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**No. ICC-01/12-01/18
Date: 30 December 2019**

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 Redacted version

Decision on the Prosecution motion for authorisation to withhold information identifying Witnesses MLI-OTP-P-0636, MLI-OTP-P-0638, MLI-OTP-P-0639 and MLI-OTP-P-0641 from their statements

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

The Office of the Prosecutor

Fatou Bensouda
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Legal Representatives of Victims

Seydou Doumbia
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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Defence**

States Representatives

Amicus Curiae

REGISTRY

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Peter Lewis

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 Prosecution motion for authorisation to withhold information identifying Witnesses MLI-OTP-P-0636, MLI-OTP-P-0638, MLI-OTP-P-0639, and MLI-OTP-P-0641 from their statements.’

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 [REDACTED],¹ [REDACTED],² [REDACTED], [REDACTED], [REDACTED],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 [REDACTED].¹⁸ The Single Judge of PTC I subsequently [REDACTED].¹⁹

¹ [REDACTED].

² [REDACTED].

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 [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

2. On 30 September 2019, PTC I confirmed charges against Mr Al Hassan of crimes against humanity and war crimes, allegedly committed in Timbuktu, Mali.²⁰
3. On 13 November 2019, the Prosecution filed a motion seeking authorisation to withhold the identities of Witnesses MLI-OTP-P-0636 ('P-0636'), MLI-OTP-P-0638 ('P-0638'), MLI-OTP-P-0639 ('P-0639'), MLI-OTP-P-0641 ('P-0641') and MLI-OTP-P-0642 ('P-0642') by redacting all identifying information from their statements ('Request').²¹
4. On 5 December 2019, the Prosecution partially withdrew the Request insofar as it related to Witness P-0642.²²
5. On 19 December 2019, in accordance with an extension of time granted by the Chamber,²³ the Defence filed its response to the Request, in which it requested that the Chamber deny the Request, as the withholding of the identities of P-0636, P-0638, P-0639 and P-0641 would be contrary to Mr Al Hassan's fair trial rights and is unjustified ('Response').²⁴

²⁰ 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).

²¹ 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, ICC-01/12-01/18-487-Conf-Exp (confidential, *ex parte*, only available to the Prosecution and the VWU; with confidential, *ex parte* Annexes A to J, only available to the Prosecution and the VWU; corrected versions of Annexes A,C,E & G were filed on 27 November 2019; a confidential *ex parte* redacted version of the Request, also available to the Defence, was filed on 5 December 2019, ICC-01/12-01/18-487-Conf-Exp-Red; a public redacted version was filed on 17 December 2019, ICC-01/12-01/18-487-Red2).

²² [REDACTED].

²³ [REDACTED].

²⁴ 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", ICC-01/12-01/18-535-Conf-Exp (confidential *ex parte*, only available to the Prosecution, the Defence and the VWU; a public redacted version was notified on 23 December 2019).

II. Analysis

A. Preliminary remarks

6. Notwithstanding that the Request was filed before the Single Judge of PTC I, the Single Judge of this Chamber deals with it, noting that the Chamber is now seized of the case record.
7. Next, noting that the Prosecution has withdrawn the Request insofar as it relates to Witness P-0642,²⁵ the Single Judge does not deal further with the Request in respect of Witness P-0642.
8. Finally, the Single Judge observes that in previously authorising the non-disclosure of witnesses' identities to the Defence, the Single Judge of PTC I emphasised the specificity of the confirmation of charges stage of proceedings.²⁶ He noted in particular the Appeals Chamber statement 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'.²⁷ Notwithstanding that the proceedings have now moved past the confirmation of charges stage, the Single Judge notes that the Request has been made in the context of an intention by the Prosecution to file a request to amend the charges to add incidents underlying the charges earlier confirmed by PTC I, whereby the amendment will be partly based on information provided by some of the witnesses who are the subject of the Request.²⁸ For these reasons, the Single Judge considers it appropriate to apply the same law and principles in deciding this Request that were used by the Single Judge of PTC I to decide the above mentioned earlier Prosecution requests to withhold the identities of other witnesses.

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED], 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. [REDACTED].

²⁸ Request, para. 11.

B. Applicable law and previous rulings

9. The Single Judge refers to Articles 21, 54, 57(3)(c), 61, 67 and 68 of the Statute, Rules 15, 76, 81 and 121 of the Rules of Procedure and Evidence ('Rules') and Regulation 42 of the Regulations of the Court ('Regulations').
10. The Single Judge also incorporates the applicable law set out in the first decision of the Single Judge of PTC I concerning non-disclosure of the identity of a witness,²⁹ and in the Single Judge of PTC I's decision [REDACTED], in which he set out the law applicable to victims of sexual violence, who should benefit from special and increased protection in proceedings before the Court.³⁰

C. Arguments of the parties

11. As noted above, the Prosecution states that it intends to make an application to amend the confirmed charges in this case to add underlying incidents and that the amendment will be partly based on information provided by some of the witnesses who are the subject of the Request.³¹ In addition, it advises that P-0638 has furnished potentially exculpatory evidence, and that parts of the statements of P-0638 and P-0641 potentially constitute material under Rule 77 of the Rules.³²
12. The Prosecution explains that: (i) all of the Witnesses were interviewed by the Prosecution after the confirmation hearing;³³ (ii) all are to meet with [REDACTED],³⁴ and (iii) [REDACTED].³⁵ It submits therefore that, in the interim, redaction of identifying information from their statements is the only effective measure to protect the safety of P-0638, P-0639 and P-0641 and that of their families,³⁶ and would be prudent in the case of P-0636.³⁷

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ Request, para. 11.

³² Request, paras 11, 29, 60-1.

³³ Request, paras 3-6.

³⁴ Specifically, the Prosecution states that [REDACTED] (Request, paras 8, 45, 51, 53).

³⁵ Request, para. 9.

³⁶ Request, paras 8, 45, 51.

³⁷ Request, paras 8, 53.

13. The Prosecution submits that the redaction of any identifying information from the Witnesses' statements will not prejudice the Defence,³⁸ since the redactions will not deprive the Defence of the substantive content of the statements.³⁹ It further notes that portions of P-0638's statement which could be considered potentially exculpatory remain unredacted, and that portions of P-0638's and P-0641's statements which potentially constitute material under Rule 77 of the Rules will also be unredacted,⁴⁰ save in the latter case for some identifying details.⁴¹
14. The Prosecution accordingly requests: (i) authorisation to redact any information identifying P-0636, P-0638, P-0639 and P-0641, from their statements and annexes thereto prior to their disclosure to the Defence;⁴² and (ii) [REDACTED].⁴³ It further submits that these measures should remain in place until such time as the assessments have been conducted and protective measures have been implemented where necessary.⁴⁴ The Prosecution's proposed redactions are contained in annexes to the Request.
15. The Defence opposes the Request.⁴⁵ In the Defence's view, should the Prosecution be unwilling or unable to disclose the information relating to the Witnesses at this stage, it should be disallowed from relying on the Witnesses and prevented from amending the charges to include additional incidents based on their evidence.⁴⁶
16. First, the Defence submits that the withholding of the identities of P-0636, P-0638, P-0639 and P-0641 would be contrary to Mr Al Hassan's fair trial rights.⁴⁷ For the Defence, 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

³⁸ Request, para. 57.

³⁹ Request, para. 59.

⁴⁰ Request, paras 60-1.

⁴¹ Request, para. 61.

⁴² Request, paras 1, 63.

⁴³ Request, paras 46, 64, [REDACTED].

⁴⁴ Request, paras 10, 62.

⁴⁵ Response, paras 2, 40.

⁴⁶ Response, para. 3.

⁴⁷ Response, paras 2, 5-19.

without undue delay.⁴⁸ In this regard, the Defence notes that the Prosecution is seeking to ‘add to the already significant tally of anonymous witnesses on whom it intends to rely’ and recalls that the Prosecution’s submissions that full disclosure of the identities of at least 29 anonymous Prosecution witnesses would not be completed before May 2020.⁴⁹ The Defence stresses the need for the Chamber to assess the cumulative effect of withholding the identities of at least 29 individuals⁵⁰ and submits that, given the security situation, organising investigative missions is extremely time-consuming. According to the Defence, should the Request be granted, it will only be able to conduct an extremely limited number of missions prior to the proposed start of trial.⁵¹

17. The Defence further submits that the measures sought in the Request are unjustified, as the Prosecution has not met the threshold for withholding the identities of witnesses under Rules 81(2) and (4) of the Rules.⁵² Notably the Defence submits that the argument that the Prosecution needs time to establish witness protection procedure should not be accepted in the circumstances and particularly at this stage of the proceedings.⁵³

D. Determinations of the Single Judge

18. At the outset, the Single Judge notes the Defence’s submission that, owing to the extensive redactions, it has been unable to exercise its right of response meaningfully. The Single Judge, who has access to the unredacted version of the Request, considers that the Prosecutor’s redactions are necessary to prevent a possible identification of the witnesses in question, which would defeat the very purpose of the Request.
19. The Single Judge notes that the Prosecution and the Defence repeat a number of general arguments already made to the Single Judge of PTC I in its previous responses to requests to withhold the identities of certain witnesses, on which

⁴⁸ Response, paras 2, 5-19.

⁴⁹ Response, para. 7.

⁵⁰ Response, para. 11.

⁵¹ Response, para. 8.

⁵² Response, paras 2, 20-37.

⁵³ Response, para. 30.

the Single Judge of PTC I already ruled.⁵⁴ Consistent with the practice of the Single Judge of PTC I in this regard,⁵⁵ the Single Judge considers that the aforementioned findings of the Single Judge of PTC I, on the same general arguments put forward by the parties, are still applicable in the present case.

20. The Single Judge now turns to the specific considerations in relation to the four witnesses in question.

21. **P-0639 and P-0641:** Considering the similarity of the profiles of Witnesses P-0639 and P-0641, the Single Judge finds it appropriate to consider them together. The Single Judge notes that a number of factors relating to their profiles establish the existence of an objective risk. First, the fact that the witnesses [REDACTED],⁵⁶ [REDACTED] as accepted by the Single Judge of PTC I in previous decisions [REDACTED].⁵⁷ In this respect the Single Judge notes that [REDACTED].⁵⁸ [REDACTED].⁵⁹ [REDACTED].⁶⁰

22. Further, the Single Judge [REDACTED]. In relation to P-0639, [REDACTED], the Single Judge notes the submissions of the Prosecution that [REDACTED]⁶¹ [REDACTED].⁶² In relation to P-0641, the Single Judge notes that [REDACTED].⁶³

23. **P-0638:** In relation to Witness P-0638, the Single Judge notes that a [REDACTED]. First, although the witness [REDACTED], the Single Judge notes the information from the Prosecution that [REDACTED].⁶⁴ The witness also [REDACTED].⁶⁵

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ Request, paras 8, 45.

⁵⁷ Request, para. 45.

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ Request, paras 8, 45. *See also* [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ Request, paras 8, 48.

⁶⁵ [REDACTED].

24. Further, the Single Judge notes [REDACTED].⁶⁶ Further, he was also [REDACTED].⁶⁷ [REDACTED].⁶⁸ [REDACTED].⁶⁹
25. **P-0636:** [REDACTED].⁷⁰ [REDACTED]⁷¹ [REDACTED].⁷² Notwithstanding, the Single Judge notes the Prosecution's submission that [REDACTED].⁷³ [REDACTED],⁷⁴ [REDACTED].⁷⁵ The Single Judge further notes that the witness [REDACTED],⁷⁶ [REDACTED].⁷⁷
26. In the light of the foregoing, the Single Judge is persuaded that there exists an objective risk in the case of each of the Witnesses. Disclosing the information to the Defence, before any charges relying on their accounts have been confirmed, [REDACTED] have been conducted and recommended protective measures, if any, implemented, could endanger the individuals concerned. [REDACTED].
27. Next, the Single Judge is also convinced that these measures are the least restrictive possible in this case. [REDACTED],⁷⁸ [REDACTED].⁷⁹ [REDACTED],⁸⁰ and that P-0641 [REDACTED].⁸¹
28. In line with her statutory obligations, the Single Judge requires the Prosecution to inform her [REDACTED] with a view to reassess the necessity of the measures. Noting the exceptional nature of these measures, particularly in light of the current stage of the proceedings, the Single Judge also considers that the relief granted in this decision should be time limited [REDACTED]. This is without prejudice to any further application the Prosecution wishes to make on this subject until that date.

⁶⁶ Request, paras 8, 48; and [REDACTED].

⁶⁷ Request, paras 8, 48; and [REDACTED].

⁶⁸ Request, para. 8.

⁶⁹ [REDACTED].

⁷⁰ Request, paras 8, 52; and [REDACTED].

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ Request, paras 8, 52.

⁷⁴ [REDACTED].

⁷⁵ Request, paras 3, 19-21; [REDACTED]

⁷⁶ Request, paras 18-21 and [REDACTED].

⁷⁷ [REDACTED]

⁷⁸ [REDACTED].

⁷⁹ Request, para. 9.

⁸⁰ [REDACTED].

⁸¹ [REDACTED]

29. Further, the Single Judge observes that the redactions applied do not prevent the substance of the witnesses' accounts from being understood and notes that, in light of their anonymity towards the Defence, the relevant material is likely to be of lesser probative value in any subsequent decision on additional charges.⁸² It is in this context that the Defence's submission on the assessment of the witnesses' credibility will be entertained.⁸³
30. The Single Judge considers that the requested measures are proportionate, regard being had to the rights of the suspect and the requirement of a fair and impartial trial, considering: (i) the risk to the safety of Witnesses [REDACTED] and (ii) the fact that the Defence will nevertheless have access to each of the Witnesses' statements, together with the fact that the redactions concern only information that could lead to the identification of the witness and – prima facie – not information material to the Defence case, and (iii) the temporary nature of the non-disclosure of the Witnesses' identities.
31. Therefore, in these specific instances, having regard to the personal circumstances of each of the Witnesses, [REDACTED] the temporary nature of the relief, and the fact that the request relates to an application to amend the charges to add additional incidents, the Single Judge finds it appropriate to grant the Prosecution's Request concerning P-0636, P-0638, P-0639 and P-0641 for the purpose of protecting the safety, physical and psychological well-being, dignity and privacy of those witnesses pursuant to Article 68(1) of the Statute and Rule 81(4) of the Rules. Accordingly, the Single Judge authorises the Prosecution to proceed with the redaction of the relevant identifying information and does not consider it necessary to entertain the part of the request made pursuant to Rule 81(2) of the Rules.

⁸² [REDACTED].

⁸³ See Response, paras 15 and 17.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

AUTHORISES the Prosecution to withhold the identity of Witnesses P-0636, P-0638, P-0639, and P-0641 from the Defence and to continue to use those pseudonyms in the course of the proceedings;

AUTHORISES the Prosecution to disclose the relevant material applying redactions to identifying information as proposed [REDACTED];

INSTRUCTS the Prosecution to inform her [REDACTED] promptly [REDACTED];
and

DECIDES that the aforementioned redactions shall be lifted by [REDACTED], without prejudice to any further application the Prosecution wishes to make on this subject until that date.

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

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

Judge Kimberly Prost, Single Judge

Dated this 30 December 2019

At The Hague, The Netherlands