

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



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16 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 E,
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-0111 upon whose evidence
the Prosecution will not rely at the confirmation hearing”,
6 September 2018, ICC-01/12-01/18-117-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. The Office of the Prosecutor ("Prosecution") hereby seeks authorisation to withhold the identity of Prosecution Witness P-0111, *i.e.* to redact all identifying information from his article 55(2) transcripts and other documents, and to not disclose some documents related to him that could allow the Suspect to cross-reference information and identify him.

- 2.

[REDACTED]

[REDACTED] the Prosecution could approach and interview him.

3. At this stage, the Prosecution does not envisage to call him as a Prosecution witness, but still need to disclose his evidence under rule 77.

- 4.

[REDACTED]

[REDACTED]

[REDACTED]

- 5.

[REDACTED]

[REDACTED]

6. In this context, considering that the Prosecution is not relying on the evidence of P-0111 for the article 61 confirmation hearing (“confirmation hearing”), and in light of the danger for all persons who are considered to be cooperating with international organisations 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 at risk, while also prejudicing ongoing and future investigations.
7. 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-0111 should be applied.

Confidentiality

8. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this motion and its Annexes A to E are filed *ex parte*, available only to the Prosecution and 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 at risk and render the motion moot.
9. These annexes are divided as follows:
 - Annex A contains the waivers and transcripts of the interviews of Witness P-0111 with proposed redactions;¹
 - Annex B contains several documents the non-disclosure of which is requested:

¹ [REDACTED]

[REDACTED] The transcripts also contain *proprio motu* redactions, for instance to the identity of investigators.

- i. [REDACTED]
[REDACTED]² as well
as [REDACTED]
[REDACTED]³, [REDACTED]
[REDACTED]⁴, [REDACTED]
[REDACTED]⁵
- ii. [REDACTED]
[REDACTED]⁶
- iii. [REDACTED]
[REDACTED] P-0111 and
[REDACTED]⁷
- iv. [REDACTED]
[REDACTED]⁸
- v. [REDACTED]
[REDACTED]; and
- vi. [REDACTED]
[REDACTED]¹⁰
- Annex C [REDACTED]
[REDACTED]¹² [REDACTED]
[REDACTED]
 - Annex D is [REDACTED] and

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
1 [REDACTED]
11 [REDACTED]
12 [REDACTED]

- Annex E [REDACTED]

[REDACTED]¹³

10. The Prosecution simultaneously files a redacted version of the present motion.

Background

11. On 4 April 2018, AL Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“AL HASSAN”) made his initial appearance before the Court.

12. 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-0111, among others,¹⁴ whose evidence needs to be disclosed under rule 77.

13. 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 not disclose the identity and identifying information of P-0111;
- to disclose to the Defence an anonymous redacted version of the waivers and article 55(2) transcripts of the interviews of Witness P-0111;
- to redact P-0111’s name from the metadata of the redacted waivers and transcripts; and
- to not disclose documents contained in Annexes B and C.

14. These measures will avoid revealing the witness’ identity or other information which might expose his interaction with the Court.

¹³ [REDACTED]

¹⁴ The Prosecution will submit separate motions related to other witnesses in this category.

Applicable Law

15. As for 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 ICC-01/12-01/18-88-Conf-Exp, in particular in paragraphs 15-17.

Submissions

16. The Prosecution submits that withholding the identity and other information which might lead to the exposure of Witness P-0111 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.

A. Information on Prosecution Witness P-0111

17. Witness P-0111 [REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

18. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

19. [REDACTED] [REDACTED] [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

20. [REDACTED]

[REDACTED]

21. [REDACTED] [REDACTED]

[REDACTED]

22. P-0111's interview deals with the following topics (see Annex A):

- The everyday life in Timbuktu, the peaceful relationships amongst the inhabitants, and the management of the town by the Malian state before the arrival of the Islamists;
- The arrival of the Islamists during 2012 (Ansar Dine and Al-Qaeda) and their way of completely controlling the town, through seizing everything, establishing check-points at the entry/exit roads in town and putting different groups of their people in each building, in order to implement the Sharia;
- [REDACTED]
[REDACTED]
[REDACTED]
- The Islamic regime at the time and the composition of the Islamic bodies that is, [REDACTED]
[REDACTED]
[REDACTED]

B. Disclosure of redacted waivers and transcripts 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-0111 is necessary because there exists an objectively justifiable risk of danger

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

24. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. [REDACTED] the Prosecution cannot presently rely on him for the confirmation hearing but still has to disclose his information under rule 77 while ensuring his security.

25. [REDACTED]
[REDACTED]
[REDACTED]

26. In this context, the Prosecution refers a) to the Single Judge's findings in paragraph 33 of decision ICC-01/12-01/18-88-Conf-Exp, especially with regard to the Suspect's role at the time of his arrest, as well as b) [REDACTED]

[REDACTED]¹⁶ [REDACTED]

[REDACTED]¹⁷

15

16

17

27. In particular, the Prosecution reminds the Chamber that the general conclusion of its witness security assessment for Mali is worrying.

28. [REDACTED] - that should it become known to armed groups that an individual has cooperated with the Court, the risk of physical harm or death to the individual and his family is “high.” This conclusion is based in part on documented instances in which AQIM and other groups have been involved in targeted attacks and assassinations against individuals suspected of cooperating with international organisations.¹⁸

29. 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 case) and the *Jama’at Nusrat Al-Islam wal-Muslimin* («Groupe pour le soutien de l’Islam et des musulmans» or “JNIM”¹⁹, established in March 2017 and led by Iyad Ag GHALY²⁰).

¹⁸ See, *e.g.*, “Mali : Ansar Dine revendique l’attaque contre la Minusma à Kidal,” RFI, 28 November 2015 (available at <http://www.rfi.fr/afrique/20151128-mali-ansar-dine-revendique-attaque-contre-minusma-kidal>); “Mali: Le groupe Ansar Eddine envoie des tracts aux populations locales,” Sahelien.com, 7 January 2015, MLI-OTP-0022-0404. See also “Deux Touaregs Imghads, guides de la force Barkhane, égorgés à Aguelhok,” Mali-Web, February 2015 (available at <http://mali-web.org/nord-mali/deux-touaregs-imghads-guides-de-la-force-barkhane-egorges-a-aguelhok>); “Nouvelle victime à Zoueira près de Tombouctou : Un présumé informateur des forces françaises éliminé,” Maliweb, November 2014 (available at <https://www.maliweb.net/la-situation-politique-et-securitaire-au-nord/nouvelle-victime-zoueira-pres-tombouctou-presume-informateur-forces-francaises-elimine-629332.html>); “Mali: des civils enlevés par des jihadistes à la frontière nigérienne,” RFI, March 2015 (available at http://www.rfi.fr/afrique/20150312-trois-civils-maliens-enleves-jihadistes-frontiere-nigerienne-mujao/#/?&_suid=144768778866503002341593728486); UNSC, Report of the Secretary-General on the situation in Mali, 26 December 2017, MLI-OTP-0058-0400; UNGA, Report of the Independent Expert on the situation of human rights in Mali, 2 February 2018, MLI-OTP-0058-0354; UNSC, Report of the Secretary-General on the situation in Mali, 29 March 2018, MLI-OTP-0058-0368; Reuters, Al Qaeda affiliate claims responsibility for Burkina Faso attacks, 3 March 2018, MLI-OTP-0058-0419.

¹⁹ *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.

²⁰ « 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,

30. The capacity of the said groups to conduct numerous and significant attacks in Timbuktu and its region is well established: the Prosecution refers to its prior filing ICC-01/12-01/18-48-Conf-Exp, in particular to paragraphs 38-39.

31. In this context, [REDACTED] [REDACTED]
[REDACTED].²¹

32. [REDACTED]
[REDACTED] concrete information regarding his contact with the OTP, in the context of the actual ICC proceedings against AL HASSAN, would seriously increase the risk against him.

33. In these circumstances, it should be stressed that P-0111 is [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²²
[REDACTED]

34. Concretely, one scenario under which armed groups such as AQIM and Ansar Dine 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.

35. 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]

« 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.

²¹

²²

[REDACTED]

[REDACTED]

[REDACTED] It will be even more difficult for the Defence to operate discretely [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.

36. In this juncture, the Prosecution relies on the results of the analysis of P-0111's personal situation [REDACTED] [REDACTED]

[REDACTED]

-
-
-
-

[REDACTED]

- given this, the most effective measure to mitigate the identified risk to P-0111 [REDACTED] is non-disclosure of his identity.

37. Overall, given the seriousness of the risks mentioned, the limited scope of the confirmation hearing, the fact that his evidence will not be relied upon at the said hearing, [REDACTED]
[REDACTED], redaction of any information related to the identity of this witness and non-disclosure of some related identifying evidence and metadata seem to be the most reasonable and practical solution.

Withholding P-0111's identity and identifying documents/information is the least restrictive means available

38. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

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

39. The Prosecution submits that redactions of the information going to the identity of P-0111 will not result in any prejudice to the Defence nor undermine the fairness and impartiality of the confirmation proceedings.

40. The Prosecution has redacted the transcripts of the interview of P-0111 with a view to including all relevant and disclosable information while protecting the security of the witness and his family. Hence, redactions were applied to excerpts containing identifying information (proposed redactions are visible in grey in Annex A).

41. The Prosecution has disclosed a lot of other material related to P-0111's evidence

[REDACTED] The Prosecution will also disclose [REDACTED] [REDACTED] and transcripts of [REDACTED] interviews, some of which mention [REDACTED]

42. Last, P-0111 does not talk much about AL HASSAN and his role in the police.

43. In addition, the non-disclosure of the documents referred to in Annexes B and C is necessary. The reading of these documents (even with redactions) would identify P-0111 as a witness²³ [REDACTED] and the cross-referencing of these documents with other pieces of information would allow the Suspect to find out the identity of P-0111.

44. Furthermore, within these documents:

- [REDACTED]
[REDACTED] [REDACTED]²⁴ [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED] [REDACTED]²⁵ [REDACTED]
[REDACTED]
- [REDACTED] P-0111²⁶ [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]

²³ [REDACTED]

²⁴ [REDACTED]

²⁵ [REDACTED]

²⁶ [REDACTED]

- [REDACTED]
[REDACTED]²⁷ but would certainly lead to the identification of P-0111; and
- last, [REDACTED]
[REDACTED] would allow to identify P-0111 even with redactions.

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

45. The use of a redacted transcript 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

46. The Appeals Chamber has held that interference with Prosecution witnesses may prejudice further and ongoing investigations.²⁸

47. This is true in the sense that the particular witnesses targeted may cease cooperating, and also in the sense that other witnesses or potential witnesses who learn of the interference may cease cooperating out of fear that they too will be targeted.

48. In the Prosecution's judgment, disclosure of the identity or identifying information of this witness would create a risk for P-0111 and his family [REDACTED]
[REDACTED] If, practically speaking, the identity of every person [REDACTED] who provides information to the Prosecution is disclosed, regardless of whether their evidence will be used in

²⁷ [REDACTED]

²⁸ 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.").

court and whether their protection can be ensured, it will severely hamper the Prosecution's investigative work.

49. [REDACTED]
[REDACTED]
[REDACTED]

The use of redactions is the least restrictive means available

50. 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

51. For the reasons set forth above in relation to rule 81(4), the disclosure of redacted waivers and transcripts of the interview of P-0111 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

52. 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-0111;
- b) to disclose to the Defence an anonymous redacted version of the waivers and transcripts of the interviews of Prosecution Witness P-0111;
- c) to not disclose documents contained in Annexes B and C; and
- d) to redact P-0111's name from the metadata of the disclosed documents.

53. 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-0111 [REDACTED]
[REDACTED]



Fatou Bensouda, Prosecutor

Dated this 6th day of September 2018
At The Hague, The Netherlands