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Date: 27 November 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

**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**

**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 27 September 2018, the Defence was notified of the Prosecution's motion for authorisation to withhold the identity of Witness MLI-OTP-P-0130 upon whose statement the Prosecution will not rely at the confirmation hearing, but contains information that falls within the scope of rule 77 of the Rules of Procedure and Evidence, and upon whose exhibits the Prosecution will rely at the confirmation hearing.¹
2. In the motion, 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. 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 of confidential information to the Defence, the Prosecution's proposed measures do not serve to protect the Witness, but instead infringe Mr Al Hassan's fair trial rights. Accordingly, the Prosecution's motion should be dismissed and all relevant information disclosed to the Defence.

II. Classification

4. In accordance with regulation 23*bis*(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.

III. Applicable law

5. 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*, Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0130 upon whose statement the Prosecution will not rely at the confirmation hearing, 26 September 2018, ICC-01/12-01/18-136-Conf-Exp-Red (the Prosecution's **motion**). 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

6. The criteria for non-disclosure of information to the Defence are clear: (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; (ii) non-disclosure must be necessary;³ and (iii) non-disclosure must be proportionate to the prejudice caused to the Suspect, including his right to a fair and impartial trial.
7. Judicial authorisation to withhold relevant information from the Defence must be based upon a careful examination of the case⁴ and plainly justified.⁵ 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.⁶

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 *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.

⁴ *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.

⁵ *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.

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 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.

IV. Submissions

(A) *Non-disclosure unfairly prejudices the Suspect's fair trial rights*

8. Contrary to the Prosecution's assertion,⁷ the proposed measures would in fact cause prejudice to the Suspect, who is not only prevented from accessing material relevant to his case but is also unable to assess the extent to which he has been disadvantaged. The relevant question here is whether the proposed measures are *proportionate* to the prejudice arising to the Suspect.
9. According to the information available to the Defence, the content of Witness P-0130's statement [REDACTED] provided to the Prosecution concern the settling of armed groups in Timbuktu, as well as alleged acts of flogging, torture and unlawful detention. The Prosecution also states that [REDACTED].⁸ Information in relation to these events is of the utmost importance to the Defence as it constitutes the core of the Prosecution's case against the Suspect. In fact, the Prosecution even goes so far as to say that '[REDACTED]',⁹ further emphasising the materiality of [REDACTED] to the defence case.
10. In order to properly assess the material provided by Witness P-0130, the Defence must have all necessary information. This includes the [REDACTED], [REDACTED], [REDACTED], and the [REDACTED]. By granting the motion, the Prosecution will also be in a position to withhold the answers to these questions, ultimately prejudicing the Suspect's ability to test the reliability of material the Prosecution will rely on at the confirmation hearing.
11. Although ICC jurisprudence indicates that a lower standard may be applied to non-disclosure at the pre-confirmation 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. 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.

⁷ Prosecution's motion, para 34.

⁸ *ibid*, para 18.

⁹ *ibid*.

12. 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.

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

13. The Prosecution's motion, 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.
14. At the same time, the Prosecution refers to the designation of one armed group (JNIM) as a 'foreign terrorist organisation' by the US State Department,¹⁰ despite the fact that there is no proven or alleged association between the Suspect and JNIM. The Suspect's right to access information material to his case should not be affected by the highly political decision of the US government to designate specific groups as 'terrorist organisations', and the Prosecution's submissions in this regard should be dismissed.
15. For reasons previously submitted by the Defence, baseless assumptions concerning Mr Al Hassan's connection with members of armed groups and fears of intentional

¹⁰ Prosecution's motion, para 24.

disclosure of confidential information must also be rejected.¹¹ Nor can arguments relating to inadvertent disclosure be sustained.¹²

16. The Defence re-emphasises that, although a lower standard may be accepted for non-disclosure of relevant information prior to the confirmation of charges, if the types of submissions offered by the Prosecution are accepted as meeting the standard for non-disclosure under rules 81(2) and 81(4) 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.¹³ The threshold here should not be rendered so low as to make it pointless for the Defence to participate in the pre-trial stage of the proceedings.

(C) *Non-disclosure is unnecessary*

17. Without any objective indicators that show a risk to Witness P-0130 from disclosure of his identity to the Defence, the Prosecution is unable to maintain the contention that withholding relevant information is necessary for his protection.
18. The Prosecution's stated intention not to rely on the Witness's statement at the confirmation hearing must also be disregarded by the Single Judge in his determination as to whether to authorise the withholding of information, particularly when considering that the Witness's identity will affect the reliability of [REDACTED], and that [REDACTED] will be relied on by the Prosecution at the confirmation hearing.

¹¹ See, for example, 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 9.

¹² *ibid*, paras 10-11.

¹³ 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; and 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 12.

19. Additionally, neither the scope of the Prosecution's disclosure obligations, pursuant to rule 77 or otherwise, nor the materiality of an item to the defence case are contingent on a prosecutorial decision to rely on an item at a confirmation hearing or at trial.

(D) *Need for additional information*

20. Finally, the Defence considers it necessary to have access to Annex D, which supposedly contains more details justifying the withholding of relevant material. To properly and fully assess the Prosecution's motion, the Defence must have all relevant details concerning the proposed non-disclosure of the identifying information of Witness P-0130.

V. Conclusion

21. 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.
22. The Defence also respectfully requests that the Single Judge grant the Defence access to Annex D of the Prosecution's motion so that it can make a complete and proper assessment of the proposed measures.



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Dated this 27th Day of November 2018
At The Hague, The Netherlands