



Original: **French**

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

Date of original: **21 March 2019**

Date: **3 June 2020**

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

**Public Redacted Version of the "Decision on the 'Defence request for Remedy for
Disclosure Violation'"**

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

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**Victims Participation and Reparations Other
Section**

Judge **Péter Kovács**, having been designated on 28 March 2018 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* (“Al Hassan case”),¹ issues the following decision.

I. Procedural history

1. On 27 March 2018, the Chamber, acting pursuant to article 58 of the Rome Statute (“Statute”), issued a warrant for the arrest of Mr 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; he is currently in custody at its Detention Centre in The Hague.³
3. On 4 April 2018, Mr Al Hassan made his first appearance before the Single Judge, who set Monday, 24 September 2018 as the start date for the confirmation of charges hearing (“Hearing”).⁴
4. On 16 May 2018, the Single Judge issued the “Decision on the Evidence Disclosure Protocol and Other Related Matters”⁵ (“Decision on the Evidence Disclosure Protocol”), accompanied by an annex reproducing the “Unified Technical protocol (‘E-court Protocol’) for the provision of evidence, witness and victims information in electronic form”⁶ applicable in this case (“Protocol”).
5. On 20 July 2018, the Single Judge issued his “Decision Postponing the Date of the Confirmation Hearing”,⁷ in which the date was set as 6 May 2019.

¹ “Decision Designating a Single Judge”, 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”, 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 Transcript of the first appearance hearing held on 4 April 2018, ICC-01/12-01/18-T-1-Red-FRA.

⁵ [ICC-01/12-01/18-31-tENG-Corr](#).

⁶ See Annex to the Decision on the disclosure protocol, ICC-01/12-01/18-31-Anx-tENG.

⁷ ICC-01/12-01/18-94-Red-tENG.

6. On 21 January 2019, the Prosecution disclosed its twenty-fourth package of incriminating evidence,⁸ in which it disclosed [REDACTED] Witness P-0150 [REDACTED], and various documents relating to that [REDACTED].⁹

7. On 13 February 2019, Mr Al Hassan's defence team ("Defence") informed the Prosecution by email that it was encountering various difficulties in gaining access to [REDACTED].¹⁰ On 20 February 2019, the Prosecution responded to the Defence, likewise by email.¹¹

8. On 6 March 2019, the Defence filed a request seeking a remedy for a disclosure violation¹² ("Request"). On 13 March 2019, the Single Judge sent the Prosecution an email containing a list of questions for the Prosecution to answer, if applicable, in its Response.¹³

9. On 15 March 2019, acting pursuant to rule 77 of the Rules of Procedure and Evidence ("Rules"), the Prosecution disclosed a number of documents [REDACTED].¹⁴ On the same day, The Prosecution filed its response¹⁵ (the "Response").

⁸ See ICC-01/12-01/18-221-Conf-AnxA.

⁹ The item of evidence in question has reference number MLI-OTP-0050-0443. See ICC-01/12-01/18-221-Conf-AnxA, reference no. 41, p. 7. The Defence refers also to three other items of evidence relating to [REDACTED], that is to say, MLI-OTP-0038-0002-R01, MLI-OTP-0050-0445 and MLI-OTP-0052-0582-R01.

¹⁰ See "Defence request for Remedy for Disclosure Violation", 6 March 2019, ICC-01/12-01/18-263-Conf-Exp, para. 4, and ICC-01/12-01/18-263-Conf-Exp-AnxB.

¹¹ "Defence request for Remedy for Disclosure Violation", 6 March 2019, ICC-01/12-01/18-263-Conf-Exp, para. 5, and ICC-01/12-01/18-263-Conf-Exp-AnxB.

¹² "Defence request for Remedy for Disclosure Violation", ICC-01/12-01/18-263-Conf-Exp and the two annexes to that request, ICC-01/12-01/18-263-Conf-Exp-AnxA and ICC-01/12-01/18-263-Conf-Exp-AnxB.

¹³ Email from the Single Judge to the Prosecution, copied to the Defence, dated 13 March 2019. The questions were as follows: [REDACTED]?

¹⁴ See ICC-01/12-01/18-283-Conf-AnxA.

¹⁵ "Prosecution's Response to the Defence request for Remedy for Disclosure Violation", 18 March 2019, ICC-01/12-01/18-284-Conf-Exp. A redacted version, accessible to the Defence, was filed on 19 March 2019, ICC-01/12-01/18-284-Conf-Exp-Red.

II. Submissions of the parties

10. The Defence contends that the Prosecution violated its disclosure obligations by disclosing [REDACTED], thereby violating the Suspect's right, under article 67(1)(b) of the Statute, "[t]o have adequate time and facilities for the preparation of the defence", and his right to be informed of the evidence on which the Prosecution intends to rely at the hearing within a reasonable time before it is held, as set out in article 61(3)(b) of the Statute.¹⁶ The Defence submits that, under rule 77 of the Rules, it is entitled to be in a position to assess the materiality of all the evidence [REDACTED], even if the Prosecution intends to rely on only some of that evidence for the purposes of the confirmation of charges,¹⁷ and that it is not in a position to do so as things currently stand.¹⁸ The Defence also notes the importance of Witness P-0150, and accordingly of the Defence having access to any document relating to him.¹⁹

11. First, the Defence asserts that it has encountered difficulties relating to: (i) certain documents being inaccessible;²⁰ (ii) the fact that, even though [REDACTED] was disclosed, the [REDACTED] were not assigned ID numbers because, in violation of the Protocol, they had not been disclosed one by one;²¹ (iii) the fact that it was impossible to carry out a keyword search [REDACTED];²² (iv) the languages of some documents, such as Tamasheq;²³ and (v) the fact that only one person at a time can have access [REDACTED], and that Mr Al Hassan has no access to it whatsoever.²⁴

¹⁶ Request, paras. 6, 12 and 24.

¹⁷ Request, paras. 8-10, citing Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008", dated 11 July 2008 and translation registered on 28 October 2010, ICC-01/04-01/06-1433, paras. 77-78.

¹⁸ Request, paras. 16 and 18.

¹⁹ Request, paras. 32-34.

²⁰ Request, para. 14, A and E.

²¹ Request, paras. 14-17 and references drawn from the *Karadžić* case cited in footnotes 24 and 25.

²² Request, para. 14.

²³ Request, paras. 14 and 15.

²⁴ Request, paras. 28-31.

12. Second, the Defence asserts that the Prosecution did not disclose [REDACTED], which has been in its possession since 2016, sufficiently in advance, a circumstance which, coupled with the technical problems raised and [REDACTED], conflicts with the instructions given by the Single Judge in the Decision on the disclosure protocol to make disclosures as soon as possible and not to wait until the deadlines set by the Court's texts.²⁵

13. The Defence therefore requests the Single Judge: (i) to order the Prosecution to disclose an accessible and [REDACTED] as soon as possible, [REDACTED]; (ii) to instruct the Prosecution that all the other documents to which the Prosecution has access must be disclosed to the Defence under rule 77 of the Rules and in accordance with the Protocol; (iii) to order the Prosecution to provide the Defence with [REDACTED], clearly indicating [REDACTED]; (iv) to order the Registrar to assist Mr Al Hassan and his defence team to [REDACTED]; (v) to order that the Prosecution may not rely on [REDACTED] as evidence for the purposes of the confirmation of charges, in view of the unjustified delay by the Prosecution in disclosing the [REDACTED] inaccessible evidence in question; and (vi) to remind the Prosecution of its disclosure obligations and warn it that any future violation will be penalized.²⁶

14. The Prosecution requests the Single Judge to dismiss the Request and to permit it to rely for the purposes of the confirmation of charges on the pieces of evidence [REDACTED].²⁷ The Prosecution explains that it [REDACTED].²⁸ The Prosecution states that it disclosed [REDACTED] only in January 2018, as a result of [REDACTED].²⁹ According to the Prosecution, for the purposes of rule 77 of the Rules, it falls to the Prosecution to determine which items of evidence may be

²⁵ Request, paras. 19-27 and 35.

²⁶ Request, paras. 6, 11 and 36.

²⁷ Response, paras. 16 and 29. See also para. 1.

²⁸ Response, para. 19.

²⁹ Response, paras. [REDACTED].

“material to the preparation of the defence”³⁰. After carrying out that assessment, it states that the immense majority of the documents [REDACTED] have no relevance to this case,³¹ with the exception of a limited number of documents, all of which have either been disclosed as incriminating evidence or will soon be disclosed under rule 77 of the Rules.³² The Prosecution argues that the Defence has therefore had ample time, since November 2018, to review the limited number of items of evidence concerned and that there has been no “unjustified delay” whatsoever.³³

15. The Prosecution submits that it disclosed [REDACTED] as incriminating evidence because [REDACTED] and that were disclosed as incriminating evidence [REDACTED].³⁴ The Prosecution nevertheless notes that [REDACTED] will not be on the list of evidence that it is to file for the purposes of the confirmation of charges and that it will not rely on [REDACTED] for the purposes of the confirmation of charges.³⁵ The Prosecution asserts that it therefore had no obligation to disclose [REDACTED], that it did so merely as a matter of courtesy,³⁶ and that [REDACTED] was disclosed in accordance with the requirements of the Protocol.³⁷ The Prosecution submits that the fact that it did not disclose [REDACTED] is consistent with case law [REDACTED],³⁸ while the case-law [REDACTED] cited by the Defence is irrelevant in this instance.³⁹

16. According to the Prosecution, the Defence has access to [REDACTED] as the Prosecution and they share the same problems as regards [REDACTED].⁴⁰ The Prosecution asserts that the technical difficulties encountered by the Defence stem

³⁰ Response, para. 50.

³¹ Response, paras. 3, 30 and 52.

³² Response, paras. 3, 20, 21, 23, 31, 37, 52 and 61.

³³ Response, paras. 40 and 41.

³⁴ Response, paras. 6 and 32.

³⁵ Response, paras. 7 and 34.

³⁶ Response, paras. 8, 14, 33 and 39.

³⁷ Response, paras. 42-45.

³⁸ Response, para. 45, citing [REDACTED].

³⁹ Response, paras. 47 and 48.

⁴⁰ Response, paras. 9, 13, 63 and 65.

from the Defence's lack of technical knowledge,⁴¹ and offers to provide it with [REDACTED] and [REDACTED].⁴² The Prosecution suggests that the Defence seek the assistance of an expert if necessary to help it review [REDACTED].⁴³

17. The Prosecution contends that it has no obligation to translate the documents in Tamasheq disclosed under rule 77 of the Rules, and that Mr Al Hassan can assist his team since he speaks that language.⁴⁴

III. Applicable law

18. The Single Judge refers to articles 61, 67 and 68 of the Statute and rules 15, 20, 76 to 79 and 121 of the Rules.

IV. Determination of the Single Judge

19. On the first point, the manner in which the evidence was disclosed, the Single Judge is sympathetic to the Defence's submission that Witness P-0150 is a key witness in this case, and that any evidence relating to him is therefore particularly important for the Defence. The Single Judge nevertheless does not subscribe to the Defence's submission that [REDACTED] in order to make it accessible and comprehensible to the Defence. One need only imagine the day when the Prosecution [REDACTED]. It would be placed in a position that would not serve the general interests of justice and would impede the expeditiousness of the proceedings. The case-law that the Defence cites in support of that submission⁴⁵ does not seem germane to the present case, since [REDACTED] concerned [REDACTED]; it therefore did not address the question of [REDACTED].

20. Similarly, the Single Judge is of the view that the Prosecution fulfilled its obligations by disclosing [REDACTED], that is to say, in the same state as

⁴¹ Response, paras. 9, 11, 54 and 62.

⁴² Response, paras. 9, 11, 12, 54-58 and 70.

⁴³ Response, para. 59.

⁴⁴ Response, paras. 15, 67 and 68.

⁴⁵ Request, para. 17 and references cited in footnote 25.

[REDACTED] to which it has access itself, [REDACTED], as requested by the Defence.⁴⁶

21. The Single Judge notes, however, that the Prosecution revealed the said evidence⁴⁷ in its twenty-fourth communication of incriminating evidence,⁴⁸ and pursuant to articles 61(3)(b) and 67(1)(a) and (b) of the Statute.⁴⁹ The Prosecution should nevertheless have disclosed [REDACTED] under rule 77 of the Rules, so that the Defence could “inspect” it and examine any documents that might be “material to the preparation of the defence”. Subsequent to that, the Prosecution should also have [REDACTED] the few pieces of evidence on which it intends to rely at the Hearing as incriminating evidence [REDACTED], and if possible simultaneously, under articles 61(3)(b) and 67(1)(a) of the Statute, thereby indicating specifically to the Defence that at the Hearing the Prosecution *will not rely* on the other documents. Lastly, it could also have disclosed [REDACTED] under rule 77 of the Rules any other document it considers “material to the preparation of the defence”.

22. In respect of the time frame within which the Prosecution disclosed [REDACTED], the Single Judge notes that in his Decision on the Evidence Disclosure Protocol he did in fact ask the parties to disclose the evidence as soon as possible and not to wait until the deadlines set by the Court’s texts.⁵⁰ The Single Judge had also advised that: “[d]isclosing large amounts of evidence for the purposes of the confirmation hearing only 30 days before the start of the hearing might interfere with the suspect’s right to have adequate time for the preparation of his or her defence.”⁵¹

23. Although disclosure more in advance of the Hearing would have been preferable, the Single Judge does not find that the Prosecution failed to fulfil its disclosure obligations by disclosing [REDACTED] to the Defence in January 2019,

⁴⁶ Request, para. 14.

⁴⁷ See footnote 9 above.

⁴⁸ ICC-01/12-01/18-221-Conf-AnxA, reference no. 41, p. 7.

⁴⁹ ICC-01/12-01/18-221, para. 1.

⁵⁰ Decision on the Evidence Disclosure Protocol, para. 21.

⁵¹ Decision on the Evidence Disclosure Protocol, para. 20.

whereas the confirmation of charges hearing was set for 6 May 2019, in particular in view of the submissions the Prosecution has put forward in that regard.⁵²

24. Regarding the various technical difficulties encountered by the Defence, the Single Judge is aware of the degree of technical expertise necessary in order to [REDACTED] that may be of interest to it. The Single Judge points out that under rule 20 of the Rules, the Registrar must “[p]rovide support [and] assistance” to defence counsel. The Single Judge therefore directs the Registrar to make available to the Defence an expert to support the members of the defence team in [REDACTED]. The Single Judge notes that as a result of the constraints caused by [REDACTED], the only way in which Mr Al Hassan can inspect [REDACTED] is to do so in coordination with his defence team, [REDACTED].

25. The Single Judge notes that the Defence has asked for the Prosecution to [REDACTED], presumably in order to satisfy itself that [REDACTED]. The Single Judge is mindful of the Prosecution’s observations to the effect that the Prosecution and the Defence have access [REDACTED] and share the same problems in relation to [REDACTED]. Since the Prosecution has undertaken to disclose [REDACTED] all the relevant items of evidence under rule 77 of the Rules, and since it has given the Defence access [REDACTED], the Single Judge is of the view that this represents the full extent of the Prosecution’s obligations and invites the Defence to convey the difficulties in question to the expert appointed by the Registry. The Single Judge notes nevertheless that the Prosecution has offered to send the Defence [REDACTED]. The Single Judge does not believe this to be among the Prosecution’s obligations and leaves it at the Prosecution’s discretion whether or not it sends [REDACTED] to the Defence. The Single Judge nevertheless reminds the Prosecution that until it has filed the document containing the charges it should concentrate its resources on drafting that document. Conversely, the Single Judge is of the view that

⁵² Response, paras. [REDACTED].

the Prosecution's offer to send [REDACTED] is unlikely to take up too much of its time and could effectively help the Defence to [REDACTED].

26. Regarding the fact that the items of evidence not [REDACTED] disclosed [REDACTED], and that according to the Defence this means that they cannot be cited by the parties in their filings and oral observations, the Single Judge reminds the Defence that under rule 78 or 79 of the Rules it is entitled itself to file any documents "which are intended for use by the defence as evidence for the purposes of the confirmation hearing".

27. Lastly, the Single Judge shares the Prosecution's view that there is no applicable provision requiring it to translate all the documents disclosed under rule 77 of the Rules.⁵³

V. Confidentiality

28. In order to ensure that the hearings and proceedings are public, the Single Judge requests the Prosecution to file a public redacted version of its Response in the record of the case.

⁵³ See response, para. 67 referring to Appeals Chamber, Case of *The Prosecutor v. Bosco Ntaganda*, "Judgment on the appeal of Mr Bosco Ntaganda against the 'Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses'", 20 May 2016, ICC-01/04-02/06 OA 3, para. 30 ("The Appeals Chamber further notes that the requirement to make the disclosed material available in a language which the accused fully understands and speaks is not expressly stated with respect to disclosure under other provisions of the Statute and the Rules. Notably, no such requirement is expressly stipulated for the disclosure of objects which are material to the preparation of the defence (rule 77 of the Rules)").

FOR THESE REASONS, the Single Judge

DISMISSES the Defence request to order the Prosecution to communicate [REDACTED] accessible and [REDACTED];

DISMISSES the Defence request to order the Prosecution to provide the Defence with [REDACTED];

DISMISSES the Defence request to order that the Prosecution may not rely on [REDACTED] where [REDACTED] have been disclosed [REDACTED];

ORDERS the Prosecution to disclose [REDACTED] under rule 77 of the Rules [REDACTED];

ORDERS the Prosecution to disclose all the items of incriminating evidence [REDACTED] on which it intends to rely for the purposes of the confirmation of charges as soon as possible and [REDACTED];

DIRECTS the Registrar to provide the Defence with support, assistance and technical expertise, pursuant to rule 20 of the Rules, in [REDACTED] and, to the extent possible, in relation to the other problems raised by the Defence that,

according to that party, prevent it from gaining access [REDACTED] and prevent more than one member of the team having access at the same time; and

ORDERS the Prosecution to file a public redacted version of its Response.

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

[signed]

Judge Péter Kovács
Single Judge

Dated this 21 March 2019

At The Hague, Netherlands