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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 confidential redacted
version of the Prosecution's motion for authorisation to withhold the identity of
Prosecution Witness MLI-OTP-P-0431**

**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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Introduction

1. On 13 June 2018, the Defence was notified of the confidential redacted version of the Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0431.¹ In the Motion, the Prosecution submits that the non-disclosure of identifying information of Witness P-0431 to the Defence is necessary to protect the Witness and his family, and to protect the Prosecution's investigations in Mali.²
2. Rule 76(1) of the Rules of Procedure and Evidence, which relates to pre-trial disclosure, states that "[t]he Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence."
3. The Prosecution is also under an obligation to disclose evidentiary material in full. Non-disclosure under Rules 81(2) and 81(4) of the Rules, being an exception to the overriding principle of full disclosure, must only be used where "there are no less restrictive 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."³
4. At the pre-trial stage, the Prosecution is required to demonstrate that non-disclosure is warranted by the existence of an objectively justifiable risk to the safety of the person concerned, or interference with the Prosecution's investigations, as a result of

¹ *Al Hassan*, Confidential redacted version of the "Amended Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0431 upon whose evidence the Prosecution will rely at the confirmation hearing", 11 June 2018, ICC-01/12/01/18-48-Conf-Exp, 13 June 2018, ICC-01/12-01/18-48-Conf-Exp-Red (the **Prosecution's Motion**). All cases referred to in this response are to the *Al Hassan* case, unless indicated otherwise.

² *ibid*, para 27.

³ *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. 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 61; *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 36-37; and *Al Mahdi*, Decision on the Prosecutor's requests for redactions, 8 December 2015, [ICC-01/12-01/15-9](#), para 1.

disclosure to the Defence specifically – and not only the public in general – and be proportionate to the rights of the accused.⁴

5. The Prosecution does not provide any information that indicates the existence of circumstances that give rise to such a risk. The Defence requests that the Prosecution's Motion be dismissed and the identity of P-0431 be disclosed to the Defence. The Defence also requests the Chamber to direct the Prosecution to provide lesser-redacted versions of motions for non-disclosure so as to ensure that the Defence is given sufficient information to respond.

Classification

6. In accordance with Regulation 23bis(1) of the Regulations of the Court, this response is classified as confidential *ex parte* the Defence, the Prosecution, and the Victims and Witnesses Unit only, as the Motion to which it relates is classified as such.

Submissions

7. The non-disclosure of information pursuant to Rule 81(4) “may only be authorised if, first of all, disclosure of the information concerned would pose a danger to the particular person. In such circumstances, [...] a) the alleged danger must involve an objectively justifiable risk to the safety of the person concerned; b) the risk must arise from disclosing the particular information *to the Defence*, as opposed to disclosing the information to the public at large.”⁵
8. The Prosecution fails to establish an “objectively justifiable risk” of danger to the Witness, or interference with Prosecution witnesses, that requires the non-disclosure

⁴ *Ongwen*, Decision on Prosecution's Request under Paragraph 9 of the Decision 1207, 20 April 2018, [ICC-02/04-01/15-1234](#), para 7; and *Bemba et al*, Decision on Modalities of Disclosure, 22 May 2015, [ICC-01/05-01/13-959](#), para 12. 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](#), paras 56, 70-73, and 97; *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 36-39; 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](#), paras 33-34.

⁵ *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 (emphasis in original).

of the identity of Witness P-0431 to the Defence specifically. Rather than pointing to “the existence of circumstances that give rise to such a risk”,⁶ the Prosecution instead relies on the “general security situation in Mali” to justify the non-disclosure of the identity of Witness P-0431.⁷

9. In support of the Motion, for example, the Prosecution states that “jihadist” groups operating in Timbuktu and its region “[REDACTED].”⁸ However it does not explain why disclosure *to the Defence in particular* would create an objective risk that is distinguished from the Witness’s actual cooperation with the Prosecution and other ICC departments.
10. The Prosecution submits that there is a [REDACTED] “[REDACTED] based in part on documented instances” of attacks involving AQIM and other groups.⁹ This assessment, which is based on vague associations between Mr Al Hassan, AQIM and other groups,¹⁰ falls short of demonstrating an objective risk of harm to the Witness or interference with the Prosecution’s investigations. If this were accepted as meeting the standard for non-disclosure under Rules 81(2) or 81(4), even at the pre-trial stage, then the identity of almost every individual in Mali in contact with the Prosecution could be withheld on similar grounds, significantly impairing the Defence’s right to prepare its case.
11. The Prosecution further suggests “armed groups such as AQIM and Ansar Dine could obtain knowledge about these witnesses [...] through an intentional or inadvertent disclosure of information to the Defence”.¹¹ This argument is purely speculative and far from persuasive. Participants in these proceedings are obligated to maintain the strictest levels of confidence, and the Defence’s professional obligations in this respect have not been shown to be insufficient so as to warrant the non-disclosure of

⁶ *Ongwen*, Decision on Prosecution’s Request under Paragraph 9 of the Decision 1207, 20 April 2018, [ICC-02/04-01/15-1234](#), para 7.

⁷ Prosecution’s Motion, para 39.

⁸ *ibid*, para 36.

⁹ *ibid*.

¹⁰ *ibid*, paras 37 and 39.

¹¹ *ibid*, para 40.

the identity of Witness P-0431.¹² It is also improper to suggest that the Defence would intentionally disclose confidential information exchanged between the parties.

12. Nor is it reasonable to deprive the Defence of its ability to test evidence because of unsubstantiated concerns that submission of evidence to the Court's disclosure process might lead to the inadvertent release of confidential information. Indeed the whole disclosure system is designed to avoid this very risk. If the Prosecution is concerned about inadvertent disclosure of confidential information, then the protocol relating to the handling of confidential information should be reassessed.
13. The Prosecution, in short, fails to demonstrate the existence of any circumstances that require the non-disclosure of the identity of Witness P-0431 to the Defence.
14. In addition, the Prosecution's request to withhold Witness P-0431's curriculum vitae should be dismissed. The nature of the Witness's statement and his ability to comment on [REDACTED] necessitates that his CV in particular be made available to the Defence. If this were withheld, along with his identity, then it would be impossible for the Defence to verify the Witness' authority in respect of [REDACTED], and his credibility on a material issue in this case given the charges alleged, which include "[REDACTED]".¹³
15. [REDACTED].¹⁴ [REDACTED].
16. The Defence further notes that the confidential redacted version of the Motion is heavily redacted and missing key information. For instance, the Prosecution provides almost no assessment as to why the withholding of the identity of Witness P-0431 from Defence is considered the least restrictive means available to protect the Witness and his family, or to protect the Prosecution's ability to investigate,¹⁵ even though this is required for an application of non-disclosure.¹⁶ Nor does the Prosecution clearly

¹² *Ntaganda*, Decision on disclosure concerning an individual previously considered to be called as a witness in rebuttal, 11 April 2018, [ICC-01/04-02/06-2271](#), paras 25 and 27.

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ Prosecution's Motion, paras 47 and 60.

¹⁶ *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-](#)

explain how disclosure to the Defence creates an objective risk of interference with Prosecution witnesses.¹⁷ The Prosecution must ensure that these requests provide sufficient accessible information so as to allow the Defence to conduct its assessment.

17. Finally, the Defence emphasises that, should the Chamber be inclined to grant the Motion, any evidence provided by Witness P-0431 and relied on by the Prosecution at the confirmation hearing must be considered as having “lesser probative value than statements of witnesses whose identities have been disclosed to the Defence.”¹⁸ This is because the Prosecution’s reliance on such evidence “must be balanced with the right of the Defence, in accordance with article 61(6) of the Statute, to challenge the evidence presented by the Prosecution.”¹⁹

Conclusion

18. While the “general security situation” in Mali might be adequate reason to protect the identity of Witness P-0431 from the public at large, the Prosecution fails to demonstrate the existence of an objective risk to the safety of the person concerned or interference with the Prosecution’s investigations that requires withholding such information from the Defence. The Prosecution also fails to distinguish the factors in this case that require the non-disclosure of the identity of Witness P-0431 [REDACTED]. Accordingly, the Motion should be dismissed and the identity of Witness P-0431 be disclosed to the Defence. This will allow the Defence to test the credibility of the Witness on a material issue in the case against Mr Al Hassan.

[01/04-01/06-773](#), para 33; and *Katanga and Ngudjolo*, Decision on the Prosecutor’s Application for Protective Measures Pursuant to Article 54(3)(f) of the Statute and Rule 81(4) of the Rules, 25 March 2009, [ICC-01/04-01/07-989-tENG](#), para 4.

¹⁷ Prosecution’s Motion, paras 55-58.

¹⁸ *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 18. See also *Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, [ICC-02/05-02/09-243-Red](#), paras 51-52; *Katanga and Ngudjolo*, Decision on the confirmation of charges, 30 September 2008, [ICC-01/04-01/07-717](#), para 159; and *Lubanga*, Decision concerning the Prosecution Proposed Summary Evidence, 4 October 2006, [ICC-01/04-01/06-517](#), pp 4 and 6.

¹⁹ *Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, [ICC-02/05-02/09-243-Red](#), para 50. See also *Kenyatta*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, [ICC-01/09-02/11-382-Red](#), para 90; *Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, [ICC-01/04-01/10-465-Red](#), paras 49 and 78; and *Banda and Jerbo*, Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, [ICC-01/05-03/09-121-Corr-Red](#), para 41.

19. The Defence also respectfully requests the Single Judge to direct the Prosecution to provide lesser-redacted versions of requests for non-disclosure so as to allow the Defence to make a proper and complete assessment.



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Dated this 19th Day of July 2018
At The Hague, The Netherlands