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**International
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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 Annexes A and B

Public Redacted Version of “Defence Response to ‘Prosecution’s request to retain redactions on one item related to Prosecution Witness MLI-OTP-P-0570 and to the identity of Prosecution intermediary MLI-OTP-P-0572””

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 4 May 2021, the Office of the Prosecutor ('Prosecution') filed its 'Request to retain redactions on one item related to Prosecution Witness MLI-OTP-P-0570 and to the identity of Prosecution intermediary MLI-OTP-P-0572' ('Request').¹ By the Request, the Prosecution seeks the Trial Chamber's authorisation to retain redactions in [REDACTED] and to the identity of [REDACTED] P-0572. The Request is made in response to the Defence's request to order the Prosecution to lift the impugned redactions.²
2. The Defence reiterates its position that the redactions prevent the Defence from conducting effective inquiries necessary for opposing the 'Prosecution application under rule 68(2)(c) to introduce into evidence the prior recorded testimony and associated material of P-0570 ('Rule 68(2)(c) Application').³ Failure to lift the impugned redactions is contrary to established precedent and will deny Mr Al Hassan adequate facilities to prepare his Defence. On 5 May 2021, the Trial Chamber set the deadline for any related responses to 7 May 2021.⁴

II. Confidentiality

3. Pursuant to Regulation 23bis(2) of the Regulations of Court, this response has been filed confidentially as it responds to a filing of the same classification.

III. Submissions

4. By way of preliminary remarks, the Defence refers to the Court's *dictum* that standardised justifications based on generalised security concerns are problematic, and do not constitute a sufficient basis to deny disclosure.⁵ The Request fails to

¹ ICC-01/12-01/18-1462-Conf.

² Annex A, pp. 4-5.

³ ICC-01/12-01/18-1408-Conf.

⁴ Annex A, p. 1.

⁵ [ICC-01/09-01/11-743-Red](#), para. 26: "As to the Prosecution's requests for category B.2 and B.3 redactions, the Chamber recalls its recent findings on a similar Prosecution redaction request that: (i) it was generally not convinced by standardised justifications that a person is a family member of a witness was sufficient, without more, to demonstrate the existence of an objectively justifiable risk and (ii) general references to security concerns were insufficient to establish an objectively justifiable risk to a person's security. The Chamber notes

demonstrate specific reasons for denying disclosure of the requested information, beyond *pro forma* justifications based on generalised security concerns. As directed by the Chamber, “the burden remains with the disclosing party to justify any redaction, whether it falls within or outside the standard categories”.⁶

(a) Redactions to [REDACTED]

5. As confirmed by the Prosecution, the impugned [REDACTED] redactions applied to [REDACTED] relate to [REDACTED]. From the outset, the Prosecution has failed to establish that the [REDACTED] in question are ‘other persons at risk’ and that B.3 redactions are necessary to protect the safety of such persons.⁷
6. Lifting the impugned redactions is crucial to allow the Defence to investigate the authenticity of the documentation and the information therein. Such investigations are necessary for the Defence to effectively challenge the Prosecution’s case on P-0570’s unavailability to testify [REDACTED] or to make a declaration under rule 68(2)(b). Lifting the redactions would be consistent with ICC precedent. In *Ntaganda*, the Trial Chamber VI granted a Defence request to lift redactions concerning information in [REDACTED] that were pertinent to the testimony of the witness.⁸
7. The Defence reiterates its position that the Prosecution’s case on P-0570’s unavailability is based almost entirely on the contents of [REDACTED]. In its Request, the Prosecution points to two additional expert reports as proof that this is not the case. However, these reports and the conclusions therein are themselves derivatives of the information contained in [REDACTED]. The first is a report by [REDACTED],⁹ who had no contact with P-0570 and whose report is based on a reading of [REDACTED]. The second is a report [REDACTED] based on an [REDACTED] and a video-call with P-0570. Contrary to the Prosecution’s assertion¹⁰ and as indicated by [REDACTED], the video-call does not constitute a [REDACTED]

up front that the Prosecution's argumentation in the present case is similarly problematic, as the Prosecution makes widespread use of standardised justifications and generalised security concerns.”

⁶ [ICC-01/12-01/18-546](#), para. 16.

⁷ [ICC-01/12-01/18-546](#), para. 12.

⁸ [ICC-01/04-02/06-1374](#).

⁹ [REDACTED].

¹⁰ ICC-01/12-01/18-1462-Conf, para. 18.

as [REDACTED] was unable to conduct a [REDACTED] over the video-call,¹¹ was unable to test P-0570's [REDACTED],¹² and concluded that a [REDACTED].¹³ No evidence of [REDACTED] has been disclosed to the Defence. Thus, [REDACTED]'s report is also largely based on [REDACTED].

8. Furthermore, the Prosecution has not demonstrated the chain of custody of the documents contained in [REDACTED] to the requisite standard. The documents were allegedly received by the Prosecution from [REDACTED] in unknown and undocumented circumstances. The documents appear to be scans of hand-written forms that the Prosecution's expert [REDACTED] described as partially illegible (*pas lisible*). Even without the redactions, [REDACTED] would fail to meet the minimum indicia of reliability.
9. In sum, the documents contained in [REDACTED] are the main piece of evidence in the Prosecution's case for P-0570's unavailability. Their chain of custody has not been demonstrated. All information relating to their provenance has been redacted without proper justification. In such circumstance, the Defence is prevented from verifying and challenging the authenticity of these documents,¹⁴ and therefore unable to effectively oppose the Rule 68(2)(c) Application on unavailability. The Prosecution could have applied for a further extension of time to allow the Prosecution to submit the application related to this witness at a time after COVID-19 related restrictions were lifted; the Prosecution cannot, therefore, rely on current difficulties in conducting an *in situ* examination as a basis for lessening the evidential threshold for demonstrating unavailability or depriving the Defence of an effective opportunity to contest this threshold. For these reasons, the Defence respectfully requests that the Trial Chamber order these redactions to be lifted. Failing this, the Defence is entitled to a full and effective remedy to counterbalance the prejudice to its investigations. In line with established ICC precedent,¹⁵ given that the existing redactions to

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ Contrary to the Prosecution's assertions in paragraph 20 of its Request, the Defence has no other means to effectively challenge the Prosecution's evidence of P-0570's alleged unavailability as [REDACTED] is the Prosecution's main evidence to that effect.

¹⁵ See for example, [ICC-01/09-02/11-868-Red](#), para.101, referring to the following remedies for non-disclosure: "ruling certain testimony and other materials inadmissible, (ii) determining that certain evidence be given little to no weight at the end of the trial, (iii) making evidentiary inferences to counterbalance the fact that the

[REDACTED] prevent the Defence from challenging its authenticity and reliability, the Trial Chamber should exclude this document from its consideration of the Rule 68(2)(c) Application. To allow the Prosecution to rely on this evidence are part of its Rule 68(2)(c) Application would deprive Mr Al Hassan of his right to adequate facilities to defend himself, causing him unacceptable prejudice.

(b) The identity of P-0572

10. From the outset, it is crucial to note that the Defence is not asking the Prosecution to disclose P-0572's identity *per se*. Rather, the Defence requests that the Prosecution confirm whether the name and/or identity of P-0572 has come up in proceedings so far and/or whether P-0572 is associated with or involved with NGOs, associations and other entities involved in the collection of victim statements and other forms of evidence in this case, including (but not limited to) entities such as [REDACTED]. If this is not the case, then the Defence does not seek disclosure of P-0572's identity. Conversely, if P-0572 does fall into one of these categories, then the Defence is in its rights to request prompt disclosure of P-0572's identity as part of Mr Al Hassan's right to adequate facilities to prepare his defence. The fact that the work of such NGOs/individuals with victims is publicly known further obviates the justification for withholding their name from a Defence team, bound by confidentiality obligations.¹⁶
11. Trial Chamber X has directed that Category A.5 redactions are applicable to "Identifying and contact information of intermediaries, insofar as disclosure of this information could hinder their work in the field, **thereby putting at risk the ongoing or future investigations of the Prosecutor**" (emphasis added).¹⁷ In the present case, the Prosecution has not indicated that it intends to continue to rely on P-0572 for investigative purposes or that disclosing the identity of P-0572 would put ongoing or future investigations at risk.

Defence may have been wrongfully deprived of access to specific evidence (iv) adjourning the trial to allow for additional investigations and (v) ensuring that appropriate measures are taken to protect Defence witnesses"; [ICC-01/04-01/07-893](#), para. 8, where the Prosecution conceded that: "[a] form of protective measure, considered by the Prosecution, would be for the provision of discrete contextual admissions of fact to those exculpatory or materially beneficial elements of the PEXO or R77 Witness's evidence in lieu of disclosing the identity of the witness". See also [ICC-01/04-01/07-1332-tENG](#), para. 7: where the Chamber "invited the Prosecutor to consider the option of combining redactions and admissions of facts in one document in order to comply fully with his disclosure obligation pursuant to rule 77 of the Rules". See also [ICC-01/04-01/06-1401](#), paras 79-81.

¹⁶ [ICC-01/05-01/08-816](#), para. 18.

¹⁷ [ICC-01/12-01/18-546](#), para. 12.

12. P-0570's admission that she has confided in [REDACTED]¹⁸ is relevant to the present request, as the Chamber has limited the application of redactions to "identifying information of [...] individuals who have in any other way acquired or established knowledge of the events or circumstances part of a witness's narrative [...]."¹⁹

13. The Prosecution contention that the Defence has failed to establish the possibility of witness contamination misstates the scope of Rule 77 and the burden for lifting redactions. The scope of disclosure under Rule 77 is broad and extends to all information that would assist the Defence to appreciate the reliability and accuracy of the witness's testimony. As confirmed by Pre-Trial Chamber II,²⁰

persons falling under categories A.2, A.3, A.6, B.2 and B.3 can have a decisive impact on the credibility and reliability of the evidence. The Chamber notes, in particular, that it is essential for the Defence to be able to follow the interaction between leads, sources (category A.6), witnesses and the Prosecutor and determine whether different pieces of evidence emanate from the same source, or whether a particular lead or source has been in contact with different witnesses. The Chamber is also persuaded that the work of translators and interpreters (categories A.2 and A.3) may, by its very nature, impact on the substance of a witness statement, which makes it essential for the Defence to be able to assess how many pieces of evidence may have been affected. Regarding the remaining individuals and categories, the Chamber considers that it is equally important for the Defence to be able to trace their appearance across the evidence in order to be able to assess any risk of collusion.

14. The Defence's concern that evidence in the case may have been impacted by certain intermediaries, NGOs and organisations is relevant to the present litigation. [REDACTED]. This includes [REDACTED], who interacted with several witnesses (including [REDACTED] in a group that included [REDACTED]²¹ and P-0570, for whom [REDACTED]²²) in connection with [REDACTED], and who [REDACTED]²³ and as [REDACTED].²⁴ Similarly, there are various witnesses and victims who were members of or linked with [REDACTED]²⁵ and [REDACTED].²⁶ [REDACTED] has

¹⁸ [REDACTED].

¹⁹ [ICC-01/12-01/18-546](#), para. 22.

²⁰ [ICC-01/14-01/18-169](#), para. 11.

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

expressed concern regarding the reliability of a particular interpreter, who could be [REDACTED].²⁷

15. There is, therefore, a growing volume of evidence in the case that points to inaccuracies, contradictions and cross-pollination between victims and witnesses that have come into contact with certain organisations and [REDACTED]. Given that the Defence is already in possession of the names of the NGOs and individuals in question, it has a right to receive information that allows the Defence to “trace their appearance across the evidence”.

16. The evidence of P-0570 is also replete with inaccuracies,²⁸ internal contradictions²⁹ and unverified accusations,³⁰ and the Defence is entitled to receive any information that might shed light on the reasons or source for such inaccuracies and allegations.

17. There is also no burden to be met by the Defence in order to justify why it should receive such information. As established by the Appeals Chamber, whilst the Defence may make submissions on the impact of non-disclosure on the fairness of proceedings, “there is no burden to meet in this regard”.³¹ Rather, the burden is on the Prosecution to establish that the redactions continue to be justified in light of the Defence submissions. As such, the Prosecution’s argument that the Defence has failed to prove ‘contamination’ [REDACTED] is an attempt to reverse the evidential burden. It is sufficient for the Defence to assert, as it has, that P-0572’s identity may pertain to its case theory.

18. The prejudice caused by withholding the requested information from the Defence outweighs any generalised security concerns put forward by the Prosecution. The prejudice is compounded by the fact that contrary to the Court’s procedure,³² the

²⁷ [REDACTED].

²⁸ E.g.: P-0570 repeatedly refers to [REDACTED] whereas everyone in Timbuktu knows the described location as [REDACTED].

²⁹ E.g.: internal contradictions in accounts on [REDACTED]; internal contradictions over the [REDACTED]; contradiction or outright dishonesty over [REDACTED].

³⁰ All but two of her ‘stories’ about other victims are absent from the Prosecutor’s case – one of which [REDACTED] is based exclusively on P-0570’s evidence and the other [REDACTED] was widely reported in the region.

³¹ [ICC-02/11-01/15-915-Red](#), paras 61-63.

³² [ICC-01/09-01/11-458-AnxA-Corr](#), para. 40.

Prosecution has not used consistent means of redacting intermediaries in this case (using a combination of different pseudonyms and full redactions).

IV. Conclusion

19. For the foregoing reasons, the Prosecution's Request fails to meet the requisite standard under rule 81(2) and (4). Disclosures requested by the Defence are justified by Mr Al Hassan's right to adequate facilities to prepare his defence. The standardised justifications provided by the Prosecution, based on generalised security concerns, do not outweigh the prejudice of the redactions on Mr Al Hassan's rights.

V. Relief sought

20. The Defence respectfully requests that Trial Chamber X **REJECT** the Request.



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Dated this 7th Day of May 2021
At The Hague, The Netherlands