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TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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

**Public redacted version of ‘Decision on the Prosecution request for
reconsideration of the Decision on the delayed disclosure of the identity of
Witness P-0603’**

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

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Other

TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, issues this ‘Decision on the Prosecution request for reconsideration of the Decision on the delayed disclosure of the identity of Witness P-0603’.

I. Procedural history

1. Between 19 July 2018 and 10 October 2019, the Single Judge of Pre-Trial Chamber I (hereinafter: ‘PTC I’) granted motions from the Office of the Prosecutor (the ‘Prosecution’) to withhold from the Defence the identities of a number of witnesses, including P-0553 and P-0574,¹ P-0570,² and P-0538, P-0542 and P-0603.³
2. On 10 March 2020, the Prosecution filed a request seeking the authorisation to temporarily withhold from the Defence the identities and identifying information of six witnesses, namely P-0538, P-0542, P-0553, P-0570, P-0574, and P-0603, and to continue to temporarily maintain the redactions to their associated material and non-disclosure of certain documents, until 45 days before their testimony (the ‘Prosecution Request for delayed disclosure’).⁴

¹ Decision on the Prosecution’s Request for Authorization to Withhold the Identities of Witnesses P-0553 and P-0574, 25 February 2019, ICC-01/12-01/18-184-Conf-Exp-tENG (confidential *ex parte*, only available to the Prosecution and the VWU; original dated 16 November 2018; confidential *ex parte* redacted version available to the Defence was filed on the same day).

² Décision relative à la requête du Procureur aux fins d’autorisation de la non-communication de l’identité du témoin MLI-OTP-P-0570, 20 February 2019, ICC-01/12-01/18-251-Secret-Exp (secret *ex parte*, only available to the Prosecution and the VWU with a secret *ex parte* annex, only available to the Prosecution and the VWU; a secret *ex parte* redacted version available to the Defence was filed on the same day).

³ Décision relative aux requêtes du Procureur aux fins d’autorisation de la non-communication de l’identité des témoins MLI-OTP-P-0520, MLI-OTP-P-0595, MLI OTP-P-0538, MLI-OTP-P-0542 et MLI-OTP-P-0603, 1 May 2019, ICC-01/12-01/18-322-Conf-Exp (confidential *ex parte*, only available to the Prosecution and the VWU with a confidential *ex parte* annex, only available to the Prosecution and the VWU; a confidential *ex parte* redacted version available to the Defence was filed on the same day).

⁴ Prosecution’s request for delayed disclosure for MLI-OTP-P-0538, MLI-OTP-P-0542, MLI-OTP-P-0553, MLI-OTP-P-0570, MLI-OTP-P-574 and MLI-OTP-P-0603, ICC-01/12-01/18-646-Conf-Exp (*ex parte* Prosecution and VWU only; with *ex parte* Prosecution and VWU only Annexes A to F; a confidential redacted version of the request was filed on 13 March 2020, ICC-01/12-01/18-646-Conf-Red).

3. On 20 March 2020, pursuant to instructions from the Single Judge,⁵ the Victims and Witnesses Unit (the ‘VWU’) submitted its observations on the Prosecution Request for delayed disclosure.⁶
4. On 25 and 26 March 2020, pursuant to instructions from the Single Judge,⁷ the Prosecution⁸ and the VWU⁹ submitted complementary information in relation to the Prosecution Request for delayed disclosure.
5. On 26 March 2020, the Defence filed its response, opposing the Prosecution Request for delayed disclosure.¹⁰
6. On 15 April 2020, the Chamber issued a decision on the Prosecution Request for delayed disclosure (the ‘First Decision on delayed disclosure’), authorising the delayed disclosure of the identities and identifying information of P-0538, P-0553 and P-0574 until 45 days before their testimony and postponing any determination regarding P-0542, P-0570 and P-0603 pending [REDACTED].¹¹ In this regard, the Chamber instructed the Prosecution to provide an update on the situation of these three witnesses by 4 May 2020 and to indicate whether it reiterates its request for the delayed disclosure of their identities and identifying information until 45 days before their testimony.¹²
7. On 4 May 2020, the Prosecution submitted an *ex parte* update on the situation of P-0542, P-0570 and P-0603, and reiterated its request to keep withholding from disclosure to the Defence the identities and identifying information of these witnesses, as well as to continue to temporarily maintain the redactions to their

⁵ Email from the Chamber to the parties and participants, 13 March 2020, at 15:59.

⁶ Email from the VWU to the Chamber, 20 March 2020, at 11:28.

⁷ Email from the Chamber to the Prosecution and the VWU, 23 March 2020, at 16:12.

⁸ Email from the Prosecution to the Chamber, 25 March 2020, at 15:56.

⁹ Email from the VWU to the Chamber, 26 March 2020, at 15:52.

¹⁰ Defence response to ‘Confidential redacted version of the “Prosecution’s request for delayed disclosure for MLI-OTP-P-0538, MLI-OTP-P-0542, MLI-OTP-P-0553, MLI-OTP-P-0570, MLI-OTP-P-574 and MLI-OTP-P-0603”, 10 March 2020, ICC-01/12-01/18-646-Conf-Exp’, ICC-01/12-01/18-683-Conf (with confidential *ex parte* Defence and Registry only Annexes A and B).

¹¹ Decision on the Prosecution request for delayed disclosure of the identities of Witnesses P-0538, P-0542, P-0553, P-0570, P-0574, and P-0603, ICC-01/12-01/18-741-Conf-Exp (a confidential redacted version was filed on the same day, ICC-01/12-01/18-741-Conf-Red; a public redacted version was filed on 27 May 2020, ICC-01/12-01/18-741-Red2).

¹² First Decision on delayed disclosure, ICC-01/12-01/18-741-Conf-Red, para. 40.

associated material and non-disclosure of certain documents, until 45 days prior to their testimony (the ‘Prosecution Update’).¹³

8. On 8 May 2020, the Chamber issued its second decision on the Prosecution Request for delayed disclosure (the ‘Second Decision on delayed disclosure’), authorising the delayed disclosure of the identity and identifying information of P-0603 until two weeks before the start of trial and of P-0542 and P-0570 until 45 days before their testimony.¹⁴
9. On 29 June 2020, the Prosecution filed a request asking the Chamber to reconsider the Second decision on delayed disclosure and authorise the delayed disclosure of P-0603’s identity and identifying information until 45 days before the start of the third block of witnesses to be called by the Prosecution (the ‘Prosecution Request’).¹⁵ It submits that, while P-0603 was expected to testify during the first block of Prosecution witnesses at the time of the Second decision on delayed disclosure, her testimony has been rescheduled for the third block due to Defence objections to the scheduling of the testimony of any witnesses subject to delayed disclosure at the beginning of the Prosecution’s presentation of evidence.¹⁶ As such, it argues that, should P-0603’s identity be disclosed two weeks before the start of trial, she may be exposed to risks to her security for a significantly longer period of time than previously expected.¹⁷ It further submits that, in light of the (at the time of its submission) pending Defence request for reconsideration of the date for the commencement of substantive testimony, there is a possibility that this period of vulnerability will further extend.¹⁸ Consequently, in light of new facts arising since the issuance of the Second

¹³ Prosecution’s update on contact with and situation of witnesses MLI-OTP-P-0542, MLI-OTP-P-0570 and MLI-OTP-P-0603, ICC-01/12-01/18-782-Conf-Exp (confidential *ex parte*, available to the Prosecution and VWU only). See also Prosecution Request, ICC-01/12-01/18-646-Conf-Red, para. 76.

¹⁴ Second Decision on the Prosecution request for delayed disclosure of the identities of Witnesses P-0542, P-0570, and P-0603, ICC-01/12-01/18-794-Conf-Exp (a confidential redacted version was filed on the same day, ICC-01/12-01/18-794-Conf-Red; a public redacted version was filed on 27 May 2020, ICC-01/12-01/18-794-Red2).

¹⁵ Urgent Prosecution request for reconsideration of ICC-01/12-01/18-794-Conf-Exp in relation to MLI-OTP-P-0603 or authorisation to call P-0603 as part of the first block of witnesses, ICC-01/12-01/18-912-Conf-Exp (a confidential redacted version was filed on the same day, ICC-01/12-01/18-912-Conf-Red).

¹⁶ Prosecution Request, ICC-01/12-01/18-912-Conf-Red, paras 2, 8-9.

¹⁷ Prosecution Request, ICC-01/12-01/18-912-Conf-Red, paras 3, 9.

¹⁸ Prosecution Request, ICC-01/12-01/18-912-Conf-Red, paras 3, 9.

decision on delayed disclosure, a reconsideration as regards the timing of disclosure of P-0603's identity is necessary to prevent an injustice which might be caused by exposing her to a greater risk than was anticipated at the time of the decision.¹⁹ The Prosecution adds that, since its Update, [REDACTED], and there is no undue prejudice to the Defence given that P-0603 will testify only later in the Prosecution's presentation of evidence and the Defence will be informed of her identity 45 days before the start of the third block of witnesses.²⁰ Alternatively, the Prosecution requests the Chamber to authorise it to amend the order of its witnesses and call P-0603 as part of the first block of witnesses, should testimony via audio visual link technology become possible.²¹

10. On 6 July 2020, pursuant to instructions from the Single Judge,²² the Defence submitted its response (the 'Defence Response'), opposing the Prosecution Request.²³ First, the Defence disputes the Prosecution's characterisation of the Chamber's initial determinations, as well as the basis for disclosing the identity of P-0603 after the commencement of the trial.²⁴ Further, the Defence argues that the Chamber's findings on the prejudice that would arise if P-0603's identity was to be disclosed after the commencement of the trial continue to hold true, considering notably the fact that P-0603 provides testimony concerning Mr Al Hassan and other persons in the Islamic Police.²⁵ In addition, it submits that deferring the disclosure of P-0603's identity until after the commencement of trial would disturb the balance that the Chamber reached in its earlier decisions on delayed disclosure, in view of the impact of these measures on Defence preparations and investigations.²⁶ Finally, if the Chamber determines that there may be grounds to vary its previous decision for reasons related to risk, the Defence requests to receive a redacted version of ICC-01/12-01/18-63-Conf-Exp-

¹⁹ Prosecution Request, ICC-01/12-01/18-912-Conf-Red, paras 4, 11.

²⁰ Prosecution Request, ICC-01/12-01/18-912-Conf-Red, para. 12.

²¹ Prosecution Request, ICC-01/12-01/18-912-Conf-Red, paras 1, 4, 13-14.

²² Email from the Chamber to the parties and participants, 30 June 2020, at 13:33.

²³ Defence response to 'Confidential redacted version of "Urgent Prosecution request for reconsideration of ICC-01/12-01/18-794-Conf-Exp in relation to MLI-OTP-P-0603 or authorisation to call P-0603 as part of the first block of witnesses", 29 June 2020' – ICC-01/12-01/18-912-Conf-Exp, ICC-01/12-01/18-931-Conf.

²⁴ Defence Response, ICC-01/12-01/18-931-Conf, paras 8-10.

²⁵ Defence Response, ICC-01/12-01/18-931-Conf, para. 11.

²⁶ Defence Response, ICC-01/12-01/18-931-Conf, para. 12.

Red, so it can be heard on factors relied upon by the Registry to ascertain the risks to witnesses stemming from disclosure to the Defence.²⁷

II. Analysis

11. The Chamber recalls that it has the power to reconsider its decisions upon request of the parties or *proprio motu*, particularly in light of Articles 64(2) and 67 of the Statute. Nevertheless, reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.²⁸
12. The Chamber further refers to its First Decision on delayed disclosure and incorporates by reference the applicable law and the criteria for granting requests for delayed disclosure set out in detail in that decision.²⁹
13. The Chamber will now analyse whether the Prosecution Request fulfils the requirements for reconsideration detailed above.
14. At the outset, the Chamber notes that the Prosecution Request is based on the second element of the reconsideration test, and it will therefore determine whether reconsideration is necessary to prevent an injustice, bearing in mind any new facts and arguments.
15. The Chamber considers that the scheduling of P-0603's testimony during the third block of witnesses to be called by the Prosecution may amount to a new circumstance. In this context, the Chamber recalls that, in the Second Decision on delayed disclosure, it directed the Prosecution to liaise with the Defence in relation to the scheduling of P-0603's testimony, in order to provide it with sufficient time and opportunities to conduct relevant investigations.³⁰ Consequently, the timing of the calling of this witness was unknown at the time

²⁷ Defence Response, ICC-01/12-01/18-931-Conf, paras 1, 13.

²⁸ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', 9 April 2020, ICC-01/12-01/18-734, para. 11; Decision on the Prosecution's request for reconsideration regarding the presentation of opening statements, 9 June 2020, ICC-01/12-01/18-867, para. 5.

²⁹ First Decision on delayed disclosure, ICC-01/12-01/18-741-Conf-Red, paras 18-27.

³⁰ Second Decision on delayed disclosure, ICC-01/12-01/18-794-Conf-Red, para. 32.

the Second Decision on delayed disclosure was issued, pending consultation between the parties on this point.

16. The Chamber further recalls its findings in relation to the existence of an objective risk to P-0603's safety linked to the immediate disclosure of her identity to the Defence, taking notably into account her personal circumstances, as well as the lack of lesser restrictive measures available which would respond effectively to the risks she faces.³¹ The Chamber further notes the Prosecution submissions that [REDACTED] and that there remains an objective risk to her safety should disclosure to the Defence be effected.³²
17. In view of the above, the Chamber agrees with the Prosecution that, considering the timing of P-0603's testimony, which is not expected to take place until the second trimester of 2021 at the earliest,³³ she may be exposed to increased risks to her safety for a significantly long period of time if her identity is to be disclosed at this stage of the proceedings.
18. Further, the Chamber finds that the alternative proposed by the Prosecution, namely to amend the order of its witnesses and call P-0603 as part of the first block of Prosecution witnesses, is not a suitable option. Indeed, while that would limit the amount of time between the disclosure of P-0603's identity and her testimony, and thereby mitigate the overall risk to this witness by minimising her exposure ahead of her testimony, it would be particularly prejudicial to the Defence, notably in light of the current difficulties it faces in conducting necessary investigations.³⁴ The Chamber further refers to the recent [REDACTED] and particularly notes the VWU's submission that, [REDACTED].³⁵ Calling P-0603 as part of the first block of Prosecution witnesses could therefore engender increased risks for the safety of this witness.

³¹ First Decision on delayed disclosure, ICC-01/12-01/18-741-Conf-Exp, paras 28-29, 38; Second Decision on delayed disclosure, ICC-01/12-01/18-794-Conf-Red, paras 27-31.

³² Prosecution Request, ICC-01/12-01/18-912-Conf-Red, para. 10.

³³ Order of Prosecution Witnesses, ICC-01/12-01/18-805-Conf-AnxA *annexed to* Prosecution submission of further information in the Prosecution List of Witnesses and of the Prosecution Final List of Evidence, registered on 12 May 2020 and notified on 13 May 2020, ICC-01/12-01/18-805-Conf.

³⁴ Defence Response, ICC-01/12-01/18-931-Conf, para. 1.

³⁵ [REDACTED].

19. Bearing in mind this information, as well as the specific profile and vulnerability of P-0603, the risks that she faces and the lack of lesser restrictive measures available, the Chamber considers it necessary to reconsider its previous decision in relation to P-0603 and delay the disclosure of her identity and identifying information until 45 days before the start of the third block of Prosecution witnesses. While the Chamber previously considered that balance of the different interests militated in favour of authorising the delayed disclosure of P-0603's identity only until two weeks before the start of trial, it is now of the view that, in light of the information provided by the Prosecution as to the scheduling of P-0603's testimony and its impact on the duration of the risks this witness may face, the balance it previously reached has shifted. As such, delaying disclosure until shortly before the commencement of trial would no longer sufficiently mitigate the risks. The Chamber therefore finds that this new measure is necessary to prevent an injustice, particularly in light of its mandate to protect witnesses.
20. The Chamber emphasises that, in reaching this conclusion, it has considered the potential prejudice to the rights of the accused, particularly in light of the fact that P-0603 is a crime-base witness who provides some evidence regarding the role of the accused.³⁶ The Chamber however recalls that the Defence already has substantive information available it can investigate with regard to the potential evidence of this witness,³⁷ and further notes the Prosecution submission that the evidence directly implicating the accused that this witness provides is limited.³⁸ In addition, the Chamber notes that the Defence will receive P-0603's information 45 days before the start of the third block of witnesses the Prosecution intends to call, and not only 45 days before the start of her testimony, thereby providing a larger window of time for necessary Defence investigations at that stage and reducing any potential prejudice arising from the delayed disclosure of P-0603's identity.

³⁶ First Decision on delayed disclosure, ICC-01/12-01/18-741-Conf-Red, para. 37 *referring to* Prosecution Request for delayed disclosure, ICC-01/12-01/18-646-Conf-Red, para. 50.

³⁷ Second Decision on delayed disclosure, ICC-01/12-01/18-794-Conf-Red, paras 30-31.

³⁸ Prosecution Request for delayed disclosure, ICC-01/12-01/18-646-Conf-Red, para. 73.

21. The Chamber further finds that, contrary to the Defence argument, this decision does not disturb the balance that the Chamber reached in its First and Second Decisions on delayed disclosure. In this regard, the Chamber particularly notes that, at the commencement of trial, the Defence will know the identity of 81 out of the 87 Prosecution witnesses.³⁹ The Chamber also recalls that it is prepared to consider any application from the Defence at a later stage should it become apparent that it requires additional time to complete its relevant investigations.⁴⁰
22. In accordance with the above, the Chamber authorises the Prosecution to temporarily continue withholding from the Defence the identity and identifying information of P-0603, and maintaining the redactions to her associated material, until 45 days before the start of the third block of witnesses the Prosecution intends to call. The Chamber nonetheless strongly encourages the Prosecution to [REDACTED] so that [REDACTED], so as to ensure disclosure is effected at the earliest opportunity.
23. Finally, concerning the Defence request to receive a redacted version of ICC-01/12-01/18-63-Conf-Exp-Red, so it can be heard on factors relied upon by the Registry in this report,⁴¹ the Chamber observes that it has not relied on this filing to make any determinations in either the First or the Second Decision on delayed disclosure. Consequently, the Chamber does not consider it appropriate presently to provide the Defence with a redacted version of the report and rejects this request.

³⁹ Order of Prosecution Witnesses, ICC-01/12-01/18-805-Conf-AnxA *annexed to* Prosecution submission of further information in the Prosecution List of Witnesses and of the Prosecution Final List of Evidence, registered on 12 May 2020 and notified on 13 May 2020, ICC-01/12-01/18-805-Conf.

⁴⁰ First Decision on delayed disclosure, ICC-01/12-01/18-741-Conf-Red, para. 58.

⁴¹ Defence Response, ICC-01/12-01/18-931-Conf, paras 1, 13.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Prosecution request for reconsideration of the Second Decision on delayed disclosure in relation to P-0603;

GRANTS the Prosecution request for delayed disclosure of the identity and identifying information of P-0603 until 45 days before the start of the third block of Prosecution witnesses; and

REJECTS the Defence request to receive a redacted version of ICC-01/12-01/18-63-Conf-Exp-Red.

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



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated this Monday, 13 July 2020

At The Hague, The Netherlands