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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-0538”**

**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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(Participation/Reparation)**

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**Detention Section**

**Victims Participation and  
Reparations Section**

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## I. Introduction

1. On 30 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-0538 upon whose evidence the Prosecution will rely at the confirmation hearing.<sup>1</sup> The Prosecution submits that Witness P-0538 [REDACTED]. The Prosecution adds that the non-disclosure of P-0538's identity and other identifying information which might lead to her exposure to the Defence is necessary to protect the safety of the witness and her family, her psychological well-being, and to avoid prejudice against further or ongoing investigation in Mali. It further submits that the Defence will not be prejudiced by the requested redactions.
2. The request is supported by six annexes which include the Witness's ICC statement, her photographs, the metadata containing identifying information, documents [REDACTED]referring to her and one investigation note.<sup>2</sup>
3. The Defence is mindful [REDACTED]and emphasises its commitment to protecting the dignity and psychological well-being of witnesses. In this regard, the Prosecution does not demonstrate that disclosure *to the Defence* would lead[REDACTED].
4. While the status of the Witness may require the withholding of her 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 measures proposed by the Prosecution 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 23*bis*(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.

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<sup>1</sup> *Al Hassan*, Confidential redacted version of the "Prosecution's Request for authorisation to withhold the identity of Witness MLI-OTP-P-0538, upon whose evidence the Prosecution will rely at the confirmation hearing", 23 January 2019, ICC-01/12-01/18-223-Conf-Exp, notified to the Defence on 30 January 2019 (the Prosecution's **request**). All cases referenced in this document are to the *Al Hassan* case unless stated otherwise.

<sup>2</sup> Prosecution's request, para. 5.

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,<sup>3</sup> and is subject to a clear set of legal principles.<sup>4</sup> The Prosecution must demonstrate the existence of an objectively justifiable risk of harm from disclosure of her identity *to the Defence* specifically and not only the public in general.<sup>5</sup> Non-disclosure must also be necessary,<sup>6</sup> and proportionate to the prejudice caused to the Suspect, including his right to a fair and impartial trial.<sup>7</sup>
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.<sup>8</sup>

<sup>3</sup> *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.

<sup>4</sup> 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.

<sup>5</sup> *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).

<sup>6</sup> *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.

<sup>7</sup> *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.

<sup>8</sup> 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. 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”.<sup>9</sup>

#### IV. Submissions

9. The Prosecution submits that the non-disclosure of the identity of the Witness to the Defence is necessary since she faces an objectively justifiable risk[REDACTED]. The Prosecution adds that redacting P-0538’s identity is crucial to her psychological well-being and to the protection of the Prosecution’s ongoing investigations. The Defence will address the issues raised in the motion within the limits of the extensive redactions applied by the Prosecution.

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

10. The Prosecution refers to its witness security assessment for Mali, which concluded that the risk of physical harm or death to individuals known to cooperate with the Court, or to their family, is high.<sup>10</sup>
11. 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.<sup>11</sup> As previously submitted,<sup>12</sup> these arguments do not find support in the factual circumstances of the case and should not form the basis for withholding relevant information.

<sup>9</sup> 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.

<sup>10</sup> Prosecution’s request, para. 14.

<sup>11</sup> Prosecution’s request, paras 17-18.

<sup>12</sup> 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.

12. In fact, Mr Al Hassan has been held in detention since April 2017.<sup>13</sup> 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.<sup>14</sup> Since the beginning of his detention, Mr Al Hassan has shown no intent to harm witnesses.<sup>15</sup> 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.<sup>16</sup>
13. The Prosecution refers to the Single Judge’s previous findings relating to the withholding of information from the Defence in *Abu Garda*.<sup>17</sup> In that case, the Single Judge had permitted the withholding of the identity of various witnesses “due [...] to the fact that Abu Garda *is not currently detained*, [and] disclosure of the names of the witnesses to the Defence inevitably raises the possibility that information disclosed even on a limited basis might be revealed more broadly” (emphasis added).<sup>18</sup> This approach, taken on markedly different factual circumstances, is not applicable in the current situation.
14. 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 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.

<sup>13</sup> See, for example, MLI-OTP-0061-1622, p. 1627.

<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> 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](#).

<sup>17</sup> Prosecution’s Request, para. 13, referring to Decision on the Prosecution Request for Leave Not to Disclose the Identity of Witness MLI-OTP-P-0431, 19 July 2018, [ICC-01/12-01/18-88-Red2](#), para. 33.

<sup>18</sup> *Abu Garda*, Decision on the Prosecutor’s Requests for Authorisation for Non-disclosure of Identities of Witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312 and DAR-OTP-WWWW-0314, 31 August 2009, [ICC-02/05-02/09-74](#), para. 10; and Decision on the Prosecutor’s Request for Authorisation for Non-disclosure of Witnesses DAR-OTP-WWWW-0433, 31 August 2009, [ICC-02/05-02/09-77](#), para. 4.

15. 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.<sup>19</sup> 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.
16. The request states that Witness P-0538 will not testify on the Suspect's own conduct, or directly to his individual respectability.<sup>20</sup> The Prosecution therefore fails to establish any direct link between the Witness and Mr Al Hassan. The Prosecution also fails to put forward any evidence that suggests that Mr Al Hassan has been involved in the intimidation of any witness, or to substantiate any reasonable causes of fear of *Mr Al Hassan*.
17. In the Ongwen trial, the Single Judge recognised the legitimacy of the witness's fear of retaliation on account of testimony resulting from disclosure *to the public*; and even in that situation, the Single Judge found that any such risk shall be objectively justified.<sup>21</sup> In the instant case, the request fails to objectively justify the alleged risk posed to the Witness by Mr Al Hassan or his Defence team.
18. Contrary to the Prosecution's submissions,<sup>22</sup> 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).<sup>23</sup> The

<sup>19</sup> 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.

<sup>20</sup> Prosecution's Request, para. 32.

<sup>21</sup> *Ongwen*, Decision on the 'Prosecution's application for in-court protective and special measures', ICC-02/04-01/15-612-Red, 29 November 2016, para. 29.

<sup>22</sup> Prosecution's request, para. 34.

<sup>23</sup> *Katanga*, Judgment on Katanga's Appeal against the First Redaction Decision, ICC-1/04- 01/07-476, 13 May 2008, para. 49.

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.

19. 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<sup>24</sup>. 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. 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".<sup>25</sup> 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.
21. 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 risk of inadvertent contact is greater when the witness's identifying information has been withheld.
22. The Defence takes the issue of protection of witnesses seriously and wants to avoid involuntary mistakes which could occur. Information on the status of vulnerable 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.

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<sup>24</sup> ICC-01/12-01/18-44-Anx-tENG (the **Protocol**).

<sup>25</sup> The Protocol, para. 31.



(B) *Disclosure to the Defence does not constitute risk to psychological well-being, privacy and dignity of the Witness*

23. The Prosecution submits that P-0538 is [REDACTED].<sup>26</sup> It contends that withholding her identity and identifying information would protect her “safety, physical and psychological well-being, privacy and dignity” and that the proposed redactions are consistent with article 68(1) of the Statute.<sup>27</sup>
24. As stated above, the Defence is mindful of [REDACTED] the effect they may have on the psychological well-being, privacy and dignity of victims, [REDACTED].
25. However, measures provided for in article 68(1) of the Statute “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. The Prosecution does not demonstrate that disclosure *to the Defence* would increase the risk [REDACTED]. Instead, it bases the risk on an unfair assumption that the Defence would inadvertently or even intentionally breach its confidentiality obligations. This assumption is not only false, it is also offensive to the professional team of defence lawyers involved in this case.
26. The Pre-Trial Chamber has adopted robust measures that ensure that any party’s investigative activities do not breach a witness’s privacy.<sup>28</sup> [REDACTED]. The request does not substantiate the assumption that the Defence is not as capable as the Prosecution to protect the privacy and psychological well-being of witnesses, and that the Defence’s investigative activities could lead to an inadvertent or deliberate disclosure.<sup>29</sup>

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

27. As mentioned above, protective measures must not be prejudicial to the rights of the Suspect.<sup>30</sup> 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”,<sup>31</sup> to “have adequate

<sup>26</sup> Prosecution’s request, para. 26.

<sup>27</sup> Prosecution’s request, para. 28.

<sup>28</sup> The Protocol, [REDACTED]

<sup>29</sup> Prosecution’s request, paras 17 and 27.

<sup>30</sup> Article 68(1) Rome Statute.

<sup>31</sup> Article 67(1)(a) Rome Statute.

time and facilities for the preparation of the defence”,<sup>32</sup> and to “raise defences and to present other evidence”.<sup>33</sup>

28. While the Prosecution states that the Witness does not discuss Mr Al Hassan’s own conduct,<sup>34</sup> the identity of the Witness and the specific details of her statement, particularly given the nature of the crimes and the Witness’s account on members of armed groups is a crucial part of understanding the Prosecution’s case against the Suspect.
29. In light of the complexity of the Witness’s testimony and its importance to the case, 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.
30. Moreover, the Prosecution informed the Defence and the Single Judge on 9 November 2018, that the request to withhold the identity of Witness P-0538 would be notified by mid-December at the latest.<sup>35</sup> In reality, the Defence was notified of the request only on 30 January 2019. Considering the fast approaching Confirmation of Charges hearing, the Defence must be in a position to assess the entirety of 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.
31. 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.<sup>36</sup> 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.

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<sup>32</sup> Article 67(1)(b) Rome Statute.

<sup>33</sup> Article 67(1)(e) Rome Statute.

<sup>34</sup> Prosecution’s request, para. 32.

<sup>35</sup> 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.

<sup>36</sup> 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.

**V. Conclusion**

32. In the absence of an objective risk to Witness P-0538 from disclosure of her identity 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.
33. 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 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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Melinda Taylor  
Lead Counsel for Mr Al Hassan

Dated this 11<sup>th</sup> Day of February 2019  
At The Hague, The Netherlands