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No. ICC-01/12-01/18
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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

Public redacted version of ‘Decision on Prosecution request relating to protective measures for P-0543’

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

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Other

Judge Kimberly Prost, acting as Single Judge on behalf of Trial Chamber X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 54(3)(f), 64(2), (3)(c) and (6), 67(2) and 68(1) of the Rome Statute (the ‘Statute’) and Rule 81(4) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on Prosecution request relating to protective measures for P-0543’.

I. Procedural history

1. On 30 December 2019, the Single Judge issued a decision setting up a procedure and relevant time limits concerning the disclosure and re-disclosure of evidence (the ‘Disclosure Decision’).¹
2. On 6 January 2020, the Chamber issued a decision setting the commencement date of the trial to 14 July 2020 and adopting a calendar leading up to this date. It notably set 14 April 2020 as the deadline for the Prosecution to finalise its evidence disclosure.² This deadline was later postponed to 12 May 2020.³
3. On 10 March 2020, the Prosecution filed an application pursuant to Rule 81(4) of the Rules seeking authorisation for non-disclosure of the identity of P-0543, as well as items containing her identifying information (the ‘Request’).⁴ As an alternative, the Prosecution seeks the Chamber’s authorisation to apply redactions to those materials if or when required to disclose them (the ‘Alternative Request’).
4. On 13 March 2020, the Defence filed a response to a number of Prosecution’s non-disclosure applications, including in relation to P-0543 (the ‘Response’), in

¹ Decision on the evidence disclosure protocol and other related matters, ICC-01/12-01/18-546.

² Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548, para. 8.

³ Decision on the Prosecution request for extension of deadlines relating to the disclosure of evidence and a postponement of the starting date for trial, 20 March 2020, ICC-01/12-01/18-677.

⁴ Confidential redacted version of the “Prosecution Request relating to Protective Measures for MLI-OTP-P-0543”, 10 March 2020, ICC-01/12-01/18-647-Conf-Exp, ICC-01/12-01/18-647-Conf-Red.

which it submits that the Request should be denied and the identity of P-0543 should be disclosed to the Defence.⁵

5. On 16 March 2020, the LRVs submitted their observations (the ‘LRVs observations’) on the Request, requesting the Single Judge to grant all measures sought by the Prosecution.⁶
6. On 19 March 2020, and pursuant to the instruction of the Single Judge,⁷ the VWU filed its observations on the Request, informing the Single Judge, *inter alia*, [REDACTED].⁸
7. On 14 April 2020, the Prosecution submitted its final list of witnesses, in which P-0543 does not appear.⁹

II. Submissions

8. P-0543 is an alleged victim of sexual and gender-based crimes, and, as a participating victim in the present case, is represented by the LRVs.¹⁰ She is neither a Prosecution witness nor a victim named in the Confirmation Decision in this case.¹¹
9. While the Prosecution met P-0543 in [REDACTED], it decided not to proceed with an interview, having found that P-0543 was [REDACTED].¹²
10. [REDACTED]. [REDACTED]. P-0543 describes her alleged victimisation in the materials and identifies [REDACTED] as the group responsible for her victimisation. The Prosecution does not intend to rely on the materials, nor any of her evidence, during trial. Nonetheless, while the Prosecution considers that P-0543 has mistakenly identified the group responsible for her victimisation

⁵ Confidential redacted version of “Defence response to the non-disclosure applications set out in ICC-01/012-01/18-627-Conf-Red, ICC-01/12-01-18-628-Conf-Red, and ICC-01/12-01/18-647-Conf-Red”, 13 March 2020, ICC-01/12-01/18-662-Conf-Red.

⁶ Observations du Représentant Légal des victimes concernant la demande du Bureau du Procureur au sujet de MLI-OTP-P-0543, ICC-01/12-01/18-663-Conf-Exp.

⁷ Email from the Chamber to the VWU, 16 March 2020, at 12:52.

⁸ Email from the VWU to the Chamber, 19 March 2020, at 11:27.

⁹ ICC-01/12-01/18-740-Conf-AnxA.

¹⁰ Request, ICC-01/12-01/18-647-Conf-Red, para. 2.

¹¹ Request, ICC-01/12-01/18-647-Conf-Red, para. 13.

¹² Request, ICC-01/12-01/18-647-Conf-Exp, para. 7.

[REDACTED], it submits that this reference to [REDACTED] could fall within the scope of Article 67(2) of the Statute and therefore warrants disclosure under this provision.

11. The Prosecution submits that the disclosure of P-0543's identity and the material containing her identifying information would expose her and her family to a potential risk of physical harm should the armed groups [REDACTED] become aware of her status as a victim.¹³ The Prosecution also contends that P-0543 is at risk of stigmatisation and ostracism if her community learns of the sexual violence she suffered.¹⁴ The Prosecution therefore requests the Single Judge to authorise: (i) the Prosecution to withhold the identity of P-0543 from the Defence; and (ii) the non-disclosure of related materials.¹⁵ The Prosecution submits that such a measure is not unduly prejudicial to the accused as a redacted summary containing the substantive content of P-0543's accounts has already been provided to the Defence.¹⁶ However, if the Chamber were to order the disclosure of related materials, the Prosecution requests that the Chamber authorise the application of redactions, and that [REDACTED].¹⁷
12. The LRVs support the measures sought by the Prosecution and request that P-0543's consent be obtained prior to the introduction of any new protective measures.¹⁸
13. The VWU concurs with the Prosecution and observes that in addition to the significant risk of further violence that may result from any exposure of her identity or other identifying information, there are valid concerns associated with stigmatisation which may have a permanent impact on P-0543.¹⁹ The VWU therefore considers that the measures sought by the Prosecution are appropriate and informs the Single Judge of [REDACTED].²⁰

¹³ Request, ICC-01/12-01/18-647-Conf-Exp, paras 3, 11.

¹⁴ Request, ICC-01/12-01/18-647-Conf-Exp, para. 11.

¹⁵ Request, ICC-01/12-01/18-647-Conf-Exp, paras 12, 14.

¹⁶ Request, ICC-01/12-01/18-647-Conf-Exp, para. 13.

¹⁷ Request, ICC-01/12-01/18-647-Conf-Exp, paras 12, 14.

¹⁸ LRVs Observations, ICC-01/12-01/18-663-Conf-Exp, paras 6-9.

¹⁹ Email from the VWU to Trial Chamber X Communications, 19 March 2020, at 11:27.

²⁰ Email from the VWU to Trial Chamber X Communications, 19 March 2020, at 11:27.

14. The Defence submits that the identification of [REDACTED] by P-0543 as the group responsible for her victimisation is exculpatory as it supports a range of potential defences.²¹ The Defence alleges that the Prosecution has failed to fully investigate and identify other admissible evidence pertaining to these defences and that the Defence should be afforded the means to do so.²² The Defence therefore requests that the Single Judge reject the Request, or in the alternative, prepare admissions of fact as concerns the evidence that could otherwise have been obtained from P-0543.²³

III. Analysis

15. The Single Judge notes at the outset that, in accordance with the well-established case law of the Court, the authorisation of non-disclosure of information shall be viewed as an exception, the overriding principle being that of full disclosure.²⁴
16. 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.
17. The rights of the accused are enshrined in Article 67 of the Statute and also reflected in other relevant provisions. In particular, Article 67(2) of the Statute provides that the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.
18. Of particular importance is Rule 81(4) of the Rules, which provides that the Chamber, on its own motion or at the request of the Prosecution, must take

²¹ Response, ICC-01/12-01/18-662-Conf-Exp, para. 25.

²² Response, ICC-01/12-01/18-662-Conf-Red, para. 26.

²³ Response, ICC-01/12-01/18-662-Conf-Red, para. 27.

²⁴ Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546, para. 9.

necessary steps ‘to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of trial.’ These protections, which are the exception to the aforesaid disclosure obligation, have been extended by the Appeals Chamber to all individuals at risk on account of the activities of the Court.²⁵

19. The Single Judge notes further the jurisprudence on 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.²⁶
20. 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.
21. The Single Judge first notes that the Prosecution does not oppose the Defence claim that the information contained in the relevant materials, namely the fact that P-0543 identifies the group responsible for her victimisation as [REDACTED], is potentially exculpatory in nature.²⁷ Having reviewed the relevant materials, the Single Judge agrees with the parties that information falling within the scope of Article 67(2) of the Statute is contained therein.
22. The Single Judge notes the Defence argument that the Prosecution has not well substantiated the existence of an objective risk, submitting that standardised justifications, based on generalised security concerns, are problematic and

²⁵ 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.

²⁶ See 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.

²⁷ Request, ICC-01/12-01/18-647-Conf-Exp, para. 9.

insufficient.²⁸ In this regard, the Chamber incorporates the relevant findings from her decision of 27 March 2020²⁹ and clarifies that the potential security risks specific to P-0543 will be examined against the relevant background.

23. The Single Judge is satisfied that an objective risk to P-0543's safety and privacy exists should her identity be disclosed to the Defence, taking into account *inter alia*: (i) the personal circumstances of this individual, in particular, [REDACTED], (ii) the nature of her allegations – the fact that she is allegedly a victim of rape by [REDACTED], and that there is a significant risk of stigmatisation should her community learn of the acts allegedly committed against her; and (iii) the general security situation in Mali.³⁰ The Single Judge also notes that P-0543 expresses fear that her safety and well-being would be at risk, should her identity be disclosed,³¹ and that she indicated that she does not wish her identity to be disclosed to the Defence.³²
24. The Single Judge places significant weight on the fact that P-0543 is an alleged victim of sexual violence. As indicated in her previous decision, the Single Judge considers that such victims should benefit from special and increased protection in proceedings before the Court.³³ In the context of the present decision, the Single Judge is of the view that, should the fact that P-0543 is an alleged victim of sexual violence become known to, or even suspected by, her own community, there is a significant risk that P-0543 will face stigmatisation in her community, which will negatively affect her personal life on a permanent basis.

²⁸ Response, ICC-01/12-01/18-662-Conf-Red, paras 8-12.

²⁹ Decision on the Prosecution requests concerning the variation of protective measures for screened individuals P-0105, P-0120, P-0128, P-0129, P-0140 and P-0154, 27 March 2020, ICC-01/12-01/18-684-Conf-Red (the '27 March Decision'), para. 19.

³⁰ As set out in the 27 March 2020 Decision, ICC-01/12-01/18-684-Conf-Red, paras 19-20.

³¹ The Single Judge recalls that while the subjective fear of the individual is of relevance considering whether an objectively justifiable risk exists, it is not, in itself, determinative: *see* Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Public redacted version of Decision on prosecution application for delayed disclosure of witness identities, 3 February 2017, ICC-01/09-02/11-580-Red2 (original dated 21 December 2012), para. 31.

³² ICC-01/12-01/18-647-Conf-Exp-AnxA.

³³ ICC-01/12-01/18-545-Red2, para. 10.

25. Notwithstanding the Single Judge's confidence that the Defence will adhere to its confidentiality obligations and best practices when carrying out its investigations, the Single Judge considers that disclosure of the identity of P-0543, even to a limited number of people – in this instance to the Defence – inevitably entails the risk that the information will be disseminated more widely.
26. The Single Judge takes note of the Prosecution's position that the exculpatory information – the identification of [REDACTED] as the group responsible for P-0543's victimisation – appears to be a misidentification on P-0543's part, and having reviewed all relevant material, finds that although falling under Article 67(2) of the Statute, the exculpatory value of the information is marginal.³⁴ The Single Judge also recalls that the information P-0543 provides pertains to the victimisation she experienced herself and she is not a named victim in the present case. The information she provides also does not directly concern other individuals who are witnesses or named victims in the present case. Finally, information as to [REDACTED] at the relevant time and in relation to the charges in the present case is evidently not unique to this witness and constitutes a line of defence which can be investigated by the Defence through other individuals.
27. In balancing the potential and marginal benefit that may be derived from disclosing her identity to the Defence against the objectively justifiable risk as identified above, the Single Judge finds that the latter prevails and that non-disclosure of P-0543's identity is the most appropriate and proportional measure to mitigate such risks. In this regard, the Single Judge particularly notes that [REDACTED]. The Single Judge also finds that this measure does not unduly prejudice the rights of the accused and a fair and impartial trial, taking into account: (i) the fact that P-0543 is not a witness or named victim; (ii) the fact that the Prosecution does not intend to rely on the relevant materials as evidence during the trial proceedings; (iii) the fact that the content of her accounts are already made available to the Defence in redacted form;³⁵ and (iv) the benefit

³⁴ The Prosecution's assumption that P-0543 misidentified the group responsible for her victimisation is based on the fact that P-0543 identifies [REDACTED].

³⁵ MLI-OTP-0038-0040, at 0040.

that may be derived from disclosure considered in the context of potential defences as highlighted in the Response.³⁶ In light of the above, the Single Judge also authorises the Prosecution to maintain redactions applied to her identifying information contained in the redacted summary disclosed to the Defence.

28. Turning to the disclosure of the related materials, the Single Judge recalls her finding that an objectively justifiable risk with respect to P-0543 exists, should her identity be disclosed. The Single Judge notes that the information contained in the materials concerned, including that falling under the scope of Article 67(2) of the Statute, is already known to the Defence through the disclosure of a redacted summary.³⁷ Weighing the potential risk posed to P-0543 and the fact that [REDACTED] against the marginal benefit that may be derived from additional disclosure, the Single Judge is satisfied that non-disclosure of the related materials is the most appropriate and least intrusive measure available in the circumstances. For the reasons mentioned in the preceding paragraph, the Single Judge also considers this measure to be compatible with the rights of the accused and a fair and impartial trial.

³⁶ Response, ICC-01/12-01/18-662-Conf-Exp, para. 25.

³⁷ MLI-OTP-0038-0040, at 0040.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

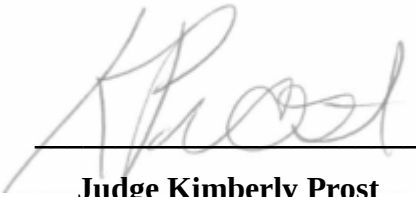
GRANTS the Request;

AUTHORISES non-disclosure of the identity of P-0543, as well as related items;

AUTHORISES the Prosecution to maintain redactions applied to her identifying information contained in the disclosed summary; and

ORDERS the LRVs to file a confidential redacted version of its observations, filing ICC-01/12-01/18-663-Conf-Exp, within 7 days of notification of the present decision.

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



Judge Kimberly Prost
Single Judge

Dated this Wednesday, 22 April 2020

At The Hague, The Netherlands