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12 November 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*, Annexes A to F,
only available to the Prosecution and the Victims and Witnesses Unit**

**Public redacted version of the “Prosecution’s Request for authorisation to
withhold the identity of Witness MLI-OTP-P-0608 upon whose evidence
the Prosecution will rely at the Confirmation Hearing”,
7 November 2018, ICC-01/12-01/18-177-Conf-Exp**

Source: Office of the Prosecutor

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

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Introduction

1. Further to the Single Judge's *Decision on the Evidence Disclosure Protocol and Other Related Matters*,¹ the Office of the Prosecutor ("Prosecution") hereby seeks authorisation to withhold the identity of Prosecution Witness P-0608, *i.e.* to redact all identifying information from her statement² and associated material and to not disclose [REDACTED], in order to protect both the safety of the witness and her family, as well as Prosecution investigations, pursuant to article 68(1) of the Rome Statute and rule 81(2) and (4) of the Rules of Procedure and Evidence ("Rules").

2. Witness P-0608 is a [REDACTED]
 She provides overview evidence regarding crimes committed by the armed groups against the population in Timbuktu [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

3. Witness P-0608 agreed to testify and the Prosecution intends to rely on Witness P-0608's evidence at the Confirmation Hearing. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] Her security situation therefore remains precarious.

¹ ICC-01/12-01/18-31-tENG, para. 33.

² And the translation thereof.

4. In this context, considering the danger for all persons whom the armed groups perceived to be cooperating with international organisations in Mali and the threat posed by armed groups at issue in this case, the exposure of this witness's cooperation with the Court would place her and her family at risk. This risk is likely to be further heightened by the Prosecution's intention to rely on her evidence at the Confirmation Hearing.
5. Under these circumstances, and particularly considering the limited scope of the Confirmation Hearing, the Prosecution submits that P-0608's identity and identifying information should not be disclosed and that, at this stage of the proceedings, the requested redactions and non-disclosure of some items should be granted.

Confidentiality

6. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this motion and its Annexes A to F are filed confidential *ex parte*, available only to the Prosecution and the VWU. Indeed, the motion discusses security concerns specific to this witness. In addition, the annexes contain personal identifying information, the disclosure of which would place the witness and her family at risk and render the motion moot.
7. The annexes are divided as follows:
 - Annex A contains the statement of Witness P-0608 and annexes A to C thereto, with proposed redactions to the content of the statement and annex A (the metadata thereof would have to be redacted with respect to all four items);³

³ [REDACTED]

- Annex B contains annex D to Witness P-0608's statement [REDACTED],⁴
[REDACTED],⁵ the metadata of which should be redacted;
- Annex C contains [REDACTED]
[REDACTED]⁶ [REDACTED]
[REDACTED]
[REDACTED];
- Annex D contains [REDACTED]
[REDACTED]
[REDACTED];⁷
- Annex E contains [REDACTED]
[REDACTED]
- Annex F contains [REDACTED]

8. The Prosecution will simultaneously file a confidential redacted version of the present motion.

Background

9. On 4 April 2018, Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ("AL HASSAN" or the "Suspect") made his initial appearance before the Court.

⁴

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⁷

10. 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-0608, among others, as a witness whose evidence it intends to rely upon at the Confirmation Hearing, but with redactions to any identifying information which might expose her interaction with the Court.

Applicable law

11. With respect to the applicable law, the Prosecution refers to its prior filing ICC-01/12-01/18-48-Conf-Exp and the Single Judge's finding in the Decision [REDACTED]

[REDACTED].

Submissions

12. Withholding Witness P-0608's identity and other identifying information which might lead to her exposure and non-disclosure of some [REDACTED] [REDACTED] is necessary under rule 81(2) and (4) of the Rules in order to protect the safety of the witness and her family members and to avoid prejudice against further or ongoing investigation by the Prosecution.

A. Information on Prosecution Witness P-0608

13. Witness P-0608 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

14. [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

15. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

16. After the arrival of the armed groups, [REDACTED]

[REDACTED]⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

17. Witness P-0608's statement addresses, amongst others, the following topics (see Annex A):

- her personal [REDACTED] background;
- the arrival of the armed groups in Timbuktu in April 2012;
- the new rules imposed on the population by the armed groups;
- crimes committed against women, including arbitrary detention, floggings and forced marriages; and

⁸ [REDACTED]

[REDACTED]

- some key members of the armed groups.

B. Disclosure of a redacted statement and non-disclosure [REDACTED]
[REDACTED] is necessary under article 68(1) and rule 81(4) to protect the safety of Witness P-0608 and her family members

Redacted statement

Redacting the identity and identifying information of Witness P-0608 is necessary because there is an objectively justifiable risk

18. Given the intent and capacity of the known threat actors, [REDACTED]
[REDACTED] there is an objectively justifiable risk to the safety of Witness P-0608 and her family, which would result from the disclosure of her identity to the Defence.

19. As a person [REDACTED]
[REDACTED] Witness P-0608 is at risk of being targeted by armed groups. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁹ [REDACTED]
[REDACTED]¹⁰ , [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹¹

20. While Witness P-0608 has reported no other threats or incidents against her, the existing risk would be significantly heightened should it become known that she

⁹ [REDACTED]

¹ HCUA consists mainly of dissidents of Ansar Dine and is one of the signatories to the Algiers Agreement. However, it has been accused of links to Ansar Dine and its leader, Iyad Ag GHALY. See, for example, Voa Afrique, "Mali : les rebelles du HCUA jouent 'un double jeu', selon Paris", 9 June 2016, available at <https://www.voaafrique.com/a/mali-les-rebelles-du-hcua-jouent-un-double-jeu-selon-paris/3368599.html> [last accessed 24/10/2018].

¹¹ [REDACTED]

was cooperating with the ICC in this case. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- In the circumstances, considering the disclosure obligations incumbent on the Prosecution, and bearing in mind that Witness P-0608's family members would also be at risk in case of disclosure of her identity, the Prosecution considers it preferable to request at this stage the redaction of her identity.

21. The Prosecution refers to: a) the Single Judge's findings in [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]; and b) the [REDACTED]

¹² [REDACTED]
[REDACTED]

23. As mentioned previously, the main actors that pose a threat against Prosecution witnesses or potential witnesses include a coalition of “jihadist” groups, the *Jama’at Nusrat Al-Islam wal-Muslimin* (“Groupe pour le soutien de l’Islam et des musulmans” or “JNIM”),¹⁶ established in March 2017 and led by Iyad Ag

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GHALY,¹⁷ the top leader of Ansar Dine with which AL HASSAN was associated until his capture in April 2017.¹⁸

24. The capacity of these groups to conduct numerous and significant attacks in Timbuktu and its region is well established: the Prosecution refers in this regards to its prior filing ICC-01/12-01/18-48-Conf-Exp, in particular paragraphs 38-39. The latest report of the United Nations Secretary-General on the situation in Mali confirms that JNIM continues to attack the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), Malian defence and security forces and international forces across central and northern Mali.¹⁹

25. Concretely, one manner in which armed groups such as JNIM could obtain knowledge about this witness is through an intentional or inadvertent disclosure of information provided to the Defence under the Court's disclosure regime.

26. 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]

[REDACTED]. It will be even more difficult for the Defence to operate discretely [REDACTED] and to effectively avoid any inadvertent disclosure of information related to association of witnesses with the Court or with international organisations more

¹⁷ "Les groupes terroristes du Nord Mali se réunifient avec Iyad AG GHALY comme Leader", *Malijet*, 2 March 2017, MLI-OTP-0041-0041, p. 0043 and 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, from 00:02:36:00 to 00:03:06:00.

¹⁸

[REDACTED]

¹⁹ Report of the Secretary-General on the situation in Mali, S/2018/866, 25 September 2018, para.33. Most recently, JNIM claimed its responsibility for the two attacks against MINUSMA camps in Ber and Konna on 27 October 2018, which killed two peacekeepers and wounded several persons. See "Mali : Nusrat Al-Islam revendique l'attaque de Ber à Tombouctou", *Alakhbar*, 29 October 2018, available at <http://fr.alakhbar.info/14263-0-Mali-Nusrat-Al-Islam-revendique-lattaques-de-Ber-a-Tombouctou.html> [last accessed on 01/11/2018]; "La MINUSMA repousse une attaque contre son camp de Ber et à Kona au Mali, déplore la perte de deux casques bleus et plusieurs blessés", MINUSMA, 27 October 2018, available at <https://minusma.unmissions.org/la-minusma-repousse-une-attaque-contre-son-camp-de-ber-et-%C3%A0-konna-au-mali-d%C3%A9plore-la-perte-de-deux> [last accessed on 01/11/2018].

generally. Consequently, the existing confidentiality obligations of counsel are insufficient to protect witnesses from the serious threats described above.

27. With respect to Witness P-0608's personal situation, the Prosecution refers to the results of the analysis as conducted by its Protection Strategies Unit ("PSU") [REDACTED]

- JNIM's activities are highly concentrated in central and northern Mali, [REDACTED]
- Based on past behaviour, consistent warnings and probable capacity, it is likely that JNIM will take action against Prosecution witnesses without additional warning or observable escalation; and
- Once Witness P-0608's statement and cooperation are disclosed to the Suspect and his Defence team and if the information leaks to threat actors, the level of risk to her will be high [REDACTED]

28. Given the seriousness of the risks mentioned, the limited scope of the Confirmation Hearing, and the specific situation of this witness, redaction of any information related to the identity of Witness P-0608 and non-disclosure of some related identifying evidence are the most reasonable and practical solution at this stage. The Prosecution will inform the Single Judge should the circumstances change, and should P-0608 [REDACTED] in the meantime, [REDACTED]

*Withholding Witness P-0608's identity and identifying information
is the least restrictive means available*

29. [REDACTED]
[REDACTED]
[REDACTED].²⁰

²⁰ [REDACTED]

30. However:

- as noted above, the Prosecution has determined that, unlike in other cases, the risk of violence in this case is likely to escalate immediately to physical violence or death, without warning; and
- [REDACTED]
[REDACTED].²¹

31. Accordingly, pending the implementation of the measures that have been deemed necessary to ensure Witness P-0608's protection, withholding her identity and identifying information is the least restrictive means available to effectively protect her safety and that of her family members, particularly at this stage of the proceedings.

*Withholding P-0608's identity and identifying information
will not prejudice the Defence*

32. The redactions applied to Witness P-0608's evidence will not result in any prejudice to the Defence nor undermine the fairness and impartiality of the confirmation proceedings.

33. The Prosecution has proposed redactions to Witness P-0608's statement, instead of preparing an anonymous summary and, while these redactions are extensive, they do not hinder the intelligibility of the statement in terms of the substance of the witness's accounts.

34. The Pre-Trial Chamber made it clear that *"in its decision on the confirmation of charges, [it] shall take into account only the version of evidence that was communicated to*

²¹ [REDACTED]
[REDACTED]

the Defence", meaning that any information redacted in the disclosure to the Defence cannot be relied upon by the Prosecution.²²

35. Witness P-0608's evidence exclusively concerns the new rules imposed on the population by the armed groups, and some crimes committed during their control of Timbuktu, which she directly witnessed or heard of from other individuals. It does not address AL HASSAN's role in their commission.

36. The Prosecution will disclose the identity of several other Prosecution witnesses prior to the Confirmation Hearing.²³ A number of items of documentary evidence will also provide similar information as that contained in Witness P-0608's material.

37. Finally, the requested measures are of interim nature, applicable pending [REDACTED]
[REDACTED]²⁴ The Prosecution would disclose the identity of this witness prior to trial, should the charges be confirmed.

Non-disclosure of [REDACTED] [REDACTED]

38. [REDACTED]
[REDACTED]

39. [REDACTED]
[REDACTED]²⁵ [REDACTED]
[REDACTED]
[REDACTED]

²² ICC-01/12-01/18-31-tENG, para. 32.

²³ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]²⁶ [REDACTED]

40. However, [REDACTED]

[REDACTED]:

- [REDACTED]
[REDACTED]
[REDACTED]²⁷ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²⁸
- [REDACTED]²⁹
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁹ [REDACTED]
[REDACTED]

- [REDACTED]
[REDACTED]³⁰ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

41. Non-disclosure of these items will not prejudice the Defence in the preparation of their case for the purposes of the Confirmation Hearing since they contain information analogous to that discussed in her written statement and/or other disclosed material.

*C. Disclosure of a redacted statement and non-disclosure of [REDACTED]
[REDACTED] is necessary under rule 81(2) to avoid
prejudice against further or ongoing investigations*

42. As mentioned in prior filings, the Appeals Chamber has accepted 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 cooperate further with the Prosecutor.”³¹

43. The Prosecution is concerned that any incident happening to Witness P-0608:

- would discourage her from further cooperating with the Prosecution and testifying at trial, should the charges against AL HASSAN be confirmed; and

³⁰ [REDACTED]

³¹ ICC-01/12-01/18-48-Conf-Exp, para. 55, citing ICC-01/04-01/07-476, para. 49.

- would discourage current and future witnesses to cooperate with the Prosecution.³²

Relief sought

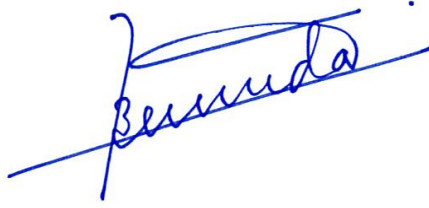
44. For the reasons set forth above, the Prosecution seeks from the Single Judge an order under article 68(1) and rule 81(2) and (4) authorising the Prosecution:

- to not disclose the identity and identifying information of Witness P-0608;
- to disclose redacted versions of her statement (and translation thereof) and annex A thereto (attached in Annex A to the present filing), from which any identifying information is expunged;
- to redact any identifying information of Witness P-0608 in the metadata of her statement and associated material attached in Annexes A and B to the present filing; and
- to not disclose the items attached in Annex D to this filing.

45. 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-0608 [REDACTED]

[REDACTED].

³² [REDACTED]



Fatou Bensouda, Prosecutor

Dated this 7th day of November 2018
At The Hague, the Netherlands