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No. ICC-01/12-01/18
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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
‘First decision on in-court protective measures’

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

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**Victims Participation and Reparations
Section**

Other

Trial Chamber X (the ‘Chamber’) of the International Criminal Court (the ‘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 ‘First 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 on 17 August 2020.⁴
3. On 27 July 2020, the Prosecution filed an application pursuant to Rule 87 (the ‘Application’),⁵ seeking in-court protective measures for its Block 1 Witnesses.⁶
4. On 17 August 2020, the Legal Representative of Victims (the ‘LRVs’) submitted their response, indicating that they do not object to the Application.⁷

¹ , paras 74-76.

² , para. 76.

³ , 22 July 2020, ICC-01/12-01/18-968, para. 31.

⁴ , 22 July 2020, 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 to VWU and the OTP (hereinafter: the ‘Application’). A confidential redacted version was filed on 28 July 2020.

⁶ Namely P-0057, P-0635, P-0193, P-0075, P0104, P-0621, P-0638, P-0065, P-0136, P-0152, P-0654, P-0653, P-0150, P-0623, P-0004 and P-0643.

5. On the same day, the Defence filed a response. The Defence indicates it does not adopt a specific position on the 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 requested that the Prosecution’s ‘*ex parte* argumentation [concerning] 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 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 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 in-court protective measures.¹⁰
7. On 18 August 2020, the Chamber decided to adjourn the trial until 8 September 2020.¹¹

II. Analysis

A. Confidential and *ex parte* information in the Application

8. At the outset, the Chamber notes the Defence’s submission as regards what it submits are extensive redactions contained in the Application. The Chamber considers that most of the redactions applied by the Prosecution are warranted, particularly as they exclusively concern the security situation of these witnesses. These redactions do not,

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, (hereinafter : ‘the VWU Observations’) Confidential *ex parte* available to the the Registry and the OTP. A confidential redacted version was filed on that same date.

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

¹¹ , ICC-01/12-01/18-999.

as suggested by the Defence, have a bearing on the reliability and credibility of the witnesses and are not being used to advance the Prosecution's case. However, the Chamber notes that other redactions pertain to general information about the witnesses that is already in possession of the Defence, particularly as regards P-0057's professional situation. Accordingly, the Chamber instructs the Prosecution to file a lesser redacted version of its Application. Moreover, in order to ensure the publicity of proceedings, the parties and the VWU are equally instructed to file a public redacted version of their respective filings.

B. Scope of the Decision

9. The present decision rules on the Prosecution's Application only in respect of the witnesses currently scheduled to testify in the month of September 2020.¹² These are witnesses P-0193, P-0075, P-0057, P-0621, P-0104 and P-0623. The Chamber will make a ruling on the remaining witnesses in a separate decision to be filed in due course.

P-0075 and P-0193

10. In its Application, the Prosecution seeks in-court protective measures for expert witnesses P-0193 and P-0075, in the form of the use of pseudonym, facial and voice distortion, as well as use of private session and closed sessions (the 'Standard Protective Measures'), pursuant to Rule 87 of the Rules and in accordance with Regulation 94 of the Registry Regulations.¹³ P-0193, is [REDACTED].¹⁴ P-0075 is [REDACTED].¹⁵

11. The Prosecution submits that [REDACTED].

¹² E-mail from the Prosecution to TCX Communications, 25 August 2020 at 17:35. *See also* , 19 August 2020, ICC-01/12-01/18-1004.

¹³ , ICC-01/12-01/18-976-Conf-Red, para. 17.

¹⁴ Application, ICC-01/12-01/18-976-Conf-Red, para. 15.

¹⁵ Application, ICC-01/12-01/18-976-Conf-Red, para. 15.

12. As noted above,¹⁶ the Defence does not raise specific objections with respect to P-0193 and P-0075.
13. The VWU recommends the in-court protective measures requested for P-0193 and P-0075. In its view, their future safety is at risk because [REDACTED].¹⁷
14. The Chamber notes that, according to the Prosecution, P-0193 and P-0075 travel to foreign countries with precarious security situations as part of their work.¹⁸ As noted by VWU, being identified by threat actors in those countries and therefore labelled as a ‘collaborator’ of the Court may have a dramatic impact on their safety and life.¹⁹ The Chamber has taken into consideration the submissions of the Prosecution and the recommendations of the VWU. However, the Chamber emphasises that in deciding on each application the specific facts must be considered and the measures must be appropriate and justified for the risk, bearing in mind the need for transparency of proceedings as emphasised by the Defence.
15. In relation to these particular witnesses, the Chamber is satisfied that based on their proposed areas of testimony, the nature of their work requires a level of anonymity for their safety. There is an objectively justifiable risk should their identity and the fact that they are appearing before the Court in this case become known to the public. Moreover, the Chamber considers that the confidentiality and security of the kinds of missions they carry out, [REDACTED], warrant that their identity be protected and not revealed to the public. As to the nature of the measures necessary to protect these particular witnesses, the Chamber is satisfied that the circumstances justify the use of a pseudonym and facial distortion and those measures are granted pursuant to Rule 87(1) of the Rules. However the Chamber sees no basis for the use of voice distortion as no explanation has been provided as to why that is necessary given the nature of risk for these witnesses as submitted by the Prosecution and supported by VWU. In addition, the Chamber will allow the use of closed and private sessions. However, to ensure that these measures do not unduly infringe upon the accused’s right to a public hearing, the Chamber instructs the parties and participants to conduct their relevant

¹⁶ See para. 6.

¹⁷ The VWU Observations, ICC-01/12-01/18-998-Conf-Exp, para. 10.

¹⁸ Application, ICC-01/12-01/18-976-Conf-Red, para.16.

¹⁹ The VWU Observations, ICC-01/12-01/18-998-Conf-Rws, paras 4-5.

examination in a manner that limits as much as possible the use of private or closed sessions.

P-0057 and P-0621

16. In its Application, the Prosecution seeks in-court protective measures for expert witnesses P-0057 and P-0621, in the form of the use of pseudonyms as well as facial and voice distortion during their testimonies.²⁰ P-0057 [REDACTED].²¹ Expert Witness P-0621 is [REDACTED].²²
17. The Prosecution submits that the protective measures sought are necessary to ensure both the witnesses' present and future safety in the conduct of their professional activity and the security of [REDACTED]. Moreover, the Prosecution submits that such protective measures would not only ensure the safety of the individuals and services concerned but also the smooth operation of [REDACTED] in the future. Finally, the OTP infers that implementation of the measures would encourage a continued cooperation with [REDACTED] experts.²³
18. As noted above,²⁴ the Defence does not raise specific objections with respect to P-0057 and P-0621.
19. The VWU states that the measures requested for P-0057 and P-0621 'represent a position of caution' as there may be a need to protect their identity due to their positions [REDACTED].²⁵ However, the VWU stresses that it has yet to conduct its independent assessment of the witnesses immediately prior to the in-court testimony.
20. The Chamber considers that an objectively justifiable risk with respect to expert Witnesses P-0057 and P-0621 has not been demonstrated and, accordingly, finds that protective measures are not warranted.

²⁰ Application, ICC-01/12-01/18-976-Conf-Red, para. 22.

²¹ Application, ICC-01/12-01/18-976-Conf-Red, para. 22.

²² Application, ICC-01/12-01/18-976-Conf-Red, para. 22, including footnote 20.

²³ Application, ICC-01/12-01/18-976-Conf-Exp, para. 22.

²⁴ See paragraph 6 above.

²⁵ The VWU Observations, ICC-01/12-01/18-998-Conf-Exp, para. 14.

21. Indeed, the Chamber considers that the only fact that both witnesses are skilled [REDACTED] working in close relationship with the [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 Application in respect of P-0057 and P-0621. The Chamber notes this determination is without prejudice to the right of these witnesses to bring their own applications for protective measures.

P-0104

22. In its Application, the Prosecution seeks Standard Protective Measures for expert witness P-0104.²⁶ P-0104 is [REDACTED].²⁷ The Prosecution submits that P-0104 [REDACTED] and argues that, for this reason, and so as not to affect [REDACTED]professional [REDACTED], the measures sought appear necessary.²⁸
23. As noted above,²⁹ the Defence does not raise specific objections with respect to P-0104.
24. The VWU recommends the in-court protective measures sought considering that P-0104 [REDACTED].³⁰
25. The Chamber notes that P-0104 [REDACTED] where it is reported that Islamist groups are still operating in what is described as an unstable and dangerous security situation.³¹ In light of those circumstances, and having due consideration for VWU's observations, it is reasonable to conclude that disclosing the identity of the witness by making available to the public either his name, or his image or voice, would allow his identification by potentially hostile individuals [REDACTED] 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 Standard Protective Measures requested for P-0104 are justified for the purpose of avoiding impermissible threat to his safety and allowing the pursuit of his professional activity. However, to ensure

²⁶ Application, ICC-01/12-01/18-976-Conf-Red, para. 23.

²⁷ Application, ICC-01/12-01/18-976-Conf-Red, para. 23.

²⁸ Application, ICC-01/12-01/18-976-Conf-Exp, para. 23.

²⁹ See para. 6.

³⁰ The VWU Observations, ICC-01/12-01/18-998-Conf-Exp, para. 15.

³¹ See Application, ICC-01/12-01/18-976-Conf-AnxA, 27 July 2020. See also The VWU Observations, ICC-01/12-01/18-998-Conf-Exp.

that these measures 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.

P-0623

26. In its Application, the Prosecution seeks face distortion, use of pseudonym and private and closed sessions for P-0623.³² P-0623 is a [REDACTED].³³
27. The Prosecution submits that the protective measures sought are necessary to ensure the witness's safety, [REDACTED].³⁴ The Prosecution submits that the measures are also necessary to ensure that P-0623 can keep doing her work presently and in the future because such measures would ensure her security and anonymity, [REDACTED].³⁵
28. As noted above,³⁶ the Defence does not raise specific objections with respect to P-0623.
29. The VWU supports the in-court protective measures sought considering the nature of P-0623's employment [REDACTED].³⁷ The VWU however stresses that it relied only on the Prosecution's information and did not have direct contacts with the witness.
30. The Chamber notes that P-0623 [REDACTED],³⁸ [REDACTED]. The Chamber also notes that P-0623 [REDACTED],³⁹ where it is reported that Islamist groups are still operating.⁴⁰ In light of those circumstances and having due consideration for the VWU's Observations, it is reasonable to conclude that disclosing the identity of the witness could constitute a threat to her safety and a restriction to the exercise of her present and future professional activity [REDACTED]. Consequently, the Chamber

³² Application, ICC-01/12-01/18-976-Conf-Red, para. 48.

³³ Application, ICC-01/12-01/18-976-Conf-Red, para. 45.

³⁴ Application, ICC-01/12-01/18-976-Conf-Red, paras 46-47.

³⁵ Application, ICC-01/12-01/18-976-Conf-Red, para. 46.

³⁶ See para. 6.

³⁷ The VWU Observations, ICC-01/12-01/18-998-Conf-Exp para. 20.

³⁸ Application, ICC-01/12-01/18-976-Conf-Red, para. 44.

³⁹ Application, ICC-01/12-01/18-976-Conf-Red, para. 47.

⁴⁰ See ICC-01/12-01/18-976-Conf-AnxA, 27 July 2020. See also The VWU Observations, ICC-01/12-01/18-998-Conf-Exp.

considers that the protective measures requested for P-0623 are justified for the purpose of avoiding impermissible threat to her safety and allowing the pursuit of her present and future professional activity. However, to ensure that these measures 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.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Application with respect to P-0104 and P-0623;

PARTIALLY GRANTS the Application with respect to P-0193 and P-0075;

REJECTS the Application with respect to P-0057 and P-0621;

DEFERS its determination for the remainder of the Application;

INSTRUCTS the Prosecution to file a lesser redacted version of the confidential version of its Application no later than 7 September 2020;

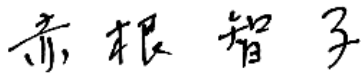
INSTRUCTS the Prosecution to file a public redacted version of its Application no later than 14 September 2020; and

INSTRUCTS the Defence and the VWU to file public redacted versions of their respective submissions no later than 16 September 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 31 August 2020

At The Hague, The Netherlands