



Original: English

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

Date: 17 December 2018

Date of submission: 4
March 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

Public redacted version of the “Defence response to the Prosecution’s Update concerning Witness MLI-OTP-P-0111 and request for non-disclosure of documents”

**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:

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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

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Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

Introduction

1. On 6 September 2018, the Defence was notified of the confidential redacted version of the Prosecution's request to withhold the identity of Witness MLI-OTP-P-0111 upon whose evidence the Prosecution will not rely at the confirmation hearing.¹ The Defence submitted its response on 17 September 2018.²
2. On 6 November 2018, the Chamber issued a decision granting the request to withhold the identity of, *inter alia*, Witness P-0111.³
3. As noted by the Single Judge, while the Defence was not opposed to the Prosecution's Request to withhold the identity of P-0111, the Defence reserved its right to request the disclosure of Witness P-0111's identity and other relevant information should their materiality to Mr Al Hassan's case subsequently become apparent.⁴
4. On 4 December 2018, the Defence was notified of the confidential redacted version of the Prosecution's Update, filed on 30 November 2018, concerning the Witness.⁵
5. The Defence wishes to express its concerns to the Single Judge in relation to [REDACTED] and the unjustified withholding of relevant information by the Prosecution. The Defence requests the expedited disclosure of all materials related to P-0111 and requests to be informed of any issues concerning the availability of witnesses irrespective of the manner in which the Prosecution will rely on them at this stage of the proceedings.

¹ *Al Hassan*, 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 (the Prosecution's **Request**). All cases referred to in this document are to the *Al Hassan* case unless stated otherwise.

² Confidential version of the "Response to 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", 17 September 2018, ICC-01/1201/18-125-Conf-Exp (the Defence **Response**).

³ Confidential redacted version of the "Décision relative aux requêtes du Procureur aux fins d'autorisation de la non-communication de l'identité des témoins P-0100, P-0111, P-0130, P-0576, P-0581, P-0583, P-0589, P-0592, P-0593 et P-0594", 6 November 2018, ICC-01/12-01/18-174-Conf-Exp-Red (the Single Judge **Decision**).

⁴ Response, paras 5 and 6 and Decision, para. 41.

⁵ Confidential redacted version of the "Update concerning Witness MLI-OTP-P-0111 and request for non-disclosure of documents", 30 November 2018, ICC-01/12-01/18-195-Conf-Exp-Red, submitted to the Defence on 4 December 2018 (the **Prosecution's Update**).

Classification

6. [REDACTED].
7. A confidential redacted version will be filed simultaneously pursuant to Regulation 23bis(2) of the Regulations of the Court, as it is a response to a filing with the same classification.

Submissions

8. The Defence notes that new elements concerning Witness P-0111 have been made available to the Defence months following the Defence Response to the Prosecution's Request. This information [REDACTED] may therefore affect the Defence's investigative opportunities in the current proceedings or at a later stage. The Defence should have been made aware of this specific situation in order to protect its right to a full and fair opportunity to assess the materiality of P-0111's evidence through its own investigation.
9. Indeed, the Defence has an equal right to investigation and to search for the truth,⁶ despite the Prosecution's duty 'to investigate incriminating and exonerating circumstances equally' in accordance with article 54(1)(a) of the Rome Statute.
10. [REDACTED], which enables the parties to effectively participate in the proceedings and ensure the Suspect's right to adequate time and facilities for the preparation of his defence. Obstacles to accessibility are amongst the elements that have a direct impact on the right to a full and fair opportunity to test the evidence and may therefore irrevocably damage investigative opportunities for the Defence.
11. In this regard, the Prosecution has an obligation to [REDACTED].⁷ This includes immediately informing the Defence of any concerns that may prevent [REDACTED] making genuine attempts towards providing the Defence, as early as possible, with the opportunity to assess the materiality of evidence that may fall into desuetude.

⁶ *Katanga*, Judgement 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. 64.

⁷ *Banda and Jerbo*, Decision on the Defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, para. 128.

12. Protective measures such as withholding witness identities must always ensure that ‘the interests of the Defence are protected so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms.’⁸ In other words, the protection of the Prosecution’s investigative work must not be done at the expense of the Defence’s investigation and fair trial rights pursuant to article 67(1)(b) and (e).
13. In the case of P-0111, between October and November 2018, the Prosecution provided information to the Chamber in relation to the Witness. The existence of this communication was only made available to the Defence in the Prosecution’s Update and without disclosing their content.⁹
14. Furthermore, the Defence, from the context of the heavily redacted Prosecution’s Update, understands that there are, [REDACTED].¹⁰ [REDACTED].¹¹
15. [REDACTED] this information was unjustifiably withheld from the Defence. Irrespective of the Prosecution’s intention not to rely on the Witness at this stage of the proceedings, the Defence should have at least been privy to the mere existence of P-0111’s conditions as soon as they became available to the Prosecution. Additionally, the Prosecution must observe the proper procedure for doing so, by including **all** relevant information in the main request so as to allow the Defence to exercise its right to respond pursuant to Regulation 24 of the Regulations of the Court. In the present case, the Prosecution provided the information in an ‘Update’ [REDACTED].¹²
16. The Defence faces further obstacles to testing the evidence related to P-0111 due to the fact that, to date, and despite the Decision issued more than one month ago, the Prosecution has not yet disclosed P-0111’s evidence and has failed to justify this delay.

⁸ *Katanga*, Judgement 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. 63.

⁹ Prosecution’s Update, paras 2, 3-4.

¹⁰ Prosecution’s Update, para 6.

¹¹ [REDACTED].

¹² [REDACTED].

Conclusion

17. The Defence is seriously concerned by the practice of being uninformed and excluded from matters that play a central role in guaranteeing the fairness of the proceedings as a whole. This is particularly alarming when this practice relates to potentially expiring evidence due to inaccessibility to a witness.
18. The Defence respectfully requests the Single Judge to instruct the Prosecution to expedite the disclosure of all material relevant to P-0111 in accordance with the Decision. The Defence also reiterates its submissions reserving the right to request the identity of and evidence relevant to the Witness should their materiality to Mr Al Hassan's case subsequently become apparent.¹³
19. The Defence further requests the Single Judge to instruct the Prosecution to inform the Defence, without delay, of any issues regarding [REDACTED] of any of the witnesses irrespective of the manner in which the Prosecution intends to rely on them at this stage of the proceedings.



Yasser Hassan
Lead Counsel for Mr Al Hassan

Dated this 17th Day of December 2018
At The Hague, The Netherlands

¹³ Defence Response, paras 5 and 6 and Decision, para. 41.