

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: **14 June 2018**

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

With confidential Annex A

Information regarding the disclosure of photographs

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Unrepresented Victims

**Unrepresented Applicants for
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Introduction

1. The Prosecution wishes to inform the Chamber that it will not disclose to the Defence photographs of buildings, where sufficient analogous images of the same sites will be disclosed as incriminatory evidence. The photographs are a) of religious, cultural and historical sites of property destruction and b) of some of the headquarters in Timbuktu in 2012 to 2013 of armed groups to which Mr Al Hassan is associated.
2. Both the Single Judge¹ and the Defence² raised concerns regarding the volume of material that the Prosecution intends to disclose to the Defence as incriminatory evidence and evidence under rule 77 of the Rules of Procedure and Evidence (“Rules”).
3. Mindful of these concerns, the Prosecution has further reviewed and compared the photographs upon which it will rely for incriminatory purposes, with photographs that it had originally intended to disclose, in an abundance of caution, pursuant to rule 77.
4. Based on this review, the Prosecution concludes that 3,348 photographs of sites, although relevant, would not assist the Defence. These photographs are similar to analogous incriminatory evidence selected to be disclosed, as they are images of the same buildings/sites taken at similar angles. Accordingly, the Prosecution submits that it is not necessary to disclose them, because they are not really material to the Defence’s preparation.
5. That being said, although the additional photographs would not assist the Defence and are not truly material to their preparation, if the Defence requests access to inspect them the Prosecution would not oppose any such request.

¹ ICC-01/12-01/18-31, para. 25, 44.

² ICC-01/12-01/18-45-Conf-Exp, para. 15, 16.

Procedural background

6. On 4 April 2018, the Prosecution requested instructions from the Single Judge concerning disclosure and redactions of evidence, including adoption of the Redactions Protocol as used in the *Prosecutor v Al Mahdi* (“Request”).³ The Defence did not submit any observations.
7. On 6 April 2018, the Single Judge instructed the Prosecution to provide additional information regarding the nature of the evidence likely to be disclosed and the nature of the necessary redactions (“Order”).⁴
8. On 12 April 2018, the Prosecution filed its initial observations in response to the Order (“Observations”).⁵ On 8 May 2018, the Prosecution submitted supplementary observations in relation to the Order (“Supplementary Observations”).⁶
9. On 16 May 2018, the Single Judge issued the ‘*Décision relative au système de divulgation et à d’autres questions connexes*’ (“Decision”).⁷
10. On 24 May 2018, the Prosecution submitted its *ex parte* observations regarding the Decision.⁸ On 25 May 2018, the Prosecution submitted the public redacted version of its *ex parte* observations.⁹
11. On 6 June 2018, the Defence submitted its observations concerning the Decision.¹⁰

³ ICC-01/12-01/18-15.

⁴ ICC-01/12-01/18-17.

⁵ ICC-01/12-01/18-18-Conf-Exp-Red.

⁶ ICC-01/12-01/18-27-Conf-Exp.

⁷ ICC-01/12-01/18-31.

⁸ ICC-01/12-01/18-38-Conf-Exp.

⁹ ICC-01/12-01/18-38-Red2.

¹⁰ ICC-01/12-01/18-45-Red.

Confidentiality

12. Annex A has been classified as confidential because it refers to evidence, and disclosure is an *inter partes* procedure.

Prosecution's submissions

13. During its preliminary review of evidence for disclosure purposes, the Prosecution adopted a conservative approach and erred on the side of broad disclosure.
14. However, in light of the concerns raised by the Single Judge¹¹ and the Defence,¹² the Prosecution has re-reviewed the large volume of photographs of sites it had intended to disclose pursuant to rule 77.
15. In particular, the Prosecution notes the Single Judge's comment that: *"le plus important, tant pour garantir les droits de la défense que pour permettre à la Chambre d'exercer ses fonctions, n'est pas que le Procureur communique le plus grand nombre de pièces, mais qu'elle communique celles qui ont un réel intérêt pour l'affaire, qu'elles soient à charge ou à décharge"*.¹³
16. In *Prosecutor v Lubanga*, Trial Chamber I ("Chamber") concluded that it was not necessary to disclose additional evidence of *"tu quoque"* material pursuant to rule 77, where, *inter alia*, the Prosecution had submitted over 150 items of evidence containing information on the use of child soldiers in other armed groups in Ituri. After reviewing that evidence, the Chamber concluded that *"the defence has been supplied with a more than sufficient body of information"* and that *"further material will*

¹¹ ICC-01/12-01/18-31, para. 25, 44.

¹² ICC-01/12-01/18-45-Red, para. 15, 16.

¹³ ICC-01/12-01/18-31, para. 25.

not provide additional assistance to the defence under Rule 77".¹⁴ The Chamber further decided that any further information relating to the general use of child soldiers by groups other than the UPC "above and beyond that already disclosed, is unnecessary for the preparation of the defence (viz. it would have no material effect). It does not, therefore, fall into the scope of the disclosure obligations under Rule 77 of the Rules".¹⁵

17. Similarly, in this case, the Prosecution has identified 3,348 photographs of sites ("Additional Photographs") that are relevant to the case against the Suspect, but that are not material or essential to the Defence's preparations as they do not provide additional assistance to the Defence.¹⁶ The Defence will be provided with a sufficient "*body of information*" by way of images of the sites, as the Prosecution is disclosing analogous images of the same buildings/sites at the same locations as incriminatory evidence.
18. The Prosecution attaches to this filing as Annex A, a table setting out to the right the ERNs for the Additional Photographs, with a list to the left of the corresponding analogous photographs that it intends to disclose as incriminatory evidence.
19. The Prosecution notes that in *Prosecutor v Bemba et al.*, the Appeals Chamber indicated that "*duplication of information is not in and of itself a reason to withhold*" disclosure.¹⁷ However, in this instance, the purpose of not disclosing the Additional Photographs is not because of a duplication of information *per se*, but because the Additional Photographs will not assist the Defence in its preparation, so cannot in the end be considered truly "material", and, accordingly, they fall outside the purview of rule 77.

¹⁴ ICC-01/04-01/06-2147, para. 23.

¹⁵ ICC-01/04-01/06-2147, para. 24.

¹⁶ The 3,348 Additional Photographs are amongst the 9,163 items of evidence that the Prosecution had previously identified as being available for disclosure (ICC-01/12-01/18-38-Red2, para. 54).

¹⁷ ICC-01/05-01/13-2275-Red, para. 56.

20. In any event, and as already advanced, the Prosecution will not oppose granting the Defence access to inspect the Additional Photographs, if the Defence so requests.

Conclusion

21. For all the foregoing reasons, the Prosecution informs the Chamber that it will not be disclosing the Additional Photographs set out to the right at Annex A to this filing.



Fatou Bensouda, Prosecutor

Dated this 14th day of June 2018
At The Hague, The Netherlands