



Original: **French**

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

Date: **31 May 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 Public Annex**

**Decision on the Adoption of a Protocol on the Handling of Confidential
Information During Investigations and Contact between a Party or Participant and
Witnesses of the Opposing Party or of a Participant**

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, 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* since 28 March 2018,¹ decides the following:

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 is currently in custody at the Court’s detention centre in The Hague.³
3. On 3 April 2018, the Single Judge set 4 April 2018 as the date of the first appearance.⁴
4. On 4 April 2018, Mr Al Hassan made his first appearance before the Single Judge in the presence of his counsel and the Prosecution.⁵
5. On 26 April 2018, the Prosecution filed a “*Demande d’adoption par le Juge unique d’un Protocole relatif au traitement des informations confidentielles pendant les enquêtes et aux contacts entre une partie ou un participant et les témoins de la partie opposée ou d’un participant*” and annexed a draft Protocol (“Draft Prosecution Protocol”) to its request.⁶

¹ “Decision Designating a Single Judge”, dated 28 March 2018 and 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”, dated 27 March 2018 and reclassified as public on 31 March 2018, ICC-01/12-01/18-2-tENG.

³ ICC-01/12-01/18-11-US-Exp.

⁴ “Order Scheduling the First Appearance of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 3 April 2018, ICC-01/12-01/18-12-tENG.

⁵ Transcript of the initial appearance hearing, 4 April 2018, ICC-01/12-01/18-T-1-Red-FRA.

⁶ “*Demande d’adoption par le Juge unique d’un Protocole relatif au traitement des informations confidentielles pendant les enquêtes et aux contacts entre une partie ou un participant et les témoins de la partie opposée ou d’un participant*”, 26 April 2018, ICC-01/12-01/18-23, and its annex, ICC-01/12-01/18-23-AnxA.

6. On 11 May 2018, the Defence submitted observations in response to the Draft Prosecution Protocol (“Observations in Response”).⁷

7. On 14 May 2018, the Single Judge instructed the parties to submit supplementary observations on the substantive differences between the Draft Prosecution Protocol and the “Protocol on the Handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant”, annexed to the Chambers Practice Manual⁸ (“Practice Manual Protocol”).⁹

8. On 17 May 2018, the Prosecution filed supplementary observations¹⁰ (“Supplementary Prosecution Observations”), to which it annexed a new amended draft Protocol (the “Amended Draft Prosecution Protocol”).¹¹ The Defence responded to the Supplementary Prosecution Observations on 22 May 2018 (“Supplementary Defence Observations”).¹²

II. Applicable law

9. The Single Judge refers to articles 43(6), 54, 61, 67 and 68 of the Statute, rules 17, 18, 76, 77, 81, 86 to 88 and 121 of the Rules of Procedure and Evidence, regulations 92 to 96 of the Regulations of the Registry, articles 8 and 29 of the Code of Professional Conduct for counsel and articles 66 to 68 of the Code of Conduct of the Office of the Prosecutor.

⁷ “Response to the ‘Demande d’adoption par le Juge unique d’un Protocole relatif au traitement des informations confidentielles pendant les enquêtes et aux contacts entre une partie ou un participant et les témoins de la partie opposée ou d’un participant’”, ICC-01/12-01/18-29, and its annex, ICC-01/12-01/18-29-Anx.

⁸ [Chambers Practice Manual](#), May 2017, pp. 32-38.

⁹ “Décision enjoignant aux parties de soumettre des observations supplémentaires au sujet d’un protocole relatif au traitement d’informations confidentielles lors d’enquêtes et de contacts entre une partie ou un participant et les témoins de la partie adverse ou d’un participant”, ICC-01/12-01/18-30.

¹⁰ “Supplementary observations on the ‘Demande d’adoption par le Juge unique d’un Protocole relatif au traitement des informations confidentielles pendant les enquêtes et aux contacts entre une partie ou un participant et les témoins de la partie opposée ou d’un participant’”, ICC-01/12-01/18-32, and its annex, ICC-01/12-01/18-32-AnxA.

¹¹ ICC-01/12-01/18-32-AnxA.

¹² “Response to the ‘Supplementary observations on the “Demande d’adoption par le Juge unique d’un Protocole relatif au traitement des informations confidentielles pendant les enquêtes et aux contacts entre une partie ou un participant et les témoins de la partie opposée ou d’un participant”’”, ICC-01/12-01/18-36.

III. Analysis

10. In drafting the Protocol adopted in this case (“present Protocol”) – annexed to this Decision – the Single Judge made use of the Practice Manual Protocol, amending it in the light of some of the observations submitted by the parties. The Single Judge notes that the Prosecution requested the adoption of the draft Protocol which it submitted to the Chamber,¹³ whereas the Defence requested the Single Judge to adopt the Practice Manual Protocol.¹⁴ The Single Judge notes that, although the Practice Manual Protocol reflects “[best practices] based on the experience and expertise of judges across trials at the Court,”¹⁵ when it comes to be applied its content is likely to evolve, in particular in response to the observations made by the parties on the specific problems which they may encounter, or have encountered in previous cases. The Single Judge further notes that the latest version of the Protocol proposed by the Prosecution in its Supplementary Observations¹⁶ – in which it included most of the provisions of the Practice Manual Protocol absent from the first version of the Draft Prosecution Protocol¹⁷ – is not unlike the Practice Manual Protocol. Nevertheless, the Single Judge considers that, despite substantive similarities between them, the structure of the Practice Manual Protocol is the one to adopt, so that the evolution of practices in different cases can be more easily followed.

11. A number of amendments proposed or arguments advanced by one of the parties – in particular those on which the other party made no observations or to

¹³ “*Demande d’adoption par le Juge unique d’un Protocole relatif au traitement des informations confidentielles pendant les enquêtes et aux contacts entre une partie ou un participant et les témoins de la partie opposée ou d’un participant*”, 26 April 2018, ICC-01/12-01/18-23, paras. 1 and 4; Supplementary Prosecution Observations, paras. 3 and 19.

¹⁴ Observations in Response, para. 6; Supplementary Defence Observations, paras. 11-14.

¹⁵ [Chambers Practice Manual](#), May 2017, p. 3.

¹⁶ ICC-01/12-01/18-32-AnxA.

¹⁷ Supplementary Prosecution Observations, para. 7.

which it assented – have been accepted by the Single Judge and incorporated into the present Protocol.¹⁸

12. The Single Judge notes, however, that the parties disagree on a number of points.

13. With regard to paragraph 41 of the Amended Draft Prosecution Protocol, the Single Judge notes that the Prosecution¹⁹ and the Defence²⁰ agree that any request to contact and interview a witness of the opposing party must be made through the calling party, and that the only other course of action is to apply to the Chamber and request that the Victims and Witnesses Section (VWS) be instructed to attempt to contact the witness under paragraph 32 of the present Protocol.²¹ The Prosecution, however, seeks to add additional provisions applicable to informal contact during VWS-organized courtesy meetings,²² while the Defence notes that that is not necessary, since the existing provisions prohibiting all direct contact between a party and a witness of an opposing party are sufficiently clear on this point.²³ The Single Judge considers that the addition of the proposed provisions clarifies the manner in which the Protocol should be applied, *inter alia* during VWS-organized courtesy meetings. The Single Judge has therefore inserted the provisions requested by the Prosecution into the present Protocol.²⁴

14. For the same reason, while taking the arguments of the Defence on this point into account,²⁵ the Single Judge sees fit to adopt, in part, the Prosecution's proposed amendments²⁶ concerning paragraph 29 of the present Protocol.

¹⁸ Protocol annexed to this Decision, paras. 1, 4(b), 4(f), 5, 9, 10, 13, 17, 20-22, 26, 29-32 and 39-41. Supplementary Prosecution Observations, paras. 8-11 and 15-16 (point 2), 17 (points 1-3, 5 and 7), 18 (points 1 and 5-8); Observations in Response, paras. 9-10, 12, 15 and 17-18; Supplementary Defence Observations, paras. 18, 23-25 and 27.

¹⁹ Supplementary Prosecution Observations, paras. 8-11.

²⁰ Supplementary Defence Observations, para. 16.

²¹ Protocol annexed to this Decision.

²² Supplementary Prosecution Observations, para. 9.

²³ Supplementary Defence Observations, para. 15; Observations in Response, para. 14.

²⁴ Protocol annexed to this Decision, para. 31.

²⁵ Observations in Response, para. 13.

²⁶ Supplementary Prosecution Observations, para. 12.

15. Concerning the Prosecution's proposed amendment relating to paragraph 21 of the present Protocol, the Single Judge accepts its proposal to request the return of all material disclosed in error,²⁷ given that that seems to afford better protection of confidentiality; he rejects the Defence arguments on this point.²⁸

16. The Single Judge notes the Prosecution's request for provisions allowing a party to apply to the Chamber and object to the opposing party's request to contact a witness.²⁹ The Prosecution notes that

there may be situations, pursuant to article 68, where it is appropriate to object to an interview proceeding immediately. For example, there may be health, welfare, or even security concerns, which must first be addressed before an interview can proceed.³⁰

In this connection, the Defence notes that,

[w]hile these concerns are important and must be taken into consideration throughout the preparation of interviews, they should not grant the calling party the power to interfere with the witness's exclusive right to provide consent to an interview.³¹

The Single Judge considers that, in exceptional circumstances, requests for temporary suspension of the interview process should be allowed. Nonetheless, the Single Judge considers that this new procedure must follow strict rules and, for that reason, an amended version of the provisions proposed by the Prosecution has been adopted.³²

17. The Single Judge agrees that paragraph 4(b) of the Practice Manual Protocol, concerning the definition of "participants" in proceedings, must be amended in keeping with the Prosecution's argument that "States" are not participants in proceedings³³ and that of the Defence that some States may, nonetheless, be allowed to participate in proceedings and should therefore be bound by the same

²⁷ Draft Prosecution Protocol, para. 19.

²⁸ Supplementary Defence Observations, para. 26.

²⁹ Supplementary Prosecution Observations, para. 17.

³⁰ Supplementary Prosecution Observations, para. 17.

³¹ Supplementary Defence Observations, para. 20; Observations in Response, para. 16.

³² Protocol annexed to this Decision, paras. 40-41.

³³ Supplementary Prosecution Observations, para. 16.

confidentiality obligations as other participants rather than the obligations applicable to “third parties”.³⁴

18. The Single Judge has not, however, accepted the following proposed amendments, for the reasons set out below:

- With regard to the Prosecution’s proposal³⁵ for a more detailed definition of “third parties” in paragraph 4(c) of the present Protocol, the Single Judge considers that the definition of “third parties” given in the Chambers Practice Manual – which states that the relevant provisions apply to “any person” (“except a party or participant as defined above, or a Judge or staff of the Court authorised to have access to the information in question”) – clearly encompasses the entities on the Prosecution list and, therefore, the proposed additions are unnecessary.
- For the same reason, the Single Judge rejects the Prosecution’s proposal³⁶ for paragraph 4(d) of the present Protocol to include examples of the different categories of confidentiality applicable.
- The Single Judge also rejects the Prosecution’s proposal for a more detailed definition of “persons at risk on account of the activities of the Court” in paragraph 4 of the present Protocol, since the term appears only once, in its non-abbreviated form, in the present Protocol³⁷ – and in the Amended Draft Prosecution Protocol.³⁸
- The Single Judge does not see the need to include paragraphs 32 and 33 of the Amended Draft Prosecution Protocol for the reasons already given in his previous Decision.³⁹ The Single Judge notes that, in the Supplementary

³⁴ Supplementary Defence Observations, para. 17.

³⁵ Supplementary Prosecution Observations, para. 18 (point 2).

³⁶ Supplementary Prosecution Observations, para. 18 (point 4).

³⁷ Protocol annexed to this Decision, para. 24.

³⁸ Draft Prosecution Protocol, para. 30.

³⁹ “*Décision enjoignant aux parties de soumettre des observations supplémentaires au sujet d’un protocole relatif au traitement d’informations confidentielles lors d’enquêtes et de contacts entre une partie ou un participant et les témoins de la partie adverse ou d’un participant*”, 14 May 2018, ICC-01/12-01/18-30, para. 13.

Defence Observations, the Defence again called for these provisions not to be included.⁴⁰

- The Single Judge has not accepted the Prosecution's proposal to insert the term "with reasonable notice" into paragraph 30 of the Protocol.⁴¹ Given its lack of precision, the usefulness of its inclusion was not immediately clear to the Single Judge.
- Noting the Defence's argument⁴² concerning the confusion that could arise if the terms "public" and "third parties" were used in different parts of the Amended Draft Prosecution Protocol, whereas only "public" is defined – in paragraph 4 thereof – the Single Judge has rejected the Prosecution's proposed amendments in that regard.⁴³

FOR THESE REASONS, the Single Judge

ORDERS the parties to comply with the provisions of the Protocol annexed hereto.

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

[signed]

Judge Péter Kovács

Single Judge

Dated this 31 May 2018

At The Hague, Netherlands

⁴⁰ Supplementary Defence Observations, para. 20.

⁴¹ Draft Prosecution Protocol, para. 39.

⁴² Supplementary Defence Observations, para. 18.

⁴³ Draft Prosecution Protocol, para. 4.