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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-0542 and
MLI-OTP-P-0603**

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 1 February 2019, the Defence was notified of the confidential redacted version of the Prosecution's request to withhold the identity of Witnesses MLI-OTP-P-0542 and MLI-OTP-P-0603 (the "Witnesses") upon whose evidence the Prosecution will rely at the confirmation hearing.¹
2. The Prosecution submits that Witness P-0542 [REDACTED]. Witness P-0603 is [REDACTED] providing information on jihadist groups in Timbuktu in 2012, and, *inter alia*, on instances of imprisonment, forced marriages and floggings.
3. The Prosecution argues that withholding the identity of the Witnesses and the non-disclosure of material associated to their statement is necessary to protect their safety and that of their families.
4. The Prosecution does not demonstrate that disclosure *to the Defence* would expose the Witnesses to an objective risk of harm. The requested measures 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

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 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

6. 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

¹ *Al Hassan*, Confidential redacted version of the "Prosecution's Request for authorisation to withhold the identity of Witnesses MLI-OTP-P-0542 and MLI-OTP-P-0603 upon whose evidence the Prosecution will rely at the confirmation hearing", 31 January 2019, ICC-01/12-01/18-229-Conf-Exp, notified to the Defence on 1 February 2019 (the Prosecution's **request**). All cases referenced in this document are related to the *Al Hassan* case unless stated otherwise.

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

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

7. The Defence refers to its previous submissions 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 unfair to the Suspect.⁷
8. The Defence further refers to its previous submissions on the relevance of 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”.⁸

(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 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. 7.

⁸ 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. 8.

IV. Submissions

9. The Prosecution submits that the withholding of the identity of the Witnesses from the Defence is necessary due to an objective risk of danger if their identities were to be disclosed to the Defence, as well as to protect the Prosecution's ongoing investigations. The Defence will address the issues raised in the motion within the limits of the redactions applied by the Prosecution.

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

10. The Prosecution refers to an objectively justifiable risk of danger if the Witnesses' identities were to be disclosed to the Defence.⁹ The Prosecution also refers to the general situation in Mali as grounds to withhold the identity and identifying information of Witnesses P-0542 and P-0603.¹⁰
11. While the Defence is aware of the security situation in Mali, the Prosecution does not provide any evidence of the "objectively justifiable risk of danger" in disclosing the identity of the Witnesses *to the Defence*.¹¹ Rather, the Prosecution makes unfounded assumptions concerning Mr Al Hassan's connection with members of armed groups currently operating in Mali.¹² As previously submitted,¹³ these arguments do not find support in the factual circumstances of the case and should not form the basis for withholding relevant information.
12. In fact, Mr Al Hassan has been held in detention since April 2017.¹⁴ Following his transfer to the ICC on 31 March 2018, Mr Al Hassan has been subject to strict active

⁹ Prosecution's request, para. 11.

¹⁰ Prosecution's request, para. 17.

¹¹ Prosecution's request, para. 11.

¹² Prosecution's request, paras 15, 16, 17.

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, paras 10, 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. 10.

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

monitoring of his non-privileged telephone calls and visits.¹⁵ Since the beginning of his detention, Mr Al Hassan has shown no intent to harm witnesses.¹⁶ It is also worth mentioning that Mr Al Hassan must, under the Court's statutory framework, refrain from disclosing confidential case information, insofar as such conduct would violate existing decisions and orders issued by the Chamber.¹⁷

13. 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 over Mr Al Hassan's contact with members of armed groups – despite indications to the contrary – does not demonstrate the existence of an objective risk to the Witnesses. 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.
14. 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.¹⁸ 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.
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. The Prosecution underlines Witness P-0603's fear of enemies "among us".¹⁹ While a general fear may

¹⁵ Décision relative à la requête présentée par le Procureur en application de la norme 101 du Règlement de la Cour, 5 April 2018, ICC-01/12-01/18-16-Conf-Exp.

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 \(the "Protocol"\)](#).

¹⁸ 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.

¹⁹ Prosecution's request, para. 14.

be rational, the Prosecution fails to establish and substantiate reasonable causes of fear of *Mr Al Hassan*, more so considering that the threats appear to emanate from individuals currently operating in Mali rather than an individual detained in The Netherlands for almost a year and placed under strict monitoring conditions.

16. In relation to the protection of the Prosecution's ongoing investigations, contrary to the Prosecution's submissions,²⁰ 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).²¹ The Prosecution, in this regard, fails to justify that disclosure *to the Defence* could lead to interference with the Witnesses, 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.
17. The Pre-Trial Chamber has adopted robust measures that ensure that any party's investigative activities do not breach a witness's privacy.²²[REDACTED]²³, [REDACTED]. The request does not substantiate the assumption that the Defence is not as capable as the Prosecution to protect the privacy [REDACTED] of witnesses, and that the Defence's investigative activities could lead to an inadvertent or deliberate disclosure.²⁴
18. 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. 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.

²⁰ Prosecution's request, para. 28.

²¹ *Katanga*, Judgment on Katanga's Appeal against the First Redaction Decision, ICC-1/04- 01/07-476, 13 May 2008, para. 49.

²² [REDACTED].

²³ [REDACTED]

²⁴ Prosecution's request, paras 17 and 27.

19. Indeed, pursuant to the Protocol, the Defence has no means of preventing an inadvertent meeting with a Witness whose identity it ignores. The Protocol merely offers a remedy if this occurs: “If a party or participant contacts a witness of an opposing party or participant inadvertently (...), the party or participant shall refrain from any discussion of the case and shall under no circumstances seek the witness’s consent to be interviewed directly”.²⁵ If the Defence is forced to investigate blindly, it will be unable to take preventative measures, therefore increasing the risk of inadvertent contacts with Prosecution witnesses.
20. While the Defence will take all necessary measures to avoid contact with OTP 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.

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

21. According to the Prosecution, Witness P-0542 was [REDACTED].²⁶ The Witness also refers to the case of the amputation and a case of flogging [REDACTED].²⁷
22. Witness P-0603 is [REDACTED], providing information on jihadist groups in Timbuktu at the time of the occupation, and, *inter alia*, cases of imprisonment, forced marriages and floggings.²⁸ [REDACTED] the name of Mr Al Hassan and has met Abou Zeid, who is an alleged member of the so-called common plan together with Mr Al Hassan.²⁹
23. The Prosecution adds that the testimonies of the Witnesses will be used to support the Prosecution’s evidence at the confirmation of charges hearing,³⁰ and [REDACTED].³¹

²⁵ The Protocol, para. 31.

²⁶ Prosecution’s request, para. 12.

²⁷ Prosecution’s request, para. 12.

²⁸ Prosecution’s request, para. 13.

²⁹ Prosecution’s request, para. 13. See also, ICC-01/12-01/18-149-Conf-Exp, para. 18.

³⁰ Prosecution’s request, paras 13 and 26.

³¹ Prosecution’s request, para. 26.

24. As provided for in Article 68(1) of the Rome Statute, protective measures must not be prejudicial to the rights of the Suspect. 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",³² to "have adequate time and facilities for the preparation of the defence",³³ and to "raise defences and to present other evidence".³⁴
25. In light of the range and gravity of crimes and facts covered in these testimonies and due to their direct relevance to Mr Al Hassan and to the case, the Prosecution's proposed measures will undoubtedly prevent the Defence from understanding the totality of the Witnesses' evidence. More importantly, it will prevent Mr Al Hassan from preparing his own defence *vis-à-vis* the Witnesses' evidence.
26. The Prosecution argues that the Defence will not be prejudiced by the requested measures, including the redactions to parts of Witness P-0603's account [REDACTED] because these will not be relied on for the confirmation of charges.³⁵ This argument however neglects taking into account Mr Al Hassan's right to examine the evidence brought against him and his right to be informed promptly and in detail of the nature, cause and content of the charges against him. This is particularly important when the evidence directly relates to his acts and conducts.
27. The Defence notes that P-0542 and P-0603 were amongst the Witnesses whose status was pending as noted by the Prosecution on 9 November 2018.³⁶ While the Prosecution had not set a specific schedule on requests to withhold their identities, the Prosecution's request was submitted on 1 February 2019. The Defence reiterates its concern by the timing of the request considering the fast approaching confirmation of charges hearing and the time needed for the Defence response, for the Single Judge to conduct an assessment of the request and for the Defence to accordingly examine the disclosed evidence.³⁷
28. The Single Judge has previously expressed his expectation from the parties to "fulfill their disclosure and communication obligations as soon as possible and not to wait

³² Article 67(1)(a) Rome Statute.

³³ Article 67(1)(b) Rome Statute.

³⁴ Article 67(1)(e) Rome Statute.

³⁵ Prosecution's request, para. 26.

³⁶ ICC-01/12-01/18-180-Conf-Red, para. 22.

³⁷ See, ICC-01/12-01/18-239-Conf-Exp, para. 30.

until the deadlines set by the Court's texts [...]."³⁸ The lack of clarity over the Prosecution's calendar for the recent and remaining requests and disclosures disregards the Single Judge's findings and seriously prevents the Defence from exercising its right to effectively participate in the proceedings.

29. To date, in accordance with the information provided by the Prosecution, the identity of at least 40 witnesses has either been withheld or is subject to a withholding request.³⁹ The Defence further draws the Chamber's attention to the pending status of P-0580, P-0610 and P-0622,⁴⁰ as well as P-0021.⁴¹ No request in their regard has been submitted yet by the Prosecution, which creates an additional and unnecessary burden on the Defence and the Chamber in order to respectively respond to and assess the requests on a short notice.
30. This, in context and as a whole, already creates a significant gap in the Prosecution's case from the Defence's perspective, holds up the proceedings, and renders the task of understanding the 'nature, cause and content of the charges' unacceptably challenging.

V. Conclusion

31. In the absence of an objective risk to Witnesses P-0542 and P-603 from disclosure of their identities to the Defence, 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. 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.
32. 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

³⁸ ICC-01/12-01/18-31-tENG, para. 21.

³⁹ Version confidentielle expurgée des « Éléments d'information concernant notamment la communication des éléments de preuve, les requêtes aux fins d'expurgation ou déposées en application de l'article 56 et les questions de traduction », 13 November 2018, ICC-01/12-01/18-180-Conf-Red, paras 15-16, 21-22, 32-35, and 39.

⁴⁰ ICC-01/12-01/18-180-Conf-Red, para. 22.

⁴¹ ICC-01/12-01/18-180-Conf-Red, para. 39.

proceedings, the Defence respectfully requests that the Prosecution's request be dismissed and all relevant information be disclosed to the Defence.



Melinda Taylor
Lead Counsel for Mr Al Hassan

Dated this 14th Day of February 2019
At The Hague, The Netherlands