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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 Witness MLI-OTP-P-0626”**

**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:**

**The Office of the Prosecutor**

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**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**

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**REGISTRY**

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**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

## I. Introduction

1. On 28 February 2019, the Defence was notified of the secret redacted version of the Prosecution's request to withhold the identity of Witness MLI-OTP-P-0626 (the **Witness**) upon whose evidence the Prosecution will rely at the confirmation hearing.<sup>1</sup> The Prosecution submits that Witness P-0626 will provide evidence on [REDACTED]. The Prosecution argues that the withholding of his identity and the disclosure of a summary of his evidence is necessary for his safety and [REDACTED].
2. While security concerns may require the withholding of P-0626's identity from the public in general and applying other protective measures available under the Rome Statute (the "Statute"), the Prosecution does not demonstrate that disclosure *to the Defence* would expose the Witness to an objective risk of harm. The Prosecution intends to only disclose a summary of the evidence of the Witness. However, considering that the Witness's statement seems to contain lengthy and specific details regarding [REDACTED] the disclosure of an anonymous summary of the evidence will unfairly and unnecessarily infringe upon Mr Al Hassan's fair trial rights. Therefore, the Defence respectfully requests the Single Judge to reject the Prosecution's request.

## II. Classification

3. In accordance with regulation 23bis(2) of the Regulations of the Court (the "RoC"), this response is classified as secret *ex parte*, available only to the Defence, Prosecution and Victims and Witnesses Unit, as the motion to which it relates is classified the same.

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<sup>1</sup> *Al Hassan*, Secret redacted version of the "Prosecution's Request for authorisation to withhold the identity of Witness MLI-OTP-P-0626 upon whose evidence the Prosecution will rely at the confirmation hearing", 26 February 2019, ICC-01/12-01/18-258-Secret-Exp, notified to the Defence on 28 February 2019 (the Prosecution's **request**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

### III. Applicable law

4. Non-disclosure under rules 81(2) and 81(4) of the Rules of Procedure and Evidence (the “Rules”) is an exception to the overriding principle of full disclosure,<sup>2</sup> and is subject to a clear set of legal principles.<sup>3</sup> 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.<sup>4</sup> Non-disclosure must also be necessary,<sup>5</sup> and proportionate to the prejudice caused to the Suspect, including his right to a fair and impartial trial.<sup>6</sup>
5. In relation to the criteria for judicial authorisation to withhold information from the defence while ensuring that non-disclosure will not result in the confirmation of charges hearing, viewed as a whole, as being unfair to the Suspect, the Defence refers back to its previous submissions.<sup>7</sup>

<sup>2</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](#), 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.

<sup>3</sup> 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[REDACTED], 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.

<sup>4</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. 71(b).

<sup>5</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; *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.

<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. 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.

<sup>7</sup> [REDACTED]

#### IV. Submissions

6. The Prosecution submits that the withholding of the identity of the Witness from the Defence is necessary due to an objective risk of physical harm and [REDACTED].<sup>8</sup> The Defence will address the issues raised in the request within the limits of the very extensive redactions applied by the Prosecution.
  - (A) *Disclosure to the Defence does not constitute risk to physical safety of the Witness*
7. While the Defence is aware of the security situation in Mali and appreciates the need to withhold the identity of Witness P-0626 from the public at this stage of the proceedings, the Defence reiterates that the Prosecution's request to withhold the identity of Witness P-0626 from the Defence is unwarranted, unfounded and prejudicial to the rights of the Suspect.<sup>9</sup>
8. With regards to the Prosecution's concerns regarding *intentional* disclosure<sup>10</sup>, the Defence reiterates that the Prosecution cannot simply presume that the Defence will breach its professional obligations, obligations which have been carefully respected by the Defence at all times. The Defence does not accept the Prosecution's submissions in this regard and considers these assumptions insulting and unfair to Defence staff in general. Furthermore, the Prosecution ignores the fact that Mr Al Hassan is in ICC custody under strict detention conditions.
9. With regards to the Prosecution's concerns regarding *inadvertent* disclosure of the Witness's identity by the Defence, this argument is unsubstantiated. The Defence is just as capable as the Prosecution to protect the privacy and safety of witnesses.
10. Contrary to the Prosecution's argument, disclosure of the Witness's identity would in fact allow the Defence to better abide by its protection obligations under the Protocol on the Handling of Confidential Information.<sup>11</sup> Should the Defence be put in the situation of having to lead its investigations in the dark, without knowing the identity of a substantial number of Prosecution witnesses, this will unavoidably increase the

<sup>8</sup> Prosecution request, paras 21, 38.

<sup>9</sup> Article 68(1) Statute.

<sup>10</sup> Prosecution's **request**, para. 22.

<sup>11</sup> ICC-01/12-01/18-40-Anx (the **Protocol**).

risk of inadvertent contact with these protected witnesses, or other vulnerable individuals.

11. While the Defence will take all necessary measures to avoid contact with Prosecution witnesses, the risks of inadvertent contact are multiplied when the witnesses' identifying information has been withheld. With regards to the increase risk of inadvertent disclosure, the Defence refers to its prior filings, [REDACTED].
12. Further, Mr Al Hassan is at present a suspect in proceedings before the Court. No charges have yet been brought against him. The Prosecution's speculation [REDACTED]– does not demonstrate the existence of an objective risk to the Witness.<sup>12</sup> Instead, it leads to a reversal of the presumption of innocence to which Mr Al Hassan is entitled and punishes him by limiting his ability to confront the evidence against him.
13. The Defence re-emphasises that if the Prosecution's submissions are deemed to meet the standard for exceptional 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>13</sup> 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.
14. The Prosecution insists on the Witness's fears for his safety and [REDACTED].<sup>14</sup> The Prosecution however does not allow the Defence to understand the basis for this argument, since all the relevant information is redacted from the request<sup>15</sup>. In the unredacted parts of the request, the Prosecution only refers to its general assessment of the situation of witnesses as factual basis for requesting the withholding of the identity of P-0626<sup>16</sup>. The Prosecution offers no evidence of threats specifically

<sup>12</sup> Prosecution's request, para. 28.

<sup>13</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; [REDACTED]

<sup>14</sup> Prosecution's request, para. 21.

<sup>15</sup> Prosecution's request, paras 23-26, 29-30.

<sup>16</sup> Prosecution's request, para. 27.

directed at P-0626 and does explain how his specific situation places him [REDACTED] at high risk if his identity was to be revealed to the Defence.

15. The Prosecution also fails to put forward any evidence that suggests that Mr Al Hassan has been involved in the intimidation of any witness and does not substantiate any reasonable causes of fear that could result from disclosing the Witness's identification information to the Defence and Mr Al Hassan.
16. Contrary to the Prosecution's submissions,<sup>17</sup> and as previously stated by the Defence, the Appeals Chamber has recognised the possible prejudice to ongoing investigations due to the fear of witness interference only "*if it can be demonstrated by the Prosecutor* that the disclosure of the identities and identifying information of such individuals to the Defence could lead to the intimidation of or interference with such individuals" (emphasis added).<sup>18</sup> The Prosecution, in this regard, fails to justify that disclosure to the Defence could lead to the interference with the Witness, and instead relies on the general security situation in Mali and the capacity of armed groups to conduct attacks against individuals cooperating with the Court.

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

17. The evidence provided by P-0626 goes to [REDACTED] and therefore the disclosure of an anonymous summary would be prejudicial to the fair trial rights of the Suspect.
18. Indeed, Witness P-0626 refers to [REDACTED]<sup>19</sup>. These alleged activities and actions of the Suspect are likely to be contained in the charges that will be brought against him and will be relevant to the establishment of his criminal responsibility for these alleged crimes. Therefore, the information provided by the Prosecution must be sufficiently detailed to allow the Defence to challenge the evidence at the confirmation of charges, and not only at the trial stage.
19. Details of the Witness's account are of the utmost importance when they refer to [REDACTED]. Statements and prior testimony of witnesses which mention

<sup>17</sup> Prosecution's request, para. 38.

<sup>18</sup> *Katanga*, Judgment on Katanga's Appeal against the First Redaction Decision, ICC-1/04- 01/07-476, 13 May 2008, para. 49.

<sup>19</sup> Prosecution's request, para. 16.

[REDACTED] to the defence [REDACTED].<sup>20</sup> The disclosure and reliance on an anonymous summary of evidence will simply not be sufficiently detailed to allow the Defence to prepare adequately for the confirmation of charges hearing, to raise defences and challenge the “incriminating evidence” of Witness P-0626.

20. Moreover, the anonymous statements disclosed by the Prosecution to date have been heavily redacted, with entire pages fully blacked out<sup>21</sup>. The current state of disclosure does not allow the Defence to understand the nature and scope of the statements given by a large number of witnesses, therefore gravely limiting the Defence’s ability to participate in the pre-trial proceedings.
21. As mentioned previously, protective measures must not be prejudicial to the rights of the Suspect.<sup>22</sup> They must guarantee Mr Al Hassan’s right to be informed “in detail of the nature, cause and content of the charges brought against him”,<sup>23</sup> to “have adequate time and facilities for the preparation of the defence”,<sup>24</sup> and to “raise defences and to present other evidence”.<sup>25</sup>
22. Consequently, given the nature of the alleged crimes and the Witness’s [REDACTED], every aspect of the Witness’s statement is a crucial part of understanding the Prosecution’s case against the Suspect. This includes the transcript of the statement of the Witness rather than a summary that provides the “*substantive parts* of P-0626’s account, including [REDACTED]” (emphasis added).<sup>26</sup>
23. In light of the complexity of the Witness’s testimony and its importance to the case, the disclosure of a mere anonymous summary, as suggested by the Prosecution, will undoubtedly prevent the Defence from understanding the totality of the Witness’s evidence. More importantly, it will prevent Mr Al Hassan from understanding the relevant material and from preparing his own defence.

<sup>20</sup> ICTY, *Prosecutor v Seselj*, No. IT-03-67-PT, Decision on Form of Disclosure, 4 July 2006, paras 16, 18.

<sup>21</sup> [REDACTED]

<sup>22</sup> Article 68(1) Statute.

<sup>23</sup> Article 67(1)(a) Statute.

<sup>24</sup> Article 67(1)(b) Statute.

<sup>25</sup> Article 67(1)(e) Statute.

<sup>26</sup> Prosecution’s request, para. 36.



## V. Conclusion

24. In the absence of an objective risk to Witness P-0626, the Prosecution's request to withhold his identity from the Defence cannot be considered proportional to the prejudice arising to Mr Al Hassan and the infringement of his rights to present evidence and to raise defences. At the same time, the request 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.
25. 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 of the proceedings, the Defence respectfully requests that the Prosecution's request be dismissed and all relevant information be disclosed to the Defence.
26. Alternatively, if the Single Judge authorises the non-disclosure of Witness P-0626's identity, the Defence considers that an appropriately redacted version of the Witness's statement and associated materials would be preferable to an anonymous summary.



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Melinda Taylor  
Lead Counsel for Mr Al Hassan

Dated this 11<sup>th</sup> Day of March 2019  
At The Hague, The Netherlands