

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: French

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

Date: 29 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 Document**

**Decision on the In-Depth Analysis Chart of Disclosed Evidence**

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**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Section**

**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,<sup>1</sup> 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”).<sup>2</sup>
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.<sup>3</sup>
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.<sup>4</sup>
4. On the same day, the Prosecution filed a request asking the Single Judge for instructions on disclosure and redaction practices and, specifically, to adopt the protocol used in the *Al Mahdi* case.<sup>5</sup>
5. The Defence did not submit any observations.
6. In an order issued on 6 April 2018, the Single Judge instructed the Prosecution to provide him with further information on the nature of the material to be disclosed and any redactions that may be necessary.<sup>6</sup>

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<sup>1</sup> “Decision Designating a Single Judge”, 28 March 2018, reclassified as public on 31 March 2018, [ICC-01/12-01/18-6-tENG](#).

<sup>2</sup> “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](#).

<sup>3</sup> ICC-01/12-01/18-11-US-Exp.

<sup>4</sup> Transcript of the first appearance hearing, 4 April 2018, [ICC-01/12-01/18-T-1-Red-ENG](#).

<sup>5</sup> “Prosecution’s Request in relation to its Disclosure and Redaction Practice”, 4 April 2018, [ICC-01/12-01/18-15](#).

<sup>6</sup> “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 Chamber<sup>7</sup> and, on 8 May 2018, it filed additional information on the status of the Office of the Prosecutor's transcripts and translations.<sup>8</sup>

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"),<sup>9</sup> in which he instructed the parties to submit observations on a potential analysis of the disclosed evidence.<sup>10</sup>

9. On 24 May 2018, the Prosecution filed observations ("Prosecution's Observations"),<sup>11</sup> to which the Defence responded on 6 June 2018 ("Defence Response").<sup>12</sup>

## II. Applicable law

10. The Single Judge refers to articles 57(2)(b), 61(3)(b), 61(7) and 67 of the Statute and rule 121(2) of the Rules of Procedure and Evidence ("Rules").

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<sup>7</sup> "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 Prosecution later 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.

<sup>8</sup> ICC-01/12-01/18-27-Conf-Exp.

<sup>9</sup> [ICC-01/12-01/18-31](#).

<sup>10</sup> [Decision on the System of Disclosure](#), para. 51 and p. 23.

<sup>11</sup> "Prosecution's observations regarding the '*Décision relative au système de divulgation et à d'autres questions connexes* (ICC-01/12-01/18-31)", ICC-01/12-01/18-38-Conf-Exp, and its confidential, *ex parte* annex ICC-01/12-01/18-38-Conf-Exp-AnxA. On 25 April 2018, the Prosecution filed another version, classified as confidential redacted, *ex parte* available only to the Prosecution and the Defence, ICC-01/12-01/18-38-Conf-Exp-Red, along with one confidential redacted annex, ICC-01/12-01/18-38-Conf-Exp-AnxA, and a public redacted version, [ICC-01/12-01/18-38-Red2](#).

<sup>12</sup> "Response to 'Confidential redacted version of the "*Décision relative au système de divulgation et à d'autres questions connexes* (ICC-01/12-01/18-31)', 24 May 2018, ICC-01/12-01/18-38-Conf-Exp", ICC-01/12-01/18-45-Conf-Exp. On the same day, the Defence also filed a public redacted version of its response, [ICC-01/12-01/18-45-Red](#).

### III. Analysis

11. The Single Judge recalls that, in his Decision on the System of Disclosure, he made reference<sup>13</sup> to an approach whereby – to streamline the evidence disclosure process – when disclosing any evidence and communicating it to the Chamber the Prosecution may be required to attach an in-depth analysis chart (IDAC) of incriminatory evidence, based on the model, *mutatis mutandis*, of that annexed to the Decision of 10 November 2008 in *Bemba*<sup>14</sup> and to the Decision of 27 February 2015 in *Ongwen*.<sup>15</sup>

12. The Prosecution requested the Single Judge not to order it to produce an IDAC when disclosing evidence,<sup>16</sup> and annexed to its observations a template for an alternative table for the Single Judge to select should he decide to order a disclosure table to be produced regardless.<sup>17</sup>

13. In its observations, the Prosecution maintains that the Single Judge should adopt an approach different to that set out in the Chambers Practice Manual only in exceptional circumstances, which these are not.<sup>18</sup> It acknowledges that, although the Single Judge has the discretion to take measures aimed at facilitating the disclosure process, when doing so he must, as previously pointed out by the Appeals Chamber, consider the circumstances of the individual case and the possible consequences of such measures – e.g. a delay in the proceedings.<sup>19</sup>

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<sup>13</sup> [Decision on the System of Disclosure](#), para. 44.

<sup>14</sup> Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence”, 10 November 2008, [ICC-01/05-01/08-232](#), (“Decision of 10 November 2008”), and its annex, [ICC-01/05-01/08-232-Anx](#).

<sup>15</sup> Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 27 February 2015, [ICC-02/04-01/15-203](#) (“Decision of 27 February 2015”) and its Annex 2, [ICC-02/04-01/15-203-Anx2](#).

<sup>16</sup> [Prosecution’s Observations](#), para. 57.

<sup>17</sup> ICC-01/12-01/18-38-Conf-Exp-AnxA; [Prosecution’s Observations](#), paras. 41, 57.

<sup>18</sup> [Prosecution’s Observations](#), paras. 2, 14-15, 37-39.

<sup>19</sup> [Prosecution’s Observations](#), paras. 11-13, making reference to the Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’”, 17 June 2015, [ICC-02/04-01/15-251](#) (“Appeal Chambers’ Judgment of 17 June 2015”), paras. 2, 42-43.

14. According to the Prosecution, the production of an IDAC: (1) is not necessary since much of the evidence being disclosed is relatively straightforward and uncomplicated to assess;<sup>20</sup> (ii) is premature at this stage of the proceedings and would provide only a truncated, incomplete and inaccurate view of the charges as they will be presented during the confirmation of charges hearing,<sup>21</sup> rendering the production of tables useless, as has been emphasized by various judges and defence teams in the past;<sup>22</sup> (iii) would necessarily and unduly delay the proceedings and, as a result, have a negative impact on the parties' right to the fair and expeditious conduct of proceedings;<sup>23</sup> (iv) would unfairly burden and intrude into the Prosecution's ability to undertake its core work before the confirmation of charges hearing;<sup>24</sup> (v) is not a substitute for the defence's deontological obligation to assess each and every item of evidence;<sup>25</sup> (vi) does not facilitate the Defence's or the Chamber's understanding of the Prosecution's case, especially as the IDAC envisaged is law-driven rather than fact-driven,<sup>26</sup> which inverts the logic of the three-stage process of evidence assessment, which – according to the Prosecution – is to be followed by the Pre-Trial Chamber to determine whether there are substantial grounds to believe that Mr Al Hassan committed the crimes charged, pursuant to article 61(7) of the Statute;<sup>27</sup> and (vii) departs from the practice of other international tribunals.<sup>28</sup>

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<sup>20</sup> [Prosecution's Observations](#), paras. 3, 16, 19.

<sup>21</sup> [Prosecution's Observations](#), paras. 5, 22-25, 31-32. The Prosecution points out that, under article 61(5), it is required to support each charge with evidence only "at the hearing". See [Prosecution's Observations](#), para. 5.

<sup>22</sup> [Prosecution's Observations](#), paras. 33-36.

<sup>23</sup> [Prosecution's Observations](#), paras. 4, 42-47, 52-54. See also paras. 49-51.

<sup>24</sup> [Prosecution's Observations](#), para. 48.

<sup>25</sup> [Prosecution's Observations](#), paras. 20-21.

<sup>26</sup> [Prosecution's Observations](#), paras. 26-32.

<sup>27</sup> The Prosecution argues that the Pre-Trial Chamber must undertake a three-stage evidence assessment process. First, the Chamber must assess the relevance of the evidence in its totality. Second, it must analyse whether the relevant evidence, taken in its totality, provides substantial grounds to believe that the alleged facts are established. Third, it must decide whether there are substantial grounds to believe that the elements of crimes and modes of liability charged are established. The Prosecution argues that the IDAC proposed by the Single Judge inverts the logic according to which the Pre-Trial Chamber must first determine if there are substantial grounds to believe that the relevant facts are established. See [Prosecution's Observations](#), para. 30.

<sup>28</sup> [Prosecution's Observations](#), para. 39.

15. According to the Prosecution, the most appropriate tool available to the Chamber to analyse the evidence is a document containing a detailed description of the charges and other documents provided in support of it.<sup>29</sup> Making reference to the document annexed to its Observations,<sup>30</sup> the Prosecution – while nonetheless noting that this has not been the practice in most other cases – suggests that, when disclosing evidence, the parties could attach a table in which the relevance of the evidence is briefly described, including a preliminary assessment of legal issues.<sup>31</sup> The Prosecution notes, however, that this would cause delays, pushing back final disclosure until at least November 2018.<sup>32</sup>

16. The Prosecution considers that adopting an IDAC based on the model presented by the Single Judge would extend proceedings by several months or more, possibly as much as a year,<sup>33</sup> and would likely necessitate a postponement of the confirmation of charges hearing,<sup>34</sup> whereas, without an IDAC, the Prosecution would be able to disclose the bulk of its evidence by the end of August 2018.<sup>35</sup> Bearing in mind the possibility of a detrimental delay in proceedings, the Prosecution requests the Single Judge to hold a status conference to provide both parties with an additional opportunity to be heard on this matter.<sup>36</sup>

17. In its response, the Defence requested the Single Judge to reject the Prosecution's arguments and the suggestion of an alternative disclosure table set out in the annex to the Prosecution's Observations, and to order the production of an IDAC of incriminatory evidence following the model provided by the Single Judge in the Decision on the System of Disclosure.<sup>37</sup> The Defence argues that the alternative disclosure table suggested by the Prosecution is neither relevant nor helpful as it

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<sup>29</sup> [Prosecution's Observations](#), paras. 6, 40.

<sup>30</sup> ICC-01/12-01/18-38-Conf-Exp-AnxA.

<sup>31</sup> [Prosecution's Observations](#), paras. 6, 41.

<sup>32</sup> [Prosecution's Observations](#), paras. 8, 41, 55, 57.

<sup>33</sup> [Prosecution's Observations](#), paras. 4, 42.

<sup>34</sup> [Prosecution's Observations](#), para. 52.

<sup>35</sup> [Prosecution's Observations](#), paras. 8, 55.

<sup>36</sup> [Prosecution's Observations](#), para. 57.

<sup>37</sup> [Defence Response](#), paras. 5, 41, 45. The Single Judge notes that the Defence sets out guidelines that it considers must be respected when disclosing evidence to ensure the efficiency and utility of the IDAC of incriminatory evidence is maximized. See para. 42.

would not establish the link between the alleged fact, the constituent element of crime, the relevant charges and the mode of liability.<sup>38</sup>

18. The Defence maintains that the Chambers Practice Manual does not rule out the possibility of an IDAC of incriminatory evidence, but simply refrains from requiring the parties to produce one.<sup>39</sup> The Defence adds that, in the Decision cited by the Prosecution, the Appeals Chamber merely required the Pre-Trial Chamber – should it envisage ordering the production of an IDAC of incriminatory evidence – to first request observations from the parties on the matter.<sup>40</sup>

19. The Defence maintains that if an IDAC of incriminatory evidence were produced, Mr Al Hassan’s right to be informed promptly and in detail of the nature, cause and content of the charges brought against him would be guaranteed, together with his right to have adequate time and facilities for the preparation of his defence, pursuant to article 61(7)(a) and 61(7)(b) of the Statute and as stated by the Pre-Trial Chamber in *Bemba* when it asserted that “the defence has to have all necessary tools to understand the reasons why the Prosecutor relies on any particular piece of evidence”.<sup>41</sup> For the Defence, given the considerable volume of evidence the Prosecution intends to disclose, an IDAC would allow the Defence and the Chamber to determine the relevance of the evidence and the link between the facts alleged and the constituent elements of each crime and modes of liability.<sup>42</sup> The Defence adds that, as pointed out by the Prosecution, much of the evidence emanates from *Al Mahdi* and, as a result of the guilty plea in that case, has not been subject to a process [*débat contradictoire*] in which the parties are given notice and an opportunity to be heard and, therefore, requires meticulous analysis by Mr Al Hassan’s Defence.<sup>43</sup>

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<sup>38</sup> [Defence Response](#), para. 41.

<sup>39</sup> [Defence Response](#), para. 14. See also para. 36.

<sup>40</sup> [Defence Response](#), paras 12-13.

<sup>41</sup> [Defence Response](#), paras. 5, 15, 23, 44. See also para. 17, which references the [Decision of 31 July 2008](#), para. 66.

<sup>42</sup> [Defence Response](#), paras. 15-16.

<sup>43</sup> [Defence Response](#), para. 22.



20. The Defence also maintains that: (i) since there is no way of verifying the Prosecution's assertion that much of the evidence should be straightforward and uncomplicated to assess, producing an IDAC of incriminatory evidence is precisely the way to ensure that that is the case;<sup>44</sup> (ii) the fact that, according to the Prosecution, the IDAC of evidence might not necessarily reflect all of the charges to be presented against the individual, is not sufficient grounds to reject the idea of an IDAC, because it allows the Defence, as and when the Prosecution discloses its evidence, to follow the Prosecution's case and to analyse the evidence presented, whereas the document containing the charges and the list of evidence are submitted only 30 days before the confirmation of charges hearing (pursuant to rule 121(3) of the Rules),<sup>45</sup> and the Prosecution's references to other cases intended to prove the redundancy of producing an IDAC have been cited out of context in a truncated and distorted way;<sup>46</sup> (iii) the disclosure of voluminous evidence with no indication of its relevance to the constituent elements of crime and modes of liability is, in fact, what could truly affect the expeditiousness of the proceedings, in addition to shifting the burden of proof onto the Defence, putting it in a situation where it would neither be able to follow the Prosecution's case nor prepare its own strategy;<sup>47</sup> (iv) the Prosecution's argument regarding the burden of additional work that would be required of the Prosecution had already been rejected in *Katanga*, when the Chamber considered that this practical consideration was not an admissible legal argument;<sup>48</sup> and (v) the Defence can fulfil its deontological obligation to analyse the

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<sup>44</sup> [Defence Response](#), paras. 18-21.

<sup>45</sup> [Defence Response](#), paras. 25-30.

<sup>46</sup> [Defence Response](#), paras. 31-36.

<sup>47</sup> [Defence Response](#), para. 40.

<sup>48</sup> [Defence Response](#), paras. 37-39. The Defence cites the following previous ruling: "Without wishing to minimise the additional work that the production of the Table of Incriminating Evidence entails, the Chamber considers that workload, which is a consequence of the Chamber's normal exercise of its judicial powers and responsibilities [...] cannot be the legal basis for granting leave to appeal. The appropriate procedural avenue for raising such issues is by applying for a variation of time limit, as indeed the Prosecution has had occasion to do." See para. 38, citing Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the 'Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'" and the 'Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with

evidence effectively only if the Prosecution fulfils its own obligation to ensure that the evidence it submits is relevant.<sup>49</sup>

21. The Single Judge notes that the Prosecution proposed a template for a table<sup>50</sup> different to that suggested by the Single Judge in his Decision on the System of Disclosure,<sup>51</sup> and that the Defence rejected this table, finding it to be inadequate and in no way helpful.<sup>52</sup> The Single Judge also notes that the Prosecution argued that the production of an IDAC based on the model proposed by the Single Judge would considerably delay the proceedings, by potentially up to a year.<sup>53</sup>

22. The Single Judge considers that, in addition to the burden the production of an IDAC of evidence would place on the parties, and especially on the Prosecution, postponing the confirmation of charges hearing to September 2019, which an IDAC could render necessary, would be disproportionate to the potential benefits it might bring.<sup>54</sup>

23. In view of the arguments presented by the parties, the Single Judge considers that, in the present case, the parties should not be required to produce an IDAC of evidence at the time of disclosure.

24. Furthermore, the Single Judge has noted the Prosecution's request to hold a status conference so that both parties have an additional opportunity to be heard on this question, but considers that the parties have already had the opportunity to submit their views and that no more time should be spent on this matter.

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Trial Chamber II "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", 1 May 2009, [ICC-01/04-01/07-1088](#), para. 36.

<sup>49</sup> [Defence Response](#), para. 24.

<sup>50</sup> [Prosecution's Observations](#), paras. 6 and 41, making reference to ICC-01/12-01/18-38-Conf-Exp-AnxA.

<sup>51</sup> [Decision on the System of Disclosure](#), para. 44.

<sup>52</sup> [Defence Response](#), para. 41.

<sup>53</sup> [Prosecution's Observations](#), para. 4.

<sup>54</sup> See "[Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision setting the Regime for Evidence Disclosure and Other Related Matters'](#)", para. 2: "The Appeals Chamber considers that in the circumstances of this case, it was incumbent on the Single Judge to receive submissions from the parties on the utility and practical implications of this additional disclosure requirement prior to imposing it, given that the imposition of an obligation to prepare and submit in-depth analysis charts may place a disproportionate burden on the parties and may ultimately lead to delays in the proceedings."

**FOR THESE REASONS, the Single Judge**

**REJECTS** the Prosecution's request for a status conference to be held;

**FINDS** that, in the present case, parties should not be required to provide any evidence analysis chart at the time of disclosure;

**INSTRUCTS** the Prosecution to immediately begin the process of disclosing evidence and communicating it to the Chamber, in accordance with the instructions given in the Decision on the System of Disclosure of 16 May 2018.

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

[signed]

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**Judge Péter Kovács**

**Single Judge**

Dated this 29 June 2018

At The Hague, Netherlands