



Original: English

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

Date: 24 September 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

**Public redacted version of the Defence response to the Prosecution's motion
under regulation 42(3) for authorisation to disclose an updated anonymous
summary for Witness MLI-OTP-P-0113**

**Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
Mahmoud**

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for the Defence

Yasser Hassan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. On 20 June 2018, the Defence was notified of the confidential redacted version of the Prosecution's motion to disclose an updated anonymous summary for Witness MLI-OTP-P-0113 upon whose evidence the Prosecution will rely at the confirmation hearing.¹
2. The Prosecution submits that regulation 42 of the Regulations of the Court applies to the Witness's statement and several associated items, following approval of the Single Judge in *Al Mahdi* to withhold the identity of Witness P-0113 from the defence in that case.² However, unlike *Al Mahdi*, the Prosecution characterises Witness P-0113's evidence against the Suspect as incriminatory, and seeks to rely on this evidence at the confirmation hearing. In addition, the Prosecution submits that the non-disclosure of identifying information of Witness P-0113 to Mr Al Hassan's Defence is necessary in order to protect the Witness and his family, and to protect the Prosecution's ongoing and future investigations in Mali.³
3. In the view of the Defence, the Prosecution's proposed measures are not necessary or proportionate to the rights of the Suspect in this case. Not only does the Prosecution fail to point to objective factors that warrant withholding the identity of Witness P-0113 from the Defence, but relying on anonymous summaries of the Witness's statement and related materials, including at least two investigator notes, would unfairly prejudice the Suspect's fair trial rights, including the fundamental right to challenge the credibility of the Prosecution's evidence. As such, the Prosecution's Motion should be dismissed and the identity of Witness P-0113 and all associated materials should be disclosed to the Defence.
4. The Prosecution also omits key information relating to the scope and content of Witness P-0113's evidence, including whether the Witness attests to Mr Al Hassan personally, or how the Prosecution will rely on Witness P-0113's testimony at the

¹ *Al Hassan*, Confidential redacted version of the "Prosecution's motion under regulation 42(3) for authorisation to disclose an updated anonymous summary for Witness MLI-OTP-P-0113 upon whose evidence the Prosecution will rely at the confirmation hearing", 16 July 2018, ICC-01/12-01/18-86-Conf-Exp, 20 July 2018, ICC-01/12-01/18-86-Conf-Red (the Prosecution's **Motion**).

² *ibid*, paras 2 and 8.

³ *ibid*, para 13.

confirmation of charges hearing.⁴ The Defence therefore respectfully requests that the Chamber direct the Prosecution to file a lesser-redacted version of the Motion in order to make such information available.

II. Classification

5. In accordance with regulation 23*bis*(2) of the Regulations of the Court, this response is classified as confidential as the filing to which it relates is classified the same.

III. Applicable law

6. The Prosecution is subject to broad disclosure obligations under the ICC statutory framework. This importantly includes the obligation to investigate incriminating and exonerating circumstances equally, as dictated by article 54(1)(a) of the Rome Statute, and the obligation to disclose evidentiary material in full.
7. The Prosecution's disclosure obligations in respect of exculpatory material are enshrined in the ICC statutory framework. Article 67(2) stipulates that the Prosecutor "shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows the innocence of the accused, or to mitigate the guilt of the accused, or *which may affect the credibility of prosecution evidence*" (emphasis added).
8. Under rule 76(1) of the Rules of Procedure and Evidence, the Prosecutor must also provide the Suspect with the statements of those witnesses on whom it intends to rely at the hearing together with a copy of any prior statement made by the witness, "sufficiently in advance to enable the adequate preparation of the defence." The statements of Prosecution witnesses shall be made available in the original and in a language which the Suspect fully understands and speaks.⁵ This latter requirement supports the Suspect's right to translations of documents under article 67(1)(f) of the Statute.

⁴ *ibid*, paras 28-30, and 47-48.

⁵ Rule 76(3) ICC RPE.

9. Article 61(3)(b) of the Statute also provides that, “[w]ithin a reasonable time before the [confirmation] hearing, the person shall [...] be informed of the evidence on which the Prosecutor intends to rely at the hearing.”
10. Non-disclosure under rules 81(2) and 81(4) of the Rules is an exception to the overriding principle of full disclosure, and requires careful balancing of the interests at stake.⁶
11. **First**, the Prosecution must demonstrate the existence of an objectively justifiable risk to the safety of the person concerned, or interference with the Prosecution’s investigations, as a result of disclosure *to the Defence* specifically and not only the public in general.⁷
12. **Second**, the non-disclosure must be necessary, such that there are no less restrictive protective measures available and the measures implemented restrict the rights of the Suspect “only as far as necessary.”⁸

⁶ *Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, [ICC-01/04-01/06-568](#), paras 36 and 39; *Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, [ICC-01/04-01/07-475](#), para 70; and *Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, [ICC-01/04-01/07-476](#), para 57. See also *Lubanga*, Decision on the Prosecutor’s second request for redactions for the purposes of disclosure, 8 December 2014, [ICC-01/04-01/06-3118-Red2](#), para 8; *Ntaganda*, Redacted First Decision on the Prosecutor’s Requests for Redactions and Other Related Requests, 3 July 2014, [ICC-01/04-02/06-117-Red3](#), para 16; *Bemba et al*, Decision on the “Prosecution’s Application for Redactions pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence” dated 25 June 2014, 25 June 2014, [ICC-01/05-01/13-516](#), p 4; *Mbarushimana*, Decision on the Prosecution’s applications for redactions pursuant to Rule 81(2) and Rule 81(4), 20 May 2011, [ICC-01/04-01/10-167](#), para 6; *Al Mahdi*, Decision on the Prosecutor’s requests for redactions, 8 December 2015, [ICC-01/12-01/15-53-Red](#), para 1; and *Gbagbo and Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016, 31 July 2017, [ICC-02/11-01/15-915-Red](#), para 61.

⁷ *Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, [ICC-01/04-01/07-475](#), para 71(b).

⁸ *Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, [ICC-01/04-01/06-568](#), para 37; *Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, [ICC-01/04-01/06-773](#), para 33; *Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, [ICC-01/04-01/07-475](#), para 99.

13. **Third**, non-disclosure must be proportionate in view of the prejudice caused to the Suspect, including his right to a fair and impartial trial.⁹ In particular, the Pre-Trial Chamber must ensure that the non-disclosure would not result in the confirmation of charges hearing, viewed as a whole, to be unfair to the Suspect.¹⁰
14. A refusal to disclose witness evidence in full must be based upon a careful examination of the individual case in question,¹¹ and be justified as transparently and concretely as possible.¹² Rules 81(2) and 81(4) of the Rules also cannot be interpreted as authorising the redaction of potentially exculpatory excerpts from the statements of witnesses on whose written or oral testimony the Prosecution intends to rely on at the confirmation hearing.¹³

IV. Submissions

(A) *New application for authorisation to withhold the identity of a witness*

15. At the outset, the Defence notes that Pre-Trial Chamber I was seised of the relevant application in *Al Mahdi* in which protective measures were ordered for Witness P-0113. This Chamber is therefore capable of determining a new application for

⁹ *Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, [ICC-01/04-01/07-475](#), para 67; and *Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, [ICC-01/04-01/06-773](#), para 21. See also article 68(1) of the Rome Statute.

¹⁰ *Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, [ICC-01/04-01/07-475](#), para 72; and *Mbarushimana*, Decision on the Prosecution’s applications for redactions pursuant to Rule 81(2) and Rule 81(4), 20 May 2011, [ICC-01/04-01/10-167](#), para 6.

¹¹ *Lubanga*, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, [ICC-01/04-01/06-568](#), paras 36-37; and *Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Statute Conference on 10 June 2008, 13 June 2008, [ICC-01/04-01/06-1401](#), para 89.

¹² *Katanga and Ngudjolo*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008, [ICC-01/04-01/07-428-Corr](#), para 18. See also Kai Ambos, *Treatise on International Criminal Law, Volume III: International Criminal Procedure* (OUP 2016) p 539.

¹³ *Lubanga*, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, 19 May 2006, [ICC-01/04-01/06-108-Corr](#), para 38; and *Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, [ICC-01/04-01/07-475](#), para 62.

protective measures relating to Witness P-0113 or an application to vary the protective measures implemented in *Al Mahdi*.

16. In the view of the Defence, the Prosecution's Motion, although relating to material authorised for non-disclosure in the *Al Mahdi* case, must be considered anew by this Chamber. In *Al Mahdi*, the Single Judge authorised the withholding of Witness P-0113's identity and disclosure of an anonymous summary in lieu of the Witness's statement and associated materials, on the premise that the Prosecution would not rely on Witness P-0113's evidence at the confirmation hearing and any prejudice to the defence would be limited.¹⁴ In fact, the Prosecution emphasised as much in its initial application.¹⁵
17. The Prosecution now intends to submit an updated anonymous summary of Witness P-0113's statement and summaries of two related investigator notes as potentially incriminating evidence against the Suspect, and rely on this evidence at the confirmation hearing.
18. Although regulation 42(1) stipulates that "protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court", the re-characterisation of Witness P-0113's evidence in relation to the Suspect favours the requesting of a new authorisation for non-disclosure under rules 81(2) and 81(4) of the Rules.¹⁶ Further, and notwithstanding the limited information provided by the Prosecution, the content of Witness P-0113's testimony appears to be much more relevant to the suspect in this case.
19. These factors, as well as the Prosecution's intention to rely on the Witness's testimony at the confirmation hearing, requires that the Motion to be considered as a new application for judicial authorisation to withhold the identity of Witness P-0113 from the Al Hassan Defence.

¹⁴ *Al Mahdi*, Second Decision on the Prosecutor's requests for redactions, 16 December 2015, [ICC-01/12-01/15-61](#), para 10.

¹⁵ *Al Mahdi*, Public redacted version of "Prosecution's motion for authorisation to disclose summaries for witnesses MLI-OTP-P-0004, MLI-OTP-P-0113, MLI-OTP-P-0121, and MLI-OTP-P-0146, upon whose evidence the Prosecution will not rely at the confirmation hearing", 11 December 2015, ICC-01/12-01/15-59-Conf-Exp, 25 October 2016, [ICC-01/12-01/15-59-Red2](#), para 31

¹⁶ *Ntaganda*, Redacted Seventh Decision on the Prosecutor's Requests for Redactions, 3 July 2014, [ICC-01/04-02/06-248-Red2](#), para 14.

(B) *No objective risk from disclosure to the Defence*

20. The Prosecution fails to demonstrate an objective risk to Witness P-0113 that requires the withholding of relevant information and potentially exculpatory evidence from the Defence and prejudicing the Suspect's fair trial rights, including the right to confront the evidence against him. Rather the Prosecution bases much of its Motion on broad-sweeping arguments and untested associations between the Suspect and armed groups operating in northern Mali.
21. For instance, the Prosecution considers the general security situation in Mali to be a significant factor weighing in favour of non-disclosure,¹⁷ but fails to point to concrete factors that lead to the conclusion of an objective risk to Witness P-0113 from the disclosure of their identity to the Defence that is not inherent to the Witness's circumstances. In *Katanga*, the Appeals Chamber held: "[d]angers that cannot be overcome by redactions because they are inherent in the situation itself cannot, as such, provide a justification for redactions."¹⁸ However the Prosecution continues to point to dangers inherent to the Witness's current circumstances, ie their location in northern Mali and demonstrated willingness to cooperate with the ICC. This does not provide reasonable justification for non-disclosure to the Defence.
22. Mr Al Hassan is, at present, a suspect in proceedings before the Court. No charges have been made against him. The Prosecution's assumptions concerning the Suspect's association with armed groups does not prove an objective risk to Witness P-0113, but lead to a reversal of the presumption of innocence to which the Suspect is entitled, and effectively punishes him by limiting his ability to confront the evidence against him.
23. The Defence also re-emphasises that if the type of assumptions proffered by the Prosecution in relation to the Suspect's association with members of "jihadist groups" are accepted as meeting the standard for non-disclosure under rules 81(2) or 81(4), then the identity of almost every individual in Mali in contact with the Prosecution

¹⁷ Compare *Al Hassan*, Public redacted version of "Amended Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0431 upon whose evidence the Prosecution will rely at the confirmation hearing", 11 June 2018, ICC-01/12-01/18-48-Conf-Exp, 10 July 2018, [ICC-01/12-01/18-48-Red2](#), paras 36, 38 and 39; and Prosecution's Motion, paras 35 and 37.

¹⁸ *Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, [ICC-01/04-01/07-475](#), para 98.

could be withheld on similar grounds.¹⁹ Indeed, the Prosecution states as much in its Motion.²⁰

24. Arguments in relation to intentional or inadvertent disclosure of confidential information by the Defence²¹ must also be dismissed, particularly in the absence of any proof that the Defence's professional obligations are insufficient to protect the identity of relevant witnesses.²² The Defence does not accept the Prosecution's submissions in this regard. These statements are unfair to defence staff in general, and fail to show proper deference to the ability of team members to conduct themselves as legal professionals subject to strict professional obligations.
25. The Prosecution's submissions set a low threshold for non-disclosure under rules 81(2) and 81 (4) of the Rules, potentially leading to broad-sweeping application to Prosecution witnesses. This would not only undermine the Defence's ability to prepare its case, but it would seriously prejudice the Suspect's fair trial rights, which include the right to confront the evidence against him.

(C) *The Prosecution's proposed measures are not necessary*

26. Even if the Single Judge determines the existence of an objective risk to Witness P-0113, non-disclosure of the Witness's identity and submission of anonymous summaries are not necessary in this case.
27. In assessing the need for a protective measure, the Single Judge should not only consider whether there are less restrictive alternative measures, but also whether non-disclosure could overcome or reduce the risk to Witness P-0113,²³ and whether the

¹⁹ See also *Al Hassan*, Public redacted version of the Defence response to the confidential redacted version of the Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0431, 19 July 2018, [ICC-01/12-01/18-58-Red2](#), para 10.

²⁰ Prosecution's Motion, paras 56-57.

²¹ Compare *Al Hassan*, Public redacted version of "Amended Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0431 upon whose evidence the Prosecution will rely at the confirmation hearing", 11 June 2018, ICC-01/12-01/18-48-Conf-Exp, 10 July 2018, [ICC-01/12-01/18-48-Red2](#), paras 40-41; and Prosecution's Motion, para 39.

²² *Ntaganda*, Decision on disclosure concerning an individual previously considered to be called as a witness in rebuttal, 11 April 2018, [ICC-01/04-02/06-2271](#), paras 25 and 27. See also *Al Hassan*, Public redacted version of the Defence response to the confidential redacted version of the Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0431, 19 July 2018, [ICC-01/12-01/18-58-Red2](#), para 11.

²³ *Gbagbo*, First decision on the Prosecutor's requests for redactions and other protective measures, 27 March 2011, [ICC-02/11-01/11-74-Red](#), para 57.

rights of the Suspect are restricted only as far as necessary.²⁴ Even when measures that limit the Suspect's rights are necessary to protect people at risk on account of the activities of the Court, "these cannot extend to denying him [...] a fair trial."²⁵

28. The Prosecution does not indicate with any specificity whether less intrusive alternative protective measures are available – only that a heavily redacted statement "would still allow a person with first-hand knowledge of the events, such as the suspect, to potentially identify the witness."²⁶ The Prosecution also fails to explain how its summary would be any different from a redacted statement in this respect, or how it would overcome the risk to Witness P-0113. Further, a Prosecution-prepared summary of Witness P-0113's statement would generally be considered as less reliable, and therefore having lower probative value, than a redacted version of the statement.²⁷
29. In the absence of any discernible impact on the risks facing Witness P-0113, and in light of the prejudice that would be caused to the Suspect's fair trial rights, the protective measures proposed by the Prosecution, which include withholding exculpatory material from the Defence, go further than necessary to protect Witness P-0113 and must not be adopted in this case.

(D) *Prejudice to the Suspect outweighs the need for non-disclosure*

30. Whether non-disclosure should be authorised requires careful assessment on a case-by-case basis, balancing the various interests at stake.²⁸ Article 68(1) also cautions

²⁴ *Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, [ICC-01/04-01/06-568](#), para 37; and *Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, [ICC-01/04-01/07-475](#), para 99.

²⁵ *Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Statute Conference on 10 June 2008, 13 June 2008, [ICC-01/04-01/06-1401](#), para 80.

²⁶ Prosecution's Motion, para 44.

²⁷ *Lubanga*, Decision concerning the Prosecution Proposed Summary Evidence, 4 October 2006, [ICC-01/04-01/06-517](#), p 4. See also ICTY, *Prosecutor v Galić*, Decision on Interlocutory Appeal Concerning Rule 92bis(C), [IT-98-29-AR73.2](#), 7 June 2002, paras 29-30.

²⁸ *Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, [ICC-01/04-01/07-475](#), para 66.

that protective measures “shall not be prejudicial to or inconsistent with the right of the accused and a fair and impartial trial”.

31. Although the standard for permitting non-disclosure at the confirmation stage may, in some circumstances, be less demanding than at trial, it should not be applied so as to undermine the Suspect’s right to challenge the evidence against him under article 61(6)(a) of the Statute or the Prosecution’s obligations to disclose material relevant to the Suspect’s case.
32. The obligation to disclose exculpatory evidence in particular goes to the heart of the Suspect’s right to a fair trial.²⁹ In fact, “[i]t is the most important, if not the only, instrument for the defence to counterbalance the greater resources of the prosecution and achieve some kind of ‘equality of arms’. It ‘is not a secondary’ obligation ‘to be complied with after everything else is done’ but ‘it is as important as the obligation to prosecute’.”³⁰
33. While the precise scope and content of the statement and associated materials have not been made known to the Defence, Witness P-0113’s testimony and evidence generally pertains to crimes allegedly committed by armed groups in Timbuktu as well as the structure and leaders of these groups, including Ansar Dine and AQIM.³¹ As the Prosecution alleges that [REDACTED],³² the evidence provided by Witness P-0113 appears to be highly relevant to the case against the Suspect and must be examined by the Defence.
34. To ensure full equality of arms, the Suspect must be able to confront Prosecution witnesses and challenge the reliability of Prosecution evidence. This cannot be done in circumstances where the Defence is made to rely on anonymous summaries of witness statements prepared by the Prosecution, and relevant information – including exculpatory material – is withheld.

²⁹ *Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Statute Conference on 10 June 2008, 13 June 2008, [ICC-01/04-01/06-1401](#), para 77.

³⁰ Kai Ambos, *Treatise on International Criminal Law, Volume III: International Criminal Procedure* (OUP 2016) p 532.

³¹ Prosecution’s Motion, para 47.

³² [REDACTED].

35. Witness P-0113's testimony appears to be highly relevant to the case against the Suspect, and the Prosecution has stated its intention to rely on this Witness's evidence at the confirmation hearing. Although the Witness faces risks to their safety on account of current circumstances, withholding their identity from the Defence does not overcome or reduce those risks. By all counts, the Prosecution's proposed measures for non-disclosure are disproportionate to the prejudicial impact on the Suspect's right to a fair trial, and should not be permitted in this case.

(E) *If non-disclosure is authorised, the Prosecution should not be permitted to rely on the evidence of Witness P-0113 at the confirmation hearing*

36. If the Single Judge is inclined to grant the Prosecution's proposed measures, then the Prosecution should be prevented from relying on evidence provided by Witness P-0113 at the confirmation hearing.

37. Article 69(4) of the Statute provides that a Chamber "may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness". This assessment is not affected by the stage of the proceedings, and the threshold for relying on such evidence is not lower in the context of a confirmation hearing.³³

38. The Prosecution submits that there are no feasible alternative measures to protect Witness P-0113 other than non-disclosure of their identifying information to the Defence. In this case, given the relevance of the Witness's testimony to the Suspect, the proposed conditions for disclosure, ie anonymity and summarised information, would not be permissible for use at trial. If then the Prosecution could not rely on Witness P-0113's testimony at trial in the form currently proposed, the Prosecution should not be permitted to rely on an anonymous summary of Witness P-0113's testimony at the confirmation hearing.

39. Indeed, as stated by the Single Judge in *Katanga and Ngudjolo*, "the Prosecution should not be allowed to rely at the confirmation hearing on the evidence given by a

³³ *Ruto and Sang*, Transcript of 2 September 2011, ICC-01/09-01/11-T-6-Red-ENG, page 3, lines 7-8 ("The Chamber recalls the provision of Article 69(3), according to which the parties submit evidence which is relevant to the case.")

witness (be it in written format or through oral testimony) if the Prosecution cannot subsequently rely on the evidence of the said witness for the purpose of the trial”.³⁴

(F) *Probative value of anonymous witness summaries*

40. If the Single Judge grants the Motion, and the Prosecution relies on the Witness P-0113’s anonymous evidence at the confirmation hearing, then that evidence must be considered as having lesser probative value than if the Witness’s identity had been made known to the Defence. This is because the Defence is prevented from effectively challenging the reliability of statements of witnesses whose identities have not been disclosed.³⁵
41. Additionally, the Prosecution cannot, at the confirmation hearing, rely on any information which does not appear in the summary evidence, such as the identity, position and other identifying features of Witness P-0113.³⁶

(G) *Need for lesser-redacted version*

42. Finally, the version of the Motion made available to the Defence is missing key information. The Prosecution crucially omits details relating to the content of Witness P-0113’s testimony and the manner in which the Prosecution intends to rely on Witness P-0113’s evidence at the confirmation hearing. The annexes supporting the Prosecution’s arguments have also not been communicated to the Defence.
43. Many of the sources relied on by the Prosecution are not accessible to the Defence. For instance, numerous documents with ID numbers that are used to support the Prosecution’s submissions relating to the activity of armed groups in northern Mali [REDACTED].³⁷ In addition, footnote 36, which is used to support the Prosecution’s

³⁴ *Katanga and Ngudjolo*, Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12, 18 April 2008, [ICC-01/04-01/07-412](#), p 6.

³⁵ *Katanga and Ngudjolo*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008, [ICC-01/04-01/07-428-Corr](#), para 18. See also *Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, [ICC-02/05-02/09-243-Red](#), paras 51-52; *Katanga and Ngudjolo*, Decision on the confirmation of charges, 30 September 2008, [ICC-01/04-01/07-717](#), para 159; and *Lubanga*, Decision concerning the Prosecution Proposed Summary Evidence, 4 October 2006, [ICC-01/04-01/06-517](#), pp 4 and 6.

³⁶ *Lubanga*, Decision concerning the Prosecution Proposed Summary Evidence, 4 October 2006, [ICC-01/04-01/06-517](#), p 4.

³⁷ [REDACTED].

allegations of association between the Suspect and these armed groups, has been redacted completely.

44. Even where non-disclosure is authorised, a suspect or accused should at least be in a position to understand the extent of the prejudice suffered in light of the relevance of the non-disclosed information to their case. The Defence therefore requests that the Prosecution be directed to provide a lesser-redacted version of the Motion, and to provide information on the scope and content of Witness P-0113's testimony; whether the Witness has refused to disclose his identity to the Defence; whether the Witness knows the Suspect personally; if so, whether the Witness will attest to the Suspect personally; and how the Prosecution intends to rely on Witness P-0113's evidence at the confirmation of charges hearing.

V. Conclusion

45. In this case the Prosecution fails to demonstrate any concrete or objective circumstances that warrant withholding relevant information relating to Witness P-0113 from the Defence. Instead, the Prosecution reiterates general arguments relating to the security situation in Mali and the activity of armed groups without providing any clear connection to the Suspect. Not only do these arguments set an unreasonably low threshold for non-disclosure under rules 81(2) and 81(4) of the Rules, but it also reverses the presumption of innocence to which the Suspect is entitled.
46. In addition, the relevance of the Witness's testimony and limited utility of non-disclosure in this case means that, even if there is an objective risk to the Witness from disclosing their identity to the Defence, the Prosecution's proposed measures are outweighed by the prejudicial impact to the Suspect's fair trial rights.
47. Accordingly, the Prosecution's Motion should be dismissed and the identity of Witness P-0113 should be disclosed to the Defence, along with all materials arising from their interaction with the Prosecution, including screening notes, investigator notes, and documents provided by the Witness to the Prosecution. This will ensure that the Suspect's right to access exculpatory material, including the identity of Prosecution witnesses, and the right to challenge the credibility of evidence against him are protected.

48. Alternatively, if the Single Judge authorises the non-disclosure of Witness P-0113's identity, the Defence considers that appropriately redacted versions of the Witness's statement and associated materials would be preferable to anonymous summaries.
49. The Defence also respectfully requests that the Single Judge direct the Prosecution to provide a lesser-redacted version of the Motion so as to allow the Defence to make a proper and complete assessment of the materiality of the Witness's testimony to the Suspect's case.



Yasser Hassan
Lead Counsel for Mr Al Hassan

Dated this 24th Day of September 2018
At The Hague, The Netherlands