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**TRIAL CHAMBER X**

**Before:** Judge Antoine Kesia-Mbe Mindua, Presiding  
Judge Tomoko Akane  
Judge Kimberly Prost

**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 ‘Response to “Confidential redacted version of ‘Prosecution Motion for authorisation to withhold information identifying Witnesses MLI-OTP-P0636, MLI-OTP-P0638, MLI-OTP-P0639, MLI-OTP-P0641, and MLI-OTP-P0642 from their statements’, ICC-01/12/-01/18-487-Conf-Exp, 13 November 2019”’**

**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') files this Response to the "Confidential redacted version of 'Prosecution motion for authorisation to withhold information identifying Witnesses MLI-OTP-P-0636; MLI-OTP-P-0638; MLI-OTP-P-0639; MLI-OTP-P-0641; and MLI-OTP-P-0642 from their statements'"<sup>1</sup> (the 'Motion').
2. The Motion should be denied. The withholding of the identities of the four witnesses<sup>2</sup> ('Four Witnesses') as these proceedings enter the trial phase is contrary to Mr Al Hassan's fair trial rights, and in this respect, the Motion runs contrary to the very rules under which it is brought. The sought measures endanger Mr Al Hassan's right to time and facilities for the preparation of his defence, as well as his right to trial without undue delay. Further, withholding of the identities of the Four Witnesses would have the prejudicial knock-on effect of unduly hindering the Defence's ability to contest the Prosecution's upcoming application to amend the charges. Furthermore, the measures sought in the Motion are unjustified, as the Prosecution has not met the threshold for withholding the identities of witnesses under Rules 81(2) and (4), as established through ICC jurisprudence.
3. Should the Prosecution be unwilling or unable to disclose the information in question at this stage, it should be disallowed from relying on the Four Witnesses; it should also be prevented from amending the charges to include additional incidents based on these witnesses. Only then would the appropriate balance be struck between the fair trial rights of Mr Al Hassan and the protection of witnesses, given the multi-faceted prejudice to Mr Al Hassan's trial rights and preparations that would be occasioned by the continued withholding of this information.

## II. Confidentiality

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<sup>1</sup> ICC-01/12-01/18-487-Conf-Exp-Red ('Motion').

<sup>2</sup> P-0636, P-0638, P-0639, P-064; see also, [REDACTED]

4. Pursuant to Regulation 23bis(2) of the Regulations of the Court, this response is filed confidential *ex parte*, Prosecution, Defence and the Victims and Witnesses Unit only, as it refers to a filing of the same classification.

### III. Submissions

#### A. The Motion is contrary to Mr Al Hassan's fair trial rights

5. At the outset, the Defence notes that the provisions under which the Prosecution brings this Motion expressly require that any measures or steps taken under said provisions be consistent with fair trial rights.<sup>3</sup> Rule 81(4) of the Rules of Procedure and Evidence ('Rules') requires that any steps taken to ensure confidentiality of information be in accordance with Article 54 of the Rome Statute ('Statute'), which in turn obliges the Prosecution to fully respect the rights of an accused in the conduct of investigations.<sup>4</sup> Similarly, according to Article 68(1) of the Statute, any measures taken under said Article 'shall not be prejudicial to or inconsistent with' an accused's fair trial rights.
6. Contrary to the above, the Motion is entirely inconsistent with Mr Al Hassan's statutory right to adequate time and facilities for the preparation of his defence.<sup>5</sup> Nearly three months have passed since the charges against Mr Al Hassan were confirmed. At this stage, as these proceedings enter the trial phase, the Prosecution should be in the process of immediately disclosing the identities of the witnesses it intends to rely on, in accordance with the 'overriding principle' of full disclosure.<sup>6</sup>
7. Instead, the Prosecution now seeks to add to the already significant tally of anonymous witnesses on whom it intends to rely; it has indicated that full disclosure

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<sup>3</sup> See, Motion, para. 1.

<sup>4</sup> See, Article 54(1)(c).

<sup>5</sup> Article 67(1)(b).

<sup>6</sup> ICC-01/04-01/07-475 ('Katanga Decision'), para. 70.

of the identities of at least 29 anonymous Prosecution witnesses – including the Four Witnesses – would not be completed before May 2020.<sup>7</sup>

8. It is self-evident that non-disclosure of a witness's identity severely impairs Defence investigations. Indeed, it is only once the identities of these 30-odd witnesses are disclosed to the Defence, that its investigations into these witnesses and their evidence can start in earnest. Only then will the Defence be able to formulate targeted disclosure requests to the Prosecution, which will then take time to be processed; the closer to trial these requests are sent, the more time the Prosecution will inevitably need to respond to them. Furthermore, in of itself, organising Defence investigative missions to Mali is an extremely time-consuming process given the security considerations, and secure mission requests can take weeks to be processed; for missions to [REDACTED] they can take months. Given this, the Defence would be only able to conduct an extremely limited number of missions in the window between mid-May 2020 (the time when the Prosecution will complete full disclosure) and the Prosecution's proposed start date of September 2020. The fact that the Court's summer judicial recess falls within this time present further logistical difficulties and delays.
9. Nor would the prejudice to Defence investigations be remedied by any 'rolling' disclosure of identifying information. Belated and piecemeal disclosure delays and impedes the ability of the Defence to formulate possible lines of investigation in a timely and comprehensive manner.<sup>8</sup> The resultant prejudice would be particularly heightened in this case, given that the Defence might only be afforded 'one shot' to visit certain locations, or to speak to potential sources and witnesses, in light of security considerations.
10. As this case approaches the commencement of trial, Defence resources will already be severely stretched, which will further limit the Defence's ability to conduct

<sup>7</sup> ICC-01/12-01/18-518-Conf-Exp-Red2 ('Prosecution Submissions of 6 December 2019'), paras 7-8.

<sup>8</sup> ICC-01/09-02/11-728-Anx2, para. 5.

investigative missions. Indeed, to the extent that the Prosecution and the Defence will have had drastically different amounts of time to investigate the charges against Mr Al Hassan<sup>9</sup> – which time the Prosecution seeks to further constrict through withholding of an inordinate amount of witness identities – this issue also touches upon the equality of arms.<sup>10</sup>

11. Moreover, in the instant case, the prejudice to the Defence is compounded by the sheer quantity of Prosecution witnesses whose identities continue to be withheld. Indeed, in order to properly assess the detrimental impact that granting the Motion would have on Defence preparations, the Trial Chamber must measure not only the effect of withholding the identities of the Four Witnesses, but the cumulative effect of withholding the identities of at least 29 witnesses<sup>11</sup> from the Defence in the lead-up to the commencement of trial.<sup>12</sup> On top of this, the Trial Chamber must take into consideration the fact that the Prosecution intends to seek delayed disclosure for over ten of its witnesses – i.e. to request authorisation to disclose their identities and unredacted statements no more than 30-60 days before their testimonies.<sup>13</sup>

12. The detrimental effect that granting the Motion would have on Defence preparation is apparent. However, it does not follow that granting the Motion on the condition that the Defence be afforded more time to prepare for trial is an appropriate remedy. The Prosecution has recently signalled its opposition to starting the trial before the summer recess, as per the Trial Chamber's inclination; instead, it has stated that it would not be trial-ready until September 2020, due to the corollary factors of 'witness management' and disclosure delays – including in relation to the Four Witnesses.<sup>14</sup> By that time, Mr Al Hassan – who is presumed innocent – will have been in detention for nearly three and a half years. It cannot be controversial that

<sup>9</sup> The ICC Prosecution's investigation into the situation in Mali opened in January 2013 – roughly seven years ago.

<sup>10</sup> See, Katanga Decision, para. 73(a), where the ICC Appeals Chamber held that safeguarding of the equality of arms is a factor to be taken into account in considering Rule 81(4) requests.

<sup>11</sup> Prosecution Submissions of 6 December 2019, para. 7.

<sup>12</sup> ICC-01/04-02/06-537-Red2, para. 18.

<sup>13</sup> Prosecution Submissions of 6 December 2019, para. 30.

<sup>14</sup> Prosecution Submissions of 6 December 2019, paras 6-8.

such an excessive period of detention is manifestly contrary to Mr Al Hassan's right to be tried without undue delay, guaranteed to him under the Statute.<sup>15</sup> Moreover, in the event that the Motion is granted, and the Prosecution is allowed to withhold the identities of its 30-odd anonymous witnesses, including those of the Four Witnesses: even then there is no guarantee that the Defence would be in a position to start, having had less than four months for full, unfettered<sup>16</sup> investigations.

13. Further, should the Defence be unable to complete its investigations into a given witness before their testimony, as a result of the late disclosure as proposed by the Prosecution, it would not mean that said investigations would cease. Should these later investigations unearth information that impacts the credibility or reliability of a witness that has been heard, the Defence would inevitably seek to recall of that witness, or to augment a Defence case, both of which would inevitably cause further delay to the proceedings.

14. Lastly, granting of the Motion would also unduly prejudice Defence preparation, as it would severely hinder the Defence's ability to meaningfully oppose the Prosecution's upcoming application to amend the charges against Mr Al Hassan *inter alia* on the basis of the evidence of the Four Witnesses.<sup>17</sup>

15. In order to mount any challenges to the evidence of the Four Witnesses or to present countering evidence pursuant to Article 61(6), the Defence must be in a position to properly assess the reliability of the evidence of the Four Witnesses. However, without identifying information, the Defence is unable to verify even the most elementary aspects of the reliability of their evidence – for example, whether they actually witnessed the incidents in question, or whether any social and familial connections of a witness exist that might affect their credibility. Moreover, given that the Four Witnesses were interviewed [REDACTED], the exact dates of the interviews

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<sup>15</sup> Article 67(1)(c).

<sup>16</sup> Not counting the 10-plus witnesses in relation to whom the Prosecution intends to seek delayed disclosure; see *supra*.

<sup>17</sup> Motion, para. 11.

– which are also withheld from the Defence – are critical in assessing of the credibility of the Four Witnesses, of whom at least three claim to have witnessed events that [REDACTED],<sup>18</sup> or otherwise give evidence as regards Mr Al Hassan’s alleged role and conduct, [REDACTED].<sup>19</sup>

16. Further, the Defence notes that given that the Prosecution intends to apply to amend the charges on the basis of the evidence of the Four Witnesses, it follows that this anonymous evidence – of which the Defence would be deprived of any meaningful opportunity to challenge its probative value<sup>20</sup> – would fall outside the current scope of the charges against Mr Al Hassan. The Defence also recalls that anonymous hearsay evidence cannot on its own sustain the confirmation of a charge; rather, it can only be used for the purposes of corroborating other evidence.<sup>21</sup>

17. Nor can this prejudice be remedied by the eventual disclosure of the identities of the Four Witness as proposed by the Prosecution,<sup>22</sup> given that any Prosecution application to amend the charges would very likely precede the disclosure of the identifying information of the Four Witnesses.<sup>23</sup> As things stand, the Prosecution is withholding information that would be of fundamental importance in the determination of an application to amend the charges. For example, [REDACTED], which the Prosecution has redacted in the Motion, is directly relevant to the issue of whether the Prosecution’s failure to bring these charges at the Confirmation of Charges stage is justifiable.<sup>24</sup> Similarly, should information as to the manner in which the Four Witnesses were located or identified by the Prosecution be withheld, this would undermine the Defence’s ability to put forward cogent arguments as regards whether the Prosecution acted with due diligence in this regard. The fact that the Four Witnesses provide potentially exculpatory evidence only prejudices the

<sup>18</sup> See e.g., Motion, paras 33 and 38, [REDACTED].

<sup>19</sup> See e.g., Motion, paras 24 and 35, where P-0638 and P-0641 [REDACTED].

<sup>20</sup> See e.g. ICC-01/05-01/08-424, para. 50.

<sup>21</sup> ICC-01/04-01/10-465-Red, para. 49; see also, para. 78.

<sup>22</sup> Motion, para. 10.

<sup>23</sup> See *supra*, para 7.

<sup>24</sup> Motion, paras 3-6.

Defence further, as it is unable to investigate or interview them, or assess the likely value of their evidence.<sup>25</sup>

18. In this respect, the wider context of this Motion only serves to illustrate the multifaceted prejudice that would be occasioned to Defence preparations and Mr Al Hassan's fair trial rights.

19. Given what is at stake in any criminal proceedings, the balance of fair trial rights of an accused and the protection of witnesses must always favour the rights of an accused – especially so, given the gravity of the crimes that fall within jurisdiction of this Court.<sup>26</sup> Indeed, this principle is reflected in Article 64(2) of the Statute, which obliges the Trial Chamber to ensure that a trial is conducted 'with full respect of the rights of the accused', but 'due regard for the protection of [...] witnesses'. In light of this principle, should the Prosecution not be in a position to provide the identifying information, it should be compelled to renounce its reliance on the Four Witnesses.

**B. The withholding of identifying information for the Four Witnesses is unjustified.**

20. At the outset, the Defence recalls that authorisation of non-disclosure of information remains the exception to the general rule of full disclosure.<sup>27</sup>

21. Further, as has previously been relied on by the Prosecution, the Appeals Chamber has held there is a clear distinction between the standard for permitting non-disclosure at the confirmation stage and that at the trial stage.<sup>28</sup> This distinction duly reflects the fact that during the trial phase, the fundamental issue at stake is the very determination of the guilt or innocence of an accused.<sup>29</sup>

<sup>25</sup> See *infra*, paras. 31-34; see also, ICC-01/04-01/06-1311-Anx2 ('Lubanga Decision'), para. 95.

<sup>26</sup> See e.g., IT-95-5/18-PT, *Prosecutor v. Karadžić*, Decision on Prosecution's Motion for Delayed Disclosure for KDZ456, KDZ493, KDZ531, and KDZ532, and Variation of Protective Measures for KDZ489, 5 June 2009, para. 12, and ICTR-96-13-A, *Prosecutor v. Musema*, Judgement, 16 November 2001, para. 68, and references cited therein.

<sup>27</sup> Katanga Decision, para. 70.

<sup>28</sup> See, ICC-01/12-01/18-48, para. 24, citing Katanga Decision, para. 68.

<sup>29</sup> Katanga Decision, para. 68.

22. Indeed, this distinction is clear from the Pre-trial Chamber Single Judge's Decision of 19 July 2018, cited in the Prosecution's Motion under 'Applicable Law', in which the he repeatedly made reference to the stage of the proceedings in his observations on the applicable law.<sup>30</sup> This includes his expressly recalling that the Appeals Chamber had "emphasized the specificity of the confirmation of the charges stage [...] and set forth, in particular, that 'it is permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial'".<sup>31</sup> Similarly, in his Decisions of 9 October 2018 and 6 November 2018, also relied on in the Motion, the Single Judge made express reference to the specific stage of proceedings in granting Prosecution applications to withhold witnesses' identities.<sup>32</sup>

23. In this respect, the Prosecution's reliance on its prior redaction requests and decisions to justify withholding of the identities of the Four Witnesses is misplaced.<sup>33</sup>

*i. The alleged Article 81(4) considerations*

24. At the outset, the Defence strongly objects to the application of extensive redactions to the Prosecution's submissions regarding the alleged individual security concerns of the Four Witnesses that purport to justify the Motion.<sup>34</sup> This approach runs contrary to the principle of *audi alteram partem* and makes a mockery of the Defence's right of response. As this stage in the proceedings, when the central issue under consideration is the very guilt or innocence of Mr Al Hassan, the Defence should not be side-lined in litigation of such matters, especially given their wider context.<sup>35</sup> The

<sup>30</sup> See Motion, para. 44, fn. 57, citing ICC-01/12-01/18-88-Conf-Exp-Red ('PTC Decision of 19 July 2018'), paras 11-15, 17; the other two Decisions cited in fn. 57 refer back to the applicable law as outlined in the PTC Decision of 19 July 2018; see, ICC-01/12-01/18-150-Conf-Red ('PTC Decision of 9 October 2018'), para. 10; and ICC-01/12-01/18-174-Conf-Exp-Red ('PTC Decision of 6 November 2018'), para. 24.

<sup>31</sup> PTC Decision of 19 July 2018, para. 15, citing Katanga Decision, para. 68; see also, para. 72(b).

<sup>32</sup> See Motion, para 44; respectively, PTC Decision of 9 October 2018, para. 41; and ICC-01/12-01/18-174-Conf-Exp-Red, paras 44, 46, 56, 93; see also, where in granting the Prosecution request to disclose anonymous witness statement summaries, the Single Judge considers 'in particular' the fact that the request comes 'at the preliminary stage of the proceedings', para. 68.

<sup>33</sup> C/f Motion, paras 43-44, 55.

<sup>34</sup> Motion, paras 43-46, 48-54.

<sup>35</sup> See also, *supra*, paras 14-19.

Defence recalls the Appeals Chamber's finding that the Defence should be provided the greatest possible opportunity to make submissions on the issues relevant to any application for redactions;<sup>36</sup> to this end, the Defence submits that the Prosecution's application of redactions – such as the date of the interview<sup>37</sup> – is overzealous and cannot reasonably be reconciled with the Appeals Chamber's finding.

25. In any event, those submissions that remain unredacted fail to justify the withholding of identifying information of the Four Witnesses. The Defence recalls that non-disclosure must be warranted by the existence of an 'objectively justifiable risk to the safety of the person concerned, as a result of disclosure to the Defence specifically – and not only the public in general – and be proportionate to the rights of an accused [emphasis added]'.<sup>38</sup>

26. Contrary to the above, no information has been provided in support of the Prosecution's baseless implication that the identities of the Four Witnesses could become known to armed groups as a result of intentional or inadvertent disclosure by the Defence.<sup>39</sup> Likewise, the Prosecution has failed to demonstrate the existence of any factors indicating that Mr Al Hassan would pass this information to others or otherwise put an individual at risk by his actions.<sup>40</sup>

27. The Defence notes that the Prosecution has previously attempted to paint unfounded picture of Mr Al Hassan as a dangerous terrorist, associated with Ansar Dine and Iyad Ah Ghaly and involved in attacks against MINUSMA at the time of his arrest.<sup>41</sup> These allegations are utterly without merit.<sup>42</sup> The Pre-Trial Chamber has found that Mr Al Hassan was a low-lying administrator with no decision-making

<sup>36</sup> Katanga Decision, para. 73(b).

<sup>37</sup> Motion, paras 3-6.

<sup>38</sup> ICC-02/04-01/15-1234, para. 7; see also, PTC Decision of 19 July 2018, para. 12 and references therein.

<sup>39</sup> C/f Motion, para. 44.

<sup>40</sup> See, Katanga Decision, para 71(b).

<sup>41</sup> [REDACTED]; see also, ICC-01/12-01/18-T-008-ENG, 12:14-19.

<sup>42</sup> See, ICC-01/12-01/18-520-Conf-Exp ('Response on [REDACTED]'), paras 2, 5, 12-18, 21-23.

power.<sup>43</sup> The allegations are nothing more than Prosecution scaremongering, and are extremely detrimental to Mr Al Hassan, not just in the context of this Motion and wider defence preparations, [REDACTED].<sup>44</sup> They cannot constitute a foundation for finding that disclosure 'to the Defence' of the identities of the Four Witnesses could result in them becoming known to armed groups.

28. Nor can generalised risks to the public, however real, justify the withholding of identifying information at this stage. The Prosecution's reliance on the prevailing security situation in Mali, and on the Single Judge's acceptance as regards alleged operations of armed groups in Mali, are therefore misplaced.<sup>45</sup> Furthermore, [REDACTED], UN Security Council reports cited by the Prosecution relate to attacks on Malian and foreign armed forces, and not on civilians as such.<sup>46</sup> Reliance on the purported risk of 'retaliatory' or 'reprisal' attacks on civilians to withhold identities of the Four Witnesses is illogical in the circumstances, as the identities of these witnesses will be disclosed to the Defence eventually;<sup>47</sup> in this respect, the timing of the disclosure of their identities – i.e. whether it occurs in December 2019 or May 2020 – therefore has very little to do with the risk of retaliation that is purportedly run by the witnesses.

29. The withholding of this information at this stage runs contrary to Mr Al Hassan's right to adequate time and facilities for the preparation of his defence and his right to expeditious proceedings, and occasions a multi-faceted prejudice to Mr Al Hassan's trial preparations, as detailed above. It is therefore entirely disproportionate to Mr Al Hassan's fair trial rights.

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<sup>43</sup> ICC-01/12-01/18-461-Conf, paras 764, 839.

<sup>44</sup> Response on [REDACTED], paras 41-49..

<sup>45</sup> C/f Motion, paras 43-44.

<sup>46</sup> See, [REDACTED]; c/f Motion, para. 44.

<sup>47</sup> Motion, paras 10, 54, 62.

30. Nor should the argument that the Prosecution needs time to establish witness protection procedures be accepted at this stage of the proceedings.<sup>48</sup> As of January 2020, it will have been seven years since the opening of the Prosecution's investigations in Mali; as for Mr Al Hassan, he will have been detained on the authority of the ICC for over 22 months. In such circumstances, it is unjustifiable that the Prosecution is yet to conduct 'proper' assessments of security situations of its witnesses,<sup>49</sup> and moreover, that it seeks up to five months additional months to do so; this is especially so, given the Prosecution's repeated emphasising of the precarity of the security situation in Mali.<sup>50</sup> Furthermore, [REDACTED],<sup>51</sup> the Prosecution would have been in a position to either conduct up-to-date security assessments for these witnesses,<sup>52</sup> or alternatively, should have done so in the five months that have passed since the Confirmation of Charges hearing. There is no valid reason why the Prosecution – the 'triggering force' of these proceedings – did not finalise individual risk assessments of the 30-odd witnesses (including the Four Witnesses) and take the decision to refer witnesses to the VWU in advance, in full respect of expeditiousness and the overarching fairness of these proceedings.<sup>53</sup> Mr Al Hassan, who is presumed innocent, should not have to further languish in pre-trial detention on account of these manifest failures of preparation on the part of the Prosecution. With respect, the line must be drawn somewhere; if the Prosecution is not in a position to disclose the information, it should be disallowed from relying on the evidence of the Four Witnesses.<sup>54</sup>

31. Lastly, and contrary to the Prosecution submissions, it does not follow that the prejudice to the Defence is somehow minimised on account of the fact that there is

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<sup>48</sup> C/f Motion, paras 8-10, 54, 62.

<sup>49</sup> Motion, paras 45, 51.

<sup>50</sup> Motion, para. 43; ICC-01/12-01/18-48, paras 37-39; see also, ICC-01/12-01/18-T-008-ENG, 12:14-13:1.

<sup>51</sup> Motion, paras 3-6.

<sup>52</sup> See, ICC-01/12-01/18-T-008-ENG, 37:22-38:2.

<sup>53</sup> ICC-01/14-01/18-64-Red, para. 14.

<sup>54</sup> See, *supra*, paras 14-19.

potentially exculpatory information in the evidence of the Four Witnesses.<sup>55</sup> The Defence recalls that, where the information sought to be withheld may be relevant to the Defence – i.e. where it may be of assistance to the Defence case, or may affect the credibility of the Prosecution case – particular care must be taken when balancing the interests at stake.<sup>56</sup>

32. First, in another instance of the prejudice occasioned to the Defence as a result of withholding of this information, the Defence is not in a position to fully assess the proportion of exculpatory information provided by the Four Witnesses, or the materiality of their evidence, as their statements and evidence have not been disclosed to the Defence.

33. In any event, the materiality of the evidence provided by the Four Witnesses militates against granting the Motion. The Defence recalls that the Single Judge has previously granted a Prosecution motion to withhold the identity of a witness partly on the basis of his assessment that ‘most importantly’, the evidence ‘was not of a nature that could yield exculpatory evidence’ and was ‘not essential to Mr Al Hassan’s defence in that it does not relate to his conduct or directly to his individual responsibility’.<sup>57</sup> *A contrario*, by the Prosecution’s own admission, at least two of the Four Witnesses provide evidence that could comprise Rule 77 or potentially exculpatory material.<sup>58</sup> Nor can it be controversial that the evidence of the Four Witnesses is ‘essential to Mr Al Hassan’s defence’ as per the Single Judge, given that at least two of the witnesses appear to provide direct evidence as regards Mr Al Hassan, including his conduct,<sup>59</sup> not to mention the fact that it is on the basis of this evidence that the Prosecution will seek to amend the charges against Mr Al Hassan.<sup>60</sup>

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<sup>55</sup> Contra Motion, paras 59-61.

<sup>56</sup> Katanga Decision, para. 72(c), citing Article 67(2) of the Statute and Rule 83 of the Rules; see also, PTC Decision of 19 July 2018, para. 37.

<sup>57</sup> PTC Decision of 19 July 2018, para. 37.

<sup>58</sup> Motion, paras 60-61.

<sup>59</sup> Motion, paras 24, 28-29, 35.

<sup>60</sup> Motion, para. 11.

34. It is irrelevant that the material or potentially exculpatory portions are currently unredacted in their statements;<sup>61</sup> any argument that, whereas certain information is material to defence preparations, the identity of the individual who provided that information is not, is without merit. The source of information is inextricably linked to the information itself, where the materiality or potentially exculpatory nature of that information is concerned; to argue otherwise would be to draw a false distinction. For example, as regards the evidence given by P-0638 to the effect that ‘many people were puzzled that AL HASSAN had been arrested, as they considered that he had solved numerous problems for them during the occupation’<sup>62</sup>: just as it cannot reasonably be argued that this evidence is not material or potentially exculpatory, it cannot be argued that the identity of this witness, who would likely be able to provide the Defence with the identities of the ‘many people’ in question, is not by extension material or potentially exculpatory. In this respect, the Prosecution’s continued withholding of the identities of these witnesses, while indicating that their evidence is potentially exculpatory, would of itself comprise a failure to comply with its obligations under Article 67(2) of the Statute.<sup>63</sup>

*ii. The alleged Article 81(2) considerations*

35. At the outset, the Prosecution position that disclosure of the Four Witnesses’ identities could prejudice further or ongoing investigations is predicated on the problematic assumption that the Prosecution should be permitted to continue its investigations, over three months since the charges against Mr Al Hassan were confirmed. As previously argued, the Defence submits that absent limited and demonstrated exceptions, the Prosecution’s investigations should largely have been completed prior to the Confirmation Hearing.<sup>64</sup> The Defence reiterates that the

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<sup>61</sup> C/f Motion, paras. 60-61.

<sup>62</sup> Motion, para. 29.

<sup>63</sup> See, IT-95-14-T, *Prosecutor v. Blaškić*, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 41; see also, Lubanga Decision, para. 95.

<sup>64</sup> See, ICC-01/12-01/18-519-Conf-Exp, para. 20, and references cited therein.

Prosecution's previous submissions as regards its intention to continue its investigations are prejudicial and unjustified;<sup>65</sup> nor can they, in turn, justify the Motion per Rule 81(2).<sup>66</sup> This prejudice is further compounded by the Prosecution then using this as justification to withhold identities of key witnesses from the Defence. Mr Al Hassan should not be doubly punished for the fact that the Prosecution only partially completed its investigations prior to confirmation.<sup>67</sup>

36. Consistent with this, and with the fundamental distinction between the pre-trial and trial phases in the context of withholding information from the Defence as discussed above, the case law relied on by the Prosecution is distinguishable from the instant circumstances in that each of the cited decisions relate to the question of Rule 81(2) redactions at the pre-confirmation stage.<sup>68</sup>

37. Furthermore, the Prosecution's submissions as regards the possibility that the Four Witnesses or any other witnesses might be 'discouraged' from cooperating with the Prosecution is entirely unsubstantiated, not to mention hypothetical.<sup>69</sup> They are also so broad in scope so as to apply to nearly any witnesses or potential witnesses testifying in a criminal proceeding. The Prosecution cannot rely on this inherent risk, run by all witnesses, to justify the extraordinary protective measures it seeks in the Motion. Furthermore, and again, given that the Prosecution has undertaken to eventually disclose the identities of the Four Witnesses, this justification is illogical: in the context of a trial slated to run for a matter of years, the granting of a few months of anonymity has very little to do with the risk that a witness might at some point find reason to be discouraged from cooperating or testifying. Granting the Motion on this basis would represent an unjustifiable lowering of the standard applicable to Rule 81(2), at the very time when it should be raised.

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<sup>65</sup> See, ICC-01/12-01/18-T-008-ENG, pp 14-18, 21.

<sup>66</sup> C/f Motion, paras 55-56.

<sup>67</sup> Prosecution Submissions of 6 December 2019; see also, ICC-01/12-01/18-T-008-ENG, p. 21.

<sup>68</sup> See, Motion, paras 55-56, fns 62-63 and references cited therein.

<sup>69</sup> C/f Motion, para. 56; ICC-01/04-01/07-476, para. 60.

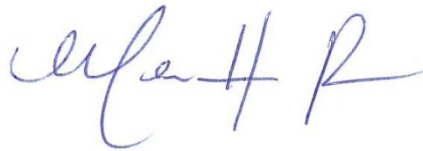
#### IV. Conclusion

38. The pre-confirmation phase of these proceedings has been marked by an extraordinary reliance on the withholding of information from the Defence on the part of the Prosecution. The Prosecution now seeks to add more anonymous witnesses to its case, which runs directly contrary Mr Al Hassan's fundamental fair trial rights and his trial preparations, and threatens to set in motion a cascade of inter-related delays and prejudices.
39. The Motion cannot be shorn of its wider context: this is the first of more Prosecution post-confirmation applications to withhold the identities of its witnesses, at a time when the Prosecution should be disclosing them in preparation for trial; nor of its wider implications: an upcoming application to amend the charges against Mr Al Hassan, based on anonymous evidence that the Defence cannot meaningfully challenge. In this respect, the Defence respectfully urges the Trial Chamber not to miss the forest for the trees.
40. These proceedings are now at a crossroads. The issue for determination is no longer whether the case should be committed for trial, but the very question of the guilt or innocence of Mr Al Hassan. In light of this fundamental transition, and in the interests of allowing these trial proceedings to start off on a firm and fair footing, in full respect of Mr Al Hassan's rights, the Defence respectfully requests that the Trial Chamber deny the Motion.



Melinda Taylor

Lead Counsel for Mr Al Hassan



Marie-Hélène Proulx

Associate Counsel for Mr Al Hassan

Dated this 19<sup>th</sup> Day of December 2019

At The Hague, The Netherlands