



Original: English

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

Date: 1 April 2019

Date of submission:
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 Supplemental request for authorisation to withhold the identity of Witness MLI-OTP-P-0111 upon whose evidence the Prosecution will not 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

Ms Melinda Taylor
Ms Marie-Hélène Proulx

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 19 March 2019, the Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the “Defence”) was notified of the “Prosecution’s Supplemental request for authorisation to withhold the identity of Witness MLI-OTP-P-0111 upon whose evidence the Prosecution will not rely at the confirmation of charges hearing”.¹ The Prosecution requests to disclose redacted versions of [REDACTED] and of an investigative note related to Witness P-0111.
2. On 6 November 2018, the Chamber issued a decision granting the request to withhold the identity of, *inter alia*, Witness P-0111.²
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.³
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.⁴
5. [REDACTED].⁵
6. The Defence submits that while the security situation in Mali may require the withholding of the Witness’ identity from the public in general and applying other protective measures available under the Statute, the Prosecution does not demonstrate that disclosure *to the Defence* would expose the Witnesses to an objective risk of harm.

¹ *Al Hassan*, Secret redacted version of the “Prosecution’s Supplemental request for authorisation to withhold the identity of Witness MLI-OTP-P-0111 upon whose evidence the Prosecution will not rely at the confirmation of charges hearing”, 15 March 2019, ICC-01/12-01/18-280-Secret-Exp”, notified to the Defence on 19 March 2019 (the **Prosecution’s Supplemental request**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

² 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**).

³ Response, paras 5 and 6 and Decision, para. 41.

⁴ 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**).

⁵ [REDACTED]

7. Additionally, Witness P-0111's evidence is important for the Defence and therefore the measures proposed in the request unfairly and unnecessarily infringe upon Mr Al Hassan's fair trial rights. Consequently, the Defence respectfully requests the Single Judge to reject the Prosecution's request.

II. Classification

8. In accordance with Regulation 23bis(2) of the Regulations of the Court (the "RoC"), this response is classified as secret *ex parte*, available only to the Defence, Prosecution and Victims and Witnesses Unit, as the motion to which it relates is classified the same. [REDACTED]

III. Applicable law

9. Non-disclosure under Rules 81(2) and 81(4) of the Rules is an exception to the overriding principle of full disclosure,⁶ and is subject to a clear set of legal principles.⁷ 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.⁸ Non-disclosure must also be necessary,⁹ and proportionate to the prejudice caused to the Suspect, including his right to a fair and impartial trial.¹⁰

⁶ *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.

⁷ 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.

⁸ *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).

⁹ *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.

¹⁰ *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-](#)

10. 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 being unfair to the Suspect, the Defence refers back to its previous submissions.¹¹

IV. Submissions

11. On 21 December 2018, the Prosecution disclosed [REDACTED] related to Witness P-0111.¹² After carefully reviewing them, the Defence is now able to assess the materiality of the Witness' evidence.
12. Witness P-0111 refers to [REDACTED]the alleged *plan commun*, [REDACTED] in the city of Timbuktu in 2012. Most of the evidence provided by P-0111 relates directly to the charges brought against the Suspect in this case. The information provided by Witness P-0111 is therefore material to the preparation of the defence.
13. [REDACTED]¹³, as well as the investigative note, are all the more material for the preparation of the defence since they are likely directly related to Mr Al Hassan.
14. Therefore, the Defence must have access to the entirety of the information provided by Witness P-0111. The Defence reiterates that protective measures must not be prejudicial to the rights of the Suspect.¹⁴ They must guarantee Mr Al Hassan's right to be informed "in detail of the nature, cause and content of the charges brought against him",¹⁵ to "have adequate time and facilities for the preparation of the defence",¹⁶ and to "raise defences and to present other evidence".¹⁷
15. Moreover, the Defence underlines that while the security situation in Mali may justify the need to withhold the identity of witnesses to the public at this stage of the proceedings, the Prosecution's request to withhold the identity of the Witness to the

[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 Statute.

¹¹ 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.

¹² ICC-01/12-01/18-214

¹³ [REDACTED]

¹⁴ Article 68(1) Statute.

¹⁵ Article 67(1)(a) Statute.

¹⁶ Article 67(1)(b) Statute.

¹⁷ Article 67(1)(e) Statute.

Defence is prejudicial to the rights of the Suspect and will unfairly affect the Suspect's fair trial rights.¹⁸

16. The Defence is also concerned with the heavy redactions applied to Witness P-0111's [REDACTED] disclosed so far by the Prosecution. [REDACTED] contain pages entirely redacted in large blocks. These large blocks of redaction are often severing sections where the Witness is referring [REDACTED] in Timbuktu in 2012.¹⁹ The large blocks of redaction appear to be covering not only identifying information, but any identification of time frame, places, opinion, doubts, etc. These redactions are unwarranted and unnecessary, and therefore contrary to the Decision regarding the Evidence Disclosure Protocol and Other Related Matters.²⁰
17. In order to safeguard the Suspect's fair trial rights, the Defence must have access to the evidence of the Witness in its entirety and without redaction. The Prosecution's proposed measures will undoubtedly continue to prevent the Defence from understanding the totality of the Witness' evidence. More importantly, it will prevent Mr Al Hassan from preparing his own defence in preparation for the confirmation of charges hearing.
18. While the scope of the confirmation of charges hearing may be limited in nature, the consequences of not being able to assess the evidence in the case are dire. This severely limits the right of the Defence to participate in the pre-trial proceedings. By limiting the information available to the Defence that is otherwise accessible to the Prosecution, the Defence is put in an unfair position that affects the Suspect's fair trial rights and the fairness of the proceedings as a whole.
19. While the Defence takes note of the Decision previously issued by the Single Judge allowing the withholding of the identity of P-0111, it now submits that the materiality of the evidence of Witness P-0111 has become apparent [REDACTED]. Therefore, the Defence opposes to the withholding of the Witness's identity. Contrary to the Prosecution's submission, redacting P-0111's identity and the non-disclosure of a large portion of the evidence he provided to the Defence does not constitute the only available or the less intrusive measure available to protect the safety of the Witness.

¹⁸ Article 68(1) Statute.

¹⁹ [REDACTED]

²⁰ ICC-01/12-01/18-31, para. 32.

Taking into consideration the aforementioned arguments, the Defence submits that the disclosure of the identity and of [REDACTED] evidence of Witness P-0111 in its entirety to the Defence and not the public will protect the safety of the Witness and his family while protecting the right of the Suspect to a fair trial.

V. Conclusion

20. The Defence respectfully requests that the Prosecution's request be dismissed and the identity of Witness P-0111 be disclosed *to the Defence*, along with all materials arising from his interaction with the Prosecution.
21. Alternatively, if the Single Judge authorises the non-disclosure of Witness P-0111's identity, the Defence requests the Single Judge to direct the Prosecution to limit the redactions applied to the evidence to a minimum in order to allow the Defence to fully understand the content of the evidence of Witness P-0111.



Melinda Taylor
Lead Counsel for Mr Al Hassan

Dated this 1st Day of April 2019
At The Hague, The Netherlands