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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 withhold the identity of Prosecution witness MLI-OTP-P-0654 and request for a lesser redacted version”

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. The Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the “Defence”) submits the present response to the “Prosecution’s motion for authorisation to withhold the identity of Witness MLI-OTP-P-0654 upon whose evidence the Prosecution will rely at the confirmation hearing”.¹
2. The Prosecution requests to withhold the identity of Witness MLI-OTP-P-0654 (P-0654) and to only disclose a redacted version of P-0654 [REDACTED]. It submits that the requested measures will not prejudice the Suspect’s Defence. However, the Prosecution fails to demonstrate the existence of an objective risk arising from disclosure *to the Defence specifically*, and falls short of the threshold for non-disclosure under Rules 81(2) and 81(4) of the Rules of Procedure and Evidence (the “Rules”). As such, the Prosecution’s proposed measures constitute an unfair and unnecessary infringement on Mr Al Hassan’s fair trial rights, and the request should be dismissed.
3. Moreover, the version of the Prosecution’s request made available to the Defence is heavily redacted rendering it impossible for the Defence to actively participate in the proceedings.

II. Classification

4. 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.

¹ *Al Hassan*, Secret redacted version of the “Prosecution’s motion for authorisation to withhold the identity of Witness MLI-OTP-P-0654 upon whose evidence the Prosecution will rely at the Confirmation of Charges Hearing”, 14 March 2019, ICC-01/12-01/18-274-Secret-Exp-Red, notified to the Defence on 19 March 2019 (the Prosecution’s **request**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

III. Applicable law

5. Non-disclosure under Rules 81(2) and 81(4) of the Rules is an exception to the overriding principle of full disclosure,² and is subject to a clear set of legal principles.³ 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 Non-disclosure must also be necessary,⁵ and proportionate to the prejudice caused to the Suspect, including his right to a fair and impartial trial.⁶
6. 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.⁷

IV. Submissions

A. The redactions to the Prosecution's request available to the Defence make the request unintelligible

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[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.

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 (the "Statute").

⁷ [REDACTED]

7. The version of the Prosecution's request made available to the Defence is almost entirely redacted, which renders the document incoherent and unintelligible. Due to these redactions, the Defence is cast aside, unable to actively participate in the proceedings.
8. [REDACTED].
9. The Prosecution's request is so heavily redacted that the Defence has to guess the scope of the request and its potential impact on the Suspect, rendering the process of responding to the motion simply purposeless.
10. For instance, the request does not allow the Defence to understand the extent of the non-disclosure requested by the Prosecution. Indeed, paragraph 11 refers to 12 annexes, most of which are unavailable to the Defence, in addition to having the description of their content, including information on the size and type of the evidence, also redacted from the Defence:

“11. The annexes are divided as follows:

) Annex A [REDACTED] the non-disclosure [REDACTED] is requested. Annex A also contains [REDACTED] non-disclosure of which is also requested;

) Annex B contains the [REDACTED] of P-0654 and [REDACTED], for which redactions are being proposed to their content and to any identifying information in their metadata [REDACTED];

) Annex C contains the [REDACTED] of P-0654 and [REDACTED], for which redactions are being proposed to their content and to any identifying information in their metadata;

) Annex D contains [REDACTED] for which non-disclosure is being requested;

) Annex E(I) contains [REDACTED]

) Annex E(II) contains [REDACTED] for which non-disclosure is generally requested;

) Annex E(III) contains [REDACTED];

) Annex F(I) contains [REDACTED];

) Annex F(II) contains [REDACTED] for which non-disclosure is being requested [REDACTED];

) Annex G contains [REDACTED] for which non-disclosure is equally requested;

) Annex H contains highly identifying investigation notes mainly relating to security and logistic and a screening note concerning P-0654, the non-disclosure of which is also requested;

) Annex I contains [REDACTED] and

) [REDACTED]”⁸

11. The Prosecution’s request fails to provide any information on P-0654, or on what issues he/she will testify. The redactions applied by the Prosecution are so heavy that any attempt to respond meaningfully by the Defence is pointless.
12. Moreover, the Prosecution applies extensive redactions to section A regarding the existence of a security risk.⁹ As a result, the Defence is incapable to address the objectively justifiable risk, although it forms the legal basis for the exception of the overriding principle of full disclosure, pursuant to Rules 81(2) and 81(4) of the Rules.
13. In addition, the Prosecution seems to imply that the evidence of P-0654 contains potentially exculpatory evidence in the context of the confirmation hearing.¹⁰ Again, this section is redacted and difficult to assess. The Defence submit that any exculpatory evidence should be disclosed as soon as possible, and in an un-redacted form. The Suspect has a fundamental right to a fair trial, including the right to receive disclosure of potentially exculpatory material.
14. Pushing the absurdity to the limit, the Prosecution also heavily redacted the relief sought section of the request.¹¹ The Defence is therefore prevented from understanding or participating in any way to the current litigation.
15. To ensure that the Defence is given an opportunity to properly consider the consequences of Witness P-0654’s evidence for the Suspect, the Defence requests the

⁸ Prosecution’s request, para. 11.

⁹ Prosecution’s request, paras 14 (fully redacted), 15 (partly redacted).

¹⁰ Prosecution’s request, para. 30 (“[REDACTED] contain ample and key incriminatory and rule 77 material for the Defence as well as potentially exonerating information in the context of the confirmation hearing”).

¹¹ Prosecution’s request, paras 32 (partly redacted) and 33 (fully redacted).

Chamber to direct the Prosecution to provide a lesser-redacted, if not an unredacted, version of the request and to make available to the Defence *all* related information.

B. Disclosure to the Defence does not constitute a security risk to the Witness

16. While the Defence is aware of the security situation in Mali and appreciates the need to withhold the identity of Witness P-0654 to the public at this stage of the proceeding, the Defence reiterates that the Prosecution's request to withhold the identity of Witness P-0654 to the Defence is unwarranted, unfounded and prejudicial to the rights of the Suspect.¹²
17. 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.¹³ 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 risk of inadvertent contact with these protected witnesses, or other vulnerable individuals.
18. 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. Therefore, identifying information of individuals that are already known to the Prosecution should be disclosed so that the Defence can steer clear of any direct or indirect contact with them.

C. Non-disclosure will unfairly affect the Suspect's fair trial rights

19. The Defence reiterates that protective measures must not be prejudicial to the rights of the Suspect.¹⁴ 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",¹⁵ to "have adequate time and facilities for the preparation of the defence",¹⁶ and to "raise defences and to present other evidence".¹⁷

¹² Article 68(1) Statute.

¹³ ICC-01/12-01/18-40-Anx.

¹⁴ Article 68(1) Statute.

¹⁵ Article 67(1)(a) Statute.

¹⁶ Article 67(1)(b) Statute.

¹⁷ Article 67(1)(e) Statute.

20. While the scope of the confirmation of charges hearing may be limited in nature, the consequences of not being able to assess the evidence in the case are dire. This severely limits the right of the Defence to participate in the proceeding before the court. By limiting the information available to the Defence that is otherwise accessible to the Prosecution, the Defence is put in unfair position that affects the Suspect's fair trial rights and the fairness of the proceedings as a whole.
21. In order to safeguard the Suspect's fair trial rights, the Defence must have access to the evidence of the Witness in its entirety and without redaction. The Prosecution's proposed measures will undoubtedly prevent the Defence from understanding the totality of the Witness's evidence. More importantly, it will prevent Mr Al Hassan from preparing his own defence in preparation for the confirmation of charge hearing.
22. Contrary to the Prosecution's submission, redacting P-0654's identity and the non-disclosure of a large portion of the evidence he/she provided to the Defence does prejudice the rights of the Defence. It also impedes the fairness and impartiality of the confirmation of charges proceedings, especially in light of the information relating to potentially exonerating evidence, as discussed above. Taking into consideration the aforementioned arguments, the Defence submits that the disclosure of the identity and of the evidence provided by Witness P-0654 in its entirety to the Defence is essential to the fairness of the proceedings and will not endanger the safety of the Witness and his/her family.

V. Conclusion

23. The Defence respectfully requests the Single Judge to direct the Prosecution to provide a lesser-redacted version of the request so as to allow the Defence to make a proper and complete assessment of the materiality of the Witness's testimony to the Suspect's case. The Defence reserves the right to submit further observations on the Prosecution's request once it receives an intelligible version of the request.
24. The Prosecution's proposed measures cannot be considered proportionate to the prejudice arising to Mr Al Hassan and the infringement of his rights to present evidence and to raise defences. 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*, along with all materials arising from Witness P-0654's interaction with the Prosecution [REDACTED].



Melinda Taylor
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Dated this 27th Day of March 2019
At The Hague, The Netherlands