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No. **ICC-01/12-01/18**
Date: **30 December 2019**

TRIAL CHAMBER X

Before: Judge Kimberly Prost, 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 on the evidence disclosure protocol and other related matters

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

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**Unrepresented Applicants for
Participation/Reparations**

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REGISTRY

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Counsel Support Section

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**Victims Participation and Reparations
Section**

Other

Judge Kimberly Prost, designated by Trial Chamber X (‘Chamber’) as Single Judge for the preparation of the trial,¹ in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (‘*Al Hassan Case*’), issues this ‘Decision on the evidence disclosure protocol and other related matters’.

I. Procedural history

1. On 26 November 2019, the Chamber scheduled a first status conference in order to set the date of the trial and, in preparation, sought written submissions from the parties and participants on potential agenda items,² including: (i) the disclosure of outstanding material in the Prosecution’s possession; (ii) disclosure by the Defence; and (iii) any amendments required to the simplified protocol for the redaction of evidence adopted at the pre-trial stage of the *Al Hassan Case* (‘Pre-Trial Redaction Protocol’).³
2. On 6 December 2019, written submissions were filed by the parties and participants.⁴ These written submissions contained various requests and proposals on disclosure-related matters which, to the extent necessary, the Single Judge has addressed in her analysis below.
3. On 10 December 2019, the Chamber issued an order setting the agenda for the status conference,⁵ thereby deciding to receive oral submissions, *inter alia*, regarding ongoing disclosure obligations, the Pre-Trial Redaction Protocol, and delayed disclosure.

¹ Decision notifying the election of a Presiding Judge and Single Judge, 21 November 2019, ICC-01/12-01/18-504.

² Order Scheduling First Status Conference, ICC-01/12-01/18-507.

³ PTC I, Decision on the Evidence Disclosure Protocol and Other Related Matters, 16 May 2018, ICC-01/12-01/18-31-tENG-Corr, paras 27-35.

⁴ Observations des Représentants légaux suite à l’« Order Scheduling First Status Conference » (ICC-01/12-01/18-507), ICC-01/12-01/18-516; Registry Submissions in View of the 12 December 2019 Status Conference, ICC-01/12-01/18-517, with an Annex; Observations de l’Accusation suite à l’Ordonnance de la Chambre de Première Instance X relative à la conférence de mise en état du 12 décembre 2019, ICC-01/12-01/18-518-Conf-Exp; Submissions pursuant to ‘Order Scheduling First Status Conference’, ICC-01/12-01/18-519-Conf-Exp, with Annexes A to E (‘Defence Written Submissions’).

⁵ Order Setting the Agenda for the First Status Conference, ICC-01/12-01/18-521.

4. On 12 December 2019, the Chamber held a first status conference,⁶ during which parties supplemented their written submissions and were given an opportunity to respond to the requests and proposals formulated by the other party. The parties notably suggested that the start of trial is set either before or after the summer recess, namely in July or in August 2020.⁷ Both parties also submitted that disclosure of evidence must be completed sufficiently in advance of the commencement of trial.⁸

II. Applicable law

5. The Single Judge notes Articles 54(3), 64(2), (3) and (6)(c), 67, 68, and 93(8) of the Rome Statute, and Rules 76 to 84, 87 and 132*bis*(4) of the Rules of Procedure and Evidence ('Rules').
6. The Single Judge particularly notes that, pursuant to Rule 84 of the Rules, the Trial Chamber shall issue any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. This provision also specifies that, '[t]o avoid delay and ensure that the trial commences on the set date, any such order shall include strict time limits which shall be kept under review by the Trial Chamber.' Moreover, Rule 132*bis* specifies that, in ensuring the preparation of the trial, the Single Judge may 'establish a work plan indicating the obligations the parties are required to meet [...] and the dates by which these obligations must be fulfilled'.

III. Analysis

7. In the present decision, the Single Judge will: (i) adopt the redaction regime to be applied during the trial phase of the proceedings; (ii) put in place a procedure and set time limits for the review of existing redactions and the re-disclosure of material in lesser redacted forms; and (iii) provide guidance on other exceptions to disclosure.

⁶ Transcript of the status conference held on 12 December 2019, ICC-01/12-01/18-T-008-ENG.

⁷ ICC-01/12-01/18-T-008-ENG, p. 37, line 22 to p. 39, line 10.

⁸ ICC-01/12-01/18-T-008-ENG, p. 33, lines 5-20.

8. The Single Judge emphasises that it is desirable for the disclosure of material to be made on a rolling basis and, as such, expects the Prosecution to fulfil its disclosure obligations as soon as possible and not to wait until the last minute.

A. Redaction Regime

9. In line with the relevant framework, the Single Judge notes that disclosable material should be served in full and that any and all redactions applied need to be justified. This is particularly important during the present phase of the proceedings, when the Prosecution is providing the Defence with all the material in support of its case so that the accused can prepare his defence prior to the start of trial.
10. The Single Judge recalls that, on 16 May 2018, the Single Judge of Pre-Trial Chamber I ('PTC I') issued a decision setting out, *inter alia*, general principles and timeframes governing the disclosure of evidence as well as adopting the Pre-Trial Redaction Protocol.⁹ The Single Judge further notes that, with the exception of discrete requests for clarifications, discussed below, the Prosecution and the Defence generally agree with maintaining the Pre-Trial Redaction Protocol. The Single Judge recognises that a unified procedure would simplify the evidence disclosure process and, in light of the above, finds it appropriate to adopt principles which are as close as possible to the regime applied so far in the present case.
11. Accordingly, and unless decided otherwise below,¹⁰ the Single Judge orders that the Pre-Trial Redaction Protocol, that is the 'principles governing the protocol for the redaction of evidence' to be found at paragraphs 27 to 35 of the Pre-Trial Decision on Disclosure,¹¹ shall be followed in the disclosure and re-disclosure of material throughout the trial proceedings. These principles, as amended and supplemented in paragraphs 12 to 17 below, constitute the evidence disclosure regime at trial ('Redaction Protocol').

⁹ Decision on the Evidence Disclosure Protocol and Other Related Matters, ICC-01/12-01/18-31-tENG-Corr, with one public annex.

¹⁰ See paragraphs 14 and 17.

¹¹ ICC-01/12-01/18-31-tENG-Corr.

12. **Redactions falling under the below categories**, when covered by standard justification, can be applied by the disclosing party without discrete application to the Chamber:

- Under Rule 81(2) of the Rules:
 - J Category “A.1”: Locations of witness interviews/accommodation, insofar as disclosure would unduly attract attention to the movements of the Prosecutor’s staff and witnesses, thereby posing a risk to ongoing or future investigations;
 - J Category “A.2”: Identifying and contact information of the Prosecutor’s, VWU or other Court staff members who travel frequently to, or are based in, the field, insofar as disclosure of this information could hinder their work in the field and thereby put at risk the ongoing or future investigations of the Prosecutor (to be further specified as “A.2.1” for translators, “A.2.2” for interpreters, “A.2.3” for stenographers, “A.2.4” for psycho-social experts, “A.2.5” for other medical experts and “A.2.6”. for other staff members falling within this category);
 - J Category “A.3”: Identifying and contact information of translators, interpreters, stenographers and psycho-social experts assisting during interviews who are not members of the Prosecutor’s staff but who travel frequently to, or are based in the field, insofar as disclosure of this information could hinder their work so that the Prosecutor could no longer rely on them, and thereby put at risk ongoing or future investigations of the Prosecutor (to be further specified as “A.3.1” for translators, “A.3.2” for interpreters, “A.3.3” for stenographers, “A.3.4” for psycho-social experts, “A.3.5” for other medical experts and “A.3.6”. for other persons falling within this category);
 - J Category “A.4”: Identifying and contact information of investigators, insofar as disclosure of this information could hinder their work in the field, thereby putting at risk the ongoing or future investigations of the Prosecutor;
 - J Category “A.5”: Identifying and contact information of intermediaries, insofar as disclosure of this information could hinder their work in the field, thereby putting at risk the ongoing or future investigations of the Prosecutor;
 - J Category “A.6”: Identifying and contact information of leads and sources, insofar as disclosure of this information could result in the leads and sources being intimidated or interfered with and would thereby put at risk the ongoing or future investigations of the Prosecutor (to be further specified as “A.6.1” for individual sources, “A.6.2” for NGOs, “A.6.3” for international organisations; “A.6.4” for national governmental agencies, “A.6.5” for academic sources, “A.6.6” for private-sector companies and “A.6.7” for other sources);
 - J Category “A.7”: Means used to communicate with witnesses, insofar disclosure of this information may compromise investigation techniques or the location of witnesses and would thereby put at risk the ongoing or future investigations of the Prosecutor;
 - J Category “A.8”: Other redactions under rule 81(2) of the Rules;
- Under Rule 81(4) of the Rules:
 - J Category “B.1”: Recent contact information of witnesses, insofar as necessary to protect the safety of the witness;
 - J Category “B.2”: Identifying and contact information of family members of witnesses, insofar as necessary to protect their safety;
 - J Category “B.3”: Identifying and contact information of “other persons at risk as a result of the activities of the Court” (“innocent third parties”), insofar as necessary to protect their safety;

- J) Category “B.4”: Location of witnesses who are admitted in the International Criminal Court Protection Programme and information revealing the places used for present and future relocation of these witnesses, including before they enter the ICCPP;
13. The Single Judge finds redactions falling under these categories to be necessary, at this stage, to protect the interests warranting restrictions to disclosure under either Rule 81(2) or (4) of the Rules. Underlying justifications are considered to be sufficiently circumscribed and, in this regard, the Single Judge notes that the Defence agreed to the use of these categories as part of an evidence disclosure protocol to be used at trial.¹²
14. Concerning category ‘B.5. Other redactions under Rule 81(4) of the Rules’, the Single Judge notes the Defence submissions that *proprio motu* procedure for non-disclosure of other information under Rule 81(4) departs from the practices of other Chambers at trial, with the exception of the *Al Mahdi* case,¹³ and that, given the ‘potentially broad nature of this category’, redactions falling under the category B.5. should be subject of a discrete application to the Chamber. The Single Judge does not consider that a specific and standard justification covers redactions that would fall under category B.5. Noting the competing interests at stake, and in light of its statutory obligations, the Single Judge considers that non-disclosure of any ‘other information’ pursuant to Rule 81(4) should, at this stage, be subject to a judicial examination. Accordingly, and notwithstanding the limited use made of this category so far by the Prosecution,¹⁴ the Single Judge did not retain category B.5 as part of the Redaction Protocol.
15. **Redactions falling outside of the abovementioned categories** will be subject to a discrete application to the Chamber for authorisation. The disclosing party shall submit an application providing the required justification for the redaction sought and the Chamber will decide on a case-by-case basis on the necessity and appropriateness of any such redaction. A redacted version of this application shall be provided to the receiving party. As suggested,¹⁵ noting the

¹² Defence Written Submissions, ICC-01/12-01/18-519-Conf-Exp, para. 41.

¹³ Defence Written Submissions, ICC-01/12-01/18-519-Conf-Exp, para. 41.

¹⁴ ICC-01/12-01/18-T-008-ENG, p. 23.

¹⁵ Defence Written Submissions, ICC-01/12-01/18-519-Conf-Exp, para. 42. *See also*, Prosecution Written Submissions, ICC-01/12-01/18-518-Conf-Exp, para. 39; and ICC-01/12-01/18-T-008-ENG, p. 27.

current stage of the proceedings, and to reduce any delay, the Single Judge finds it appropriate for the relevant material in its proposed redacted form to be disclosed to the receiving party simultaneously with the application.

16. More generally, and as requested, the Chamber clarifies that the burden remains with the disclosing party to justify any redaction, whether it falls within or outside the standard categories. Indeed, the Defence may at any given time after the disclosure is effected challenge redactions applied *proprio motu* by the Prosecution. The system adopted in this regard by PTC I shall remain in place¹⁶ and the Single Judge, at this stage, does not consider it necessary to change the time limits previously adopted.¹⁷
17. In light of the above, and particularly noting that the evidence disclosure regime adopted only allows for limited and circumscribed exceptions to the principle of full disclosure, the Chamber no longer requires access to the evidence disclosed in its non-redaction form and, therefore, finds it appropriate, at this stage, to depart from paragraph 32 of the Pre-Trial Redaction Protocol.

B. Ongoing review of existing redactions

18. The Single Judge recalls and emphasises the disclosing party' ongoing obligation to review the redactions applied to ensure that they remain justified.¹⁸ In order to ensure that the trial is conducted with full respect for the rights of the accused, and taking into consideration that the stage of the proceedings necessarily impacts on the assessment of the appropriateness of non-disclosure, the Prosecution shall conduct a review of the redactions applied to the evidence disclosed, whether they were approved by PTC I, in the context of this case, or another chamber in the context of other proceedings. In light of its specific obligations under Rule 84 and 132*bis* of the Rules, the Single Judge considers it necessary to establish a clear procedure and set related deadlines.

¹⁶ Pre-Trial Redaction Protocol, ICC-01/12-01/18-31-tENG-Corr, paras 30-31.

¹⁷ The Single Judges notes that the Defence had requested that the five days to respond on disclosure-related motions be amended to three days (Defence Written Submissions, ICC-01/12-01/18-519-Conf-Exp, para. 40). The Single Judge does not consider this amendment require, but may, on a case-by-case basis, and in light of the circumstances, shorten the deadline for responses where appropriate.

¹⁸ Pre-Trial Redaction Protocol, ICC-01/12-01/18-31-tENG-Corr, para. 34.

19. Existing redactions shall remain so long as they are covered by standard justifications and fall under the categories listed above or pursuant to Regulation 42 of the Regulations. Whenever redactions applied following the above category are no longer considered justified, the disclosing party will **immediately** lift the redactions and re-disclose the relevant material without seeking the prior leave of the Chamber, unless such an application is necessary under Regulation 42 of the Regulations. The disclosing party will give notice to the Chamber by way of a disclosure note that redactions have been lifted.
20. Redactions approved by the Pre-Trial Chamber which do not fall under the categories retained above shall be lifted **at the earliest opportunity** and the Prosecution shall clearly identify, when disclosing the material, which information is newly available to the Defence. To that aim, the Single Judge orders a first full and thorough review of non-standard redactions to be conducted by the Prosecution by **10 February 2020**. The Prosecution shall report back to the Chamber specifying the amount of redactions remaining, their nature, and making any individual application for the retention of non-standard redactions, if required. To maintain already approved redactions not covered by Regulation 42 or falling outside the standard categories, the Prosecution shall file applications following the procedure described at paragraph 15 above and it is instructed to do so by **10 February 2020**. This would include any application to seek authorisation to delay the disclosure of the identity of a witness.
21. Concerning redactions approved by another Chamber which do not fall under the categories retained above, the Prosecution shall make appropriate applications pursuant to Regulation 42 for the lifting of the redactions where it is determined that redactions are no longer justified. The Single Judge decides that, by **10 February 2020** at the latest, any motion required pursuant to Regulation 42 should have been filed by the Prosecution before the competent Chamber. Redactions authorised by another Chamber which are retained by reason of Regulation 42 shall be clearly identified as such when disclosing the material.
22. Finally, the Single Judge considers that a periodic review of standard redactions is particularly important for identifying information covered by categories B.2

and B.3. Accordingly, the Prosecution is instructed to review existing redactions applied under these two categories by **24 February 2020** and ensure that all redactions retained remain justified. In this regard, the Single Judge clarifies that redactions pursuant to these categories are only justified when they concern individuals who are of no relevance to a known issue in the case.¹⁹ Given that issues will arise during the course of the trial, which, it can be expected, will require the lifting of existing redactions covered by B.2 and B.3, the Prosecution shall conduct a periodic review of these redactions. A specific targeted review of material related to a witness should additionally be performed by the Prosecution in advance of the witness's appearance at trial and taking into consideration the evidence adduce so far.

C. Other exceptions to disclosure

23. The Single Judge notes the Prosecution's submissions that there is currently in its possession no document falling under Article 54(3)(e) of the Statute. Should any such document be obtained, the Prosecution is instructed to undertake all necessary efforts to obtain the document's provider's consent to lift any conditions and effectively disclose the relevant information as soon as possible. The matter should be brought without delay to the attention of the Chamber.

FOR THESE REASONS, THE SINGLE JUDGE

DECIDES that the parties shall apply the Redaction Protocol, pursuant to paragraphs 11 to 17 above;

INSTRUCTS the Prosecution to lift, on a rolling basis and **at the earliest opportunity**, without prior leave of the Chamber, all existing redactions not covered by Regulation 42 or falling outside the categories provided for in the Redaction Protocol;

¹⁹ For example, identifying information of individuals, family members or not, who were physically present at the scene of an alleged crime or individuals who have in any other way acquired or established knowledge of the events or circumstances part of a witness's narrative cannot be redacted pursuant to these two categories as no standard justification applies.

ORDERS the Prosecution to conduct a review of all non-standard redactions applied and to report back to the Chamber by **10 February 2020**;

DECIDES that all applications to maintain existing redactions not covered by Regulation 42 or falling outside the categories provided for in the Redaction Protocol shall be filed by the Prosecution by **10 February 2020**;

DECIDES that all applications required pursuant to Regulation 42 shall be filed by the Prosecution at the latest by **10 February 2020**; and

INSTRUCTS the Prosecution to conduct a review of existing redactions applied under categories B.2 and B.3 and to report to the Chamber by **24 February 2020**.

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

A handwritten signature in grey ink, appearing to read 'K. Prost', is written over a horizontal line.

Judge Kimberly Prost, Single Judge

Dated this 30 December 2019

At The Hague, The Netherlands