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Date: 11 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 D,
only available to the Prosecution and the Victims and Witnesses Section,
and confidential, *EX PARTE*, annexes E to H,
only available to the Prosecution**

Public redacted version of “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”, 11 December 2015, ICC-01/12-01/15-59-Conf-exp

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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 anonymous summaries of the witness statements of four witnesses (P-0004, P-0113, P-0121, and P-0146) upon whose evidence the Prosecution will not rely at the article 61 hearing to confirm the charges (“confirmation hearing”).

2. For each of these witnesses, his or her witness statement or a related item (such as an annex or material provided by the witness) 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 witnesses, the security situation in Mali, and the threat posed by armed groups still active in the region, exposure of their cooperation with the Court would lead to the grave endangerment of them and their families, while also prejudicing ongoing and future investigations.

3. Under these circumstances, and particularly considering the current stage of proceedings, the Prosecution submits that the witnesses’ identities and identifying information should not be disclosed and that summaries of their statements and associated items should be disclosed instead.

Confidentiality

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this motion and annexes A to D are filed *ex parte*, available only to the Prosecution and VWS. Annexes E to H, consisting of witness statements and associated items, are filed *ex parte*, available to the Prosecution only. The motion discusses security concerns specific to these witnesses [REDACTED]. The annexes 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

Prosecution's Disclosure Obligations

5. 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.

6. 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 Witnesses

7. 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.

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.

8. 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.”³
9. 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
10. 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

³ These protections have been extended by the Appeals Chamber to all individuals at risk on account of the activities of the Court. *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.

⁴ *Prosecutor v. Lubanga*, Judgement 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*, Judgement on Katanga’s Appeal against the First Redaction Decision, ICC-01/04-01/07-476 OA2, 13 May 2008, para. 62.

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

11. 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

12. 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.

13. 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:

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.

[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

14. 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

Submissions

15. The Prosecution submits that withholding the identities and other information which might lead to the exposure of witnesses P-0004, P-0113, P-

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.

0121, and P-0146 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

16. First, disclosure of anonymous summaries for these witnesses is appropriate under rule 81(4), because such approach is necessary to reduce or eliminate objectively justifiable risks to the witnesses 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

17. As the Single Judge is aware from previous filings,¹⁴ 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.”

18. The general security situation in Mali has deteriorated in 2015. As demonstrated by the recent deadly attack in Bamako,¹⁵ the threat is not 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”

¹⁴ E.g., ICC-01/12-01/15-55-Conf-Exp.

¹⁵ 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-al-qaida#/20151120-attentat-mali-hotel-radisson-blu-bamako-al-mourabitoun-terrorisme-al-qaida?&_suid=144836922990102058847676074465).

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.¹⁶

19. 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.

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

21. [REDACTED]

22. The Prosecution emphasises once again that these witnesses could be placed at risk even if the Defence does not desire or intend such a result. The Prosecution goes to [REDACTED]
[REDACTED] [REDACTED]. It will be even more difficult for the Defence to operate discretely in Mali and to effectively avoid any inadvertent association of these witnesses with the Court or with international organisations more generally. Consequently, the existing confidentiality obligations of counsel are

¹⁶ [REDACTED]

insufficient by themselves to protect these witnesses from the serious threats described above.¹⁷

23. Additional information on the security situation of each witness is provided in the attached *ex parte* annexes A, B, C, and D. [REDACTED]

The Use of Summaries Is The Least Restrictive Means Available

24. Given the risks discussed above, and the human and financial costs associated with the implementation of highly intrusive protection measures, disclosure of anonymous summaries is the least restrictive means available to effectively protect the safety of these witnesses and their families, particularly at this stage of the proceedings.

25. 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 require referrals to VWS for the implementation of highly intrusive measures [REDACTED].

26. [REDACTED]

27. [REDACTED]However, [REDACTED]

[REDACTED]

[REDACTED] As noted above, 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.

¹⁷ See *Prosecutor v. Al Faqi Al Mahdi*, “Decision on the Prosecutor’s request for redactions,” ICC-01/02-01/15-53-Conf, 2 December 2015, para.9.

28. The Prosecution has also determined that disclosure of redacted statements rather than summaries would not, in the case of these four witnesses, provide adequate protection. Even heavily redacted statements would still allow a person with first-hand knowledge of the events, such as the suspect, to potentially identify the witnesses. 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

[REDACTED]

[REDACTED] onsequently, the exposure of one witness could lead to the exposure of others.

29. The Prosecution notes that it has disclosed or will soon disclose the identities of other Prosecution witnesses, including several eye-witnesses to events in Timbuktu in 2012. 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.

The Use of Summaries Will Not Prejudice the Defence

30. 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 confirmation proceedings.

31. The Prosecution emphasises that it will not rely upon the evidence of any of these witnesses at the confirmation hearing. The summaries will be disclosed

only because they contain rule 77 information or information which might appear exonerating or mitigating of the suspect's guilt or to undermine the credibility of Prosecution evidence.

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

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

33. Second, 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

34. The Appeals Chamber has accepted that interference with prosecution witnesses may prejudice further and ongoing investigations.¹⁸ As set forth above, disclosure of the identities or identifying information of these witnesses would create a risk that they or their families might be targeted for violence or even death. That risk to witnesses poses a direct threat to the Prosecution's ability to continue investigating [REDACTED].

35. In addition, in the Prosecution's judgment, disclosure of the identities or identifying information of these witnesses would [REDACTED] for the implementation of highly intrusive protection measures, even though

¹⁸ 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.").

none of the witnesses will be relied upon by the Prosecution at the confirmation hearing. [REDACTED]

The Use of Summaries Is The Least Restrictive Means Available

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

37. Also, as noted above, the Prosecution has determined that the disclosure of even heavily redacted statements would not sufficiently protect these witnesses.

The Use of Summaries Will Not Prejudice the Defence

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

- a. authorising the Prosecution to not disclose the identities and identifying information of P-0004, P-0113, 0121 and P-0146;
- b. authorising the Prosecution to disclose the anonymous summaries in *ex parte* annexes A, B, C, and D in lieu of the witness statements and associated items of P-0004, P-0113, P-0121, and P-0146; and
- c. authorising the non-disclosure in their entirety of the items specified in annexes A, B, and D, disclosure of which items might reveal the identities of the witnesses.

40. [REDACTED]



Fatou Bensouda, Prosecutor

Dated this 11th day of December 2015

At The Hague, The Netherlands