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TRIAL CHAMBER X

Before: Judge Kimberly Prost, 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 'Decision on the Defence request for clarification and disclosure'

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of Victims

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
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States Representatives

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Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Kimberly Prost, acting as Single Judge of Trial Chamber X (‘Single Judge’ and ‘Chamber’, respectively) of the International Criminal Court (‘Court’), in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, issues this ‘Decision on the Defence request for clarification and disclosure.’

I. Procedural history

1. Between 19 July 2018 and 10 October 2019, the Single Judge of Pre-Trial Chamber I (‘PTC I’) granted the Prosecutor’s motions to withhold from the Defence the identity of a number witnesses, namely MLI-OTP-P-0431,¹ MLI-OTP-P-0113,² MLI-OTP-P-0100, MLI-OTP-P-0130, MLI-OTP-P-0576, MLI-OTP-P-0581, MLI-OTP-P-0583, MLI-OTP-P-0589, MLI-OTP-P-0592, MLI-OTP-P-0593 and MLI-OTP-P-0594,³ [REDACTED],⁴ [REDACTED],⁵ [REDACTED],⁶ [REDACTED],⁷ [REDACTED],⁸ [REDACTED],⁹ [REDACTED],¹⁰ [REDACTED],¹¹ [REDACTED],¹² [REDACTED],¹³ [REDACTED],¹⁴ [REDACTED],¹⁵ [REDACTED],¹⁶ [REDACTED],¹⁷ and [REDACTED].¹⁸ The Single Judge of PTC I subsequently [REDACTED].¹⁹

¹ 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-Conf-Exp (confidential *ex parte*, only available to the Prosecution and the VWU; a confidential *ex parte* redacted version available to the Defence and a public redacted version were filed on the same day).

² Décision relative à la requête du Procureur aux fins d’autorisation du dépôt d’un résumé anonyme concernant le témoin MLI-OTP-P-0113, 13 September 2018, ICC-01/12-01/18-122-Conf-Exp (confidential *ex parte*, only available to the Prosecution and the VWU; a confidential redacted version was filed on the same day and a public redacted version was filed on 27 September 2018).

³ Décision relative aux requêtes du Procureur aux fins d’autorisation de la non-communication de l’identité des témoins P-0100, P-0111, P-0130, P-0576, P-0581, P-0583, P-0589, P-0592, P-0593 et P-0594, 6 November 2018, ICC-01/12-01/18-174-Conf-Exp (confidential *ex parte*, only available to the Prosecution and the VWU with a confidential *ex parte* annex, only available to the Prosecution and the VWU; a confidential *ex parte* redacted version available to the Defence was filed on the same day; corrected versions of the initial filing and annex were filed on 9 November 2018, ICC-01/12-01/18-174-Conf-Exp-Corr).

⁴ [REDACTED].

⁵ [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

2. [REDACTED].²⁰
3. On 30 September 2019, PTC I confirmed charges against Mr Al Hassan of crimes against humanity and war crimes, allegedly committed in Timbuktu, Mali.²¹
4. On 7 November 2019, the Defence filed a motion seeking guidance from the Chamber as to whether the Defence may contact an individual ('Person of Interest') in the course of its investigations who may have been interviewed by the Office of the Prosecutor ('Prosecution'). The Defence requests that if this is the case, the Single Judge orders the Prosecution to disclose any statements and information in its possession concerning [REDACTED], or which might otherwise fall under Article 67(2) of the Statute, or Rule 77 of the Rules of Procedure and Evidence ('Rules') ('Request').²²
5. On 13 November 2019, the Prosecution filed its response to the Request, in which it invited the Defence to provide the full identity of the Person of Interest in order to establish whether this individual is a Prosecution witness, and further reserved its right to make further submissions regarding *inter alia* the disclosure of any material ('Response').²³
6. On the same day, the Defence filed a motion for leave to reply to the Response, in order to address: (i) the issue as to whether the Person of Interest can be characterised as a Prosecution witness, for the purposes of the Protocol on the handling of confidential information during investigations and contact between

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Conf (a corrected version of the decision was filed on 8 November 2019, ICC-01/12-01/18-461-Conf-Corr; a public redacted version of the decision was filed on 13 November 2019, ICC-01/12-01/18-461-Conf-Corr-Red).

²² Request for Clarification and Disclosure, ICC-01/12-01/18-482-Conf-Exp (confidential, *ex parte*, only available to the Prosecution, the VWU and the Defence).

²³ Prosecution Response to the Defence's "Request for Clarification and Disclosure", ICC-01/12-01/18-485-Conf-Exp (confidential, *ex parte*, only available to the Prosecution, the Defence and the VWU).

a party or participant and witnesses of the opposing party or of a participant²⁴ ('Protocol'); and (ii) the power of the Chamber to authorise the Defence to conduct a recorded interview with an individual on discrete issues, outside of the presence of the Prosecution, in circumstances where the presence of the Prosecution is likely to impede the willingness of the individual to respond freely to questions concerning the discrete issue in question ('Request for Leave to Reply').²⁵ The Defence also informed the Single Judge that it had transmitted the name of the Person of Interest to the Prosecution via email on 13 November 2019 and that it had requested the Registry to prepare a French transcript of the recording of the Defence interview with the Person of Interest on an urgent basis.²⁶ Further, the Defence requested the Single Judge to convene an urgent Status Conference to discuss any remaining issues concerning the interpretation and application of the Protocol.²⁷

7. On the same day, the Prosecution informed PTC I via email that the Person of Interest referred to in the Request is a Prosecution Witness and sought authorisation to disclose that information to the Defence.²⁸
8. On 15 November 2019, the Prosecution filed its response to the Request for Leave to Reply, in which it argued that the request should be rejected as its Response did not raise any new issue which the Defence could not reasonably have anticipated ('Response to the Request for Leave to Reply').²⁹
9. On 22 November 2019, the Prosecution transmitted via email to the Chamber its email dated 13 November 2019.³⁰

²⁴ Annex to the Décision portant adoption d'un protocole relatif au traitement d'informations confidentielles lors d'enquêtes et de contacts entre une partie ou un participant et les témoins de la partie adverse ou d'un participant, 31 May 2018, ICC-01/12-01/18-40-Anx.

²⁵ Defence Request for Leave to Reply to ICC-01/12-01/18-485-Conf-Exp, ICC-01/12-01/18-486-Conf-Exp (confidential, *ex parte*, only available to the Prosecution, the VWU and the Defence, with a confidential *ex parte* annex, only available to the Defence and the VWU).

²⁶ Request for Leave to Reply, para. 4.

²⁷ Request for Leave to Reply, paras 8-9.

²⁸ Email from the Prosecution to PTC I on 13 November 2019, at 19:25.

²⁹ Réponse à la *Defence Request for Leave to Reply to ICC-01/12-01/18-485-Conf-Exp*, ICC-01/12-01/18-490-Conf-Exp (confidential, *ex parte*, only available to the Prosecution, the Defence and the VWU).

³⁰ Emails from the Prosecution to the Chamber on 22 November 2019, at 14:16 and 17:16.

10. On 26 November 2019, the Chamber authorised the Prosecution via email to confirm to the Defence that the Person of Interest referred to in the Request is a Prosecution Witness.³¹
11. On 12 December 2019, the Chamber held a first status conference in the presence of the Prosecution, the Defence, the Legal Representatives of Victims and the Registry.³² During the status conference, the Chamber encouraged the parties to address any issues regarding the interpretation and application of the Protocol through *inter partes* discussions, with a view to coming up with a joint proposal, and to revert to the Chamber in February 2020.³³

II. Analysis

A. Applicable law and previous rulings

12. The Single Judge refers to Articles 54, 57(3)(c), 61(11), 64, 67 and 68 of the Statute, Rules 15, 76, 81 and 84 of the Rules and Regulation 42 of the Regulations of the Court ('Regulations').

B. Determinations of the Single Judge

13. The Single Judge observes that, in previously authorising the non-disclosure of witnesses' identities, the Single Judge of PTC I considered that disclosing particular information to the Defence would create an objectively justifiable risk to the safety of the persons concerned, taking into account, *inter alia*, the particular circumstances of the personal situation of the witness, as well as the general security situation in Mali.³⁴ The Single Judge of PTC I also emphasised the specificity of the confirmation of charges stage of proceedings,³⁵ and noted in particular the Appeals Chamber statement that 'it is permissible to withhold

³¹ Email from the Chamber to the Prosecution on 26 November 2019, at 12:55.

³² Order Scheduling First Status Conference, 26 November 2019, ICC-01/12-01/18-507; Transcript of hearing, 12 December 2019, ICC-01/12-01/18-T-008-ENG.

³³ Transcript of hearing, 12 December 2019, ICC-01/12-01/18-T-008-ENG, p. 53, line 21 to p. 54, line 6.

³⁴ See, e.g., ICC-01/12-01/18-88-Red2, paras 16, 33; ICC-01/12-01/18-150-Conf-Red, para. 30; ICC-01/12-01/18-174-Conf-Exp-Red, para. 31.

³⁵ ICC-01/12-01/18-88-Red2, para. 15. See also ICC-01/12-01/18-88-Red2, para. 17.

the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial'.³⁶

14. In the present case, the Single Judge notes that, following authorisation from the Chamber, the Prosecution informed the Defence that the Person of Interest is a Prosecution Witness, without, however, providing his pseudonym. While the Single Judge is mindful of the security concerns that exist in this case, she considers that, in view of the current circumstances, in particular the fact that the Defence has been in contact with the Person of Interest and is aware of his identity, non-disclosure of the pseudonym vis-à-vis the Defence is no longer warranted. Accordingly, the Single Judge informs the Defence that the Person of Interest referred to in its Request is Witness MLI-OTP-P-0626 ('P-0626').
15. The Single Judge observes that, during the pre-trial proceedings, the Single Judge of PTC I concluded that considering the particular profile of Witness P-0626, an objectively justifiable risk to his safety existed, in that disclosing information to the Defence at this stage of the proceedings could endanger him.³⁷ Further, the Single Judge of PTC I considered that the requested measures were the least restrictive possible in this case and were proportionate to the rights of the Accused.³⁸ Accordingly, the Single Judge of PTC I granted the Prosecution's motion to withhold from the Defence the identity of Witness P-0626, as well as other documents that could be identifying, and to only disclose an anonymous summary to the Defence.³⁹
16. However, as the Defence has already approached P-0626's and is aware of his status as a Prosecution witness, and considering the current stage of the proceedings, where the Prosecution has the obligation to disclose all material to the Accused for the preparation of trial, the Single Judge considers that the protective measures implemented to withhold P-0626's identity from the

³⁶ ICC-01/12-01/18-88-Red2, para. 15, citing the Appeals Chamber, *The Prosecutor v. Germain 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. 68. *See also* ICC-01/12-01/18-88-Red2, para. 17.

³⁷ ICC-01/12-01/18-315-Secret-Exp, para. 38.

³⁸ ICC-01/12-01/18-315-Secret-Exp, paras 39, 41.

³⁹ ICC-01/12-01/18-315-Secret-Exp, paras 26, 43; p. 17.

Defence are no longer necessary and should be lifted. The Single Judge thus directs the Prosecution to proceed with the required disclosure, which include, *inter alia*, the provision to the Defence of the transcripts of interviews with P-0626, as well as any other material falling under Article 67(2) of the Statute or Rule 77 of the Rules, including material related to [REDACTED],⁴⁰ with any required standard redactions.⁴¹ Noting the volume of evidence involved, disclosure shall take place at the earliest opportunity and no later than 13 January 2020.

17. Similarly, the Single Judge directs the Prosecution to file a confidential-redacted version of its initial request for authorisation to withhold the identity of Witness P-0626.⁴²
18. Regarding the Defence's request for clarification concerning its contacts with the Person of Interest, the Single Judge recalls that the Prosecution [REDACTED].⁴³ Accordingly, the Single Judge directs the Defence to follow the procedure set in the Protocol regarding contacts with witnesses of the other party.⁴⁴
19. As to the other issues raised by the parties regarding the interpretation and application of the Protocol, the Single Judge recalls that, during the 12 December 2019 status conference, the Chamber encouraged the parties to address any issues regarding the Protocol through *inter partes* discussions and

⁴⁰ See, e.g., [REDACTED].

⁴¹ Transcript of hearing on 12 December 2019, ICC-01/12-01/18-T-008-ENG, p. 27, lines 15 to 19.

⁴² Prosecution's Request for authorisation to withhold the identity of Witness MLI-OTP-P-0626 upon whose evidence the Prosecution will rely at the confirmation hearing, 26 February 2019, ICC-01/12-01/18-258-Secret-Exp (secret, *ex parte*, only available to the Prosecution and the VWU, with secret *ex parte* Annexes A to D, only available to the Prosecution and the VWU; corrected versions of Annexes A and C were filed on 13 March 2019; a secret *ex parte* redacted version available to the Defence was filed on 28 February 2019, ICC-01/12-01/18-258-Secret-Exp-Red; a public redacted version was filed on 13 May 2019, ICC-01/12-01/18-258-Red2).

⁴³ ICC-01/12-01/18-258-Secret-Exp, para. 3. See, e.g., Document contenant les charges contre M. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 8 May 2019, ICC-01/12-01/18-335-Conf (a corrected version of the document was filed on 11 May 2019, ICC-01/12-01/18-335-Conf-Corr; a public redacted version of the document was filed on 2 July 2019, ICC-01/12-01/18-335-Corr-Red), paras [REDACTED].

⁴⁴ ICC-01/12-01/18-40-Anx, paras 27-43.

to revert to the Chamber in February 2020.⁴⁵ The Single Judge thus postpones any determination on these issues, pending parties' submissions on the Protocol and any joint proposal thereof.

20. In view of the above conclusion, the Single Judge rejects the Request for Leave to Reply, noting that it addresses issues that must be discussed firstly *inter partes*. For the same reasons, the Single Judge deems it unnecessary to convene a Status Conference at this stage and also rejects this part of the Defence's request.

C. Confidentiality

21. The Single Judge fails to see a reason justifying the '*ex parte*' classification of this litigation. Accordingly, and pursuant to Regulation 23*bis* of the Regulations of the Court, the Single Judge finds it appropriate to issue the redacted version of the present decision 'confidential', and not '*ex parte*'.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

INFORMS the Defence that the Person of Interest referred to in its Request is Witness P-0626;

DIRECTS the Prosecution to comply with its disclosure obligations with regard to P-0626, at the earliest opportunity and no later than 13 January 2020;

DIRECTS the Prosecution to file a confidential-redacted version of filing ICC-01/12-01/18-258-Secret-Exp within 10 days of notification of the present decision;

DIRECTS the Defence to follow the procedure set in the Protocol regarding any contact with Witness P-0626;

POSTPONES any determination on issues regarding the interpretation and the application of the Protocol pending *inter partes* discussions;

REJECTS the Request for Leave to Reply;

⁴⁵ Transcript of hearing, 12 December 2019, ICC-01/12-01/18-T-008-ENG, p. 53, line 21 to p. 54, line 6.

DIRECTS the Defence to seek reclassification or file confidential redacted versions of its Request and its Request for Leave to Reply within 10 days of notification of the present decision; and

DIRECTS the Prosecution to seek reclassification or file confidential redacted versions of its Response and Response to the Request for Leave to Reply within 10 days of notification of the present decision.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'K. Prost', is written over a horizontal line.

Judge Kimberly Prost, Single Judge

Dated this 24 December 2019

At The Hague, The Netherlands