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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-0595”**

**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 24 January 2019, the Defence was notified of the confidential redacted version of the Prosecution's request to withhold the identity of Witness MLI-OTP-P-0595 (the **Witness**) upon whose evidence the Prosecution will rely at the confirmation hearing.¹ The Prosecution submits that Witness P-0595 will provide evidence on[REDACTED]. The Prosecution argues that the withholding of his identity and identifying information in his statement, and the non-disclosure of associated material annexed to the Prosecution's request is necessary for his safety and that of his family.
2. While security concerns may require the withholding of P-0595's identity from the public in general and applying other protective measures available under the Statute, the Prosecution does not demonstrate that disclosure *to the Defence* would expose the Witness 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

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 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

4. 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 Witness MLI-OTP-P-0595, upon whose evidence the Prosecution will rely at the confirmation hearing", 22 January 2019, ICC-01/12-01/18-222-Conf-Exp, notified to the Defence on 24 January 2019 (the Prosecution's **request**). All cases referenced in this document are 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 (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

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

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.⁷

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 the protection of the Prosecution's ongoing investigations. The Defence will address the issues raised in the motion within the limits of the very extensive redactions applied by the Prosecution.

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.

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

7. The Prosecution refers to an internal analysis [REDACTED] and the high risk for the Witness and his family should his cooperation with the Court become known to armed groups.⁸
8. The Prosecution also makes unfounded assumptions concerning Mr Al Hassan's connection with members of armed groups and fears of inadvertent or intentional disclosure of confidential information by the Defence.⁹ As previously submitted,¹⁰ these arguments do not find support in the factual circumstances of the case and should not form the basis for withholding relevant information.
9. In fact, Mr Al Hassan has been held in detention since April 2017.¹¹ Following his transfer to the ICC on 31 March 2018, Mr Al Hassan has been subject to strict active monitoring of his non-privileged telephone calls and visits.¹² Since the beginning of his detention, Mr Al Hassan has shown no intent to harm witnesses.¹³ 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.¹⁴
10. 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

⁸ Prosecution's request, para. 30.

⁹ Prosecution's request, paras 26-27.

¹⁰ 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.

¹¹ See, for example, MLI-OTP-0061-1622, p. 1627.

¹² 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.

¹³ 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.

¹⁴ 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.

Hassan's contact with members of armed groups – despite indications to the contrary – does not demonstrate the existence of an objective risk to the Witness. 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.

11. 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.¹⁵ 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.
12. The Prosecution insists on the Witness's fears for his safety and the safety of his family.¹⁶ However, the request states that Witness P-0595 has not reported threats or incidents against him.¹⁷ Rather, the Prosecution refers to its general assessment of the situation of witnesses as factual basis for requesting the withholding of the identity of P-0595. The Prosecution offers no evidence of threats specifically directed at P-0595 and does explain how his specific situation places him and his family at high risk if his identity was to be revealed to the Defence.
13. 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.
14. Contrary to the Prosecution's submissions,¹⁸ the Appeals Chamber has recognised the possible prejudice to ongoing investigations due to the fear of witness interference

¹⁵ 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.

¹⁶ Prosecution's request, para. 24.

¹⁷ Prosecution's request, para. 21.

¹⁸ Prosecution's request, para. 44.

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).¹⁹ 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.

15. 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.²⁰ 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.
16. 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”.²¹ 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.
17. Moreover, provided that such inadvertent contact occurs, the Defence will only be able to take the necessary measures and refrain from any further discussion if the witness is forthcoming regarding his/her role in the proceedings when asked. While the Defence will take all necessary measures to avoid contact with OTP witnesses, the risks of inadvertent contact are multiplied when the witness’s identifying information has been withheld.

¹⁹ *Katanga*, Judgment on Katanga’s Appeal against the First Redaction Decision, ICC-1/04- 01/07-476, 13 May 2008, para. 49.

²⁰ ICC-01/12-01/18-40-Anx-tENG (the **Protocol**).

²¹ The Protocol [Redacted].

18. The Defence takes the issue of protection of witnesses seriously and wants to avoid committing involuntary mistakes. 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*

19. The Witness's account, as reflected in the Prosecution's request, contains information on[REDACTED].²² P-0595[REDACTED]²³.
20. According to the Prosecution's case, the Suspect[REDACTED].²⁴ Therefore, the evidence provided by P-0595 is central to the present case and crucial for the preparation of the Defence.
21. The anonymous statements disclosed by the Prosecution to date have been heavily redacted, with entire pages fully blacked out²⁵. 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.
22. As mentioned above, protective measures must not be prejudicial to the rights of the Suspect.²⁶ 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",²⁷ to "have adequate time and facilities for the preparation of the defence",²⁸ and to "raise defences and to present other evidence".²⁹
23. Moreover, given the nature of the crimes and[REDACTED], every aspect of the Witness's statement is a crucial part of understanding the Prosecution's case against the Suspect. This includes identification information.

²² Prosecution's request, para. 15, 16.

²³ Prosecution's request, para. 41.

²⁴ ICC-01/12-1/18-1-Conf-Exp-Red3, para. 222.

²⁵ See for example: MLI-OTP-0033-5539-R01, p. 5542, 5543, 5545 (fully redacted).

²⁶ Article 68(1) Rome Statute.

²⁷ Article 67(1)(a) Rome Statute.

²⁸ Article 67(1)(b) Rome Statute.

²⁹ Article 67(1)(e) Rome Statute.

24. In light of the complexity of the Witness's testimony and its importance to the case, "extensive" redactions to his evidence, as suggested by the Prosecution,³⁰ 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.
25. Moreover, the Prosecution informed the Defence and the Single Judge on 9 November 2018, that the request to withhold the identity of Witness P-0595 would be notified by mid-December at the latest.³¹ In reality, the Defence was notified of the request only on 24 January 2019. Considering the upcoming Confirmation of Charges hearing, the Defence must be in a position to assess the evidence against the Suspect and is in no position to do so when unexplained delays occur in the disclosure of Witnesses whose evidence the Prosecution will rely on at the confirmation hearing.
26. 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.³² This, in context and as a whole, already creates a significant gap in the Prosecution's case from the Defence's perspective and renders the task of understanding the 'nature, cause and content of the charges' unacceptably challenging.

V. Conclusion

27. In the absence of an objective risk to Witness P-0595, 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.

³⁰ Prosecution's request, para. 41.

³¹ Version confidentielle expurgée des « Eléments 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, para 21.

³² Version confidentielle expurgée des « Eléments 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.

28. 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.



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Lead Counsel for Mr Al Hassan

Dated this 04 Day of February 2019
At The Hague, The Netherlands