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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 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

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 13 September 2018, the Defence was notified of the confidential redacted version of the Prosecution's request to withhold the identity of Witness MLI-OTP-P-0160.¹ In the request, the Prosecution seeks authorisation from the Chamber to withhold the identity of Witness P-0160 from Mr Al Hassan and his defence team. The Prosecution submits that non-disclosure is necessary in order to protect the Witness and his family, and to protect the Prosecution's ongoing and future investigations in Mali. It also submits that, despite the Prosecution's intention to rely on Witness P-0160's evidence at the confirmation hearing, non-disclosure will not prejudice the Suspect's fair trial rights.
2. In the view of the Defence, the Prosecution fails to demonstrate that an exception to the overriding principle of full disclosure is warranted in this case. In the absence of an objective risk arising from disclosure to the Defence, the Prosecution's proposed measures do not serve to protect Witness P-0160 but instead encroach on Mr Al Hassan's fair trial rights. Accordingly, the Prosecution's request should be dismissed and all relevant information disclosed to the Defence.

II. Classification

3. 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 request to which it relates is classified the same. This filing is also classified as confidential *ex parte* pursuant to regulation 23bis(1) of the Regulations of the Court as it contains [REDACTED].

III. Applicable law

4. The Prosecution is subject to broad disclosure obligations under the ICC statutory framework, including the obligation to disclose evidentiary material in full. Non-

¹ *Al Hassan*, Confidential redacted version of 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", 13 September 2018, ICC-01/12-01/18-121-Conf-Exp-Red (the Prosecution's **request**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

disclosure under rules 81(2) and 81(4) of the Rules is an exception to the overriding principle of full disclosure.²

5. The legal principles applicable to non-disclosure of information to the Defence are clear:³ (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;⁴ (ii) non-disclosure must be necessary;⁵ and (iii) non-disclosure must be proportionate to the prejudice caused to the Suspect, including his right to a fair and impartial trial.⁶
6. Judicial authorisation to withhold relevant information from the Defence must be based upon a careful examination of the case⁷ and plainly justified.⁸ Importantly, the

² *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.

³ See 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, 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.

⁴ *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).

⁵ *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.

⁶ *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.

⁷ *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 Statute Conference on 10 June 2008, 13 June 2008, [ICC-01/04-01/06-1401](#), para 89.

⁸ *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

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.⁹

IV. Submissions

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

7. The Prosecution's request, as with previous requests of this nature, is based on broad-sweeping arguments that have limited relevance to the Suspect currently in ICC custody. In particular, the Prosecution relies on the general security situation in Mali; assumptions concerning the Suspect's relationship with certain armed groups; and inadvertent or intentional disclosure by the Defence. Rather than leading to the conclusion of an objective risk from disclosure to the Defence, the Prosecution merely highlights difficulties inherent to its investigation in Mali and seeks relief from the Chamber at the expense of the Suspect's fair trial rights.
8. For instance, the Prosecution submits that the current security situation in Mali and the capacity of non-state actors to carry out attacks weighs in favour of non-disclosure.¹⁰ However it does not explain how these dangers might be affected from disclosure *to the Defence* and not the public at large. While not contesting the Prosecution's general security assessment, the risks to Witness P-0160 are inherent to his circumstances, [REDACTED], and do not provide justification for withholding relevant information from the Defence. As held by the Appeals Chamber, "[d]angers that cannot be overcome by redactions because they are inherent in the situation itself cannot, as such, provide a justification for redactions."¹¹
9. The Prosecution's baseless assumptions concerning Mr Al Hassan's connection with members of armed groups, and fears of intentional disclosure of confidential

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.

⁹ *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.

¹⁰ Prosecution's request, paras 23-24.

¹¹ *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 98.

information,¹² must also be rejected. Mr Al Hassan has been held in detention since April 2017.¹³ [REDACTED].¹⁴ [REDACTED]. 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.¹⁵

10. Nor can arguments relating to inadvertent disclosure be sustained.¹⁶ The Prosecution does not show that the Defence's professional obligations are insufficient to protect the identity of Witness P-0160, and it ignores the fact that Mr Al Hassan is in ICC custody. Although the Single Judge in *Abu Garda* accepted that harm might be caused to witnesses from inadvertent disclosure by the Defence, this assessment was based on the fact that the person concerned was not in detention.¹⁷ The position in *Abu Garda*, being formulated on different factual circumstances, should therefore not be followed in the present case.
11. Finally, it should be emphasised that Mr Al Hassan is at present a suspect in proceedings before the Court. No charges have been made 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 Witness P-0160, 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 reiterates 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, [REDACTED].¹⁸ Although a lower standard may be accepted for non-

¹² Prosecution's request, paras 23 and 28.

¹³ See, for example, MLI-OTP-0061-1622, p 1627.

¹⁴ [REDACTED].

¹⁵ See, for example, [REDACTED]; 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.](#)

¹⁶ Prosecution's request, paras 26-27.

¹⁷ *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.

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; and Response to the Prosecution's motion under regulation 42(3) for

disclosure of relevant information at the pre-trial stage, 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.

(B) *Non-disclosure is unnecessary*

13. The Prosecution, in failing to demonstrate the existence of an objective threat from disclosure to the Defence, is unable to support the contention that withholding relevant information is necessary to protect Witness P-0160.
14. While there are undoubted risks facing the Witness, these are – as mentioned above – inherent to his circumstances, and there are no objective indicators showing that disclosure of the Witness's identity to the Defence would augment or increase these risks. As such, the withholding of relevant, potentially exculpatory material from the Defence cannot overcome or reduce the risks to Witness P-0160¹⁹ and is otherwise unnecessary for his protection.

(C) *Non-disclosure unfairly prejudices the Suspect's right to a fair confirmation hearing*

15. Contrary to the Prosecution's assertion,²⁰ the proposed measures would in fact cause prejudice to the Suspect, who is not only prevented from testing the credibility and veracity of Prosecution evidence, but is also unable to assess the extent to which he has been disadvantaged.
16. 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, nor allowing the use of evidence at the confirmation hearing that would not be permissible 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.

authorisation to disclose an updated anonymous summary for Witness MLI-OTP-P-0113, 2 August 2018, ICC-01/12-01/18-103-Conf, para 23.

¹⁹ *Gbagbo*, First decision on the Prosecutor's requests for redactions and other protective measures, 27 March 2011, [ICC-02/11-01/11-74-Red](#), para 57.

²⁰ Prosecution's request, para 33.

17. While some safeguards may help curb the extent of prejudice to the Suspect,²¹ 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.²²
18. 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. 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.

V. Conclusion

19. Having failed to demonstrate the existence of an objective risk to Witness P-0160 or the necessity of non-disclosure in this case, the Prosecution's proposed protective measures would 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 and, if adopted, would hamper meaningful contribution by the Defence during the pre-trial stage of the proceedings.

²¹ 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, 13 September 2018, ICC-01/12-01/18-122-Conf-Red, 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, 13 September 2018, ICC-01/12-01/18-122-Conf-Red, 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).

²² Décision relative à la requête du Procureur aux fins d'autorisation du dépôt d'un résumé anonyme concernant le témoin MLI-OTP-P-0113, 13 September 2018, ICC-01/12-01/18-122-Conf-Red, para 41; and Prosecution's request, para 39.

20. 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 information be disclosed to the Defence.



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Dated this 17th Day of October 2018
At The Hague, The Netherlands