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Court**

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

Date: **25 June 2021**

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August 2021**

**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*, Annex A [Prosecution and Defence only]**

**Public Redacted Version of “Defence response to ‘Prosecution application under rule  
68(2)(c) to introduce into evidence the prior recorded testimony and associated  
material of Prosecution Witness MLI-OTP-P-0570’”**

**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:**

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## I. Introduction

1. On 1 April 2021, the Prosecution filed its ‘Prosecution application under rule 68(2)(c) to introduce into evidence the prior recorded testimony and associated material of Prosecution Witness MLI-OTP-P-0570’ (‘Prosecution’s Application’).<sup>1</sup>
2. The Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Defence) hereby submits its response within the applicable timeframe.<sup>2</sup> The Defence avers that the Prosecution has failed to establish Witness P-0570’s unavailability to the requisite standard and objects to the application on the basis of the prejudice it will cause to Mr Al Hassan’s fair trial rights as enshrined in the Statute,<sup>3</sup> including the right to examine witnesses called by the Prosecution.<sup>4</sup>
3. The introduction of P-0570’s prior recorded testimony via Rule 68(2)(c) would deprive Mr Al Hassan of an opportunity to cross-examine evidence relating to his alleged acts and conduct, live and important issues in the case or issues on which the witness is uncorroborated and unreliable. P-0570’s testimony discusses a wide array of matters and events which go beyond ‘background’ information;<sup>5</sup> all aspects of her testimony are materially in dispute. The Defence accordingly also opposes the introduction of the items identified by the Prosecution as associated material to P-0570’s prior recorded testimony.
4. The burden of proof falls on the Prosecution to establish the factual threshold required for introducing the prior recorded testimony through Rule 68(2)(c) – supported by evidence of sufficient specificity and probative value to satisfy the Chamber that the applicable requirements are met.<sup>6</sup> Notably, Rule 68(2) applications carry a higher threshold than Rule 68(3) applications, as the Defence is denied the opportunity to cross-examine Rule 68(2) witnesses in court.<sup>7</sup> The European Court of Human Rights (‘ECtHR’) has held that ‘if the prosecution decides that a particular person is a relevant source of information and relies on his or her testimony at the trial, and if the testimony of that witness is used by

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<sup>1</sup> ICC-01/12-01/18-1408-Conf.

<sup>2</sup> Email from Trial Chamber X dated 15 June 2021 at 11:39: “The Single Judge finds that the Defence has identified good cause for the extension of time sought and therefore grants the below request pursuant to Regulation 35 of the Regulations of the Court. The Defence response to Prosecution request ICC-01/12-01/18-1408-Conf may be filed by C.O.B. on 25 June 2021.”

<sup>3</sup> Articles 64(2) and 67(1).

<sup>4</sup> Article 67(1)(e).

<sup>5</sup> ICC-01/12-01/18-1402-Conf-Red, para. 12.

<sup>6</sup> [ICC-01/09-01/11-1938-Corr-Red2](#), para. 37.

<sup>7</sup> [ICC-02/11-01/15-722-Red](#), para. 5.

the court to support a guilty verdict, it must be presumed that his or her personal attendance is necessary.’<sup>8</sup>

5. Pursuant to Regulation 23bis(2) of the Regulations of the Court, the present response is filed confidentially because it responds to a filing of the same classification.

## II. Submissions

*The Prosecution has not established Witness P-0570’s unavailability to the requisite standard*

6. According to Rule 68(2)(c)(i), prior recorded testimony falling under sub-rule (c) may be introduced only if the Chamber is satisfied that the person is unavailable. Trial Chamber IX has previously ruled that the party seeking the introduction of evidence under Rule 68(2)(c) “must submit relevant information substantiating its allegation regarding [the witness’ unavailability]”.<sup>9</sup> Trial Chamber IV has found that a statement from an alleged widow is insufficient proof of unavailability where it might still be possible to obtain a death certificate.<sup>10</sup>
7. In the present case, the Prosecution claims that P-0570 is unavailable to testify “due to obstacles that cannot be overcome with reasonable diligence”, namely on account of [REDACTED].<sup>11</sup> However, P-0570’s unavailability to testify has not been demonstrated to the requisite standard. The Prosecution’s evidence of P-0570’s unavailability is based on an unsworn statement and copies of only partially legible [REDACTED], and two expert reports based almost exclusively on the same documents and one video-call.
8. [REDACTED] is tainted by [REDACTED],<sup>12</sup> [REDACTED]<sup>13</sup> and [REDACTED],<sup>14</sup> [REDACTED],<sup>15</sup> [REDACTED],<sup>16</sup> and [REDACTED].<sup>17</sup> [REDACTED] is not an impartial actor in these proceedings. Moreover, the information was not obtained in a formal context or in a sworn statement, and the Prosecution has confirmed that

<sup>8</sup> ECtHR Fourth Section, [Keskin v. The Netherlands](#), 2205/16, para. 45, citing, [Khordorkovsky and Lebedev v. Russia](#), 11082/06 and 13772/05, para. 712, and [Khordorkovsky and Lebedev v. Russia \(No. 2\)](#), 51111/07 and 42757/05, para. 484.

<sup>9</sup> [ICC-02/04-01/15-1288](#), para. 9.

<sup>10</sup> [ICC-01/04-02/06-1029](#), para. 43.

<sup>11</sup> ICC-01/12-01/18-1408-Conf, paras. 12-19.

<sup>12</sup> [REDACTED].

<sup>13</sup> [REDACTED].

<sup>14</sup> [REDACTED].

<sup>15</sup> [REDACTED].

<sup>16</sup> [REDACTED].

<sup>17</sup> [REDACTED].

[REDACTED].<sup>18</sup> For these reasons [REDACTED] is unreliable and any information provided by her regarding P-0570's [REDACTED] or ability to testify is inadmissible or at best insufficient to establish P-0570's unavailability to testify.

9. The [REDACTED] obtained by the Prosecution through [REDACTED] are unreliable and do not support the Prosecution's case.<sup>19</sup> The documents appear to be scans of only partially legible hand-written [REDACTED]. The Prosecution has not demonstrated the chain of custody for these documents. The documents' provenance – through [REDACTED] under unknown and undocumented circumstances<sup>20</sup> – further undermines their reliability as genuine [REDACTED]. Furthermore, the documents do not support the Prosecution's argument that P-0570 is unavailable to testify due to obstacles that cannot be overcome with reasonable diligence. The documents appear to indicate that P-0570 had [REDACTED],<sup>21</sup> [REDACTED],<sup>22</sup> and [REDACTED].<sup>23</sup> Notably, the document dated February 2020 makes no mention of any [REDACTED] resulting from [REDACTED]. None does. None of these conditions supports P-0570's inability to testify *per se*, in person or via video-link. Prosecution expert [REDACTED] suggests that report [REDACTED];<sup>24</sup> however, the document is of such poor quality (and unknown provenance) that this conclusion is not reliable. Prosecution expert [REDACTED] is unable properly to discern this [REDACTED] - or any other - from the document.<sup>25</sup>

10. The [REDACTED] reports submitted by the Prosecution similarly fail to establish P-0570's unavailability to the requisite standard:

The first is a report by [REDACTED].<sup>26</sup> The author had no contact with P-0570 and the entire report is based on the expert's reading of the aforementioned [REDACTED]. The report is therefore tainted by the unreliability of the documents. Furthermore, nothing in the report establishes P-0570's inability to testify: the author merely hypothesises that P-0570 [REDACTED] may need additional support during interviews.<sup>27</sup>

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<sup>18</sup> Prosecution email dated 23 April 2021: Annex A.

<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

<sup>22</sup> [REDACTED].

<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> Prosecution expert [REDACTED] also found this part of the document illegible (*pas lisible*) – [REDACTED].

<sup>26</sup> [REDACTED].

<sup>27</sup> [REDACTED].

The second is a report [REDACTED] based on an examination of the above mentioned documents and a video-call with P-0570. According to [REDACTED], the [REDACTED] indicate that P-0570 [REDACTED]. [REDACTED] was unable to discern further information from the documents because they are illegible (*pas lisible*).<sup>28</sup> [REDACTED] was unable to [REDACTED] over the video-call;<sup>29</sup> does not understand or speak the same language as P-0570;<sup>30</sup> and was unable to test P-0570's [REDACTED].<sup>31</sup> [REDACTED]'s assessment of P-0570 [REDACTED] was based entirely on what P-0570 told him, through an interpreter. He concluded that a [REDACTED].<sup>32</sup> As such, [REDACTED] was unable to diagnose P-0570's condition, and any conclusions that he drew on her ability to [REDACTED] testify are entirely speculative and based on incomplete and unreliable information. Moreover, the Defence notes that [REDACTED] is the same individual who produced an opinion for the Prosecution disputing the Defence expert's opinion on the torture endured by Mr Al Hassan in custody.<sup>33</sup> In that opinion, [REDACTED] suggested that the Defence expert failed to exclude all contrary possibilities, effectively reversing the burden of proof<sup>34</sup> and rejected her findings based on, *inter alia*, the limitations of the Defence's expert in-person examination of Mr Al Hassan.<sup>35</sup> In the present case, [REDACTED] reversed his approach, and confirmed the Prosecution's hypothesis notwithstanding his own admission that he was unable to conduct a genuine examination and lacked legible documentation. [REDACTED]'s prior engagement in this case, and the inconsistency between his approaches, further undermine his conclusions.

11. Consequently, the Prosecution has failed to demonstrate Witness P-0570's unavailability to testify to the requisite standard.

***There are insufficient counterbalancing factors to permit a fair assessment of the evidence***

12. The admission of untested witness evidence in the form of a prior recorded testimony requires sufficient counterbalancing factors to permit a fair and proper assessment of the

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<sup>28</sup> [REDACTED].

<sup>29</sup> [REDACTED].

<sup>30</sup> [REDACTED].

<sup>31</sup> [REDACTED].

<sup>32</sup> [REDACTED].

<sup>33</sup> [REDACTED].

<sup>34</sup> [REDACTED].

<sup>35</sup> [REDACTED].

reliability of that evidence.<sup>36</sup> In the absence of the ability properly to assess reliability, the Chamber will not be able to determine that the P-0570's statement is sufficiently reliable, relevant and probative to outweigh the fundamental premises of a fair trial.

13. P-0570's prior recorded testimony: goes to proof of Mr Al Hassan's conduct; concerns important aspects of the charges facing Mr Al Hassan; is largely uncorroborated; and is internally inconsistent. Because her identity was withheld until 1 April 2021, the Defence was not able to investigate P-0570 during the pre-trial phase.<sup>37</sup> Further, the Court is provided with only a summary statement *prepared by the Prosecution*, falling far short of the possible safeguards of, e.g., a video-recording of the investigative questioning that would permit the Court and the Defence at least some observation of her demeanour under questioning, or indirect Defence questioning.<sup>38</sup> For all these reasons, the Court will never be able to make a fair and proper assessment of the reliability of P-0570's prior testimony and its admission would therefore affect the fairness of the trial.

*(a) P-0570's prior recorded testimony goes to proof of Mr Al Hassan's acts and conduct*

14. According to Rule 68(2)(c)(ii), "the fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it". The term 'acts and conduct' refers to actions of the accused which are described in the charges brought against him *or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged*.<sup>39</sup> This includes testimony that – although not explicitly mentioning the accused – is tendered to prove the acts and conduct of the accused.<sup>40</sup> According to Trial Chamber VI, "this factor relates principally to the fair trial rights of the accused and his right to examine the witnesses testifying as to his acts and conduct".<sup>41</sup> In assessing the prejudicial impact of the testimony of Mr Al Hassan, the

<sup>36</sup> ECtHR Grand Chamber, [Al-Khawaja and Tahery v. The United Kingdom](#), 26766/05 and 22228/06, para. 147; [Schatschaschwili v. Germany](#), 9154/10, especially paras 107, 125.

<sup>37</sup> Trial INCRIM package 120 01 April 2021, ICC-01/12-01/18-1443.

<sup>38</sup> ECtHR Grand Chamber, [Schatschaschwili v. Germany](#), 9154/10, paras 127, 129, 130.

<sup>39</sup> [ICC-02/04-01/15-596-Red](#), para. 12.

<sup>40</sup> [ICC-01/05-01/13-1430](#), para. 8; [ICC-02/04-01/15-596-Red](#), fn. 26; [ICC-01/05-01/13-1430](#), para. 8.

<sup>41</sup> [ICC-01/04-02/06-2242-Red](#), para. 54.

Chamber should consider whether the references are of a “peripheral discrete” nature, or conversely are of significance to the case.<sup>42</sup>

15. P-0570’s testimony discusses a wide array of matters and events which go beyond ‘background’ information;<sup>43</sup> all aspects of her testimony are materially in dispute. The Chamber has previously dismissed a Rule 68(2) Request for the submission of prior recorded testimony of such a nature, finding that the Defence ought to be afforded the opportunity to cross-examine.<sup>44</sup>

16. The Prosecution relies on P-0570’s prior recorded testimony to charge Mr Al Hassan with [REDACTED].<sup>45</sup> The Prosecution also relies on P-0570’s prior recorded testimony as the sole evidence of Mr Al Hassan’s responsibility for [REDACTED].<sup>46</sup> Whilst the Prosecution does not allege that Mr Al Hassan perpetrated these crimes directly, P-0570’s testimony is relied upon to establish his criminal responsibility for the acts as the Prosecution avers that [REDACTED].<sup>47</sup>

17. P-0570’s allegations, relied upon to establish Mr Al Hassan’s criminal responsibility for the charged crimes, are by no means ‘peripheral discreet’ – they are at the heart of the Prosecution’s case against Mr Al Hassan. Allowing such allegations to be admitted into evidence without any possibility for the Defence to question and challenge their author would be antithetical to Mr Al Hassan’s right to examine or have examined the witnesses against him,<sup>48</sup> and would therefore cause him undue prejudice.

*(b) P-0570’s prior recorded testimony raises live and important issues in the case and their introduction into evidence would be unduly prejudicial*

18. According to Trial Chamber VII, “in exercising its discretion in allowing the introduction of previously recorded testimony under Rule 68(2)(c) of the Rules, it may take into consideration, inter alia, the following factors: (i) whether the evidence relates to issues

<sup>42</sup> [ICC-02/04-01/15-596-Red](#), para. 13; [ICC-02/04-01/15-1294](#), para. 5; [ICC-02/11-01/15-950-Red](#), para. 72 (considerations applicable to Rule 68(2)(b) applications are applicable to Rule 68(2)(c) applications *mutatis mutandis*).

<sup>43</sup> ICC-01/12-01/18-1402-Conf-Red, para. 12.

<sup>44</sup> ICC-01/12-01/18-1402-Conf-Red, paras 12-13.

<sup>45</sup> ICC-01/12-01/18-819-Conf-AnxA, para. 154; ICC-01/12-01/18-894-Conf, paras. 77-81.

<sup>46</sup> ICC-01/12-01/18-819-Conf-AnxA, para. 261.

<sup>47</sup> ICC-01/12-01/18-819-Conf-AnxA, para. 243.

<sup>48</sup> Article 67(1)(e).

that are not materially in dispute; (ii) whether the evidence is central to the allegations or the case; and (iii) whether the evidence is purportedly corroborative.”<sup>49</sup> This is consistent with jurisprudence relating to the application of Rule 68(2)(b), which prohibits the use of that mechanism to introduce evidence pertaining to live and important issues in the case.<sup>50</sup> The rationale behind the prohibition is equally applicable to Rule 68(2)(c) applications – i.e. that the introduction of prior recorded testimony pertaining to live, important and uncorroborated issues in the case without the possibility of cross examination by the Defence would constitute undue prejudice.

19. The Prosecution has relied on P-0570’s prior recorded testimony to advance the following live and important issues in its case, namely:

- a. That the armed groups controlled “every aspect of the population’s private lives”.<sup>51</sup>
- b. That civilians were arbitrarily arrested and detained.<sup>52</sup>
- c. That some women and girls were subjected to a system of forced marriage and were made victims of sexual slavery and rape.<sup>53</sup>
- d. That P-0570 was arrested [REDACTED], was beaten and detained [REDACTED].<sup>54</sup> This aspect of P-0570’s prior recorded testimony is uncorroborated by any other evidence.
- e. That the armed groups passed sentences without due process: by failing to provide adequate time and facilities to prepare a defence, [REDACTED].<sup>55</sup>
- f. The [REDACTED].<sup>56</sup> This is uncorroborated by any other evidence.

20. The above extracts from P-0570’s prior recorded testimony have all been relied upon by the Prosecution to underpin issues that are central to the case and are materially in dispute. As noted, key allegations in P-0570’s prior recorded statement – most notably those pertaining to alleged crimes committed against P-0570 and [REDACTED] – are uncorroborated. The Prosecution does not appear to have made any effort to identify other individuals who could testify in respect of these allegations in *lieu* of P-0570.

<sup>49</sup> [ICC-01/05-01/13-1481-Red-Corr](#), para. 21.

<sup>50</sup> [ICC-01/04-01/07-2362](#), paras 27-28, 33-34; [ICC-02/04-01/15-596-Red](#), paras 214-215.

<sup>51</sup> ICC-01/12-01/18-819-Conf-AnxA, para. 5, citing [REDACTED].

<sup>52</sup> ICC-01/12-01/18-819-Conf-AnxA, para. 7, citing [REDACTED].

<sup>53</sup> ICC-01/12-01/18-819-Conf-AnxA, para. 8, citing [REDACTED].

<sup>54</sup> ICC-01/12-01/18-819-Conf-AnxA, para. 154, citing [REDACTED].

<sup>55</sup> ICC-01/12-01/18-819-Conf-AnxA, para. 154, citing [REDACTED].

<sup>56</sup> ICC-01/12-01/18-819-Conf-AnxA, para. 261 – citing [REDACTED].

*(c) The absence of corroborative evidence supporting the untested witness statement renders the admission of P-0570's statement unduly prejudicial*

21. P-0570's prior recorded testimony is inconsistent and uncorroborated. To admit such evidence without the ability for the Defence to test it through cross-examination would be prejudicial and affect the fairness of the trial. The ICTY found that 'absent any corroborative evidence, it would be unsafe to rely on evidence of [...] a witness who was unable to return to the Tribunal for cross-examination because of ill-health.'<sup>57</sup> The ICTY also noted that where testimony relates to central issues in the case:

*[T]he lack of cross-examination would mean that the probative value of the testimony is substantially outweighed by the Accused's right to a fair trial, unless the Chamber is satisfied as to the reliability of the witness's testimony with there also being strong corroboration from other witnesses as to the central allegations.'*<sup>58</sup>

22. The Appeals Chamber in Ntaganda held that:

*[T]he extent to which a prior recorded statement is corroborated by other evidence is also important in determining the weight to be accorded to it and this must be carefully assessed in light of the full evidentiary record and in relation to the issue(s) to be determined.'*<sup>59</sup>

Even when assessed in light of the evidentiary record as a whole, there is not only an absence of corroborating evidence, but rather contradictory evidence. P-0570's assertions cannot, therefore, be found to be sufficiently probative.

23. The existence of corroboration on some or all aspects also does not exempt the Chamber from the obligation to exclude the statement if (i) the statement is being relied upon to establish – to a significant degree – a disputed fact that would result in a conviction for a particular incident or incidents, and (ii) the necessary *indicia* of reliability are missing or the Defence is unduly handicapped as a result of its inability to test key aspects of the evidence.<sup>60</sup>

<sup>57</sup> ICTY, [Prosecutor v. Haradinaj](#), Reasons for Trial Chamber's Decision to Exclude the Evidence of Witness 55 Under Rule 89(D) and Deny his Testimony Pursuant to Rule 92 Quater, para. 9, citing [Prosecutor v. Brdanin](#), Trial Judgement, fns 944 and 2261.

<sup>58</sup> ICTY, [Prosecutor v. Haradinaj](#), para. 10.

<sup>59</sup> ICC-01/04-02/06-2666-Red, para. 630.

<sup>60</sup> [Schatschaschwili v. Germany](#), 9154/10, para. 116: "Given that the Court's concern is to ascertain whether the proceedings as a whole were fair, it must review the existence of sufficient counterbalancing factors not only in cases in which the evidence given by an absent witness was the sole or decisive basis for the applicant's conviction but also in those cases where, following its assessment of the domestic courts' evaluation of the weight of the evidence [...], it finds it unclear whether the evidence in question was the sole or decisive basis but is nevertheless satisfied that it carried significant weight and that its admission may have handicapped the

24. Allowing this prior recorded testimony to be admitted into evidence without any possibility for the Defence to question and challenge their author would be antithetical to Mr Al Hassan's right to examine or have examined the witnesses against him,<sup>61</sup> and would therefore cause him undue prejudice.
25. The charged incident regarding [REDACTED] relies solely on the account made by Witness P-0570. Relying only on P-0570's statement, the Prosecution charged [REDACTED]'s incident under counts [REDACTED]. However, P-0570's prior recorded testimony P-0570 includes only one paragraph regarding [REDACTED], does not describe the alleged perpetrator, does not mention the role of the armed group in this incident, and furthermore contains uncorroborated elements related to the general incident of [REDACTED]. P-0570 alleges that [REDACTED].<sup>62</sup> The Defence is not in possession of any information that corroborates any of these assertions. P-0570 does not provide a date for this alleged incident, so it cannot be found that this incident occurred in the related period of the case. The alleged incident regarding [REDACTED] and the account recalled by P-0570 must therefore be considered wholly uncorroborated. The introduction of such material without the opportunity to explore its reliability through cross-examination would cause undue prejudice to the Defence.
26. Other claims made by P-0570 are so outlandish – and uncorroborated by any other evidence in the case - that the fact that she made them casts further doubt on the reliability of her evidence as a whole:
- a. [REDACTED];<sup>63</sup>
  - b. [REDACTED];<sup>64</sup>
  - c. [REDACTED];<sup>65</sup>
  - d. [REDACTED].<sup>66</sup>

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defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair will depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair."

<sup>61</sup> Article 67(1)(e).

<sup>62</sup> [REDACTED].

<sup>63</sup> [REDACTED].

<sup>64</sup> [REDACTED].

<sup>65</sup> [REDACTED].

<sup>66</sup> [REDACTED].

*(d) P-0570's prior recorded testimony lacks sufficient indicia of reliability and its introduction into evidence would be unduly prejudicial*

27. Rule 68(2)(c)(i) requires prior recorded testimony to have sufficient indicia of reliability.

Whilst the Chamber is not obliged to consider factors beyond formal requirements in its assessment of indicia of reliability, neither is the Chamber precluded from considering other factors, where necessary and appropriate.<sup>67</sup> In *Haradinaj*, the ICTY set out the following criteria for determining the reliability of an unavailable witness under Rule 92*quater*: (a) the circumstances in which the statement was made and recorded (in particular whether the statement was (i) given under oath, (ii) signed by the witness with accompanying acknowledgment that it was true to the best of his/her recollection, and (iii) taken with the assistance of a duly qualified, Registry-approved interpreter); (b) whether it was subject to cross-examination; (c) whether the statement (particularly unsworn statements not subject to cross-examination) relates to events about which there is other evidence; and (d) other factors such as the absence of manifest or obvious inconsistencies in the statement.<sup>68</sup>

28. At the outset, the Defence observes that P-0570's 'statement' is a summary noted in French of an interview conducted in Songhaï and French: it is not a verbatim transcript reflecting the questions and answers put to the witness. The Defence cannot, therefore, ascertain the manner in which information was elicited from P-0570. P-0570 also does not [REDACTED].<sup>69</sup> It is not known whether the interpreter was approved by the Registry,<sup>70</sup> and since their identity has been withheld from the Defence, the Defence cannot verify their skills or neutrality. Significant issues regarding the accuracy of interpretation between French and Songhaï have arisen in the course of the trial proceedings, raising concerns as to the accuracy of P-0570's statement.<sup>71</sup> This necessarily impacts its reliability. The Court remains denied the audio-recording.

<sup>67</sup> [ICC-02/11-01/15-744](#), para. 104.

<sup>68</sup> ICTY, [Prosecutor v. Haradinaj](#), Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater* and 13<sup>th</sup> Motion for Trial-Related Protective Measures, para. 8.

<sup>69</sup> [REDACTED].

<sup>70</sup> ICTY, [Prosecutor v. Mladić](#), IT-09-92-T, Decision on Prosecution Rule *Quater* Motion (Witness RM-012), para. 6.

<sup>71</sup> See for example ICC-01/12-01/18-T-069-CONF-ENG ET, p. 24 lns 2-25, p. 25 lns 1-2; ICC-01/12-01/18-T-072-CONF-FRA ET, p. 37 lns 1-25; ICC-01/12-01/18-T-051-CONF-ENG ET, p. 14 lns 18-25, p. 15 lns 1-5.

29. In the present case, P-0570's prior recorded testimony contains a number of manifest and obvious inconsistencies that cast serious doubt on the reliability of her evidence:

- a. P-0570 makes contradictory statements about one or several members of armed groups [REDACTED]. [REDACTED].<sup>72</sup> P-0570 goes on to say that [REDACTED].<sup>73</sup> She describes the [REDACTED].<sup>74</sup> She says that [REDACTED].<sup>75</sup> When confronted with her prior account about [REDACTED], P-0570 declared that it was [REDACTED].<sup>76</sup> Her accounts are contradictory [REDACTED]. These contradictions were not effectively challenged by the investigators and could be resolved only through cross-examination.
- b. P-0570 describes being arrested [REDACTED].<sup>77</sup> There is however no indication that [REDACTED]. The date of the [REDACTED] of P-0570 is crucial in addressing the potential role of the Islamic Police or the Hesbah in her [REDACTED] as well as the impact on Mr Al Hassan's potential knowledge and contribution to the alleged incident. These are issues that could be resolved only through cross-examination.
- c. P-0570 describes [REDACTED].<sup>78</sup> She then goes on to state that [REDACTED].<sup>79</sup> Even allowing for a poor grasp of arithmetic, it is difficult to mistake [REDACTED]. The inconsistency demonstrates P-0570's unreliability on key details. The investigators did not question this inconsistency, which could be resolved only through cross-examination.
- d. P-0570 states that [REDACTED].<sup>80</sup> She confirms this again at the end of her statement.<sup>81</sup> This is belied by [REDACTED]. When confronted with [REDACTED], she acknowledges that [REDACTED].<sup>82</sup> When asked about an inconsistency between the two statements, she claims that [REDACTED].<sup>83</sup> Furthermore, according to [REDACTED]. The fact that she does not recall, or chooses not to mention (twice), the fact [REDACTED], undermines the reliability

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<sup>72</sup> [REDACTED].

<sup>73</sup> [REDACTED].

<sup>74</sup> [REDACTED].

<sup>75</sup> [REDACTED].

<sup>76</sup> [REDACTED].

<sup>77</sup> [REDACTED].

<sup>78</sup> [REDACTED].

<sup>79</sup> [REDACTED].

<sup>80</sup> [REDACTED].

<sup>81</sup> [REDACTED].

<sup>82</sup> [REDACTED].

<sup>83</sup> [REDACTED].

of her evidence. These are issues that could be resolved only through cross-examination.

- e. Throughout her prior recorded testimony, P-0570 refers to [REDACTED] as the place [REDACTED]. Nevertheless, the Prosecution states: [REDACTED], explaining in a footnote that [REDACTED].<sup>84</sup> The Prosecution thus seeks to promote an inference that is in fact contradicted by P-0570's testimony. [REDACTED].<sup>85</sup> [REDACTED]. P-0570 uses terms such as [REDACTED]<sup>86</sup>, [REDACTED]<sup>87</sup>, [REDACTED]<sup>88</sup> with no identification of direction or distance travelled. P-0570's sense of direction is also called into question by [REDACTED].<sup>89</sup> [REDACTED]. Furthermore, the details P-0570 provided [REDACTED] are not consistent [REDACTED].<sup>90</sup> Considering theses inconsistencies and the vagueness of her description, testing the evidence of the Witness during cross-examination using maps and the SITU presentation is necessary.

30. This issue is critical to the Prosecution's case and goes directly to the alleged guilt of Mr Al Hassan. The Prosecution has not presented evidence linking Mr Al Hassan to [REDACTED]. Without the possibility of examining P-0570 on this point to clarify the location of the alleged crimes, admitting her statement into evidence would cause extreme undue prejudice to Mr Al Hassan.

31. Where a factual finding is based on an inference drawn from circumstantial evidence, the finding is established beyond reasonable doubt only if it was the only reasonable conclusion that could be drawn from the evidence.<sup>91</sup> A conclusion pointing to the guilt of the accused must be the only reasonable conclusion available.<sup>92</sup> P-0570 – apparently accurately – describes the route taken to [REDACTED]. Another possible – and likely more appropriate – inference in this instance is therefore that P-0570 refers to [REDACTED] rather than [REDACTED].

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<sup>84</sup> ICC-01/12-01/18-819-Conf-AnxA, para 154, fn 511.

<sup>85</sup> [REDACTED].

<sup>86</sup> [REDACTED].

<sup>87</sup> [REDACTED].

<sup>88</sup> [REDACTED].

<sup>89</sup> [REDACTED].

<sup>90</sup> [REDACTED].

<sup>91</sup> [ICC-01/05-01/13-2275-Red](#), para. 868.

<sup>92</sup> [ICC-01/05-01/13-2275-Red](#), para. 868.

32. In all these instances, when prompted by investigators, P-0570 was unable to explain the manifest and obvious inconsistencies, which casts universal doubt on her reliability as a witness. Her inability to explain the inconsistencies was not properly tested by the investigators.

*(e) The Defence was denied important counter-balancing measures*

33. The denial of a key counterbalancing measure, namely Defence questioning of P-0570 during the investigation stage, must be taken into consideration.<sup>93</sup> The Defence was not in a position to investigate P-0570's evidence during the Pre-Trial phase of the case as the identity and the details of her allegations were withheld from the Defence [REDACTED].<sup>94</sup> The prejudice to the Defence is further exacerbated by the withholding of information relating to [REDACTED], preventing Defence investigation of P-0570 and [REDACTED]'s charged incidents.

34. Additionally, since Mr Al Hassan has no personal knowledge of Witness P-0570 or her alleged [REDACTED], the Defence cannot seek instructions with regards to the facts of her prior recorded testimony. Only cross-examination would allow the Defence to address specific issues of inconsistency and reliability.

35. The Defence and the Court are also deprived of a proper record of P-0570's earlier testimony, provided in [REDACTED].<sup>95</sup> The Prosecution has explained that [REDACTED].<sup>96</sup> Even where factors are beyond the control of the Prosecution, this does not remedy the prejudice arising from the reliance on material that cannot be tested through cross-examination.<sup>97</sup>

36. Withholding P-0570's and [REDACTED]'s identities has steeply inhibited (or totally precluded) the ability of the Defence to question appropriately other witnesses that have or could have provided relevant testimony. The advanced stage of the Prosecution's case significantly amplifies the undue prejudice to the Defence occasioned by the delayed disclosure of their identities. The prejudice is manifest: for example, directly due to the delayed disclosure of her identity, the Defence has been prevented from questioning

<sup>93</sup> ECtHR, [Rowe and Davis v. United Kingdom](#), 28901/95, para. 61.

<sup>94</sup> [REDACTED]; ICC-01/12-01/18-794-Conf-Red, para 24.

<sup>95</sup> [REDACTED].

<sup>96</sup> [REDACTED].

<sup>97</sup> ECtHR, [Schatschaschwili v. Germany](#), 9154/10, para. 113.

[REDACTED] about P-0570 or other complainants who have testified and who may (following Defence investigations) be found to be linked to P-0570. Operating under a heavy handicap, the Defence has been denied the effective possibility to challenge P-0570's credibility and reliability, and thus denied any counterbalancing safeguard.<sup>98</sup> The procedure followed has thus permitted the Prosecution to determine the meaning of P-0570's prior recorded testimony (itself only a summary prepared by Prosecution investigators) outside the scrutiny of the Defence and the Court. The ECtHR has consistently found that admission of material in such circumstances would contravene fundamental fair trial rights, including the rights to adequate facilities to prepare a defence, and to examine incriminating witnesses.<sup>99</sup>

***Prejudice to the Defence occasioned by the absence of Witness P-0570***

37. Allowing such unreliable prior recorded testimony to be admitted into evidence without any possibility for the Defence to question and challenge their author would be antithetical to Mr Al Hassan's Article 67(1)(e) right to examine or have examined the witnesses against him, and therefore cause him undue prejudice.
38. Prejudice would be occasioned by submission of P-0570's prior recorded testimony pursuant to Rule 68(2)(c) as the Defence would be deprived of an opportunity to question P-0570 concerning her links to [REDACTED] and other individuals present immediately prior to, and during, [REDACTED]<sup>100</sup> where P-0570 was assisted by [REDACTED].<sup>101</sup> [REDACTED].<sup>102</sup> [REDACTED],<sup>103</sup> [REDACTED],<sup>104</sup> [REDACTED]<sup>105</sup> and [REDACTED]<sup>106</sup> provided *procès-verbaux*, and were all assisted by [REDACTED]. [REDACTED].<sup>107</sup> In the event that P-0570's evidence is submitted through Rule 68(2)(c), the Defence will be deprived of an ability to question her concerning her links to these

<sup>98</sup> ECtHR, [Yakuba v. Ukraine](#), 1452/09, paras 43 to 46.

<sup>99</sup> ECtHR, [Yakuba v. Ukraine](#), 1452/09, especially paras 49-53; [Rowe and Davis v. United Kingdom](#), 28901/95 para. 63; [Matanović v. Croatia](#), 2742/12, para. 161.

<sup>100</sup> [REDACTED].

<sup>101</sup> [REDACTED].

<sup>102</sup> [REDACTED].

<sup>103</sup> [REDACTED].

<sup>104</sup> [REDACTED].

<sup>105</sup> [REDACTED].

<sup>106</sup> [REDACTED].

<sup>107</sup> [REDACTED].

individuals, any discussions that she had concerning her evidence with these individuals, and the impact of the other individuals' evidence on her.

39. Further prejudice is occasioned by the Defence inability to cross-examine the Witness regarding her potential participation in [REDACTED] in Timbuktu. [REDACTED].<sup>108</sup> [REDACTED].<sup>109</sup> Considering the fact that P-0570 [REDACTED],<sup>110</sup> the probability of Witness P-0570 participating in this [REDACTED] is considerable. The Defence would have cross-examined P-0570 regarding her attendance at any of [REDACTED]. The potential cross-pollination of the [REDACTED] was not assessed by the investigators at the time of the interview with P-0570. The Chamber's assessment of reliability thus requires exploration of her direct knowledge under cross-examination.

***The Defence objects to the introduction of associated material into evidence***

40. Materials associated with the prior recorded statements are admissible only if (i) the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced (forming an integral part of the statement), and (ii) their admission is not unduly prejudicial to the accused in accordance with Article 69(4) of the Statute (any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence).<sup>111</sup>
41. The associated material consists of 14 photographs and video extracts that were shown to P-0570 in the course of the interview. The Prosecution has not demonstrated that this material is not unduly prejudicial to Mr Al Hassan. The witness did not create, edit or handle the images in question. P-0570 was simply shown the material for the purpose of demonstrating her visual recognition of certain persons and places. Without cross-examination, the Defence is unable to test the witness' recognition or whether the recognition arises from personal experience, hearsay or evidence contamination by investigators or others. Moreover, the Defence is precluded from confronting the witness with parts of her testimony where she failed to recognise persons and places.

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<sup>108</sup> [REDACTED].

<sup>109</sup> [REDACTED].

<sup>110</sup> [REDACTED].

<sup>111</sup> [ICC-01/09-01/11-1938-Corr-Red2](#), para. 33; [ICC-02/04-01/15-596-Red](#), para. 10.

42. For these reasons, the Defence opposes the introduction of the items identified by the Prosecution as associated material to P-0570's prior recorded testimony.

### **III. Relief Sought**

43. The introduction of evidence under Rule 68(2)(c) is antithetical to the principles of orality and publicity and the adversarial nature of criminal proceedings,<sup>112</sup> and as such must be restricted to circumstances where it can have no prejudicial effect on the rights of the accused. The defendant's right to cross-examine prosecution witnesses is a paramount feature of a fair trial, particularly in relation to evidence that pertains to acts and conduct of the accused, live and important issues in the case, or matters marred by unreliability.<sup>113</sup>

44. For all of the above reasons, the Defence objects to the introduction of P-0570's prior recorded testimony. The introduction of her prior recorded testimony would deprive Mr Al Hassan of an opportunity to cross examine evidence of his alleged acts and conduct and other matters that go to the heart of the Prosecution's case or on which the witness is unreliable and/or uncorroborated. Introducing P-0570's prior recorded testimony - or associated material - would thus cause undue prejudice to Mr Al Hassan.

45. Evidence obtained by witnesses under conditions in which the rights of the Defence cannot be secured to the extent normally required by the Statute must be treated with extreme caution.<sup>114</sup> In the event that the Chamber grants the Prosecution's Application in full, the impugned material identified herein cannot be afforded significant or any evidential weight. Conversely, exculpatory aspects of P-0570's prior recorded testimony deserve full weight because the Prosecution had an opportunity to question the witness and would suffer no prejudice.



<sup>112</sup> [ICC-01/14-01/18-685](#), para. 30.

<sup>113</sup> [ICC-01/14-01/18-685](#), para. 33; see also: [ICC-01/05-01/08-1386](#), para. 76: [The advantages of testimony given *viva voce* are] "[n]ot only is the testimony given under oath and under the Chamber's oversight, it further enables the Chamber and the accused to hear natural and spontaneous accounts from witnesses, to directly and closely observe their reactions, demeanour and composure, and to immediately seek clarifications".

<sup>114</sup> ECtHR, [Doorson v. The Netherlands](#), 20524/92, para. 76.

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Dated this 25<sup>th</sup> Day of June 2021  
At The Hague, The Netherlands