

**Cour
Pénale
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**International
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16 November 2018

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovacs, 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 I
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-0581,
MLI-OTP-P-0592 and MLI-OTP-P-0594, upon whose evidence the
Prosecution will not rely at the confirmation hearing",
5 October 2018, ICC-01/12-01/18-145-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] [REDACTED] documents of Witnesses P-0581, P-0592 and P-0594, upon whose evidence the Prosecution will not rely at the article 61 confirmation hearing (“Confirmation Hearing”).

2. Witness P-0594 [REDACTED]
[REDACTED]
[REDACTED].

3. Witnesses P-0581 and P-0592 [REDACTED]
[REDACTED].

4. The Prosecution does not envisage having to rely upon their evidence at the Confirmation Hearing, but is still obliged to disclose the information they provide under rule 77 of the Rules of Procedure and Evidence (“Rules”). This information 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 against the Suspect¹ and on Prosecution witnesses such as [REDACTED]
[REDACTED]² [REDACTED]
[REDACTED].

5. Since Witnesses P-0581, P-0592 and P-0594 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

¹ See, for instance, Summary of P-0592 in relation to video [REDACTED]

² [REDACTED].

6. In addition, experience has shown [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

7. Considering 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' identities and exposure of their cooperation with the Court will place them at risk and will also prejudice ongoing and future investigations.

8. Under these circumstances, and particularly considering that the Prosecution is not relying on the evidence of Witnesses P-0581, P-0592 and P-0594 for the Confirmation Hearing, and the limited scope thereof, the Prosecution submits that the Single Judge should authorise the Prosecution to protect their identities and potentially identifying information by disclosing anonymous summaries (see Annexes A, C, and E).

9. Lastly, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]³

Confidentiality

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

11. The motion discusses security concerns specific to these witnesses, including [REDACTED]. Annexes B, D, F, G, H and I 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 the relevant information provided by Witness P-0581;
- Annex B contains [REDACTED] documents relating to Witness P-0581;⁴
- Annex C is the summary of the relevant information provided by Witness P-0592;
- Annex D contains [REDACTED] documents relating to Witness P-0592;⁵

³ [REDACTED]

⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- Annex E is the summary of the relevant information provided by Witness P-0594;
- Annex F contains [REDACTED] [REDACTED] documents relating to Witness P-0594;⁶
- Annex G contains an [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED].⁷
- Annex H contains [REDACTED]
[REDACTED]
- Annex I [REDACTED]
[REDACTED].⁸

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-0581, P-0592 and P-0594 as containing rule 77 information, upon which the Prosecution will not rely at the Confirmation Hearing.

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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 anonymous summaries of these witnesses' statements and to not disclose documents in Annex I [REDACTED].⁹ This measure will avoid revealing their identities or any other information that might expose their interactions with the Court.

Applicable law

17. As regards 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.

Submissions

18. The Prosecution submits that non-disclosure of certain documents¹⁰ and withholding, by way of the summaries in Annexes A, C and E, the identity and other identifying information which might lead to the exposure of Witnesses P-0581, P-0592 and P-0594, is necessary and appropriate under both rule 81(2) and rule 81(4).

⁹ [REDACTED]

See Annex I.

A. Information on Witnesses P-0581, P-0592 and P-0594

Witness P-0581

19. Witness P-0581 [REDACTED]
[REDACTED].¹¹ He has been interviewed for the purpose of the investigation in the Mali situation.

20. Witness P-0581 has indicated that, in 2012, [REDACTED] and [REDACTED]
[REDACTED].¹²

21. In his statement Witness P-0581 has given information regarding his former [REDACTED]
[REDACTED]¹³ [REDACTED]
[REDACTED], [REDACTED]¹⁴ [REDACTED]
[REDACTED]¹⁵ and has indicated that the Islamic police used to carry out patrols throughout Timbuktu to verify if women were correctly clothed but also to distribute clothes to women.¹⁶ Witness P-0581 confirmed that [REDACTED]
[REDACTED]¹⁷ (see Annexes A and B for more details).

Witness P-0592

22. Witness P-0592 [REDACTED]. [REDACTED]
[REDACTED]

¹¹ See [REDACTED]
[REDACTED].

[REDACTED].

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁷ [REDACTED]

[REDACTED]¹⁸ He has been interviewed for the purpose of the investigation in the Mali situation.

23. [REDACTED]
[REDACTED]
[REDACTED]¹⁹ (see Annexes C and D for more details).

Witness P-0594

24. Witness P-0594 [REDACTED]
[REDACTED]
[REDACTED]²⁰ He has been interviewed for the purpose of the investigation in the Mali situation.

25. P-0594 [REDACTED]
[REDACTED]
[REDACTED]²¹

26. Witness P-0594 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²²

27. Witness P-0594 [REDACTED]
[REDACTED]²³ [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]²⁴
 [REDACTED]
 [REDACTED]
 [REDACTED]²⁵ (see Annexes E, F and G for more details).

B. Disclosure of anonymous summaries and the non-disclosure of [REDACTED] are necessary under rule 81(4) to protect these witnesses and their families

28. Disclosure of anonymous summaries for these witnesses and the non-disclosure of two documents are 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 anonymous summaries

Disclosure of the summaries of the statements of Witnesses P-0581, P-0592 and P-0594 and related documents is necessary since there exists an objective risk of physical harm

29. The Prosecution refers to [REDACTED]
 [REDACTED]²⁶ [REDACTED]²⁷

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

²⁴ [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
²⁷ [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.²⁸

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”,²⁹ established in March 2017 and led by Iyad AG GHALY).³⁰

33. The capacity of the said groups to conduct frequent 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.

²⁸ 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.

²⁹ *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.

³⁰ “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. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³¹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³²

35. In these circumstances, it should be stressed that P-0581, P-0592 and P-0594 are

[REDACTED]:

-

- first,

- [REDACTED] [REDACTED] [REDACTED]
[REDACTED]³³ [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]

- second, [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED];

³¹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³³ [REDACTED] [REDACTED].

- third, [REDACTED]
[REDACTED]
[REDACTED];
- [REDACTED]
[REDACTED] it is likely that Ansar Dine or JNIM will be able to locate their families and could target them;
- lastly, [REDACTED]
[REDACTED]
[REDACTED]³⁴ [REDACTED]
[REDACTED]

36. Additional information on the security situation of these three witnesses is provided in the attached *ex parte* Annex H.

37. 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.

38. 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

³⁴ [REDACTED]
[REDACTED].

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

39. 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.

40. The Defence submits that [REDACTED]
[REDACTED]
[REDACTED].³⁵ As a matter of fact the Prosecution has not yet disclosed the identities of many crime base or insider witnesses. [REDACTED]

41. It does not mean that all additional appropriate and necessary measures, including redactions and anonymous summaries, should not be taken. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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

³⁵ [REDACTED]

³⁶ [REDACTED].

The use of summaries is the least restrictive means available

43. Given the nature of the risks discussed above, and the [REDACTED]
[REDACTED] disclosure of these 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.

44. Other protective measures 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]
[REDACTED]
[REDACTED].

45. The Prosecution has also determined that disclosure of redacted statements for Witnesses P-0581, P-0592 and P-0594 rather than summaries, would not provide adequate anonymity. Even heavy redactions would still allow a person with first-hand knowledge of the events to potentially identify the witnesses.

46. 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]

(see Annexes B, D, F and G).

47. Thus, 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

48. 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.
49. 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.
50. The information provided by these witnesses on Timbuktu, and relevant to the Suspect, is reflected in the said summaries to the extent it is not identifying. The Prosecution has drafted them with a view to including all relevant and disclosable information, while protecting the identities of P-0581, P-0592 and P-0594 and therefore their security and that of their families. In particular, the essence of the information regarding [REDACTED] [REDACTED] is captured in the summaries.

Non-disclosure of two documents

51. [REDACTED]
[REDACTED] should not be disclosed because they would reveal [REDACTED]
[REDACTED]
[REDACTED].
52. Given the nature of the document [REDACTED] they would have to be entirely redacted and as such cannot be summarised without revealing the identity of [REDACTED]. Their non-disclosure is solely

requested to protect the aforementioned identities. Moreover, the non-disclosure would not prejudice the Defence in the preparation of their case for the purposes of the Confirmation Hearing.

C. Disclosure of anonymous summaries and non-disclosure of two documents are necessary under rule 81(2) to protect the Prosecution's ability to investigate

53. The use of anonymous summaries and the non-disclosure of two documents are 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

54. 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).³⁷

55. 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 and non-disclosure of two documents will not prejudice the Defence

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

³⁷ 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.").

Relief requested

57. 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:

- to not disclose the identities and identifying information of Witnesses P-0581, P-0592 and P-0594;
- 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-0581,³⁸ P-0592,³⁹ and P-0594⁴⁰ and related documents in Annexes B, D and F;
- to redact any identifying information of these three witnesses from the metadata of these anonymous summaries;
- to redact any identifying information of Witness P-0594 from the [REDACTED]⁴¹ ([REDACTED]
[REDACTED]
[REDACTED]); and
- to not disclose the documents in Annex I.⁴²

38

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

59. 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-0581, P-0592 and P-0594 [REDACTED]
[REDACTED]
[REDACTED].

60. In this regard, [REDACTED]
[REDACTED]
[REDACTED]. The Prosecution will inform them as soon as practicable.



Fatou Bensouda, Prosecutor

Dated this 5th day of October 2018

At The Hague, The Netherlands