



Original: **French**

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

Date: **14 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

Decision Instructing the Parties to Submit Supplementary Observations on 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 to carry out the functions of the Chamber in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* on 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 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 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 Prosecutor.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 attached a draft protocol as an annex to its request⁶ (“Draft Prosecution Protocol”).

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 filed observations in response to the Draft Prosecution Protocol (“Observations in Response”).⁷

II. Applicable law

7. The Single Judge refers to articles 54, 61, 67 and 68 of the Statute, rules 76, 77, 81, 86 to 88 and 121 of the Rules of Procedure and Evidence, articles 8 and 29 of the Code of Professional Conduct for counsel and paragraphs 66 to 68 of the Code of Conduct for the Office of the Prosecutor.

III. Analysis

8. The Single Judge notes a number of differences between the content of the Draft Prosecution Protocol, on the one hand, 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” which is annexed to the Chambers Practice Manual⁸ (“Practice Manual Protocol”), on the other hand.

9. The Defence requested the Single Judge to dismiss in its entirety the Draft Prosecution Protocol and to use the Practice Manual Protocol as the basis for the protocol to be adopted in the present case.⁹ The Defence submitted, *inter alia*, that to proceed in such a way would be in line with the Court’s efforts to maintain uniformity of procedure.¹⁰ It also submitted that the Chambers Practice Manual contains “general recommendations and guidelines reflecting best practices [...] based on the experience and expertise of judges across trials at the Court”.¹¹ The Defence annexed to its Observations in Response an amended version of the Draft

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 Observations in Response, para. 6.

¹⁰ Observations in Response, para. 4.

¹¹ Observations in Response, para. 5, quoting the Chambers Practice Manual, p. 3.

Prosecution Protocol, which it requested the Single Judge to adopt in the event that the Single Judge dismisses its request to use the Practice Manual Protocol as the basis for the protocol to be adopted in the present case and decides to use the Draft Prosecution Protocol instead.¹²

10. The Single Judge notes from the outset that a number of elements of the Practice Manual Protocol, which, however, appear in the assessment of the Single Judge to be essential for the proper conduct of proceedings, are absent from the Draft Prosecution Protocol,¹³ including:

- in particular, the whole of the paragraph dedicated to “[i]nvestigation[s] of allegations of sexual or gender based crimes”;¹⁴
- the general provision whereby “[p]arties and participants are under a general obligation not to disclose to third parties any confidential document or information”;¹⁵
- the reference whereby “[a] party or participant shall only disclose to third parties those portions of a confidential document of which the disclosure is directly and specifically necessary for the preparation and presentation of its case”;¹⁶
- the reference whereby “[i]f the information inadvertently disclosed pertains to a witness in the ICCPP or who has been otherwise provided with form of protective measures, the party or participant shall also inform the VWU”;¹⁷
- the whole of paragraphs 13, 17, 30, 34 and 36 of the Practice Manual Protocol. In regard to paragraph 30, the Single Judge notes that, as underlined by the Defence, their deletion could leave the party or participant seeking to interview a witness of an opposing party without recourse in the event that

¹² ICC-01/12-01/18-29-Anx.

¹³ ICC-01/12-01/18-23-AnxA.

¹⁴ Practice Manual Protocol, para. 14.

¹⁵ Practice Manual Protocol, para. 5.

¹⁶ Practice Manual Protocol, para. 7.

¹⁷ Practice Manual Protocol, para. 18.

their request remains unanswered.¹⁸ Similarly, in regard to paragraph 34, the Single Judge notes that the Defence underlined the need for alternative solutions in case a party or participant is unable to travel to the location where the interview is due to take place.¹⁹ In regard to paragraph 36, the Single Judge notes that, as underlined by the Defence,²⁰ its deletion could create a normative vacuum.

The Single Judge would like to receive the Prosecution's observations on the reasons why, in the Prosecution's view, it is not justified to include these provisions from the Practice Manual Protocol, even though they are in force in similar protocols adopted in the preliminary procedures in previous cases.²¹

11. Furthermore, the Single Judge would like to receive the Prosecution's observations on the reasons why:

- "States' representatives", who are included in the "participants" category in the Practice Manual Protocol,²² have been placed (and referred to as "governments") in the "public" category rather than in the "participant" category in the Draft Prosecution Protocol;²³
- it is appropriate, in the Prosecution's view, to extend the period a calling party has to contact a witness after being notified of the intention of the opposing party or participant to interview the witness.²⁴

¹⁸ Observations in Response, para. 15.

¹⁹ Observations in Response, para. 18.

²⁰ Observations in Response, para. 17.

²¹ See Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, "Order concerning the modalities for the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant", 11 November 2015, ICC-02/04-01/15-339 and its annex ICC-02/04-01/15-339-Anx. See also, for example Pre-Trial Chamber I, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, "Decision on the adoption of a protocol on the handling of confidential information", 6 November 2015, ICC-01/12-01/15-40 and its annex ICC-01/12-01/15-40-AnxA.

²² Practice Manual Protocol, para. 4(b).

²³ Draft Prosecution Protocol, para. 4(c).

²⁴ Practice Manual Protocol, para. 30; Draft Prosecution Protocol, para. 35.

12. Similarly, the Single Judge would also like to receive the Prosecution's observations on why it would be necessary to retain the following elements of the Draft Prosecution, which do not appear in the Practice Manual Protocol:

- “[...] provided that such intention has been conveyed to the non-calling party or participant by means that establish a clear intention on behalf of the calling party or participant to rely upon the individual as a witness”;²⁵
- “[t]his consent should be provided before the provision of any witness statement”;²⁶
- “within ten days”;²⁷
- the whole of paragraphs 37, 40 and 41. In the Observations in Response, the Defence requested the deletion of paragraph 37 and submitted that it contradicted paragraph 26 of the Practice Manual Protocol.²⁸ The Defence also submitted that the content of paragraphs 40 and 41 contradicted the provisions of paragraphs 35 and 36 of the Practice Manual Protocol,²⁹ whereby it is up to the witness and only the witness to consent to be interviewed by the opposing party or a participant.

13. Furthermore, and without undermining the relevance of the content of paragraphs 28 and 29 of the Draft Prosecution Protocol, the Single Judge questions, however, whether by their nature they have their place in a protocol whose purpose is primarily to set the practical modalities for handling confidential information. In its Observations in Response, the Defence requested the deletion of both paragraphs.³⁰

14. The Single Judge also notes that, in paragraph 16 of the Draft Prosecution Protocol, the Prosecution proposes an amended version of paragraph 21 of the

²⁵ Draft Prosecution Protocol, para. 4(f).

²⁶ Draft Prosecution Protocol, para. 30.

²⁷ Draft Prosecution Protocol, para. 47.

²⁸ Observations in Response, para. 14, footnote no. 17.

²⁹ Observations in Response, para. 16.

³⁰ Observations in Response, para. 16.

Practice Manual Protocol. The Single Judge would like to receive the Prosecution's observations on why it considers that this paragraph, and the procedure that it establishes, should be amended.

15. The Single Judge would like to receive the Prosecution's observations on any other notable differences between the content of the Practice Manual Protocol and the Draft Prosecution Protocol that are not mentioned in the present decision and which the Prosecution deems necessary to bring to the attention of the Single Judge.

FOR THESE REASONS, the Single Judge

DIRECTS the Prosecution to submit its observations on the points raised in the present decision by Thursday, 17 May 2018,

DIRECTS the Defence to respond to the Prosecution's observations and to submit any observations it deems necessary by Tuesday, 22 May 2018.

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

[signed]

Judge Péter Kovács

Single Judge

Dated this 14 May 2018

At The Hague, Netherlands