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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 Defence response to the Prosecution Motion for
Authorisation to Withhold the Identity of Witness MLI-OTP-P-0577**

**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 Motion for Authorisation to Withhold the Identity of Witness MLI-OTP-P-0577 from the latter’s statement, upon which the Prosecution does not rely for the confirmation of charges” (respectively, the “Request”, the “Statement” and the “Witness”).¹
2. The Defence opposes the Request.
3. Withholding the identity of the Witness is unnecessary at this stage, given that the confirmation of charges process is coming to its end; should there be a trial, the Defence will, in principle, be entitled to full disclosure. The Prosecution fails to demonstrate the existence of an objective risk arising from disclosure *to the Defence specifically*. The request therefore falls short of the threshold for non-disclosure under Rules 81(2) and 81(4) of the Rules of Procedure and Evidence (the “Rules”). In addition, the Witness statement contains information that is relevant to Defence preparation and investigations (irrespective as to whether the Witness is relied upon by the Prosecution at this stage or at a future stage). Therefore, the entirety of the Witness’s statement must be disclosed as soon as practicable.
4. If concrete security reasons prevent such disclosure, the Defence must have access to the information relied upon to demonstrate the risk, and be given an opportunity to respond. 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).
5. The Request fails to justify – in reasons that are available to the Defence – why the Witness’s identifying 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.

¹ Confidential redacted version of the “Prosecution Motion for Authorisation to Withhold the Identity of Witness MLI-OTP-P-0577 from the latter’s statement, upon which the Prosecution does not rely for the confirmation of charges, 16 July 2019, ICC-01/12-01/18-410-Conf-Exp”, 18 July 2019, ICC-01/12-01/18-410-Conf.

6. If the materiality of the Statement rests solely in the fact that the Prosecution intends to call Witness P-0577 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 Statement should therefore be disclosed to the Defence in its entirety 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.

II. Classification

7. In accordance with Regulation 23bis(2) of the Regulations of the Court, this response is classified as confidential *ex parte*, as the filing relates *inter partes* disclosure issues, and potential Defence strategy.

III. Submissions

A. The Request is Insufficiently Justified

8. In its Request, the Prosecution has disclosed a Witness Statement to the Chamber on an *ex parte* basis. The Prosecution argues that [REDACTED].² The Prosecution fails to explain why the Statement was not disclosed ahead of the filing of the DCC, since the Prosecution clearly knew that they would rely on P-0577's [REDACTED].
9. The Prosecution now requests the non-disclosure of P-0577's identifying information to the Defence. The Prosecution makes an alternative request that it be redacted from the Defence.³

² Request, para. 3.

³ Request, para. 28.

10. 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 Statement has independent relevance to Defence preparation, whereas the second scenario concerns the possibility that the materiality of this Statement arises solely from the Prosecution's intention to rely upon it at a future point in time.
11. In any case, by designating the Statement as information that is material to the preparation of the Defence, the Prosecution has itself demonstrated why the entirety of the Statement 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 that if the fourth reason were upheld, the Defence would be hindered from discovering it, thus frustrating the principle of a fair trial".⁴
12. 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.

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.

13. Such a case-by-case assessment would also need to take into account the impact of placing this Statement 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 [REDACTED].
14. The assessment would also need to take into 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 "[s]hould any harm befall P-0577 or her family as a result of the disclosure of her identity, this could discourage her or other current and future witnesses from cooperating with the Prosecution and providing evidence."⁸
15. These grounds are completely hypothetical and lack any factual basis to conclude that disclosure to the Defence would constitute risk to the Witness.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.
16. For the reasons set out below, when a thorough assessment is applied to the Prosecution's generic justifications, it should be clear that the Request should be rejected.
17. The content of P-0577's statement appears at least in part exonerating. For example, [REDACTED]¹⁰ [REDACTED],¹¹ [REDACTED].

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

18. Although the Prosecution indicated that it would not rely on the Statement for the confirmation hearing,¹² the Prosecution nonetheless submitted the Statement to the

⁷ [ICC-01/04-01/07-475](#), para. 98.

⁸ Request, para. 24.

⁹ [ICC-01/04-01/07-476](#), para. 60.

¹⁰ Request, para. 12.

¹¹ Request, para. 15.

¹² Request, para. 22.

Chamber, the day before the end of the confirmation of charges hearing. 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:¹³

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.

19. 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."¹⁴ 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.
20. The prejudice is further exacerbated by the fact that the Request is completely silent as concerns the, dates on which the Statement was taken, the manner in which it was taken, and why the Request was not submitted either before the expiration of the deadlines for tendering evidence, or after the confirmation process itself (given that the Prosecution is not relying on the Statement at this point of the proceedings).
21. In addition, the Prosecution Request points to a number of inconsistencies between P-0577's Statement and [REDACTED].¹⁵ [REDACTED].¹⁶
22. 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

¹³ [ICC-01/04-01/07-476](#), para. 63.

¹⁴ ICC-01/12-01/18-T-005-CONF-ENG CT, p. 96, lns. 21-24.

¹⁵ Request, paras. 17-18.

¹⁶ Compare DCC, paras. 763, 799, 819, with Request, para. 18.

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 incriminatory information before the Chamber, outside of the deadlines and appropriate forum for doing so.

23. The numerous redactions applied to the Request itself have also prevented the Defence from making meaningful submissions as concerns the impact on specific Defence rights, and the overall fairness of the confirmation proceedings.

C. The Non-Disclosure of P-0577 identifying information causes a prejudice to the Defence

24. The Defence reiterates that protective measures must not be prejudicial to the rights of the Suspect.¹⁷ 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",¹⁸ to "have adequate time and facilities for the preparation of the defence",¹⁹ and to "raise defences and to present other evidence".²⁰
25. The Defence also has the right to call witnesses under the same conditions as witnesses called against the defendant. The Defence cannot, however, call witnesses if it is not provided with the names of persons who have information that is relevant to the preparation of the Defence.
26. Whereas the Prosecution has characterized the statement as falling under Rule 77, it clearly contains information that falls under Article 67(2): [REDACTED].
27. It would appear, in this regard, that apart from the exonerating information provided by P-0577, P-0577 may be in a position to enlighten the Defence as to the reasons for [REDACTED]. P-0577 is also likely to be in a position to [REDACTED].

¹⁷ Article 68(1) Statute.

¹⁸ Article 67(1)(a) Statute.

¹⁹ Article 67(1)(b) Statute.

²⁰ Article 67(1)(e) Statute.

28. Contrary to the Prosecution's submission,²¹ redacting P-0577's identity therefore prejudices the rights of the Defence, and impedes the fairness and impartiality of the proceedings. Indeed, it is a matter of extreme concern that this information was not disclosed to the Defence at an earlier point in time. The phrasing in the request suggests that the Prosecution initially obtained the statement for the purposes of the confirmation hearing. If this is the case, then the fact that it was not disclosed as soon as practicable has deprived the Defence of the ability to investigate these issues in advance of the hearing, with a view to tendering its own evidence on this point. [REDACTED] Ongoing non-disclosure of the identity would aggravate this harm, and divert the Chamber from a proper focus on the appropriate remedy, as concerns the harm that has already been occasioned to the rights of the Defence.
29. Even if the Prosecution only obtained this statement recently, such a delay is an unacceptable breach of Article 54(1)(a), and the Prosecutor's duty to endeavour to complete its investigations by this stage. The Prosecution relied upon P-0577 was relied upon to establish an incident in the charges: having decided to include this incident in the DCC, the Prosecutor had a clear duty to ensure that the allegation itself was investigated in an independent and impartial manner, consistent with its obligation to establish the truth.

IV. Conclusion

30. The Defence respectfully requests the Single Judge to reject the Request, and to instruct the Prosecution to disclose the unredacted Statement to allow the Defence to either assess its materiality in light of Article 67(2) and Rule 77 or the prejudice caused by its late disclosure. This would be without prejudice to the right of the Defence, upon receipt and review of this statement, to seek further remedies concerning any prejudice occasioned by the late disclosure of this statement.

²¹ Request, paras. 25-26.



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Dated this 29th Day of July 2019
At The Hague, The Netherlands