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**International
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16 November 2018

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Single Judge

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
THE PROSECUTOR *v.* AL HASSAN AG ABDOUL AZIZ AG MOHAMED
AG MAHMOUD**

Public

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

**Public redacted version of the “Prosecution’s motion for authorisation to
disclose summaries of the statements of Witnesses MLI-OTP-P-0583,
MLI-OTP-P-0589 and MLI-OTP-P-0593, upon whose evidence
the Prosecution will not rely at the confirmation hearing”,
18 September 2018, ICC-01/12-01/18-129-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 anonymous summaries of [REDACTED] statements of Witnesses P-0583, P-0589 and P-0593 upon whose evidence the Prosecution will not rely at the article 61 confirmation hearing (“Confirmation Hearing”).

2. [REDACTED]

3. The Prosecution does not envisage having to rely upon their evidence at the Confirmation Hearing, but still needs to disclose it under rule 77. The information they provide may be material for the preparation of the Defence due to their presence in Timbuktu at the relevant time and/or because of the information they provide [REDACTED]

4. [REDACTED]

5. [REDACTED]

6. In this context, considering that the Prosecution is not relying on the evidence of Witnesses P-0583, P-0589 and P-0593 for the Confirmation Hearing, the danger posed to all persons who are considered to be cooperating with international organisations in Mali and the threat posed by the armed groups, disclosure of these witnesses' identity and exposure of their cooperation with the Court will place them at risk and will also prejudice ongoing and future investigations.
7. Under the circumstances, and particularly considering the limited scope of the Confirmation Hearing, the Prosecution submits that their identity and identifying information should not be disclosed but that anonymous summaries (attached as Annexes A, C, and E) should be disclosed instead.

8.

9.

Confidentiality

10. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this motion and its Annexes A to H are filed *ex parte*, only available to the Prosecution and VWU.

11. The motion discusses security concerns specific to these witnesses, [REDACTED]
[REDACTED] Annexes B, D, F and
G in particular contain personal identifying information the disclosure of
which would place the witnesses at risk and render the motion moot.

12. These annexes are divided as follow:

- Annex A is the summary of [REDACTED] statements provided by P-0583;
- Annex B contains the statements of Witness P-0583;¹
- Annex C is the summary of [REDACTED] statements provided by P-0589;
- Annex D contains the statements of Witness P-0589;²
- Annex E is the summary of [REDACTED] statements provided by P-0593;
- Annex F contains the statements of Witness P-0593;³
- Annex G contains [REDACTED]

[illegible]

- Annex H contains [REDACTED]

[REDACTED]

[REDACTED].⁴

13. The Prosecution will simultaneously file a confidential redacted version of the present motion.

Background

14. On 4 April 2018, Al HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD ("AL HASSAN") made his initial appearance before the Court.

15. Since then, the Prosecution has been reviewing the evidence in its possession for possible disclosure to the Defence. In the process of review, the Prosecution has identified the material of Witnesses P-0583, P-0589 and P-0593 as containing rule 77 information and upon which the Prosecution will not rely at the Confirmation Hearing.

16. In order to protect these witnesses and their families and to facilitate the Prosecution's ability to continue its investigation into the situation of Mali, the Prosecution requests the authorisation to disclose the anonymous summaries of these witnesses' statements. This measure will avoid revealing their identities or any other information that might expose their interactions with the Court.

Applicable law

17. As for the applicable law, the Prosecution refers to its prior filing ICC-01/12-01/18-48-Conf-Exp and the Single Judge's finding in the decision ICC-01/12-01/18-88-Conf-Exp, particularly in paragraphs 15-17.

⁴ [REDACTED]

Submissions

18. The Prosecution submits that withholding, by way of summaries (Annexes A, C and E), the identity and other identifying information which might lead to the exposure of Witnesses P-0583, P-0589 and P-0593, is necessary and appropriate under both rule 81(2) and rule 81(4).

A. Information on Witnesses P-0583, P-0589 and P-0593

Witness P-0583

19. [REDACTED]
[REDACTED]⁵ He has been interviewed for the purpose of the investigation in the Mali situation.

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

21. [REDACTED]

22. [REDACTED]
[REDACTED]⁷
[REDACTED]

5
6
7

[REDACTED]

[REDACTED]⁸ (see Annexes A and B for more details).

Witness P-0589

23. [REDACTED]
[REDACTED]⁹
He has been interviewed for the purpose of the investigation in the Mali situation.

24. [REDACTED]
[REDACTED]⁰ (see Annexes C and D for more details).

Witness P-0593

25. [REDACTED]
[REDACTED]¹¹ He has been interviewed for the purpose of the investigation in the Mali situation.

26. [REDACTED]
[REDACTED]¹² [REDACTED]
[REDACTED]¹³
[REDACTED]

⁸ [REDACTED]
[REDACTED]
[REDACTED]
¹ [REDACTED]
¹¹ [REDACTED]
¹² [REDACTED]
¹³ [REDACTED]

[REDACTED]

[REDACTED]¹⁴

27.

[REDACTED]

[REDACTED]¹⁵ (see Annexes E and F for more details). [REDACTED]

[REDACTED]

[REDACTED]

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

28. Disclosure of anonymous summaries for these witnesses is appropriate under rule 81(4), because such an approach is necessary to reduce or eliminate objective risks to these witnesses and their families, and is consistent with the rights of the Suspect, and fair and impartial proceedings.

Disclosure of the summaries of the statements of Witnesses P-0583, P0589 and P-0593 is necessary since there exists an objective risk of physical harm

29.

[REDACTED]

[REDACTED]¹⁶ [REDACTED]¹⁷

30. The Prosecution reiterates to the Chamber that the security assessment of its witnesses in Mali is alarming.

31. This assessment concluded - [REDACTED] - that should it become known to armed groups that an individual has cooperated with the Court, the risk of physical harm or death to the individual and his family is

¹⁴

¹⁵

¹⁶

¹⁷

[REDACTED]

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.¹⁸

32. As a matter of fact, the main actors that pose a threat against Prosecution witnesses or potential witnesses include a coalition of “jihadist” groups consisting of, *inter alia*, Ansar Dine and AQIM (with which AL HASSAN was associated, and which operate throughout Mali and the neighbouring countries, *i.e.* the very armed groups at issue in this case) and the *Jama’at Nusrat Al-Islam wal-Muslimin* («Groupe pour le soutien de l’Islam et des musulmans» or “JNIM”,¹⁹ established in March 2017 and led by Iyad AG GHALY).²⁰

33. The capacity of the said groups to conduct numerous and significant attacks in Timbuktu and its region is well established: the Prosecution refers to its prior filing ICC-01/12-01/18-48-Conf-Exp, in particular to paragraphs 38-39.

¹⁸ 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 January 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); UNSC, Report of the Secretary-General on the situation in Mali, 26 December 2017, MLI-OTP-0058-0400; UNGA, Report of the Independent Expert on the situation of human rights in Mali, 2 February 2018, MLI-OTP-0058-0354; UNSC, Report of the Secretary-General on the situation in Mali, 29 March 2018, MLI-OTP-0058-0368; Reuters, Al Qaeda affiliate claims responsibility for Burkina Faso attacks, 3 March 2018, MLI-OTP-0058-0419.

¹⁹ *Déclaration à la presse faite par le Conseil de sécurité sur l’attaque ayant visé la MINUSMA*, SC/12810-PKO/636, 4 May 2017, MLI-OTP-0046-9012; *Déclaration à la presse faite par le Conseil de sécurité à l’occasion de l’attentat terroriste perpétré contre la MINUSMA*, SC/12837-PKO/644, 23 May 2017, MLI-OTP-0046-9011.

²⁰ « Les groupes terroristes du Nord Mali se réunifient avec Iyad AG GHALY comme Leader », *Malijet*, 2 March 2017, MLI-OTP-0041-0041, p. 0043 (version française) et MLI-OTP-0041-0037 at 0038; video, « Announcement of the victory of Islam and Muslim groups/ Speech Sheikh Abou Fadl », 6 March 2017, MLI-OTP-0042-0178, de 00:02:36:00 à 00:03:06:00.

34. In these circumstances, it should be stressed that P-0583, P-0589 and P-0593 [REDACTED]
[REDACTED]

- first, it is established that Iyad Ag GHALY [REDACTED]
[REDACTED]
[REDACTED]²¹ (see Annex E). Again, the Suspect in the present case had links with Iyad Ag GHALY;
- second, [REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²²
- third, [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED];
- fourth, [REDACTED]
[REDACTED]
[REDACTED]
- fifth, [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
- sixth, [REDACTED]
[REDACTED]
[REDACTED]

²¹ [REDACTED]

²² [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

35. [REDACTED] is provided in the attached *ex parte* Annex G.

36. Concretely, one scenario under which armed groups such as AQIM and Ansar Dine and JNIM could obtain knowledge about these witnesses is through an intentional or inadvertent disclosure of information provided to the Suspect and the Defence under the Court's disclosure regime.

37. 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. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. It will be even more difficult for the Defence to operate discretely [REDACTED] and to effectively avoid any inadvertent association of witnesses with the Court or with international organisations more generally. Consequently, the existing confidentiality obligations of counsel are insufficient by themselves to protect witnesses from the serious threats described above.

38. At this juncture, the Prosecution also refers to the Single Judge's findings in paragraph 33 of decision ICC-01/12-01/18-88-Red2, especially with regard to the Suspect's role at the time of his arrest.

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

The use of summaries is the least restrictive means available

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

41. [REDACTED]

42. The Prosecution has also determined that disclosure of redacted statements for Witnesses P-0583, P-0589 and P-0593 rather than summaries, would not provide adequate protection. Even heavy redactions would still allow a person with first-hand knowledge of the events to potentially identify the witnesses.

43. 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 witnesses' identities. [REDACTED]
[REDACTED]
[REDACTED]

44. In the Prosecution's opinion, disclosure of anonymous summaries for these witnesses represents the least restrictive means available to 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 Confirmation Hearing.

The use of summaries will not prejudice the Defence

45. The Prosecution submits that disclosure of anonymous summaries for these witnesses will not result in any prejudice to the Defence nor will it undermine the fairness of the Confirmation Hearing.
46. The Prosecution emphasises that it will not rely upon the evidence of these witnesses at the said hearing. The summaries will be disclosed only because they contain specific rule 77 information.
47. The information provided by these witnesses on Timbuktu, and relevant to the Suspect, is limited and reflected in the said summaries. The essence of the information regarding [REDACTED] is captured in the summaries: the Prosecution has drafted them with a view to including all relevant and disclosable information on them while protecting the identities of P-0583, P-0589 and P-0593 and therefore their security and their families.
48. As a result, withholding their identities would not prejudice the Defence in their preparation.

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

49. 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

50. The Appeals Chamber has confirmed that interference with Prosecution witnesses is capable of prejudicing further and ongoing investigations and therefore constitutes a valid ground for withholding disclosure under rule 81(2).²³

51. This can happen, for instance, if other witnesses or potential witnesses who learn of any interference cease cooperating out of fear that they too will be targeted.

The use of summaries will not prejudice the Defence

52. For the reasons set out above in relation to rule 81(4), the disclosure of summaries will not prejudice the rights of the Defence nor impede fair and impartial confirmation proceedings.

Relief requested

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

- a. to not disclose the identities and identifying information of Witnesses P-0583, P-0589 and P-0593;
- b. to disclose the anonymous summaries in the attached Annex A, Annex C and Annex E *in lieu* of the statements and transcripts of Witnesses P-0583, P-0589 and P-0593;
- c. to redact any identifying information of these three witnesses from the metadata of these anonymous summaries;

²³ See *Prosecutor v. Katanga*, Judgment on Katanga's Appeal against the First Redaction Decision, ICC-01/04-01/07-476, 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.").

d. to redact any identifying information of Witnesses P-0583 and P-0593 [REDACTED] in Annex H²⁴ ([REDACTED])

[REDACTED]

[REDACTED]

54.

[REDACTED]

55. 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 Witnesses P-0583, P-0589 and P-0593 only [REDACTED]

[REDACTED]

[REDACTED]

56. In this regard, the Prosecution informs the Single Judge that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



Fatou Bensouda, Prosecutor

Dated this 18th day of September 2018

At The Hague, The Netherlands