



Original: English

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

Date: 27 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**

**Public redacted version of the Defence response to the Prosecution's motion for  
authorisation to withhold the identity of Witness MLI-OTP-P-0100**

**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**

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  
(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**

## **I. Introduction**

1. On 17 September 2018, the Defence was notified of the Prosecution's motion for authorisation to redact identifying information from the statement of Witness MLI-OTP-P-0100, which the Prosecution intends to disclose to the Defence under rule 77 of the Rules of Procedure and Evidence.<sup>1</sup>
2. The Prosecution submits that non-disclosure of the Witness's identity to the Defence is necessary in order to protect the Witness, and to protect the Prosecution's ongoing and future investigations in Mali. It also submits that there will be no prejudice to the Defence as the Prosecution will not rely on the Witness's statement at the confirmation hearing.
3. In the view of the Defence, the Prosecution fails to demonstrate that an exception to the overriding principle of full disclosure is warranted in this case. In the absence of an objective risk arising from disclosure, the Prosecution's proposed measures do not serve to protect Witness P-0100 but instead infringe on Mr Al Hassan's fair trial rights. Accordingly, the Prosecution's motion should be dismissed and all relevant information disclosed to the Defence.

## **II. Classification**

4. In accordance with regulation 23bis(2) of the Regulations of the Court, this response is classified as confidential *ex parte*, available only to the Defence, Prosecution and Victims and Witnesses Unit, as the request to which it relates is classified the same. This filing is also classified as confidential *ex parte* pursuant to regulation 23bis(1) of the Regulations of the Court as it contains sensitive information relating to the conditions of Mr Al Hassan's detention.

## **III. Applicable law**

5. The Prosecution is subject to broad disclosure obligations under the ICC statutory framework, including the obligation to disclose evidentiary material in full. Non-

---

<sup>1</sup> *Al Hassan*, Confidential redacted version of the "Prosecution's motion for authorisation to disclose a redacted statement of Witness MLI-OTP-P-0100, whose evidence will not be relied upon at the confirmation hearing", 17 September 2018, ICC-01/12-01/18-124-Conf-Exp-Red (the Prosecution's **motion**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

disclosure under rules 81(2) and 81(4) of the Rules is an exception to the overriding principle of full disclosure.<sup>2</sup>

6. The legal principles applicable to non-disclosure of information to the Defence are clear:<sup>3</sup> (i) the Prosecution must demonstrate the existence of an objectively justifiable risk as a result of disclosure *to the Defence* specifically and not only the public in general;<sup>4</sup> (ii) non-disclosure must be necessary;<sup>5</sup> and (iii) non-disclosure must be proportionate to the prejudice caused to the Suspect, including his right to a fair and impartial trial.<sup>6</sup>
7. Judicial authorisation to withhold relevant information from the Defence must be based upon a careful examination of the case<sup>7</sup> and plainly justified.<sup>8</sup> Importantly, the

<sup>2</sup> *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.

<sup>3</sup> See Response to the Prosecution's motion under regulation 42(3) for authorisation to disclose an updated anonymous summary for Witness MLI-OTP-P-0113, 2 August 2018, ICC-01/12-01/18-103-Conf, paras 11-14; and *Décision relative à la requête du Procureur aux fins d'autorisation de la non-communication de l'identité du témoin MLI-OTP-P-0431*, 19 July 2018, ICC-01/12-01/18-88-Red2, paras 12-14 and 17.

<sup>4</sup> *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).

<sup>5</sup> *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.

<sup>6</sup> *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.

<sup>7</sup> *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.

<sup>8</sup> *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

Pre-Trial Chamber must also ensure that the non-disclosure would not result in the confirmation of charges hearing, viewed as a whole, to be unfair to the Suspect.<sup>9</sup>

#### IV. Submissions

(A) *No grounds to warrant deviating from the overriding principle of full disclosure*

8. ICC jurisprudence requires the Prosecution to demonstrate the existence of an objective risk to Witness P-0100 from the disclosure of her identity *to the Defence* and not the public in general.<sup>10</sup> The Prosecution however makes no attempt to do so,<sup>11</sup> instead submitting that it does not intend to rely on Witness P-0100's statement at the confirmation hearing.<sup>12</sup> The Prosecution also suggests that the Witness, who is currently living [REDACTED],<sup>13</sup> [REDACTED].<sup>14</sup> This neither demonstrates the existence of an objective risk, nor does it meet the threshold for non-disclosure under rules 81(2) and 81(4) of the Rules. The Prosecution in turn is unable to support the contention that withholding relevant information is necessary to overcome or reduce a risk to Witness P-0100.
9. The Prosecution is obligated under rule 77 of the Rules to disclose any such items that may be 'material to the preparation of the defence'. In view of the principle of full disclosure, this includes information on the source of those items, which the Defence may require in preparation of its case. The scope of the Prosecution's disclosure obligations, pursuant to rule 77 or otherwise, is not contingent on a prosecutorial decision to rely on an item at a confirmation hearing or at trial. The Prosecution's intended use of Witness P-0100's statement is therefore irrelevant to an assessment on the need for the proposed protective measures.

---

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.

<sup>9</sup> *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.

<sup>10</sup> *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).

<sup>11</sup> See section B of the Prosecution's motion, which notably overlooks this key aspect of ICC case law.

<sup>12</sup> Prosecution's motion, para 37.

<sup>13</sup> Prosecution's motion, para 28.

<sup>14</sup> Prosecution's motion, para 30.

10. Baseless arguments concerning inadvertent or intentional disclosure of confidential information<sup>15</sup> must also be rejected. Mr Al Hassan has been held in detention since April 2017.<sup>16</sup> Following his transfer to the ICC on 31 March 2018, [REDACTED].<sup>17</sup> Mr Al Hassan has shown no intent to harm witnesses, and there is no evidence that he has contacted or attempted to contact members of armed groups during this time.
11. It also bears mentioning that Mr Al Hassan is under existing obligations under the Court's statutory framework to refrain from disclosing confidential case information, including insofar as such conduct would violate existing decisions and orders issued by the Chamber.<sup>18</sup> Nor does the Prosecution demonstrate that the Defence's professional obligations are insufficient to protect the identity of Witness P-0100 in this case.
12. Finally, it should be emphasised that Mr Al Hassan is at present a suspect in proceedings before the Court. No charges have been made against him. The Prosecution's speculation over inadvertent or intentional disclosure of confidential information by Mr Al Hassan – despite indication to the contrary – does not prove an objective risk to Witness P-0100, but leads to a reversal of the presumption of innocence to which Mr Al Hassan is entitled and punishes him by limiting access to relevant material in his case.

(B) *Non-disclosure unfairly prejudices the Suspect's right to a fair confirmation hearing*

13. Contrary to the Prosecution's assertion,<sup>19</sup> the proposed measures would in fact cause prejudice to the Suspect, as does non-disclosure of any information material to an individual's case. The relevant question is whether the proposed non-disclosure is proportionate to the prejudice arising to the Suspect.
14. The Suspect is entitled, pursuant to article 67(1)(b) of the Rome Statute, to adequate facilities for the preparation of his defence. According to the European Commission

<sup>15</sup> Prosecution's motion, para 27.

<sup>16</sup> See, for example, MLI-OTP-0061-1622, p 1627.

<sup>17</sup> [REDACTED].

<sup>18</sup> See, for example, [REDACTED]; and Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant, 31 May 2018, [ICC-01/12-01/18-40-Anx.](#)

<sup>19</sup> Prosecution's motion, para 39.

of Human Rights, this means the Suspect must have ‘the opportunity to organize his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the [...] court’.<sup>20</sup> In addition, the Suspect is entitled under article 67(1)(e) to raise defences and to present other evidence admissible under the Statute. Withholding the source of relevant records, documents or items, including those disclosed under rule 77 which may be exculpatory in nature or otherwise material to the Suspect’s case, impedes the Suspect’s ability to exercise his rights in this regard, and prevents the Defence from building its case.<sup>21</sup>

15. Witness P-0100 attests to the behaviour of ‘jihadist groups’ following their arrival in Timbuktu, one of which the Suspect is alleged to have been a member of. The Witness also compares them to the MNLA which preceded them, and whose members are alleged to have committed crimes such as rape and murder. Based on this, the Witness may have information that can help distinguish between the conduct of various actors present in Timbuktu between 2012 and 2013. Witness P-0100 also refers to an individual known as Mohamed Moussa, [REDACTED].
16. The identifying information of a witness who provides information material to a suspect’s case falls squarely within the Prosecution’s obligation to disclose, irrespective of the stage of the proceedings or whether the Prosecution relies on material at the confirmation hearing. Neither does the Prosecution’s decision to rely on an item at a hearing affect the materiality of that item to the defence case.
17. In this case, having failed to demonstrate the existence of an objective risk or the necessity of non-disclosure to the Defence, the Prosecution’s proposed protective measures only prejudice the Suspect and his right to actively present a defence. At the same time, the Prosecution sets an unreasonably low threshold for non-disclosure under rules 81(2) and 81(4) of the Rules and, if adopted, would hamper meaningful contribution by the Defence during the pre-trial stage of the proceedings.

<sup>20</sup> *Can v. Austria*, Series A, No 96, 30 September 1985, Commission Report, para 53 (available [here](#)). See also Schabas and McDermott, ‘Article 67 Rights of the Accused’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary* (3rd edition, Beck, Hart, Nomos: 2016), p 1662, para 24.

<sup>21</sup> *Ruto*, Decision setting the Regime for Evidence Disclosure and Other Related Matters, 6 April, [ICC-01/09-01/11-44](#), para 6

**V. Conclusion**

18. For these reasons, with a view to fostering an open and transparent disclosure process and ensuring that Mr Al Hassan's fair trial rights are protected at all stages in the proceedings, the Defence respectfully requests that the Prosecution's motion be dismissed and all relevant information be disclosed to the Defence.



---

Yasser Hassan  
Lead Counsel for Mr Al Hassan

Dated this 27<sup>th</sup> Day of November 2018  
At The Hague, The Netherlands