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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 anonymous summaries of the statements of Witnesses
MLI-OTP-P-0583, MLI-OTP-P-0589 and MLI-OTP-P-0593**

**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 18 September 2018, the Defence was notified of 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 In the motion, the Prosecution submits that withholding the identity of these Witnesses is necessary to protect them and their families, 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.
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 of confidential information to the Defence, the Prosecution's proposed measures do not serve to 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, including the obligation to disclose evidentiary material in full. Non-

¹ *Al Hassan*, Confidential redacted version of the "Prosecution's motion for authorisation to disclose summaries of the statements of Witnesses MLI-OTP-P-0583, MLI-OTP-P-0589 and MLI-OTP-P-0593, upon whose evidence the Prosecution will not rely at the confirmation hearing", 18 September 2018, ICC-01/12-01/18-129-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

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 Status 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 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.
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 Witnesses P-0583, P-0589 and P-0593 are inherent to their circumstances, [REDACTED] 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.'¹¹

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 motion, paras 32-33.

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.

9. Baseless assumptions concerning Mr Al Hassan's connection with members of armed groups and fears of intentional disclosure of confidential information¹² must also be rejected. Mr Al Hassan has been held in detention since April 2017.¹³ Following his transfer to the ICC on 31 March 2018, [REDACTED].¹⁴ Since this time, Mr Al Hassan has fully complied with the instructions of the Single Judge [REDACTED] and he has shown no intent to harm witnesses.¹⁵ 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.¹⁶
10. Nor can arguments relating to inadvertent disclosure be sustained.¹⁷ The Prosecution does not show that the Defence's professional obligations are insufficient to protect the identity of Witnesses P-0583, P-0589 and P-0593, and it ignores the fact that Mr Al Hassan is in ICC custody.¹⁸
11. 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 innocence to which Mr Al Hassan is entitled and punishes him by limiting access to relevant material in his case.
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

¹² Prosecution's motion, para 36.

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

¹⁴ [REDACTED].

¹⁵ Registry Report on the Implementation of the Monitoring Measures Ordered by the Single Judge, 21 May 2018, ICC-01/12-01/18-34-Conf-Exp, para 4.

¹⁶ 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.](#)

¹⁷ Prosecution's motion, paras 36-37.

¹⁸ Although the Single Judge in *Abu Garda* accepted that harm might arise to witnesses from inadvertent disclosure by the Defence, his assessment was based on the fact that the person concerned was not in detention. The present factual circumstances are clearly distinguished and do not support the same approach being adopted in this case. *Cf* 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.

with the Prosecution could be withheld from the Defence on similar grounds.¹⁹ Although a lower standard may be accepted for non-disclosure of relevant information 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 any objective indicators that show a risk to Witnesses P-0583, P-0589 and P-0593 from disclosure of their identities to the Defence, the Prosecution is unable to sustain the argument that withholding relevant information is necessary for their protection.
14. Moreover, the Prosecution fails to provide any meaningful assessment as to the need for non-disclosure or the availability of less intrusive measures. It simply offers that a heavily redacted statement ‘would still allow a person with first-hand knowledge of the events to potentially identify the witnesses’,²⁰ but does not explain how a summarised version of the Witnesses statements would be different from a redacted statement in this regard.
15. The Prosecution’s stated intention not to rely on the Witnesses statements at the confirmation hearing must also be disregarded by the Single Judge in his determination as to whether to authorise the withholding of information from the Defence. 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.

¹⁹ 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.

²⁰ Prosecution’s motion, para 42.

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

16. Contrary to the Prosecution's assertion,²¹ the proposed measures would in fact cause prejudice to the Suspect, who is not only prevented from accessing material relevant to his case but 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.
17. The Suspect is entitled pursuant to article 67(1)(b) of the Rome Statute, to adequate facilities for the preparation of his defence, which 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'.²² In addition, the Suspect is entitled under article 67(1)(e) to raise defences and to present other evidence admissible under the Statute. Withholding the source of relevant records, documents or items, including those disclosed under rule 77 which may be exculpatory in nature or otherwise material to the Suspect's case, impedes the Suspect's ability to exercise his rights in this regard, and prevents the Defence from building its case.²³
18. 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 identifying information of a witness who provides information that is material to a suspect's or an accused's case falls squarely within the Prosecution's obligation to disclose, irrespective of the stage of the proceedings or whether the Prosecution relies on material at the confirmation hearing or at trial. Neither does the Prosecution's decision to rely on an item affect the materiality of that item to the defence case.

²¹ Prosecution's motion, para 45.

²² *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.

²³ *Ruto*, Decision setting the Regime for Evidence Disclosure and Other Related Matters, 6 April, [ICC-01/09-01/11-44](#), para 6

(D) *Need for additional information*

19. Finally, the Defence considers that it requires a lesser-redacted version of the Prosecution's motion in order to properly assess the materiality of the statements of Witnesses P-0583, P-0589 and P-0593 to Mr Al Hassan's case. The redacted version of the motion made available to the Defence omits key information, namely details on the content and scope of the Witnesses statements, which limits the Defence's ability to assess the materiality of an item or piece of information to its case.

V. Conclusion

20. In this case, having failed to demonstrate the existence of an objective risk to Witnesses P-0583, P-0589 and P-0593 or the necessity of non-disclosure of their identities to the Defence, the Prosecution's proposed protective measures only prejudice the Suspect and his right to actively present a defence. At the same time, the Prosecution's motion 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.
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. Alternatively, should the Single Judge authorise the non-disclosure of the identities of Witnesses P-0583, P-0589 and P-0593, the Defence considers that appropriately redacted versions of their statements would be preferable to summaries.
23. The Defence also respectfully requests that the Single Judge direct the Prosecution to provide a lesser-redacted version of the motion so as to allow the Defence to make a proper and complete assessment of the materiality of the Witnesses statements to the Suspect's case.



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