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6 June 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 Secret, *EX PARTE*, Annexes A to D,
only available to the Prosecution and the Victims and Witnesses Unit**

**Public redacted version of the “Prosecution’s Request for authorisation to
withhold the identity of Witness MLI-OTP-P-0625 upon whose evidence the
Prosecution will not rely at the confirmation of charges hearing”,
11 February 2019, ICC-01/12-01/18-241-Secret-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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I. Introduction

1. The Office of the Prosecutor ("Prosecution") seeks authorisation to withhold from the defence of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ("AL HASSAN" or the "Suspect") the identity of Prosecution Witness MLI-OTP-P-0625 ("P-0625"). Specifically, the Prosecution requests to only disclose, at this stage, a summary of P-0625's statement and to withhold all identifying information pertaining to this witness, pursuant to articles 68(1), 68(5) and 61(5) of the Rome Statute ("Statute"), as well as rules 81(2) and (4) of the Rules of Procedure and Evidence ("Rules").

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

3. [REDACTED]
[REDACTED]

4. The Prosecution does not intend to rely on P-0625 at the confirmation hearing and wishes to disclose an anonymous summary of his evidence pursuant to rule 77 of the Rules. Indeed, P-0625's identification information should not be disclosed to the Suspect at this stage of the proceedings, in order to protect his security and that of his family, [REDACTED] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]
- [REDACTED].
5. As shown in more details below, there is an objectively justifiable risk to P-0625 if his cooperation with the Prosecution were disclosed to the Suspect. In addition, the non-disclosure of his cooperation with the Prosecution and the provision of an anonymous summary of his account are necessary and are the only available and least intrusive measures available at the moment. Furthermore, the proposed measures are proportionate and would not prejudice the defence of the Suspect at this preliminary stage of the proceedings.¹ Finally, ongoing investigations would be unduly prejudiced if P-0625 were to be interfered with as that could lead him and other witnesses to decline further cooperation with the Prosecution.

II. Confidentiality

6. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this motion and its Annexes A to D are filed secret and *ex parte*, available only to the Prosecution and the Victims and Witnesses Unit (“VWU”). The motion discusses security concerns specific to P-0625. In addition, the annexes contain personal identifying information, the disclosure of which would place him and his family at a higher risk and defeat the purpose of this motion.
7. The annexes are divided as follows:
- Annex A contains the [REDACTED] interview of Witness P-0625², the non-disclosure of which is requested;
 - Annex B contains the [REDACTED] regarding P-0625³, the non-disclosure of which is requested;

¹ Lubanga Appeal Decision, ICC-01/04-01/06-568, para. 33-34, 67, 71, 72; [REDACTED]
[REDACTED]
[REDACTED]

- Annex C is the proposed anonymous summary of the material in Annexes A and B; and
- Annex D is the [REDACTED] of Witness P-0625.

8. The Prosecution will file a secret redacted version of the present motion.

III. Background

9. On 4 April 2018, the Suspect made his initial appearance before the Court. On 16 May 2018, the Single Judge issued his *Decision on the Evidence Disclosure Protocol and Other Related Matters*.⁴ Since then, the Single Judge rendered several decisions granting the Prosecution's requests to withhold the identity of several witnesses, redact any identifying information, and/or disclose a summary of their statement.⁵

IV. Applicable law

10. With respect to the applicable law, the Prosecution refers to its prior filings, including in ICC-01/12-01/18-48 [REDACTED].

11. The Prosecution also recalls the Single Judge's findings, including in decision ICC-01/12-01/18-88 [REDACTED] at paragraphs 15-17 and decision ICC-01/12-01/18-122 [REDACTED], concerning the disclosure of anonymous summary of witness statements at the pre-trial stage, in particular at paragraphs 30-41.

³ [REDACTED]

⁴ *Prosecutor v. Al Hassan*, ICC-01/12-01/18-31-tEng-Corr, para. 33.

⁵ [REDACTED]

V. Submissions

A. Information on P-0625 and his evidence

12. P-0625 [REDACTED]. [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
13. [REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
14. [REDACTED]
[REDACTED]

***B. Disclosure of an anonymous summary and non-disclosure [REDACTED]
[REDACTED] is necessary under article
68(1) and rule 81(4) to protect his security and safety***

(a) There is an objectively justifiable risk of harm facing P-0625

15. The disclosure of P-0625's identifying information and cooperation with the Prosecution in the present case would create the objectively justifiable risk of danger for this witness' security and safety and that of his family.

16. Indeed, in case of intentional or inadvertent disclosure of his identity and his status as cooperating witness, the risks to P-0625 would be high for at least two reasons.

17. First, the risk to P-0625's security and safety is likely to be significant because of

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

18. In other words, the risk to P-0625 will be high [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

19.

[REDACTED]
[REDACTED]
[REDACTED]

20. With regard [REDACTED] the Prosecution recalls that the Chamber has found that the security situation in Timbuktu and northern Mali [REDACTED] [REDACTED] is volatile and the armed groups operating there pose a danger to anyone perceived to be cooperating with any international organisation.⁶ Groups forming a coalition under the name *Jama'at Nusrat Al-Islam was-Muslimin (Groupe pour le soutien de l'Islam et des musulmans* or "JNIM") have made threats and conducted targeted attacks and assassinations against such individuals.⁸

21. Established in March 2017, JNIM is led by Iyad AG GHALY, the founder and head of Ansar Dine with whom the AL HASSAN was closely associated up until his capture in April 2017.⁹

22. If JNIM and other threat actors were to learn of P-0625's cooperation with the Prosecution in the present case, there is a high risk that he will be interfered with,

⁶ See e.g. ICC-01/12-01/18-48-Conf-Exp, para. 38-39; ICC-01/12-01/18-185-Red2, para. 36; *Déclaration à la presse du 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 du 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.

⁷ *Déclaration à la presse du 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 du 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.

⁸ See e.g. ICC-01/12-01/18-185-Red2, para. 36. See also "Mali : Ansar Dine revendique l'attaque contre la Minusma à Kidal," RFI, 28 November 2015 (<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 ; "Deux Touaregs Imghads, guides de la force Barkhane, égorgés à Aguelhok," Mali-Web, February 2015 (<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 (<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 (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.

⁹ "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.

either physically harmed or killed, [REDACTED]:
 the risk will be high were these groups to learn that P-0625 could testify at the Court in a case involving one of their own, like AL HASSAN, or someone linked to them in any way.

23. Second, [REDACTED]

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24. In sum, the only viable protective measure available at this stage is the non-disclosure of P-0625's identifying information.

(b) Withholding P-0625's identity and providing an anonymous summary of his evidence is necessary to reduce the security risk and is the only viable and least intrusive measure available

25. Withholding P-0625's identity and providing a summary of his evidence is the only viable and least intrusive protective measure available in his situation.

26. [REDACTED]

27. In addition, [REDACTED]

10

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

(c) The Suspect's defence will not be prejudiced

29. The defence of the Suspect will not be prejudiced by the disclosure of an anonymous summary at this stage of the proceedings, considering that:

- the sole purpose of the proposed summary is to prevent an identification of the witness and ensure the best available protection in the circumstances;
- the summary provides the substantive parts of P-0625's account and information material to the preparation of the Defence [REDACTED]
 [REDACTED]; and
- [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

30. In sum, the Suspect will be in a position to understand the evidence of P-0625. The redactions and the disclosure of an anonymous summary of this witness' account should be granted as requested.¹¹

¹¹ Lubanga Appeal Decision, ICC-01/04-01/06-568, para. 33-34, 67, 71, 72; [REDACTED]
 [REDACTED]

C. The disclosure of an anonymous summary is necessary under rule 81(2) of the Rules to protect the Prosecution investigations

31. As the Appeals Chamber held, “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 cooperate further with the Prosecutor.”¹²

32. In light of the risk discussed above, the Prosecution is concerned that any incident affecting P-0625 would:

- discourage him to further cooperating with the Prosecution and testifying at trial if the charges against AL HASSAN were confirmed; and
- prevent other witnesses from cooperating with the OTP.

VI. Relief sought

33. For the above reasons, the Prosecution seeks from the Single Judge an order authorising the Prosecution to:

- not disclose the identity and identifying information of P-0625;
- not disclose [REDACTED] contained in Annex A to the present filing and the [REDACTED] relating to P-0625 contained in Annex B to the present filing; and
- disclose the anonymous summary in Annex C to the present filing (and a translation thereof), and redact any identifying information from the metadata.

34. In the event that the Single Judge were to deny this motion in whole or in part, the Prosecution requests an order granting the Prosecution leave to make necessary disclosures concerning P-0625 [REDACTED]

¹² [REDACTED]



A handwritten signature in blue ink, appearing to read 'Fatou Bensouda', written over a horizontal line.

Fatou Bensouda, Prosecutor

Dated this 11th day of February 2019
At The Hague, the Netherlands