



Original: **English**

No.: **ICC-01/12-01/18**
Date: **11 December 2019**

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
Judge Tomoko Akane
Judge Kimberly Prost

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD

Public

with Confidential *Ex Parte* Annex A, Prosecution and Defence only

Public Redacted Version of “Response to “Addendum to Prosecution Request for Access to the Identity of and Applications of Participating Victims, 21 November 2019, ICC-01/12-01/18-502””

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 Addendum filed on 29 November 2019,¹ whereby the Prosecution seeks access to the unredacted application forms for only the dual status victims/witnesses, along with all supporting documents, to be identified and disclosed by the Victims Participation and Reparations Section (VPRS).² The Prosecution’s position, as averred in its Addendum, constitutes a notable departure from that posited in its Initial Request filed a week before,³ whereby it sought the identity and unredacted application forms for all 882 participating victims in these proceedings.⁴ The revised position is inconsistent with the Prosecution’s duties under Article 54(1) of the Statute, would prevent the Defence from accessing information that is exculpatory or otherwise material to Defence preparation, and is particularly prejudicial in light of the specific scheme for victim participation adopted in this case.

II. Submissions

- a) *The restricted nature of the Prosecution’s access request is inconsistent with the Prosecution’s positive duty to search for and collect information that is relevant to the truth*
2. The Prosecution has an overarching obligation to investigate exculpatory material, which requires positive and sufficient efforts to do so on the part of the Prosecution,⁵ and which the Appeals Chamber has already found, extends to discovering any such information in the

¹ [ICC-01/12-01/18-510](#), Prosecutor v. Al Hassan, Addendum to Prosecution Request for access to the identity and applications of participating victims, 21 November 2019, ICC-01/12-01/18-502, 29 November 2019 (“**Addendum**”). The Defence files this response confidential as it refers to information arising from filings of the same classification. A public redacted version is filed concomitantly. The Defence limits its response to the Prosecution’s request as concerns the provision of application forms of participating victims. The Defence will address the LRV’s submissions as concerns the adoption of a protocol to address contacts with victims in this case at the first scheduled status conference see [ICC-01/12-01/18-513](#), Prosecutor v. Al Hassan, Réponse à la requête du Bureau du Procureur « Prosecution Request for access to the identity and applications of participating victims » et son addendum (ICC-01/12-01/18-502 et ICC-01/12-01/18-510), 2 December 2019.

² Addendum, para. 4 (point 2).

³ [ICC-01/12-01/18-502](#), Prosecutor v. Al Hassan, Prosecution Request for access to the identity and applications of participating victims, 21 November 2019 (“**Initial request**”).

⁴ Initial Request, para. 13. See also [ICC-01/12-01/18-391-Red](#), Prosecutor v. Al Hassan, Public redacted version of the Decision on the participation of victims in the proceedings, 1 July 2019, para. 38.

⁵ E.g. [ICC-01/05-01/13-1202](#), Prosecutor v. Bemba et al., Decision on Joint Request to Strike Prosecution Witnesses P-198 and P-201 from the Witness List, 31 August 2015, para. 12; [ICC-01/09-01/11-1655-Red](#), Prosecutor v. Ruto et al., Decision on Joint Defence Application for Further Prosecution Investigation Concerning [REDACTED] of Certain Prosecution Witnesses, 12 January 2015, paras. 37-39.

victims' possession.⁶ As a corollary obligation, the Prosecution also has a duty to disclose all exculpatory material in its possession, as well as information which is material to the preparation of the defence which includes material collected by the Prosecution from the victims.⁷ As the charging entity, it is the Prosecution and not the Registry which is in a position to determine whether material is discloseable to the Defence in accordance with Article 67(2) of the Statute and Rule 77 of the Rules, noting that the positive obligation to disclose exculpatory material rests solely with the Prosecution.⁸

3. Any alternative proposal, whereby the Prosecution is only provided with the application forms for dual status victims/witnesses runs the real risk of relevant and potentially exculpatory material being overlooked in these proceedings so as to give rise to serious errors. For example, in a situation where the Prosecution only has in its possession the application form for a specific dual status victim/witness, any contradictory accounts provided for in other application forms completed by relatives or associates of the identified dual status victim/witness would not be readily available or known to the Prosecution or subsequently disclosed to the Defence in the absence of any general disclosure obligations on the part of the victims. This gap is only protected against if the Defence and/or the Prosecution are granted access to the unredacted application forms for all participating victims.⁹
4. The potential for such evidential and misleading gaps is not a theoretical issue as evidenced in the *Ongwen* case,¹⁰ and as acknowledged in the Prosecution in its Initial Request whereby

⁶ [ICC-01/04-01/07-2288](#), Prosecutor v. Katanga, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010, para. 81.

⁷ [ICC-02/11-01/15-915-Red](#), Prosecutor v. Gbagbo et al., Public Redacted Version Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016, 31 July 2017, para. 56.

⁸ [ICC-01/04-01/06-1637](#), Prosecutor v. Lubanga, Decision on the defence application for disclosure of victims applications, 22 January 2009, para. 10

⁹ In this regard, the Defence notes that the provision of the application forms for participating victims does not discharge the Prosecution of its disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules see [ICC-02/11-01/15-915-Red](#), Prosecutor v. Gbagbo, Public Redacted Version Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016, 31 July 2017, para. 56 "Nevertheless, the fact that victims' applications are provided to the defence by the Registry under rule 89 (1) of the Rules does not mean that they cannot be the subject of separate disclosure obligations of the Prosecutor once they are in her possession or control, in particular if the copies that have been provided to the Prosecutor contain lesser redactions than those provided to the defence or no redactions at all."

¹⁰ [ICC-02/04-01/15-907](#), Prosecutor v. Ongwen, Decision on Prosecution's Request to Disclose Lesser Redacted Versions of 43 Victims' Applications, 6 July 2017, para. 18 whereby the Prosecution had identified Rule 77 material in the application forms for victims who were related to dual victim/witnesses in the case. The Prosecution was able to identify the material by virtue of its access to the application forms for all participating victims.

it recognised the relevance of collecting all application forms for all participating victims in order to discharge its investigative and disclosure obligations.¹¹

b) Limited access would prevent the Prosecution from discharging its duty to disclose information that is relevant to Defence preparation

5. On 10 October 2019, the Defence wrote to the Prosecution to [REDACTED].¹² It is therefore a matter of concern that the Prosecution amended its request to restrict the nature of its access to application forms, even though it was aware that information set out in such application forms was likely to be relevant to the Defence disclosure request. There is, therefore, an appearance that the Prosecution might be shutting its eyes to possible discrepancies and inconsistencies in this body of information, in order to avoid disclosing information that would undermine the reliability of evidence or information initially collected by certain NGOs. That is, the Prosecutor is imposing artificial fetters on the scope of its own investigations, in order to limit the scope of material within its possession (i.e. to a small percentage of the 882 applications forms it had originally requested), which it would then be required to review, and disclose, if the information falls under Rule 77 of the Rules or Article 67(2) of the Statute.¹³ This runs counter to the Prosecution's obligation to investigate and collect exculpatory material, from all sources, which again, is only further compounded by the absence of any redress for the Defence to obtain the information directly from the Registry or victims.
6. The actual as opposed to hypothetical relevance of such information has already been demonstrated during the confirmation proceedings, in particular, in relation to the identification of armed groups, which were present in Timbuktu in 2012, and to which the alleged perpetrators belonged to. [REDACTED];¹⁴ [REDACTED].¹⁵ Given the broad definition of 'victim' employed at the pre-trial stage,¹⁶ there are potentially multiple victim application forms which include crucial details concerning the identity of the armed groups

¹¹ Initial Request, paras. 2, 7 and 8.

¹² See Annex A [REDACTED].

¹³ E.g. [ICC-01/04-01/07-579](#), Prosecutor v. Katanga and Ngudjolo, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case", 10 June 2008, para. 31.

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [ICC-01/12-01/18-146-tENG](#), Prosecution v. Al Hassan, Second Decision on the Principles Applicable to Victims' Applications for Participation, 8 October 2018, in particular, paras. 23, 28, 30 and 35. See also ICC-01/12-01/18-475-Conf, Prosecutor v. Al-Hassan, Appeal of the Pre-Trial Chamber's "Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense", 21 October 2019, para. 46.

present during the underlying incident, or the affiliation of particular perpetrators at the time of particular incidents (which is important given that certain perpetrators shifted their alignments throughout the charging period).

7. Nor is there any reason to restrict access, or otherwise depart from the procedure set out in the Prosecution's initial request. The Prosecution unequivocally stated that there were "no security issues which would arise from granting the Prosecution access to the identity of Participating Victims or to unredacted versions of their applications",¹⁷ and more pertinently, that upon consultation all three LRVs "expressed their consent to the disclosure being sought in the present Request".¹⁸ The LRVs also expressed their willingness to provide all such applications to the parties during the confirmation hearing.¹⁹ There is clearly no security risk or objection from the victims which would have necessitated the Prosecution's *volte face*, or otherwise outweighed the prejudice caused by a limited-access regime.

c) Restricting access to dual victim-witnesses in particularly prejudicial in light of the scheme for victim participation adopted in this case

8. At the outset, the Defence notes that neither the Addendum nor the Initial Request actually reflect the statutory framework applicable to the provision of application forms for participating victims. Rule 89(1) of the Rules mandates the Registry to provide both the Prosecution and Defence with a copy of all victim application forms subject only to protective measures issued pursuant to Article 68(1) of the Statute. The starting point is therefore that the Defence has a statutory entitlement to the application forms of all participating victims with the appropriate redactions applied. This disclosure right has been explicitly endorsed by the Appeals Chamber,²⁰ and subsequently reflected in the Chambers Practice Manual which provides that:²¹

"[i]n accordance with Rule 89(1), all complete applications falling within the scope of the concerned case that are transmitted to the Chamber, and any supporting

¹⁷ Initial Request, para. 3 and 10.

¹⁸ Initial Request, para. 3 and 11.

¹⁹ ICC-01/12-01/18-513, para. 11.

²⁰ [ICC-02/11-01/15-915-Red](#), Prosecutor v. Gbagbo, Public Redacted Version Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016, 31 July 2017, para. 56 which provides "Under rule 89 (1) of the Rules, the Registry is under an obligation to provide copies of such applications to the defence and to the Prosecutor. The Registry applies redactions to the copies provided to the defence when the Registry deems it necessary [emphasis added]".

²¹ [Chambers Practice Manual - November 2019](#), paras. 96(v) and 96(vi).

documentation, are also provided, together with the transmission report, to the Prosecutor and the Defence, at the same time and by way of the same filing in the record of the case made for the transmission to the Chamber [emphasised added]”

[...]

“[c]onsistent with Article 68(1) of the Statute, which is also explicitly referred to in Rule 89(1) of the Rules, if there exist security concerns in case the applicant’s identity and involvement with the Court were to be known to the Defence, the Registry transmits the application, and any supporting documentation, to the Defence in redacted form, expunging the person’s identifying information.”

9. The Chambers Practice Manual reflects the best practices identified with respect to systems common to various stages of the proceedings,²² and which applicable to ongoing cases as of the date of its issuance.²³ In particular, it allows the Defence to ensure that the procedural rights of participating victims are to be determined in a manner which is not prejudicial to or inconsistent with the rights of the accused pursuant to Article 68(3), to identify material which is relevant to its case, and more pertinently, to evaluate the veracity of the factual allegations as submitted by the participating victims.
10. Even in the event that the Trial Chamber is considering maintaining such a departure at the trial stage, then the prejudice that this occasions to the Defence would need to be remedied through counter-balancing measures: namely, it is the procedure as set out in the Prosecution’s Initial Request and not the Addendum which is better aligned to the statutory framework and more conducive to fair proceedings in protection of Mr. Al Hassan’s due process rights.

²² [Chambers Practice Manual - February 2016](#), p. 4.

²³ [Chambers Practice Manual - November 2019](#), p. iii. See also [ICC-02/04-01/15-229](#), Prosecutor v. Ongwen, Decision concerning the procedure for admission of victims to participate in the proceedings in the present case, 3 September 2015, para. 6, and [ICC-02/11-01/11-800](#), Prosecutor v. Gbagbo, Decision on Victim Participation, 6 March 2015, para. 51.

Relief sought

11. For the foregoing reasons, the Defence respectfully requests the Trial Chamber to:

- i. **DISMISS** the Prosecution's proposal as set out in the Addendum; and
- ii. **DIRECT** the Registry to adopt the procedure as set out in paragraphs 96(v) and 96(vi) of the Chambers Practice Manual; or in the alternative,
- iii. **GRANT** the Prosecution's proposal as set out in the Initial Request.



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Dated this 11th Day of December 2019
At The Hague, The Netherlands