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

Date: **25 February 2019**

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

**Order Setting a Deadline for Filing Requests with a view to Filing the Document
Containing the Charges**

Order 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 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 orders as follows.

I. Procedural history

1. On 27 March 2018, in accordance with 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”).²
2. On 31 March 2018, Mr Al Hassan was surrendered to the Court; he is currently detained at the Court’s detention centre in The Hague.³
3. On 4 April 2018, Mr Al Hassan’s first appearance hearing was held. During the hearing, the Single Judge set the date for the commencement of the confirmation hearing for Monday, 24 September 2018.⁴
4. On 16 May 2018, the Single Judge rendered the “Decision on the Evidence Disclosure Protocol and Other Related Matters”⁵ (“Decision on the disclosure protocol”) requesting the Prosecutor to communicate her observations on a provisional schedule for disclosure of evidence, taking into account any possible translation or witness protection requirements.
5. On 20 July 2018, the Single Judge rendered the “Decision Postponing the Date of the Confirmation Hearing”⁶ (“Postponement Decision”), and scheduled the hearing for 6 May 2019.

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

⁵ [ICC-01/12-01/18-31-tENG-Corr.](#)

⁶ ICC-01/12-01/18-94-Red-tENG.

6. On 5 October 2018, the Chamber rendered the “Decision on the Defence Request concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges”⁷ (“Decision on the date for filing the DCC”) directing the Prosecutor to tender into the record the French version of the document containing a detailed description of the charges (“DCC”) and the list of evidence no later than 60 days before the confirmation hearing (Confirmation Hearing),⁸ i.e. on 6 March 2019.

7. On 9 November 2018, the Prosecutor filed information on the discharge of her disclosure and witness protection obligations.⁹

8. On 7 February 2019, the Single Judge directed the Prosecutor to file precise submissions for requests concerning the proceedings which she intended to file before the start of the Confirmation Hearing.¹⁰ On 12 February 2019, the Prosecutor filed her submissions, requesting a postponement of the Confirmation Hearing.¹¹ On 19 February 2019, the Defence responded.¹²

⁷ ICC-01/12-01/18-143-tENG.

⁸ Decision on the date for filing the DCC, para. 27 and p. 13.

⁹ ICC-01/12-01/18-180-Red2. The confidential *ex parte* version was filed on 9 November 2018 (ICC-01/12-01/18-180-Conf-Exp). Subsequently, on 13 November 2018, the Prosecutor filed a confidential redacted version, available to the Defence (ICC-01/12-01/18-180-Conf-Red) and on 16 November 2018, a public redacted version (ICC-01/12-01/18-180-Red2).

¹⁰ “Order Directing the Prosecutor to File Precise Submissions for Requests concerning the Proceedings which She Intends to File before the Start of the Confirmation of Charges Hearing”, ICC-01/12-01/18-236-tENG.

¹¹ “*Eléments d’information concernant notamment la communication des éléments de preuve et les requêtes aux fins d’expurgation à venir et demande d’extension de délai pour déposer le Document contenant les charges ainsi que la Liste des témoins et des éléments de preuve*”, ICC-01/12-01/18-243-Secret-Exp (“Prosecutor’s Observations”). On 14 February 2019, the Prosecutor filed a secret redacted *ex parte* version of her request, available to the Defence (ICC-01/12-01/18-243-Secret-Exp-Red), and on 15 February 2019, a public redacted version (ICC-01/12-01/18-243-Red2).

¹² “Defence response to the Prosecution’s *‘Eléments d’information concernant notamment la communication des éléments de preuve et les requêtes aux fins d’expurgation à venir et demandes d’extension de délai pour déposer le Document contenant les charges ainsi que la Liste des témoins et des éléments de preuve’*”, 19 February 2019, ICC-01/12-01/18-250-Secret-Exp (“Defence’s Response”). The Defence filed a public redacted version on 21 February 2019, ICC-01/12-01/18-250-Red.

II. Analysis

A. Observations of the parties

9. The Prosecutor states that she expects to have filed all her requests for non-disclosure of the identity of witnesses by 11 March 2019,¹³ that “[TRANSLATION] the date of filing of the DCC can realistically be set for 30 April 2019”, and that the Confirmation Hearing would then take place in early July.¹⁴ The Prosecutor makes particular reference to the difficulties encountered as she will have to make proposals for redactions concerning at least eight witnesses, some of whose statements are voluminous.¹⁵ Pursuant to regulation 35 of the Regulations of the Court, the Prosecutor therefore requests that the date of filing of the DCC, the list of witnesses and the list of evidence be postponed to 30 April 2019.¹⁶

10. The Defence states its objection to the Prosecutor’s requests for an additional extension of time in which to file her DCC and for the postponement of the Confirmation Hearing, requesting the Single Judge to reject them.¹⁷ The Defence contends that the Prosecutor is attempting to impose her own deadlines on the Chamber and the Defence, in disregard of the fact that the Chamber has repeatedly stated its intention to maintain 6 May 2019 as the date for the Confirmation Hearing.¹⁸ The Defence adds that the Chamber’s decisions thus far have been taken with a view to assisting the Prosecutor in meeting the deadlines by relieving her of any burden likely to impede the preparation of the confirmation of charges: for instance, it rejected the Defence’s request for an in-depth analysis chart of the evidence disclosed (“IDAC”) and has granted *all* requests for non-disclosure of the identity of witnesses.¹⁹

¹³ Prosecutor’s Observations, paras. 19, 23, 28, 32, 42.

¹⁴ Prosecutor’s Observations, Defence’s Response 44.

¹⁵ Prosecutor’s Observations, paras. 44, 47.

¹⁶ Prosecutor’s Observations, paras. 44, 47.

¹⁷ Defence’s Response, paras. 2, 74.

¹⁸ Defence’s Response, para. 22.

¹⁹ Defence’s Response, paras. 24, 26.

11. The Defence argues that the Prosecutor's request for a new date to be set for the Confirmation Hearing is in reality a request for reconsideration of an existing decision of the Chamber which falls short of the criteria established by the relevant case-law.²⁰ In particular, the Defence points out that the Prosecutor has failed to report any change in circumstances since the Postponement Decision, or at least any new information that she could not have foreseen, that would explain why the additional eight-month extension she had been granted had been insufficient; that would account for her delay in making the filing; and, consequently, that would warrant another extension of time.²¹

12. The Defence submits that the Prosecutor refers to regulation 35 of the Regulations of the Court without even attempting to show good cause for an exceptional second postponement of the Confirmation Hearing²² which, moreover, has not previously been accepted in the Court's jurisprudence as justifiable, as in this instance, by the Prosecutor's inability to prepare her case within the time limit.²³ The Defence adds that the Prosecutor has failed to properly fulfil her disclosure and translation obligations and that such shortcomings should not constitute good reason for postponement of the Confirmation Hearing.²⁴ The Defence moves the Single Judge to determine that, for the purposes of the Confirmation Hearing, the Prosecution may not rely on any evidence which was not disclosed "within a reasonable time" before the date of filing of the DCC, and that she must disclose such material only under rule 77 of the Rules of Procedure and Evidence ("Rules") or as exculpatory material.²⁵

13. Lastly, the Defence submits that should the Prosecutor's request be granted, it would cause prejudice to Mr Al Hassan and could interfere with his right to be tried within a reasonable period.²⁶ The new time limit proposed by the Prosecutor would

²⁰ Defence's Response, paras. 23, 30, 32, 40.

²¹ Defence's Response, paras. 33-36, 40, 63.

²² Defence's Response, paras. 41, 42.

²³ Defence's Response, paras. 43-45. See also paras. 22, 35.

²⁴ Defence's Response, paras. 49-65.

²⁵ Defence's Response, paras. 62, 74.

²⁶ Defence's Response, paras. 66-73, referring to articles 60(4) and 67(1)(c) of the Statute.

mean that Mr Al Hassan will have been detained for 16 months between the date of his first appearance and the decision on the confirmation of charges, and for 26 months if the time spent in detention before his surrender to the Court is taken into account, without having been informed of the charges brought against him.²⁷ The Defence emphasizes that those periods largely exceed the average period of 10 months between the first appearance and confirmation of charges hearings normally seen in proceedings before the Court, and run contrary to what was proposed during the drafting of the Statute.²⁸

B. Applicable law

14. The Single Judge refers to articles 54(3), 57(3)(c), 60(4), 61(3), 67(1) and 68 of the Statute, rules 76, 77, 81(2) and 81(4), 87, and 121 of the Rules and to regulation 35 of the Regulations of the Court.

C. Findings of the Single Judge

15. As a threshold matter, the Single Judge notes his disagreement with the Defence submissions that the Prosecutor's request for postponement of the Confirmation Hearing amounts to a request for reconsideration of the Postponement Decision. A request to postpone the date of the confirmation hearing is a prerogative enjoyed by the Prosecutor under rule 121(7) of the Rules. The Single Judge points out, however, that pursuant to article 60(4) of the Statute, the Pre-Trial Chamber must also [...] "ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor". It is therefore a matter for the Chamber's discretion to strike a balance between the "competing interests at stake"²⁹ and to interpret the terms "*unreasonable period*" and "*inexcusable delay*" mentioned

²⁷ Defence's Response, para. 69.

²⁸ Defence's Response, para. 70.

²⁹ See the Postponement Decision, para. 14 and references.

in article 60(4) of the Statute in the light of the individual circumstances of each case, the drafters of the Statute having deliberately chosen not to mention deadlines.

16. Taking into account the specific circumstances of the current proceedings, and in particular the significant number of applications for witness and victim protection that have been filed and that still have to be filed, and considering, furthermore, that the additional time requested by the Prosecutor does not seem unreasonable in this respect, the Single Judge authorizes the Prosecutor to meet her procedural requirements for the protection of witnesses and victims *before* filing her DCC, so that evidence relating to them may be incorporated.

17. The Single Judge therefore sets 15 March 2019 as the deadline for the Prosecutor to file her requests relating to the DCC and directs the Prosecutor to file them as soon as possible. The Single Judge will then, i.e. after 15 March 2019, set the final date for filing the DCC and for the Confirmation Hearing.

18. Lastly, regarding the Defence's submissions on the Prosecutor's disclosure obligations,³⁰ the Single Judge recalls that in the instant case, the Defence will receive the DCC 60 days before the Confirmation Hearing,³¹ thus putting it in a position to "adequately prepare" within the meaning of rule 76 of the Rules. The Single Judge further notes that no applicable provision states a specific time limit for disclosure of evidence by the Prosecutor before the DCC is filed. The Single Judge nonetheless directs the Prosecutor, in the overall interest of the proceedings for which adequate preparation by the Defence is essential, not to disclose without good reason either large amounts of evidence, or crucial evidence, just before the expiry of the deadline for filing the DCC.³² The Defence is also right in pointing out in its submissions that in the Decision on the Disclosure Protocol, the Single Judge had stated that

³⁰ Defence's Response, paras. 52-56, 60-61.

³¹ Decision on the date for filing the DCC, para. 27 and p. 13.

³² Decision on the Disclosure Protocol, para. 20 ("Disclosing 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").

exculpatory evidence must be disclosed at “the earliest opportunity for disclosure after the evidence in question comes into the Prosecution’s possession.”³³

³³ Decision on the Disclosure Protocol, para. 24. See Defence’s Response, para. 64.

FOR THESE REASONS, the Single Judge

DIRECTS the Prosecutor to file, by 15 March 2019, all of her requests with a view to filing the document containing the charges;

DIRECTS the Prosecutor to disclose as soon as possible any evidence yet to be disclosed, and refrain from disclosing large amounts of evidence, or crucial evidence, just before the expiry of the deadline for filing the document containing the charges.

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

[signed]

Judge Péter Kovács
Single Judge

Dated this 25 February 2019

At The Hague, Netherlands