

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/12-01/15
Date: 16 December 2015

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Single Judge

**SITUATION IN THE REPUBLIC OF MALI
IN THE CASE OF
*THE PROSECUTOR v. AHMAD AL FAQI AL MAHDI***

Confidential

Second Decision on the Prosecutor's requests for redactions

To be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for the Defence

Mohamed Aouini

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

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Cuno Tarfusser, Single Judge exercising the functions of the Chamber, issues this decision on the following applications submitted by the Prosecutor: "Prosecution's motion for authorisation to disclose summaries of the witness statements of MLI-OTP-P-0123 and MLI-OTP-P-0147, upon whose evidence the Prosecution will not rely at the confirmation hearing" dated 7 December 2015 ("Prosecutor's First Application");¹ "Prosecution's motion for authorisation to disclose summaries for seven screened individuals MLI-OTP-P-0105, MLI-OTP-P-0107, MLI-OTP-P-0120, MLI-OTP-P-0128, MLI-OTP-P-0129, MLI-OTP-P-0149, and MLI-OTP-P-0154" dated 9 December 2015 ("Prosecutor's Second Application");² and "Prosecution's motion for authorisation to disclose summaries for witnesses MLI-OTP-P-0004, MLI-OTP-P-0113, MLI-OTP-P-0121, and MLI-OTP-P-0146, upon whose evidence the Prosecution will not rely at the confirmation hearing" dated 11 December 2015 ("Prosecutor's Third Application").³ In all the three Applications, the Prosecutor is requesting authorisation to redact information from certain material prior to its disclosure to the Defence. The Defence notified the Single Judge that it did not intend to respond to any of the Prosecutor's Applications.

Applicable law

1. The Single Judge notes articles 54, 57(3)(c), 61, 67 and 68 of the Statute, rules 15, 76, 77, 81(2), 81(4) and 121 of the Rules of Procedure and Evidence ("Rules") and recalls that: (i) in accordance with the well-established case-law of the Court, the authorisation of non-disclosure of information shall be viewed as an exception, the overriding principle being that of full disclosure;

¹ ICC-01/12-01/15-55-Conf-Exp and Conf-Exp Annexes A to D; a confidential redacted version of the application has also been filed in the record.

² ICC-01/12-01/15-58-Conf-Exp and Conf-Exp Annexes A to H; a confidential redacted version of the application has also been filed in the record.

³ ICC-01/12-01/15-59-Conf-Exp and Conf-Exp Annexes A to D; a confidential redacted version of the application has also been filed in the record.

(ii) the Court has also an obligation not to jeopardise the security of witnesses and other persons at risk ; (iii) accordingly, decisions on non-disclosure shall be taken on a case-by-case basis, in accordance with the principles established by the Appeals Chamber. The Single Judge also notes the "Decision on the Prosecutor's requests for redactions" ("First Decision on Redactions")⁴ issued in this case on 2 December 2015.

The Prosecutor's First Application

2. In her First Application, the Prosecutor seeks authorisation "to disclose anonymous summaries of the witness statements" of Witnesses P-0123 and P-0147, upon whose evidence she will not rely for the purposes of the confirmation hearing, *in lieu* of those witnesses' statements and associated items which might reveal their identities, in light of the fact that this evidence might still be of relevance to the Defence, whether within the meaning of rule 77 of the Rules or for the purposes of article 67(2) of the Statute. The Prosecutor provides further detail in the *ex parte* annexes to the Application as to why the professional background of and positions held by both P-0123 and P-0147, as well as the nature of the information provided by them, in combination with their personal circumstances and the general security situation in Mali, justify the requested protective measures.

The Prosecutor's Second Application

3. In her Second Application, the Prosecutor requests authorisation to disclose anonymous summaries of information provided by seven individuals (P-0105, P-0107, P-0120, P-0128, P-0129, P-0149 and P-0154) *in lieu* of their screening notes and related items. In spite of having been subjected to screening by the Prosecutor, none of these individuals has provided witness

⁴ ICC-01/12-01/15-53-Conf.

statements; however, they did provide information which, in the assessment of the Prosecutor, might be of relevance to the Defence, whether within the meaning of rule 77 of the Rules or for the purposes of article 67(2) of the Statute. Due to the absence of written witness statements, the information obtained by the Prosecutor from these individuals is limited.

The Prosecutor's Third Application

4. In her Third Application, the Prosecutor's seeks authorisation to disclose anonymous summaries of the statements of four witnesses (P-0004, P-0113, P-0121 and P-0146) upon whose evidence she will not rely for the purposes of the confirmation hearing, *in lieu* of those witnesses' statements and associated items which might reveal their identities, in light of the fact that this evidence might still be of relevance to the Defence, whether within the meaning of rule 77 of the Rules or for the purposes of article 67(2) of the Statute. Similarly to the First Application, further details concerning the professional background of and positions held by all four witnesses, as well as the specific nature of the information provided by them, is detailed by the Prosecutor in the *ex parte* annexes to the Application, justifying in her submission, in combination with their personal circumstances and the general security situation in Mali, the requested protective measures.

Single Judge's determinations

5. The Single Judge notes that the core of all three Applications consists in the Prosecutor seeking authorisation to take measures (namely, the disclosure of anonymous summaries of statements and the non-disclosure of related items annexed thereto) which would allow her not to disclose to the Defence the identity of the provider(s) of information which (i) she will not rely upon for the purposes of the confirmation hearing and (ii) yet, in her view, might still be of relevance to the Defence, whether pursuant to article 67(2) of the

Statute or to rule 77 of the Rules. It is therefore appropriate to jointly address the three Applications.

6. As indicated by the Appeals Chamber, non-disclosure of the identity of a witness is a protective measure which might be warranted at the pre-trial stage of the proceedings, provided that all relevant factors are weighed. Among those factors, specific attention should be given to the following: the personal situation of the witness; the security conditions of the area where the witness or his or her family reside; the actual existence of threats to the witness because of the involvement in the activities of the Court; the extent to which alternative protective measures might be available to him or her; the fact that the witness has consented or not to the disclosure of his or her identity; the fact that the requested protective measures should not be prejudicial to or inconsistent with the rights of the suspect to a fair trial.

7. On the basis of the information made available by the Prosecutor on an *ex parte* basis, the Single Judge is satisfied that the requested measures are necessary and justified. As submitted by the Prosecutor, the personal circumstances of all of the affected witnesses (as detailed in the Applications and in the relevant supporting material), especially when assessed in light of the increasingly and rapidly deteriorating security situation overall in Mali, including in the areas where they and/or their families reside, are such as to create an appreciable risk that either themselves and/or their families might become the target of acts of retaliation, were their involvement in the activities of the Court, albeit minimal, be known. Recent events in the area show that individuals perceived as having cooperated with Western States or international organisations have indeed become targets of violent attacks, including of a murderous nature.

8. The nature and extent of the risks which might concretely materialise, were the identities of the Witnesses affected by the three Applications to be disclosed, are such that they are not suitable to be countered by exclusively relying on the confidentiality obligations of the members of the Defence team, as vital as those obligations are. More specifically, the security assessments relied upon by the Prosecutor indicate that, unlike in other scenarios also known to the Court, risks entailed by the identity of the relevant individuals being revealed, albeit inadvertently, would immediately materialise once such revelation occurs and would therefore leave little, if any, margin to put in place adequate and effective countermeasures.

9. Also, the Single Judge notes that, in light of both the general situation in Mali and the personal circumstances of the relevant Witnesses (as detailed in the Applications and in the information submitted to the Chamber on an *ex parte* basis), no less intrusive measure apt to neutralise the risk to their own and their families' safety can be feasibly envisaged at this stage.

10. Further, the Single Judge is satisfied that the requested protective measures are not prejudicial to or inconsistent with the rights of the suspect to a fair trial. Any prejudice caused to the Defence by the requested redactions is very limited, particularly in light of the current stage of the proceedings and of the fact that the Prosecutor will not rely on any of the Witnesses for whom the protective measures are sought for the purposes of the confirmation hearing. More importantly, any and all information which might be relevant to the Defence will be included in the summaries and will therefore be accessible to the Defence.

11. The Single Judge is also satisfied that the disclosure of the certain items related to some of the Witnesses and/or provided by them, as specified in annexes A, B, and D to the Third Application, in light of their nature and

content, would make it possible for the Defence to establish the identity of the relevant Witnesses, thereby defeating the purpose of the requested protective measures. Accordingly, the Prosecutor is authorised not to disclose any of those items.

12. Furthermore, the Single Judge is satisfied that the extreme volatility of the security situation in Mali makes the requested redactions also necessary not only pursuant to rule 81(4) of the Rules, but also for the purposes of protecting the Prosecutor's investigative activities in Mali under rule 81(2).

13. Finally, the information submitted by the Prosecutor in the three Applications and their annexes is sufficient and adequate for the purposes of reaching a decision. Accordingly, there is no need for this information to be supplemented by way of an *ex parte* hearing as requested by the Prosecutor in her First Application.

FOR THESE REASONS, THE SINGLE JUDGE

GRANTS the Prosecutor's First Application;

GRANTS the Prosecutor's Second Application;

GRANTS the Prosecutor's Third Application.

Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser
Single Judge

Dated this Wednesday 16 December 2015

At The Hague, The Netherlands