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No. ICC-01/12-01/18

Date: 2 March 2022

Date of original: 24 August 2021

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

**Decision on requests for Rule 74 assurances and in-court protective measures for
P-0099**

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

The Office of the Prosecutor

Karim A. A. Khan
James Stewart

Counsel for the Defence

Melinda Taylor

Legal Representatives of Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

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

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

François Cantier, Rule 74 Counsel for P-0099

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), 68 and 93(2) of the Rome Statute (the ‘Statute’), Rules 74, 87 and 88 of the Rules of Procedure and Evidence (the ‘Rules’), and Regulations 20 and 23bis of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on requests for Rule 74 assurances and in-court protective measures for P-0099’.

I. Procedural history and submissions

1. On 14 April 2021, the Chamber issued its ‘Eighth Decision on in-court protective measures for witnesses’, in which it notably rejected a request from the Office of the Prosecutor (the ‘Prosecution’) to provide in-court protective measures for P-0099.¹
2. On 4 June 2021, the Registry informed the Chamber of the appointment of Mr François Cantier (the ‘Counsel for P-0099’) as duty counsel for P-0099 pursuant to Rule 74 of the Rules.²
3. On 28 June 2021, the Counsel for P-0099 filed two requests seeking in-court protective measures and Rule 74 assurances for P-0099 (the ‘Requests’).³ The Counsel for P-0099 submits that Rule 74 assurances are necessary in order to allow P-0099 to testify without fear of being prosecuted by the Court or national

¹ Eighth Decision on in-court protective measures for witnesses, ICC-01/12-01/18-1414-Conf-Red, paras 70-73.

² Notification of the Appointment of Mr François Cantier as Legal Adviser to Witness P-0099, ICC-01/12-01/18-1506.

³ Requête de l’Avocat aux fins de demande de mesures de protection en faveur du témoin P0099 et des membres de sa famille, ICC-01/12-01/18-1551-US-Exp (only available to the Prosecution, the Counsel for P-0099 and the Registry, hereinafter : ‘First Request’); Requête de l’Avocat aux fins de demande de protection contre d’éventuelles poursuites de la part d’Etats et de la Cour Pénale Internationale, ICC-01/12-01/18-1552-US-Exp (only available to the Prosecution, the Counsel for P-0099 and the Registry, hereinafter : ‘Second Request’).

The Chamber notes that on 9 July 2021, the Counsel for P-0099 filed two further requests (ICC-01/12-01/1571-Secret-Exp and ICC-01/12-01/18-1574-Secret-Exp) which are nearly identical to the Requests, albeit with a different classification. The Chamber has not considered these filings as they do not contain any new submissions that are not included in the Requests. However, the Chamber recalls that, pursuant to Regulation 23bis(3) of the Regulations, where the basis for a certain classification no longer exists, the party filing the document should apply to the Chamber to reclassify the document. Further, and where appropriate, the filing party should file redacted versions of documents on the record, rather than submitting such documents as new filings.

authorities.⁴ Further, the Counsel for P-0099 requests, pursuant to Article 68 of the Statute and Rules 74, 87 and 88 of the Rules, that P-0099's testimony and identity be kept strictly confidential and only be disclosed to certain members of the Prosecution and the Chamber, and that his voice and face be concealed by appropriate means.⁵ In support, the Counsel for P-0099 refers *inter alia* to general information regarding threats posed by extremist Islamists and the possibility of P-0099 and his family facing significant security risks should his status as a witness before the Court become known to such actors, which is further substantiated by threats that P-0099 has received in the past.⁶

4. On 29 June 2021, the Single Judge instructed the parties to submit responses to the Requests by 9 July 2021 and for this purpose, provided specific extracts of the Requests to the Defence.⁷
5. On 6 July 2021, pursuant to the instructions by the Single Judge,⁸ the Registry provided its observations on the Requests (the 'Registry Observations').⁹ The Registry, particularly the VWU, reiterates that although some risk may exist, it will only be able to submit a complete assessment to the Chamber once it has met with the witness and received necessary information.¹⁰ With respect to the Counsel for P-0099's request that P-0099's identity and his testimony be disclosed only to a limited number of individuals, the VWU explains that it is necessarily aware of the identity of witnesses as per its mandate and nature of its duties, and that, for logistical purposes, P-0099's identity may need to be disclosed to the authorities of the Host State and the authorities of P-0099's country of residence.¹¹ Additionally, the Registry's Court Management Section informs the Chamber that, due to its specific mandate, it is essential for the proper

⁴ Second Request, ICC-01/12-01/18-1552-US-Exp, para. 7.

⁵ First Request, ICC-01/12-01/18-1551-US-Exp, paras 6-7; Second Request, ICC-01/12-01/18-1552-US-Exp, paras 6-7.

⁶ First Request, ICC-01/12-01/18-1551-US-Exp, para. 7;

⁷ Email from the Chamber dated 29 June 2021 at 17:14.

⁸ Email from the Chamber dated 29 June 2021 at 17:09.

⁹ Registry's Observations on the « Requête de l'Avocat aux fins de demande de mesures de protection en faveur du témoin P0099 et des membres de sa famille » and the « Requête de l'Avocat aux fins de demande de protection contre d'éventuelles poursuites de la part d'Etats et de la Cour Pénale Internationale », ICC-01/12-01/18-1564-US-Exp (only available to the Prosecution and the Registry).

¹⁰ Registry Observations, ICC-01/12-01/18-1564-US-Exp, paras 7-8.

¹¹ Registry Observations, ICC-01/12-01/18-1564-US-Exp, paras 9-14.

functioning of judicial activities that it be provided access to the identity of P-0099 and information relevant to his testimony.¹²

6. On 8 July 2021, the Prosecution filed its response to the Requests (the ‘Prosecution Response’).¹³ The Prosecution submits that measures under Rule 74 of the Rules are necessary due to risk of self-incrimination and potential prosecution in national proceedings, which will have a chilling effect on P-0099’s testimony.¹⁴ The Prosecution contends that P-0099 faces risk of [REDACTED], as a comparison [REDACTED] and his previous statement to the Prosecution demonstrates that he was [REDACTED].¹⁵ Given that the [REDACTED], the Prosecution submits that P-0099 may refuse to answer questions unless he is assured that he will not face any [REDACTED] or before the Court.¹⁶ For these reasons, and pursuant to Rule 74(8) of the Rules, the Prosecution notifies the Chamber of the risks posed to P-0099 as regards self-incrimination and requests that measures be taken under Rule 74 of the Rules.¹⁷ The Prosecution submits that upon being granted Rule 74 assurances, P-0099 should be required to answer questions as P-0099’s testimony is both important and unique, and that, while his expected evidence is highly incriminating, Rule 74 assurances provide sufficient protection against any self-incrimination.¹⁸ Further, the Prosecution indicates that it supports P-0099’s request for in-court protective measures. The Prosecution submits that P-0099 and his family would face security risks if P-0099 is identified as a witness before the Court, and that P-0099 might not be forthcoming in his testimony, should he be required to testify without in-court protective measures.¹⁹

¹² Registry Observations, ICC-01/12-01/18-1564-US-Exp, paras 19-23.

¹³ Prosecution response to Rule 74 Counsel requests regarding Prosecution Witness MLI-OTP-P-0099, ICC-01/12-01/18-1568-US-Exp (only available to the Prosecution and the Registry; a redacted version available to the Prosecution, the Registry, the Defence and the Counsel for P-0099 was filed on 9 July 2021).

¹⁴ Prosecution Response, ICC-01/12-01/18-1568-US-Exp-Red, para. 13

¹⁵ Prosecution Response, ICC-01/12-01/18-1568-US-Exp-Red, paras 16-21.

¹⁶ Prosecution Response, ICC-01/12-01/18-1568-US-Exp-Red, paras 14-15, 22-25.

¹⁷ Prosecution Response, ICC-01/12-01/18-1568-US-Exp-Red, paras 6, 26.

¹⁸ Prosecution Response, ICC-01/12-01/18-1568-US-Exp-Red, paras 28-41.

¹⁹ Prosecution Response, ICC-01/12-01/18-1568-US-Exp-Red, paras 42-44.

7. On 9 July 2021, the Defence filed its response to the Requests (the Defence Response).²⁰ The Defence submits that absent any sufficiently substantiating information supporting the necessity of in-court protective measures, the Chamber should reject such request as previously done.²¹ However, the Defence does not object to the provision of identity protecting measures pursuant to Rule 88(1) of the Rules and observes that such measures would meet the objectives of both Article 68 of the Statute and Rule 74 of the Rules.²² In light of the principle of public proceedings and the accused's rights under Article 67(1) of the State, the Defence submits that the use of closed sessions must be considered on a case-by-case basis only when necessary and appropriate to compel the provision of self-incriminatory testimony.²³

II. Analysis

8. The Chamber recalls that pursuant to Rule 74(3)(a) of the Rules, the default rule is that witnesses may object to making any statement that might tend to incriminate him or her.²⁴ Consequently, assurances under Rule 74 are in a way an exception to this rule that enables the Chamber to require a witness to answer self-incriminatory questions provided certain conditions are met.
9. In light of the factors listed under Rule 74(5) of the Rules, given the nature and scope of P-0099's expected testimony,²⁵ and having had regard to the views expressed by the Prosecution as well as P-0099 himself through his Counsel, the Chamber considers it necessary to provide Rule 74(3)(c) assurances to P-0099. In line with the requirements of this provision, and to allow P-0099 to testify without fear of the consequences of possible self-incrimination, the Chamber hereby assures P-0099 that the evidence provided in response to potentially self-

²⁰ Defence Response to P-0099's Ex Parte Requests for Protective Measures, Special Measures and Rule 74 Assurances, ICC-01/12-01/18-1570-US-Exp (only available to the Defence, the Prosecution, the Counsel for P-0099 and the Registry).

²¹ Defence Response, ICC-01/12-01/18-1570-US-Exp, paras 5-8.

²² Defence Response, ICC-01/12-01/18-1570-US-Exp, paras 3, 9.

²³ Defence Response, ICC-01/12-01/18-1570-US-Exp, paras 2, 4, 10-13.

²⁴ ICC-01/12-01/18-1474-Conf-Exp, para. 32. *See also* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Request for Rule 74 Assurances for P-40, 6 December 2017, ICC-02/04-01/15-1096, para. 6.

²⁵ Annex B to the Dépôt de la Liste des témoins de l'Accusation, des résumés desdits témoins et de la Liste provisoire des éléments de preuve à charge, 14 April 2020, ICC-01/12-01/18-740-AnxB, pp. 358-365.

incriminatory questions which could be asked during the course of his upcoming testimony: (i) will be kept confidential and will not be disclosed to the public or any State; and (ii) will not be used either directly or indirectly against him in any subsequent prosecution by the Court, except under Articles 70 and 71 of the Statute, which govern offences against the Court should P-0099 be untruthful in testifying.

10. Furthermore, the Chamber is mindful of P-0099's status as an insider witness who, [REDACTED].²⁶ Having had regard to the anticipated contents of P-0099's testimony, and in order to give full effect to the Rule 74 assurances hereby granted, the Chamber considers it necessary to adopt measures to ensure that P-0099's identity is not disclosed to the public during the course of his testimony. Accordingly, pursuant to Rule 74(7) of the Rules, the Chamber decides to grant the use of pseudonym, face distortion and voice distortion to P-0099. The Chamber considers that with these measures, it is unnecessary to have P-0099 testify entirely in closed session. Rather, closed or private sessions may be used only on a case-by-case basis where it is envisaged that P-0099 will be providing answers that may incriminate himself or allow for his identification.
11. The Chamber is mindful of its duty under Article 68 of the Statute to ensure the safety and well-being of witnesses, as well as the specific circumstances of P-0099 and his family as illustrated in the Requests. Nonetheless, the Chamber considers that the aforementioned measures offer sufficient protection against any security risks and risks of self-incrimination. In particular, and in light of existing access to disclosed evidence and filings on the case record, the Chamber considers that further restrictions on access to relevant information within the parties and participants or other staff members of the Court, who are already subject to rigorous confidentiality obligations, is not warranted as it does not create additional security risks. Further, as rightly pointed out by the Registry, sharing such information within the Court is also necessary for the proper conduct of judicial proceedings. Accordingly, the Chamber revokes the 'Under Seal' or

²⁶ 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, 31 August 2020, ICC-01/12-01/18-1022-Conf-Red, para. 66.

‘Secret’ classification of the relevant filings²⁷ and annexes thereto and reclassifies them as confidential, *ex parte* (access to be given to those having access to the original filings).

12. Although the Chamber will address P-0099 directly when he appears in court, the Chamber instructs the Counsel for P-0099 to discuss with his client the assurances hereby provided, as well as the exceptions provided for in Articles 70 and 71 of the Statute.

²⁷ ICC-01/12-01/18-1551-US-Exp; ICC-01/12-01/18-1552-US-Exp; ICC-01/12-01/18-1564-US-Exp; ICC-01/12-01/18-1568-US-Exp; ICC-01/12-01/18-1568-US-Exp-Red, ICC-01/12-01/18-1570-US-Exp; ICC-01/12-01/18-1574-SECRET-Exp; ICC-01/12-01/18-1574-SECRET-Exp-Red.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS assurances pursuant to Rule 74(3)(c) of the Rules as specified in paragraph 9 of the present decision;

GRANTS the measures as specified in paragraph 10 of the present decision;

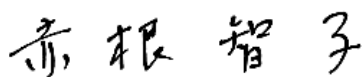
REJECTS the remainder of the Requests; and

REVOKES the Under Seal and Secret classification of the relevant filings in accordance with paragraph 11 of the present decision.

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 Tuesday, 24 August 2021

At The Hague, The Netherlands