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Pénale
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**International
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Date: 1 July 2016

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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 and B
only available to the Prosecution and the Victims and Witnesses Section**

**Public redacted version of "Prosecution's motion for authorisation to
disclose a summary for screened Witness MLI-OTP-P-0357", 1 July 2016,
ICC-01/12-01/15-123-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 screening note of Witness MLI-OTP-P-0357 (“P-0357”), who was approached by the Prosecution but did not provide a witness statement, and upon whom the Prosecution does not rely at trial.

2. More precisely, the Prosecution requests authorisation to disclose to the Defence only a summary of the rule 77 information contained in the screening note, without revealing the witness' identity or other information which might expose his interaction with the Court. These measures are needed to protect the identity and security of P-0357.

3. Due to the personal circumstances of this witness, 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 this witness' cooperation with the Court would place him at a high risk of physical violence or death, while also prejudicing ongoing and future investigations. Consequently, any disclosure of P-0357's identity or other information which might lead to his exposure, would [REDACTED]
[REDACTED]
[REDACTED].¹

4. Under these circumstances, the Prosecution submits that P-0357's identity and identifying information should not be disclosed and that a summary (attached as Annex A) should be disclosed instead.

¹ Similar concerns related to other witnesses and screened individuals have been raised in previous filings. *See, e.g.,* [REDACTED] 7 December 2015; [REDACTED] 9 December 2015; [REDACTED] 11 December 2015; and ‘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.

Confidentiality

5. Pursuant to regulation 23*bis* of the Regulations of the Court, this motion and its Annexes A and B² are filed confidential *ex parte*, available only to the Prosecution and VWS. The motion discusses security concerns specific to P-0357, [REDACTED]. The Prosecution will file a redacted confidential version of the motion as soon as practicable.

Applicable Law

6. The Prosecution refers Trial Chamber VIII (“the Chamber”) to its 30 June 2016 submissions requesting authorisation to disclose summaries in lieu of a witness statement and a screening note (“30 June submissions”),³ in which the Prosecution outlined its disclosure obligations to the Defence and the interaction of these obligations with its duties to protect witnesses and others at risk as a result of their interaction with the Court, as well as future and ongoing investigations.
7. In its 30 June submissions, the Prosecution notably referred to article 68(5) of the Rome Statute (“Statute”) and rules 81(2) and 81(4) of the Rules of Procedure and Evidence (“Rules”), which allow the Prosecution to seek (and the Chamber to order) the non-disclosure of witnesses’ identities prior to the commencement of the trial.

Submissions

8. Witness P-0357 was screened for a possible interview by the Prosecution, but no interview was ultimately conducted and no witness statement was provided. Screening notes created by the investigation contain a limited

² Biographical information for Witness P-0357 is provided in Annex B.

³ ‘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.

amount of information disclosable under rule 77 of the Rules (see the summary in Annex A).

9. The Prosecution submits that withholding, by way of a summary, the identity and other identifying information which might lead to the exposure of Witness P-0357's interaction with the Court is necessary and appropriate under rules 81(2) and 81(4).

A. Non-disclosure is necessary under rule 81(4) to protect P-0357 and his family

10. Disclosure of an anonymous summary for this witness is appropriate under rule 81(4), because such approach is necessary to reduce or eliminate objectively justifiable risks to the witness and is consistent with the rights of the suspect and fair and impartial proceedings.

There exists an objectively justifiable risk of danger

11. As set forth in the 30 June submissions, any exposure of individuals as cooperating with the Prosecution or the Court would create a high risk of interference, physical violence, or even death.⁴

12. The Prosecution has already informed the Chamber about the worrying deterioration of the security situation in Mali in 2015 and still in 2016.⁵ As explained, the witness security assessment for Mali has concluded that the

⁴ '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, paras.23, 25-26.

⁵ See, e.g. '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, paras.24-25; [REDACTED]; [REDACTED].

. See, also, 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/>). Just a few days ago, Iyad AG GHALY, the leader of Ansar Dine, threatened anew the UN mission in Mali (MINUSMA) and France. RFI, 'Mali: le chef d'Ansar Dine s'en prend à nouveau aux forces internationales', 26 juin 2016, MLI-OTP-0035-0908.

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.

13. The Prosecution emphasises that P-0357 [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED].⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

14. P-0357 further revealed to the Prosecution that, [REDACTED]

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

The use of a summary is the least restrictive means available

15. Given the nature of the risks discussed above, [REDACTED]

[REDACTED]
[REDACTED], disclosure of an anonymous summary of the screening note of Witness P-0357 is the least restrictive means available to effectively protect his safety, particularly at this stage of the proceedings.

⁶ [REDACTED]

16. As explained in the Prosecution's 30 June submissions,⁷ the disclosure of any information that might expose the cooperation of P-0357 with the Court would [REDACTED]

[REDACTED]⁸ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

17. In line with its previous submissions, the Prosecution has also determined that disclosure of a redacted screening note for P-0357, rather than a summary, would not provide adequate protection.⁹ The Prosecution reiterates that the risk of identification of an individual often results not simply from a single piece of information in isolation, but from the combination of two or more related pieces of information. [REDACTED]

[REDACTED]
[REDACTED]¹⁰

18. In the Prosecution's opinion, disclosure of an anonymous summary for this individual represents the least restrictive means available to adequately protect P-0357 while complying with its disclosure obligations, bearing in mind that he has not provided a statement and the Prosecution does not intend to rely in any way on the information contained in his screening note.

⁷ See, '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, paras.31-32.

[REDACTED]
[REDACTED]

⁸ See, '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, para.33.

[REDACTED]
[REDACTED]¹⁰

The use of a summary will not prejudice the Defence

19. The Prosecution submits that disclosure of an anonymous summary for Witness P-0357 will not result in any prejudice to the Defence nor undermine the fairness and impartiality of the proceedings.
20. The Prosecution emphasises again that P-0357 has not provided a witness statement and the Prosecution will not rely upon any information provided by P-0357 at trial. The summary will be disclosed only because it contains limited rule 77 information.
21. The Prosecution has drafted the summary with a view to including all relevant and disclosable information while protecting the identity and therefore the security of this individual.

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

22. Moreover, the use of an anonymous summary 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

23. The Appeals Chamber has accepted that interference with prosecution witnesses may prejudice further and ongoing investigations.¹¹ This is true in the sense that the P-0357 may cease cooperating if interfered with, and also

¹¹ 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.").

24. As set forth above in the context of rule 81(4), disclosure of the identity or identifying information of this Witness would create a high risk that he 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].

25. As already set forth above, in the Prosecution's judgment, disclosure of the identity or identifying information of P-0357 would necessitate [REDACTED] implementation of highly intrusive protection measures, even though P-0357 will not be relied upon by the Prosecution at trial. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The use of a summary is the least restrictive means available

26. 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]

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



Fatou Bensouda, Prosecutor

Dated this 1st day of July 2016

At The Hague, The Netherlands