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**International  
Criminal  
Court**

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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 C,  
only available to the Prosecution and Victims and Witnesses Section,  
and confidential *EX PARTE* Annex D,  
only available to the Prosecution**

**Public redacted version of "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", 10 December 2015, ICC-01/12-01/15-55-Conf-Exp-Red**

**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 anonymous summaries of the witness statements of two witnesses (P-0123 and P-0147) upon whose evidence the Prosecution will not rely at the article 61 hearing to confirm the charges (“confirmation hearing”).
2. Due to the personal circumstances of these 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 these witnesses’ 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. Consequently, any disclosure of the witnesses’ identities or other information which might lead to their exposure would [REDACTED] [REDACTED] for implementation of highly intrusive protection measures, such as relocation. In the case of P-0123, [REDACTED]. 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 (attached as Annexes A.2 and B.2) should be disclosed instead.

### Confidentiality

3. Pursuant to regulation 23bis(2) of the Regulations of the Court, this motion and its annexes A to C are filed *ex parte*, available only to the Prosecution and VWS. Annex D, consisting of the witness statements of P-0123 and P-0147, is 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.

### **Background**

4. 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.
5. The Prosecution has been reviewing the evidence in its possession for possible disclosure to the Defence. During this review, the Prosecution has identified two witnesses (P-0123 and P-0147), among others,<sup>1</sup> upon whom it will not rely at the confirmation hearing but whose statements contain information that is potentially exonerating or mitigating of guilt under Article 67(2) of the Rome Statute (“Statute”) or falls within the scope of rule 77 of the Rules of Procedure and Evidence (“Rules”).
6. To protect these witnesses, as well as the Prosecution’s ability to conduct further investigation into the situation in Mali, the Prosecution requests authorisation to disclose to the Defence only summaries of the possible article 67(2) and/or rule 77 information contained in their witness statements, without revealing the witnesses’ identities or other information which might expose their interaction with the Court.

### **Applicable Law**

#### *A. Prosecution’s Disclosure Obligations*

7. Pursuant to article 61(3)(b) of the Rome Statute (“Statute”) and rules 76 and 77, the Prosecution must disclose to the Defence all evidence upon which it intends to rely at the confirmation hearing.

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<sup>1</sup> The Prosecution will submit a separate motion or motions related to other witnesses in this category.

8. 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 suspect, or to mitigate his guilt, or which may affect the credibility of Prosecution evidence.
9. 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."<sup>2</sup> 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."<sup>3</sup>

*B. Duty to Protect Witnesses*

10. 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

<sup>2</sup> *Prosecutor v. Lubanga*, Judgment on Appeal against Oral Disclosure, ICC-01/04-01/06-1433 OA11, 11 July 2008, para. 77.

<sup>3</sup> *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-501 OA 4, 28 August 2013, paras. 38-39.

be necessary to protect the fundamental rights of an individual put at risk by the activities of the Court.<sup>4</sup>

11. 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.”<sup>5</sup>

12. The Appeals Chamber has held that non-disclosure of information under rule 81(4) must be assessed on a case-by-case basis.<sup>6</sup> Four factors which a Single Judge or Pre-Trial 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;<sup>7</sup>

(2) the necessity of the non-disclosure (and in particular the feasibility and sufficiency of less restrictive measures);<sup>8</sup>

(3) whether the non-disclosure would be prejudicial to or inconsistent with the rights of the suspect and a fair and impartial proceeding;<sup>9</sup> and

(4) the relevance of the information to the Defence.<sup>10</sup>

<sup>4</sup> *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.

<sup>5</sup> 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.

<sup>6</sup> *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.

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

<sup>8</sup> *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.

<sup>9</sup> *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 21.

<sup>10</sup> *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.

13. In assessing the existence of a risk, a Single Judge or Pre-Trial 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 suspect.<sup>11</sup>
14. The Prosecution submits that factors relevant to the assessment of risk include, but are not limited to, the witness’s personal circumstances, any 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*

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.<sup>12</sup>

<sup>11</sup> *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.

<sup>12</sup> *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.

*D. 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.

17. Rules 81(2) and 81(4) similarly authorise the Prosecution to seek (and the Chamber to order) the non-disclosure of witnesses' identities at the confirmation stage.

18. 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.<sup>13</sup>

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<sup>13</sup> *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.



19. 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.”<sup>14</sup> 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.”<sup>15</sup>

### Submissions

20. The Prosecution submits that withholding the identities and other information which might lead to the exposure of witnesses P-0123 and P-0147 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*

21. 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

<sup>14</sup> *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, par.18.

<sup>15</sup> *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.

22. The Prosecution has determined, after consultation with VWS,<sup>16</sup> that any exposure of these 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 [REDACTED] for the implementation of highly intrusive protection measures, [REDACTED].<sup>17</sup>

23. Since these witnesses were first interviewed and their statements taken, the Prosecution has inquired about and documented their personal security situations [REDACTED]. In particular, since the arrest of the suspect in this case, [REDACTED] [REDACTED] to the extent possible, potential impacts upon their personal security (see below regarding P-0123). In part because the disclosure of even redacted witness statements or summaries inherently increases the risk of exposure, the Prosecution [REDACTED] [REDACTED] [REDACTED].

24. The Prosecution also 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." This conclusion is based in part on documented instances in which AQIM and other groups have been involved in targeted attacks and

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<sup>16</sup> [REDACTED].

<sup>17</sup> [REDACTED].

assassinations against individuals suspected of cooperating with international organisations.<sup>18</sup>

25. The general security situation in Mali, particularly in the north, has deteriorated in 2015 (see Annex C). Recently, armed gunmen linked to Al Qaeda attacked a hotel in Bamako frequented by internationals, taking more than 100 people hostage and killing 21 civilians.<sup>19</sup> Indeed, 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.<sup>20</sup> 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.<sup>21</sup>

26. The witness security assessment for Mali has also identified a significant difference in the type of threat presented in this case compared to other cases before the Court. Whereas associates and affiliates of some individuals investigated by the Court have sought to dissuade witnesses from testifying

<sup>18</sup> 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-enlevés-jihadistes-frontiere-nigerienne-mujao/#./?&\\_suid=144768778866503002341593728486](http://www.rfi.fr/afrique/20150312-trois-civils-maliens-enlevés-jihadistes-frontiere-nigerienne-mujao/#./?&_suid=144768778866503002341593728486)).

<sup>19</sup> 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](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](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)).

<sup>20</sup> [REDACTED].

<sup>21</sup>

or to influence their testimony through bribery or other means, the armed jihadist groups at issue here would be unlikely to gradually escalate towards violence. Instead, there is a high likelihood that identified (or suspected) Prosecution witnesses, [REDACTED], would become direct targets of physical violence, including killing.

27. One scenario under which armed groups such as AQIM and Ansar Dine could obtain knowledge about these witnesses is through an intentional or inadvertent disclosure of information provided to the Defence under the Court's disclosure regime. In this regard, the Prosecution emphasises that these witnesses could be placed at risk even if the Defence does not desire or intend such a result. The Prosecution [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 insufficient by themselves to protect these witnesses from the serious threats described above.<sup>22</sup>

28. Additional information on the security situation of each witness is provided in the attached *ex parte* annexes.

#### The Use of Summaries Is The Least Restrictive Means Available

29. Given the nature of the risks discussed above, and the costs (financial and most importantly human) associated with the implementation of highly intrusive protection measures, disclosure of anonymous summaries is the

<sup>22</sup> 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, par.9.

least restrictive means available to effectively protect the safety of these witnesses and their families, particularly at this stage of the proceedings.

30. 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

[REDACTED] for the implementation of highly intrusive measures, [REDACTED].

31. [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.

32. The Prosecution has also determined that disclosure of redacted statements rather than summaries would not, in the case of these two 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. [REDACTED]

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

33. The Prosecution notes that it has disclosed or will soon disclose the identities of more than a dozen 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.
34. In the Prosecution's considered opinion, disclosure of anonymous summaries for these two witnesses represents the least restrictive means available to adequately protect them and their families while complying with its disclosure obligations.

The Use of Summaries Will Not Prejudice the Defence

35. 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.
36. The Prosecution emphasises that it will not rely upon the evidence of either of these witnesses at the confirmation hearing. The summaries will be disclosed only because they contain rule 77 information and, in the case of P-0147, information which might appear exonerating or mitigating of the suspect's guilt or to undermine the credibility of Prosecution evidence.
37. 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*

38. 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

39. The Appeals Chamber has accepted that interference with prosecution witnesses may prejudice further and ongoing investigations.<sup>23</sup> This is true in the sense that the particular witnesses targeted may cease cooperating, [REDACTED]

40. 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].

41. In addition, in the Prosecution's judgment, disclosure of the identities or identifying information of these witnesses would necessitate [REDACTED] implementation of highly intrusive protection measures, even though neither of the witnesses will be relied upon by the Prosecution at the confirmation hearing. [REDACTED], regardless of whether their evidence will be used in court, it will severely hamper the Prosecution's investigative work.

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<sup>23</sup> 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.").

The Use of Summaries Is The Least Restrictive Means Available

42. 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] thus severely hampering ongoing and future investigations.

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

The Use of Summaries Will Not Prejudice the Defence

44. 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 confirmation proceedings.

**Relief Requested**

45. 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-0123 and P-0147; and



- b. authorising the Prosecution to disclose the anonymous summaries in the attached annexes in lieu of the witnesses' statements and associated items (such as annexes or items provided by the witness).

46. Pursuant to rule 81(2), the Prosecution requests an *ex parte* hearing to further explain the reasons for the present motion and to answer any questions regarding the same.

47. [REDACTED].



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Fatou Bensouda, Prosecutor

Dated this 10<sup>th</sup> day of December 2015

At The Hague, The Netherlands