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No. ICC-01/12-01/18

Date of original: 24 September 2020

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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 ABDOL AZIZ AG MOHAMED AG
MAHMOUD

Public redacted version of
‘Second decision on 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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Seydou Doumbia
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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Defence**

States Representatives

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**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), 64(6)(e), 64(7), 67(1) and 68(1) and (2) of the Rome Statute (the ‘Statute’), Rule 87 of the Rules of Procedure and Evidence (the ‘Rules’), Regulation 23*bis* of the Regulations of the Court (the ‘Regulations’) and Regulation 94 of the Regulations of the Registry (the ‘Registry Regulations’), issues the following ‘Second decision on in-court protective measures’.

I. Procedural background

1. On 6 May 2020, the Chamber issued its ‘Directions on the conduct of proceedings’,¹ instructing the Office of the Prosecutor (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’.²
2. On 22 July 2020, the Chamber extended the deadline for the Prosecution’s filing of applications for in-court protective measures with respect to witnesses scheduled to testify first in the trial (the ‘Block 1 Witnesses’) to 27 July 2020.³ The deadline for responses to any application as well as observations from the Victims and Witnesses Unit (the ‘VWU’) was set to 17 August 2020.⁴
3. On 27 July 2020, the Prosecution filed an application pursuant to Rule 87 (the ‘First Application’),⁵ seeking in-court protective measures for several of its Block 1 Witnesses.⁶

¹ , ICC-01/12-01/18-789-AnxA, paras 74-76.

² [ICC-01/12-01/18-789-AnxA](#), para. 76.

³ [Decision on the Prosecution’s witness order and variation of time limit for filing applications for in-court protective measures](#), 22 July 2020, ICC-01/12-01/18-968, para. 31.

⁴ [ICC-01/12-01/18-968](#), para. 31.

⁵ Requête de l’Accusation sur le fondement de la règle 87 aux fins de mesures de protection pour des témoins du Bloc 1, 27 July 2020, ICC-01/12-01/18-976-Conf-Exp, (confidential *ex parte*, available

4. On 17 August 2020, the Legal Representatives of Victims (the ‘LRVs’) submitted their response, indicating that they do not object to the First Application.⁷
5. On the same day, the Defence submitted a response to the First Application. The Defence indicates it does not adopt a specific position on each protective measures requested, due to ‘the lack of time available to the Defence at present, and the fact that [the Defence] is not familiar with the specific security profile of Prosecution witnesses’.⁸ Nonetheless, the Defence submits that proceedings should remain open and transparent, which warrants the use of closed sessions and/or the anonymization of witnesses only where necessary and proportionate. Moreover, the Defence requests that the Prosecution’s ‘*ex parte*’ argumentation in relation to matters directly related to the trial process’ – especially those related to the accused – either be reclassified or dismissed *in limine*. The Defence argues that the First Application should not be used to advance arguments related to the reliability or credibility of witnesses’ future testimony.
6. On the same day, the VWU filed its observations (the ‘VWU Observations’).⁹ The VWU indicates that these are ‘general observations’ as it did not have the opportunity to make an assessment of all the witnesses who are subject to the First Application. The VWU confirms that it will meet all witnesses prior to their testimony and will then provide the Chamber with a more detailed assessment on necessary in-court protective measures.¹⁰

only to VWU and the Prosecution ; confidential redacted versions were filed on 28 July 2020, ICC-01/12-01/18-976-Red, and on 7 September 2020, ICC-01/12-01/18-976-Conf-Red2 ; a public redacted version was filed on 14 September 2020,) (hereinafter: the ‘First Application’).

⁶ Namely Witnesses P-0057, P-0635, P-0193, P-0075, P-0104, P-0621, P-0638, P-0065, P-0136, P-0152, P-0654, P-0653, P-0150, P-0623, P-0004 and P-0643.

⁷ Email from the LRVs to TCX Communications, 17 August 2020, at 12:09.

⁸ Email from the Defence to TCX Communications, 17 August 2020, at 13:07.

⁹ Victims and Witnesses Unit’s Observations on the « Requête de l’Accusation sur le fondement de la règle 87 aux fins de mesures de protection pour des témoins du Bloc 1 », 17 August 2020, ICC-01/12-01/18-998-Conf-Exp (confidential *ex parte*, available only to the Registry and the Prosecution; a confidential redacted version was filed on the same date, ICC-01/12-01/18-998-Conf-Red) (hereinafter : the ‘VWU Observations’).

¹⁰ , ICC-01/12-01/18-998-Conf-Red, para. 9.

7. On 31 August 2020, the Chamber issued its ‘First decision on in-court protective measures’ (the ‘First Decision’),¹¹ regarding the Block 1 Witnesses scheduled to testify during the month of September, namely Witnesses P-0057, P-0104, P-0621, P-0193, P-0075 and P-0623.
8. On the same day, the Prosecution filed a second application pursuant to Rule 87 (the ‘Second Application’),¹² seeking in-court protective measures for 20 witnesses.¹³
9. On 1 September 2020, the Prosecution filed a third application pursuant to Rule 87 (the ‘Third Application’),¹⁴ seeking in-court protective measures for 23 witnesses.¹⁵
10. On 3 September 2020, the Chamber issued an order *inter alia* authorising the Prosecution to file an additional request for in-court protective measures for Witness P-0660 by 10 September 2020, and shortening the deadline for responses to the Third Application to 18 September 2020.¹⁶
11. On 14 September 2020, the LRVs submitted their response to the Third Application, indicating that they do not object to the protective measures requested.¹⁷

¹¹ First decision on in-court protective measures, 31 August 2020, ICC-01/12-01/18-1019-Conf-Exp (confidential *ex parte*, available only to VWU and the Prosecution; a confidential redacted version was filed on the same day, ICC-01/12-01/18-1019-Conf-Red) (hereinafter: the ‘First Decision’).

¹² Deuxième requête de l’Accusation sur le fondement de la règle 87 aux fins de mesures de protection des témoins du Bloc 2 et du Bloc 3, 31 August 2020, ICC-01/12-01/18-1020-Conf-Exp (confidential *ex parte*, available only to VWU and the Prosecution; a confidential redacted version was filed on 4 September 2020, ICC-01/12-01/18-1020-Conf-Red) (hereinafter: the ‘Second Application’).

¹³ Namely Witnesses P-0557, P-0565, P-0554, P-0984, P-0602, P-0642, P-0547, P-0580, P-0639, P-0641, P-0542, P-0603, P-0574, P-0538, P-0570, P-0553, P-0610, P-0622, P-0636 and P-0520.

¹⁴ Prosecution third application for in-court protective measures for Block 2 and Block 3 witnesses and request for additional time to contact MLI-OTP-P-0660, 1 September 2020, ICC-01/12-01/18-1022-Conf-Exp (confidential *ex parte*, available only to VWU and the Prosecution; a confidential redacted version was filed on 4 September 2020, ICC-01/12-01/18-1022-Conf-Red) (hereinafter: the ‘Third Application’).

¹⁵ Namely Witnesses P-1086, P-0113, P-0114, P-0130, P-0147, P-0524, P-0595, P-0608, P-0081, P-0160, P-0111, P-0626, P-0099, P-0537, P-0582, P-0605, P-0634, P-0647, P-0431, P-0587, P-0617, P-0620 and P-0655.

¹⁶ Email from the Chamber to the parties and participants, 3 September 2020, at 13:46.

¹⁷ Email from the LRVs to TC X Communications, 14 September 2020, at 17:08.

12. On 18 September 2020, the VWU filed its observations (the ‘VWU Second Observations’).¹⁸
13. The Defence did not respond to the Third Application seeking protective measures for witnesses P-0620 and P-0655.

II. Analysis

A. Scope of the Decision

14. The present decision rules on the in-court protective measures requested by the Prosecution for witnesses currently scheduled to testify on 29 September, namely Witness P-0152, or in October 2020, namely Witnesses P-0065, P-0653, P-0620 and P-0655.

1. P-0152

15. The Prosecution seeks in-court protective measures for expert Witness P-0152, in the form of the use of a pseudonym, as well as the use of private sessions and closed sessions.¹⁹ P-0152 is [REDACTED].²⁰ The Prosecution submits that P-0152 often travels [REDACTED] for work. It argues that in order to avoid any risks for his subsequent professional missions, his name should not be publically associated to the trial and therefore that the sought protective measures appear necessary.²¹

¹⁸ Victims and Witnesses Unit’s Observations on the “Deuxième requête de l’Accusation sur le fondement de la règle 87 aux fins de mesures de protection des témoins du Bloc 2 et du Bloc 3”, on the “Prosecution’s third application for in court protective measures for Block 2 and Block 3 witnesses and request for additional time to contact [REDACTED]” and on the “Prosecution’s application for in-court protective measures for REDACTED”, 18 September 2020, ICC-01/12-01/18-1052-Conf-Exp (confidential *ex parte*, available only to the Registry and the Prosecution; a confidential redacted version was filed on the same date, ICC-01/12-01/18-1052-Conf-Red) (hereinafter : the ‘VWU Second Observations’).

¹⁹ , ICC-01/12-01/18-976-Conf-Red2, para. 24.

²⁰ , ICC-01/12-01/18-976-Conf-Red2, para. 24.

²¹ , ICC-01/12-01/18-976-Conf-Red2, para. 24.

16. The Defence does not raise specific objections with respect to the protective measures requested for P-0152.²²
17. The VWU recommends the in-court protective measures sought considering that P-0152 frequently travels [REDACTED] for professional purposes, which the VWU notes [REDACTED] may subject him to ‘escalated levels of risk’.²³
18. The Chamber notes that P-0152 is required to frequently travel for professional purposes to [REDACTED] where it is reported that Islamist groups are still operating in what is described as an unstable and dangerous security situation.²⁴ In light of these circumstances, and having due consideration for VWU’s observations, it is reasonable to conclude that having the witness’s name being associated with ICC proceedings could allow his identification by potentially hostile individuals in the territories where the witness operates and would therefore constitute a threat to his safety and a restriction to the exercise of his professional activity. Consequently, the Chamber considers that the in-court protective measures requested for P-0152 are justified for the purpose of avoiding an impermissible threat to his safety and allowing the pursuit of his professional activity.

2. *P-0065*

19. The Prosecution seeks in-court protective measures for Witness P-0065, in the form of the use of a pseudonym, facial and voice distortion, as well as use of private sessions and/or closed sessions, pursuant to Rule 87 of the Rules and in accordance with Regulation 94 of the Registry Regulations.²⁵ P-0065 is [REDACTED].²⁶

²² Email from the Defence to TCX Communications, 17 August 2020, at 13:07.

²³ , ICC-01/12-01/18-998-Conf-Red, para. 15.

²⁴ Rapport de situation du Greffe concernant la situation au Mali du 1^{er} au 30 mai 2020 (confidential annex available only to the Registry), 27 July 2020, ICC-01/12-01/18-976-Conf-AnxA. *See also* , ICC-01/12-01/18-998-Conf-Red.

²⁵ , ICC-01/12-01/18-976-Conf-Red2, para. 38.

²⁶ , ICC-01/12-01/18-976-Conf-Red2, paras 34, 36.

20. The Prosecution submits that [REDACTED] P-0065 [REDACTED].²⁷ It submits that [REDACTED].²⁸ The Prosecution argues that the measures sought are required to ensure his safety and that a public testimony without them would defeat [REDACTED]. The Prosecution further argues that he is [REDACTED].²⁹
21. The Defence does not raise specific objections with respect to the protective measures requested for P-0065.³⁰
22. The VWU recommends the in-court protective measures requested for P-0065. In its view, the measures requested will help ensuring [REDACTED] effectively protect the witness's safety.³¹
23. The Chamber notes that the witness [REDACTED]. The Chamber is of the view that the above warrants the protection of the witness's identity to avoid an impermissible threat to his safety, through the use of a pseudonym, face and voice distortion and of closed and private sessions where warranted [REDACTED].

3. *P-0653*

24. The Prosecution seeks in-court protective measures for expert Witness P-0653, in the form of the use of a pseudonym as well as facial and voice distortion during her testimony.³² P-0653 is [REDACTED].³³
25. The Prosecution submits that although P-0653 lives in [REDACTED], the protective measures sought are necessary to ensure her present and future personal safety in the conduct of her professional activity, the regular performance of her professional duties and the security of [REDACTED]

²⁷ , ICC-01/12-01/18-976-Conf-Red2, para. 34.

²⁸ , ICC-01/12-01/18-976-Conf-Red2, para. 36.

²⁹ , ICC-01/12-01/18-976-Conf-Red2, para. 37.

³⁰ Email from the Defence to TCX Communications, 17 August 2020, at 13:07.

³¹ , ICC-01/12-01/18-998-Conf-Red, para. 17.

³² , ICC-01/12-01/18-976-Conf-Red2, para. 22.

³³ , ICC-01/12-01/18-976-Conf-Red2, para. 22.

together with the smooth operation of its missions in the future.³⁴ Moreover, the Prosecution submits that, given P-0653's close work with [REDACTED] and her high technical competence in terrorist cases in [REDACTED], her testimony at the Court without the requested protective measures may have a negative impact on her safety and the continued cooperation by [REDACTED].³⁵

26. The Defence does not raise any specific objections with respect to P-0653.³⁶
27. The VWU states that the measures requested for P-0653 'represent a position of caution' as there may be a need to protect her identity based on the nature of her specific duties.³⁷ However, the VWU stresses it has yet to conduct its independent assessment of the witnesses immediately prior to the in-court testimony.
28. The Chamber considers that an objectively justifiable risk with respect to expert Witness P-0653 has not been demonstrated. Accordingly, the Chamber finds that the protective measures sought are not warranted.
29. As previously decided in respect of other witnesses,³⁸ the Chamber considers that the mere fact that Witness P-0653 is a [REDACTED] working in close relationship with [REDACTED] is not itself sufficient to justify the use of the protective measures sought. Accordingly, and unless the VWU's upcoming assessment raises specific concerns, the Chamber rejects the First Application in respect of P-0653. The Chamber notes that this determination is without prejudice to the right of this witness to bring her own application for protective measures.

4. *P-0620 and P-0655*

30. The Prosecution seeks in-court protective measures for expert Witnesses P-0620 and P-0655, in the form of the use of a pseudonym, facial and voice distortion,

³⁴ , ICC-01/12-01/18-976-Conf-Red2, para. 22.

³⁵ , ICC-01/12-01/18-976-Conf-Red2, para. 22.

³⁶ Email from the Defence to TC X Communications, 17 August 2020, at 13:07.

³⁷ , ICC-01/12-01/18-998-Conf-Red, para. 14.

³⁸ First Decision, ICC-01/12-01/18-1019-Conf-Red, paras 20-21.

as well as use of private sessions and/or closed sessions during their testimony.³⁹ P-0620 is [REDACTED].⁴⁰ Expert Witness P-0655 is [REDACTED].⁴¹ P-0620 and P-0655 both live in [REDACTED].⁴²

31. The Prosecution submits that the protective measures sought are necessary to ensure both witnesses' safety in the conduct of their current and future professional activities [REDACTED].⁴³
32. The Defence did not raise objections with respect to the protective measures requested for P-0620 and P-0655.⁴⁴
33. The VWU observes that although it has not met with these witnesses, it supports the protective measures sought in respect of P-0620 and P-0655.⁴⁵
34. The Chamber takes note of the VWU Second Observations and of the fact that these two witnesses may [REDACTED]. The Chamber also notes that P-0620 and P-0655 are technical expert witnesses.
35. The Chamber is satisfied that exposing the witnesses' identities to the public, [REDACTED] gives rise to an objectively justifiable risk for the witnesses, warranting the use of certain in-court protective measures. However, the Chamber is of the view that such risk solely warrants the use of: a pseudonym, face distortion and private sessions and/or closed sessions where appropriate. It follows that, as previously decided in respect of other witnesses,⁴⁶ the Chamber does not deem it necessary to grant the use of voice distortion for these witnesses.

B. Use of private sessions

³⁹ , ICC-01/12-01/18-1022-Conf-Red, para. 75.

⁴⁰ , ICC-01/12-01/18-1022-Conf-Red, para. 72.

⁴¹ , ICC-01/12-01/18-1022-Conf-Red, para. 73.

⁴² , ICC-01/12-01/18-1022-Conf-Red, para. 75.

⁴³ , ICC-01/12-01/18-1022-Conf-Red, para. 74.

⁴⁴ See paragraph 13 above.

⁴⁵ VWU Second Observations, ICC-01/12-01/18-1052-Conf-Red, paras 30-31. VWU refers specifically to P-0057 and P-0621.

⁴⁶ First Decision, ICC-01/12-01/18-1019-Conf-Red, para. 15.

36. In order to ensure that the protective measures granted do not unduly infringe upon the accused's right to a public hearing, the Chamber instructs the parties and participants to conduct their relevant examination in a manner that limits as much as possible the use of private or closed sessions.
37. The Chamber emphasises that 'identifying information' related to protected witnesses must be interpreted strictly, particularly when witnesses are expert or technical witnesses. In particular, while the name, date and place of birth and other singular and personal information of a witness shall remain confidential, general information related to the witness should be elicited in public session. The Chamber also notes that in the case of experts/technical witnesses the fact that a witness works in a particular specialized field and has done so in Mali cannot be considered in and of itself as identifying information. The parties are therefore instructed to structure their questioning such that there are not lengthy passages of non-confidential questions and answers in private session solely because confidential information must be adduced at the beginning of that series of questions.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the requests for in-court protective measures with respect to P-0152 and P-0065;

PARTIALLY GRANTS the requests for in-court protective measures with respect to P-0620 and P-0655;

REJECTS the request for in-court protective measures with respect to P-0653;

DEFERS its determination for the remainder of the First and Third Applications; and

INSTRUCTS the Prosecution to file a public redacted version of its Third Application no later than 2 October 2020.

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, 24 September 2020

At The Hague, The Netherlands