



Original: English

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

Date: 11 December 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 request for authorisation to withhold the identity of Witness MLI-OTP-P-0608 upon whose evidence the Prosecution will rely at the confirmation of charges hearing”

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 8 November 2018, the Defence was notified of the confidential redacted version of the Prosecution's request to withhold the identity of Witness MLI-OTP-P-0608 upon whose evidence the Prosecution will rely at the confirmation hearing.¹ The Prosecution submits that withholding the identity of Witness P-0608 is necessary to protect her and her family, and to protect the Prosecution's ongoing investigations in Mali. It further submits that the proposed measures will not prejudice the Suspect's fair trial rights.
2. 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. Without an objectively justifiable risk arising from disclosure to the Defence specifically, the Prosecution's proposed measures do not serve to protect Witness P-0608 but instead abrogate Mr Al Hassan's fair trial rights. As such, the Prosecution's request should be dismissed and all relevant information disclosed to the Defence.

II. Classification

3. In accordance with regulation 23bis(2) of the Regulations of the Court, this response is classified as confidential *ex parte*, available only to the Prosecution, the Defence and the Victims and Witnesses Unit, as the filing to which it relates is classified the same. This document, which contains no confidential information, can be reclassified as public following the rendering of the Single Judge's decision.
4. At this juncture, the Defence wishes to point out that the Prosecution has, for the most part, classified its requests for withholding witness identities under rules 81(2) and 81(4) of the Rules as confidential *ex parte*, available to the Prosecution, the Defence and the Victims and Witnesses Unit.² However the recent filing of numerous public

¹ *Al Hassan*, Confidential redacted version of the "Prosecution's Request for authorisation to withhold the identity of protected Witness MLI-OTP-P-0608 upon whose evidence the Prosecution will rely at the Confirmation Hearing", 8 November 2018, ICC-01/12-01/18-177-Conf-Exp-Red (the Prosecution's **request**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

² See, for example, Confidential redacted version of the "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", 13 June 2018, ICC-01/12-01/18-48-Conf-Exp-Red; Confidential redacted version of the "Prosecution's Request for authorisation to withhold the identity of Witness MLI-OTP-P-0111 upon whose evidence the Prosecution will not rely at the confirmation hearing", 6 September 2018, ICC-01/12-01/18-117-Conf-Exp-Red; Confidential redaction version of the "Prosecution's Request for

versions of the Prosecution's rule 81 requests show little difference between the information made available to the Defence in the confidential versions and the information made available to the general public.³ To this end, the Defence seeks clarification from the Prosecution as to its reasons for applying a higher confidentiality classification than necessary; that is, the reasons that the requests made pursuant to rule 81 of the Rules have been classified as confidential *ex parte* rather than confidential. The Defence also asks that the Single Judge remind the Prosecution of its duty to maintain the publicity of these proceedings, which necessarily includes appropriate classification of filings.

III. Submissions

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

5. The Prosecution's request, as with previous requests of this nature, is based on broad-sweeping arguments that have limited relevance to the Suspect in ICC custody. It

authorisation to withhold the identity of Witness MLI-OTP-P-0160 upon whose evidence the Prosecution will rely at the confirmation hearing", 13 September 2018, ICC-01/12-01/18-121-Conf-Exp-Red; Confidential redacted version of the "Prosecution 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; Confidential redacted version of the "Prosecution's motion for authorisation to disclose summaries of the statements of Witnesses MLI-OTP-P-0583, MLI-OTP-P-0589 and MLI-OTP-P-0593, upon whose evidence the Prosecution will not rely at the confirmation hearing", 18 September 2018, ICC-01/12-01/18-129-Conf-Exp-Red; Confidential redacted version of the "Prosecution motion for authorisation to disclose an updated anonymous summary of information obtained from Witness MLI-OTP-P-0147, whose evidence the Prosecution will rely upon at the confirmation hearing", 26 September 2018, ICC-01/12-01/18-134-Conf-Exp-Red; Confidential redacted version of the "Prosecution's Request for authorisation to withhold the identity of Witnesses MLI-OTP-P-0553 and MLI-OTP-P-0574 upon whose evidence the Prosecution will rely at the confirmation hearing", 26 September 2018, ICC-01/12-01/18-135-Conf-Exp-Red; Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0130 upon whose statement the Prosecution will not rely at the confirmation hearing, 27 September 2018, ICC-01/12-01/18-136-Conf-Exp-Red; Confidential redacted version of the "Prosecution's Request for authorisation to continue withholding the identity of protected Witness MLI-OTP-P-0114, upon whose evidence the Prosecution will rely at the confirmation hearing", 3 October 2018, ICC-01/12-01/18-141-Conf-Exp-Red; Confidential 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", 8 October 2018, ICC-01/12-01/18-145-Conf-Exp-Red; Confidential redacted version of the "Prosecution's Request for authorisation to withhold the identity of Witness MLI-OTP-P-0576 upon whose evidence the Prosecution will not rely at the Confirmation of Charges Hearing", 10 October 2018, ICC-01/12-01/18-151-Conf-Exp-Red; and Confidential 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", 2 November 2018, ICC-01/12-01/18-167-Conf-Exp-Red.

³ Compare, for example, the confidential redacted version of the Prosecution's request (ICC-01/12-01/18-177-Conf-Exp-Red) with the public redacted version filed on 12 November 2018 (ICC-01/12-01/18-177-Red). The only additional redactions appear in paragraphs 1, 11, 21 and 26, and none of them warrant the *ex parte* classification applied to the confidential redacted version.

relies on the general security situation in Mali; assumptions concerning the Suspect's relationship with certain armed groups; and baseless fears of inadvertent or intentional disclosure by the Defence. Rather than leading to the conclusion of an objectively justifiable risk to Witness P-0608 from disclosure of her identity to the Defence, the Prosecution merely highlights difficulties inherent to its investigation [REDACTED] and seeks relief from the Chamber at the expense of the Suspect's fair trial rights.

6. The Prosecution, for instance, submits that the capacity of non-state actors in Mali to carry out attacks against international organisations weighs in favour of non-disclosure.⁴ It does not explain, however, how these dangers might be affected from disclosure *to the Defence specifically*. Here the Prosecution suggests that 'threat actors', such as members of Jama'at Nusrat Al-Islam wal-Muslimin (**JNIM**), could obtain knowledge of Witness P-0608's cooperation with the ICC from intentional or inadvertent disclosure of confidential information but without providing any tangible or concrete indicators to this effect.
7. Mr Al Hassan has been held in detention since April 2017.⁵ He has shown no intent to harm witnesses or individuals cooperating with the Court, and there is no evidence to suggest that he has been in contact with members of, or individuals associated with, armed groups operating in Mali, including JNIM. 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 Mr Al Hassan's contact with members of armed groups – despite evidence to the contrary – does not prove an objective risk to Witness P-0608, but instead 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.
8. The Prosecution also fails to demonstrate how the Defence's professional obligations are insufficient to protect the identity of Witness P-0608. The Defence treats its confidentiality obligations with the utmost seriousness and categorically rejects any suggestion to the contrary. Concerns regarding the Defence's ability to carry out its duties, particularly where they have not been substantiated, are detrimental to its role in and contribution to the proceedings, and must be disregarded by the Single Judge.

⁴ Prosecution's request, paras 22-24.

⁵ See, for example, MLI-OTP-0061-1622, p 1627.

9. If the types of submissions offered by the Prosecution are accepted as meeting the standard for non-disclosure under rules 81(2) or 81(4) of the Rules, then the identity of almost every individual in Mali who has been in contact with the Prosecution could be withheld from the Defence on similar grounds. Although a lower threshold for non-disclosure to the Defence might be accepted at the pre-trial stage than at the trial stage, it must not be rendered so low as to make it pointless for the Defence to participate in the confirmation of charges hearing.

(B) *Non-disclosure is unduly prejudicial to the Suspect's fair trial rights*

10. The Prosecution requests authorisation to withhold the identity of an individual on whose information it will rely at the confirmation of charges hearing. According to the request, Witness P-0608's testimony 'concerns the new rules imposed on the population [of Timbuktu] by the armed groups, and some crimes committed during their control'.⁶ Many of these crimes the Prosecution will likely seek to impute to the Suspect given his alleged role as *de facto* head of the Islamic police of Ansar Dine. The Defence must therefore be in a position to test Witness P-0608's testimony, and this cannot be done where her identity is not known.
11. The disclosure mechanism goes to the heart of a person's right to a fair trial, and the principle of full disclosure is not defined by the stage of the proceedings or whether charges have been confirmed. While some safeguards may help curb the extent of prejudice to the Suspect from non-disclosure,⁷ these measures do not wholly compensate for the inability to test the Prosecution's evidence. Nor do they allow the Defence to make a meaningful contribution to pre-trial proceedings if relevant information need only be disclosed in the event that the case goes to trial.⁸

⁶ Prosecution's request, para 35.

⁷ For example : assigning lesser probative value to anonymous-source information (Décision relative à la requête du Procureur aux fins d'autorisation du dépôt d'un résumé anonyme concernant le témoin MLI-OTP-P-0113, 27 September 2018, [ICC-01/12-01/18-122-Red2](#), para 36) ; limiting the Prosecution's reliance on redacted material at the confirmation hearing (*Lubanga*, Decision concerning the Prosecution Proposed Summary Evidence, 4 October 2006, [ICC-01/04-01/06-517](#), p 4; and Décision relative à la requête du Procureur aux fins d'autorisation du dépôt d'un résumé anonyme concernant le témoin MLI-OTP-P-0113, 27 September 2018, [ICC-01/12-01/18-122-Red2](#), para 37); and the Chamber limiting its assessment of information to the form in which it is presented to the Defence (Décision relative au système de divulgation et à d'autres questions connexes, 16 May 2018, [ICC-01/12-01/18-31](#), para 32).

⁸ Décision relative à la requête du Procureur aux fins d'autorisation du dépôt d'un résumé anonyme concernant le témoin MLI-OTP-P-0113, 27 September 2018, [ICC-01/12-01/18-122-Red2](#), para 41; Prosecution's request, para 37.

12. It is incumbent on the Chamber to ensure that non-disclosure would not result in the confirmation of charges hearing, viewed as a whole, to be unfair to the Suspect. At present, the Prosecution has sought authorisation to withhold the identities of 19 witnesses, and has redacted the identifying information of countless potential witnesses.⁹ The more information that is sought to be withheld from the Defence, including the identities of witnesses on whose information the Prosecution will rely at the confirmation hearing, leads to greater restraint on the Defence's ability to test the Prosecution's case and provides fewer opportunities for defence participation. To ensure that pre-trial proceedings are fair and provide opportunity for meaningful defence participation, the Prosecution must remain obligated to present information in full and without redaction.

(C) *The redactions applied to the Prosecution's request limit the Defence's ability to respond*

13. As a final point, the Defence again emphasises the difficulty it faces in responding to the Prosecution's submissions given the extensive redactions applied to the request. If the Defence is to properly protect the Suspect's fair trial rights and execute its duties by submitting views on matters that affect these rights, it must have access to all relevant information, including the Prosecution's assessment of the security situation in Mali which is largely used to justify withholding the identity of Prosecution witnesses.

IV. Conclusion

14. Having failed to demonstrate the existence of an objectively justifiable risk to Witness P-0608 or the necessity of withholding her identity, the Prosecution's proposed measures simply prevent the Defence from testing the veracity of information on which the Prosecution will rely at the confirmation hearing. In doing so, the request sets a low threshold for non-disclosure under rules 81(2) and 81(4) of the Rules that, if adopted, would hamper meaningful contribution by the Defence during the pre-trial stage of the proceedings more generally. For these reasons, with a view to fostering an open and transparent disclosure process and ensuring that Mr Al Hassan's fair trial

⁹ See Decision on the Prosecutor's Request for Clarification on the Non-Disclosure of Witnesses' Identities, 4 July 2018, [ICC-01/12-01/18-66](#).

rights are protected at all stages in the proceedings, the Defence respectfully requests that the Prosecution's request be dismissed and all relevant information and material be disclosed to the Defence.



Yasser Hassan
Lead Counsel for Mr Al Hassan

Dated this 11th Day of December 2018
At The Hague, The Netherlands