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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-0538 upon whose evidence
the Prosecution will rely at the confirmation hearing”,
23 January 2019, ICC-01/12-01/18-223-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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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") seeks authorisation to withhold from the Defence the identity of Prosecution Witness P-0538, by redacting all identifying information from her statement² and associated material. The Prosecution will rely on this witness at the confirmation hearing, [REDACTED] and to corroborate other witnesses.
2. The Single Judge should authorise the non-disclosure to the Defence of the identity of P-0538 to protect both the safety of the Witness and her family, 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").
3. In summary, (i) there is an objectively justifiable risk to the Witness if the information is disclosed to the Defence; (ii) the non-disclosure is necessary to eliminate or reduce the risk, and is the only available and least intrusive measure; (iii) there is a psychological risk to the Witness [REDACTED] (iv) the non-disclosure is proportionate, and would not prejudice the Defence;³ and (v) the Prosecution's further investigations would be prejudiced if the Witness were to be interfered with and she declines cooperation.

II. Confidentiality

4. Pursuant to regulation 23bis(2) of the Regulations of the Court, this motion and its Annexes A to F are filed as confidential *ex parte*, available only to the Prosecution and the VWU. The motion discusses security concerns specific to this Witness. In

¹ ICC-01/12-01/18-31-tENG, para. 33.

² And the translation thereof.

³ *Lubanga* Appeal Decision, ICC-01/04-01/06-568, para. 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. 12-18.

addition, the annexes contain personal identifying information, the disclosure of which would place the Witness and her family at risk and defeat the purpose of this motion.

5. The annexes are divided as follows:

- Annex A contains the statement of Witness P-0538 (and the translation thereof⁴) as well as an associated document, with proposed redactions,⁵ some of which are applied *proprio motu*;
- Annex B contains the photographs of Witness P-0538, the metadata of which (containing identifying information) will have to be redacted;⁶
- Annex C [REDACTED]
[REDACTED];⁷
- Annex D contains documents [REDACTED] referring to Witness P-0538 (and the translation thereof), with proposed redactions,⁸ some of which are applied *proprio motu*;
- Annex E [REDACTED];
- Annex F contains one investigation note⁹, with proposed redactions, some of which are applied *proprio motu*.

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

⁴ All the proposed redactions have not been implemented yet in the Arabic translation.

⁵ See the statement of Witness P-0538, [REDACTED] (and translation [REDACTED]) and [REDACTED] (and translation [REDACTED]).

See [REDACTED]
[REDACTED].
[REDACTED].

⁸ See [REDACTED] (and translation [REDACTED]); and [REDACTED] (and translation [REDACTED]).

All the proposed redactions have not been implemented yet in the Arabic translations.

⁹ [REDACTED].

III. Background

7. 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.
8. 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 P-0538, 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.

IV. Applicable law

9. 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.

V. Submissions

10. Withholding P-0538’s identity and other identifying information which might lead to her exposure is necessary under rule 81(2) and (4) of the Rules in order to protect the safety of the Witness and her family and to avoid prejudice against further or ongoing investigation by the Prosecution.

A. Information on Prosecution Witness P-0538

11. P-0538 was a [REDACTED]
 [REDACTED] Based on her statement, [REDACTED]
 [REDACTED] Throughout the events, [REDACTED]

¹⁰ When she was

¹¹

B. Disclosure of a redacted statement and additional material and non-disclosure of material is necessary under article 68(1) of the Statute and rule 81 (2) and (4) of the Rules to protect the safety of P-0538 and her family members

(a) Witness P-0538 faces an objectively justifiable risk of being harmed

12. Witness P-0538 is . Her situation presents an objectively justifiable risk of danger if her identity were to be disclosed to the Defence.

13. The Prosecution refers to: a) the Single Judge's findings in paragraph 33 of decision ICC-01/12-01/18-88-Conf-Exp and

especially with regard to the Suspect's role at the time of his arrest; and b)

¹²

¹³

14. In particular, the Prosecution reminds the Chamber of the serious and dire conclusions of its witness security assessment for Mali. This assessment concluded – – 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 or her family is "high". This conclusion is based in part on documented instances in which Al-Qaeda in the Islamic Maghreb ("AQIM") and other groups have been involved in targeted attacks and assassinations against individuals suspected of cooperating with

¹⁰ See witness P-0538's statement

¹¹ See Witness P-0538's statement

¹²

¹³

international organisations.¹⁴ As a matter of fact, 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”),¹⁵ established in March 2017 and led by Iyad Ag GHALY,¹⁶ the top leader of Ansar Dine with which AL HASSAN was associated until his capture in April 2017.

15. The capacity of these groups to conduct numerous and significant attacks in [REDACTED] is well established: the Prosecution refers in this regard to its prior filing ICC-01/12-01/18-48-Conf-Exp, [REDACTED]. 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.¹⁷

¹⁴ 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> [last accessed 24/10/2018]; “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> [last accessed 24/10/2018]; “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> [last accessed 24/10/2018]; “Mali: des civils enlevés par des jihadistes à la frontière nigérienne,” *RFI*, 12 March 2015, available at http://www.rfi.fr/afrique/20150312-trois-civils-maliens-enleves-jihadistes-frontiere-nigerienne-mujao/#/?&_suid=144768778866503002341593728486 [last accessed 24/10/2018]; Report of the Secretary-General on the situation in Mali, 26 December 2017, MLI-OTP-0058-0400; Report of the Independent Expert on the situation of human rights in Mali, 2 February 2018, MLI-OTP-0058-0354; Report of the Secretary-General on the situation in Mali, 29 March 2018, MLI-OTP-0058-0368; “Al Qaeda affiliate claims responsibility for Burkina Faso attacks,” *Reuters*, 3 March 2018, MLI-OTP-0058-0419.

¹⁵ *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.

¹⁶ “Les groupes terroristes du Nord Mali se réunissent 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.

¹⁷ 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.alkhbar.info/14263-0-Mali-Nusrat-Al-Islam-revendique-lattaques-de-Ber-a-Tombouctou.html> [last

16. It is immaterial that P-0538 [REDACTED]

[REDACTED] [REDACTED]
[REDACTED]. If these groups were to learn of her cooperation with the Court, there is a high risk that the Witness or members of her family will be physically harmed or killed. The risk is likely to be heightened were these groups to learn that the Witness would testify at the Court in a case involving one of their own, or one linked to them in any way.

17. Concretely, P-0538's identity could become known to the armed groups due to an intentional or inadvertent disclosure of information provided to the Defence under the Court's disclosure regime.

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

19. [REDACTED]

accessed on 1 November 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%A9ploire-la-perte-de-deux> [last accessed on 1 November 2018].

20.

[REDACTED]

21. Overall, although the Witness has not yet reported any threat to her, in light of the volatile security situation in [REDACTED] the country where anyone perceived to be cooperating with an international organisation risks being targeted, the Prosecution considers that the risk to the Witness would be significantly heightened were it to be revealed that she was cooperating with the Court. [REDACTED]

[REDACTED].

(b) Redacting P-0538' identity is necessary to reduce the objective risk, and is the only available and least intrusive measure

22. Witness P-0538, [REDACTED]

[REDACTED]

23.

[REDACTED]

[REDACTED]¹⁸.

¹⁸

[REDACTED].

24. However:

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

- [REDACTED]
[REDACTED]¹⁹

25. Accordingly, [REDACTED]
[REDACTED] withholding her identity and identifying information and non-disclosure of material are the least restrictive means available to effectively protect her safety and that of her family members, particularly at this stage of the proceedings. This is the only available and least intrusive protective measure available to the Witness and her family at the moment.

(c) *Psychological risk of harm to P-0538*

26. In addition, P-0538 is a vulnerable witness. [REDACTED]
[REDACTED] In that situation, it is also incumbent upon the Chamber to protect her from psychological harm, pursuant to article 68 of the Statute.

27. [REDACTED]
[REDACTED]
[REDACTED]²⁰

Nevertheless, disclosing P-0538's identity to the Defence at this early stage in the proceedings – before the charges have been confirmed – unnecessarily risks that

¹⁹ [REDACTED]
[REDACTED]
[REDACTED]

through the Defence's investigative activities by way of inadvertent or deliberate disclosure [REDACTED] becomes aware [REDACTED].

28. [REDACTED]
[REDACTED] The requested redactions are consistent with the Court's duty to "take appropriate measures to protect the safety, physical and psychological well-being, privacy and dignity of victims and witnesses", [REDACTED] [REDACTED] article 68 (1) of the Statute).

29. If the charges are confirmed and P-0538 testifies at trial, [REDACTED]
[REDACTED]
[REDACTED]

30. In the meantime, the Prosecution submits that redactions of her identity for the purposes of the confirmation hearing pursuant to article 68 and rule 81 (4) of the Rules are the most appropriate means of protection.

(d) The Defence will not be prejudiced

31. The Defence will not be prejudiced by the requested redactions. The content of the Witness's evidence will not be redacted, only her identity will. The Defence will therefore be in a position to understand her evidence to prepare for the confirmation hearing.

32. Witness P-0538 agreed to testify. The Prosecution will rely on her evidence during the confirmation hearing as [REDACTED] itness. She will not testify on the Suspect's own conduct, or directly to his individual responsibility. As noted above, the Witness, [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²¹

33. Furthermore, P-0538's testimony is to corroborate other Prosecution evidence. Finally, the Witness's testimony is not of such a nature that could yield exculpatory evidence [REDACTED]

[REDACTED] These factors weigh in favour of granting the requested redactions.²²

C. Disclosure of a redacted statement and related material is necessary under rule 81(2) of the Rules to avoid prejudice against further or ongoing investigations

34. 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."²³

35. The Prosecution is concerned that any incident involving P-0538 would discourage:

- her 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 Prosecution.²⁴

²¹ [REDACTED].

²² 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.

²² *Lubanga* Appeal Decision, ICC-01/04-01/06-568, para. 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.

²³ ICC-01/12-01/18-48-Conf-Exp, para. 55, citing ICC-01/04-01/07-476, para. 49.

²⁴ In relation to a similar Prosecution request, [REDACTED]

[REDACTED]

36. Under these circumstances, and particularly considering the limited scope of the confirmation hearing, the Prosecution submits that P-0538'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.

Relief sought

37. 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-0538;
- disclose redacted versions of her statement (and translation thereof) and the associated document (attached in Annex A to the present filing), from which any identifying information is expunged;
- disclose redacted versions of the documents (and translation thereof) attached in Annexes D and F to the present filing, from which any identifying information is expunged;
- redact any identifying information of Witness P-0538 in the metadata of her statement and associated material attached in Annexes A, B, D and F to the present filing; and
- not disclose the item attached in Annex C to this filing.

38. 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-0538 [REDACTED]



Fatou Bensouda, Prosecutor

Dated this 23rd January 2019
At The Hague, the Netherlands