

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

N° ICC-01/12-01/15

Date: 10 December 2015

Date of submission: 25 October 2016

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

Public

**With confidential, *EX PARTE*, Annexes A to H,
only available to the Prosecution and the Victims and Witnesses Section**

Public redacted version of “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”, 9 December 2015, ICC-01/12-01/15-58-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 Mohamed Aouini

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Office of the Prosecutor (“Prosecution”) hereby seeks authorisation to disclose anonymous summaries of information provided by seven persons who have been approached as potential witnesses by the Prosecution but who have not provided witness statements (for the purposes of this motion, “screened individuals”). The pseudonyms for these screened individuals are P-0105, P-0107, P-0120, P-0128, P-0129, P-0149, and P-0154.
2. For each of these screened individuals, a screening note or other related item contains some information which might be considered material to the preparation of the Defence within the meaning of rule 77 of the Rules of Procedure and Evidence (“Rules”) or potentially exculpatory or mitigating of guilt under article 67(2) of the Rome Statute (“Statute”). However, due to the personal circumstances of the screened individuals, the security situation in Mali, and the threat posed by armed groups still active in the region, any exposure of these individuals’ cooperation with the Court would place them and their families at a high risk of physical violence or death, while also prejudicing ongoing and future investigations.
3. Under these circumstances, and particularly considering the current stage of proceedings and the very limited information provided by these individuals, the Prosecution submits that their identities and identifying information should not be disclosed to the Defence, and that summaries (attached hereto as *ex parte* Annexes A to G) should be disclosed instead.

Confidentiality

4. Pursuant to regulation 23bis(2) of the Regulations of the Court, this motion and its annexes are filed *ex parte*, available only to the Prosecution and the Victims and Witnesses Section (VWS). The motion and annexes discuss security concerns and other information the disclosure of which might place the individuals at risk and render the motion moot. The Prosecution will file a redacted confidential version of the motion as soon as practicable.

Background

5. On 30 September 2015, Ahmad AL FAQI AL MAHDI ("AL MAHDI") made his initial appearance before the Court. The confirmation hearing was set for 18 January 2016.
6. During its investigation, the Prosecution held initial meetings and screenings of potential witnesses. These initial meetings and screenings were restricted to providing an introduction to the work of the Court and the Prosecution, assessing the potential relevance of information possessed by the individual, and establishing the willingness and ability of the individual to cooperate with the Court. Notwithstanding the restricted purpose of these initial meetings and screenings, the Prosecution sometimes received information which might fall within the scope of article 67(2) of the Statute or rule 77 of the Rules.
7. The Prosecution has reviewed the information contained in the screening and investigation notes created as a result of initial meetings in the Mali investigation. As a result of that review, the Prosecution has identified seven screened individuals who have provided some information which might fall within the scope of article 67(2) of the Statute or rule 77 of the Rules, but who would be placed at serious risk by disclosure of their identities.

8. In order to fulfil its disclosure obligations while appropriately protecting these screened individuals, as well as the Prosecution's ability to conduct further investigation into the situation in Mali, the Prosecution requests authorisation to disclose any article 67(2) or rule 77 information provided by the screened individuals in the form of anonymous summaries.

Applicable Law

Disclosure Obligations

9. 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 suspect, 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

Duty to Protect Those at Risk Due to Their Interaction with the Court

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.

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.
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 authorizing the non-disclosure of their identity prior to the commencement of trial.” These protections have been extended by the Appeals Chamber to all individuals at risk on account of the activities of the Court.³
13. Non-disclosure of a person’s identity under rule 81(4) must be assessed on a case-by-case basis,⁴ taking into account at least the following factors:
- (1) the danger to the person or to members of his or her family that the disclosure of his or her identity might cause;⁵
 - (2) the necessity of the non-disclosure (and in particular the feasibility and sufficiency of less restrictive measures);⁶
 - (3) whether the non-disclosure would be prejudicial to or inconsistent with the rights of the suspect and a fair and impartial proceeding;⁷ and
 - (4) the relevance of the information to the Defence.⁸

³ *Prosecutor v. Katanga*, Judgment on Prosecution’s Appeal against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, para. 56.

⁴ *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.

⁵ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 21.

⁶ *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.

⁷ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 21.

⁸ *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.

14. The Single Judge 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 suspect.⁹

Protection of the Prosecution’s Investigative Ability

15. Rule 81(2) provides that the Prosecution may also request non-disclosure of information where necessary to protect future or ongoing investigations. 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.¹⁰

Non-disclosure and Use of Summaries at the Confirmation Stage

16. 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 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.

⁹ *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.

¹⁰ *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.

17. The Appeals Chamber has emphasised that the standard for permitting non-disclosure at the confirmation stage is less demanding than the standard at trial. In the *Katanga* case, the Appeals Chamber stated:

[I]t must be emphasised that this judgment concerns the stage of the proceedings relating to the confirmation of the charges against a suspect and must be seen in that light. A hearing to confirm the charges is not a trial to establish guilt or innocence. It is a phase of the proceedings designed to “determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged” prior to confirming any charges and committing the person to a Trial Chamber to be tried on the charges as confirmed. As such, it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial.¹¹

18. The Single Judge in *Ruto et al.* concluded that “the Prosecutor has the obligation to protect victims and witnesses and, to that effect, he may request that certain information be redacted or rely on summary evidence for the purposes of the confirmation hearing.”¹² The Single Judge in *Ntaganda* similarly authorised the use of anonymous summaries and redactions for rule 77 material at the confirmation stage under rules 81(2) and 81(4), reasoning that “in light of the limited scope of the confirmation of charges hearing, the anonymity is necessary and not prejudicial to or inconsistent with the rights of the suspect and fair and impartial proceedings as the Defence will have access to the relevant information contained in the summary.”¹³

¹¹ *Prosecutor v. Katanga*, Judgment on Katanga’s Appeal against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, para. 68.

¹² *Prosecutor v. Ruto et al.*, Decision on the “Prosecution’s Application for leave to Appeal the Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure” (ICC-01/09-01/11-62)”, ICC-01/09-01/11-85, para. 18.

¹³ See, e.g., *Prosecutor v. Ntaganda*, Redacted Seventh Decision on the Prosecutor’s Requests for Redactions, ICC-01/04-02/06-248-Red2, 3 July 2014, paras. 21, 22, 29.

Submissions

19. The Prosecution submits that withholding the identities and other information which might lead to the exposure of these screened individuals 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 Individuals and their Families

20. First, non-disclosure of the screened individuals' identities and identifying information is appropriate under rule 81(4), because such non-disclosure is necessary to reduce or eliminate objectively justifiable risks to the individuals and their families and is consistent with the rights of the suspect and fair and impartial proceedings.

There Exists An Objectively Justifiable Risk of Danger

21. As the Single Judge is aware from a previous filing, regarding P-0123 and P-0147, 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 Magreb (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."

22. The general security situation in Mali has deteriorated in 2015. As demonstrated by the recent deadly attack in Bamako,¹⁴ the threat is not

¹⁴ See, e.g., "Deadly Siege Ends After Assault on Hotel in Mali," New York Times, 20 November 2015 (available at http://www.nytimes.com/2015/11/21/world/africa/mali-hotel-attack-radisson.html?_r=0); "Ce que l'on sait de l'attentat à l'hôtel Radisson de Bamako" RFI, 21 November 2015 (available at <http://www.rfi.fr/afrique/2min/20151120-attentat-mali-hotel-radisson-blu-bamako-al-mourabitoun-terrorisme->

confined to the north, although the danger is most acute there. 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]. The Prosecution recalls in this regard that the suspect has admitted he was a member of Ansar Dine and that he was accompanying an AQIM weapons convoy at the time of his arrest last year.¹⁵

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

24. The Prosecution emphasises [REDACTED]. Given the circumstances described above, the exposure of any of these witnesses as cooperating with the Court, even for purposes of a screening only, would place them at serious and immediate risk of violence or even death.

25. The Prosecution emphasises once again that these screened individuals could be placed at risk even if the Defence does not desire or intend such a result.

The Prosecution goes [REDACTED]
[REDACTED] [REDACTED]. It will be even more difficult for the Defence to operate discretely in Mali and to effectively avoid any

al-qaida#/20151120-attentat-mali-hotel-radisson-blu-bamako-al-mourabitoun-terrorisme-al-qaida?&_suid=144836922990102058847676074465).

¹⁵ [REDACTED]

inadvertent association of these individuals with the Court or with international organisations more generally. Consequently, the existing confidentiality obligations of counsel are insufficient by themselves to protect these witnesses from the serious threats described above.¹⁶

Non-disclosure Is The Least Restrictive Means Available

26. Given the risks discussed above, the limited nature of the information provided by these screened individuals, the current stage of proceedings, and [REDACTED], the disclosure of summaries (see Annexes A to G) without identifying information is the least restrictive means available to effectively protect the safety of these individuals and their families.
27. The Prosecution notes that none of these screened individuals has provided a witness statement to the Prosecution. Due to the preliminary nature of the screenings at issue, these individuals have provided only very limited (and presumptively incomplete) information to the Prosecution.
28. Particularly given the limited scope of these individuals' information and the limited purpose of the confirmation hearing, [REDACTED]. The exposure of these screened individuals as having cooperated or interacted with the Court could place them at serious risk of violence or death, [REDACTED] [REDACTED].
29. [REDACTED], and in consultation with VWS, [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.

¹⁶ [REDACTED]

30. [REDACTED].

Non-disclosure Will Not Prejudice the Defence

31. The Prosecution submits that non-disclosure of the identities of these screened individuals will not result in any prejudice to the Defence nor undermine the fairness and impartiality of the confirmation proceedings.

32. The Prosecution emphasises that it will not rely upon the evidence of any of these individuals at the confirmation hearing. Summaries will be disclosed only because the screening notes or other items related to these screened individuals contain some arguable rule 77 information or, notably in the case of P-0107, potentially exonerating or mitigating information under article 67(2).

33. The Prosecution has drafted the summaries in the *ex parte* annexes with a view to including all rule 77 and/or article 67(2) information to the Defence while protecting the security of these screened individuals.

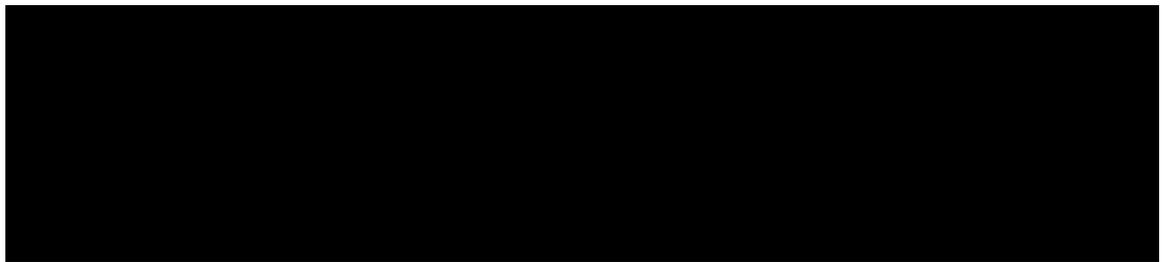
B. Non-disclosure is Necessary under Rule 81(2) to Protect the Prosecution's Ability to Investigate

34. Second, non-disclosure of these individuals' identities 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

35. The Appeals Chamber has accepted that interference with prosecution witnesses may prejudice further and ongoing investigations.¹⁷ As set forth above, disclosure of the identities or identifying information of these screened individuals would create a risk that they or their families might be targeted for violence or even death by armed groups including AQIM and Ansar Dine. That risk to potential witnesses and others at risk because of their interaction with the Court poses a direct threat to the Prosecution's ability to continue investigating these and other crimes committed in Timbuktu and elsewhere in Mali.

36. In addition, the Prosecution uses witness screenings in part to evaluate the security concerns and risks to potential witnesses before proceeding with an interview. This is done precisely to avoid placing people at risk unnecessarily or disproportionately to the value of the evidence the person might provide. If



[REDACTED]. Such a regime would unduly limit the Prosecution's investigative work.

Non-disclosure Is The Least Restrictive Means Available

37. In the Prosecution's submission, there are no less restrictive means available to protect its investigative ability in Mali, [REDACTED] thus severely hampering ongoing and future investigations.

¹⁷ 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.").

Non-disclosure Will Not Prejudice the Defence

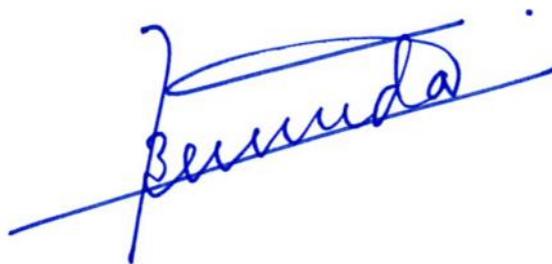
38. For the reasons set forth above in relation to rule 81(4), non-disclosure of these individuals' identities and identifying information will not prejudice the rights of the Defence nor impede fair and impartial proceedings.

Relief Requested

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

- to not disclose the identities and identifying information of screened individuals P-0105, P-0107, P-0120, P-0128, P-0129, P-0149, and P-0154; and
- to disclose the summaries attached in the *ex parte* annexes in lieu of the original screening notes and other items on which they are based.

40. [REDACTED].



Fatou Bensouda, Prosecutor

Dated this 10th day of December 2015

At The Hague, The Netherlands