

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



Original: **English**

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

Date: **26 September 2018**

Date of submission:

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 motion for authorisation to
withhold the identity of Prosecution Witness MLI-OTP-P-0130 upon whose
statement the Prosecution will not rely at the confirmation hearing”,
26 September 2018, ICC-01/12-01/18-136-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 MLI-OTP-P-0130 ("P-0130"):
 - upon whose statement the Prosecution will not rely at the article 61 confirmation hearing ("confirmation hearing") but whose statement contains information that falls within the scope of rule 77 of the Rules of Procedure and Evidence ("Rules"), and
 - upon whose exhibits the Prosecution will rely partly at the confirmation hearing (see paragraph 18).

2. Due to the personal circumstances of this witness, 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 high risk of physical violence, including death, while also prejudicing ongoing and future investigations.

3. Consequently, any disclosure of his identity or other information might lead to a high risk exposure. [REDACTED]
 [REDACTED]
 [REDACTED] [REDACTED]
 [REDACTED]
 [REDACTED]

4. Under these circumstances, and particularly considering the current stage of proceedings, the Prosecution submits that this witness' identity and identifying information should not be disclosed and that redactions to the identity of P-0130 should be applied.

Confidentiality

5. 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. 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 is the statement of Witness P-0130 with proposed redactions;¹ and one annex thereto², the non-disclosure of which is requested;
- Annex B contains annex 2 to P-0130's statement [REDACTED]³ [REDACTED]
[REDACTED]⁴ [REDACTED]
[REDACTED];
- Annex C contains [REDACTED]⁵
[REDACTED]⁶ [REDACTED]
[REDACTED];
- Annex D contains more details justifying the non-disclosure of some of these documents;
- Annex E is [REDACTED].

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

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

Background

8. On 4 April 2018, AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD ("AL HASSAN") made his initial appearance before the Court.
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-0130 upon whose evidence the Prosecution will not rely at the confirmation hearing but whose statement contains information that falls within the scope of rule 77 of the Rules of Procedure and Evidence.
10. To protect him as well as the Prosecution's ability to conduct further investigation into the situation in Mali, the Prosecution requests authorisation:
 - to disclose to the Defence under rule 77 an anonymous redacted version of the statement of Prosecution Witness P-0130;
 - to redact the name of Witness P-0130 in the metadata of his statement;
 - to not disclose Annex 1 to his statement [REDACTED]
[REDACTED]
[REDACTED]; and
 - to redact the name of P-0130 in the metadata of other related documents [REDACTED], which the Prosecution still intends to use as incriminatory evidence (see below paragraph 18).
11. These measures will avoid revealing the witness' identity or other information which might expose his interaction with the Court.

Applicable law

12. 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

13. The Prosecution submits that withholding the identity and other information which might lead to the exposure of Witness P-0130 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-0130

14. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

15. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

16. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

17. P-0130's statement deals with the following topics (see Annex A):

- [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
- the description of the first days of the occupation, the arrival of the groups, the description of the "Jihadists" and the setting up of the authorities;
- the organs set up by the occupiers such as the *Brigade des mœurs*, the Islamic Tribunal and the different places of detention;
- [REDACTED]
[REDACTED]

- life during the occupation including public floggings, one amputation, one execution, a murder, detentions, the treatment of men, attacks against buildings and two direct encounters he had with the occupiers;
- the complaints made by the population at the time of the occupation such as the women's march [REDACTED].

18. There are two annexes to P-0130's statement:

- the first annex⁷ contains a scanned document [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁸ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁹ [REDACTED]
[REDACTED]
[REDACTED]¹⁰
- the second annex is [REDACTED]
[REDACTED]¹¹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
1 [REDACTED]
11 [REDACTED]

[REDACTED]

[REDACTED]¹² [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

19. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

20. Lastly, [REDACTED]

[REDACTED]¹³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (see more details in Annex D).

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

¹² [REDACTED]

¹³ [REDACTED]

There exists an objectively justifiable risk of danger

21. 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].¹⁴ [REDACTED]

[REDACTED].¹⁵

22. The Prosecution reminds the Chamber that the general conclusion of its witness security assessment for Mali, [REDACTED] is alarming.

23. This assessment concluded - [REDACTED] that should it become known to armed groups that an individual has cooperated with the Court, the risk of physical harm including 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.¹⁶

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ 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-

24. As mentioned previously, 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”,¹⁷ established in March 2017 and led by Iyad Ag GHALY).¹⁸ Recently, on 5 September 2018, the US Department of State designated JNIM as a Foreign Terrorist Organisation under section 219 of the Immigration and Nationality Act; the Department has also designated JNIM as a Specially Designated Global Terrorist (SDGT) under section 1(b) of Executive Order (E.O.) 13224.¹⁹
25. The capacity of these 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 paragraphs 38-39.
26. 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.

0368 ; Reuters, Al Qaeda affiliate claims responsibility for Burkina Faso attacks, 3 March 2018, MLI-OTP-0058-0419.

¹⁷ *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.

¹⁸ “Les groupes terroristes du Nord Mali se réunifient avec Iyad AG GHALY comme Leader”, *Malijet*, 2 March 2017, MLI-OTP-0041-0041, at 0043 (version française) et MLI-OTP-0041-0037, at 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.

¹⁹ <https://www.state.gov/r/pa/prs/ps/2018/09/285705.htm>.

27. 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 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.

28. In this context, the Prosecution relies on the results of [REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED];
- [REDACTED]
[REDACTED]
[REDACTED]

29. As mentioned above, [REDACTED]

30. Overall, given the seriousness of the risks mentioned, the limited scope of the confirmation hearing, [REDACTED] and his rule 77 status as a result, 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-0130's identity and identifying documents/information is the least restrictive means available

31. [REDACTED]

32. 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, with little or no warning;

- [REDACTED]

33. Further, [REDACTED]

[REDACTED]

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

34. The Prosecution submits that redactions of the information going to the identity of P-0130 will not result in any prejudice to the Defence nor undermine the fairness and impartiality of the confirmation proceedings.

35. The Prosecution emphasises that it will not rely upon the material of this witness for the confirmation hearing, save the [REDACTED]

[REDACTED]

[REDACTED].²⁰ The redacted version of his statement will be disclosed only because it contains rule 77 information.

36. The Prosecution has redacted the statements of P-0130 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).

37. As for documents the non-disclosure of which is sought, the Prosecution refers *inter alia* to Annex D.

²⁰ E.g. [REDACTED]

C. Disclosure of a redacted statement, redactions to metadata and non-disclosure of some related evidence are necessary under rule 81(2) to protect the Prosecution's ability to investigate

38. The use of a redacted statement, redactions to metadata and non-disclosure of some related evidence are 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

39. The Appeals Chamber has held that interference with Prosecution witnesses may prejudice further and ongoing investigations.²¹

40. 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.

The use of redactions is the least restrictive means available

41. 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.

²¹ See *Prosecutor v. Katanga*, Judgment on Katanga's Appeal against the First Redaction Decision, ICC-01/04-01/07-476 OA2, 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 will not prejudice the Defence

42. For the reasons set forth above in relation to rule 81(4), the disclosure of a redacted statement of P-0130, redactions to metadata 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

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

- to not disclose the identity and identifying information of Witness P-0130;
- to disclose to the Defence an anonymous redacted version of Witness P-0130's rule 77 statement;
- to redact any identifying information of Witness P-0130 in the metadata of his statement;
- to not disclose annex 1 to his statement (see Annex A) as well as the documents referred to in Annex C; and
- to redact any identifying information of P-0130 from the metadata of annex 2 to his statement [REDACTED]
[REDACTED] (see Annex B).

44. 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-0130 [REDACTED]

[REDACTED]



Fatou Bensouda, Prosecutor

Dated this 26th day of September 2018

At The Hague, The Netherlands