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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 motion for  
authorisation to disclose summaries of the statements of Witnesses MLI-OTP-P-  
0581, MLI-OTP-P-0592 and MLI-OTP-P-0594**

**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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**Victims Participation and  
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## I. Introduction

1. On 8 October 2018, the Defence was notified of the Prosecution's motion for authorisation to disclose summaries of the statements of Witnesses MLI-OTP-P-0581, MLI-OTP-P-0592 and MLI-OTP-P-0594.<sup>1</sup> The Prosecution submits that withholding the identities of these Witnesses is necessary to protect them and their families, and to protect the Prosecution's ongoing investigations in Mali. It further submits that the proposed measures 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. Without an objective risk from disclosure to the Defence, the Prosecution's proposed measures do not protect the Witnesses 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

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 motion to which it relates is classified the same. This filing is also classified as confidential *ex parte* pursuant to regulation 23bis(1) as it contains sensitive information relating to the conditions of the Suspect's detention.

## III. Applicable law

4. The Prosecution is subject to broad disclosure obligations under the ICC statutory framework.<sup>2</sup> Under article 67(2) of the Rome Statute, the Prosecution must disclose evidence it 'believes shows the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence'. Rule 77

<sup>1</sup> *Al Hassan*, Confidential redacted version of the "Prosecution's motion for authorisation to disclose summaries of the statements of Witnesses MLI-OTP-P-0581, MLI-OTP-P-0592 and MLI-OTP-P-0594, upon whose evidence the Prosecution will not rely at the confirmation hearing", 5 October 2018, 8 October 2018, ICC-01/12-01/18-145-Conf-Exp-Red (the Prosecution's **motion**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

<sup>2</sup> Please also 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.

obligates the Prosecution to disclose any object that is ‘material to the preparation of the defence’.

5. Non-disclosure 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 from the Defence must be based upon a careful examination of the case and plainly justified. Importantly, the Pre-Trial Chamber must ensure that the non-disclosure would not result in the confirmation of charges hearing, viewed as a whole, to be unfair to the Suspect.<sup>3</sup>
6. In addition, Mr Al Hassan has the right, pursuant to article 67(1)(b) of the Rome Statute, to adequate facilities for the preparation of his defence. This includes ‘the opportunity to organize his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the [...] court’.<sup>4</sup> He is further guaranteed the right to raise defences and to present evidence under article 67(1)(e) of the Statute.

#### IV. Submissions

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

7. The Prosecution’s motion, as with previous requests of this nature, is based on broad-sweeping arguments that have limited relevance to the Suspect 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.

<sup>3</sup> *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.

<sup>4</sup> *Can v. Austria*, Series A, No 96, 30 September 1985, Commission Report, para 53 (available [here](#)). See also Schabas and McDermott, ‘Article 67 Rights of the Accused’ in Triffterer and Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary* (3rd edition, Beck, Hart, Nomos: 2016), p 1662, para 24.

8. The Prosecution, for instance, 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,<sup>5</sup> but does not explain how these dangers might be affected from disclosure *to the Defence specifically*. The risks to Witnesses P-0581, P-0592 and P-0594, as cited in the Prosecution's motion, are inherent to their circumstances, ie their presence in Mali and cooperation with the ICC, 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.'<sup>6</sup>
9. Baseless assumptions concerning Mr Al Hassan's connection with members of armed groups, and fears of intentional or inadvertent disclosure of confidential information,<sup>7</sup> must also be rejected. Mr Al Hassan has been held in detention since April 2017<sup>8</sup> and, in this time, has shown no intent to harm witnesses or individuals cooperating with the Court. Nor is there evidence to suggest that Mr Al Hassan has been in contact with members of, or individuals associated with, armed groups operating in Mali. Here the Prosecution postulates that [REDACTED]. In fact, [REDACTED] has demonstrated that Mr Al Hassan has no desire to harm individuals cooperating with the Court or to impede the Prosecution's investigations. 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,<sup>9</sup> and he has wholly complied with such measures.<sup>10</sup>
10. 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 the Witnesses, but instead leads to a reversal of the presumption of

<sup>5</sup> Prosecution's motion, paras 32-33.

<sup>6</sup> *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.

<sup>7</sup> Prosecution's motion, para 37.

<sup>8</sup> See, for example, MLI-OTP-0061-1622, p 1627.

<sup>9</sup> See, for example, 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.](#)

<sup>10</sup> [REDACTED].

innocence to which Mr Al Hassan is entitled, and punishes him by limiting his access to material that could reasonably form part of his defence case.

11. Further, the Prosecution fails to demonstrate how the Defence's professional obligations are insufficient to protect the identities of Witnesses P-0581, P-0592 and P-0594. The Defence treats its confidentiality obligations with the utmost seriousness, and categorically rejects any suggestion to the contrary. If the Prosecution is concerned about the Defence team's technical capacity to operate discretely [REDACTED], then the Defence must be given the resources and support necessary to do so, as dictated by the principle of equality of arms. It should not be prevented from accessing relevant information, including the identities of witnesses, on the basis that it does not have adequate resources. If, on the other hand, the Prosecution is simply concerned with increasing the pool of individuals with access to protected information, then it could be argued that the identities of defence witnesses must be withheld from the Prosecution for the same reason. It also stands to reason that the risk of inadvertent association with a protected witness would be higher in cases where their identity was not made known to the Defence.
12. The Defence re-emphasises 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, 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.<sup>11</sup> Although a lower standard may be accepted for non-disclosure of relevant information

<sup>11</sup> 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.

prior to the confirmation of charges, 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. Without objective risk to the Witnesses from disclosure of their identities to the Defence, the Prosecution's proposed measures go further than necessary<sup>12</sup> and must not be adopted. Moreover, the Prosecution does not provide any meaningful assessment as to how the submission of anonymous summaries *in lieu* of statements would reduce or overcome such a risk (if it did exist),<sup>13</sup> and fails to consider the availability of less intrusive measures. The Prosecution only offers that '[e]ven heavy redactions would still allow a person with first-hand knowledge of the events to potentially identify the witnesses',<sup>14</sup> without explaining how a summarised version of the Witnesses statements would be different from a redacted statement in this regard.

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

14. Mr Al Hassan has the statutory right to raise evidence that contradicts the Prosecution's case as well as to present his own.<sup>15</sup> However, withholding the sources of records, documents or items impedes the exercise of these rights, as Mr Al Hassan is prevented from examining potential leads and sources. The relevant question is therefore not whether non-disclosure will prejudice Mr Al Hassan, but whether non-disclosure is *proportional* to the prejudice suffered.<sup>16</sup>

<sup>12</sup> *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; 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 99.

<sup>13</sup> *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.

<sup>14</sup> Prosecution's motion, para 45.

<sup>15</sup> Articles 61(6) and 67(1) of the Rome Statute.

<sup>16</sup> *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 66; 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 51.

15. From the information made available to the Defence, Witnesses P-0581 and P-0592 appear to [REDACTED].<sup>17</sup> Witness P-0581 in particular discusses [REDACTED] the Islamic police of Ansar Dine,<sup>18</sup> of which Mr Al Hassan is accused of being its *de facto* chief during the occupation.<sup>19</sup> It is likely that these two Witnesses, at least, know Mr Al Hassan personally and are in a position to attest to his conduct, making them persons of interest to the Defence. If the Defence is to examine these Witnesses as potential leads or sources, their identities must be made known.
16. The Defence has no information on the content of Witness P-0594's statement,<sup>20</sup> and so is unable to make a proper assessment as to its materiality to the defence case. On this point, the Defence respectfully requests that the Single Judge direct to the Prosecution to provide details on the scope and subject of Witness P-0594's statement.
17. Whether the Prosecution intends to rely on information provided by the Witnesses 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 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.
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. 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

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<sup>17</sup> Prosecution's motion, paras 20 and 23.

<sup>18</sup> *ibid*, para 21.

<sup>19</sup> Version publique expurgée de la « Requête urgente du Bureau du Procureur aux fins de délivrance d'un mandat d'arrêt et de demande d'arrestation provisoire à l'encontre de M. Al Hassan Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud » 20 mars 2018, ICC-01/12-54-Secret-Exp, 31 mars 2018, [ICC-01/12-01/18-1-Red](#), para 6.

<sup>20</sup> Prosecution's motion, paras 24-27.

authorisation, pursuant to the standard redaction protocol.<sup>21</sup> 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**

19. In the absence of an objective risk to Witnesses P-0581, P-0592 and P-0594 from disclosure of their identities to the Defence, the proposed measures cannot be considered proportionate to the infringement of Mr Al Hassan's fair trial rights, including his right to present evidence and to raise defences. At the same time, the Prosecution's motion 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.
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, the Defence respectfully requests that the Prosecution's motion be dismissed and all relevant information be disclosed to the Defence.




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Yasser Hassan  
Lead Counsel for Mr Al Hassan

Dated this 27<sup>th</sup> Day of November 2018  
At The Hague, The Netherlands

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<sup>21</sup> 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](#).