

**Cour
Pénale
Internationale**
**International
Criminal
Court**



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No.: **ICC-01/12-01/18**

Date: **11 June 2018**

Date of submission:
10 July 2018

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, 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

**With confidential *EX PARTE* Annex,
only available to the Prosecution and the Victims and Witnesses Unit**

**Public redacted version of “Amended Prosecution’s motion for authorisation to
withhold the identity of Prosecution Witness MLI-OTP-P-0431 upon whose
evidence the Prosecution will rely at the confirmation hearing”, 11 June 2018,
ICC-01/12-01/18-48-Conf-Exp**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence

Mr Yasser Hassan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

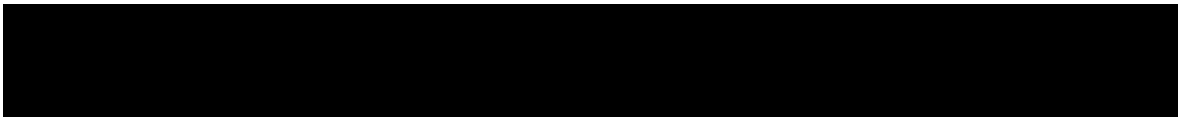
Detention Section

Victims Participation and Reparations

Section

Other

Introduction

1. The Office of the Prosecutor ("Prosecution") hereby seeks authorisation to withhold the identity of Prosecution Witness P-0431.
2. The Prosecution will rely on the evidence of this witness at the article 61 confirmation hearing ("confirmation hearing"). However, due to his personal circumstances, the security situation in Mali, and the threat posed by armed groups at issue in this case, exposure of this witness' cooperation with the Court would place him and his family at a risk of physical violence or death, while also prejudicing ongoing and future investigations. Consequently, any disclosure of his identity or other information which might lead to his exposure would require

3. Under these circumstances, and particularly considering the current stage of proceedings and the limited scope of the confirmation hearing, the Prosecution submits that this witness' identity and identifying information should not be disclosed and that redactions to the identity of P-0431 should be applied.
4. The Prosecution notes from the outset that it intends to disclose the identities of other Prosecution witnesses before the confirmation hearing, including 
 he decision to disclose some witnesses' identities and to seek non-disclosure of others, like in the present Request, is made after careful consideration of the relevance of each witness' evidence and the risks to each, as well as the suspect's rights.

Confidentiality

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this motion and its Annexes A to F are filed *ex parte*, available only to the Prosecution and VWU. Indeed, the motion discusses security concerns specific to this witness, including his occupation and place of residence. In addition, the annexes contain personal identifying information the disclosure of which would place the witness at risk and render the motion moot.
6. These annexes are divided as follows:
 - Annex A [REDACTED]
 - Annex B contains the CV of P-0431;¹
 - Annex C is the statement of Witness P-0431 with proposed redactions;²
 - Annex D contains the reasons for non-disclosure of evidence related to P-0431;³
 - Annex E [REDACTED]
 - Annex F [REDACTED]
7. The Prosecution will file a confidential redacted version of the present motion as soon as practicable.

¹ [REDACTED].

² [REDACTED]. The statement also contains *proprio motu* redactions, for instance to the identity of investigators.

³ See ERNs in the Annex.

⁴ [REDACTED]. Other redactions have been applied pursuant to the Decision ICC-01/12-01/18-31, para. 29.

Background

8. On 4 April 2018, AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD (“AL HASSAN”) made his initial appearance before the Court. The confirmation hearing was set for 24 September 2018.
9. Since then, the Prosecution has been reviewing the evidence in its possession for possible disclosure to the Defence. During this review, the Prosecution has identified Witness P-0431, among others,⁵ upon whose evidence the Prosecution will rely at the confirmation hearing.
10. To protect him, as well as the Prosecution’s ability to conduct further investigation into the situation in Mali, the Prosecution requests *inter alia* authorisation:
 - to disclose to the Defence an anonymous redacted version of the statement of Prosecution Witness P-0431 and its Arabic translation;
 - to redact the name of P-0431 in the chain of custody of his statement; and
 - not to disclose his CV and several annexes to his statement.
11. These measures will avoid revealing the witness’ identity or other information which might expose his interaction with the Court.

Applicable Law

A. Prosecution’s disclosure obligations

12. Pursuant to article 61(3)(b) of the Rome Statute (“Statute”) and rules 77 and 76, the Prosecution must disclose to the Defence all evidence upon which it intends to rely at the confirmation hearing.

⁵ The Prosecution will submit separate motions related to other witnesses in this category.

13. In addition, the Prosecution must disclose certain information to the Defence even in the absence of an intention to rely upon it.
14. First, pursuant to article 67(2), the Prosecution must disclose to the Defence all evidence in its possession or control which it believes shows or tends to show the innocence of the suspect, or to mitigate his guilt, or which may affect the credibility of Prosecution evidence.
15. Second, pursuant to rule 77, the Prosecution must also permit the Defence to inspect any books, documents, photographs and other tangible objects in the Prosecution's possession or control which are "*material to the preparation of the Defence.*" The Appeals Chamber in *Lubanga* ruled that the term "*'material to the preparation of the defence' must be interpreted broadly,*" and clarified that this includes "*objects which, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence.*"⁶ However, the Appeals Chamber has also indicated that "*the right to disclosure is not unlimited and which objects are 'material to the preparation of the defence' will depend upon the specific circumstances of the case.*"⁷

B. Duty to protect witnesses

16. The Prosecution must meet its disclosure obligations in a manner consistent with its duty under articles 54(1)(b), 68(1) and 68(5) of the Statute to protect victims and witnesses and others at risk because of the activities of the Court. In some circumstances, not disclosing certain information to the Defence may be

⁶ *Prosecutor v. Lubanga*, Judgment on Appeal against Oral Disclosure, ICC-01/04-01/06-1433, 11 July 2008, para. 77.

⁷ *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-501, 28 August 2013, para. 38-39.

necessary to protect the fundamental rights of an individual put at risk by the activities of the Court.⁸

17. Rule 81(4) provides that the Chamber, on its own motion or at the request of the Prosecution, must take necessary steps “to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of trial.”⁹

18. The Appeals Chamber has held that non-disclosure of information under rule 81(4) must be assessed on a case-by-case basis.¹⁰ Four factors which a Single Judge or Pre-Trial Chamber should consider in determining whether to authorise the non-disclosure of the identity of a witness under rule 81(4) are:

- the danger to the witness or to members of his or her family that the disclosure of his or her identity might cause;¹¹
- the necessity of the non-disclosure (and in particular the feasibility and sufficiency of less restrictive measures);¹²
- whether the non-disclosure would be prejudicial to or inconsistent with the rights of the suspect and a fair and impartial proceeding;¹³ and
- the relevance of the information to the Defence.¹⁴

⁸ *Prosecutor v. Katanga*, Judgment on Prosecution’s Appeal against the First Redaction Decision, ICC-01/04-01/07-475, 13 May 2008, para. 57-58.

⁹ The protections of rule 81(4) were extended by the Appeals Chamber to all individuals at risk on account of the activities of the Court in *Prosecutor v. Katanga*, Judgement on Prosecution’s Appeal against the First Redaction Decision, ICC-01/04-01/07-475, 13 May 2008, para. 56.

¹⁰ *Prosecutor v. Lubanga*, Judgment on Disclosure Restriction pursuant to rule 81(2) and (4), ICC-01/04-01/06-568, 13 October 2006, paras. 36-37; *Prosecutor v. Katanga*, Judgment on Katanga’s Appeal against the First Redaction Decision, ICC-01/04-01/07-476, 13 May 2008, para. 66.

¹¹ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773, 14 December 2006, para. 21.

¹² *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773, 14 December 2006, para. 21; *Prosecutor v. Lubanga*, Judgment on Disclosure Restriction pursuant to rule 81(2) and (4), ICC-01/04-01/06-568, 13 October 2006, para. 37.

¹³ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773, 14 December 2006, para. 21.

19. In assessing the existence of a risk, a Single Judge or Pre-Trial Chamber should ensure that there is an “*objectively justifiable risk*” to the safety of the person concerned and that such risk arises from disclosure of the identity or other information to the Defence, rather than to the public at large, taking into account the circumstances of the individual suspect.¹⁵
20. The Prosecution submits that factors relevant to the assessment of risk include, but are not limited to, the witness’ personal circumstances, any existing protection or security measures in place for the witness, the security situation in the area where the witness or his or her family currently resides, whether the witness or his or her family has received any threats on account of his or her perceived involvement with the Court, whether the witness himself or herself has taken any actions that might endanger his or her personal safety, and whether the witness has consented to disclosure of his or her identity.

C. Protecting the Prosecution’s ability to investigate

21. Rule 81(2) provides that the Prosecution may also request non-disclosure of information where necessary to protect future or ongoing investigations. The Appeals Chamber has held that the same general factors, used to analyse applications for non-disclosure under rule 81(4), apply under rule 81(2), namely:

“a thorough consideration of the danger that the disclosure of the information may cause; the necessity of the non-disclosure, including whether it is the least intrusive measure necessary to avoid prejudice to the investigations of the Prosecutor; and the fact that any measures taken

¹⁴ *Prosecutor v. Katanga*, Judgement on Katanga’s Appeal against the First Redaction Decision, ICC-01/04-01/07-476, 13 May 2008, para. 62.

¹⁵ *Prosecutor v. Katanga*, Judgment on Prosecution’s Appeal against the First Redaction Decision, ICC-01/04-01/07-475, 13 May 2008, para. 71.

*shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.*¹⁶

D. Non-disclosure and redactions or use of summaries at the confirmation stage

22. Article 68(5) provides:

“Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purpose of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measure shall be exercised in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial”.

23. Rules 81(2) and 81(4) similarly authorise the Prosecution to seek (and the Chamber to order) the non-disclosure of witnesses’ identities at the confirmation stage.

24. The Appeals Chamber has emphasised that the standard for permitting non-disclosure at the confirmation stage is less demanding than the standard at trial. In the *Katanga* case, the Appeals Chamber stated:

“[I]t must be emphasised that this judgment concerns the stage of the proceedings relating to the confirmation of the charges against a suspect and must be seen in that light. A hearing to confirm the charges is not a trial to establish guilt or innocence. It is a phase of the proceedings designed to “determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the

¹⁶ *Prosecutor v. Katanga*, Judgment on Katanga’s Appeal against the First Redaction Decision, ICC-01/04-01/07-476, 13 May 2008, para. 59.

crimes charged” prior to confirming any charges and committing the person to a Trial Chamber to be tried on the charges as confirmed. As such, it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial”.¹⁷

25. The Single Judge in *Ruto et al.* concluded that *“the Prosecutor has the obligation to protect victims and witnesses and, to that effect, he may request that certain information be redacted or rely on summary evidence for the purposes of the confirmation hearing.”¹⁸*

26. The Single Judge in *Ntaganda* similarly authorised the use of anonymous summaries and redactions for rule 77 material at the confirmation stage under rules 81(2) and 81(4), reasoning that *“in light of the limited scope of the confirmation of charges hearing, the anonymity is necessary and not prejudicial to or inconsistent with the rights of the suspect and fair and impartial proceedings as the Defence will have access to the relevant information contained in the summary.”¹⁹*

Submissions

27. The Prosecution submits that withholding the identity and other information which might lead to the exposure of Witness P-0431 is necessary under both rule 81(2) and rule 81(4) in order to not put him and/or his family in danger and to protect the Prosecution’s ability to investigate.

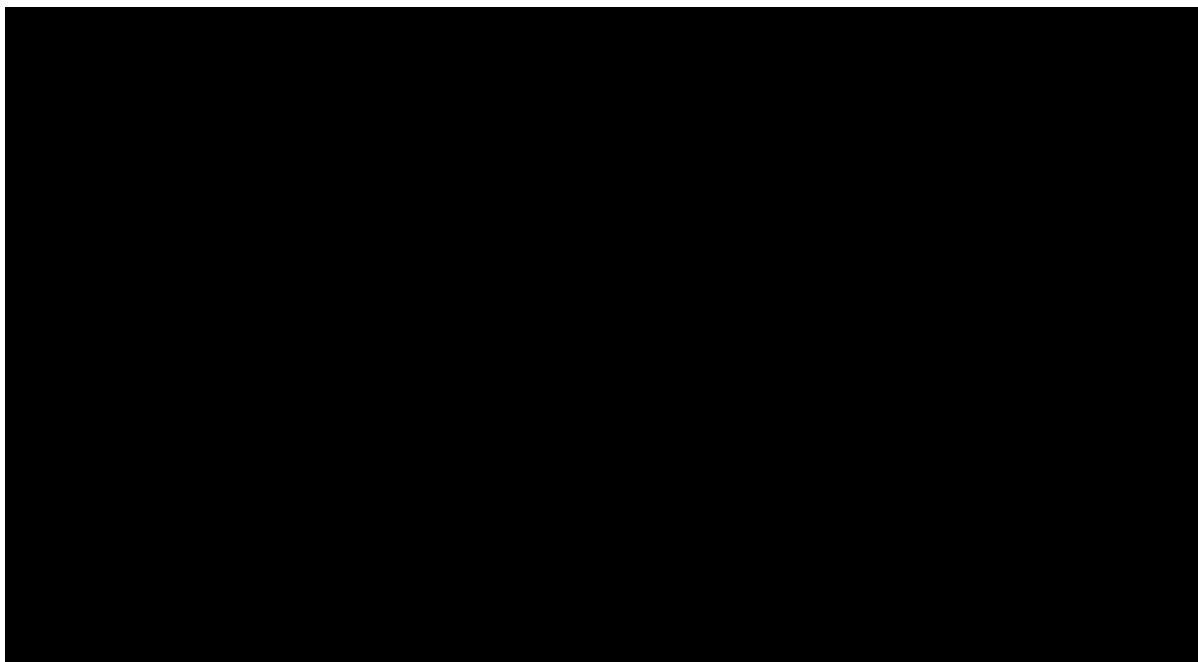
¹⁷ *Prosecutor v. Katanga*, Judgment on Katanga’s Appeal against the First Redaction Decision, ICC-01/04-01/07-475, 13 May 2008, para. 68.

¹⁸ *Prosecutor v. Ruto et al.*, Decision on the “Prosecution’s Application for leave to Appeal the Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure” (ICC-01/09-01/11-62)”, ICC-01/09-01/11-85, para. 18.

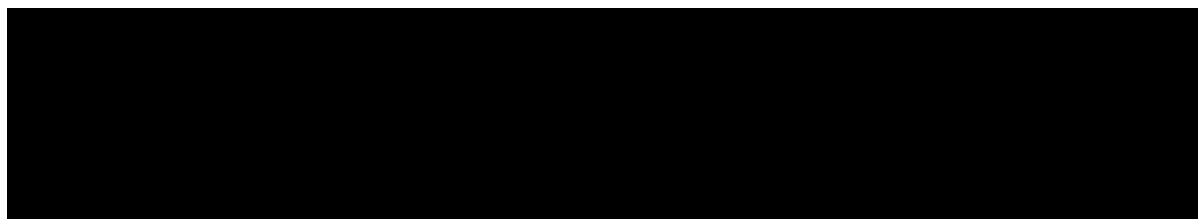
¹⁹ See, e.g., *Prosecutor v. Ntaganda*, Redacted Seventh Decision on the Prosecutor’s Requests for Redactions, ICC-01/04-02/06-248-Red2, 3 July 2014, para. 21, 22, 29.

A. Information on Prosecution Witness P-0431

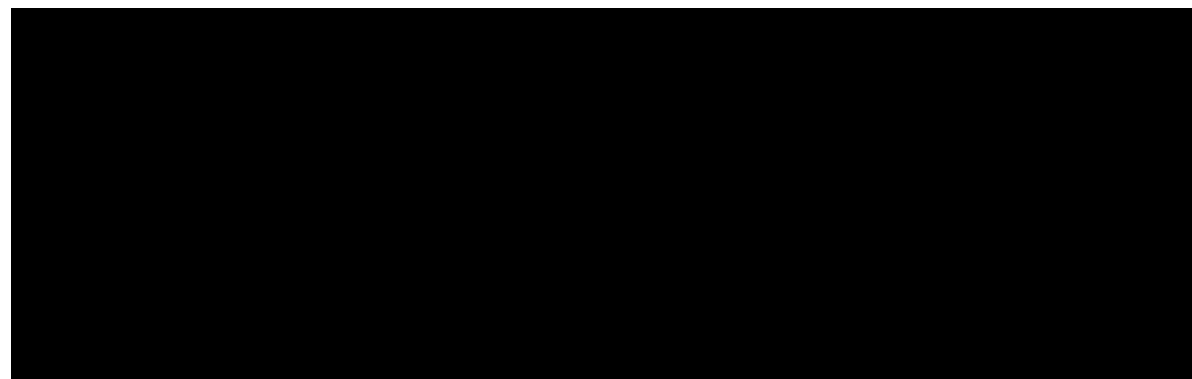
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29.



30.

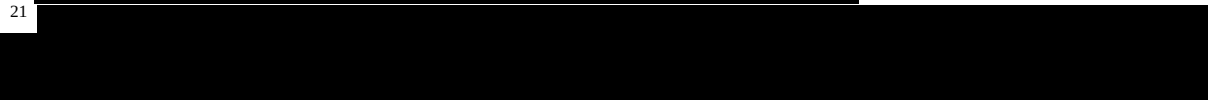


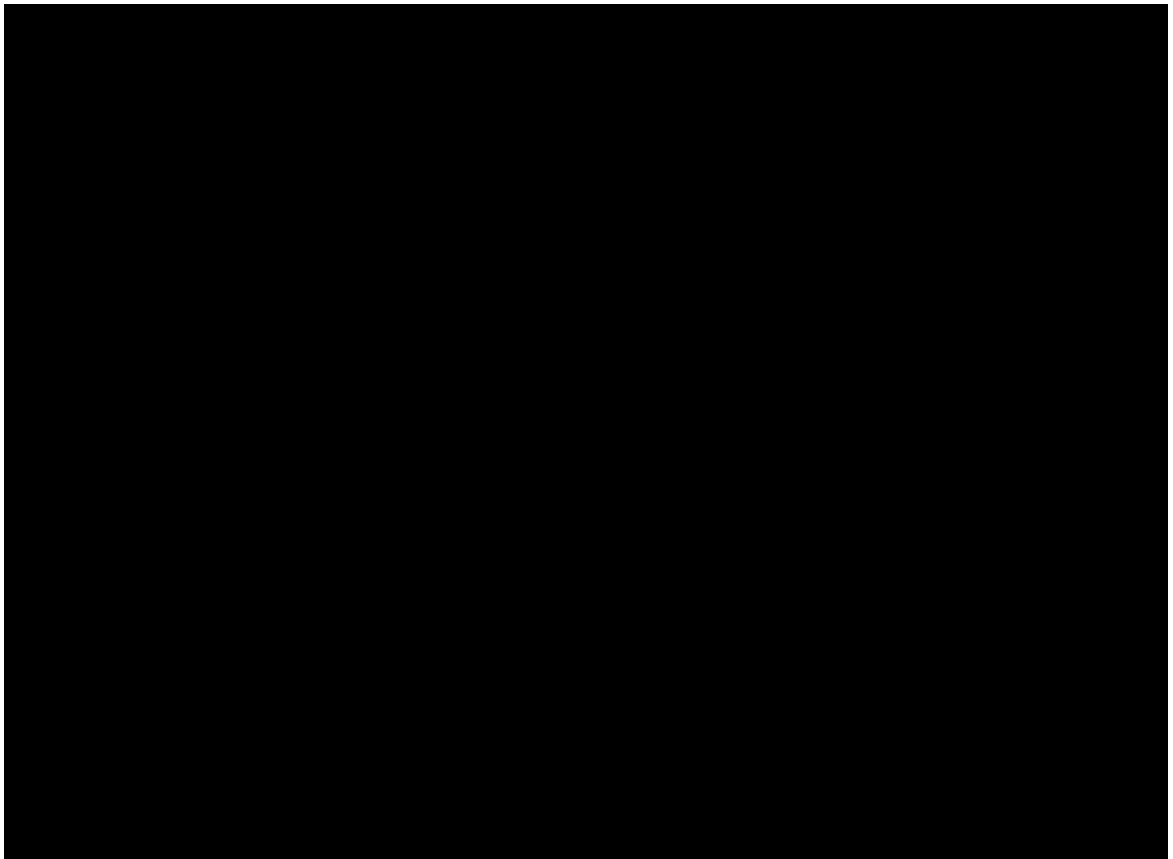
²¹

31. P-0431's statement deals with the following topics (see Annex C):

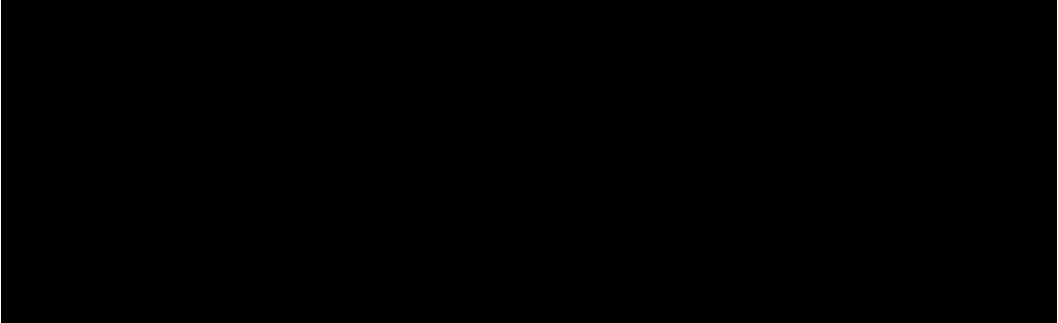
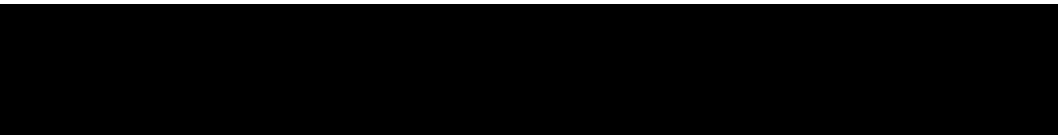
²⁰

²¹





32. There are five annexes to P-0431's statement:

- 
 ²²
-  ²³ 


²²

²³

[REDACTED]

33. Further, P-0431 also provided his CV to the Prosecution (see Annex B). Being in itself highly identifying, the Prosecution submits that it should not be disclosed at this stage.²⁴

B. Disclosure of a redacted statement and non-disclosure of some related evidence and metadata is necessary under rule 81(4) to protect this witness and his family

Redacting the identity and identifying information of P-0431 is necessary because there exists an objectively justifiable risk of danger

34. [REDACTED]
[REDACTED]²⁵ [REDACTED]
[REDACTED]²⁶

35. [REDACTED]

36. [REDACTED] that should it become known to armed groups that an individual has cooperated with the Court, the [REDACTED] This conclusion is based in part on documented instances in which AQIM and other groups [REDACTED]

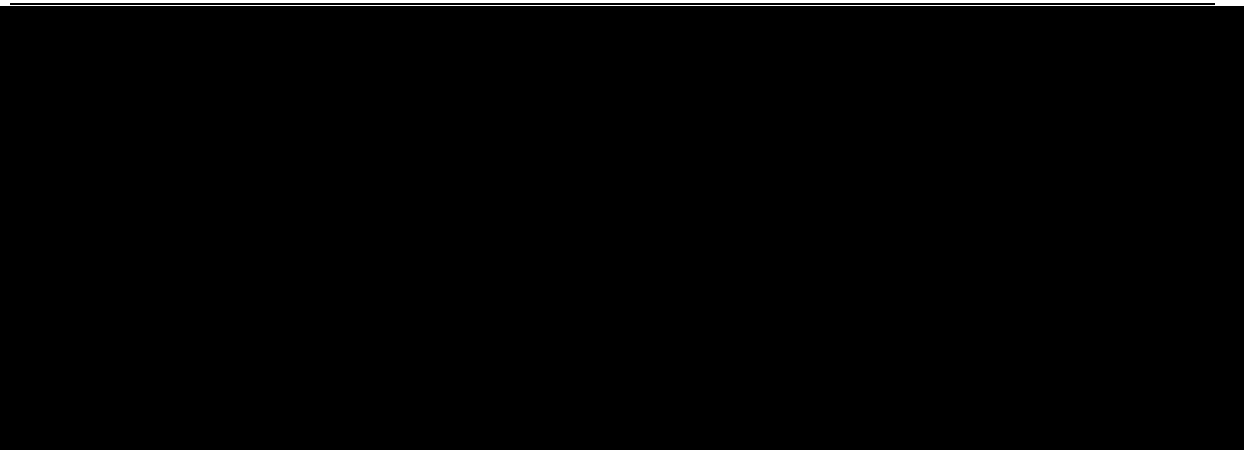
[REDACTED]²⁷

²⁴ [REDACTED]
²⁵ [REDACTED]
²⁶ [REDACTED]
²⁷ [REDACTED]

37. As a matter of fact, the main threat actors against Prosecution witnesses or potential witnesses include a coalition of “jihadist” groups including Ansar Dine and AQIM (with which AL HASSAN was associated, and which operate throughout Mali and the neighbouring countries, *i.e.* the very armed groups at issue in this case²⁸) and the *Jama’at Nusrat Al-Islam wal-Muslimin* («Groupe pour le soutien de l’Islam et des musulmans» or “JNIM”²⁹ established in March 2017 and led by Iyad Ag GHALY ³⁰).

38. The capacity of the said groups to conduct numerous and significant attacks in Timbuktu and its region is well established:

- AQIM was responsible for numerous killings in the year leading up to this day, and retains operational capacity and influence in the area around Timbuktu;



Déclaration à la presse faite par le Conseil de sécurité sur l’attaque ayant visé la MINUSMA, SC/12810-PKO/636, 4 May 2017, [MLI-OTP-0046-9012](#); Déclaration à la presse faite par le Conseil de sécurité à l’occasion de l’attentat terroriste perpétré contre la MINUSMA, SC/12837-PKO/644, 23 May 2017, [MLI-OTP-0046-9011](#).

³⁰ « Les groupes terroristes du Nord Mali se réunifient avec Iyad AG GHALY comme Leader », *Malijet*, 2 March 2017, [MLI-OTP-0041-0041](#), p. 0043 (version française) et [MLI-OTP-0041-0037](#), p. 0038 ; video, « Announcement of the victory of Islam and Muslim groups/ Speech Sheikh Abou Fadl », 6 March 2017, [MLI-OTP-0042-0178](#), de 00:02:36:00 à 00:03:06:00.

- Timbuktu has seen between 30-60 incidents annually since 2012 resulting in some 432 fatalities, of which 172 are attributed to JNIM or its precursor groups (AQIM, MUJAO or Ansar Dine), while approximately 32 of these fatalities are reported to have been civilians;³¹
- very recently, on 14 April 2018, MINUSMA and French forces camps were the target of a well-organised complex attack in Timbuktu, involving the use of mortars, small arms fire, and multiple suicide vehicle-borne improvised explosive devices (“SVBIED”).³² The attack, described as the largest attack on MINUSMA since its deployment, resulted in the death of one peacekeeper, and the injury of seven peacekeepers, seven French soldiers and two civilians.³³ The attack was claimed by JNIM in retaliation for operations against JNIM that had resulted in the killing or capture of multiple senior cadres.³⁴

39. In other words:

- the general security situation in Mali, particularly in the north, remains highly volatile, due, *inter alia*, to the threat posed by the armed groups associated with AL HASSAN (the latter is a member of Ansar Dine and was still acting under Iyad Ag GHALY’s order at the time of his arrest³⁵);

³¹ Data taken from <https://www.acleddata.com/data/> for the period 1 January 2012 to 1 February 2018, [last accessed in March 2018].

³² MINUSMA, « Attaque de Tombouctou », 15 April 2018, MLI-OTP-0058-0422. Some of the vehicles used by the attackers were disguised with signs of the UN and Malian armed forces.

³³ MINUSMA, « Déclaration attribuable au porte-parole du Secrétaire général sur l’attaque contre la MINUSMA à Tombouctou, au Mali », MLI-OTP-0058-0425; Security Council, “Security Council Press Statement on Attack against United Nations Multidimensional Integrated Stabilization Mission in Mali”, 15 April 2018, MLI-OTP-0058-0424.

³⁴ « Mali : l’attaque de Tombouctou revendiquée par un groupe lié à Al-Qaïda », *Jeune Afrique*, 21 avril 2018, MLI-OTP-0058-0426.

³⁵

- whereas associates and affiliates of some individuals investigated by the Court in other cases have sought to dissuade witnesses from testifying or to influence their testimony through bribery or other means, the armed jihadist groups at issue here [REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]

40. Concretely, one scenario under which armed groups such as AQIM and Ansar Dine could obtain knowledge about these witnesses is through an intentional or inadvertent disclosure of information provided to the Defence under the Court's disclosure regime.

41. In this regard, the Prosecution emphasises that this witness could be placed at risk even if the Defence does not desire or intend such a result. [REDACTED]

[REDACTED]

[REDACTED] It will be even more difficult for the Defence [REDACTED] and to effectively avoid any inadvertent association of witnesses with the Court or with international organisations more generally. Consequently, the existing confidentiality obligations of counsel are insufficient by themselves to protect witnesses from the serious threats described above.

42. In this context, the Prosecution relies on the results of the analysis of P-0431's personal situation as conducted by PSU [REDACTED]

- [REDACTED]
 - [REDACTED]
- [REDACTED]³⁶);
- [REDACTED]
[REDACTED] and
 - [REDACTED] disclosing the identity of this witness would possibly require the implementation of intrusive protective measures,
[REDACTED]
[REDACTED].

43. P-0431

[REDACTED]³⁷ He avoids situations that could reveal his cooperation with the OTP: he keeps his contacts with the OTP strictly confidential [REDACTED]
[REDACTED]

44. P-0431 was contacted on [REDACTED] by the OTP and he agreed to the disclosure of his statements to the Defence, provided that information related to his identity is redacted. P-0431's stance is consistent with the Prosecution's assessment that

³⁶ [REDACTED]

³⁷ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

disclosure of his identity would put him in danger [REDACTED]
[REDACTED]

45. Overall, given the seriousness of the risks mentioned, the limited scope of the confirmation hearing and the likely irreversible impact of [REDACTED]
[REDACTED] redaction of any information related to the identity of this witness and non-disclosure of some related identifying evidence and metadata seems to be the most reasonable and practical solution.

Withholding P-0431's identity and identifying documents/information is the least restrictive means available

46. [REDACTED]

47. However:

- as noted above, the Prosecution has determined that, unlike in other cases, the risk of violence in this case is likely to escalate [REDACTED]
[REDACTED]

- [REDACTED]

48. [REDACTED]

Withholding the witness's identity and identifying documents/information will
not prejudice the Defence

49. The Prosecution submits that redactions of the information going to the identity of P-0431 will not result in any prejudice to the Defence nor undermine the fairness and impartiality of the confirmation proceedings.
50. The Prosecution has redacted the statements of P-0431 with a view to including all relevant and disclosable information while protecting the security of the witness and his family. Hence, redactions were only applied to excerpts containing identifying information and not to the substance (proposed redactions are visible in grey in Annex C).
51. As for documents, the non-disclosure of which is sought, the Prosecution refers to Annex D.
52. Most importantly, several types of supporting evidence will be disclosed in relation to [REDACTED] For instance: witness statements (e.g. [REDACTED]³⁸ or [REDACTED]⁹), photographs,⁴⁰ videos ([REDACTED]¹ or [REDACTED]¹²) and expert reports.⁴³
53. Last, P-0431 does not provide information about AL HASSAN in person.

³⁸ [REDACTED]

³⁹ [REDACTED]

⁴⁰ E.g. MLI-OTP-0006-1257 to MLI-OTP-0006-1307 and MLI-OTP-0006-1330 to MLI-OTP-0006-1427.

⁴¹ E.g. MLI-OTP-0001-6926, MLI-OTP-0001-6927, MLI-OTP-0001-6929, MLI-OTP-0001-6935, MLI-OTP-0001-6956.

⁴² E.g. [REDACTED]

[REDACTED]

[REDACTED]

C. Non-disclosure is necessary under rule 81(2) to protect the Prosecution's ability to investigate

54. The use of a redacted statement is independently warranted under rule 81(2) to protect the Prosecution's future and ongoing investigations in Mali.

There exists an objectively justifiable risk of interference

55. The Appeals Chamber has held that interference with Prosecution witnesses may prejudice further and ongoing investigations.⁴⁴

56. This is true in the sense [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

57. In addition, in the Prosecution's judgment, disclosure of the identity or identifying information of this witness would possibly necessitate [REDACTED]

[REDACTED] If, practically speaking, every person [REDACTED] to the Prosecution will require [REDACTED] regardless of whether their evidence will be used in court, it will severely hamper the Prosecution's investigative work.

58. Last, [REDACTED]

[REDACTED]

⁴⁴ See *Prosecutor v. Katanga*, Judgment on Katanga's Appeal against the First Redaction Decision, ICC-01/04-01/07-476, 13 May 2008, para. 49 ("The Appeals Chamber accepts that further or ongoing investigations may be prejudiced if potential prosecution witnesses are interfered with in a manner that could lead to them being unable to co-operate further with the Prosecutor.").



The use of redactions is the least restrictive means available

59. In the Prosecution's submission, there are no less restrictive means available to protect its investigative ability in Mali, particularly with regards to crimes allegedly committed in Timbuktu.

The use of redactions will not prejudice the Defence

60. For the reasons set forth above in relation to rule 81(4), the disclosure of a redacted statement of P-0431 and the non-disclosure of some related evidence will not prejudice the rights of the Defence nor impede fair and impartial confirmation proceedings.

Relief sought

61. For the reasons set forth above, the Prosecution seeks from the Single Judge an order under rules 81(2) and 81(4) authorising:

- a. the Prosecution to not disclose the identity and identifying information of P-0431;
- b. to disclose to the Defence an anonymous redacted version of the statement of Prosecution Witness P-0431 and its Arabic translation;
- c. to redact the name of P-0431 in the chain of custody of his statement;
- d. not to disclose his CV and four out of the five annexes to his statement (the ones referred to in Annex D); and
- e. to redact the name of P-0431 in the chain of custody of one annex to his statement (containing ) and to not mention the

pseudonym "P-0431" in the chain of custody field regarding the said [REDACTED]

62. In the event that the Single Judge were to deny this motion in whole or in part, the Prosecution requests an order permitting the Prosecution to make any necessary disclosures regarding Witness P-0431 only after necessary protective measures, [REDACTED]



Fatou Bensouda, Prosecutor

Dated this 11th day of June 2018
At The Hague, The Netherlands