



Original: **French**

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

Date: **5 October 2018**

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

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 Defence Request concerning the Time Limit for the Prosecutor to
File the Document Containing a Detailed Description of the Charges**

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

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER I (“Chamber”) of the International Criminal Court (“Court”) decides the following.

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 Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan”)¹ upon the application of the Prosecutor (“Application for the Issuance of a Warrant of Arrest”).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, the first appearance hearing was held; Mr Al Hassan appeared before the Single Judge, in the presence of his counsel and the Prosecutor.⁴
4. That day, the Prosecutor filed a request seeking directions from the Single Judge on the disclosure and redaction of evidence, and on the adoption of the protocol used in *The Prosecutor v. Ahmad Al Faqi Al Mahdi* in particular.⁵
5. The Defence made no submissions.
6. By order of 6 April 2018, the Single Judge sought from the Prosecutor further information on the nature of the evidence to be disclosed and on any redactions necessary.⁶

¹ “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](#).

² “*Requête urgente du Bureau du Procureur aux fins de délivrance d’un mandat d’arrêt et de demande d’arrestation provisoire à l’encontre de M. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*”, 20 March 2018, ICC-01/12-01/18-1-Secret-Exp. A confidential version, *ex parte* Office of the Prosecutor and Defence Team for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (ICC-01/12-01/18-1-Conf-Exp-Red2), and a public redacted version (ICC-01/12-01/18-1-Red) of the application were filed on 31 March 2018 (“Application for the Issuance of a Warrant of Arrest”).

³ ICC-01/12-01/18-11-US-Exp.

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

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

⁶ “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 Prosecutor submitted her observations to the Chamber.⁷ On 8 May 2018, the Prosecutor filed additional information on the status of the transcripts and translations of the Office of the Prosecutor.⁸
8. On 16 May 2018, the Single Judge issued the “Decision on the Evidence Disclosure Protocol and Other Related Matters” (“Decision on the Evidence Disclosure Protocol”),⁹ in which he directed observations from the parties as to a possible analysis of the evidence they had disclosed to each other.¹⁰
9. On 24 May 2018, the Prosecutor filed observations,¹¹ to which the Defence responded on 6 June 2018.¹²
10. On 1 June 2018, the Single Judge issued his “Decision on Defence Request for an Arabic Translation of the Prosecution Application for the Issuance of a Warrant of Arrest”.¹³
11. On 29 June 2018, the Single Judge issued the “Decision on the In-Depth Analysis Chart of Disclosed Evidence” (“Decision on the Analysis Chart”, “Decision”),¹⁴ in which, in view of the arguments presented by the parties, he ruled that, in the

⁷ “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 Prosecutor subsequently 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.

⁸ ICC-01/12-01/18-27-Conf-Exp.

⁹ [ICC-01/12-01/18-31-tENG](#).

¹⁰ [Decision on the Evidence Disclosure Protocol](#), para. 51 and p. 21.

¹¹ “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 confidential *ex parte* annex ICC-01/12-01/18-38-Conf-Exp-AnxA. Subsequently, on 25 April 2018, the Prosecutor filed a confidential *ex parte* redacted version, reclassified as confidential *ex parte* Prosecution and Defence, ICC-01/12-01/18-38-Conf-Exp-Red, 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](#).

¹² “Response to ‘Confidential redacted version of the “Prosecution’s observations regarding 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](#).

¹³ “Decision on the Defence Request for an Arabic Translation of the Prosecution Application for the Issuance of a Warrant of Arrest”, [ICC-01/12-01/18-42-tENG](#).

¹⁴ [ICC-01/12-01/18-61-tENG](#).

case at bar, the parties should not be required to provide an evidence analysis chart upon disclosure.¹⁵

12. On 4 July 2018, the Defence filed a request for an alternative mechanism to facilitate disclosure or, in the alternative, for leave to appeal the Decision on the Analysis Chart ("Request"),¹⁶ in which it asked that, among other things, the Single Judge instruct the Prosecutor to file the document containing a detailed description of the charges ("DCC") pursuant to article 61(3) of the Statute and rule 121(3) of the Rules of Procedure and Evidence ("Rules") no later than 60 days prior to the confirmation hearing.¹⁷ The Prosecutor filed her response on 9 July 2018 ("Response").¹⁸

13. On 9 July 2018, the Defence¹⁹ and the Prosecutor,²⁰ at the behest of the Single Judge,²¹ filed their observations concerning the date of the confirmation hearing. On 20 July 2018, the Single Judge issued his "Decision Postponing the Date of the Confirmation Hearing" ("Decision Postponing the Date of the Confirmation Hearing")²² and set the hearing for 6 May 2019.

14. On 18 September 2018, the Chamber rejected the Defence's request for reconsideration or leave to appeal the Decision on the Analysis Chart.²³ In that decision the Chamber also advised that it would dispose of the issue of the

¹⁵ [Decision on the Analysis Chart](#), para. 23 and p. 11.

¹⁶ "Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts", [ICC-01/12-01/18-65](#).

¹⁷ Request, paras. 21-22, 35.

¹⁸ "Prosecution's Response to 'Defence Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts'", [ICC-01/12-01/18-76](#).

¹⁹ "Defence observations on postponing the date of the confirmation hearing", ICC-01/12-01/18-74-Conf. That day, the Defence filed a public redacted version of its observations, ICC-01/12-01/18-74-Red.

²⁰ "Observations du Bureau du Procureur sur la date de confirmation des charges", ICC-01/12-01/18-75-Conf-Exp ("Prosecutor's Observations on Postponement of Hearing"). On 11 July 2018, the Prosecutor filed a public redacted version of her observations, ICC-01/12-01/18-75-Red.

²¹ "Decision Instructing Parties to File Observations on a Possible Postponement of the Confirmation of Charges Hearing", 9 July 2018, ICC-01/12-01/18-64-tENG.

²² ICC-01/12-01/18-94-Red-tENG.

²³ "Decision on the Defence 'Request for alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts'", 18 September 2018, ICC-01/12-01/18-130-tENG ("Decision of 18 September 2018").

setting of different time limits than those laid down in rule 121(3) (for filing the DCC) and rules 121 (4) and (5) of the Rules in a subsequent decision.²⁴

II. Analysis

A. Submissions of the parties

15. The Defence requests that the DCC be filed 60 days before the date of the confirmation hearing pursuant to rule 121(3) of the Rules and that the Prosecutor discharge her obligations under rule 121(4) and (5) of the Rules 45 days before that date.²⁵ The Defence submits that absent any means of analysing the evidence upon disclosure the DCC is the only document available to the Defence which allows it to understand the Prosecutor's case.²⁶
16. The Defence requests that the DCC be as comprehensive as possible, with hyperlinks to the evidence.²⁷ The Defence suggests that the document be accompanied by a table setting out the relationship between each paragraph of the DCC and the corresponding evidence, along the lines of what was done in *Abu Garda*.²⁸
17. In its Request, the Defence also raises the issue of the Prosecutor's translation of the Application for the Issuance of a Warrant of Arrest into Arabic, which, it imagines, will not be ready by the date of the confirmation hearing.²⁹
18. The Prosecutor counters that the Defence has no basis for arguing that the notice period of 30 days before the confirmation hearing to file the DCC is insufficient because that notice is specifically allowed by rule 121(3) of the Rules.³⁰

²⁴ Decision of 18 September 2018, paras. 20-21.

²⁵ Request, para. 21.

²⁶ Request, para. 20.

²⁷ Request, para. 20.

²⁸ Request, para. 20, referring to *The Prosecutor v. Bahar Idriss Abu Garda*, "Annex-Red to Prosecution's submission of Public Redacted Version of Document Containing the Charges and List of Evidence", [ICC-02/05-02/09-91-Red](#) and "Annex 1-Red to Prosecution's submission of Public Redacted Version of Document Containing the Charges and List of Evidence", 25 September 2009, [ICC-02/05-02/09-91-Anx1-Red](#).

²⁹ Request, para. 30, referring to "Prosecution's notice in relation to the implementation of the 'Décision relative à la requête de la défense sollicitant la traduction en arabe de la requête du Procureur aux fins de délivrance d'un mandat d'arrêt'", 14 June 2018, [ICC-01/12-01/18-49](#), paras. 6-8.

B. Applicable law

19. The Chamber has regard to articles 61(3), 64(2) and 67(1)(a) and (b) of the Statute and rule 121(1-6) of the Rules.

C. Determination of the Chamber

20. The Chamber recalls that the Single Judge, in his Decision Postponing the Date of the Confirmation Hearing, instructed the Prosecutor pursuant to article 67(1)(b) of the Statute and rule 121 of the Rules, read together, to enter into the record no later than 30 days before the date of the confirmation hearing an Arabic translation of the DCC and of the list of the evidence which the Prosecutor intends to present at the hearing.³¹

21. The Single Judge further instructed the Prosecutor to enter into the record of the case the original version of the DCC and of the list of evidence, preferably to be provided in French, as soon as that version is ready for translation into Arabic, so that it may be provided as soon as possible to the Defence, the Chamber and any victims who have been admitted to participate in the proceedings.³² The Single Judge noted in this regard “that in the absence of an in-depth analysis of the evidence at the time of its disclosure, those documents will [...] put the Defence in a position to better prepare for the confirmation hearing.”³³

22. The Chamber sees, however, that in its Request the Defence moves that the DCC (version unspecified) be filed 60 days before the date of the confirmation hearing.³⁴

23. In that connection, the Chamber observes that rule 121(3) of the Rules imposes on the Prosecutor a *minimum* notice period beyond which the suspect’s right “[t]o have adequate time and facilities for the preparation of the defence” under article 67(1)(b) of the Statute would necessarily be compromised. The Chamber recalls in this regard the Single Judge’s Decision on the Evidence Disclosure

³⁰ Response, para. 17.

³¹ Decision Postponing the Date of the Confirmation Hearing, para. 26 and p. 12.

³² Decision Postponing the Date of the Confirmation Hearing, para. 27 and p. 12.

³³ Decision Postponing the Date of the Confirmation Hearing, para. 27.

³⁴ Request, para. 21.

Protocol in the present case,³⁵ where he followed the decision of Pre-Trial Chamber II in *Ntaganda*³⁶ and said:

[...] it should be noted that the intervals referred to in rule 121 of the Rules are only indicative of the minimum notice periods a party may avail itself of to comply with its disclosure obligations. This interpretation finds support in the express wording “no later than” found in rule 121(3-6) and (9) of the Rules. The Single Judge wishes to underline that the Rules serve the application of the Statute and, accordingly, are subordinate to the Statute in all cases, the hierarchy between the two texts being clearly established in article 51(5) of the Statute. The minimum notice periods established in rule 121 of the Rules, especially the notice period set in rule 121(3) regarding disclosure by the Prosecution, must therefore be taken in conjunction with and subject to article 67(1)(b) of the Statute, which provides that the “accused”³⁷ must have adequate time for the preparation of his or her defence.

24. Likewise, having regard to the hierarchy of norms which operates between article 67(1)(b) of the Statute and rule 121(3) of the Rules, the Chamber is of the opinion that the bench may, pursuant to article 61(3) of the Statute, require more notice than the 30-day minimum under rule 121(3) of the Rules where they find that the specific circumstances of the case so warrant, in particular to give effect to the suspect’s right “[t]o have adequate time and facilities for the preparation of the defence”.

25. In this particular instance, the Chamber finds that the circumstances of the case justify directing the Prosecutor to submit the DCC, in French, 60 days before the date of the confirmation hearing. Specifically, the Chamber would point first to the relative complexity of the case, which alleges both war crimes and crimes against humanity perpetrated in the city of Timbuktu over a period of several months, from April 2012 to January 2013.³⁸

³⁵ [Decision on the Evidence Disclosure Protocol](#), para. 20.

³⁶ *The Prosecutor v. Bosco Ntaganda*, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 12 April 2013, [ICC-01/04-02/06-47](#), para. 16.

³⁷ The Chamber notes that, pursuant to rule 121(1) of the Rules, the suspect enjoys the rights set forth in article 67 of the Statute upon his or her first appearance before the Pre-Trial Chamber. See 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, footnote 15.

³⁸ Application for the Issuance of a Warrant of Arrest, para. 50; “Decision on the Prosecutor’s Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 22 May 2018, ICC-01/12-01/18-35-Conf-Exp-Red-tENG, paras. 41-100. A public redacted version of the decision was filed on 28 May 2018, [ICC-01/12-01/18-35-Red2-tENG](#).

26. The Chamber further notes that the Prosecutor has now disclosed a significant number of items of evidence in a number of communications³⁹ and has made known that the total body of evidence she intends to file will be quite considerable.⁴⁰ However, in the absence of an in-depth analysis chart of the evidence disclosed, or some other tool by which the Prosecutor may rank the evidence or spell out its relevance to the crimes with which the person is charged, the Defence and the Chamber are now in a position where, until the DCC is filed, they are having to attempt to assess the relevance of the evidence disclosed in case the Prosecutor ultimately decides to rely on it in support of the charges.
27. To ensure that the Defence has the time the Chamber considers adequate for its preparation, the Chamber sees fit to direct the Prosecutor to file the DCC, in French, in the record of the case, 60 days before the date of the confirmation hearing. This new time frame also has application to the filing of the list of evidence. Accordingly, the Chamber further orders the Prosecutor to discharge her obligations under rule 121(4) and (5) of the Rules no later than 30 days before the date of the confirmation hearing.
28. The Chamber does not consider it necessary, however, to set different time limits to those laid down by rule 121(6) of the Rules for the list of evidence, which the Defence may file in the record no later than 15 days before the date of the hearing.
29. Turning to the structure of the DCC, the Chamber asks that the Prosecutor provide a single document, consisting of one part only⁴¹ and in which each statement of fact

³⁹ The Chamber observes that, to date, the Prosecutor has filed 16 communications on the disclosure of incriminating evidence, with most of those communications concerning the disclosure of upwards of 100 items of evidence and as many as 667 items of evidence disclosed in a single communication (see ICC-01/12-01/18-67-Conf-AnxA). The Prosecutor has also filed 11 communications on the disclosure of rule 77 evidence and three communications on the disclosure of potentially exculpatory material.

⁴⁰ “*Précisions supplémentaires concernant l’état des transcriptions et des traductions du Bureau du Procureur suite 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”*”, 8 May 2018, ICC-01/12-01/18-27-Conf-Exp, para. 5.

⁴¹ The Chamber means a single part as opposed to the two parts distinguishing between “Charges” and “Submissions” recommended in the Chambers Practice Manual. See Chambers Practice Manual, May 2017 (“Practice Manual”), p. 12. Specifically, the Chamber is of the opinion that practice has

has a footnote referring specifically, by means of hyperlinks, to the supporting evidence, as was done in the Application for the Issuance of a Warrant of Arrest. The Chamber underscores the importance of identifying, where applicable, within the evidence, including audio or video material, the relevant excerpts by precise references (e.g. by page or paragraph number). In this respect, the Chamber does not share the view of the Defence, which requests that the DCC be accompanied by a table along the lines of that used in *Abu Garda*.⁴² On the contrary, the Chamber would like all references to the evidence to be contained in the DCC and not in a separate document. Lastly, legal considerations, as opposed to a purely fact-based analysis, must inform the DCC's structure, which must differentiate clearly between war crimes and crimes against humanity, and, under each such head, differentiate clearly between the various crimes charged and between the various modes of responsibility.

30. The Chamber further notes that the Prosecutor must be sufficiently specific and exhaustive in her presentation and description of the events relating to the crimes alleged, so that the Chamber can be equally specific and exhaustive in its decision on the confirmation of the charges. The Chamber recalls in this connection that the "charges", which may ultimately be confirmed and delimit the scope of the trial, consist of, among other ingredients, "facts", as described in regulation 52 of the Regulations of the Court, which include, among other particulars, the time and place of the alleged crimes and provide a sufficient legal and factual basis to bring the person charged to trial. Accordingly, the Chamber emphasizes the need for the Prosecutor to be as specific and exhaustive as possible in respect of those facts in her DCC. Nonetheless, the Chamber is of the view that the degree of specificity expected from the Prosecutor in her description of the facts depends on the

shown that it would be preferable, in that particular regard, to depart from the guidelines in the Practice Manual.

⁴² Request, para. 20, making reference to *The Prosecutor v. Bahar Idriss Abu Garda*, "Annex-Red to Prosecution's submission of Public Redacted Version of Document Containing the Charges and List of Evidence", 25 September, [ICC-02/05-02/09-91-Red](#) and "Annex 1-Red to Prosecution's submission of Public Redacted Version of Document Containing the Charges and List of Evidence", 25 September 2009, [ICC-02/05-02/09-91-Anx1-Red](#).

nature of the crimes in question and the circumstances of the case brought by the Prosecutor before the Chamber. Where crimes such as torture or rape are concerned, the Prosecutor must describe the criminal acts in issue, stating the date and place of the acts, along with the number of victims, or at the very least a clear estimate of that number, and their identities as far as at all possible. However, where by their nature the crimes are directed against a group or collectivity of people, as in the case of the crime of persecution, a like degree of specificity cannot be expected of the Prosecutor's description of the facts; nonetheless, the Prosecutor must endeavour to pinpoint as much as possible places, times and approximate numbers of victims and to provide the necessary particulars to make out the elements of the crimes.

31. Furthermore, the Chamber requires that the Prosecutor notify the Defence at the earliest opportunity, i.e. well in advance of the 60 days leading up to the date of the confirmation hearing, of any material change to the factual basis of the allegations stated in the Application for the Issuance of a Warrant of Arrest, so as to satisfy the requirements of article 67(1) of the Statute on the rights of the person charged.⁴³
32. Lastly, on the issue of the Prosecutor's translation of the Application for the Issuance of a Warrant of Arrest into Arabic, the Chamber recalls that the Single Judge gave a decision on this matter on 1 June 2018, in which he ordered the Prosecutor, with the help of the Registry if necessary, to enter in the record of the proceedings as soon as possible an Arabic version of the confidential redacted version, *ex parte* Office of the Prosecutor and Defence for Mr Al Hassan, of her Application for the Issuance of a Warrant of Arrest.⁴⁴ The Chamber notes in this regard that the Prosecutor estimated in her submissions of 11 July 2018, and

⁴³ See also Practice Manual, May 2017, p. 11 ("While rule 121(3) of the Rules establishes the presumption that 30 days between the presentation of the detailed description of the charges and the commencement of the confirmation hearing are sufficient, the Pre-Trial Chamber may order, in light of the particular circumstances of each case, that the Defence be informed, by way of a formal notification in the record of the case, of the intended expanded factual basis of the charges in order not to be confronted at the last possible moment with unforeseen factual allegations in respect of which the Defence could not reasonably prepare.").

⁴⁴ "Decision on the Defence Request for an Arabic Translation of the Prosecution Application for the Issuance of a Warrant of Arrest", [ICC-01/12-01/18-42-tENG](#).

contrary to what the Defence asserts, that the translation would be ready and filed into the record in “[TRANSLATION] early October 2018”.⁴⁵ The Chamber therefore asks the Prosecutor to adhere to that time frame and, failing that, to alert the Chamber and the Defence at the earliest opportunity, stating the reasons for the delay and the date on which the translation will be ready.

⁴⁵ Prosecutor’s Observations on Postponement of Hearing, para. 41.

FOR THESE REASONS, the Chamber

GRANTS, in part, the Defence Request seeking different time limits to those under rule 121(3-5) of the Rules;

DIRECTS the Prosecutor to file the document containing a detailed description of the charges, in French, and the list of evidence, no later than 60 days before the date of the confirmation hearing;

DIRECTS the Prosecutor to file a single document containing a detailed description of the charges and consisting of a single part and in which each statement of fact has a footnote referring specifically, by means of hyperlinks, to the supporting evidence;

DIRECTS the Prosecutor to discharge her obligations under rule 121(4) and (5) of the Rules no later than 30 days before the confirmation hearing; and

DIRECTS the Prosecutor to notify the Defence at the earliest opportunity, and no later than 90 days before the commencement of the confirmation hearing, of any material change to the factual basis of the allegations stated in the Application for the Issuance of a Warrant of Arrest.

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

[signed]

Judge Péter Kovács

Presiding Judge

[signed]

[signed]

Judge Marc Perrin de Brichambaut Judge Reine Adélaïde Sophie Alapini-Gansou

Dated this 5 October 2018,

At The Hague, Netherlands

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

13/13

5 October 2018

Official Court Translation