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11 June 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 Request for authorisation to withhold the identity of Witness MLI-OTP-P-0625 upon whose evidence the Prosecution will not rely at the confirmation of charges hearing”, 11 February 2019, ICC-01/12-01/18-241-Secret-Exp

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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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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**Victims Participation and
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Other

I. Introduction

1. The Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the “Defence”) submits the present response to the Prosecution’s request for authorisation to withhold the identity of Witness MLI-OTP-P-0625.¹
2. The Prosecution submits that withholding the identity of this Witness and providing an anonymous summary of his statement are necessary to protect him [REDACTED]. The Prosecution further submits that the Suspect’s Defence will not be prejudiced by the requested measures at this preliminary stage of the proceedings.
3. The Defence submits that the Prosecution fails to demonstrate that an exception to the overriding principle of full disclosure is warranted in this case. Without an objective risk arising from disclosure to the Defence, the Prosecution’s proposed measures infringe upon Mr Al Hassan’s fair trial rights. The Prosecution’s motion should, accordingly, 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 secret, *ex parte*, available only to the Prosecution, the Defence and the Victims and Witnesses Unit, as the motion to which it relates is classified the same. This filing is also 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. In relation to the applicable law, the Defence refers to paragraphs 6 to 14 of its response to the Prosecution’s motion for authorisation to disclose an anonymous summary for Witness MLI-OTP-P-0113.²

¹ *Al Hassan*, Secret redacted version of the “Prosecution’s Request for authorisation to withhold the identity of Witness MLI-OTP-P-0625 upon whose evidence the Prosecution will not rely at the confirmation hearing”, 11 February 2019, ICC-01/12-01/18-241-Secret-Exp-Red, notified to the Defence on 13 March 2019 (the Prosecution’s **request**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

² Public redacted version of the Defence response to the Prosecution’s motion under regulation 42(3) for authorization to disclose an updated anonymous summary for Witness MLI-OTP-P-0113, 24 September 2018, [ICC-01/12-01/18-103-Red](#), paras 6-14.

IV. Submissions

(A) *Unexplained delay in filing the Prosecution's request*

6. At the outset, the Defence notes that the Prosecution's request was filed *ex parte* to the Pre-Trial Chamber on 11 February 2019, but was only notified to the Defence on 13 March 2019, over a month later. No explanation was given for this delay in making the request available to the Defence.
7. The Defence submits that this raises serious concerns over the Prosecution's case management. The pre-trial proceedings are already being delayed because of the Prosecution's inability to put together the Document containing the charges within the timeframe set by the Chamber. However, Mr Al Hassan, who has been in detention in The Hague, with strict monitoring measures for a year without charges is the one who is suffering the consequences of the delays in the proceedings caused by prosecutorial negligence.
8. The Defence respectfully requests the Single Judge to remind the Prosecution of its obligation to be diligent, and requests that any future failings of this type be sanctioned.

(B) *Disclosure to the Defence does not constitute a risk to the physical safety of the Witness [REDACTED]*

9. While the Defence is aware of the security situation in Mali and appreciates the need to withhold the identity of Witness P-0625 to the public at this stage of the proceeding, the Defence reiterates that the Prosecution's request to withhold the identity of Witness P-0625 to the Defence is unwarranted, unfounded and prejudicial to the rights of the Suspect.
10. The Prosecution alleges that P-0625 will be facing high risk [REDACTED].³
11. With regards to the Prosecution's concerns regarding *intentional* disclosure, the Prosecution cannot simply presume that the Defence will breach its professional obligations, obligations which have been carefully respected by the Defence at all

³ Prosecution's motion, paras 18 and 26.

times. The Defence does not accept the Prosecution's submissions in this regard and considers these assumptions insulting and unfair to Defence staff in general.

12. Furthermore, the Prosecution ignores the fact that Mr Al Hassan is in ICC custody under strict detention conditions. Indeed, Mr Al Hassan has been held in detention since April 2017.⁴ 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.⁵ Since this time, Mr Al Hassan has shown no intent to harm witnesses. 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.⁶
13. With regards to the Prosecution's concerns regarding *inadvertent* disclosure of the Witness's identity by the Defence, this argument is unsubstantiated. The Defence is just as capable as the Prosecution to protect the security of the Witness.
14. Mr Al Hassan is at present a suspect in proceedings before the Court. No charges have been brought against him. The Prosecution's mere speculation over Mr Al Hassan's contacts with members of armed groups does not demonstrate the existence of 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 emphasises that 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.

⁴ See, for example, [REDACTED].

⁵ 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-[REDACTED].

⁶ 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-[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.](#)

(C) *The proposed measures go further than necessary*

16. Without an objective risk to the Witness from disclosure of his identity to the Defence, the Prosecution's proposed measures go further than necessary⁷ and must be rejected. The Prosecution does not provide any meaningful assessment as to how the submission of anonymous summaries *in lieu* of statements would reduce or overcome the alleged risk to the Witness,⁸ and fails to consider the availability of less intrusive measures. The Prosecution only submits that [REDACTED],⁹ without explaining how a summarised version of the statements would be different from redacted statements in this regard.

(D) *Non-disclosure unfairly prejudices the Suspect's fair trial rights*

17. Mr Al Hassan has the statutory right to raise evidence that contradicts the Prosecution's case as well as to present his own.¹⁰ However, withholding the sources of records, documents or items impedes the exercise of these rights, as Mr Al Hassan is prevented from examining potential leads and sources. The relevant question is therefore not whether non-disclosure will prejudice Mr Al Hassan, but whether non-disclosure is *proportional* to the prejudice suffered.¹¹
18. The motion presents the Witness as [REDACTED],¹² who [REDACTED].¹³ Furthermore, P-0625 [REDACTED]¹⁴, [REDACTED].¹⁵
19. The identity of the Witness, [REDACTED], is a crucial part of understanding the Prosecution's case against the Suspect. Withholding P-0625's identity would deprive

⁷ *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.

⁸ *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.

⁹ Prosecution's request, para. 28.

¹⁰ Articles 61(6) and 67(1) of the Rome Statute.

¹¹ *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; 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. 51.

¹² Prosecution's request, paras 2, 12-13.

¹³ Prosecution's request, para. 13.

¹⁴ Prosecution's request, para. 12.

¹⁵ Prosecution's request, para. 13.

Mr Al Hassan of his right to be informed ‘in detail of the nature, cause and content of the charges brought against him’,¹⁶ to ‘have adequate time and facilities for the preparation of the defence’,¹⁷ and to ‘raise defences and to present other evidence’.¹⁸ 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.’ However, this must be done in a manner that is not prejudicial to the rights of the Suspect.¹⁹ The Prosecution, in this regard, has not demonstrated the inadequacy of the other available protective measures.

20. The Defence reiterates its concerns in relation to the heavy redactions imposed by the Prosecution and the challenges it is facing due to the significant gap in the Prosecution’s case from the Defence’s perspective.
21. Granting the Prosecution’s request to withhold the identity of Witness P-0625 and to disclose a summary of the statements made by the Witness would disproportionately prejudice the rights of the Suspect.
22. Whether the Prosecution intends to rely on information provided by the Witness at the confirmation hearing should have no bearing on an assessment of the materiality of his statement to the Defence case. Neither the scope of the Prosecution’s disclosure obligations nor the materiality of an item to the Defence is contingent on a prosecutorial decision to rely on that item at the confirmation hearing or at trial. If this is accepted as a justification of the prejudice caused by the non-disclosure of a witness’s identity, then the Prosecution’s requests to withhold the identities of witnesses that *will be relied on* at the confirmation hearing, having nothing else to distinguish them.
23. It is incumbent on the Chamber to ensure that non-disclosure would not result in the confirmation of charges hearing, viewed as a whole, being unfair to the Suspect. At present, the Prosecution has sought to withhold the identities of nearly 50 witnesses, and has redacted the identifying information of countless potential witnesses without

¹⁶ Article 67(1)(a) Rome Statute.

¹⁷ Article 67(1)(b) Rome Statute.

¹⁸ Article 67(1)(e) Rome Statute.

¹⁹ Article 68(1).

judicial authorisation, pursuant to the standard redaction protocol.²⁰ Withholding greater amounts of information from the Defence, including the identities of witnesses who provide information material to the Defence case, only leads to broader restrictions on the presentation of evidence by the Defence and fewer opportunities for Defence participation.

(E) *Need for lesser-redacted version of the Prosecution's request*

24. Finally, the version of the Prosecution's request made available to the Defence is missing key information. The Prosecution crucially omits details relating to the content of Witness P-0625's testimony and the documents to be withheld.
25. The Prosecution's heavily redacted request does not allow for the Defence to fully appreciate the extent of the prejudice suffered in light of the relevance of the non-disclosed information to the Prosecution's case. The Defence therefore requests that the Prosecution be directed to provide a lesser-redacted version of the request, and to provide information on the scope and content of Witness P-0625's testimony and nature of the documents annexed to the request.

V. Conclusion

26. The Prosecution's proposed measures cannot be considered proportionate to the prejudice arising to Mr Al Hassan and the infringement of his rights to present evidence and to raise defences. 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 request be dismissed and all relevant information be disclosed to the Defence.
27. Accordingly, the Prosecution's request should be dismissed and the identity of Witness P-0625 should be disclosed to the Defence, along with all materials arising from his interaction with the Prosecution.

²⁰ ICC-01/12-01/18-66.



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Dated this 18th Day of March 2019
At The Hague, The Netherlands