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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 non-disclosure of a document concerning witness MLI-OTP-P-0542 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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Unrepresented Victims

**Unrepresented Applicants
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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 Request for non-disclosure of a document concerning Witness MLI-OTP-P-0542”.¹
2. The Prosecution had previously submitted an application to withhold the identity of P-0542,² which the Defence opposed.³ The Redaction request is still pending.
3. The Prosecution submits that Witness P-0542 is [REDACTED],⁴ and refers [REDACTED].⁵
4. The Prosecution seeks authorisation to not disclose a document concerning P-0542, incorporating by reference its Redaction Request.⁶ The Prosecution submits that applying redactions to the document would not “adequately mitigate the risk that P-0542’s identity could be ascertained”⁷ while not disclosing the document “will not prejudice the Defence for the purpose of the Confirmation of Charges”⁸.
5. 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.
6. 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.

¹ *Al Hassan*, Confidential redacted version of the “Prosecution’s Request for non-disclosure of a document concerning Witness MLI-OTP-P-0542”, 14 March 2019, ICC-01/12-01/18-273-Conf-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.

² ICC-01/12-01/18-229-Conf-Exp-Red (the **Redaction request**).

³ ICC-01/12-01/18-246-Conf-Exp.

⁴ Redaction request, para. 12.

⁵ Redaction request, para. 12.

⁶ Prosecution request, para. 14.

⁷ Prosecution request, para. 17.

⁸ Prosecution request, para. 18.

II. Classification

7. 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 filing to which it relates is classified the same.

III. Applicable law

8. Non-disclosure under Rules 81(2) and 81(4) of the Rules is an exception to the overriding principle of full disclosure,⁹ and is subject to a clear set of legal principles.¹⁰ 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.¹¹ Non-disclosure must also be necessary,¹² and proportionate to the prejudice caused to the Suspect, including his right to a fair and impartial trial.¹³
9. 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

⁹ *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.

¹⁰ 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.

¹¹ *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).

¹² *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.

¹³ *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").

charges hearing, viewed as a whole, as being unfair to the Suspect, the Defence refers back to its previous submissions.¹⁴

IV. Submissions

A. Defence response to the redaction Request

10. The Defence recalls and refers back to its previous “response to the Prosecution’s Request for authorisation to withhold the identity of Witnesses MLI-OTP-P-0542 and MLI-OTP-P-0603”.¹⁵

B. The redactions to the Prosecution’s request available to the Defence make the request unintelligible

11. The version of the Prosecution’s request made available to the Defence is heavily redacted, which renders the document incoherent and unintelligible. Due to these redactions, the Defence is cast aside, unable to actively participate in the proceedings.
12. The Single Judge cautioned the Prosecution on the importance of limiting the redactions applied to avoid putting the Defence in a situation where it is left to “deviner le périmètre de cette demande”.¹⁶ The Single Judge therefore directed the Prosecution to apply all necessary redactions, while ensuring the motions remain “intelligibles par tous les destinataires de ses écritures”.¹⁷
13. The Prosecution’s request is so heavily redacted and does not allow the Defence to understand the content of the document for which non-disclosure is requested,¹⁸ and to verify if it provides any substantive information to the defence.
14. Moreover, the Prosecution applies extensive redactions to section C regarding the Lack of prejudice to Defence.¹⁹ As a result, the Defence is incapable to understand how non-disclosure will not unfairly affect the Suspect’s fair trial rights.

¹⁴ 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.

¹⁵ ICC-01/12-01/18-246-Conf-Exp.

¹⁶ ICC-01/12-01/18-251-Secret-Exp-Red, para. 43.

¹⁷ ICC-01/12-01/18-251-Secret-Exp-Red, para. 43.

¹⁸ Prosecution request, paras 15, 16 and 17.

¹⁹ Prosecution’s request, para. 18.

15. To ensure that the Defence is given an opportunity to properly consider the consequences of Witness P-0542's evidence for the Suspect, the Defence requests the 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.

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

16. The Defence reiterates that protective measures must not be prejudicial to the rights of the Suspect.²⁰ 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",²¹ to "have adequate time and facilities for the preparation of the defence",²² and to "raise defences and to present other evidence".²³
17. 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.
18. 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.
19. Contrary to the Prosecution's submission, the non-disclosure of this incriminatory document does prejudice the rights of the Defence. It also impedes the fairness and impartiality of the confirmation of charges proceedings. Taking into consideration the aforementioned arguments, the Defence submits that the disclosure of the identity and of the evidence provided by Witness P-0542 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.

²⁰ Article 68(1) Statute.

²¹ Article 67(1)(a) Statute.

²² Article 67(1)(b) Statute.

²³ Article 67(1)(e) Statute.

V. Conclusion

20. 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.
21. 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 the document be disclosed *to the Defence*.



Melinda Taylor
Lead Counsel for Mr Al Hassan

Dated this 1st Day of April 2019
At The Hague, The Netherlands