

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/12-01/18

Date: 30 December 2019

TRIAL CHAMBER X

Before: Judge Kimberly Prost, Single Judge

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
THE PROSECUTOR v. *AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD***

Confidential redacted version

Decision on the Prosecution's request for non-disclosure of an item of evidence

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Fatou Bensouda
James Stewart

Counsel for the Defence

Melinda Taylor
Marie-Hélène Proulx

Legal Representatives of Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Kimberly Prost, acting as Single Judge of Trial Chamber X ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, issues this 'Decision on the Prosecution's request for non-disclosure of an item of evidence'.

I. Procedural history

1. On 10 October 2019, the Defence requested the Office of the Prosecutor ('Prosecution') to disclose three photographs mentioned by Witness MLI-OTP-P-0580 ('P-0580') in its statement ('Defence's Request').¹
2. On 15 November 2019, the Prosecution filed a motion requesting the Single Judge to authorise the non-disclosure of photograph MLI-OTP-0012-1844 at this stage ('Prosecution's Motion' and 'Photograph', respectively),² one of the three photographs sought to be obtained in the Defence's Request. The Prosecution informs the Chamber that although it disclosed two photographs sought in the Defence's Request, the non-disclosure of the Photograph is required under Rule 81(4) of the Rules of Procedure and Evidence ('Rules') in order not to [REDACTED].³ If the Prosecution were to disclose the Photograph, [REDACTED],⁴ [REDACTED] and the protective measures implemented by the Single Judge of Pre-Trial Chamber I would be rendered useless.⁵ Furthermore, the Prosecution submits that [REDACTED].⁶ Consequently, the Prosecution submits that the Photograph should not be disclosed to the Defence at this stage but instead later on, once [REDACTED].⁷

¹ Email sent by the Defence to the Prosecution on 10 October 2019, at 19:46, to which the Chamber has not had access.

² Requête de l'Accusation aux fins de non-divulgarion d'un élément de preuve (secret, *ex parte*, available to the Prosecution and the Victims and Witnesses Unit only), 15 November 2019, ICC-01/12-01/18-491-Secret-Exp (a secret redacted version was filed on 20 November 2019, ICC-01/12-01/18-491-Secret-Exp-Red).

³ Prosecution's Motion, ICC-01/12-01/18-491-Secret-Exp, paras 10, 12.

⁴ Prosecution's Motion, ICC-01/12-01/18-491-Secret-Exp, paras 5, 8-9.

⁵ Prosecution's Motion, ICC-01/12-01/18-491-Secret-Exp, paras 10, 12.

⁶ Specifically, the Prosecution indicates that the Photograph [REDACTED] (Prosecution's Motion, ICC-01/12-01/18-491-Secret-Exp, para. 11).

⁷ Prosecution's Motion, ICC-01/12-01/18-491-Secret-Exp, para. 12.

3. On 2 December 2019, the Defence filed a response to the Prosecution's Motion ('Defence's Response'),⁸ requesting the Single Judge to: (i) dismiss the Prosecution's Motion; (ii) order the Prosecution to file a lesser redacted version of the Motion; and (iii) order the Prosecution to disclose, without delay, the Photograph.⁹ Regarding the redacted version of the Prosecution's Motion, the Defence asserts that the extent and manner in which the document has been redacted 'curtails the Defence's right to be heard and diminishes the Chamber's ability to make a fully informed decision'.¹⁰ Regarding the Photograph, the Defence submits that its materiality, which has not been contested by the Prosecution, is 'a significant factor for any determination as to its discloseability' and relevant to the preparation of the Defence,¹¹ whereas its non-disclosure results in significant prejudice to Mr Al Hassan.¹² Furthermore, the Defence remarks that, while the Prosecution refuses to disclose the Photograph 'at this stage', it fails to, *inter alia*, provide a concrete timeline for the requested disclosure or propose other interim measures to safeguard the interests of Mr Al Hassan.¹³

II. Analysis

4. The Single Judge notes Articles 64(6), 67 and 68(1), (4) and (5) of the Rome Statute ('Statute'), and Rules 76, 81(4) and 84 of the Rules.
5. At the outset, the Single Judge takes note of the Defence's submission that, due to the number and manner in which redactions have been applied to the Prosecution's Motion, the Defence's ability to make submissions as to its legal basis has been hampered.¹⁴ On this matter, the Single Judge, who has access to the unredacted version of the Prosecution's Motion, considers that the redactions applied by the Prosecution are necessary, in particular to

⁸ Response to "Version secrète expurgée de la Requête de l'Accusation aux fins de non-divulgarion d'un élément de preuve 15 novembre 2019, ICC-01/12-01/18-491-Secret-Exp" (secret, *ex parte*, available to the Prosecution, the Victims and Witnesses Unit and the Defence), 2 December 2019, ICC-01/12-01/18-512-Secret-Exp.

⁹ Defence's Response, ICC-01/12-01/18-512-Secret-Exp, para. 18.

¹⁰ Defence's Response, ICC-01/12-01/18-512-Secret-Exp, paras 2, 5-9.

¹¹ Defence's Response, ICC-01/12-01/18-512-Secret-Exp, paras 10, 12.

¹² Defence's Response, ICC-01/12-01/18-512-Secret-Exp, para. 14.

¹³ Defence's Response, ICC-01/12-01/18-512-Secret-Exp, para. 16.

¹⁴ Defence's Response, ICC-01/12-01/18-512-Secret-Exp, para. 7.

[REDACTED], which would defeat the very purpose of the Prosecution's Motion. Accordingly, the Defence's request to receive a lesser redacted version is rejected.

6. Turning to the merits, the Single Judge notes the Court's duty pursuant to Article 68(1) and (5) of the Statute, to take appropriate measures, including the withholding of evidence or information, where disclosure may lead to the grave endangerment of the security of a witness or his or her family. Specifically, the Single Judge of Pre-Trial Chamber I authorised the non-disclosure of [REDACTED], as he determined that there was [REDACTED].¹⁵
7. Although the Single Judge refers to the aforesaid conclusions of Pre-Trial Chamber I for the purposes of the present decision, it must be noted that these decisions were rendered at an earlier stage of the proceedings, that is, before the hearing on the confirmation of charges, and must be considered in this light. In this sense, the Appeals Chamber has emphasised that 'it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that *could not be withheld prior to trial*'.¹⁶ Accordingly, the Prosecution has the obligation to disclose all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as all Article 67(2) and Rule 77 material, save where delayed disclosure has been requested and authorised. The present decision is therefore only an interim measure, pending full disclosure to the Accused for the preparation of trial.
8. Considering that [REDACTED], and noting that disclosing the Photograph [REDACTED], the non-disclosure sought in the Prosecution's Motion is currently appropriate and required. The Single Judge emphasises that this

¹⁵ [REDACTED].

¹⁶ Appeals Chamber, *The Prosecutor v. Germain 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. 68. *See also* ICTY, Trial Chamber, *Prosecutor v. Tihomir Blaškić*, Decision on the Application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses, 5 November 1996, IT-95-14-PT, para. 24.

measure is an interim one and thus only warranted pending the Prosecution's final disclosure deadline in preparation for trial.

III. Classification

9. The Single Judge fails to see a reason justifying the '*ex parte*' classification of this litigation. Accordingly, and pursuant to Regulation 23*bis* of the Regulations of the Court, the Single Judge finds it appropriate to issue the redacted version of the present decision 'confidential', and not '*ex parte*'. The Single Judge also instructs the Registry to reclassify, from '*ex parte*' to 'confidential', versions of the Prosecution's Motion and Defence's Response, unless the parties file confidential-redacted versions of their respective filings by 8 January 2020.
10. Moreover, having reviewed the related material on the record, and noting the nature of the present ruling and related litigation, the Chamber does not consider that the 'secret' classification is required. Accordingly, the present decision, although 'confidential', is not issued under the 'secret' classification.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Prosecution's Motion;

AUTHORISES the temporary non-disclosure of the Photograph, pending the [REDACTED];

REJECTS all other requests contained in the Defence's Response; and

INSTRUCTS the Registry to reclassify Prosecution's Motion ICC-01/12-01/18-491-Secret-Exp-Red and Defence's Response ICC-01/12-01/18-512-Secret-Exp from 'secret, *ex parte*, Prosecution, Defence and VWU' to 'confidential', unless the parties file confidential-redacted versions of their respective filings by **8 January 2020**.

Done in both English and French, the English version being authoritative.

A handwritten signature in grey ink, appearing to read 'K Prost', is positioned above a solid horizontal line.

Judge Kimberly Prost, Single Judge

Dated this 30 December 2019

At The Hague, The Netherlands