



Original: English

No.: ICC-01/12-01/18

Date: 19 July 2019

Date of submission: 05
September 2019

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 Defence response to the Prosecution's Request for
non-disclosure of statements of witnesses MLI-OTP-P-0554 and MLI-OTP-P-
0984**

**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”) submits its response to the “Prosecution Request for non-disclosure of statements of witnesses MLI-OTP-P-0554 and MLI-OTP-P-0984” (respectively, the “Request”, the “Statements and the “Witnesses”).¹
2. The Defence opposes the Request.
3. If the Statements have information that is, in itself, relevant to Defence preparation (irrespective as to whether the Witnesses are relied upon by the Prosecution at this stage or at a future stage) then this information must be disclosed as soon as practicable. If concrete security reasons prevent such disclosure, then effective counter-balancing measures must be implemented (such as the withdrawal of allegations that are affected by this information or the admission of facts). The Request fails to justify – in reasons that are available to the Defence – why the information cannot be disclosed at this phase to the Defence on a confidential basis, or in the alternative, what counter-balancing measures can be taken to remedy any resultant prejudice.
4. If the materiality of the Statements rests solely in the fact that the Prosecution intends to call these witnesses at a later stage of the proceedings, then the Request constitutes an improper attempt to circumvent the strict timeline imposed on pre-confirmation disclosure, by putting incriminating information before the Chamber on an *ex parte* basis, after the expiration of the deadline for submitting Prosecution evidence. The submission of these *ex parte* filings offends the notion of open justice, which is of central importance to the fair and impartial nature of confirmation proceedings. The Statements should therefore be disclosed to the Defence as soon as possible, so that the Defence can make meaningful submissions concerning the nature and extent of any prejudice occasioned by this *ex parte* violation of critical deadlines and procedures set out in Rules 121(3)-(6) of the Rules of Procedure and Evidence.

¹ Confidential redacted version of the “Prosecution Request for non-disclosure of statements of witnesses MLI-OTP-P-0554 and MLI-OTP-P-0984”, 8 July 2019, ICC-01/12-01/18-397-Conf-Exp.

II. Classification

5. In accordance with Regulation 23bis(2) of the Regulations of the Court, this response is classified as confidential, as the filing to which it relates is classified the same.

III. Submissions

A. The Request is Insufficiently Justified

6. In its Request, the Prosecution has disclosed two Witness Statements to the Chamber on an *ex parte* basis. The Prosecution has expressed its intention to disclose them “later on as incriminatory evidence”,² and acknowledged their possible materiality to the Defence under Rule 77. The Prosecution has nonetheless requested the complete non-disclosure of these Statements to the Defence and has further indicated that it is unable to provide summaries or redacted versions. The Prosecution makes an alternative request that is entirely redacted from the Defence.³
7. On the basis of the non-redacted information in the Request, there appears to be two possible reasons for classifying the information under Rule 77. The first concerns the possibility that the Statements have independent relevance to Defence preparation, whereas the second scenario concerns the possibility that the materiality of these statements arises solely from the Prosecution’s intention to rely upon them at a future point in time. In any case, by designating these Statements as information that is material to the preparation of the Defence, the Prosecution has itself demonstrated why the information must be disclosed. As affirmed by the ICTY Appeals Chamber in *Blaskic*, “it is misconceived, in that it does not make sense that the Prosecution can stop short of providing exculpatory evidence in its possession, having pointed out to the Defence that it possesses such evidence. If the evidence is in the sole possession of the Prosecution, it is obvious

² Request, para. 3.

³ Request, para. 24.

that if the fourth reason were upheld, the Defence would be hindered from discovering it, thus frustrating the principle of a fair trial”.⁴

8. The fact that the case is at the confirmation phase also does not eliminate the imperative of disclosure, or mitigate the prejudice occasioned by non-disclosure of Rule 77 information. The ICC Appeals Chamber has found, in this regard, that although it is theoretically possible to withhold some Rule 77 or Article 67(2) information at this phase, the “overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of nondisclosure of information is the exception to this general rule.”⁵ When deciding whether exceptional circumstances exist:⁶

a thorough assessment will need to be made by the Pre-Trial Chamber of the potential relevance of the information to the Defence on a case-by-case basis. If the information is relevant or potentially exculpatory, the balancing exercise performed by the Pre-Trial Chamber between the interests at stake will require particular care.

9. Such a case-by-case assessment would also need to take into account the impact of placing these Statements before the Chamber during the confirmation proceedings, the extremely small proportion of exculpatory information that has been disclosed to the Defence thus far, and the fact that the security situation in Mali also impedes the Defence from conducting its own independent investigations.
10. The assessment would also need to take in consideration the Prosecution’s failure to explain the existence of an objectively justifiable risk, arising from disclosure on a confidential basis to the Defence, as opposed to the public.⁷ The Request rests instead on the extremely generic argument that “any incident involving [the Witnesses] would discourage them from further cooperating with the Prosecution and testifying at trial should the charges against AL HASSAN be confirmed. This

⁴ ICTY: *Prosecutor v. Blaskic*, ‘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.

⁵ [ICC-01/04-01/07-476](#), para. 64.

⁶ [ICC-01/04-01/07-476](#), para. 57.

⁷ [ICC-01/04-01/07-475](#), para. 98.

would also discourage other current and future witnesses from cooperating with the Prosecution.”⁸

11. These grounds are completely hypothetical and lack any factual basis to conclude that disclosure to the Defence would constitute risk to the Witnesses.⁹ The vagueness of this argument lowers the standards for non-disclosure under Rule 81(2) and (4) dramatically and would simply be applicable on the identity of any individual cooperating with the Court. The request is therefore unfounded and should be dismissed.

12. For the reasons set out below, when such a thorough assessment is applied to the Prosecution’s generic justifications, it should be clear that the Request should be rejected.

i. P-0554

13. Information on P-0554 is provided in three paragraphs that are entirely redacted.¹⁰ This prevents the Defence from understanding or responding to the relevance of the Statement to the case, whether the Statement is incriminatory in nature or contains evidence that may be exculpatory or otherwise material to the Defence. The extent of the redactions do not comport to the Appeals Chamber’s instruction that the Defence must, to the extent that is possible, be afforded with a meaningful opportunity to be heard as concerns requests for non-disclosure.¹¹

ii. P-0984

14. According to the Request, P-0984’s account contains information about the alleged role of Mr. Al Hassan, and his physical description. No other details are provided about the substance of P-0984’s statement or its relevance to the case.

15. [REDACTED],¹² which the Prosecution has heavily relied upon in the Document Containing the Charges. The relevance of this Statement to the charges heightens

⁸ Request, para. 21.

⁹ [ICC-01/04-01/07-476](#), para. 60.

¹⁰ Request, paras 13 to 15.

¹¹ [ICC-01/04-01/07-475](#), para. 73.

¹² MLI-OTP-0046-8845-R01.

the degree of prejudice arising from the *ex parte* submission of the Statement to the Pre-Trial Chamber.

B. The Request is Prejudicial, and Inconsistent with the Right to Fair, Adversarial, and Impartial Confirmation Proceedings

16. Although the Prosecution indicated that it would not rely on the Statements for the confirmation hearing,¹³ the Prosecution nonetheless submitted the Statements to the Chamber, on the first day of confirmation of charges hearings, and further expressed the view that the contents could be relied upon to incriminate the defendant, if the charges were to be confirmed.¹⁴ The placement of incriminating information before the Chamber in a tardy and on an *ex parte* basis undermines the procedural safeguards set out in Rule 121, and the Appeals Chamber's directive that:¹⁵

if non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect, the requested redactions should not be authorised. In addition, adequate procedural safeguards should be in place to ensure that the interests of the Defence are protected so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms.

17. As explained by the Defence during the hearing, the timing and the manner in which this information was presented to the Chamber is "highly prejudicial in the sense that it appears gathered towards creating an impression that the Prosecution is in possession of further evidence on certain points."¹⁶ The introduction of this information therefore allows the Prosecution to address a highly contested issue (the sufficiency of evidence) in a manner, which falls outside the procedural protections of adversarial proceedings, and which violates equality of arms.
18. The prejudice is further exacerbated by the fact that the Request is completely silent as concerns the manner in which the Statements were taken, and why the Request was not submitted either before the expiration of the deadlines for

¹³ Request, para. 22.

¹⁴ Request, para. 3.

¹⁵ [ICC-01/04-01/07-476](#), para. 63.

¹⁶ ICC-01/12-01/18-T-005-CONF-ENG CT, p.96, lns. 21-24.

tendering evidence, or after the confirmation process itself (given that the Prosecution is not relying on these individuals at this point of the proceedings).

19. Even if the Prosecution did not intend to rely on these Statements at this phase, if there is truly independent Rule 77 information within the Statements, then the Prosecution should have anticipated the possibility that the Defence may have wished to use the information itself, either as evidence, investigative leads, or to frame its submissions for the hearing. For example, when a similar situation arose in the *Gbagbo* case, the Single Judge authorised the Prosecution to withhold the identity and underlying statement of a particular witness, whom the Prosecution did not intend to rely on during the confirmation hearing, but nonetheless ordered the Prosecution to disclose all exculpatory extracts from the statement, along with any additional information that would facilitate the investigations of the Defence.¹⁷ It is therefore clear that the fact that the Prosecution does not intend to rely on certain statements does not cure the prejudice arising from non-disclosure.
20. The late submission of the Request has also undermined the ability of the Single Judge to exercise effective control over this issue: irrespective as to whether the Request is denied or granted, the Defence has not had access to the information in question in connection with its investigations and preparations for the confirmation hearing. The timing therefore reinforces the appearance that the underlying objective of the Request was not to safeguard Defence rights, but to serve as an avenue for placing Rule 76 information before the Chamber, outside of the deadlines and appropriate forum for doing so.
21. The non-disclosure of the Statements, coupled with the highly redacted nature of the Request, has also prevented the Defence from making meaningful submissions as concerns the impact on specific Defence rights, and the overall fairness of the confirmation proceedings.

¹⁷ [ICC-02/11-01/11-348-Red](#), para. 11.

C. The Request Should be Rejected Due to the Absence of Appropriate Counter-Balancing Measures

22. The Prosecution has indicated that it is not possible to summarise or redact the statements, and the alternative request is entirely redacted.¹⁸ The Request nonetheless lacks any counterbalancing measures that could mitigate either the prejudice arising from non-disclosure, or the prejudice arising from the submission of incriminating information to the Pre-Trial Chamber, on an *ex parte* basis.¹⁹ The Requests therefore fails to comply with the Appeals Chamber's directive that even if a Pre-Trial Chamber decides to grant certain non-disclosure requests, "adequate procedural safeguards should be in place to ensure that the interests of the Defence are protected so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms."²⁰

IV. Conclusion

23. The Defence respectfully requests the Single Judge to reject the Request, and to instruct the Prosecution to disclose the Statements to allow the Defence to either assess their materiality in light of Rule 77 or the prejudice caused by disclosure in violation of Rule 121(3) of the Rules.

¹⁸ Request, para. 24.

¹⁹ [ICC-01/04-01/06-1486](#), para. 48; Trial Chamber I has stated that "[t]here is no logical reason for suggesting that this approach is confined to issues arising out of Article 54(3)(e) [of the Statute]...". [Emphasis added], [ICC-01/04-01/06-1557](#), para. 35. See also [ICC-02/05-03/09-442-Red2](#), paras. 11-12, and *Rowe & Davis v. United Kingdom*, app. no. 28901/95, para 61, "in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities."

²⁰ [ICC-01/04-01/07-476](#), para. 63.



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Dated this 19th Day of July 2019
At The Hague, The Netherlands