

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original : English

N° ICC-01/12-01/15

Date: 30 June 2016

Date of submission: 7 July 2016

Date of submission: 25 October 2016

TRIAL CHAMBER VIII

Before: Judge Raul C. Pangalangan, Single Judge

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF

THE PROSECUTOR v. AHMAD AL FAQI AL MAHDI

Public

With Confidential *EX PARTE* Annexes A, B, D and E
only available to the Prosecution and Victims and Witnesses Section,
and Confidential, *EX PARTE*, Annex C,
only available to the Prosecution

Public redacted version of "Prosecution's motion for authorisation to
disclose a summary of the witness statement of MLI-OTP-P-0523 and
screening note of witness MLI-OTP-P-0140, upon whose evidence the
Prosecution will not rely at trial", 30 June 2016,
ICC-01/12-01/15-116-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 disclose an anonymous summary of the statement of Witness P-0523 and the screening note of Witness P-0140 upon whose evidence the Prosecution will not rely at trial.
2. More precisely, to protect these witnesses, as well as the Prosecution's ability to conduct further investigations into the situation in Mali, the Prosecution requests authorisation to disclose to the Defence only a summary of the rule 77 information contained in the witness statement and screening note, without revealing the witnesses' identities or other information which might expose their interaction with the Court.
3. Indeed, due to the personal circumstances of these two witnesses, the security situation in Mali, and the threat posed by armed groups at issue in this case and still active in the region, exposure of the witnesses' cooperation with the Court would place them and their family at a high risk of physical violence or death, while also prejudicing ongoing and future investigations.
4. Consequently, any disclosure of the witnesses' identities or other information which might lead to their exposure would require [REDACTED]
[REDACTED]
[REDACTED].
5. Under these circumstances, the Prosecution submits that the witnesses' identities and identifying information should not be disclosed and that a summary (attached as Annex B and E) should be disclosed instead.

Confidentiality

6. Pursuant to regulation 23bis(2) of the Regulations of the Court, this motion and its Annexes A, B, D and E are filed *ex parte*, only available to the Prosecution and VWS, while Annex C, consisting of the witness statement of P-0523, is filed *ex parte*, only available to the Prosecution.

7. The motion discusses security concerns specific to these witnesses, [REDACTED]. Annexes A, C and D in particular contain personal identifying information the disclosure of which would place the witnesses at risk and render the motion moot. The Prosecution will file a redacted confidential version of the motion as soon as practicable.

Applicable Law

A. Prosecution's Disclosure Obligations

8. Pursuant to article 69(3) of the Rome Statute ("Statute") and rules 76 and 77 of the Rules of Procedure and Evidence ("Rules"), the Prosecution must disclose to the Defence all evidence upon which it intends to rely at trial.

9. In addition, the Prosecution must disclose certain information to the Defence even in the absence of an intention to rely upon it. Pursuant to article 67(2), the Prosecution must disclose to the Defence all evidence in its possession or control which it believes shows or tends to show the innocence of the Accused, or to mitigate his guilt, or which may affect the credibility of Prosecution evidence.

10. Pursuant to rule 77, the Prosecution must also permit the Defence to inspect any books, documents, photographs and other tangible objects in the

Prosecution's possession or control which are "material to the preparation of the Defence." The Appeals Chamber in *Lubanga* ruled that the term "'material to the preparation of the defence' must be interpreted broadly," and clarified that this includes "objects which, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence."¹ However, the Appeals Chamber has also indicated that "the right to disclosure is not unlimited and which objects are 'material to the preparation of the defence' will depend upon the specific circumstances of the case."²

B. Duty to Protect Witnesses

11. The Prosecution must meet its disclosure obligations in a manner consistent with its duty under articles 54(1)(b) and 68(1) and (5) of the Statute to protect victims and witnesses and others at risk because of the activities of the Court. In some circumstances, not disclosing certain information to the Defence may be necessary to protect the fundamental rights of an individual put at risk by the activities of the Court.³

12. Rule 81(4) provides that the Chamber, on its own motion or at the request of the Prosecution, must take necessary steps "to protect the safety of witnesses and victims and members of their families, including by authorising the non-disclosure of their identity prior to the commencement of trial."⁴

¹ *Prosecutor v. Lubanga*, Judgment on Appeal against Oral Disclosure, ICC-01/04-01/06-1433 OA11, 11 July 2008, para. 77.

² *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-501 OA 4, 28 August 2013, paras. 38-39.

³ *Prosecutor v. Katanga*, Judgment on Prosecution's Appeal against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, paras. 57-58.

⁴ The protections of rule 81(4) were extended by the Appeals Chamber to all individuals at risk on account of the activities of the Court in *Prosecutor v. Katanga*, Judgement on Prosecution's Appeal against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, para. 56.

13. The Appeals Chamber has held that non-disclosure of information under rule 81(4) must be assessed on a case-by-case basis.⁵ Four factors which a Single Judge or Chamber should consider in determining whether to authorise the non-disclosure of the identity of a witness under rule 81(4) are:

- (1) the danger to the witness or to members of his or her family that the disclosure of his or her identity might cause;⁶
- (2) the necessity of the non-disclosure (and in particular the feasibility and sufficiency of less restrictive measures);⁷
- (3) whether the non-disclosure would be prejudicial to or inconsistent with the rights of the Accused and a fair and impartial proceeding;⁸ and
- (4) the relevance of the information to the Defence.⁹

14. In assessing the existence of a risk, a Single Judge or Chamber should ensure that there is an “objectively justifiable risk” to the safety of the person concerned and that such risk arises from disclosure of the identity or other information to the Defence, rather than to the public at large, taking into account the circumstances of the individual Accused.¹⁰

15. The Prosecution submits that factors relevant to the assessment of risk include, but are not limited to, the witness’s personal circumstances, any

⁵ *Prosecutor v. Lubanga*, Judgment on Disclosure Restriction pursuant to rule 81(2) and (4), ICC-01/04-01/06-568 OA3, 13 October 2006, paras. 36-37; *Prosecutor v. Katanga*, Judgment on Katanga’s Appeal against the First Redaction Decision, ICC-01/04-01/07-476 OA2, 13 May 2008, para. 66.

⁶ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 21.

⁷ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 21; *Prosecutor v. Lubanga*, Judgment on Disclosure Restriction pursuant to rule 81(2) and (4), ICC-01/04-01/06-568 OA3, 13 October 2006, para. 37.

⁸ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 21.

⁹ *Prosecutor v. Katanga*, Judgment on Katanga’s Appeal against the First Redaction Decision, ICC-01/04-01/07-476 OA2, 13 May 2008, para. 62.

¹⁰ *Prosecutor v. Katanga*, Judgment on Prosecution’s Appeal against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, para. 71.

existing protection or security measures in place for the witness, the security situation in the area where the witness or his or her family currently resides, whether the witness or his or her family has received any threats on account of his or her perceived involvement with the Court, whether the witness himself or herself has taken any actions that might endanger his or her personal safety, and whether the witness has consented to disclosure of his or her identity.

C. Protecting the Prosecution's Ability to Investigate

16. Rule 81(2) provides that the Prosecution may also request non-disclosure of information where necessary to protect future or ongoing investigations.

17. The Appeals Chamber has held that the same general factors used to analyse applications for non-disclosure under rule 81(4) apply under rule 81(2), namely:

“a thorough consideration of the danger that the disclosure of the information may cause; the necessity of the non-disclosure, including whether it is the least intrusive measure necessary to avoid prejudice to the investigations of the Prosecutor; and the fact that any measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”¹¹

D. Non-disclosure and Use of Summaries Prior to the Commencement of the Trial

18. Article 68(5) provides:

“Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purpose of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a

¹¹ *Prosecutor v. Katanga*, Judgment on Katanga’s Appeal against the First Redaction Decision, ICC-01/04-01/07-476 OA2, 13 May 2008, para.59.

summary thereof. Such measure shall be exercised in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.”

19. Rules 81(2) and 81(4) similarly authorise the Prosecution to seek (and the Chamber to order) the non-disclosure of witnesses’ identities prior to the commencement of the trial.

Submissions

20. Witness P-0140 was screened by the Prosecution. Witness P-0523 was screened and then interviewed. His statement ([REDACTED]) is attached in Annex C and contains the relevant information from the screening.¹²

21. The Prosecution submits that withholding, by way of summaries (Annex B and E), the identity and other identifying information which might lead to the exposure of Witnesses P-0523 (see biography in Annex A) and P-0140 (see biography in Annex D) is necessary and appropriate under both rule 81(2) and rule 81(4).

A. Non-disclosure is necessary under rule 81(4) to protect these witnesses and their families

22. First, disclosure of an anonymous summary for these witnesses is appropriate under rule 81(4), because such approach is necessary to reduce or eliminate

¹² [REDACTED]

objectively justifiable risks to the witnesses and their families and is consistent with the rights of the Accused and fair and impartial proceedings.

There exists an objectively justifiable risk of danger

23. The Prosecution has determined, after consultation with VWS,¹³ that any exposure of witnesses as cooperating with the Prosecution or the Court would create a high risk of interference, physical violence, or even death. Due to that risk, disclosure of any information that might lead to such exposure would

[REDACTED]

[REDACTED]

[REDACTED].¹⁴

24. The general security situation in Mali deteriorated in 2015 and incidents have kept occurring in 2016.¹⁵ The witness security assessment for Mali has concluded that the main threat actors against prosecution witnesses or potential witnesses include a coalition of “jihadist” groups including AQIM and Ansar Dine, the very armed groups at issue in this case. AQIM in particular was responsible for numerous killings in the year leading up to August 2015, [REDACTED]

[REDACTED]. The Prosecution recalls in this regard that the Accused [REDACTED]

[REDACTED] was a member of Ansar Dine and that he was accompanying an AQIM weapons convoy at the time of his arrest last year.¹⁶ Later on in 2016,

¹³

[REDACTED]

See e.g., “Mali : deux civils tués dans une attaque dans la région de Tombouctou (nord)”, Mali Actu, 16 June 2016 (available at <http://maliactu.net/mali-deux-civils-tues-dans-une-attaque-dans-la-region-de-tombouctou-nord/>).

¹⁶

[REDACTED]

the Accused was mentioned in a video related to the second kidnapping of a Swiss lady.

25. The Prosecution recently updated its witness security assessment for Mali, [REDACTED], after consultation with VWS. That assessment concluded that, should it become known to armed groups such as Al Qaeda in the Islamic Maghreb (AQIM) or Ansar Dine 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.¹⁷ This month, Iyad AG GHALY, the leader of Ansar Dine, threatened anew the UN mission (MINUSMA) and France.¹⁸

26. The witness security assessment for Mali identified a significant difference in the type of threat presented in this case compared to other cases before the Court. Unlike in some other situations before the Court, the armed jihadist groups at issue here would be unlikely to gradually escalate towards violence. Instead, there is a high likelihood that individuals associated with the Court

¹⁷ 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 Jan 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); “Attaque d’un check-point de l’armée à Tombouctou,” Malijet, 22 June 2016 (available at <http://malijet.com/actualite-dans-les-regions-du-mali/rebellion-au-nord-du-mali/158962-attaque-d-un-check-point-de-l-armee-a-tombouctou.html>)

¹⁸ See http://www.rfi.fr/afrique/20160626-mali-le-chef-ansar-dine-forces-internationales-iyad-ab-ghali-menace-france?ns_campaign=reseaux_sociaux&ns_source=twitter&ns_mchannel=social&ns_linkname=editorial&aef_campaign_ref=partage_user&aef_campaign_date=2016-06-26

in this case, [REDACTED], could immediately become direct targets of physical violence, including killing.

27. The Prosecution emphasises that P-0523 [REDACTED]

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

28. P-0140 [REDACTED]

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

29. Given the circumstances described above, the exposure of these witnesses as cooperating with the Court, would place them at serious and immediate risk of violence or even death.

The use of summaries is the least restrictive means available

30. Given the nature of the risks discussed above, [REDACTED]
[REDACTED]
[REDACTED], disclosure of an anonymous summary is the least restrictive means available to effectively protect the safety of these witnesses and their families, particularly at this stage of the proceedings.

31. Other protective measures, even if technically possible, are not feasible or appropriate at this moment. The disclosure of any information that might expose the cooperation of these witnesses with the Court would [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

32. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. 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.

33. The Prosecution has also determined that disclosure of a redacted statement for P-0523 and a redacted screening note for P-0140 rather than a summary would not provide adequate protection. [REDACTED]
[REDACTED] such as the Accused, to potentially identify the witness. The Prosecution notes in this regard that

the risk of exposure often results not simply from a single piece of information in isolation, but from the combination of two or more related pieces of information, even from different statements or from different witnesses, which together might reveal the witness's identity. It is significant in this context that several of the Prosecution's witnesses [REDACTED] [REDACTED] [REDACTED]. Consequently, the exposure of one witness could lead to the exposure of others.

34. The Prosecution notes that it has disclosed the identities of more than a dozen Prosecution witnesses, [REDACTED] [REDACTED]. The decision to disclose some witnesses' identities and to seek non-disclosure of others was made after careful consideration by the Prosecution of the relevance of each witness's evidence and the risks to each.
35. In the Prosecution's considered opinion, disclosure of anonymous summaries for these witnesses represents the least restrictive means available to adequately protect them and their families while complying with its disclosure obligations, bearing in mind that the Prosecution does not intend to use them as incriminatory witnesses for the purpose of the present trial.

The use of summaries will not prejudice the Defence

36. The Prosecution submits that disclosure of anonymous summaries for these witnesses will not result in any prejudice to the Defence nor undermine the fairness and impartiality of the trial.
37. The Prosecution emphasises that it will not rely upon the evidence of these witnesses at trial. The summaries will be disclosed only because they contain rule 77 information.

38. The Prosecution has drafted the summaries with a view to including all relevant and disclosable information while protecting the identities and therefore security of both witnesses and their families.

B. Non-disclosure is necessary under rule 81(2) to protect the Prosecution's ability to investigate

39. Moreover, the use of anonymous summaries is 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

40. The Appeals Chamber has accepted that interference with Prosecution witnesses may prejudice further and ongoing investigations.¹⁹ This is true in the sense that the particular witnesses targeted may cease cooperating, and also [REDACTED]

41. As set forth above in the context of rule 81(4), disclosure of the identities or identifying information of these witnesses would create a high risk that they or their families might be targeted for violence or even death by armed groups including AQIM and Ansar Dine. That same risk to Prosecution witnesses (and potential witnesses) poses a direct threat to the Prosecution's ability to continue investigating [REDACTED]

¹⁹ 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.").

42. In addition, the Prosecution believes that disclosure of the identities or identifying information of these witnesses ■

for the implementation of highly intrusive protection measures, even though these witnesses will not be relied upon by the Prosecution at trial.

43. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The use of summaries is the least restrictive means available

44. In the Prosecution's submission, there are no less restrictive means available to protect its investigative ability in Mali, particularly with regards to [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

45. Under these circumstances, the disclosure of any information which could expose one or more of these witnesses [REDACTED]

[REDACTED]
[REDACTED] thus severely hampering ongoing and future investigations.

46. Also, as noted above, the Prosecution has determined that the disclosure of even a heavily redacted statement/screening note would not sufficiently protect these witnesses.

The use of summaries will not prejudice the Defence

47. For the reasons set forth above in relation to rule 81(4), the disclosure of anonymous summaries for these two witnesses will not prejudice the rights of the Defence nor impede fair and impartial proceedings.

48. Last, the Prosecution recalls the decision by the Pre-Trial Chamber granting similar requests for similar witnesses.²⁰

Relief Requested

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

- a. authorising the Prosecution to not disclose the identities and identifying information of P-0523 and P-0140;
- b. authorising the Prosecution to disclose the anonymous summary in the attached Annex B in lieu of witness P-0523's statement; and
- c. authorising the Prosecution to disclose the anonymous summary in the attached Annex E in lieu of witness P-0140's screening note.

50. 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 these two witnesses only after necessary protective measures, [REDACTED], have been implemented by the Victims and Witnesses Section.

²⁰ ICC-01/12-01/15-53-Red and [REDACTED]



Fatou Bensouda, Prosecutor

Dated this 30th day of June 2016

At The Hague, The Netherlands