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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***

Confidential ex parte

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

**Defence response to the Prosecution's motion for authorisation to disclose an
updated anonymous summary of information obtained from Witness MLI-OTP-
P-0147**

**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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I. Introduction

1. On 26 September 2018, the Defence was notified of the confidential redacted version of the Prosecution's motion to disclose an updated anonymous summary for Witness MLI-OTP-P-0147 upon whose evidence the Prosecution will rely at the confirmation hearing.¹
2. In the motion, the Prosecution submits that regulation 42 of the Regulations of the Court applies to the Witness's statements and several associated items following approval of the Single Judge in *Al Mahdi* to withhold the identity of the Witness from the defence in that case.² However, unlike *Al Mahdi* where the Witness's evidence was disclosed under rule 77 of the Rules, the Prosecution characterises Witness P-0147's evidence against the Suspect as incriminatory and seeks to rely on it at the confirmation hearing.
3. Not only does the Prosecution fail to point to objective factors that warrant withholding the identity of Witness P-0147 from the Defence in this case, but it does not even attempt to explain how the proposed measures are necessary to protect the Witness or whether non-disclosure is proportionate to the prejudice arising to the Suspect. Instead the Prosecution relies exclusively on the determination of the Single Judge in *Al Mahdi*, premised on largely different factual circumstances, to justify the non-disclosure of relevant information from the Defence.
4. Without an objective risk to Witness P-0147 from disclosure of his identity to the Al Hassan Defence, relying on anonymous material at the confirmation hearing only prejudices the Suspect's fair trial rights, including the fundamental right to challenge the credibility of prosecution evidence. Accordingly, the motion should be dismissed and the identity of Witness P-0147 and all associated materials should be disclosed in full to the Defence.

¹ *Al Hassan*, Confidential redacted version of the "Prosecution motion for authorisation to disclose an updated anonymous summary of information obtained from Witness MLI-OTP-P-0147, whose evidence the Prosecution will rely upon at the confirmation hearing", 26 September 2018, ICC-01/12-01/18-134-Conf-Exp-Red (the Prosecution's **motion**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

² *ibid*, paras 2 and 16.

II. Classification

5. In accordance with regulation 23bis(2) of the Regulations of the Court, this response is classified as confidential *ex parte*, available only to the Prosecution, the Defence and the Victims and Witnesses Unit, as the motion to which it relates is classified the same.

III. Applicable law

6. The Prosecution is subject to broad disclosure obligations under the ICC statutory framework, including the obligation to investigate incriminating and exonerating circumstances equally, as dictated by article 54(1)(a) of the Rome Statute, and the obligation to disclose evidentiary material in full.
7. Article 67(2) stipulates that the Prosecutor ‘shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows the innocence of the accused, or to mitigate the guilt of the accused, or *which may affect the credibility of prosecution evidence*’ (emphasis added).
8. Under rule 76(1) of the Rules of Procedure and Evidence, the Prosecutor must provide the Suspect with the statements of those witnesses on whom it intends to rely at the hearing together with a copy of any prior statement made by the witness, ‘sufficiently in advance to enable the adequate preparation of the defence.’
9. Non-disclosure of information to the Defence under rules 81(2) and 81(4) of the Rules is an exception to the overriding principle of full disclosure.³ The criteria for non-

³ *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. See also *Lubanga*, Decision on the Prosecutor’s second request for redactions for the purposes of disclosure, 8 December 2014, [ICC-01/04-01/06-3118-Red2](#), para 8; *Ntaganda*, Redacted First Decision on the Prosecutor’s Requests for Redactions and Other Related Requests, 3 July 2014, [ICC-01/04-02/06-117-Red3](#), para 16; *Bemba et al*, Decision on the “Prosecution’s Application for Redactions pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence” dated 25 June 2014, 25 June 2014, [ICC-01/05-01/13-516](#), p 4; *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; *Al Mahdi*, Decision on the Prosecutor’s requests for redactions, 8 December 2015, [ICC-01/12-01/15-53-Red](#), para 1; and *Gbagbo and Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo

disclosure are clear:⁴ (i) 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;⁵ (ii) non-disclosure must be necessary;⁶ and (iii) non-disclosure must be proportionate to the prejudice caused to the Suspect, including his right to a fair and impartial trial.⁷

10. Judicial authorisation to withhold relevant information from the Defence must be based upon a careful examination of the case⁸ and plainly justified.⁹ Importantly, the Pre-Trial Chamber must also ensure that the non-disclosure would not result in the confirmation of charges hearing, viewed as a whole, to be unfair to the Suspect.¹⁰

against the oral decision on redactions of 29 November 2016, 31 July 2017, [ICC-02/11-01/15-915-Red](#), para 61.

⁴ See 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](#), 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.

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(b).

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](#), 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.

⁷ *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 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 Rome Statute.

⁸ *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 *Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, [ICC-01/04-01/06-1401](#), para 89.

⁹ *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 Kai Ambos, *Treatise on International Criminal Law, Volume III: International Criminal Procedure* (OUP 2016) p 539.

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-01/04-01/07-475](#), para 72; and *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.

11. Rules 81(2) and 81(4) also cannot be interpreted as authorising the redaction of potentially exculpatory excerpts from the statements of witnesses on whose written or oral testimony the Prosecution intends to rely on at the confirmation hearing.¹¹

IV. Submissions

(A) *New application for authorisation to withhold the identity of a witness*

12. Witness P-0147 is currently the subject of protective measures ordered by the Single Judge in the *Al Mahdi* case.¹² It is on this basis that the Prosecution seeks to withhold the identity of the Witness from the Al Hassan Defence pursuant to regulation 42(1) of the Regulations of the Court.
13. There are however two key differences between these cases that the Prosecution fails to adequately address in its motion. First, the Prosecution intends to rely on the information provided by Witness P-0147 as potentially incriminating evidence against the Suspect, whereas in *Al Mahdi* the Prosecution disclosed such information pursuant to rule 77 of the Rules. Second, and more importantly, the Prosecution intends to rely on this information at the confirmation hearing for the Suspect whereas it did not in *Al Mahdi*.
14. The decision of the Single Judge to withhold Witness P-0147's identity from the Al Mahdi Defence and authorise disclosure of an anonymous summary was premised on the fact that the Prosecution did not intend to rely on the Witness's evidence at the confirmation hearing and, resultantly, any prejudice to the defence would be limited.¹³ Indeed, the Prosecution emphasised as much in its initial application.¹⁴

¹¹ *Lubanga*, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, 19 May 2006, [ICC-01/04-01/06-108-Corr](#), para 38; and *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 62.

¹² *Al Mahdi*, Second Decision on the Prosecutor's requests for redactions, 16 December 2015, [ICC-01/12-01/15-61](#).

¹³ *ibid*, para 10 ('Any prejudice caused to the Defence by the requested redactions is very limited, particularly in light [...] of the fact that the Prosecutor will not rely on any of the Witnesses for whom the protective measures are sought for the purposes of the confirmation hearing.')

¹⁴ *Al Mahdi*, Public redacted version of "Prosecution's motion for authorisation to disclose summaries of the witness statements of MLI-OTP-P-0123 and MLI-OTP-P-0147, upon whose evidence the Prosecution will not rely at the confirmation hearing", 10 December 2015, ICC-01/12-01/15-55-Conf-Exp-Red, 25 October 2016, [ICC-01/12-01/15-55-Red2](#), para 36.

15. On the other hand, the characterisation of Witness P-0147's evidence in the present case, as well as the increased relevance of his testimony to the Suspect,¹⁵ should lead the Single Judge to make a new determination on the necessity of the proposed measures with reference to the Suspect in this case and the specific impact on his fair trial rights.¹⁶

(B) *No grounds to warrant deviating from the principle of full disclosure*

16. ICC jurisprudence requires the Prosecution to demonstrate the existence of an objective risk to Witness P-0147 from the disclosure of his identity *to the Defence specifically* and not only the public in general. The Prosecution however makes no attempt to do so, instead relying on the assessment of the Single Judge in *Al Mahdi*, without consideration for the appropriateness of non-disclosure to the Suspect in the present case.
17. Moreover, the section of the Prosecution's motion that supposedly addresses the existence of an objective risk is heavily redacted.¹⁷ The only full sentence in the version of the Prosecution's motion made available to the Defence is a reference to the security situation in northern Mali, which does not, of itself, demonstrate the existence of an objective risk.
18. The Defence, once again, reiterates its objection to the types of broad-sweeping submissions offered by the Prosecution, and emphasises that, should these be accepted as meeting the standard for non-disclosure under rules 81(2) or 81(4) of the Rules, the identity of every individual in Mali who has been in contact with the Prosecution could be withheld from the Defence on similar grounds.¹⁸

¹⁵ Prosecution's motion, para 22.

¹⁶ *Ntaganda*, Redacted Seventh Decision on the Prosecutor's Requests for Redactions, 3 July 2014, [ICC-01/04-02/06-248-Red2](#), para 14.

¹⁷ See section C of the Prosecution's motion.

¹⁸ 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; 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; and Defence response to the Prosecution's motion for authorisation to disclose

(C) *Non-disclosure is unduly prejudicial to the Suspect's fair trial rights*

19. Without any demonstrable need for withholding Witness P-0147's identity from the Defence, the Prosecution's proposed measures simply serve to prejudice the Suspect by preventing him from testing the veracity of evidence against him.
20. Although ICC jurisprudence indicates that a lower standard may be applied to non-disclosure at the pre-trial stage, it should not be read as loosening the exceptions to full disclosure set out in rules 81(2) and 81(4) of the Rules or allowing the use of evidence at the confirmation hearing that would not be permitted for use at trial. The disclosure mechanism goes to the heart of a person's right to a fair trial, and its overriding principle of full disclosure is not defined by the stage of the proceedings or whether charges have been confirmed.
21. While some safeguards may help curb the extent of prejudice to the Suspect,¹⁹ these measures do not wholly compensate for the disadvantage suffered from the non-disclosure of relevant information or, ultimately, the restraint on the Suspect's ability to test the Prosecution's evidence. Nor do they enable the Defence to make a meaningful contribution to the proceedings at the pre-trial phase if relevant information need only be disclosed in the event that the case goes to trial.²⁰
22. It is incumbent on the Chamber to ensure that non-disclosure would not result in the confirmation of charges hearing, viewed as a whole, to be unfair to the Suspect. As the disclosure process continues and the Prosecution submits more requests for authorisation to withhold relevant information from the Defence, the scope of non-disclosure is becoming increasingly difficult to gauge.

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 12.

¹⁹ For example : the assigning of lesser probative value to anonymous-source information (Décision relative à la requête du Procureur aux fins d'autorisation du dépôt d'un résumé anonyme concernant le témoin MLI-OTP-P-0113, 27 September 2018, [ICC-01/12-01/18-122-Red2](#), para 36; 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, para 18) ; limiting the Prosecution's reliance on redacted material at the confirmation hearing (*Lubanga*, Decision concerning the Prosecution Proposed Summary Evidence, 4 October 2006, [ICC-01/04-01/06-517](#), p 4; and Décision relative à la requête du Procureur aux fins d'autorisation du dépôt d'un résumé anonyme concernant le témoin MLI-OTP-P-0113, 27 September 2018, [ICC-01/12-01/18-122-Red2](#), para 37); and the Chamber limiting its assessment of information to the form in which it is presented to the Defence (Décision relative au système de divulgation et à d'autres questions connexes, 16 May 2018, [ICC-01/12-01/18-31](#), para 32).

²⁰ Décision relative à la requête du Procureur aux fins d'autorisation du dépôt d'un résumé anonyme concernant le témoin MLI-OTP-P-0113, 27 September 2018, [ICC-01/12-01/18-122-Red2](#), para 41.

23. To ensure that pre-trial proceedings are fair and provide opportunity for meaningful defence participation, the Prosecution must remain obligated to present information in full and without redaction. This cannot be done in circumstances where the Defence is made to rely on anonymous material prepared by the Prosecution, and relevant information – including information that may undermine the credibility of Prosecution witnesses – is withheld.

V. Conclusion

24. Having failed to demonstrate the existence of an objective risk to Witness P-0147 or the necessity of non-disclosure in this case, the Prosecution's proposed measures simply prevent the Defence from assessing the credibility of a witness upon whose evidence the Prosecution intends to rely at the confirmation hearing. In doing so, the Prosecution's request sets an unreasonably low threshold for non-disclosure under rules 81(2) and 81(4) of the Rules that, if adopted, would hamper meaningful contribution by the Defence during the pre-trial stage of the proceedings.
25. In addition, the fact that protective measures were ordered in respect of Witness P-0147 in the *Al Mahdi* case does not prevent the Single Judge from determining that the Witness's identity needs to be disclosed to the Al Hassan Defence, particularly in light of the re-characterisation of Witness P-0147's evidence in relation to Mr Al Hassan.
26. 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 request be dismissed and all relevant material be disclosed to the Defence, including screening notes, investigation notes, and documents provided by the Witness to the Prosecution.
27. Alternatively, if the Single Judge authorises the non-disclosure of Witness P-0147's identity, the Defence considers that appropriately redacted versions of the Witness's statements and associated materials would be preferable to an anonymous summary.



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Dated this 8th Day of October 2018
At The Hague, The Netherlands