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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 of the Defence response to the Prosecution's Request for
authorisation to continue to withhold the identity of Witness MLI-OTP-P-0146**

**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 Applicants

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**Unrepresented Applicants
(Participation/Reparation)**

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I. Introduction

1. On 19 December 2018, the Defence was notified of the confidential redacted version of the Prosecution's request to redact in one document the identity of Witness MLI-OTP-P-0146, upon whose evidence the Prosecution will not rely at the confirmation hearing.¹
2. The Request is related to the metadata of the 15 December 2015 Investigation Note which is not covered by the decision of the Single Judge of Pre-Trial Chamber I in the *Al Mahdi* case on withholding the identity of P-0146.²
3. In the Request, the Prosecution submits that the unchanged security situation of P-0146 warrants the redaction of Witness's identity in the metadata of the Investigative Note. The Prosecution also submits that this measure is necessary to protect the Witness and his family, and to protect the Prosecution's investigations in Mali and in the neighbouring countries.³ It also submits that the proposed measures will not prejudice the Suspect's fair trial rights.⁴
4. While the status of the Witness may require the withholding of his identity from the public in general, the Prosecution does not demonstrate that disclosure *to the Defence* would expose the Witness to an objective risk of harm. The Defence respectfully requests the Single Judge to revise the protective measures to the Witness and uphold the overriding principle of non-disclosure by dismissing the Request and authorising the disclosure of the Witness's identity and all related evidence to the Defence.

II. Classification

5. 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 Request to which it relates is classified the same.

¹ *Al Hassan*, Confidential redacted version of the "Prosecution's Request for authorisation to continue withholding the identity of Witness MLI-OTP-P-0146 upon whose evidence the Prosecution will not rely at the confirmation hearing", dated 7 December 2018 and submitted to the Defence on 19 December 2018, ICC-01/12-01/18-201-Conf-Exp-Red (the Prosecution's **Request**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

² Request, paras 3-4.

³ Request, paras 25-26.

⁴ Request, paras 28-30.

III. Applicable law

6. The Defence refers to regulation 42(1) of the Regulations of the Court by which the protective measures once ordered in any proceedings in respect of a witness shall continue to have full force and effect in relation to any other proceedings before the Court, *subject to revision by a Chamber* (emphasis added).⁵
7. In relation to the applicable law regarding protective measures, the Defence refers to paragraphs 5 to 7 of its response to the Prosecution's motion for authorisation to withhold the identity of Prosecution Witness MLI-OTP-P-0130.⁶

IV. Submissions

(A) *Disclosure to the Defence does not constitute risk to the safety of the Witness*

8. The Prosecution submits that the withholding of the Witness's identity from the Defence continues to be necessary due to an objective risk of harm. The Defence will address the issues raised in the Request within the limits of the redactions applied by the Prosecution. The Defence notes the difficulty in responding to the Prosecution's claims particularly that, besides a portion of the concluding remarks, the entire section on objective justifiable risk is redacted.⁷
9. In the Request, and in the submissions in the *Al Mahdi* case, the Prosecution justifies the withholding of the Witness's identity by only referring to the security situation in Mali, and to the capacity of armed groups to carry out attacks against individuals who cooperated with the Court.⁸

⁵ Confidential redacted version of the "Décision relative à la requête du Procureur aux fins d'autorisation du dépôt d'un résumé anonyme concernant le témoin MLI-OTP-P-0113", dated 13 September 2018, ICC-01/12-01/18-122-Conf-Red, paras 26 and 27 on the revision of the protective measures.

⁶ 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", 27 November 2018, ICC-01/12-01/18-147-Red, paras 5-7.

⁷ Request, paras 20-26.

⁸ Request, para. 25; Public redacted version of "Prosecution's motion for authorisation to disclose summaries for witnesses MLI-OTP-P-0004, MLI-OTP-P-0113, MLI-OTP-P-0121, and MLI-OTP-P-0146, upon whose evidence the Prosecution will not rely at the confirmation hearing", dated 11 December 2015, ICC-01/12-01/15-59-Red2, para. 17.

10. As previously submitted,⁹ this argument does not find support in the factual circumstances of the case and should not form the basis for withholding relevant information.
11. 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.¹⁰ 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 will unfairly affect the Suspect's fair trial rights*

12. According to the Prosecution, withholding the identity of the witness will not result in any prejudice to the Defence.¹¹ However, as previously stated by the Single Judge, withholding the identity of a witness does affect the rights of the Defence and therefore, a balance needs to be found between the defence's rights and the need to protect a witness.¹² In the present case, the Witness's testimony contains information on Ansar Dine and AQIM, the occupation of Timbuktu, the application of the Sharia

⁹ 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, paras 22-24 ; 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, paras 9-10; Defence response to the Prosecution's motion for authorisation to withhold the identity of Witness MLI-OTP-P-0100, 28 September 2018, ICC-01/12-01/18-138-Conf-Exp, paras 8-10; 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, paras 9-10.

¹⁰ 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.

¹¹ Request, para. 28.

¹² Confidential redacted version of the "Décision relative aux requêtes du Procureur aux fins d'autorisation de la non-communication de l'identité des témoins P-0100, P-0111, P-0130, P-0576, P-0581, P-0583, P-0589, P-0592, P-0593 et P-0594", dated 6 November 2018, ICC-01/12-01/18-174-Conf-Exp-Red, para. 28.

law [REDACTED] and cases of flogging.¹³ This constitutes a wide array of issues in the case that demonstrates the importance of the Witness's testimony.

13. Furthermore, [REDACTED].¹⁴ He also speaks about cases of flogging in Timbuktu.¹⁵ [REDACTED].¹⁶ [REDACTED]. Finally, P-0146's testimony [REDACTED].¹⁷ The majority of these issues did not form part of the case of *Al Mahdi*, against whom "[t]he only confirmed charge [...] is the war crime of attacking protected objects under Article 8(2)(2)(iv) of the Statute".¹⁸ This demonstrates the significance of the Witness's testimony and its possible materiality to the Defence for Mr Al Hassan, and therefore, also demonstrates the significantly higher prejudice for Mr Al Hassan due to the withholding of the Witness's identity, in comparison with the *Al Mahdi* case. Therefore, the Defence respectfully requests the Single Judge to revise the protective measures granted to Witness P-0146 by the Pre-Trial Chamber I in the *Al Mahdi* case.
14. The identity of the Witness is a crucial part of understanding the Prosecution's case against the Suspect. Withholding the identity of this Witness 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",¹⁹ to "have adequate time and facilities for the preparation of the defence",²⁰ and to "raise defences and to present other evidence".²¹ Pursuant to Article 68 of the Rome Statute, the Court has a mandate to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." This must be done in a manner that is not prejudicial to the rights of the Suspect.²² The Prosecution, in this regard, has not demonstrated the insufficiency of the available protection measures without derogating from Mr Al Hassan's right to a fair trial.

¹³ Request, para. 19.

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ [REDACTED]

¹⁷ [REDACTED]

¹⁸ *Al Mahdi* case, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171, para. 11 (see also para. 63).

¹⁹ Article 67(1)(a) Rome Statute.

²⁰ Article 67(1)(b) Rome Statute.

²¹ Article 67(1)(e) Rome Statute.

²² Article 68(1).

15. The Defence reiterates its concerns in relation to the heavy redactions imposed by the Prosecution, particularly in this Request,²³ and the challenges it is facing due to the significant gap in the Prosecution's case from the Defence's perspective. The Defence further refers to paragraph 22 of its response to the Prosecution's motion for authorisation to withhold the identity of Witness MLI-OTP-P-0520.²⁴

V. Conclusion

16. In this case the Prosecution fails to demonstrate any concrete or objective circumstances that justify continuing the withholding of Witness P-0146's identity 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.
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 in the proceedings, the Defence respectfully requests the Single Judge to reject the Request, to revise the protective measures, and to order the disclosure of the Witness's identity and all evidence related to his testimony.

²³ See para. 8 above.

²⁴ Confidential version of the "Defence response to the Prosecution's motion for authorisation to withhold the identity of Witness MLI-OTP-P-0520", 3 December 2018, ICC-01/12-01/18-197-Conf-Exp.



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Dated this 31 December 2018
At The Hague, The Netherlands