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Date: 2 October 2018

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11 December 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
continue withholding the identity of protected Witness MLI-OTP-P-0114, upon
whose evidence the Prosecution will rely at the confirmation hearing”,
2 October 2018, ICC-01/12-01/18-141-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. Witness P-0114's identity was withheld with the approval of the Single Judge in the *Al Mahdi* case¹ and a redacted version² of his statement was disclosed to the Defence as incriminatory evidence.

2. Witness P-0114 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3. The Prosecution intends to rely upon his evidence at the article 61 confirmation of charges hearing ("Confirmation Hearing"). Regulations 42(1) and (2) of the Regulations of the Court ("Regulations") apply to his statement (hereinafter "First Statement") and several associated items.³

4. However:
 - First, the Prosecution seeks authorisation to apply few additional redactions to Witness P-0114's First Statement,⁴ which was disclosed in the *Al Mahdi* case, failing which Witness P-0114 could be identified by the Suspect in the present case;
 - Second, the Prosecution requests that [REDACTED] related to the First Statement (but collected several months after its signature) and one [REDACTED] related thereto, be not disclosed;⁵

¹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³ See Annex A.

⁴ [REDACTED]

⁵ [REDACTED]

- Third, while continuing the investigation in the present case, the Prosecution collected a) a new statement (hereinafter “Second Statement”)⁶ and b) additional material from Witness P-0114.⁷ As a result, the Prosecution seeks authorisation to apply redactions in the content and/or metadata of the newly collected material.

Confidentiality

5. Pursuant to regulation 23*bis*(2) of the Regulations, this motion and its Annexes A to E are filed *ex parte*, only available to the Prosecution and the Victims and Witnesses Unit (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 organised as follows:
 - Annex A consists of the materials related to Witness P-0114 for which regulation 42 applies, namely the First Statement,⁸ its annexes 1⁹ and 2¹⁰ (and connected material),¹¹ as well as a screening note¹² as submitted in the *Al Mahdi* case;

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- Annex B contains [REDACTED] related to the First Statement (but collected several months after its signature) and one [REDACTED] related thereto,¹³ the non-disclosure of which is requested;
- Annex C contains Witness P-0114's Second Statement with proposed redactions;¹⁴
- Annex D contains other documents [REDACTED] provided by Witness P-0114 at the time or following the Second Statement (see *infra* paragraph 36)¹⁵ for which redactions are necessary; and
- Annex E contains [REDACTED].

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

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-0114, among others, as a witness whose evidence it intends to rely upon at the Confirmation Hearing.

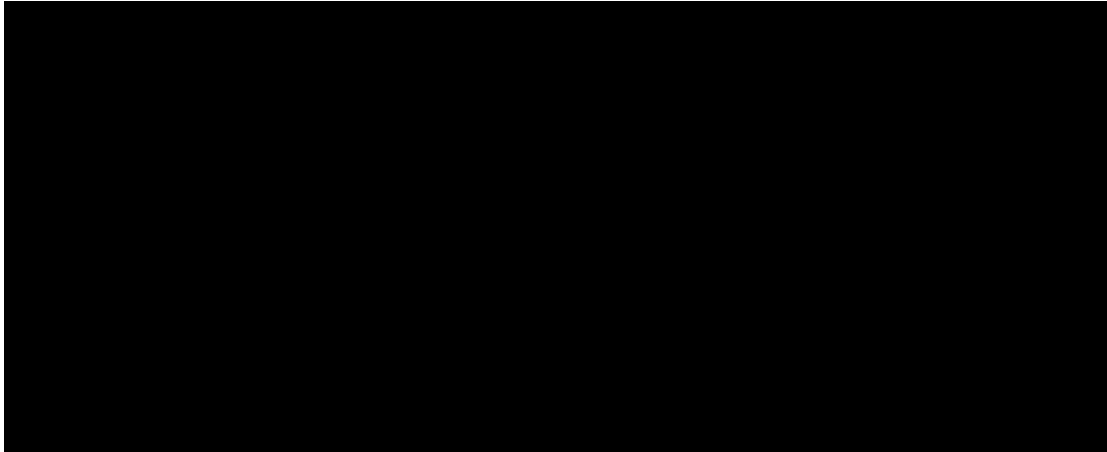
10. [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

11.



Applicable law

12. In its prior motion in the present case relating to Prosecution Witness P-0113, the Prosecution had sought authorisation to disclose an updated anonymous summary of Prosecution Witness P-0113, for whom a summary had been disclosed under rule 77 of the Rules of Procedure and Evidence (“Rules”) in the *Al Mahdi* case.¹⁶

13. The Single Judge authorised the disclosure of P-0113’s updated anonymous summary,¹⁷ stating that, pursuant to regulation 42(1) of the Regulations, authorisation in the *Al Mahdi* case to file an anonymous summary of P-0113’s evidence, along with the non-disclosure of associated documents, continued to apply *mutatis mutandis* in the present case “*car la situation sécuritaire au Mali continue à être précaire et le témoin doit continuer à bénéficier des mêmes mesures de protection*”.¹⁸

¹⁶ ICC-01/12-01/18-86-Conf-Exp, para. 16-26.

¹⁷ ICC-01/12-01/18-122-Conf-Exp, particularly para. 26-43. The Chamber quotes the Lubanga Appeals Judgment in para. 33, citing *Affaire Le Procureur c. Thomas Lubanga Dyilo*, “Arrêt relatif à l’appel interjeté par Thomas Lubanga Dyilo contre la décision de la Chambre préliminaire I intitulée ‘Première décision relative aux requêtes et aux requêtes modifiées aux fins d’expurgations introduites par l’Accusation en vertu de la règle 81 du Règlement de procédure et de preuve’”, dated 14 December 2006, French version registered on 20 February 2007, ICC-01/04-01/06-773-Tfr (“*Lubanga Appeals Judgment*”), para. 40.

¹⁸ ICC-01/12-01/18-122-Conf-Exp, para. 27.

14. The Single Judge added that *“les modifications apportées au résumé ne constituent pas une modification de mesures de protection au sens de la norme 42-3 du Règlement de la Cour. En effet, il ne s’agit pas en l’espèce de modifier la mesure de protection en soi”* as it merely entailed *“de modifier le résumé lui-même en y ajoutant des éléments contenus dans d’autres documents”*¹⁹ so that *“le dépôt d’un résumé modifié est possible en l’espèce”*.²⁰

Submissions

15. Similarly, with regards to P-0114, the submission of a redacted statement (along with the non-disclosure of associated documents) continues to apply under regulation 42(1) of the Regulations *“car la situation sécuritaire au Mali continue à être précaire”* and these protective measures for this witness must continue to apply.²¹
16. In this context, the application of additional redactions to the First Statement, the submission of a redacted Second Statement, and the non-disclosure of related identifying documents is possible and justified under regulations 42(1) and (2) and rule 81(4).

A. Information on Prosecution Witness P-0114

17. Witness P-0114 [REDACTED]
- [REDACTED]

18. [REDACTED]

¹⁹ ICC-01/12-01/18-122-Conf-Exp, para. 42.

²⁰ ICC-01/12-01/18-122-Conf-Exp, para. 43.

²¹ Cf. ICC-01/12-01/18-122-Conf-Exp, para. 27.

[REDACTED]

19.

[REDACTED]

[REDACTED] ²²

20. Witness P-0114 gave his First Statement to the Prosecution [REDACTED]

[REDACTED] ²³ This document along with other related items fall within the realm of regulations 42(1) and (2) of the Regulations.²⁴ Witness P-0114 gave a Second Statement [REDACTED] ²⁵

B. There still exists an objective risk of danger to Witness P-0114 and his family

21. Witness P-0114 [REDACTED]

[REDACTED]
[REDACTED] identifiable.

22. The Prosecution hereby refers the Single Judge to the finding of the Single Judge in the *Al Mahdi* case whereby he considered that the requested protective measures were necessary and justified.²⁶

²² [REDACTED]

²³ [REDACTED]

²⁴ See Annex A listing all the documents covered by the decision [REDACTED]

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23. In addition, [REDACTED] [REDACTED] [REDACTED]
 [REDACTED].²⁷ [REDACTED]
 [REDACTED].²⁸

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

25. 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 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.²⁹

26. 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

²⁷ [REDACTED]

²⁸ [REDACTED]

²⁹ 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.

soutien de l'Islam et des musulmans" or "JNIM"³⁰ established in March 2017 and led by Iyad Ag GHALY).³¹

27. 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 arrest).³² The capacity of the said groups to conduct numerous and significant attacks in Timbuktu and its region is well established.³³ Approximately three months ago, one serious attack was conducted against the G5 Sahel forces.³⁴

28. [REDACTED]
[REDACTED] would therefore place them and their families at a non-negligible risk of retaliation and physical violence or killing.

29. 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]

³⁰ *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.

³¹ "Les groupes terroristes du Nord Mali se réunissent 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.

³² [REDACTED]

See ICC-01/12-01/18-44-Conf-Exp, para. 38 and e.g. 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; 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; "Mali : l'attaque de Tombouctou revendiquée par un groupe lié à Al-Qaïda", *Jeune Afrique*, 21 avril 2018, MLI-OTP-0058-0426.

³⁴ "At least six dead in Mali after attack on regional anti-terror force base," *The Guardian*, 29 June 2018, <https://www.theguardian.com/world/2018/jun/29/mali-people-dead-after-attack-on-g5-sahel-anti-terror-taskforce-base>.

[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.

30. Additional information [REDACTED] is provided in the attached *ex parte* Annex E.

C. The First Statement needs additional redactions and the Second Statement needs to be redacted, and few additionally collected material should not be disclosed

31. The Prosecution now requests additional redactions/approval for non-disclosure of material to keep on protecting Witness P-0114's identity.

32. First, the Prosecution requests to apply few additional redactions to the First Statement in [REDACTED], to conceal the fact that [REDACTED]
[REDACTED]³⁵
[REDACTED]
[REDACTED] Additional redactions [REDACTED]
[REDACTED], and [REDACTED] [REDACTED] are also necessary to protect the witness identity.

33. Second, during this first interview, [REDACTED]
[REDACTED]³⁶ I
[REDACTED]

³⁵

See [REDACTED]

[REDACTED]

[REDACTED].³⁷ The Prosecution requests that these two documents (namely [REDACTED] [REDACTED]) should not be disclosed as they easily permit cross checking of information and the identification of Witness P-0114.

34. Third, [REDACTED], Witness P-0114 gave his Second Statement to the Prosecution.³⁸ The main topic addressed was [REDACTED] [REDACTED]. The Prosecution requests authorisation to submit a redacted version of this statement as proposed in Annex C.

35. Fourth, during this second interview:

- on the day of the Second Statement, [REDACTED] [REDACTED] [REDACTED] [REDACTED].³⁹ As Witness P-0114's name appears in the chain of custody, the Prosecution requests the redaction of his name from the metadata of [REDACTED] and
- following the Second Statement, Witness P-0114 provided the investigators, [REDACTED] with some items which were [REDACTED]. They included few relevant documents, including [REDACTED] [REDACTED].⁴⁰ Witness P-0114's name appears in the metadata of all these documents. Two documents, [REDACTED] contain Witness P-

37 [REDACTED]

38 [REDACTED]

39 [REDACTED]

40 [REDACTED]

0114's name in the document itself.⁴¹ To avoid any identification of Witness P-0114 at this stage, the Prosecution requests redaction of his name from the metadata as well as from the content of these documents.⁴²

36. Continuing to withhold Witness P-0114's identity and identifying information is the least restrictive means available. [REDACTED]

[REDACTED] 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. [REDACTED]

37. [REDACTED]
[REDACTED], withholding his identity and identifying information is the least restrictive means available to effectively protect his safety and that of his family members, particularly at this stage of the proceedings. As noted previously by the Single Judge in the *Al Mahdi* case: "*no less intrusive measure apt to neutralise that risk can be easily envisaged at this stage.*"⁴³

38. Withholding Witness P-0114's identity and identifying information will not prejudice the Defence. The redactions applied to Witness P-0114's

⁴¹ [REDACTED]

⁴² [REDACTED]

⁴³ [REDACTED]

evidence will not result in any prejudice to the Defence nor undermine the fairness and impartiality of the confirmation proceedings.

39. The Prosecution has proposed redactions to Witness P-0114's Second Statement instead of preparing an anonymous summary, and the suggested redactions do not hinder the understanding of the statements in terms of the substance of the witness's accounts.

40. 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 the Defence*", meaning that any information redacted in the disclosure to the Defence cannot be relied upon by the Prosecution.⁴⁴

41. Lastly, the Prosecution will disclose the identity of this witness prior to trial, should the charges be confirmed. Therefore, all the information provided by this witness will be accessible to the Defence.

Relief sought

42. In conclusion, pursuant to regulations 42(1) and (2), the Prosecution will disclose the First Statement,⁴⁵ its annex 1⁴⁶ and a screening note⁴⁷ as submitted in the *Al Mahdi* case and seeks from the Single Judge an order, under regulations 42(1) and (2) and rules 81(4), authorising the Prosecution :

- to apply additional redactions to P-0114's First Statement;
- to disclose a redacted version of Witness P-0114's Second Statement and redact any identifying information from its metadata (Annex C);

⁴⁴ ICC-01/12-01/18-31-tENG, para. 32.

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⁴⁷

- to not disclose [REDACTED] (referred to in Annex B);
- to redact any identifying information from the metadata and/or the content of [REDACTED] (Annex D).

43. 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 [REDACTED]

[REDACTED]

[REDACTED]



Fatou Bensouda, Prosecutor

Dated this 2nd day of October 2018

At The Hague, The Netherlands