



Original: **English**

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

Date: **13 December 2018**

Date of submission:

11 February 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***

Confidential ex parte

Available only to the Prosecution, Defence and Victims and Witnesses Unit

**Public redacted version of Defence response to the Prosecution's motion for
authorisation to withhold the identity of Witness MLI-OTP-P-0569**

**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 Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Reparations Section**

Other

I. Introduction

1. On 30 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-0569 upon whose evidence the Prosecution will not rely at the confirmation hearing.¹
2. In the request, the Prosecution submits that withholding the identity of the Witness is necessary to protect him and his family, and to protect the Prosecution's ongoing and future investigations in Mali. It also submits that the proposed measures will not prejudice the Suspect's fair trial rights.
3. While the status of the Witness may require that his 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. [REDACTED].

III. Applicable law

5. In relation to the applicable law, the Defence refers to paragraphs 5 to 7 of its response to the Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0130.²

¹ *Al Hassan*, Confidential redacted version of the "Prosecution's motion for authorisation to withhold the identity of Witness MLI-OTP-P-0569, upon whose evidence the Prosecution will not rely at the Confirmation Hearing", 23 November 2018, ICC-01/12-01/18-191-Conf-Exp-Red, submitted to the Defence on 30 November 2018 (the Prosecution's **motion**). 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 for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0130, 27 November 2018, ICC-01/12-01/18-147-Red, paras 5-7.

IV. Submissions

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

6. 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.
7. The Prosecution refers to the capacity of armed groups to carry out attacks against individuals who cooperated with the Court and to the fact that P-0569 [REDACTED] to justify withholding the identity of the Witness from the defence.³
8. 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.⁴ As previously submitted,⁵ these arguments do not find support in the factual circumstances of the case and should not form the basis for withholding relevant information.
9. In fact, Mr Al Hassan [REDACTED].⁶ [REDACTED].⁷ Since this time, [REDACTED].⁸ 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.⁹

³ Prosecution's motion, paras 29 and 33.

⁴ Prosecution's motion, para 29.

⁵ 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.

⁶ [REDACTED].

⁷ [REDACTED] ICC-01/12-01/18-16-Conf-Exp.

⁸ [REDACTED].

⁹ See, for example, [REDACTED], 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](#).

10. The Prosecution's motion refers to the withholding of information from the defence team in *Abu Garda*.¹⁰ 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*).¹¹ This approach, taken on markedly different factual circumstances, is not applicable on the current situation.
11. 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.
12. 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 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.¹² 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.

¹⁰ 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.

¹¹ *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.

¹² 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-0113, 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.

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

13. The motion presents the Witness as [REDACTED].¹³ This [REDACTED] and the fact that the Witness 'does not indicate that he ever met the Suspect' are of significant relevance to the case brought against the Suspect.¹⁴ Furthermore, the [REDACTED]. The Witness's knowledge [REDACTED].
14. The identity of the Witness, [REDACTED],¹⁵ 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',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.' 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 insufficiency of the available protection measures without derogating from Mr Al Hassan's right to a fair trial.
15. 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. The Defence refers to paragraph 22 of its response to the Prosecution's motion for authorisation to withhold the identity of Witness MLI-OTP-P-0520.²⁰

V. Conclusion

16. In this case the Prosecution fails to demonstrate any concrete or objective circumstances that warrant the withholding of the identity of Witness P-0569 from the Defence. Instead, the Prosecution reiterates general arguments relating to the security

¹³ Prosecution's motion, para 2.

¹⁴ Prosecution's motion, para 38

¹⁵ Prosecution's motion, para 2.

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).

²⁰ Prosecution's motion for authorisation to withhold the identity of Witness MLI-OTP-P-0520, 3 December 2018, ICC-01/12-01/18-197-Conf-Exp.

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.

17. 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.



Yasser Hassan
Lead Counsel for Mr Al Hassan

Dated this 13th Day of December 2018
At The Hague, The Netherlands