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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 request for
authorisation to withhold the identity of Witness MLI-OTP-P-0576**

**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 10 October 2018, the Defence was notified of the Prosecution's request to withhold the identity of Witness P-0576 upon whose evidence it will not rely at the confirmation of charges hearing.¹ The Prosecution submits that withholding the Witness's identity from the Defence is justified due to the volatile security situation in Mali, the individual's status as a vulnerable witness, and the fact that the Prosecution will not rely on her testimony at the confirmation of charges hearing.
2. Although lending support to withholding Witness P-0576's identity from the general public, the Prosecution has not demonstrated the existence of an objective risk arising from disclosure *to the Defence specifically*, and so falls short of the threshold for non-disclosure under rules 81(2) and 81(4) of the Rules of Procedure and Evidence. As such, the Prosecution's proposed measures constitute an unfair and unnecessary infringement on Mr Al Hassan's fair trial rights, and the request should be dismissed.
3. Moreover, the Defence is mindful of the sensitive nature of the Witness's testimony, which addresses sexual and gender-based crimes,² and emphasises its commitment to protecting the dignity and well-being of witnesses, regardless of the manner in which their testimony will be used by the Prosecution in the proceedings.

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 Prosecution, the Defence and the Victims and Witnesses Unit, as the filing to which it relates is classified the same.

III. Applicable law

5. 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. Judicial authorisation to withhold relevant information must be determined on a case-by-case basis and plainly

¹ *Al Hassan*, Confidential redacted version of the "Prosecution's Request for authorisation to withhold the identity of Witness MLI-OTP-P-0579 upon whose evidence the Prosecution will not rely at the Confirmation of Charges Hearing", 10 October 2018, ICC-01/12-01/18-151-Conf-Exp-Red (the Prosecution's **request**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

² Prosecution's request, paras 13-14.

justified. 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.³

6. In addition, the ‘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’ provides, in relevant part:

Where a witness has stated that he or she has suffered sexual or gender based crimes and it is apparent that the witness has not discussed the violence with members of his or her family, parties and participants must exercise particular caution in investigating the allegations, in order to protect the privacy, dignity and well-being of the witness. Parties and participants shall not reveal information about the witness’s alleged victimization to the family members of the witness or to persons who can reasonably be expected to communicate it to family members.⁴

IV. Submissions

(A) *No objective risk to the Witness from disclosure to the Defence*

7. In the request, the Prosecution submits that withholding the identity of Witness P-0576 is necessary for the safety of her and her family. The Defence will address the issues raised in the request within the limits of the redactions applied by the Prosecution.
8. The Prosecution refers to the general security situation in Mali and the risk posed by armed groups who could carry out attacks against individuals cooperating with the Court.⁵ It submits that, although the crimes discussed by the Witness do not seem to include AQMI or Ansar Dine, the fear of retaliation is not based on the content of the testimony since the threat actors ‘do not retaliate based on the content of a statement but rather based on the mere cooperation with an international organisation’.⁶ These submissions, in effect, bring the standard of risk assessment so low as to make it

³ Please see Public redacted version of the Defence response to the Prosecution’s motion under regulation 42(3) for authorization to disclose an updated anonymous summary for Witness MLI-OTP-P-0113, 24 September 2018, [ICC-01/12-01/18-103-Red](#), paras 6-14.

⁴ 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-tENG](#), para 15 (**Protocol on Handling Confidential Information**).

⁵ Prosecution’s request, paras 18, 20-24.

⁶ Prosecution’s request, para 23.

impossible for the identity of any individual in Mali who has had contact with the Prosecution to be disclosed to the Defence.⁷ They also disregard the particular circumstances of the Suspect, who has shown no intent to harm witnesses or to impede the Prosecution's investigations, and has complied with all orders and decisions of the Chamber in relation to his discussion of the case [REDACTED].⁸

9. Mr Al Hassan was arrested on the basis that it was 'nécessaire afin de garantir qu'il comparaitra devant la Chambre et qu'il ne fera pas d'obstacle à l'enquête ou à la procédure ni n'en compromettra le déroulement'.⁹ His current detention in The Hague should alleviate any concern as to his capacity to interfere with proceedings before the Court, particularly in the absence of any intention to do so.
10. The Prosecution further submits that Witness P-0576 is a vulnerable witness given her status as a victim of a sexual crime.¹⁰ While this may require withholding the Witness's identity from the public in general, it does not demonstrate an objective risk of harm from disclosure of her identity *to the Defence* – an important participant in the proceedings. In particular, the Prosecution fails to substantiate its claim that disclosure to the Defence would affect Witness P-0576's safety, physical and

⁷ 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; 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, 17 October 2018, [ICC-01/12-01/18-133-Red](#), para 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 12; Defence response to the Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0130, 8 October 2018, ICC-01/12-01/18-147-Conf-Exp, para 16; Defence response to the Prosecution's motion for authorisation to disclose an updated anonymous summary of information obtained from Witness MLI-OTP-P-0147, 8 October 2018, ICC-01/12-01/18-148-Conf-Exp, para 18; Defence response to the Prosecution's request for authorisation to withhold the identity of Witnesses MLI-OTP-P-0553 and MLI-OTP-P-0574, 8 October 2018, ICC-01/12-01/18-149-Conf-Exp, para 14; Defence response to the Prosecution's request for authorisation to continue withholding the identity of Witness MLI-OTP-P-0114, 15 October 2018, ICC-01/12-01/18-156-Conf-Exp, para 15.

⁸ [REDACTED].

⁹ Version publique expurgée de la Décision relative à la requête du Procureur aux fins de délivrance d'un mandat d'arrêt à la l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 22 May 2018, [ICC-01/12-01/18-35-Red2](#), para 197.

¹⁰ Prosecution's request, para 26.

psychological well-being, privacy and dignity. Withholding the Witness's identity in this case is both unjustified and unfairly prejudicial to the Suspect's fair trial rights.¹¹

11. The Prosecution also does not demonstrate how the Defence's professional obligations are insufficient to protect the identity of Witness P-0576.¹² The Defence treats its confidentiality obligations with the utmost seriousness, and categorically rejects any suggestion to the contrary.
12. Disclosure of the Witness's identity would in fact allow the Defence to better observe its protection obligations under the Protocol on Handling Confidential Information. In its investigations, the Defence is likely to come into contact with at least some of the individuals contacted, screened and interviewed by the Prosecution. Information on the status of vulnerable individuals that are already known to the Prosecution should be disclosed so that the Defence is made aware of and remains vigilant to the particular needs of that individual.

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

13. Notwithstanding the early stage of the proceedings, the Chamber must ensure that Mr Al Hassan's fair trial rights are fully respected and provide him with meaningful opportunity for participation. This includes the ability to assess the Prosecution's evidence, present his own evidence, and organise and present a defence case. However, withholding the source of records, documents and other items impedes the exercise of these rights. In circumstances where there is no objective risk of harm from disclosure to the Defence, these restrictions are simply prejudicial to Mr Al Hassan and jeopardise the fairness of the confirmation hearing.
14. Whether the Prosecution intends to rely on information provided by the Witness at the confirmation hearing should have no bearing on an assessment of the materiality of their statements to the defence case. Neither the scope of the Prosecution's disclosure obligations nor the materiality of an item to the defence is contingent on a prosecutorial decision to rely on that item at the confirmation hearing or at trial. If this

¹¹ See also Defence response to the Prosecution's request for authorisation to withhold the identity of Witnesses MLI-OTP-P-0553 and MLI-OTP-P-0574, 8 October 2018, ICC-01/12-01/18-149-Conf-Exp, paras 15-17.

¹² Prosecution's request, para 24.

is accepted as illustrating that the prejudice arising to Mr Al Hassan is so little so as to justify non-disclosure of a witness's identity, then the Prosecution's requests to withhold the identities of witnesses that *will be relied on* at the confirmation hearing, having nothing else to distinguish them, should necessarily fail.

15. 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. At present, the Prosecution has sought to withhold the identities of 17 witnesses, and has redacted the identifying information of countless potential witnesses without judicial authorisation, pursuant to the standard redaction protocol.¹³ Withholding greater amounts of information from the Defence, including the identities of witnesses who provide information material to the defence case, only leads to broader restrictions on the presentation of evidence by the defence and fewer opportunities for defence participation.

V. Conclusion

16. In the absence of an objective risk to Witness P-0576 from disclosure of her identity to the Defence, the Prosecution's proposed measures cannot be considered proportionate to the prejudice arising to Mr Al Hassan and the infringement of his rights to present evidence and to raise defences. At the same time, the request sets a 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 in the pre-trial stage of the proceedings.
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, the Defence respectfully requests that the Prosecution's request be dismissed and all relevant information be disclosed to the Defence.

¹³ See Decision on the Prosecutor's Request for Clarification on the Non-Disclosure of Witnesses' Identities, 4 July 2018, [ICC-01/12-01/18-66](#).



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