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No. ICC-01/12-01/18

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Date: 20 February 2020

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 the variation of protective measures for
Witnesses P-0004, P-0113, P-0114, P-0147, and P-0431’**

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

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**Unrepresented Applicants for
Participation/Reparations**

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Other

Judge Kimberly Prost, acting as Single Judge of Trial Chamber X (the ‘Single Judge’ and the ‘Chamber’, respectively) 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 variation of protective measures for Witnesses P-0004, P-0113, P-0114, P-0147, and P-0431’.

I. Procedural history

1. On 30 September 2019, Pre-Trial Chamber I confirmed charges against Mr Al Hassan of crimes against humanity and war crimes, allegedly committed in Timbuktu, Mali.¹
2. On 30 December 2019, the Single Judge of Trial Chamber X rendered a decision setting up a procedure and relevant time limits concerning the disclosure and re-disclosure of evidence (the ‘Disclosure Decision’).² By way of this decision, the Single Judge notably instructed the Prosecution to: i) lift at the earliest opportunity, without prior leave of the Chamber, all existing redactions not covered by Regulation 42 of the Regulations of the Court (the ‘Regulations’) or falling outside the categories provided for in the Redaction Protocol adopted for trial;³ and ii) file any application required pursuant to Regulation 42 in order to lift existing redactions which are no longer justified, by 10 February 2020.⁴ The deadline initially set for the filing of any such application was postponed to 10 March 2020 in a subsequent decision of the Single Judge issued on 22 January 2020.⁵
3. 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.

¹ *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-461-Conf (a corrected version of the decision was filed on 8 November 2019, ICC-01/12-01/18-461-Conf-Corr; a public redacted version of the decision was filed on 13 November 2019, ICC-01/12-01/18-461-Conf-Corr-Red).

² Decision on the evidence disclosure protocol and other related matters, ICC-01/12-01/18-546.

³ Disclosure Decision, ICC-01/12-01/18-546, para. 19.

⁴ Disclosure Decision, ICC-01/12-01/18-546, para. 21.

⁵ Decision on Prosecution request for a variation of time limits relating to the disclosure of evidence and scheduling a second status conference, ICC-01/12-01/18-558 (the ‘Decision extending time limits’).

It notably set 14 April 2020 as the deadline for the Prosecution to finalise its evidence disclosure.⁶

4. On 31 January 2020, before Trial Chamber VIII, the Prosecution filed two requests pursuant to Regulation 42(3) seeking the variation of different measures ordered in the context of the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (the ‘*Al Mahdi* case’) for the protection of Witnesses P-0004, P-0113, P-0114, P-0147 (in the form of non-disclosure of their identities to the *Al Mahdi* defence) and P-0431 (in the form of in-court protective measures to prevent this witness’ identity from being revealed to the public).⁷ [REDACTED].⁸
5. On 10 February 2020, the Single Judge of Trial Chamber VIII, having found that Trial Chamber VIII could not be ‘seised of the proceedings’ for the purposes of Regulation 42(3) of the Regulations, declared Trial Chamber VIII unable to rule on the two Prosecution requests and considered that ‘any related requests concerning the *Al Mahdi* case record, must instead be brought before Trial Chamber X in the *Al Hassan* case’.⁹

II. Applicable law

6. In rendering the present decision, and in addition to Regulation 42 of the Regulations, the Single Judge finds it appropriate to refer to Articles 54(3)(f), 64(2), 3(c) and (6), 67(1) and 68(1) and (5) of the Statute and Rules 76, 81(4), and 84 of the Rules of Procedure and Evidence (‘Rules’).
7. It is noted that Regulation 42(1) of the Regulations relevantly provides that protective measures in respect of a witness shall continue in full force in other

⁶ Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548.

⁷ Prosecution’s request for variation of protective measures for [REDACTED] MLI-OTP-P-0004, MLI-OTP-P-0113, MLI-OTP-P-0114 and MLI-OTP-P-0147 [REDACTED], 30 January 2020, notified on 31 January 2020, ICC-01/12-01/15-342-Conf-Exp, *ex parte* Prosecution and Victims and Witnesses Unit only, with two confidential *ex parte* annexes (the ‘First Request’); and *Requête de l’Accusation afin de divulguer à la Défense de M. AL HASSAN le transcript de l’audition du témoin de l’Accusation MLI-OTP-P-0431, en ce compris les passages à huis clos identifiants*, ICC-01/12-01/15-343-Conf-Exp, *ex parte* Prosecution and Victims and Witnesses Unit only, with one confidential *ex parte* annex (‘Second Request’).

⁸ [REDACTED].

⁹ Decision on Prosecution’s Requests for Variation of Protective Measures, ICC-01/12-01/15-344, para. 9.

proceedings and after proceedings have been concluded, subject to revision by a Chamber.

8. The Single Judge recalls that, 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. The rights of the accused are enshrined in Article 67 of the Statute and also reflected in other relevant provisions.
9. Of particular importance is Rule 76(1) of the Rules which specifies that, sufficiently in advance to enable the adequate preparation of the defence, the Prosecution shall 'provide the defence with the names of witnesses whom [it] intends to call to testify and copies of any prior statements made by those witnesses'. Where disclosure may lead to the grave endangerment of the security of a witness or his or her family, Article 68(5) of the Statute provides that the Prosecutor may seek measures to withhold certain evidence and submit instead a summary thereof 'for the purposes of any proceedings conducted prior to the commencement of the trial'.
10. 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 and witnesses called to give evidence. The stage of the proceedings is a key factor to be considered in conducting this assessment.

III. Analysis

11. The Single Judge observes that two applications were filed by the Prosecutor in the *Al Mahdi* case in accordance with Regulation 42 of the Regulations. Pursuant to Regulation 42(3), and noting the Single Judge of Trial Chamber VIII's finding that these Prosecution requests must be brought before Trial Chamber X, the Single Judge is of the view that she can decide to vary measures ordered for the protection of witnesses in the context of the *Al Mahdi* proceedings.

12. For efficiency, to ensure that disclosable material is provided to the Defence at the earliest opportunity, and on an exceptional basis, the Single Judge finds it appropriate to render the present ruling without a specific application before the Chamber and without a Defence response. In this regard, the Single Judge emphasises that it is clear that the Defence's best interest is to receive as soon as possible the identity of persons [REDACTED], as well as all related disclosable material.
13. The Single Judge notes that the Prosecution has sought variation of protective measures pursuant to Regulation 42(1) of the Regulations in the form of the rescinding of non-disclosure orders issued in the context of the *Al Mahdi* and/or *Al Hassan* proceedings. Essentially, the Prosecution points to changed circumstances and finds that it is now appropriate to disclose to Mr Al Hassan the identity of five individuals [REDACTED]. In this regard, the Single Judge recalls that since the issuance of the non-disclosure orders, and as noted above, the charges against Mr Al Hassan were confirmed and a start date for his trial was set to 14 July 2020.
14. In relation to Witnesses P-0004, P-0113, P-0114, and P-0147, the Single Judge notes that the Prosecution itself recognises that, notwithstanding their personal situation, the balance of the different interests militates in favour of varying the witnesses' protective measures.¹⁰ Further, bearing in mind Regulation 42(4) of the Regulations, the Single Judge notes that the Prosecution has advised that the witnesses have been informed and have accepted that their identity will be disclosed to the Defence.¹¹
15. Accordingly, and particularly in light of the upcoming start of trial, the Single Judge is of the view that, despite the risks faced by these Prosecution witnesses, withholding of their identities from the Defence is no longer justified. Consequently, the Single Judge considers that the Prosecution's disclosure obligations towards Mr Al Hassan require that the previous orders for non-

¹⁰ First Request, ICC-01/12-01/15-342-Conf-Exp, para. 4.

¹¹ First Request, ICC-01/12-01/15-342-Conf-Exp, para. 5.

disclosure be terminated for the purposes of the present case vis-à-vis the Defence and Mr Al Hassan.

16. Redactions applied to the names and identifying information of Witnesses P-0004, P-0113, P-0114, and P-0147 shall be lifted and disclosure of all related disclosable material shall be carried out at the earliest opportunity. It is however understood that identifying information remains confidential and that, for the time being and until [REDACTED], the witnesses' identities constitute confidential information not to be revealed to the public.
17. The Single Judge notes the Prosecution's submission that [REDACTED] Witness P-0114 [REDACTED].¹² Accordingly, [REDACTED] for the protection of P-0114. Should it become apparent that [REDACTED], the Prosecution is directed to file a specific application seeking delayed disclosure of Witness P-0114's identity by the relevant deadline, previously set to 10 March 2020.¹³
18. In relation to Witness P-0431, the Single Judge notes that protective measures in the form of facial and voice distortion, as well as use of a pseudonym, were ordered under Rule 87 of the Rules to prevent this witness' identity from being disclosed to the public during in-court testimony in the *Al Mahdi* case.¹⁴ It is however measures ordered by Pre-Trial Chamber I in 2018, in the context of pre-trial proceedings against Mr Al Hassan, which provided for the non-disclosure of Witness P-0431's identity to the Defence, as well as for the non-disclosure of related documents.¹⁵
19. Pursuant to the Single Judge's instruction of 30 December 2019, the Prosecution was instructed to lift at the earliest opportunity all existing redactions not covered by Regulation 42 which were no longer justified. Since the Prosecution does not seek a modification of the in-court protective measures

¹² First Request, ICC-01/12-01/15-342-Conf-Exp, para. 60.

¹³ Decision extending time limits, ICC-01/12-01/18-558, para. 14.

¹⁴ TC VIII, Public Redacted Version of 'Decision on Prosecution Requests for In-Court Protective Measures for P-182 and P-431', 19 July 2016, ICC-01/12-01/15-133-Red.

¹⁵ Pre-Trial Chamber I, Decision on the Prosecution Request for Leave Not to Disclose the Identity of Witness MLI-OTP-P-0431, 19 July 2018, ICC-01/12-01/18-88-Conf-Exp-tENG.

ordered by Trial Chamber VIII, i.e. to reveal P-0431's identity to the public, but instead requests authorisation to lift the existing redactions applied to ensure the non-disclosure of the witness's identity to the Defence, it is the view of the Single Judge that Regulation 42 does not apply. The Single Judge therefore clarifies that the Prosecution is to disclose at the earliest opportunity to the Defence the identity and identifying information of Witness P-0431, together with all related disclosable material, notably the transcripts of this witness' in-court testimony in the *Al Mahdi* case, including parts held in private or closed sessions. No further orders are required in this regard.

IV. Classification

20. The Single Judge considers that the present decision can be issued publicly. Further, referring to the Prosecution's indication before Trial Chamber VIII that it would file a public redacted version of its requests as soon as possible,¹⁶ the Single Judge orders that the related Prosecution requests be placed on the record of the present case by 20 February 2020, together with public and confidential versions thereof.

¹⁶ First Request, ICC-01/12-01/15-342-Conf-Exp para. 7; Second Request, ICC-01/12-01/15-343-Conf-Exp, para. 5.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

RESCINDS, for the purpose of the present case, the non-disclosure orders previously issued in relation to Witnesses P-0004, P-0113, P-0114, and P-0147;

ORDERS the Prosecution to disclose to the Defence at the earliest opportunity the identity and identifying information of Witnesses P-0004, P-0113, P-0114, and P-0147, together with all related disclosable material, applying only standard redactions;

INSTRUCTS the Prosecution to put on the record of the case its relevant requests initially filed before Trial Chamber VIII, together with public and confidential versions thereof, by 20 February 2020.

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

A handwritten signature in black ink, appearing to read 'K. Prost', is written over a horizontal line.

Judge Kimberly Prost, Single Judge

Dated this Thursday, 13 February 2020

At The Hague, The Netherlands