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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 ABDOL AZIZ AG MOHAMED AG
MAHMOUD

Public redacted version of
‘Third 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
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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 ‘Third 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

¹ [Directions on the conduct of proceedings](#), 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.

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
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.
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

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 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, [ICC-01/12-01/18-976-Red3](#)) (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.¹²
8. On the same day, the Prosecution filed a second application pursuant to Rule 87 (the ‘Second Application’),¹³ seeking in-court protective measures for 20 witnesses.¹⁴
9. On 1 September 2020, the Prosecution filed a third application pursuant to Rule 87 (the ‘Third Application’),¹⁵ seeking in-court protective measures for 23 witnesses.¹⁶
10. On 3 September 2020, the Chamber issued an order *inter alia* shortening to 9 October 2020 the deadline for responses to the Second and Third Applications regarding witnesses other than P-0620 and P-0655.¹⁷
11. On 11 September 2020, the LRVs submitted their response to the Second Application, noting that they do not object to the protective measures requested and, in particular, support the Prosecution’s request for Witnesses P-0557, P-0570 and P-0641.¹⁸

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 Namely Witnesses P-0057, P-0104, P-0621, P-0193, P-0075 and P-0623.

¹³ 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’).

¹⁴ 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.

¹⁵ 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; a public redacted version was filed on 2 October 2020, [ICC-01/12-01/18-1022-Red2](#)) (hereinafter: the ‘Third Application’).

¹⁶ 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.

¹⁷ Email from the Chamber to the parties and participants, 3 September 2020, at 13:46.

¹⁸ Email from the LRVs to TC X Communications, 11 September 2020, at 14:31.

12. On 14 September 2020, the LRVs submitted their response to the Third Application, indicating that they do not object to the protective measures requested.¹⁹
13. On 18 September 2020, the VWU filed its observations on the Second and Third Applications (the ‘VWU Second Observations’).²⁰
14. On 24 September 2020, the Chamber issued its ‘Second decision on in-court protective measures’ (the ‘Second Decision’),²¹ regarding Witnesses scheduled to testify on 29 September and during the month of October.²²
15. The Defence did not submit any response to the Second and Third Applications.

II. Analysis

A. Scope of the Decision

16. The present decision rules on the in-court protective measures requested by the Prosecution for witnesses currently scheduled to testify in November and December 2020, namely Witnesses P-0557, P-0565, P-0638 and P-0635.
17. At the outset, the Chamber reminds the parties and participants that in-court protective measures must remain an exception to the principle of the publicity of the proceedings. They may be used for the sole purpose of protecting the

¹⁹ Email from the LRVs to TC X Communications, 14 September 2020, at 17:08.

²⁰ 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 Witness MLI-OTP- P-0660” and on the “Prosecution’s application for in-court protective measures for MLI-OTP-P-0660”, 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’).

²¹ Second decision on in-court protective measures, 24 September 2020, ICC-01/12-01/18-1067-Conf-Exp (confidential *ex parte*, available only to VWU and the Prosecution; a confidential redacted version was filed on the same day, ICC-01/12-01/18-1067-Conf-Red) (hereinafter: the ‘Second Decision’).

²² Namely Witnesses P-0152, P-0065, P-0653, P-0620 and P-0655.

testifying witnesses, when it is clearly and precisely established that revealing their identity would otherwise put them at risk.

1. P-0557 and P-0565

18. The Prosecution seeks in-court protective measures for Witnesses P-0557 and P-0565, in the form of the use of a pseudonym, facial and voice distortion, as well as private sessions and/or closed sessions, pursuant to Rule 87 of the Rules and in accordance with Regulation 94 of the Registry Regulations.²³ P-0557 and P-0565 are [REDACTED].²⁴ [REDACTED].²⁵
19. The Prosecution submits that P-0557 and P-0565 need in-court protective measures because they face ‘important’ risks for their safety.²⁶ The Prosecution emphasises that if they were to testify in public they could be identified by armed groups who could act in reprisal against them. This [REDACTED].²⁷
20. The LRVs do not object to the grant of protective measures for P-0565 and support such measures for P-0557.²⁸
21. The Defence did not respond to the Second Application.²⁹
22. The VWU recommends the requested in-court protective measures for Witnesses P-0557 and P-0565, [REDACTED].³⁰ The VWU stresses that [REDACTED]. In the VWU’s view, the measures sought are essential [REDACTED].³¹

²³ Second Application, ICC-01/12-01/18-1020-Conf-Red, para. 19.

²⁴ Second Application, ICC-01/12-01/18-1020-Conf-Red, para. 14.

²⁵ Second Application, ICC-01/12-01/18-1020-Conf-Exp, para. 14.

²⁶ Second Application, ICC-01/12-01/18-1020-Conf-Red, para. 37.

²⁷ Second Application, ICC-01/12-01/18-1020-Conf-Exp, para. 19.

²⁸ Email from the LRVs to TC X Communications, 11 September 2020, at 14:31.

²⁹ See para. 15 above.

³⁰ VWU Second Observations, ICC-01/12-01/18-1052-Conf-Exp, paras 7-8.

³¹ VWU Second Observations, ICC-01/12-01/18-1052-Conf-Exp, para. 8.

23. The Chamber notes that these witnesses are [REDACTED]. The Chamber finds that the protective measures sought are necessary to protect Witnesses P-0557 and P-0565 and [REDACTED].

2. *P-0638*

24. The Prosecution seeks in-court protective measures for dual-status Witness P-0638, in the form of the use of a pseudonym, facial and voice distortion, as well as use of private sessions and/or closed sessions during the testimony.³² P-0638 is [REDACTED].³³ [REDACTED].³⁴
25. The Prosecution submits that P-0638 needs in-court protective measures because [REDACTED].³⁵ Furthermore, the Prosecution contends that protective measures are justified because [REDACTED].³⁶
26. The Defence does not raise specific objections with respect to the protective measures requested for P-0638.³⁷
27. The VWU recommends the requested in-court protective measures for Witness P-0638, noting that [REDACTED] specific risk mitigation measures are still to be implemented [REDACTED].³⁸
28. The Chamber notes that dual-status Witness P-0638 is [REDACTED]. In these circumstances, given the safety risks faced by P-0638, the Chamber finds that the protective measures sought are necessary to protect this witness and [REDACTED].

3. *P-0635*

³² , ICC-01/12-01/18-976-Conf-Red2, para. 38.

³³ , ICC-01/12-01/18-976-Conf-Red2, para. 35.

³⁴ , ICC-01/12-01/18-976-Conf-Red2, para. 37.

³⁵ , ICC-01/12-01/18-976-Conf-Red2, para. 33.

³⁶ , ICC-01/12-01/18-976-Conf-Red2, para. 38.

³⁷ See para. 5 above.

³⁸ , ICC-01/12-01/18-998-Conf-Red, para. 17.

29. The Prosecution seeks in-court protective measures for expert Witness P-0635, originally scheduled to testify in Block 1 of the trial.³⁹ The Prosecution requests the use of a pseudonym and of private and/or closed sessions.⁴⁰ P-0635 is [REDACTED].⁴¹
30. The Prosecution submits that the requested protective measures are necessary to ensure the safety and the regular conduct of P-0635's professional activity. According to the Prosecution, the risk stems from both the witness' involvement in the present case that deals with terrorist groups and the witness' current work [REDACTED].⁴²
31. The LRVs do not object to the grant of protective measures for P-0635.⁴³
32. The Defence does not raise specific objections with respect to the protective measures requested for P-0635.⁴⁴
33. The VWU observes that the measures requested represent a 'position of significant caution' to address the level of risk, considering that P-0635 is now located in [REDACTED] where threat actors who could potentially represent a threat for the witness's safety have no capability to operate and where [REDACTED] have the ability to protect citizens.⁴⁵ Furthermore, the VWU indicates that, although it does not have enough information to assess how the witness' future professional activities may be impacted if the witness's identity is revealed to the public, it will be able to provide a more detailed assessment after having had the opportunity to discuss security issues with the witness.⁴⁶
34. The Chamber considers that an objectively justifiable risk with respect to expert Witness P-0653 has not been demonstrated at this stage. Indeed, the Chamber, having due consideration for the VWU's observations that [REDACTED] have

³⁹ See para. 3 above.

⁴⁰ , ICC-01/12-01/18-976-Conf-Red2, para. 18.

⁴¹ , ICC-01/12-01/18-976-Conf-Red2, para. 18.

⁴² , ICC-01/12-01/18-976-Conf-Red2, para. 18.

⁴³ Email from the LRVs to TCX Communications, 17 August 2020, at 12:09.

⁴⁴ See para. 5 above.

⁴⁵ , ICC-01/12-01/18-998-Conf-Red, paras 12-13.

⁴⁶ , ICC-01/12-01/18-998-Conf-Red, paras 11-13.

the ability to protect the individuals within its borders, finds that no obvious risk exists for P-0635's safety. Further, the Chamber, absent an explanation from the Prosecution, is not convinced at this stage that the conduct of P-0635's professional activities with [REDACTED] would be impacted in any way were her identity to be revealed to the public. Accordingly, and unless the VWU's later assessment recommends otherwise, the Chamber rejects the First Application as regards P-0635. The Chamber notes that this determination is without prejudice to the right of this witness to bring her own application for protective measures.

35. The Chamber further stresses that the request must clearly identify and specifically describe the security concerns and risks faced by the witness. It emphasises that a speculative or remote risk for the witness's safety is not a valid ground for granting protective measures.

B. Use of private sessions

36. The Chamber reiterates that in order to ensure that the granted protective measures do not unduly infringe upon the accused's fundamental right to a public hearing, the parties and participants must conduct their relevant examination in a manner that limits as much as possible the use of private or closed sessions. Indeed, the use of private/closed sessions must remain an exception to the public nature of the proceedings and general information related to the witness must be elicited in public session. The Chamber emphasises that the parties may seek to enter into a private/closed session only when identifying information⁴⁷ would otherwise be revealed to the public, which would put the identified person at risk. The parties are therefore instructed to structure their questioning in a way that renders such sessions as short as possible.

⁴⁷ 'Identifying information' must be interpreted strictly. *See* Second decision on in-court protective measures, 24 September 2020, ICC-01/12-01/18-1067-Conf-Red, paras 36-37.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the requests for in-court protective measures with respect to P-0557, P-0565 and P-0638;

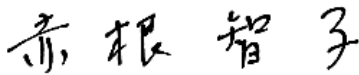
REJECTS the request for in-court protective measures with respect to P-0635; and

DEFERS its determination for the remainder of the First, Second and Third Applications.

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 Monday, 19 October 2020

At The Hague, The Netherlands