

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: **4 July 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 Document

**Decision on the Prosecutors' Request for Clarification on the Non-Disclosure of
Witnesses' Identities**

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

Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence

Mr Yasser Hassan

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

States' Representatives

**Office of Public Counsel for the
Defence**

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Péter Kovács, having been designated by **Pre-Trial Chamber I** (“Chamber”) of the International Criminal Court (“Court”) as Single Judge responsible for carrying out the functions of the Chamber in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* as of 28 March 2018,¹ hereby renders this decision.

I. Procedural history

1. On 27 March 2018, pursuant to article 58 of the Rome Statute (“Statute”), the Chamber issued a warrant of arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan”).²
2. On 31 March 2018, Mr Al Hassan was surrendered to the Court, and he is currently in custody at the Court’s detention centre in The Hague.³
3. On 4 April 2018, a hearing was held at which Mr Al Hassan first appeared before the Single Judge, in the presence of his counsel and the Prosecutor.⁴
4. On the same day, the Prosecutor filed a request asking the Single Judge for instructions on disclosure and redaction practices.⁵
5. The Defence did not submit any observations in response.
6. On 6 April 2018, the Single Judge instructed the Prosecution to submit to him further information on the nature of the material to be disclosed and the redactions that may be necessary.⁶

¹ “Decision Designating a Single Judge”, 28 March 2018, reclassified as public on 31 March 2018, ICC-01/12-01/18-6-tENG.

² “Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 27 March 2018, reclassified as public on 31 March 2018, ICC-01/12-01/18-2-tENG.

³ ICC-01/12-01/18-11-US-Exp.

⁴ Transcript of the first appearance hearing, 4 April 2018, ICC-01/12-01/18-T-1-Red-ENG.

⁵ “Prosecution’s Request in relation to its Disclosure and Redaction Practice”, 4 April 2018, ICC-01/12-01/18-15.

⁶ “Order for Information from the Prosecution further to the ‘Prosecution’s Request in relation to its Disclosure and Redaction Practice’”, 6 April 2018, ICC-01/12-01/18-17-tENG.

7. On 12 April 2018, the Prosecution submitted its observations to the Chamber⁷ and, on 8 May 2018, filed additional information on the status of the Office of the Prosecutor's transcripts and translations.⁸
8. On 16 May 2018, the Single Judge issued the "*Décision relative au système de divulgation et à d'autres questions connexes*" ("Decision on the System of Disclosure"),⁹ setting out, *inter alia*, a simplified protocol for the redaction of evidence, according to which "[TRANSLATION] the Prosecution discloses redacted evidence, pursuant to rules 81(2) and 81(4) of the Rules [of Procedure and Evidence], without having to submit to the Chamber a discrete application to do so", except when the non-disclosure of witnesses' identities before the commencement of the trial and the non-disclosure of entire items of evidence are concerned, in which case the Prosecution must submit an application to the Chamber.¹⁰
9. On 12 June 2018, the Prosecution submitted a request for clarification¹¹ ("Prosecution's Request", "Request") of whether the Prosecution must submit a discrete application for non-disclosure to the Defence of the identities of those individuals who have been contacted or screened by the Prosecution but who have not yet provided a formal statement, or whether these individuals fall within the scope of the simplified redaction protocol.
10. In its response of 18 June 2018 ("Defence Response", "Response"),¹² the Defence maintained, *inter alia*, that all information regarding potential witnesses, as contained in interview notes and similar material, must be the subject of a

⁷ "*Réponse du Bureau du Procureur à l'Ordonnance sollicitant des informations de la part du Procureur suite à sa requête intitulée 'Prosecution's Request in relation to its disclosure and Redaction Practice'*", with one confidential, *ex parte* annex, 12 April 2018, ICC-01/12-01/18-18-Conf-Exp. The Prosecutor then filed two confidential redacted versions on 13 April 2018 and 17 April 2018, respectively ICC-01/12-01/18-18-Conf-Exp-Red and ICC-01/12-01/18-18-Conf-Exp-Red2.

⁸ ICC-01/12-01/18-27-Conf-Exp.

⁹ Decision on the System of Disclosure, 16 May 2018, ICC-01/12-01/18-31.

¹⁰ Decision on the System of Disclosure, 16 May 2018, ICC-01/12-01/18-31, paras. 29-33.

¹¹ "Prosecution's request for clarification on submission of discrete applications to seek authorisation for the non-disclosure of witnesses' identities", 12 June 2018, ICC-01/12-01/18-47.

¹² "Defence response to Prosecution's request for clarification on submission of discrete applications to seek authorisation for the non-disclosure of witnesses' identities", 18 June 2018, ICC-01/12-01/18-52.

discrete application for authorization, in accordance with rule 81(2) and 81(4) of the Rules of Procedure and Evidence (“Rules”).¹³

II. Applicable law

11. The Single Judge notes articles 21, 54(1)(a), 57(2)(b), 57(3)(c), 61, 67 and 82(1)(d) of the Statute, rules 76, 77, 81(2), 81(4), 121 and 155 of the Rules, and regulations 23(1)(d) and 24 of the Regulations of the Court.

III. Analysis

A. Preliminary remarks on the admissibility of the Prosecution’s Request

12. The Defence noted that the Prosecution had submitted its Request in violation of regulation 23(1)(d) of the Regulations of the Court in that it did not list the articles, rules, regulations or any other provision of the applicable law on which the Request relied and, therefore, the Single Judge was not required to consider the Request.¹⁴

13. The Single Judge notes that nowhere in the Statute or the Rules does it state that a party or participant to the proceedings may request a chamber to clarify a decision it has taken. Nonetheless, the Single Judge considers that he must examine the Prosecution’s Request in view of his obligation under article 61(3) of the Statute and rule 121(2) of the Rules to oversee the disclosure of evidence between parties and to take the necessary decisions in that regard.

B. Examination of the Prosecution’s Request

14. As stated above, in his Decision on the System of Disclosure the Single Judge established for the present case a simplified protocol for the redaction of material according to which the Prosecution may disclose redacted evidence, pursuant to

¹³ Defence Response, paras. 4 and 14.

¹⁴ Defence Response, para. 3.

rule 81(2) and 81(4) of the Rules, without having to submit an application to do so.¹⁵ The Single Judge specified that this simplified redaction protocol did not apply to the non-disclosure of witnesses' identities before the commencement of the trial and that, for this, the Prosecution must submit an application to the Chamber.¹⁶

Parties' arguments

15. In its Request, the Prosecution asked the Single Judge to specify which redaction protocol applied to information which could be used to identify individuals who have been contacted or screened by the Prosecution but have not provided a formal statement, especially when that information appears in screening notes or investigation reports containing information that is to be disclosed to the Defence.¹⁷

16. The Prosecution considers that the disclosure of this material with the redacted identities of individuals contacted or screened falls within the scope of the simplified redaction protocol, as these individuals have not provided any formal statement to the Prosecution and, consequently, the Prosecution does not intend to rely on them as witnesses for the confirmation of charges.¹⁸

17. The Prosecution goes on to argue that adopting the simplified redaction protocol would contribute to the efficiency of proceedings and the protection of innocent third parties without prejudicing the rights of the Defence, because the simplified redaction protocol includes a provision that protects the interests of the Defence.¹⁹ The Prosecution adds that requiring it to submit an application for non-disclosure of the identity of each person contacted who has not provided a formal statement would defeat the purpose of the simplified redaction protocol, which is to streamline the disclosure process.²⁰

¹⁵ Decision on the System of Disclosure, paras. 27-32.

¹⁶ Decision on the System of Disclosure, para. 33.

¹⁷ Prosecution's Request, paras. 2, 3, 6 and 7.

¹⁸ Prosecution's Request, paras. 8 and 9.

¹⁹ Prosecution's Request, para. 10.

²⁰ Prosecution's Request, para. 11.

18. Lastly, the Prosecution undertakes to submit to the Chamber discrete applications for the redaction of information which could be used to identify individuals who have given a formal statement, even if the Prosecution does not intend to rely on such evidence during the confirmation of charges hearing.²¹

19. In its Response, the Defence considers that the simplified redaction protocol must be narrowly interpreted such that it does not apply to information concerning individuals who have been contacted or screened, or whom the Prosecution has heard during the course of its investigation and are potential witnesses. In other words, the Defence considers that the non-disclosure of any information that the Prosecution wishes to redact concerning potential witnesses or contained in interview notes or similar material must be the subject of a discrete application to the Chamber for redaction authorization, in accordance with rule 81(2) and 81(4) of the Rules.²²

20. The Defence maintains that the Prosecution's interpretation of the redaction protocol adopted by the Single Judge runs counter to the Prosecution's obligations regarding evidence disclosure; the Defence recalls the principles of disclosure.²³ The Defence relies on the principle that it is the Prosecution's obligation to disclose evidentiary material in full, including information which could be used to identify potential witnesses, regardless of whether formal statements have been or will be obtained; it emphasizes the fact that redactions are an exceptional measure.²⁴

21. The Defence also argues that disclosure depends upon the nature of the evidence, including when the Prosecution obtains statements from potential witnesses or intends to adduce evidence at the hearing.²⁵ It maintains that the Prosecution's interpretation of the simplified redaction protocol allows it to avoid judicial oversight simply by not taking formal statements. The Defence,

²¹ Prosecution's Request, para. 13.

²² Defence Response, paras. 4 and 14.

²³ Defence Response, paras. 5-7.

²⁴ Defence Response, paras. 4, 6 and 14.

²⁵ Defence Response, para. 5.

however, considers this to run counter to the Prosecution's statutory obligations to disclose its evidence to the Defence in full.²⁶

22. The Defence recalls that the aim of a simplified protocol for the redaction of evidence was to increase the expeditiousness of proceedings and that its use does not curb the Prosecution's obligations to provide full disclosure of information that is vital for the preparation of the suspect's defence.²⁷

23. The Defence emphasizes that notes taken following interviews conducted by investigators from the Office of the Prosecutor frequently contain information that is potentially exculpatory or necessary for the Defence's preparation of its case and that they cannot be properly understood without knowledge of the interviewee's ability to observe the events described. The Defence adds that the non-disclosure of information by which a person could be identified would prevent the Defence from calling on potential witnesses at the confirmation of charges hearing.²⁸ The Defence notes that if such a protocol is applied to potential witnesses it would inevitably submit requests for the lifting of the redactions, which would generate additional work for the Chamber and the Defence, whereas not applying it would not necessarily lead to an increase in the Prosecution's workload.²⁹

24. Lastly, the Defence makes reference to the judgment in *Katanga*, in which the Appeals Court directed the Prosecution to submit discrete applications for the non-disclosure of information contained in witness statements by which potential witnesses could be identified. It argues that screening notes should be subject to the same protocol, which would ensure that non-disclosure does not result in a confirmation of charges hearing viewed as a whole to be unfair.³⁰

²⁶ Defence Response, para. 13.

²⁷ Defence Response, para. 7.

²⁸ Defence Response, para. 8.

²⁹ Defence Response, para. 12.

³⁰ Defence Response, paras. 9 and 10.

Conclusions of the Single Judge

25. The question to be answered is whether the exception to the simplified protocol for the redaction of evidence as it applies to the non-disclosure of witnesses' identities³¹ also applies to notes taken by Office of the Prosecutor staff members during their contact or interviews with individuals who have not provided formal statements.

26. In the Single Judge's view, the question must be assessed with consideration for the suspect's rights, but also for the protection of those concerned by the Court's activities and for the limited scope of the confirmation of charges hearing.

27. The Single Judge recalls that the Prosecution must fulfil its obligations under article 67(2) of the Statute and rule 77 of the Rules. The Prosecution's Request has no bearing on its obligation to disclose evidence that is potentially exculpatory or otherwise relevant to the Defence's preparation for the confirmation of charges hearing.

28. Moreover, the Single Judge notes that the Defence did not submit any observations in response regarding the system of disclosure, as it is permitted to do under regulation 24 of the Regulations of the Court.³² Nor did the Defence submit to the Single Judge within the prescribed time limit a request for authorization to lodge an appeal against the Decision on the System of Disclosure, in accordance with article 82(1)(d) of the Statute and rule 155 of the Rules.

29. The Single Judge considers that to include under the simplified redaction protocol the individuals referred to in paragraph 12 of the Prosecution's Request does not mean that the evidence in question will not be subject to any checks or that the proceedings as a whole will be unfair. To apply the simplified redaction protocol in these cases is not inconsistent with the rights of the Defence because measures have been put in place such as: (i) oversight by the Single Judge, which allows him to

³¹ Decision on the System of Disclosure, para. 33.

³² See para. 5 above.

verify whether the Prosecution's redaction of evidence is excessive;³³ (ii) on-going verification by the Prosecution that the redaction of information continues to be necessary;³⁴ and (iii) the possibility for the Defence to request the lifting of redactions, first by contacting the Prosecution, then – in the event of disagreement – by submitting a request to the Chamber.³⁵

30. In view of the above, the Single Judge considers that, when disclosing to the Defence any notes it has taken during contact or interviews with individuals who have not provided formal statements, the Prosecution is not required to first seek authorization from the Single Judge to redact their identities.

³³ Decision on the System of Disclosure, para. 32.

³⁴ Decision on the System of Disclosure, para. 34.

³⁵ Decision on the System of Disclosure, para. 31.

FOR THESE REASONS, the Single Judge

DECIDES that the simplified redaction protocol laid out in the Decision on the System of Disclosure applies to the individuals referred to by the Prosecution in paragraph 12 of its Request.

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

[signed]

Judge Péter Kovács

Single Judge

Dated this 4 July 2018

At The Hague, Netherlands