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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 redacted version of

**Decision on Prosecution request concerning the scheduling of Witness P-0603
and related matters on the conduct of proceedings**

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

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TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, pursuant to Articles 64(2), 3(c) and (6)(3), 67, and 68(1) of the Rome Statute, as well as to Rules 76, 81(4), 84, and 140 of the Rules of Procedure and Evidence, issues the present decision.

I. Procedural history and submissions

1. On 15 April 2020, the Chamber issued a decision authorising the delayed disclosure of the identities of three witnesses until 45 days before their testimony and postponing any determination regarding three other witnesses, including P-0603 (the ‘First Decision on delayed disclosure’).¹
2. On 8 May 2020, upon receipt of an update from the Prosecution in which it notably reiterated its previous request for the aforesaid delayed disclosure, the Chamber issued a decision in which it *inter alia* authorised delayed disclosure in respect of P-0603’s identity, but only until two weeks before the start of trial (the ‘Second Decision on delayed disclosure’).²
3. On 13 July 2020, and upon request from the Prosecution, the Chamber issued a decision in which it reconsidered the Second Decision on delayed disclosure (the ‘Third Decision on delayed disclosure’),³ authorising the Prosecution to withhold

¹ 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). *See also* Confidential redacted version of the “Prosecution’s request for delayed disclosure for MLI-OTP-P-538, MLI-OTP-P-0542, MLI-OTP-P-0553, MLI-OTP-P-0570, MLI-OTP-P-0574 and MLI-OTP-P-0603”, 10 March 2020, ICC-01/12-01/18-646-Conf-Exp, 13 March 2020, ICC-01/12-01/18-646-Conf-Red.

² 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). *See also* Prosecution’s update on contact with and situation of witnesses MLI-OTP-P-0542, MLI-OTP-P-0570 and MLI-OTP-P-0603, 4 May 2020, ICC-01/12-01/18-782-Conf-Exp (confidential *ex parte*, available to the Prosecution and VWU only).

³ Decision on the Prosecution request for reconsideration of the Decision on the delayed disclosure of the identity of Witness P-0603, ICC-01/12-01/18-948-Conf-Exp (a confidential redacted version was filed on the same day, ICC-01/12-01/18-948-Conf-Red). *See also* 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, 30 June 2020, ICC-01/12-01/18-912-Conf-Red.

the identity of P-0603 for a longer period, *i.e.* until 45 days before the start of the evidentiary block (a ‘Block’) numbered 3.⁴

4. On 29 January 2021, the Prosecution sought the Chamber’s authorisation to call P-0603 in March 2021.⁵ This was opposed by the Defence on the same day.⁶ In light of the issues at stake, the Chamber found that it was more appropriate for the litigation of this matter to take place via formal filings and set time limits for this request and any responses thereto (the ‘29 January 2021 Email Directions’).⁷
5. On 5 February 2021, the Prosecution filed its application seeking reconsideration in relation to the order of testimony of P-0603 (the ‘Request’).⁸ It seeks the Chamber’s authorisation to schedule the testimony of P-0603 before the 2021 summer judicial recess, with disclosure of her identity to take place 50 days prior to the start of testimony. The Prosecution submits that the relief sought is necessary for a number of reasons. The Prosecution first points to the continuation of the COVID-19 pandemic which, it submits, brings unexpected and prolonged difficulties in the scheduling of testimonies, including travel restrictions, mandatory testing, and quarantines. The Prosecution further reports that the personal situation of many witnesses renders very difficult the exhaustion of the list of witnesses in Block 1, as well as the calling of witnesses in the planned order for Block 2. The Prosecution also explains that other factors are to be considered, such as the dry season in Mali – [REDACTED] –, as well as the month of Ramadan to start in April this year. The Prosecution submits that, taken altogether, these factors render the scheduling of witnesses complex and requires the consideration of new options, such as the calling of P-0603 earlier than expected.⁹ Notably pointing to the limited nature of her testimony, as well as the opportunities the Defence already had to gather information in relation to the ‘women’s demonstration’, which is discussed in P-0603’s statement, the

⁴ See below at paragraph 9 for the background information on the Blocks.

⁵ Email from the Prosecution on 29 January 2021 at 11:14.

⁶ Email from the Defence on 29 January at 11:23.

⁷ Email from the Chamber on 29 January 2021 at 18:32.

⁸ Requête de l’Accusation en reconsidération concernant l’ordre de déposition du témoin P-0603, ICC-01/12-01/18-1288-Conf-Exp, available to the Prosecution and the VWU (a confidential redacted version was filed on 8 February 2021, ICC-01/12-01/18-1288-Conf-Red).

⁹ Request, ICC-01/12-01/18-1288-Conf-Red, para. 14.

Prosecution argues that the relief sought in its Request is not unduly prejudicial nor inconsistent with the rights of Mr Al Hassan.

6. On 9 February 2021, the Legal Representatives of Victims filed a response in support of the Request,¹⁰ arguing that the Defence's rights would not be impacted by the change sought in the schedule in light of the content of P-0603's expected testimony and the proposed timing for the disclosure of her identifying information.
7. On 12 February 2021, the Defence filed its response opposing the Request (the 'Response').¹¹ It submits that the Prosecution has not established the threshold for reconsideration and that the relief sought would cause substantial prejudice to the Defence. The Defence avers that the Chamber should take into consideration other commitments and responsibilities of the Defence, as well as difficulties faced in conducting investigations, as they impact its ability to utilise the relevant time period for investigation of P-0603 and her testimony.¹² The Defence also submits that P-0603's testimony is linked to various other witnesses and assumes that there is information related to P-0603 in the testimony of other witnesses scheduled for Block 3.¹³ The Defence further points to the Chamber's previous finding that the statement of P-0603 contains redacted information which is of potential relevance to Defence preparation and reaffirms that, in these circumstances, it requires the opportunity to conduct investigations.¹⁴

¹⁰ Réponse à la Rêquete de l'Accusation en reconsidération concernant l'ordre de déposition du témoin P-0603 (ICC-01/12-01/18-1288-Conf-Red), ICC-01/12-01/18-1294-Conf.

¹¹ Defence response to 'Version confidentielle expurgée de la « Requête de l'Accusation en reconsidération concernant l'ordre de déposition du témoin P-0603 », 5 février 2021, ICC-01/12-01/18-1288-Conf-Red, ICC-01/12-01/18-1297-Conf-Exp, confidential *ex parte*, only available to the Defence and the Registry (with two confidential annexes and one *ex parte* annex) (a confidential redacted version of the Response was filed on the same day, ICC-01/12-01/18-1297-Conf-Red).

¹² Response, ICC-01/12-01/18-1297-Conf-Red, paras 13-14. *See also* Annex B to the Response, ICC-01/12-01/18-1297-Conf-Exp-AnxB.

¹³ Response, ICC-01/12-01/18-1297-Conf-Red, para.16.

¹⁴ Response, ICC-01/12-01/18-1297-Conf-Red, para. 17 referring to the Second Decision on delayed disclosure, ICC-01/12-01/18-794-Red2, para 31.

II. Analysis

8. Before discussing the remedy sought with respect to P-0603, the Chamber finds it appropriate to first address the issue raised by the Prosecution in its Request concerning the difficulties faced in the scheduling of its remaining witnesses.

A. Preliminary matter concerning the scheduling of testimony

9. The Chamber recalls that it directed the Prosecution to include together with its list of witnesses, and as part of the information to be provided ahead of the commencement of trial, an ‘estimated order and timing of scheduling of testimony’.¹⁵ This information was provided by the Prosecution in the form of a numbered list which also grouped witnesses in three subsequent Blocks.¹⁶ The Chamber later decided that, in addition to this initial estimate, the Prosecution was to provide notice of the scheduling of its witnesses on a rolling basis by way of monthly lists and that it should ‘first schedule the appearance of witnesses listed under Block 1 and only subsequently move on to the scheduling of Block 2, and then Block 3 witnesses’.¹⁷ However, since the beginning of the Prosecution case, the Chamber adopted a flexible approach and, notably having taken into consideration the impact re-scheduling has on Defence preparation, witnesses from Block 2, and eventually Block 3, were called before the exhaustion of Block 1 witnesses.¹⁸
10. In this regard, the Chamber can but acknowledge the Prosecution’s submission that it has become difficult to determine the starting and ending point of each Block.¹⁹ The Chamber also understands that the parties and participants may have organised their workload on the basis of the abovementioned directions and finds it appropriate for the necessary amendments to these directions to be made with

¹⁵ Decision Setting the Commencement Date of the Trial, 6 January 2020, ICC-01/12-01/18-548, para. 10; and 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, para. 15.

¹⁶ Order of Prosecution Witnesses, 12 May 2020, notified on 13 May 2020, ICC-01/12-01/18-805-Conf-AnxA.

¹⁷ Supplemental decision on matters related to the conduct of proceedings, 19 August 2020, ICC-01/12-01/18-1004, paras 10-11.

¹⁸ See emails from the Chamber to the parties and participants on 26 January 2021 at 10:22 and from the Single Judge to the parties and participants on 1 February 2021 at 9:04. For example, Block 2 witnesses P-0557, P-0565, P-0081 and P-0431, and Block 3 witness P-0114

¹⁹ Request, ICC-01/12-01/18-1288-Conf-Red, paras 16-17.

sufficient notice for all involved to adjust and prepare accordingly. Having had regard to the present circumstances as described in the Request, but also in light of the time which has passed since completion of the Prosecution's disclosure and the start of the trial, as well as the number of Prosecution witnesses who have already testified, the Chamber finds it appropriate to issue the following supplementary directions.

11. First, the Chamber clarifies that, for all intent and purposes, Block 2 has started and the appearance of witnesses originally listed under Block 1 and Block 2 can now be planned by the Prosecution without distinction and without prior authorisation from the Chamber. As previously indicated,²⁰ and particularly at this stage of the proceedings, one month notice for witness scheduling provides enough foreseeability and notably gives the Defence sufficient time to finalise its preparation as concerns witnesses listed under Blocks 1 and 2.
12. Second, to enable parties' preparation and to facilitate the fair and expeditious conduct of the proceedings, the Chamber finds it necessary to provide some clarity as to the starting date of Block 3. The Chamber is of the view that both parties should be ready to start with the testimony of Block 3 witnesses after the 2021 summer judicial recess. However, the Chamber may authorise on a case-by-case basis that witnesses in Block 3 be called beforehand, if deemed necessary and not prejudicial to the rights of the accused, as done below in relation to P-0603.
13. Notwithstanding the above, the Prosecution is directed to continue consulting with the Defence and the Registry, particularly the Victims and Witnesses Unit, in scheduling the testimony of its remaining witnesses.²¹

B. Scheduling of P-0603's testimony and related disclosure issues

14. The Chamber recalls that in its 29 January 2021 Email Directions, it considered that the Prosecution's proposed change in the scheduling of P-0603's testimony constituted a request for reconsideration of the Chamber's Third Decision on

²⁰ Email from the Single Judge to the parties and participants on 1 February 2021 at 9:04.

²¹ Supplemental decision on matters related to the conduct of proceedings, 19 August 2020, ICC-01/12-01/18-1004, para. 11.

delayed disclosure and directed that this matter be litigated by way of formal filings. In the below assessment, the Chamber has taken into consideration the arguments presented by the parties and participants as reflected on the record, as opposed to their prior emails.

15. The Chamber remains of the view that, while a request seeking the Chamber's authorisation for a change in the schedule of testimony does not generally amount to a reconsideration request, the remedy sought in the Request – for the Prosecution to be authorised to call Witness P-0603 before the 2021 summer judicial recess – requires partial reconsideration of the Third Decision on delayed disclosure. That is because the Chamber's detailed assessment of the appropriateness of delaying the disclosure of P-0603's identity in that decision was predicated on the expected timing of her testimony. Specifically, the Chamber decided that disclosure of P-0603's identity *45 days before the start of Block 3* struck an appropriate balance between the rights of the accused and the need to ensure the safety and privacy of the witness. The outcome and reasoning of the Chamber in this decision is too closely linked to the Prosecution's notice that it anticipated to call P-0603 in Block 3 to be separated.
16. 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.²²
17. The Chamber first notes that the Prosecution was authorised to withhold P-0603's identity for a period of time which is longer than what is now sought by way of the Request. Further, the Chamber recalls that, when issuing the Third Decision on delayed disclosure, it was already concerned that exceptions to disclosure be maintained only for as long as strictly required and it specifically encouraged the

²² See 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.

Prosecution to take a number of actions in relation to P-0603's protection 'so as to ensure disclosure [of her identity] is effected *at the earliest opportunity*' (emphasis added).²³ The Chamber thus clarifies that disclosure of P-0603's identity at a date which is earlier than what was authorised by the Chamber in its Third Decision on delayed disclosure need not be authorised as such.

18. The Chamber notes that the Third Decision on delayed disclosure, as well as the other directions regulating the scheduling of witnesses, were rendered at a time when it was not expected that the restrictions on travel as a result of the COVID-19 pandemic, in the Netherlands and elsewhere, would continue let alone increase in 2021. The Chamber stresses that it is in the interest of justice for the witness schedule to remain flexible, especially in the present circumstances with the uncertainty surrounding the ongoing COVID-19 pandemic. The Chamber accepts the Prosecution's submissions regarding the many difficulties faced in its attempts to schedule the appearance of its remaining witnesses and notes that the Prosecution reports P-0603 expressed her willingness to travel and testify.²⁴
19. In light of the above considerations, because the Request seeks a change in the timing of P-0603's testimony that can only be authorised if the outcome of the Third Decision on delayed disclosure is amended, the Chamber finds it necessary to proceed and reconsider the relevant parts of its prior decision.
20. In doing so, the Chamber shall determine whether or not the proposed change in the schedule of P-0603's testimony, together with the disclosure of her identity 50 days prior to her proposed testimony, can be effected in a way which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The Chamber refers in this regard to the applicable legal framework set out in the First Decision on delayed disclosure.²⁵

²³ Third Decision on delayed disclosure, ICC-01/12-01/18-948-Conf-Exp, para. 22. Similarly, the Chamber also previously specified that the Prosecution 'is under an obligation to review such redactions on an on-going basis and ensure they are no more than strictly necessary to conceal the identity of the witnesses, and to proceed with disclosure at the earliest opportunity should the above measure no longer be warranted' (First Decision on delayed disclosure, ICC-01/12-01/18-741-Conf-Red, para. 59).

²⁴ Request, ICC-01/12-01/18-1288-Conf-Red, para. 19.

²⁵ First Decision on delayed disclosure, ICC-01/12-01/18-741-Red2, paras 18-27.

21. The Chamber recalls its findings in relation to the existence of an objective risk to P-0603's safety linked to the 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.²⁶ The Chamber found that this risk justified the exceptional remedy of delayed disclosure and this finding is not, as explained above, being reconsidered at this stage. The Chamber will limit its reconsideration to the third prong of the relevant test, that is 'whether the measure is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.
22. The Chamber recalls that P-0603 is a crime-base witness who provides some evidence regarding the role of the accused which has been partly redacted from the version of the statement disclosed to the Defence as it was considered identifying. The Chamber however stresses that overall, as previously noted, the substance of P-0603's statement is available to the Defence, despite the redactions applied to her identifying information,²⁷ and that the Defence already has substantive information available to investigate her potential evidence.²⁸
23. The Chamber also notes that, in terms of Defence preparation, the remedy sought in the Request results in a situation which is very similar to what the Chamber found to be appropriate and proportionate in the Third Decision on delayed disclosure. Indeed, with 50 days' notice, the Defence will have many weeks to review the information which was exceptionally withheld, conduct any complementary investigations, and prepare for P-0603's testimony. Further, the proposed change in the timing of testimony requires the lifting of redactions applied to information which is of potential relevance to Defence preparation earlier than expected.
24. Notwithstanding, the Chamber acknowledges that there have been many changes to the witness order and that both the Prosecution and the Defence have been required to adapt to these changes, often on little notice. The Chamber however

²⁶ First Decision on delayed disclosure, ICC-01/12-01/18-741-Conf-Exp, paras 28-29, 38; and Second Decision on delayed disclosure, ICC-01/12-01/18-794-Conf-Red, paras 27-31.

²⁷ First Decision on delayed disclosure, ICC-01/12-01/18-741-Conf-Red, para. 37.

²⁸ Second Decision on delayed disclosure, ICC-01/12-01/18-794-Conf-Red, paras 30-31.

notes that, with respect to P-0603 specifically, the Request was filed months before the suggested start date of P-0603's testimony and the Prosecution proposes that the information withheld from the Defence be disclosed 50 days prior to the start of testimony. The Chamber further notes that adjournments have been scheduled,²⁹ in addition to gaps that can be expected between witnesses during the relevant period.³⁰ In the view of the Chamber, the relief sought allows for sufficient preparation time, including cross-referring P-0603's evidence with other evidence or material disclosed, as well as investigations if warranted. The Chamber makes this finding having fully considered the impact of the ongoing challenges related to the COVID-19 pandemic, as well as the existence of other commitments and responsibilities for the Defence.

25. The Chamber paid special attention to the specific issue of investigations of the Defence in the field, but considers that it is currently too abstract and vague to warrant delaying P-0603's testimony solely on this basis. After having received disclosure of P-0603's identity, and should the Defence identify specific investigative lead it wished to but could not explore because of the delayed disclosure authorised, the Defence may revert to the Chamber to seek a postponement in order to have additional time to prepare.
26. Having considered the competing interests at stake, the Chamber is satisfied that the relief sought strikes an appropriate balance between the rights of the accused and the need to ensure the safety of P-0603. Accordingly, the Chamber finds it necessary to amend its prior decision and grants the Request. The Chamber authorises the Prosecution to schedule P-0603's testimony before the 2021 summer judicial recess, provided that it discloses her identity and identifying information, and lifts related non-standard redactions, at least 50 days prior to the start of her testimony. The Chamber highlights that it is the Prosecution's obligation to review redactions applied to material disclosed and ensure that remaining redactions are covered by standard justification and strictly required,³¹

²⁹ See e-mail from Trial Chamber X Communications on 27 November 2020 at 13:59, indicating adjournments in March, April and May 2021 that amount to approximately two weeks.

³⁰ See e-mail from the VWU on 5 February 2021 at 15:55.

³¹ See Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546, paras 18, 22.

or else lifted together with the provision to the Defence of P-0603's identity, *i.e.* at the latest 50 days prior to her testimony.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request;

AUTHORISES the scheduling of P-0603's testimony before the 2021 summer judicial recess, provided that her identity and identifying information are disclosed to the Defence at least 50 days before to the start of her testimony; and

ADOPTS the supplementary directions on the conduct of proceedings set out above at paragraphs 11-12.

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 Thursday, 25 February 2021

At The Hague, The Netherlands