

⁴⁹ Defence Request, ICC-01/12-01/18-667-Conf, para. 15.

⁵⁰ Defence Request, ICC-01/12-01/18-667-Conf, para. 15.

⁵¹ PTC I Decision, ICC-01/12-01/18-460-Conf-Exp, para. 79.

of the interviewee's identities, which greatly increases the usability of the information disclosed by way of investigation notes.

31. Moreover, the Single Judge notes that the Defence has access to other sources of relevant information material to its preparation concerning [REDACTED]. These include, most notably, the accused himself, who can and has actually already provided information on this issue. The Single Judge further notes that parties are currently in contact with regard to the planning of Defence interviews with relevant investigators who can provide relevant evidence,⁵² as well as with [REDACTED] contacted by the Prosecution of interest to the Defence in this regard.⁵³
32. For completeness, the Single Judge reiterates that she finds that the restrictions sought by the Prosecution to disclosure are appropriate in the circumstances and sufficiently defined, particularly having had regard to [REDACTED] as well as the fact that the content of the BSQs is focused on [REDACTED].
33. In light of the above, the Single Judge is satisfied that the approach adopted so far by the Prosecution as regards the disclosure of Rule 77 information contained in the BSQs of [REDACTED] is appropriate. No further orders are required and the Defence Request is dismissed.
34. The present decision does not pre-determine the issue forecasted in the second Defence request for leave to reply, namely whether by choosing to rely on some of these investigation notes as 'incriminatory items', additional disclosure obligations under Rule 77 of the Rules and/or Article 67(2) of the Statute may be created.

⁵² Prosecution Response, ICC-01/12-01/18-699-Conf, para. 46. *See also*, Defence Request, ICC-01/12-01/18-667-Conf, paras 16-18.

⁵³ Prosecution Response, ICC-01/12-01/18-699-Conf, para. 47.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Defence Request;

AUTHORISES the non-disclosure of the BSQs and the alternative provision of relevant disclosable information via investigation notes containing summaries of relevant extracts; and

PUTS ON THE RECORD, by way of two annexes, the related email submissions and decisions.

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

A handwritten signature in grey ink, appearing to read 'K. Prost', is positioned above a solid horizontal line.

Judge Kimberly Prost, Single Judge

Dated this Wednesday, 29 April 2020

At The Hague, The Netherlands