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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 an anonymous summary of the statements of Witness
MLI-OTP-P-0619**

**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 2 November 2018, the Defence was notified of the Prosecution's motion for authorisation to withhold the identity of Witness MLI-OTP-P-0619.¹ The Prosecution submits that withholding the identity of this Witness, submitting an anonymous summary of [REDACTED], and non-disclosure of other material related to the Witness, are necessary to protect him and his family and to protect the Prosecution's ongoing investigations in Mali. The Prosecution further submits that the proposed measures are consistent with 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 Witness P-0619 but instead infringe upon Mr Al Hassan's fair trial rights. The Prosecution's motion should, accordingly, 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 Prosecution, the Defence and the Victims and Witnesses Unit, as the motion to which it relates is classified the same. [REDACTED].

III. Applicable law

4. In relation to the applicable law, the Defence refers to paragraphs 6 to 14 of its response to the Prosecution's motion for authorisation to disclose an anonymous summary for Witness MLI-OTP-P-0113.²

¹ *Al Hassan*, Confidential redacted version of the "Prosecution's motion for authorisation to disclose an anonymous summary of the statements of Witness MLI-OTP-P-0619 upon whose evidence the Prosecution will not rely at the confirmation hearing", 2 November 2018, ICC-01/12-01/18-167-Conf-Exp-Red (the Prosecution's **motion**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

² 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.

IV. Submissions

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

5. 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.
6. 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,³ but does not explain how these dangers might be affected from disclosure *to the Defence specifically*. The risks to Witness P-0619, 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.'⁴
7. Baseless assumptions concerning Mr Al Hassan's connection with members of armed groups, and fears of intentional or inadvertent disclosure of confidential information,⁵ must also be rejected. [REDACTED]⁶ and, [REDACTED]. 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]. It also bears mentioning that Mr Al Hassan is under existing obligations under the Court's statutory framework to refrain from

³ Prosecution's motion, paras 25, 26.

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 98.

⁵ Prosecution's motion, para 33.

⁶ [REDACTED}.

disclosing confidential case information, including insofar as such conduct would violate existing decisions and orders issued by the Chamber,⁷ and [REDACTED].⁸

8. 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 Witness, but instead leads to a reversal of the presumption of 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.
9. The Prosecution's argument on the risk of intentional or inadvertent disclosure of confidential information is inappropriate and prejudicial to the Defence. These statements are unacceptable and fail to provide any proof that the Defence is unable to fulfil its professional obligation to protect the identity of relevant witnesses.
10. Further, the Prosecution fails to demonstrate how the Defence's professional obligations are insufficient to protect the identity of Witness P-0619. The Defence treats its confidentiality obligations with the utmost seriousness, and categorically rejects any suggestion to the contrary. If 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.
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.⁹

⁷ 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.](#)

⁸ [REDACTED].

⁹ 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

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*

12. Without objective risk to the Witness from disclosure of his identity to the Defence, the Prosecution's proposed measures go further than necessary¹⁰ 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),¹¹ and fails to consider the availability of less intrusive measures. The Prosecution only offers that "[REDACTED], like the suspect, to potentially identify the witness",¹² without explaining how a summarised version of [REDACTED].

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

13. Mr Al Hassan has the statutory right to raise evidence that contradicts the Prosecution's case as well as to present his own.¹³ However, withholding the sources of records, documents or items impedes the exercise of these rights, as Mr Al Hassan

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.

¹⁰ *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.

¹¹ *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.

¹² Prosecution's motion, para 37.

¹³ Articles 61(6) and 67(1) of the Rome Statute.

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.¹⁴

14. From the information made available to the Defence, Witness P-0619 appears to [REDACTED].¹⁵ Witness P-0619 in particular was [REDACTED] making him a person of interest to the Defence. If the Defence is to examine this Witness as potential leads or sources, his identity must be made known.
15. The Single Judge insisted that the Prosecution must investigate incriminating and exonerating circumstances equally.¹⁶ The disclosure of all information regarding exculpatory evidence must be made available to the Defence to protect the fair trial rights of the Suspect, pursuant to article 54(1)(a) of the Statute. The Single Judge, when rendering a decision on a request for withholding identity, must guarantee a balance between the rights of the defence and the need to protect witnesses. Granting the Prosecution's request to withhold the identity of Witness P-0619 and to disclose a summary of [REDACTED] would disproportionately prejudice the rights of the Suspect.
16. Whether the Prosecution intends to rely on [REDACTED] 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.

¹⁴ *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 Prosecution's motion, paras 20 and 23.

¹⁶ ICC-01/12-01/18-174-Conf-Exp-Red, para 28

17. 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 18 witnesses, and has redacted the identifying information of countless potential witnesses without judicial authorisation, pursuant to the standard redaction protocol.¹⁷ 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

18. In the absence of an objective risk to Witness P-0619 from disclosure of his identity to the Defence, the proposed measures cannot be considered proportionate to the infringement on 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.
19. 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.

¹⁷ 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 15th Day of November 2018
At The Hague, The Netherlands