



Original: English

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

Date: 18 June 2018

**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**

**Defence response to Prosecution's request for clarification on submission of  
discrete applications to seek authorisation for the non-disclosure of witnesses'  
identities**

**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**

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**

---

**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

## Introduction

1. On 16 May 2018, the Single Judge issued the “*Décision relative au système de divulgation et à d’autres questions connexes*”.<sup>1</sup> In the Decision, the Prosecution was directed to submit discrete applications to the Chamber under Rules 81(2) and 81(4) of the Rules for the non-disclosure of witness identities prior to the commencement of trial.<sup>2</sup>
2. On 12 June 2018, the Prosecution requested the Single Judge to clarify the mechanism for redacting information of persons contacted, screened or interviewed by the Prosecution during the course of its investigation.<sup>3</sup> In the Request, the Prosecution submits that it is only required to make discrete applications to the Chamber for the non-disclosure of identifying information of persons providing formal witness statements or adducing evidence at the confirmation hearing.<sup>4</sup>
3. The Prosecution’s Request is without legal basis. Contrary to Regulation 23(1)(d) of the Regulations of the Court, the Prosecution fails to detail the articles, rules, regulations or other applicable law relied upon in submitting the Request. The Single Judge is therefore not required to consider the Request,<sup>5</sup> although he is not prevented from exercising his discretion to do so.<sup>6</sup>
4. The interpretation of the redaction protocol put forward in the Request also fails to accord with the Prosecution’s broad disclosure obligations. Redactions are an exceptional measure, and the standard redaction protocol must be applied narrowly. It does not and should not apply to information of persons contacted, screened or

---

<sup>1</sup> *Al Hassan*, *Décision relative au système de divulgation et à d’autres questions connexes*, 16 May 2018, [ICC-01/12-01/18-31](#) (the **Decision**).

<sup>2</sup> *ibid*, para 33.

<sup>3</sup> *Al Hassan*, Prosecution’s request for clarification on submission of discrete applications to seek authorisation for the non-disclosure of witnesses’ identities, 11 June 2018, [ICC-01/12-01/18-47](#) (the **Request**).

<sup>4</sup> *ibid*, para 12.

<sup>5</sup> See, for example, *Al Bashir*, Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, 13 June 2015, [ICC-02/05-01/09-242](#), para 10; *Al Mahdi*, Decision on LRV’s request for clarification of procedure applicable to newly collected reparations applications, 31 May 2017, [ICC-01/12-01/15-222](#), para 6; and *Bemba et al.*, Decision on Arido Defence Request for Exclusion of Prosecution Witness or, in the Alternative, Clarification of Sentencing Witnesses Decision, 21 November 2016, [ICC-01/05-01/13-2038](#), para 13.

<sup>6</sup> See *Gbagbo and Blé Goudé*, Decision on “Urgent Prosecution’s motion seeking clarification on the standard of a ‘no case to answer’ motion”, 13 June 2018, [ICC-02/11-01/15-1182](#), para 9; and *Bemba et al.*, Decision on Prosecution Motion for Clarification of Rule 68(3) Direction in Conduct of Proceedings Decision, 15 September 2015, [ICC-01/05-01/13-1249](#), para 4.

interviewed by the Prosecution in the course of its investigations, and who are potential witnesses in this case. The non-disclosure of such information must be subject to authorisation of the Pre-Trial Chamber pursuant to an individual application under Rules 81(2) and 81(4) of the Rules.

### Submissions

5. The test for Prosecution disclosure depends on the materiality or exculpatory nature of information in relation to the case.<sup>7</sup> These obligations are not contingent on the Prosecution's investigation or litigation strategies, including whether the Prosecution obtains statements from potential witnesses or intends to adduce certain evidence at the confirmation hearing.
6. The Prosecution is further obligated to disclose evidentiary material in full. While redactions are permitted in limited circumstances, these are considered an exceptional measure, particularly at the pre-trial stage.<sup>8</sup> In *Al Mahdi*, the Single Judge emphasised that, "in accordance with the well-established case-law of the Court, the authorisation of non-disclosure of information [to the Defence] shall be viewed as an exception, the overriding principle being that of full disclosure".<sup>9</sup>
7. Exceptions to full disclosure, i.e. redactions, are made to protect persons at risk as a result of the activities of the Court, in circumstances where "there are no less intrusive alternative protective measures available" and "the redactions are not prejudicial to or inconsistent with the rights of the suspect, including the rights to a fair and impartial trial."<sup>10</sup> The use of a standard redaction protocol, which limits judicial scrutiny of Prosecution non-disclosure, is intended to increase expeditiousness and focus of the

<sup>7</sup> See Rule 77 ICC RPE, and Article 67(2) Rome Statute.

<sup>8</sup> *Katanga and Ngudjolo*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008, [ICC-01/04-01/07-428-Corr](#), para 109 ("the use of redactions is not an adequate mechanism for discharging the Prosecution's disclosure obligations pursuant to article 67(2) of the Statute and rule 77 of the Rules in relation to statements, interview notes and interview transcripts of potential witnesses") (internal citations omitted).

<sup>9</sup> *Al Mahdi*, Decision on the Prosecutor's requests for redactions, 8 December 2015, [ICC-01/12-01/15-9](#), para 1. See, also, *Mbarushimana*, Decision on the Prosecution's applications for redactions pursuant to Rule 81(2) and Rule 81(4), 20 May 2011, [ICC-01/04-01/10-167](#), para 6 ("the Single Judge first recalls that the overriding principle is that of full disclosure, the authorization of non-disclosure of information being therefore the exception.")

<sup>10</sup> *Mbarushimana*, Decision on the Prosecution's applications for redactions pursuant to Rule 81(2) and Rule 81(4), 20 May 2011, [ICC-01/04-01/10-167](#), para 6.

proceedings. It does not limit the Prosecution's obligation to provide full disclosure of information that is material to the preparation of the Defence's case.

8. The Request generally refers to interview, contact, and screening notes of persons contacted by the Prosecution during the course of its investigation. These documents frequently contain information that is potentially exculpatory, or otherwise material for the Defence's preparation for the confirmation hearing,<sup>11</sup> and they cannot be properly understood without knowing the interviewee's ability to observe the events described. The non-disclosure of identifying information also prevents the Defence from calling on potential witnesses to present evidence at the confirmation hearing.
9. The Appeals Chamber in *Katanga* relevantly considered the issue of non-disclosure of identifying information of potential witnesses contained in formal witness statements. In this case the Court held that the non-disclosure required "careful assessment on a case-by-case basis",<sup>12</sup> and the Prosecution was directed to submit discrete applications to the Pre-Trial Chamber for authorisation under Rules 81(2) and 81(4) of the Rules.
10. Interview or screening notes of potential witnesses should not be treated differently. The redaction to the identifying information of potential witnesses must be the subject of a discrete application to the Chamber, so as to ensure that non-disclosure to the Defence does not result in the confirmation hearing, viewed as a whole, to be unfair to the Suspect.<sup>13</sup>

<sup>11</sup> *Katanga and Ngudjolo*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008, [ICC-01/04-01/07-428-Corr](#), para 104 ("it can be expected that the existence of a few excerpts, which may be potentially exculpatory, or otherwise material for the Defence's preparation for the confirmation hearing, constitutes the general rule, as opposed to an exception").

<sup>12</sup> *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 65. See also *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 59 ("a careful assessment will need to be made, in each case, to ensure that any measures restricting the rights of the Defence that are taken to protect individuals at risk are strictly necessary and sufficiently counterbalanced by the procedures taken by the Pre-Trial Chamber.")

<sup>13</sup> See *Mbarushimana*, Decision on the Prosecution's applications for redactions pursuant to Rule 81(2) and Rule 81(4), 20 May 2011, [ICC-01/04-01/10-167](#), para 6 ("the Single Judge will pay particular attention to the relevance of the information sought to be redacted to the Defence and will ensure at all times that the non-disclosure of such information 'would not result in the confirmation of the charges, viewed as a whole, to be unfair to the suspect'") (internal citations omitted); *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 73(a) ("in balancing the various interests at stake, the Pre-Trial Chamber must make sure that adequate safeguards are in place to protect the

11. The simplified redaction protocol is not an appropriate substitute for the Chamber's oversight of non-disclosure of information to the Defence, and it should not be applied to the identifying information of potential witnesses.
12. The Defence would be obligated to request the lifting of these redactions made under the protocol in relation to potential witnesses, generating more work for the Chamber and the Defence. The impact of this additional work on the Defence is exacerbated by the inequality of resources between the parties. The Prosecution, however, still has the burden of providing the information necessary for the Chamber to consider whether non-disclosure is justified in the circumstances,<sup>14</sup> and would be required to do so if the case went to trial.
13. Finally, the interpretation of the scope of the redaction protocol put forward in the Request would effectively allow the Prosecution to limit its disclosure obligations to the Defence and avoid judicial oversight by simply failing to take formal statements. This is inconsistent with the Prosecution's broad obligation to disclose material satisfying the criteria laid out in the statutory framework, and to provide disclosure in full.

### **Conclusion**

14. The Prosecution, as a rule, must disclose evidentiary material in full, including the identifying information of potential witnesses, regardless of whether formal statements have been, or will be, obtained. Any information that the Prosecution intends to withhold from the Defence concerning potential witnesses, or as contained in interview notes and similar material, must be the subject of an application to the Chamber for authorisation under Rules 81(2) and 81(4) of the Rules.

---

interests of the suspect so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms"); 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 63 ("More generally, if non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect, the requested redactions should not be authorised.")

<sup>14</sup> *Mbarushimana*, Decision on the Prosecution's applications for redactions pursuant to Rule 81(2) and Rule 81(4), 20 May 2011, [ICC-01/04-01/10-167](#), para 8.



---

Yasser Hassan  
Lead Counsel for Mr Al Hassan

Dated this 18<sup>th</sup> Day of June 2018  
At The Hague, The Netherlands