

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original : English

No.: ICC-01/12-01/18

Date: 1 November 2018

Date of submission:

23 January 2019

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 F
only available to the Prosecution and the Victims and Witnesses Unit**

**Public redacted version of the “Prosecution’s motion for authorisation to
disclose an anonymous summary of the statements of Witness MLI-OTP-P-0619
upon whose evidence the Prosecution will not rely at the confirmation
hearing”, 1 November 2018, ICC-01/12-01/18-167-Conf Exp**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence

Mr Yasser Hassan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Office of the Prosecutor (“Prosecution”) hereby seeks authorisation to disclose an anonymous summary of the [REDACTED] [REDACTED] of Witness P-0619, upon whose evidence the Prosecution will not rely at the article 61 confirmation hearing (“Confirmation Hearing”).
2. [REDACTED]
[REDACTED]
[REDACTED].
3. The Prosecution does not envisage having to rely upon his evidence at the Confirmation Hearing, but is still obliged to disclose the information he provides under rule 77 of the Rules of Procedure and Evidence (“Rules”). [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].
4. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].
5. I [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]
- [REDACTED]
6. 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 P-0619's identity and exposure of his cooperation with the Court will thus place him at risk and will also prejudice ongoing and future investigations.
 7. Under these circumstances, and particularly considering that the Prosecution is not relying on the evidence of Witness P-0619 for the Confirmation Hearing, and the limited scope thereof, the Prosecution submits that the Single Judge should authorise the Prosecution to protect his identity *inter alia* by disclosing an anonymous summary (see Annex A).

8.

[REDACTED]

[REDACTED].¹

Confidentiality

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

¹ [REDACTED]

10. The present motion discusses security concerns specific to Witness P-0619, [REDACTED] Annexes B to F in particular contain personal identifying information the disclosure of which would place the witness at risk and render the motion moot.

11. These annexes are divided as follows:

- Annex A is the summary of the relevant information from [REDACTED] [REDACTED] of Witness P-0619;
- Annex B contains the [REDACTED] of Witness P-0619;²
- Annex C contains an [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³
- Annex D [REDACTED]
[REDACTED]⁴
- Annex E contains [REDACTED] Witness P-0619; and
- Annex F [REDACTED]
[REDACTED]

12. The Prosecution will simultaneously file a confidential redacted version of the present motion (the annexes will remain confidential, *ex parte*, only available to the Prosecution and the VWU).

² [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

See [REDACTED]

⁴ See [REDACTED]

Background

13. On 4 April 2018, Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“AL HASSAN”) made his initial appearance before the Court.
14. 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 Witness P-0619 as containing rule 77 information, upon which the Prosecution will not rely at the Confirmation Hearing.
15. In order to protect this witness and his family and to facilitate the Prosecution’s ability to continue its investigation into the Mali situation, the Prosecution requests *inter alia* the authorisation to disclose an anonymous summary of this witness’ statements. This measure will avoid revealing his identity or any other information that might expose his interactions with the Court.

Applicable law

16. 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

17. The Prosecution submits that withholding, by way *inter alia* of the summary in Annex A, the identity and other identifying information which might lead to the exposure of Witness P-0619, is necessary and appropriate under both rules 81(2) and 81(4).

A. Information on Witness P-0619

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

19. In 2012, P-0619 [REDACTED]
[REDACTED] [REDACTED]
[REDACTED].⁶ [REDACTED]
[REDACTED].⁷ [REDACTED]
[REDACTED].⁸ [REDACTED]
[REDACTED].⁹

20. [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED].¹¹
[REDACTED].¹² [REDACTED]
[REDACTED]
[REDACTED].¹³ (see Annexes B and C for more details).

⁵ See [REDACTED].

⁶ See [REDACTED].

⁷ See [REDACTED].

⁸ See [REDACTED]
[REDACTED]

See [REDACTED]
[REDACTED].

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

¹³ [REDACTED]
[REDACTED]

*B. Disclosure of an anonymous summary, redaction of [REDACTED]
[REDACTED], and non-disclosure [REDACTED] are necessary
under rule 81(4) to protect this witness and his family*

21. Disclosure of an anonymous summary for this witness, redaction [REDACTED]
[REDACTED], and non-disclosure of P-0619's [REDACTED] are appropriate under rule 81(4), because such an approach is necessary to reduce or eliminate objective risks to this witness and his family, and is consistent with the rights of the Suspect and fair and impartial proceedings.

Disclosure of an anonymous summary

Disclosure of a summary of the statements of Witness P-0619 is necessary since an objective risk of physical harm exists

22. The Prosecution refers to its [REDACTED]
[REDACTED]¹⁴ and to [REDACTED].¹⁵

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

24. 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 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.¹⁶

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ 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->

25. 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”,¹⁷ established in March 2017 and led by Iyad Ag GHALY).¹⁸

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

27. [REDACTED] [REDACTED]:

- first, [REDACTED] [REDACTED]
[REDACTED] [REDACTED]¹⁹ [REDACTED]
[REDACTED]
[REDACTED]

[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.

¹⁷ *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.

¹⁸ “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.

¹⁹ [REDACTED] [REDACTED].

- second, [REDACTED]
[REDACTED]
[REDACTED];
- third, [REDACTED]
[REDACTED];
- fourth, [REDACTED]
[REDACTED];
- lastly, [REDACTED]
[REDACTED]²⁰). Again, the
Suspect in the present case had links with Iyad Ag GHALY.

28. Additional information on the security situation of P-0619 is provided in the attached *ex parte* Annex E. Annex F contains more detailed information [REDACTED].

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

30. In this regard, the Prosecution emphasises that this witness could be placed at risk even if the Defence does not desire or intend such a result. [REDACTED]

²⁰ [REDACTED].

[REDACTED]

[REDACTED].

Consequently, the existing confidentiality obligations of counsel are insufficient by themselves to protect witnesses from the serious threats described above.

31. 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.

32. The Defence submitted that [REDACTED]

[REDACTED]

[REDACTED]²¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

33. 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]²² This provides a) an additional objective basis to fear that those who assist in the ICC proceedings may be targeted in revenge and b) reasons to prevent, by withholding the identity of this witness, any intentional or inadvertent disclosure of information.

²¹ [REDACTED]

[REDACTED]

[REDACTED]

34. In sum, given the circumstances described above, the exposure of this witness as cooperating with the Court would place him at serious risk of physical harm or even death.

The use of a summary is the least restrictive means available

35. Given the nature of the risks discussed above, and [REDACTED]
[REDACTED], disclosure of this anonymous summary is the least restrictive means available to effectively protect the safety of this witness and his family, particularly at this stage of the proceedings.

36. Other protective measures are not [REDACTED] appropriate at this moment: the disclosure of any information that might expose the cooperation of this witness with the Court [REDACTED]
[REDACTED]
[REDACTED].

37. The Prosecution has also determined that disclosure of [REDACTED]
[REDACTED] from Witness P-0619 rather than a summary thereof would not provide adequate anonymity. [REDACTED]
[REDACTED], like the Suspect, to potentially identify the witness.

38. 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 and C).

39. Thus, disclosure of an anonymous summary for this witness represents the least restrictive means available to protect him and his family while complying with disclosure obligations. This is all the more so given that the Prosecution does not intend to use him as an incriminatory witness for the purpose of the Confirmation Hearing.

The use of a summary will not prejudice the Defence

40. The Prosecution submits that disclosure of an anonymous summary for this witness will not result in any prejudice to the Defence, nor will it undermine the fairness of the Confirmation Hearing.

41. The Prosecution emphasises that it will not rely upon the evidence of this witness at the said hearing.

42. The information provided by this witness on Timbuktu, is reflected in the said summary to the extent it is not identifying. The Prosecution has drafted it with a view to including all relevant and disclosable information, while protecting the identity of P-0619 and therefore his security and that of his family. [REDACTED]

[REDACTED]

[REDACTED].

Redaction of the [REDACTED] and non-disclosure of

[REDACTED]

43. The [REDACTED] in Annex C [REDACTED], [REDACTED]
[REDACTED]. In these circumstances, and in order to be consistent with the disclosure of an anonymous summary of P-0619's [REDACTED], this [REDACTED] should be redacted with the view to protecting identifying information of P-0619.

44. The [REDACTED]²³ [REDACTED] (Annex D) [REDACTED]
 [REDACTED]
 [REDACTED]. [REDACTED]. Given the nature of the document, it would have to be entirely redacted and as such cannot be summarised without revealing the identity of Witness P-0619. The non-disclosure of this document is solely requested to protect the witness. Moreover, its non-disclosure will not prejudice the Defence in the preparation of their case for the purposes of the Confirmation Hearing.

*C. Disclosure of an anonymous summary, redaction of the [REDACTED]
 [REDACTED], and [REDACTED] are necessary
 under rule 81(2) to protect the Prosecution's ability to investigate*

45. The use of an anonymous summary, redaction of [REDACTED]
 and [REDACTED] 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

46. 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).²⁴

47. 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. In this regards, the Prosecution refers to paragraph 24 above.

²³ See [REDACTED]

²⁴ 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.").

50. Should the Single Judge grant the present motion, the Prosecution intends to disclose the anonymous summary of Witness P-0619 and the redacted

[REDACTED]

51. [REDACTED]

52. [REDACTED]²⁹ [REDACTED]



Fatou Bensouda, Prosecutor

Dated this 1st day of November 2018

At The Hague, The Netherlands

²⁹ See [REDACTED]