



Original: **English**

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

Date: **25 January 2019**

Date of submission:
13 February 2019

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 H,
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 Witnesses MLI-OTP-P-0542 and MLI-OTP-P-0603 upon
whose evidence the Prosecution will rely at the confirmation hearing”,
25 January 2019, ICC-01/12-01/18-229-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 for
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

I. 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" or "OTP") seeks authorisation to withhold from the Defence the identity of Prosecution Witnesses P-0542 and P-0603, by redacting all identifying information from their statements² and associated material.
2. The Prosecution will rely on these witnesses at the confirmation hearing, as crime base witnesses, and to corroborate other witnesses. While expressing concerns for their security, both witnesses have agreed to testify.
3. However, considering the security challenges in the present case and the limited scope of the confirmation hearing, where it is not mandatory for the Prosecution to call witnesses to testify, the Prosecution submits that P-0542 and P-0603's identities and identifying information should be redacted and not disclosed to the Defence in order to protect both the safety of the witnesses and their families as well as the Prosecution's on-going investigations under article 68(1) of the Rome Statute ("Statute"), and rule 81(2) and (4) of the Rules of Procedure and Evidence ("Rules").
4. In summary, (a) there is an objectively justifiable risk to the witnesses if the information is disclosed to the Defence; (b) the non-disclosure is necessary to eliminate or reduce the risk, and it is the only available and least intrusive measure; (c) the non-disclosure is proportionate, and would not prejudice the

¹ ICC-01/12-01/18-31-tENG, para. 33.

² And the translation thereof.

Defence;³ and (d) the Prosecution's further investigations would be prejudiced if these witnesses were to be interfered with and they decline further cooperation.

II. Confidentiality

5. Pursuant to regulation 23bis(2) of the Regulations of the Court, this motion and its Annexes A to H are filed confidential *ex parte*, available only to the Prosecution and the Victims and Witnesses Unit ("VWU"). The motion discusses security concerns specific to the witnesses P-0542 and P-0603. In addition, the annexes contain personal identifying information, the disclosure of which would place the witnesses and their families at risk and defeat the purpose of this motion.
6. The annexes are divided as follows:
 - Annex A contains the statement of Witness P-0542 and associated material, with proposed redactions;⁴
 - Annex B contains [REDACTED], the non-disclosure of which is requested;⁵
 - Annex C contains [REDACTED], with proposed redactions;⁶
 - Annex D contains [REDACTED] of Witness P-0542;
 - Annex E contains the statement of Witness P-0603 [REDACTED], with proposed redactions;⁷ and

³ *Lubanga* Appeal Decision, ICC-01/04-01/06-568, paras. 33-34, 67, 71, 72; *Al Hassan AG Abdoul Aziz AG Mohamed AG Mahmoud* decision: ICC-01/12-01/18-88-Conf-Exp-Red-TENG, 27 November 2018, paras. 12-18.

⁴ [REDACTED]

[REDACTED]

⁶ [REDACTED]

⁷ [REDACTED]

- Annex F contains [REDACTED] of Witness P-0603;
- Annex G contains two investigation notes related to Witness P-0542, with proposed and *proprio motu* redactions⁸;
- Annex H [REDACTED]⁹.

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

III. Background

8. 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.
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 [REDACTED] 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 his interaction with the Court.

IV. Applicable law

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

⁸ [REDACTED]

⁹ [REDACTED]

IV. Submissions

A. Disclosure of redacted statements and other documents as well as non-disclosure of material is necessary under article 68(1) and rule 81(4) to protect the safety of these witnesses and their families

(a) Witnesses P-0542 and P-0603 face an objectively justifiable risk of being harmed

11. The situation of Witnesses P-0542 and P-0603 present an objectively justifiable risk of danger if their identities were to be disclosed to the Defence.

12. Witness P-0542 [REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]¹⁰ [REDACTED]

[REDACTED]

[REDACTED]¹¹ [REDACTED]

[REDACTED]

[REDACTED]¹². The Prosecution will refer *inter alia* to this evidence at the confirmation hearing.

13. Witness P-0603 [REDACTED]. [REDACTED] will provide information concerning punishments imposed by the jihadist groups

¹⁰ [REDACTED]
¹¹ [REDACTED]
¹² [REDACTED]

onto the civilian population of Timbuktu during their occupation of the city.¹³

Witness P-0603 describes *inter alia* several incidents and talks about imprisonments of men and women, the amputation, forced marriages and the numerous floggings¹⁴. [REDACTED]

[REDACTED]¹⁵, [REDACTED]

[REDACTED].¹⁶ The Witness provides the names of the Suspect Al HASSAN and other co-perpetrators, [REDACTED]

[REDACTED].¹⁷ [REDACTED]¹⁸. The Prosecution will refer *inter alia* to this evidence at the confirmation hearing.

14. Witness P-0603 [REDACTED]

[REDACTED]¹⁹ and maintains that confidentiality of her engagement with the Court should address her security concerns.²⁰ Although, both P-0603 and P-0542 have not yet reported any specific threat to them, the Prosecution considers that the risk to them would be significantly heightened were it to be revealed that they are cooperating with the Court.

15. Indeed, as the Prosecution has indicated in previous filings, and as the Chamber has also found, [REDACTED] [REDACTED] is highly volatile. The jihadist armed groups operating there pose a danger to

¹³ [REDACTED]
[REDACTED]
[REDACTED]

¹⁵ [REDACTED]
[REDACTED]

¹⁷ [REDACTED]
[REDACTED]

¹⁹ [REDACTED]

²⁰ See [REDACTED] of Witness P-0603 (Annex F).

anyone perceived to be cooperating with any international organisation in Mali,²¹ as shown in documented instances in which they have carried out targeted attacks and assassinations against such individuals.²²

16. More precisely, the main actor posing the worst threat against Prosecution witnesses or potential witnesses include a coalition of jihadist groups, the *Jama'at Nusrat Al-Islam was-Muslimin (Groupe pour le soutien de l'Islam et des musulmans*" or "JNIM"²³), which was established in March 2017 and is led by Iyad Ag GYALY, the top leader of Ansar Dine with which the Suspect was associated until his capture in April 2017.²⁴

17. Both witnesses are not immune from the risk posed by these jihadist groups to anyone perceived to be cooperating with the Court. [REDACTED]

[REDACTED]²⁵ [REDACTED]

²¹ See e.g., ICC-01/12-01/18-48-Conf-Exp, para. 38-39; ICC-01/12-01/18-185-Red2, 29 November 2018, para. 36 ; [REDACTED].

²¹ *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.

²² See e.g., ICC-01/12-01/18-185-Red2, 29 November 2018, para. 36; "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.

²³ *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.

²⁴ "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 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.

²⁵ [REDACTED].

[REDACTED]

[REDACTED] If these groups were to learn of their cooperation with the Court, there is a high risk that the two witnesses or members of their families will be interfered with and/or physically harmed or killed. The risk is likely to be heightened were these groups to learn that the Witnesses intend to testify at the Court in a case involving one of their own, or one linked to them in any way.

18. Thus, the Prosecution [REDACTED]

[REDACTED]:

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

19. However:

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

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

20. Meetings with these witnesses [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]²⁶. [REDACTED]

[REDACTED]

(b) Redacting P-0542 and P-0603's identities and non-disclosure of a document is necessary to reduce the risk, and is the only available and least intrusive measure

21. Both Witnesses P-0542 and P-0603 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED].

²⁶ *Décision relative à la requête de la défense concernant le délai de dépôt par le Procureur du document contenant un état détaillé des charges, ICC-01/12-01/18-143.*

22. [REDACTED]
[REDACTED].

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

24. Accordingly, withholding these witnesses' identities by way of redactions is the only viable and least intrusive protective measure available to these witnesses and their families at the moment.

25. With regards to the document in Annex B²⁷, redactions would have to be applied to the whole document. As a result, the non-disclosure thereof is requested.

(c) The Defence will not be prejudiced

26. The Defence will not be prejudiced by the requested redactions:

- to the extent that it is not identifying, the content of these witnesses' evidence will not be redacted; only their identities will. The Defence will therefore be in a position to understand their evidence to prepare for the Confirmation Hearing;
- as noted above, Witness P-0542 [REDACTED]
[REDACTED]

²⁷ [REDACTED]

[REDACTED]

[REDACTED]²⁸ However, P-0542 does not address the role of AL HASSAN;

- P-0603's evidence regarding [REDACTED] will be partly redacted. As a result, part of her incriminatory evidence will not be relied on at the confirmation of charges hearing against the Suspect;
- furthermore, the testimonies of Witnesses P-0542 and P-0603 is also meant to corroborate other Prosecution evidence;
- finally, both statements are not of such a nature that could yield exculpatory evidence.

27. These factors weigh in favour of granting the requested redactions.²⁹

B. Disclosure of redacted statements and associated documents as well as non-disclosure of material is necessary under rule 81(2) of the Rules to protect the Prosecution investigation

28. 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."³⁰

29. The Prosecution is concerned that any incident affecting Witnesses P-0542 or P-0603 would discourage:

²⁸ [REDACTED]

See e.g., *Al Hassan AG Abdoul Aziz AG Mohamed AG Mahmoud* decision: ICC-01/12-01/18-88-Conf-Exp-Red-TENG, 27 November 2018, para. 17, 37.

²⁹ *Lubanga* Appeal Decision, ICC-01/04-01/06-568, paras. 33-34, 67, 71, 72; *Al Hassan AG Abdoul Aziz AG Mohamed AG Mahmoud* decision: ICC-01/12-01/18-88-Conf-Exp-Red-TENG, 27 November 2018, para. 17, 37.

³⁰ ICC-01/12-01/18-48-Conf-Exp, para. 55, citing *Prosecutor v. Katanga*, Judgment on Katanga's Appeal against the First Redaction Decision, ICC-01/04-01/07-476, 13 May 2008, para. 49.

- them from further cooperating with the Prosecution and testifying at trial, should the charges against AL HASSAN be confirmed; and
- current and future witnesses to cooperate with the OTP.

Relief sought

30. For the above reasons, 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-0542 and Witness P-0603;
- disclose redacted versions of Witness P-0542's statement (and translation thereof) and associated/related material (attached in Annexes A and C to the present filing), from which any identifying information is expunged;
- disclose redacted versions of Witness P-0603's statement and translation thereof (attached in Annexe E to the present filing), from which any identifying information is expunged;
- redact any identifying information of Witness P-0542 in the metadata of her statement and associated materials (attached in the Annexes A and C to the present filing);
- redact any identifying information of Witness P-0603 in the metadata of her statement (attached in Annexe E to the present filing);
- redact any identifying information of Witness P-0603 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³¹;
- disclose redacted versions of the investigation notes in Annex G; and

³¹ [REDACTED]
[REDACTED].

- not disclose the item attached in Annex B to this filing.

31. 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 Witnesses P-0542 and P-0603 [REDACTED]

[REDACTED]



Fatou Bensouda, Prosecutor

Dated this 25th day of January 2019
At The Hague, the Netherlands