



Original: English

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

Date: 3 December 2018

Date of submission: 22
May 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 motion for
authorisation to withhold the identity of Witness MLI-OTP-P-0520**

**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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I. Introduction

1. On 22 November 2018, the Defence was notified of the confidential redacted version of the Prosecution's motion to withhold the identity of Witness MLI-OTP-P-0520 upon whose evidence the Prosecution will rely at the confirmation hearing.¹ The Prosecution submits that Witness P-0520 [REDACTED].
2. The Defence is mindful [REDACTED]. In this regard, the Prosecution does not demonstrate that disclosure *to the Defence*, in light of the applicable regulations, would lead to [REDACTED] of the Witness.
3. While the status of the Witness may require that her identity be held from the public in general, the Prosecution does not demonstrate that disclosure *to the Defence* would expose the Witness to an objective risk of harm. The Defence respectfully requests the Single Judge to consider Mr Al Hassan's fair trial rights and uphold the overriding principle of non-disclosure by dismissing the Prosecution's motion.

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 motion to which it relates is classified the same. This filing is also classified as confidential *ex parte* pursuant to regulation 23bis(1) as it contains sensitive information relating to the conditions of the Suspect'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-disclosure under rules 81(2) and 81(4) of the Rules is an exception to the overriding principle of full disclosure.²

¹ *Al Hassan*, Confidential redacted version of the "Prosecution's motion for authorisation to withhold the identity of Witness MLI-OTP-P-0520, upon whose evidence the Prosecution will rely at the confirmation hearing", 16 November 2018, ICC-01/12-01/18-185-Conf-Exp, submitted to the Defence on 22 November 2018 (the Prosecution's **motion**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

² *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

6. The legal principles applicable to non-disclosure of information to the Defence are clear:³ (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;⁴ (ii) non-disclosure must be necessary;⁵ and (iii) non-disclosure must be proportionate to the prejudice caused to the Suspect, including his right to a fair and impartial trial.⁶
7. The Defence refers to its previous submissions in relation to the criteria for judicial authorisation to withhold information from the defence while ensuring that non-disclosure will not result in the confirmation of charges hearing, viewed as a whole, as unfair to the Suspect.⁷
8. The Defence further refers to its previous submissions on the relevance of the ‘Protocol on the handling of confidential information during investigations 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.

³ 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.

⁴ *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).

⁵ *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.

⁶ *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.

⁷ Defence response to the Prosecution’s request for authorisation to withhold the identity of Witnesses MLI-OTP-P-0553 and MLI-OTP-P-0574, 8 October 2018, ICC-01/12-01/18-149-Conf-Exp, para 7.

contact between a party or participant and witnesses of the opposing party or of a participant'.⁸

IV. Submissions

(A) *Disclosure to the Defence does not constitute risk to physical safety of the Witness*

9. The Prosecution submits that the withholding of the identity of the Witness from the Defence is necessary because there is an objective risk of physical harm. The Defence will address the issues raised in the motion within the limits of the redactions applied by the Prosecution.
10. According to the Prosecution's assessment 'the risk of physical harm to [Witness P-0520] is low'.⁹ Nevertheless, despite the low risk the Prosecution refers to the general security situation in Mali and the capacity of armed groups to carry out attacks against individuals who cooperated with the Court to justify withholding the identity of the Witness from the defence.¹⁰ Therefore, in light of this contradiction, the Prosecution does not demonstrate the risk of physical harm.
11. The Prosecution also makes unfounded assumptions concerning Mr Al Hassan's connection with members of armed groups and fears of inadvertent or intentional disclosure of confidential information by the Defence.¹¹ As previously submitted,¹² these arguments do not find support in the factual circumstances of the case and should not form the basis for withholding relevant information.

⁸ Defence response to the Prosecution's request for authorisation to withhold the identity of Witnesses MLI-OTP-P-0553 and MLI-OTP-P-0574, 8 October 2018, ICC-01/12-01/18-149-Conf-Exp [REDACTED].

⁹ Prosecution's motion, para 35.

¹⁰ Prosecution's motion, para 36.

¹¹ Prosecution's motion, paras 36.

¹² 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, 2 August 2018, ICC-01/12-01/18-103-Conf, para 24 ; Defence response to the Prosecution's request for authorisation to withhold the identity of Witness MLI-OTP-P-0160 upon whose evidence the Prosecution will rely at the confirmation hearing, 24 September 2018, ICC-01/12-01/18-133-Conf-Exp, para 10; Defence response to the Prosecution's request for authorisation to withhold the identity of Witness MLI-OTP-P-0160 upon whose evidence the Prosecution will rely at the confirmation hearing, 28 September 2018, ICC-01/12-01/18-138-Conf-Exp, para 10, 12; Defence response to the Prosecution's motion for authorisation to disclose anonymous summaries of the statements of Witnesses MLI-OTP-P-0583, MLI-OTP-P-0589 and MLI-OTP-P-0593, 1 October 2018, ICC-01/12-01/18-140-Conf-Exp, para 10.

12. In fact, Mr Al Hassan has been held in detention since April 2017.¹³ Following his transfer to the ICC on 31 March 2018, Mr Al Hassan has been subject to strict active monitoring of his non-privileged telephone calls and visits.¹⁴ Since this time, Mr Al Hassan has shown no intent to harm witnesses.¹⁵ 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.¹⁶
13. The Prosecution's motion refers to the withholding of information from the defence team in *Abu Garda*.¹⁷ The Single Judge then permitted the withholding of the identity of various witnesses 'due [...] to the fact that Abu Garda *is not currently detained*, [and] disclosure of the names of the witnesses to the Defence inevitably raises the possibility that information disclosed even on a limited basis might be revealed more broadly' (*emphasis added*).¹⁸ This approach, taken on markedly different factual circumstances, is not applicable on the current situation.
14. Mr Al Hassan is at present a suspect in proceedings before the Court. No charges have been brought against him. The Prosecution's speculation over Mr Al Hassan's contact with members of armed groups – despite indication to the contrary – does not prove an objective risk to the Witness, but instead leads to a reversal of the presumption of innocence to which Mr Al Hassan is entitled and punishes him by limiting his ability to confront the evidence against him.
15. The Defence re-emphasises that 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

¹³ See, for example, MLI-OTP-0061-1622, p 1627.

¹⁴ Décision relative à la requête présentée par le Procureur en application de la norme 101 du Règlement de la Cour, 5 April 2018, ICC-01/12-01/18-16-Conf-Exp.

¹⁵ Registry Report on the Implementation of the Monitoring Measures Ordered by the Single Judge, 21 May 2018, ICC-01/12-01/18-34-Conf-Exp, para 4.

¹⁶ See, for example, Third Decision on the Measures to Restrict Contact throughout the Pre-trial Phase of the Proceedings, 20 July 2018, ICC-01/12-01/18-95-Conf-Exp-Red; 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](#).

¹⁷ 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](#), para 33.

¹⁸ *Abu Garda*, Decision on the Prosecutor's Requests for Authorisation for Non-disclosure of Identities of Witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312 and DAR-OTP-WWWW-0314, 31 August 2009, [ICC-02/05-02/09-74](#), para 10; and Decision on the Prosecutor's Request for Authorisation for Non-disclosure of Witnesses DAR-OTP-WWWW-0433, 31 August 2009, [ICC-02/05-02/09-77](#), para 4.

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.¹⁹ Although a lower standard may be accepted for non-disclosure of relevant information prior to the confirmation of charges, the threshold should not be rendered so low as to make it pointless for the Defence to participate in the pre-trial stage of the proceedings.

(B) *Disclosure to the Defence does not constitute risk to psychological well-being, privacy and dignity of the Witness*

16. The Prosecution submits that the [REDACTED] pursuant to article 68(1) of the Statute.²⁰
17. Measures provided for in article 68(1) 'shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'. The Prosecution does not establish a clear link between disclosure *to the Defence* and the risk [REDACTED]. Instead, it bases the risk on an unfair assumption that the Defence would inadvertently or intentionally breach its confidentiality obligations.
18. The Pre-Trial Chamber has established robust measures that ensure any party's investigative activities do not breach a witness' privacy.²¹ 'Investigating parties', in the language of the Protocol on the handling of confidential information, does not make a distinction between the Prosecution and the Defence. It imposes the same obligations and requires the same standard of ethical conduct and professionalism from both parties. The Prosecution does not substantiate its assumption that the Defence is not as able as the Prosecution to protect the privacy and psychological

¹⁹ 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; 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-01113, 24 September 2018, [ICC-01/12-01/18-103-Red](#), para 23; and Defence response to the Prosecution's request for authorisation to withhold the identity of Witness MLI-OTP-P-0160 upon whose evidence the Prosecution will rely at the confirmation hearing, 24 September 2018, ICC-01/12-01/18-133-Conf-Exp, para 12.

²⁰ Prosecution's motion, para 47.

²¹ Protocol on the handling of confidential information, para 15.

well-being of witnesses, and that the Defence's investigative activities could lead to an inadvertent or deliberate disclosure.²²

(C) *Non-disclosure will unfairly affect the Suspect's fair trial rights*

19. The motion presents the Witness as an 'important witness' to the case.²³ The testimony of the Witness will, *inter alia*, address issues that are crucial to the case brought against the Suspect, including violations committed by armed groups, the organisation of the armed groups, the events occurring in Timbuktu, and [REDACTED].
20. While the Prosecution states that the Witness does not discuss Mr Al Hassan's direct role in the perpetration of these crimes,²⁴ the identity of the Witness, particularly given [REDACTED],²⁵ is a crucial part of understanding the Prosecution's case against the Suspect. Withholding the identity of this Witness would deprive Mr Al Hassan of his right to be informed 'in detail of the nature, cause and content of the charges brought against him',²⁶ to 'have adequate time and facilities for the preparation of the defence',²⁷ and to 'raise defences and to present other evidence'.²⁸
21. Pursuant to Article 68 of the Rome Statute, the Court has a mandate to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.' This must be done in a manner that is not prejudicial to the rights of the Suspect.²⁹ The Prosecution, in this regard, has not demonstrated the insufficiency of the available protection measures without derogating from Mr Al Hassan's right to a fair trial.
22. To date, and in accordance with the information provided by the Prosecution, the identity of at least 32 witnesses either has been withheld or will be subject to a

²² Prosecution's motion, para 46.

²³ Prosecution's motion, para 32.

²⁴ Prosecution's motion, para 54.

²⁵ Prosecution's motion, para 29.

²⁶ Article 67(1)(a) Rome Statute.

²⁷ Article 67(1)(b) Rome Statute.

²⁸ Article 67(1)(e) Rome Statute.

²⁹ Article 68(1).

withholding request, in addition to 7 witnesses whose situation remains pending.³⁰ This, in context and as a whole, already creates a significant gap in the Prosecution's case from the Defence's perspective and renders the task of understanding the 'nature, cause and content of the charges' challenging.

V. Conclusion

23. In this case the Prosecution fails to demonstrate any concrete or objective circumstances that warrant the withholding of the identity of Witness P-0520 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.
24. 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.



Melinda Taylor
Lead Counsel for Mr Al Hassan

Dated this 3rd Day of December 2018
At The Hague, The Netherlands

³⁰ Version confidentielle expurgée des « Éléments d'information concernant notamment la communication des éléments de preuve, les requêtes aux fins d'expurgation ou [REDACTED] et les questions de traduction », 13 November 2018, ICC-01/12-01/18-180-Conf-Red, paras 15-16, 21-22, 32-35, and 39.