



**Original: English**

**No. ICC-01/12-01/18  
Date: 22 July 2020**

**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**

**Decision on the Prosecution's witness order and variation of time limit for filing  
applications for in-court protective measures**

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

**The Office of the Prosecutor**

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**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**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*, having regard to Articles 64(2) and 64(8)(b) of the Rome Statute (the ‘Statute’), Rules 87 and 140 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on the Prosecution’s witness order and variation of time limit for filing applications for in-court protective measures’.

### **I. Procedural history**

1. On 6 January 2020, the Chamber set the date for the commencement of trial at 14 July 2020, with the presentation of evidence to begin on 25 August 2020, and adopted a calendar leading up to this date.<sup>1</sup>
2. On 14 April 2020, the Office of the Prosecutor (the ‘Prosecution’) filed its list of witnesses and a provisional list of evidence.<sup>2</sup>
3. On 6 May 2020, the Chamber issued its directions on the conduct of proceedings pursuant to Rule 140 of the Rules, in which the Chamber, *inter alia*, instructed the Prosecution to file a motivated application seeking relevant in-court protective measures pursuant to Rule 87 of the Rules for all Prosecution witnesses for whom it is reasonably foreseeable that protective measures are required, no later than 40 days before the start of the presentation of evidence.<sup>3</sup>
4. On 12 May 2020, the Prosecution filed its final list of evidence and the updated witness list containing additional information including the order of witnesses and their respective mode of testimony.<sup>4</sup>

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<sup>1</sup> [Decision Setting the Commencement Date of the Trial](#), ICC-01/12-01/18-548.

<sup>2</sup> Dépôt de la Liste des témoins de l’Accusation, des résumés desdits témoins et de la Liste provisoire des éléments de preuve à charge, ICC-01/12-01/18-740-Conf (with confidential annexes A, B and C; notified on 15 April 2020).

<sup>3</sup> [Directions on the conduct of proceedings](#), ICC-01/12-01/18-789-AnxA, para. 76.

<sup>4</sup> Prosecution submission of further information in the Prosecution List of Witnesses and of the Prosecution Final List of Evidence, ICC-01/12-01/18-805-Conf (with confidential annexes A and B; notified on 13 May 2020). The Prosecution’s final disclosure deadline was postponed from 14 April to 12 May 2020. See [Decision on the Prosecution request for extension of deadlines relating to the](#)

5. On 10 June 2020, the Defence submitted its observations pursuant to Rule 134(1) of the Rules, requesting that the Chamber order the Prosecution to streamline its case, and reconsider the date for the commencement of substantive testimony.<sup>5</sup>
6. On 30 June 2020, the Chamber convened a Single Judge status conference to deal with issues raised under Rule 134 of the Rules and other matters related to the commencement of the trial.<sup>6</sup> In particular, the Single Judge invited the parties to engage in *inter partes* consultations with a view to achieving agreement regarding the order of the Prosecution's first 10 witnesses and instructed the parties to report back to the Chamber by 13 July 2020.<sup>7</sup>
7. On 13 July 2020, the Prosecution submitted the 'Réponse de l'Accusation à l'Ordonnance orale du Juge unique sur les accords en matière de preuve et la liste de témoins de l'Accusation' (the 'Prosecution Filing on Witnesses'), informing the Chamber that, despite their efforts, the parties were unable to reach an agreement on the witness order, and requesting that the Prosecution's proposed witness order be adopted.<sup>8</sup>
8. On 14 July 2020, the Prosecution filed the 'Prosecution's request for an extension of time to submit its Rule 87 applications' (the 'Request'), requesting that the time limit for filing applications for in-court protective measures be varied.
9. On 16 July 2020, the Single Judge suspended the deadline for filing Rule 87 applications pending the Chamber's determination on the Request.<sup>9</sup>

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[disclosure of evidence and a postponement of the starting date for trial](#), 20 March 2020, ICC-01/12-01/18-677.

<sup>5</sup> [Public redacted version of "Defence Rule 134\(1\) observations"](#), ICC-01/12-01/18-870-Red2. See also [Public redacted version of "Prosecution response to Defence rule 134\(1\) motion"](#), 22 June 2020, ICC-01/12-01/18-892-Conf, ICC-01/12-01/18-892-Red;

<sup>6</sup> Transcript of hearing, ICC-01/12-01/18-T-015-CONF-ENG.

<sup>7</sup> Transcript of hearing, ICC-01/12-01/18-T-015-CONF-ENG, p. 51, lines 2-19.

<sup>8</sup> Réponse de l'Accusation à l'Ordonnance orale du Juge unique sur les accords en matière de preuve et la liste de témoins de l'Accusation, ICC-01/12-01/18-954-Conf (with confidential *ex parte*, Defence and Prosecution only, Annex A and C, and confidential Annex B).

<sup>9</sup> Email from the Chamber to the parties and participants, 16 July 2020, at 10:48.

10. On 17 July the Defence submitted its response to the Prosecution Filing on Witnesses (the ‘Response’), opposing the adoption of the Prosecution’s suggested witness order.<sup>10</sup>
11. On the same date, the Defence submitted its response to the Request, in which it does not object to the extension sought by the Prosecution, but requests that the deadline for responses to the applications be suspended or extended such that it falls on 17 August 2020.<sup>11</sup> The LRVs informed the Chamber on 20 July 2020 that they also do not object to the Request.<sup>12</sup>

## II. Submissions and analysis

### A. The Prosecution’s witness order

12. At the outset, the Chamber notes that the calling party has a broad discretion in determining the order of its witnesses, and the Chamber defers to the calling party, save for exceptional circumstances where intervention is warranted in view of the Chamber’s obligations under Article 64(2) of the Statute.<sup>13</sup> In the present case, considering in particular the extraordinary circumstances created by the COVID-19 pandemic, the Chamber, on an exceptional basis, invited the parties to engage in *inter partes* consultations with a view to achieving agreement regarding the order of the Prosecution’s first 10 witnesses.<sup>14</sup>
13. The Chamber notes that the order of witnesses was discussed *inter partes*, as instructed by the Single Judge during the status conference of 30 June 2020. The Chamber observes that on 3 July 2020, the Defence sent a proposed witness order for the Prosecution’s block 1 witnesses to the Prosecution, which had been ‘adjusted to address specific concerns which have been raised by the Defence in

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<sup>10</sup> Confidential redacted version of "Defence response to « Réponse de l'Accusation à l'Ordonnance orale du Juge unique sur les accords en matière de preuve et la liste de témoins de l'Accusation » (ICC-01/12-01/8-954-Conf)", ICC-01/12-01/18-962-Conf-Red.

<sup>11</sup> Email from the Defence to the Chamber, 17 July 2020, at 15:41.

<sup>12</sup> Email from the LRVs to the Chamber, 20 July 2020, at 16:13.

<sup>13</sup> Transcript of hearing, 30 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 24, lines 19-25.

<sup>14</sup> Transcript of hearing, 30 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 23, lines 8-12, p.51, lines 10-16.

its filings and submissions’ (the ‘Defence Proposal’).<sup>15</sup> Further, and as a result of the Defence Proposal, on 9 July 2020, the Prosecution provided an adjusted witness order, which took the Defence’s views into account, particularly with respect to the first 10 witnesses (the ‘Prosecution list of 9 July’).<sup>16</sup>

14. The Defence responded to the Prosecution list of 9 July on 13 July 2020. While agreeing on 7 out of the first 10 witnesses, the Defence objects to the remaining 3 witnesses being called at an early stage of the Prosecution’s presentation of evidence.<sup>17</sup>
15. The Chamber observes that while the Defence objects to the three witnesses that are listed as number 1, 2, and 8 in the Prosecution list of 9 July, these witnesses were listed as number 2, 3, and 11, respectively, in the Defence Proposal of 3 July. The Chamber regrets that notwithstanding the efforts taken by the Prosecution, the Defence seems to have virtually recanted its agreement with respect to three of the witnesses, only 10 days after sending its proposal, and on the very day that the parties were due to report back to the Chamber on the status of their consultations. The Defence attempts to justify this by arguing that its original proposal was subject to the caveat that on 10 June 2020, the Defence had requested the Chamber to vary, and adjourn the date for the commencement of substantive testimony.<sup>18</sup> The Chamber is not satisfied with this reasoning and fails to see how this explains the change in the Defence’s position, especially when the Defence itself states that it ‘did not act in the expectation that its request would be granted’.<sup>19</sup>
16. While the Defence also seems to base its objection, *inter alia*, on Mr Al Hassan’s unfitness to stand trial, the Chamber reiterates its finding that with

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<sup>15</sup> See Annex A to the Réponse de l’Accusation à l’Ordonnance orale du Juge unique sur les accords en matière de preuve et la liste de témoins de l’Accusation, 14 July 2020, ICC-01/12-01/18-954-Conf-Exp-AnxA.

<sup>16</sup> Annex B to the Réponse de l’Accusation à l’Ordonnance orale du Juge unique sur les accords en matière de preuve et la liste de témoins de l’Accusation, 14 July 2020, ICC-01/12-01/18-954-Conf-Exp-AnxB.

<sup>17</sup> Annex C to the Réponse de l’Accusation à l’Ordonnance orale du Juge unique sur les accords en matière de preuve et la liste de témoins de l’Accusation, 14 July 2020, ICC-01/12-01/18-954-Conf-Exp-AnxC.

<sup>18</sup> Response, ICC-01/12-01/18-962-Conf-Red, para. 4.

<sup>19</sup> Response, ICC-01/12-01/18-962-Conf-Red, para. 5.

respect to Mr Al Hassan's alleged unfitness to stand trial, the Defence could have acted prior to the physical meeting with Mr Al Hassan,<sup>20</sup> and is therefore not convinced that the Defence was not aware of these considerations when submitting the Defence Proposal.

17. The Chamber is also unconvinced by the Defence's submission that '[t]he Prosecution's claim, that no agreement was found, presupposes that the only agreement that would be acceptable, would be one where the Defence accepts the Prosecution's proposal in full'.<sup>21</sup> The Chamber is unable to agree with the proposition that the Prosecution could make further proposals or compromises, when the Defence has indicated a change in its position on the very day the parties were due to report back to the Chamber. In fact, the Chamber recalls that the Prosecution has already made adjustments to its witness order over the course of the past months, in light of the Defence suggestions.<sup>22</sup>
18. As mentioned above, in principle, the calling party enjoys a broad discretion with respect to the order of its witnesses, and the present consultation constitutes an exception to that general rule. Noting that the parties have failed to reach agreement on the witness order, and considering the matters set out in the paragraphs above, the Chamber finds it appropriate to revert to the general rule and defer to the calling party's discretion. Having had regard to the state of the COVID-19 pandemic in both Europe and Mali, the recent Registry report on the security situation in Mali,<sup>23</sup> and all previous submissions of the parties on this matter, the Chamber is also of the view that confirming the Prosecution list of 9 July 2020 is consistent with the Chamber's obligation to ensure that the trial is fair and expeditious.

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<sup>20</sup> Decision on the Defence notice on Mr Al Hassan's unfitness to stand trial, 13 July 2020, ICC-01/12-01/18-952-Conf, paras 26-28.

<sup>21</sup> Response, ICC-01/12-01/18-962-Conf-Red, para. 7.

<sup>22</sup> Prosecution submission of further information in the Prosecution List of Witnesses and of the Prosecution Final List of Evidence, ICC-01/12-01/18-805-Conf, para. 12. *See also* Réponse de l'Accusation aux "Defence submissions pursuant to Trial Chamber X's "Order to provide information on methods of work to minimise the impact of COVID-19 and related measures on the conduct of proceedings"", 3 June 2020, ICC-01/12-01/18-855-Conf, paras 24-31.

<sup>23</sup> Confidential redacted version of the 'Second Registry Report on the Security Situation in Mali', ICC-01/12-01/18-928-Conf-Red.

19. In light of the aforementioned considerations, the Chamber confirms the Prosecution list of 9 July with respect to the first 10 witnesses. This conclusion is without prejudice to the possibility of the Chamber intervening at a later point, by regulating the length of the presentation of evidence,<sup>24</sup> or by modifying the witness order on an exceptional basis.
20. Furthermore, the Chamber defers to the Prosecution the order in which it will call all subsequent witnesses in block 1. The Prosecution should bear in mind any *inter partes* discussions, as well as the views of the Registry, and particularly the Victims and Witnesses Unit (the ‘VWU’), as to the logistics and any other issues that may have an impact on the availability of witnesses to testify at the seat of the Court or via video-link. In particular the Chamber urges the Prosecution to organise the presentation of its case in a manner that avoid unnecessary adjournments between witnesses. The Prosecution should file an updated witness order for all block 1 witnesses by **10 September 2020**.

#### **B. Request for variation of time limit**

21. As a preliminary matter, the Chamber notes that the present Request was filed a day before the original deadline for filing applications for in-court protective measures. Having considered the reasons cited in support of the Request, the Chamber considers that notwithstanding the 13 July 2020 deadline for *inter partes* consultations on the witness order, the Prosecution could have filed the present Request at an earlier point. While Regulation 35 of the Regulations does not *per se* preclude the parties and participants from filing requests for variation of time limit immediately before the original time limit, the Chamber is of the view that in light of the principle of fairness and judicial economy, parties and participants should endeavour to file requests under Regulation 35 of the Regulations sufficiently in advance of the original time limit, so as to allow the Chamber to adjudicate on those requests before the lapse of the original time limit.<sup>25</sup>

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<sup>24</sup> [Directions on the conduct of proceedings](#), ICC-01/12-01/18-789-AnxA, para. 19.

<sup>25</sup> See Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the Prosecutor’s Request for an Extension of Time to apply for the Non-Disclosure of](#)



22. The Prosecution requests that the deadline for applications for in-court protective measures be varied so that: (i) as regards applications for block 1 witnesses, the deadline is postponed until 27 July 2020; and (ii) as regards all other witnesses, the Prosecution is required to file applications no later than 30 days before each remaining evidentiary block.<sup>26</sup> The Prosecution submits that such an extension is justified as it needs additional time for filing applications for in-court protective measures since it requires having precise and updated information on the security situation of a number of witnesses, and an extension would also enable the Prosecution to make focused and consolidated submissions for in-court protective measures.<sup>27</sup>
23. The Defence does not oppose the Request but seeks that for all applications submitted by 27 July 2020, the deadline for responses is set no earlier than 17 August 2020, having regard to the summer recess.<sup>28</sup>
24. Pursuant to Regulation 35 of the Regulations, the Chamber will determine whether good cause has been shown to extend the time limit set for the filing of applications for in-court protective measures. As highlighted in the previous decisions issued by the Chamber, bearing in mind its obligation to ensure a fair and expeditious trial, and more specifically, with respect to this case, the fundamental rights of Mr Al Hassan, caution should be exercised in adjusting deadlines.<sup>29</sup>
25. As regards the first part of the Request, which concerns witnesses currently scheduled to appear in block 1, having had regard *inter alia* to the recent Registry report on the security situation in Mali,<sup>30</sup> the Chamber is satisfied that

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[Witness Identities](#), 10 April 2019, ICC-01/14-01/18-168, para. 18. *See also* [Décision portant sur la demande de prorogation de délai présentée par le Procureur](#), 13 May 2019, ICC-01/12-01/18-346, para. 17.

<sup>26</sup> Request, ICC-01/12-01/18-957-Conf, para. 11.

<sup>27</sup> Request, ICC-01/12-01/18-957-Conf, paras 5, 8.

<sup>28</sup> Email from the Defence to the Chamber, 17 July 2020, at 15:41.

<sup>29</sup> [Decision on the Prosecution request for a further extension of the time limit to file the Trial Brief](#), 23 April 2020, ICC-01/12-01/18-770, para. 10; [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, paras 8-9.

<sup>30</sup> Confidential redacted version of the 'Second Registry Report on the Security Situation in Mali', ICC-01/12-01/18-928-Conf-Red.

the difficulty the Prosecution faced in collecting necessary information constitutes good cause within the meaning of Regulation 35 of the Regulations.

26. Noting further the fact that the extension sought is limited to 10 days and the fact that the Defence does not object to an extension, the Chamber finds that granting the extension sought will not unduly impact the fairness and expeditiousness of the proceedings, and is justified under Regulation 35 of the Regulations.
27. Turning to the second part of the Request which concerns all witnesses who are currently scheduled to appear outside block 1, the Chamber finds that the extension sought by the Prosecution is not justified under the current circumstances. In particular, the Chamber does not agree with the Prosecution that filing applications for in-court protective measures prior to the start of the Prosecution's first evidentiary block will result in an overly cautious approach being adopted.<sup>31</sup> In the Chamber's view, the Prosecution fails to sufficiently demonstrate how the inability to collect security information is such that extension beyond the commencement of evidentiary hearings is necessary.
28. While the Chamber had due regard to the difficulties caused by the COVID-19 pandemic in issuing the aforementioned directions on the conduct of proceedings, it nonetheless found that requiring the Prosecution to submit all applications for in-court protective measures was the appropriate way forward. The Chamber's opinion in this regard has not changed. In particular, the Chamber considers that ruling on these applications in advance will provide more certainty to upcoming witnesses on what to expect during court proceedings, and will reduce the need for litigation on in-court protective measures during the trial.<sup>32</sup>
29. In this regard, the Chamber does not consider that the passing of the deadline for applications for in-court protective measures forecloses any such applications from being made after the time limit. To the contrary, should

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<sup>31</sup> Request, ICC-01/12-01/18-957-Conf, para. 3.

<sup>32</sup> See also Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Initial Directions on the Conduct of Proceedings](#), 13 July 2016, ICC-02/04-01/15-497 (hereinafter: 'Ongwen Directions'), para. 34.

additional information become subsequently available, the Prosecution may submit a new or additional request for in-court protective measures.<sup>33</sup>

30. That being said, the Chamber recalls its aforementioned finding that the Prosecution's inability to collect information constitutes a good cause within the meaning of Regulation 35 of the Regulations and observes that a limited extension might be warranted on that basis. Considering all relevant factors, including the difficulty experienced by the Prosecution, the impact on the fair and expeditious conduct of the proceedings, the stage of the proceedings, as well as the need to rule on applications for in-court protective measures at an early stage, the Chamber finds that a limited extension until 1 September 2020 is appropriate and justified.
31. For these reasons, the Chamber partially grants the Request and: (i) extends the deadline for the filing of any applications for in-court protective measures with respect to witnesses scheduled to appear in block 1, in accordance with ICC-01/12-01/18-954-Conf-AnxB, until **27 July 2020**; and (ii) extends the deadline for filing applications for in-court protective measures with respect to all other witnesses until **1 September 2020**. Any responses to applications for in-court protective measures for block 1 witnesses, as well as observations by the VWU on those applications, should be submitted by **17 August 2020**.

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<sup>33</sup> See [Directions on the conduct of proceedings](#), ICC-01/12-01/18-789-AnxA, para. 76. Similarly see [Ongwen Directions](#), para. 34.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**CONFIRMS** the Prosecution's witness order as contained in the Prosecution list of 9 July (ICC-01/12-01/18-954-Conf-AnxB) with respect to the first 10 witnesses;

**INSTRUCTS** the Prosecution to file an updated witness order for all block 1 witnesses by 10 September 2020;

**PARTIALLY GRANTS** the Request; and

**VARIES** the deadline for the filing of applications for in-court protective measures pursuant to Rule 87 of the Rules, and responses thereto, in accordance with paragraph 31 above.

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 Wednesday, 22 July 2020

At The Hague, The Netherlands