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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 Witnesses MLI-OTP-P-0553 and MLI-
OTP-P-0574**

**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 26 September 2018, the Defence was notified of the confidential redacted version of the Prosecution's request to withhold the identity of Witnesses MLI-OTP-P-0553 and MLI-OTP-P-0574 upon whose evidence the Prosecution will rely at the confirmation hearing.¹ The Prosecution submits that [REDACTED], and that withholding their identities is necessary for their physical safety and security and [REDACTED].
2. The Defence is mindful of [REDACTED], and stresses that it takes its confidentiality obligations, [REDACTED], with the utmost seriousness. In this regard, the Prosecution does not demonstrate that disclosure *to the Defence*, in light of the applicable regulations, would lead to [REDACTED].
3. While the status of the Witnesses may require that their identities be held from the public in general, the Prosecution does not demonstrate that disclosure *to the Defence* would expose the Witnesses to an objective risk of harm. The Defence respectfully requests the Single Judge to consider Mr Al Hassan's fair trial rights and uphold the overriding principle of non-disclosure by dismissing the Prosecution's request.

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 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

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*, Confidential redacted version of the "Prosecution's Request for authorisation to withhold the identity of Witnesses MLI-OTP-P-0553 and MLI-OTP-P-0574 upon whose evidence the Prosecution will rely at the confirmation hearing", 26 September 2018, ICC-01/12-01/18-135-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

6. 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
7. 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

8. Further, 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 [REDACTED] 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 [REDACTED].¹⁰

IV. Submissions

(A) *No demonstrable risk to the personal and physical safety of the Witnesses*

9. The Prosecution submits that the withholding of the identity of the Witnesses from the Defence is necessary because there is an objective risk of physical harm. The Defence will address the issues raised in the request within the limits of the redactions applied by the Prosecution.
10. The request refers to the general security situation in Mali and the capacity of armed groups to carry out attacks against individuals who cooperate with the Court.¹¹ The Prosecution also makes baseless assumptions concerning Mr Al Hassan’s connection with members of armed groups, and fears of inadvertent or intentional disclosure of confidential information by the Defence.¹² As previously submitted,¹³ these arguments

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 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.

¹¹ Prosecution’s request, paras 21-25.

¹² Prosecution’s request, paras 22, 24-25.

¹³ 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, 2 August 2018, ICC-01/12-01/18-103-Conf, para 24 ; 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 10; 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, 28 September 2018, ICC-01/12-01/18-138-Conf-Exp, para 10, 12;

do not find support in the factual circumstances of the case and should not form the basis for withholding relevant information.

11. In fact, Mr Al Hassan has been held in detention since April 2017.¹⁴ Following his transfer to the ICC on 31 March 2018, [REDACTED].¹⁵ 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.¹⁶ 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.¹⁷
12. The Prosecution request refers to the Single Judge's findings in paragraph 33 of the 'Décision relative à la requête du Procureur aux fins d'autorisation de la non-communication de l'identité du témoin MLI-OTP-P-0431',¹⁸ in which he refers to the withholding of information from the defence team in *Abu Garda*.¹⁹ The Single Judge in that case permitted the withholding of the identity of various witnesses 'due [...] to the fact that Abu Garda *is not currently detained*, [and] disclosure of the names of the witnesses to the Defence inevitably raises the possibility that information disclosed even on a limited basis might be revealed more broadly' (*emphasis added*).²⁰ This approach, taken on markedly different factual circumstances, is not applicable on the current situation.

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 10.

¹⁴ See, for example, MLI-OTP-0061-1622, p 1627.

¹⁵ [REDACTED].

¹⁶ 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.

¹⁷ See, for example, Third Decision on the Measures to Restrict Contact throughout the Pre-trial Phase of the Proceedings, 20 July 2018, ICC-01/12-01/18-95-Conf-Exp-Red; 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](#).

¹⁸ Prosecution's request, para 20 (citing decision ICC-01/12-01/18-88-Conf-Exp).

¹⁹ 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 33.

²⁰ *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; and Decision on the Prosecutor's Request for Authorisation for Non-disclosure of Witnesses DAR-OTP-WWWW-0433, 31 August 2009, [ICC-02/05-02/09-77](#), para 4.

13. 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.
 14. 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.²¹ 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) *No demonstrable risk to the psychological well-being, privacy and dignity of the Witnesses*
15. The Prosecution submits that [REDACTED] and that withholding their identity would protect their 'safety, physical and psychological well-being, privacy and dignity' pursuant to article 68(1) of the Statute.²²
 16. Measures provided for in article 68(1) 'shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'. The Prosecution does not establish a clear link between disclosure *to the defence* and the risk that the [REDACTED] will become aware of the crimes they endured. Instead, it bases the risk on an unfair assumption that the Defence would inadvertently or intentionally breach its confidentiality obligations.

²¹ 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

²² Prosecution's request, para 27.

17. The Pre-Trial Chamber has established robust measures that ensure any party's investigative activities do not breach a witness' privacy.²³ 'Investigating parties', in the language of the Protocol, does not make a distinction between the Prosecution and the Defence. It imposes the same obligations and requires the same standard of ethical conduct and professionalism from both parties. The Prosecution does not substantiate its assumption that the Defence is not as able as the Prosecution to protect the privacy and psychological well-being of witnesses, or explain how the 'existing confidentiality obligations of counsel are insufficient by themselves'.²⁴

(C) *Non-disclosure will unfairly affect the Suspect's fair trial rights*

18. Witnesses P-0553 and P-0574 cover issues that are crucial to the case brought against the Suspect, including the arrival of 'rebels' in Timbuktu, crimes committed by members of armed groups, and the identification of individuals and buildings in images shown by the Prosecution. Their statements also refer to individuals known as Hamed Moussa and Adama,²⁵ who are alleged to be members – with Mr Al Hassan – of a common plan that resulted in the commission of:

actes de torture, de viol, de l'esclavage sexuel, de persécution pour des motifs religieux et sexistes et d'autres actes inhumains, d'atteintes à l'intégrité corporelle et à la dignité de la personne, de condamnations prononcées sans un jugement préalable, rendu par un tribunal régulièrement constitué et assorti des garanties judiciaires généralement reconnues comme indispensables, commis à Tombouctou, au Mali, entre avril 2012 et janvier 2013, ainsi que d'attaques intentionnellement dirigées contre des bâtiments consacrés à la religion et monuments historiques, commis à Tombouctou, au Mali, entre fin juin 2012 et mi-juillet 2012.²⁶

19. The statement of Witness P-0553 is also used by the Prosecution to demonstrate the existence of reasonable grounds to believe that Mr Al Hassan is criminally responsible, through various modes of liability, for crimes against humanity and war crimes [REDACTED].²⁷

²³ Protocol on the handling of confidential information, para 15.

²⁴ Prosecution's request, para 25.

²⁵ Prosecution's request, paras 15-17.

²⁶ Décision relative à la requête du Procureur aux fins de délivrance d'un mandat d'arrêt à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 22 May 2018, [ICC-01/12-01/18-35-Red2](#), paras 173-174.

²⁷ Version confidentielle 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 ADBOUL AZIZ Ag

20. While the Prosecution states that the Witnesses do not discuss Mr Al Hassan's role in the commission of these crimes,²⁸ the identity of the Witnesses, particularly given the nature of the crimes and perpetrators involved, is a crucial part of understanding the Prosecution's case against the Suspect. Withholding the identity of these Witnesses would deprive Mr Al Hassan of his right to be informed 'in detail of the nature, cause and content of the charges brought against him',²⁹ to 'have adequate time and facilities for the preparation of the defence',³⁰ and to 'raise defences and to present other evidence'.³¹

V. Conclusion

21. In this case the Prosecution fails to demonstrate any concrete or objective circumstances that warrant withholding the identity of Witnesses P-0553 and P-0574 from the Defence. Instead, the Prosecution reiterates general arguments relating to the security situation in Mali and the activity of armed groups without providing any clear connection to the Suspect. Not only do these arguments set an unreasonably low threshold for non-disclosure under rules 81(2) and 81(4) of the Rules, but it also reverses the presumption of innocence to which the Suspect is entitled.
22. 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.

Mohamed Ag Mahmoud", 20 mars 2018, ICC-01/12-54-Secret-Exp, 31 March 2018, ICC-01/12-01/18-1-Conf-Exp-Red2, para 50.

²⁸ Prosecution's request, para 37.

²⁹ Article 67(1)(a) Rome Statute.

³⁰ Article 67(1)(b) Rome Statute.

³¹ Article 67(1)(e) Rome Statute.



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Dated this 3rd Day of December 2018
At The Hague, The Netherlands