



Original: **French**

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

Date: **20 July 2018**

PRE-TRIAL CHAMBER I

Before: Mr 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 redacted version

Decision Postponing the Date of the Confirmation Hearing

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

I, **Péter Kovács**, designated by Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) as Single Judge responsible for exercising 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 2018,¹ decide as follows.

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”).²
2. On 31 March 2018, Mr Al Hassan was surrendered to the Court and is now held at its detention centre in The Hague.³
3. At Mr Al Hassan’s first appearance hearing on 4 April 2018 the Single Judge scheduled the confirmation hearing to start on Monday 24 September 2018.⁴
4. On 16 May 2018, the Single Judge issued the “Decision on the Evidence Disclosure Protocol and Other Related Matters” (“Decision on Disclosure Protocol”).⁵
5. On 22 May 2018, the Single Judge issued the “*Décision relative à la requête du Procureur aux fins de délivrance d’un mandat d’arrêt à l’encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*”.⁶
6. On 1 June 2018, the Single Judge issued the “Decision on the Defence Request for an Arabic Translation of the Prosecution Application for the Issuance of a Warrant of Arrest” (“Decision on Translation”).⁷

¹ “Decision Designating a Single Judge”, dated 28 March 2018, 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, 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.

⁶ ICC-01/12-01/18-35-Red2.

⁷ ICC-01/12-01/18-42-tENG.

7. On 29 June 2018, the Single Judge issued the “Decision on the In-Depth Analysis Chart of Disclosed Evidence” (“Decision on Analysis Chart”), whereby he ordered the Prosecutor to begin forthwith, per the Decision on Disclosure Protocol, the process of disclosing the evidence and providing it to the Chamber.⁸

8. On 2 July 2018, having regard to the circumstances particular to the case and the difficulties arising from the challenging security conditions in Mali, the Single Judge instructed the parties to file observations on a possible postponement of the confirmation hearing.⁹

9. On 9 July 2018, the Defence¹⁰ and the Prosecutor¹¹ filed their observations on the date of the confirmation hearing.

II. Analysis

A. Submissions of the parties

10. The Prosecutor seeks postponement of the date of the confirmation hearing to the second half of May 2019.¹² She argues that to hold the confirmation hearing as scheduled, on 24 September 2018, does not appear to be feasible.¹³ In support of that motion, the Prosecutor (i) states that she is not in a position to disclose the evidence within the time currently allotted;¹⁴ (ii) describes [REDACTED];¹⁵ (iii) sets out the number and nature of the requests she intends to put before the Single Judge in

⁸ ICC-01/12-01/18-61-tENG, page 11.

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

¹⁰ “Defence observations on postponing the date of the confirmation hearing”, ICC-01/12-01/18-74-Conf (“Defence Observations”). That day, the Defence filed a public redacted version of its observations, ICC-01/12-01/18-74-Red.

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

¹² Prosecutor’s Observations, para. 45.

¹³ Prosecutor’s Observations, para. 2.

¹⁴ Prosecutor’s Observations, paras. 2, 7-12.

¹⁵ [REDACTED].

connection with witness protection;¹⁶ and (iv) explains the outstanding translation tasks.¹⁷

11. The Defence submits that the confirmation hearing should be postponed for various reasons but that it will be able to estimate for how long only once the disclosure process is complete and Mr Al Hassan has received the document containing a detailed description of the charges and a list of the evidence filed by the Prosecutor, and their Arabic translations.¹⁸ It therefore moves the Single Judge to give the parties the opportunity to make further observations at that point in time.¹⁹

12. The Defence underscores that article 67(1)(a) and (b) of the Statute vests Mr Al Hassan with the right to “be informed promptly and in detail of the nature, cause and content of the charge, in a language which [he] fully understands and speaks” and to “have adequate time and facilities for the preparation of the defence”.²⁰ Nevertheless, the Defence considers that it is impossible for it to acquaint itself with all of the evidentiary material which has or will be disclosed in the narrow time frame from the date disclosure commences, 6 July 2018, to the date, as it stands, of the confirmation hearing, 24 September 2018.²¹ It further points out that Mr Al Hassan, who has yet to receive an Arabic translation of the Prosecutor’s application for an arrest warrant, and will not receive an Arabic translation of the document containing a detailed description of the charges and of the list of evidence by 24 September 2018, is not and will not be in a position to instruct counsel and prepare his defence by then.²²

¹⁶ Prosecutor’s Observations, paras. 3, 5, 22-38, 45.

¹⁷ Prosecutor’s Observations, paras. 4, 39-45.

¹⁸ Defence Observations, paras. 7, 10-11.

¹⁹ Defence Observations, para. 11.

²⁰ Defence Observations, para. 4.

²¹ Defence Observations, paras. 6-7, 9.

²² Defence Observations, para. 8.

B. Applicable law

13. The Single Judge has regard to articles 60(4), 61 and 67 of the Statute and rule 121 of the Rules of Procedure and Evidence (“Rules”).

14. The Single Judge recalls that rule 121(7) of the Rules provides that the Pre-Trial Chamber may decide to postpone the confirmation hearing at the request of the parties or on its own motion. Of note is that the Pre-Trial Chamber, in considering a possible postponement of the confirmation hearing, must ensure that “judicial proceedings are conducted in a fair and expeditious manner taking into consideration the competing interests at stake”.²³ In making its decision, the Pre-Trial Chamber must also take account of the submissions of the parties and the circumstances particular to the case.²⁴

C. The Single Judge’s determination

15. The Single Judge rejects outright the defence motion to defer the parties’ observations on a rescheduled date for the confirmation hearing. Considerations which go to the organization of the proceedings as a whole demand that, where postponement is necessary, the hearing be rescheduled as soon as possible.

16. The Single Judge notes that various points of procedure concerning the disclosure regime to be introduced in the case ²⁵ – such as the protocol for the

²³ Pre-Trial Chamber II, Case of *The Prosecutor v. Bosco Ntaganda*, “Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties”, 17 June 2013, French version registered on 23 July 2013, ICC-01/04-02/06-73 (“Decision of 17 June 2013”), para. 13 and reference cited; Case of *The Prosecutor v. Dominic Ongwen*, “Decision Postponing the Date of the Confirmation of Charges Hearing”, 6 March 2015, ICC-02/04-01/15-206 (“Decision of 6 March 2015”), para. 25.

²⁴ Decision of 6 March 2015, para. 25. See also Chambers Practice Manual, May 2017, p. 8: “Efforts should be made to reduce the average time that passes between the first appearance and the commencement of the confirmation of charges hearing.”

²⁵ See Prosecutor, “Prosecution’s Request in relation to its Disclosure and Redaction Practice”, 4 April 2018, ICC-01/12-01/18-15; Single Judge, “Order for Information from the Prosecution further to the ‘Prosecution’s Request in relation to its Disclosure and Redaction Practice’”, ICC-01/12-01/18-17-tENG, 6 April 2018, ICC-01/12-01/18-17; Prosecutor, “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

handling of the confidential information,²⁶ or the in-depth analysis chart of disclosed evidence²⁷ – were canvassed by the parties before the Single Judge disposed of them. Although that discussion was beneficial to the proceedings, it necessarily delayed the start of the disclosure process to 6 July 2018, once the Single Judge had instructed the Prosecutor on 29 June 2018 to proceed with disclosure.²⁸ That is the context in which to regard the Prosecutor’s argument that the volume of evidence makes completion of disclosure unfeasible and the Defence argument that it will not be in a position to have acquainted itself and analysed that body of evidential material before the confirmation hearing, were it to take place on 24 September 2018. The Single Judge determines that the arguments have merit and that the date of 24 September 2018

disclosure and Redaction Practice”” and confidential *ex parte* annex, 12 April 2018, ICC-01/12-01/18-18-Conf-Exp-Red and ICC-01/12-01/18-18-Conf-Exp-Red2; Prosecutor, “*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; Single Judge, Decision on Disclosure Protocol.

²⁶ See Prosecutor, “*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 annex ICC-01/12-01/18-23-AnxA; Defence, “*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’*”, 11 May 2018, ICC-01/12-01/18-29 and annex ICC-01/12-01/18-29-Anx; Single Judge, “*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*”, 14 May 2018, ICC-01/12-01/18-30-tENG; Prosecutor, “*Supplementary observations on 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’*”, 17 May 2018, ICC-01/12-01/18-32 and annex ICC-01/12-01/18-32-AnxA; Defence, “*Response to the ‘Supplementary observations on 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’*”, 22 May 2018, ICC-01/12-01/18-36; Single Judge, “*Decision on the Adoption of 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*”, 31 May 2018, ICC-01/12-01/18-40-tENG and annex ICC-01/12-01/18-40-Anx.

²⁷ See Decision on Disclosure Protocol, para. 51 and p. 23; Prosecutor, “*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-Red2 and confidential *ex parte* annex ICC-01/12-01/18-38-Conf-Exp-AnxA; Defence, “*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”, 24 May 2018, ICC-01/12-01/18-45-Red; Decision on Analysis Chart.

²⁸ See Decision on Analysis Chart, para. 12.

would not in fact allow the parties to embark on the confirmation hearing phase in satisfactory conditions.

17. [REDACTED].²⁹ [REDACTED]³⁰ [REDACTED].³¹

18. The Single Judge recalls that article 60(4) of the Statute binds the Pre-Trial Chamber also to “ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor”. The Single Judge takes note [REDACTED] necessarily impinge upon the schedule for disclosure.

19. The Single Judge is in particular satisfied by the Prosecutor’s argument that, as regards the witnesses whose identity she intends to disclose to the Defence, she remains reliant [REDACTED] before she can so proceed. The Single Judge sees that the Prosecutor has [REDACTED].³² The Single Judge notes [REDACTED].³³ The Single Judge accepts the Prosecutor’s argument that [REDACTED].³⁴ The Single Judge also observes that the Prosecutor has set out [REDACTED],³⁵ and [REDACTED].³⁶

20. In a more general vein, the Single Judge notes that to those considerations must be added difficulties connected to the security situation and the fact that [REDACTED].³⁷

21. The Single Judge sees [REDACTED] the Prosecutor to state that she will file applications pursuant to article 56 of the Statute in relation to a number of witnesses and hopes to have done so by early November 2018, after [REDACTED].³⁸ Were the Single Judge to grant the applications to avail of article 56 of the Statute, that decision would involve, from a practical perspective, the holding of pre-trial proceedings that

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ Prosecutor’s Observations, paras. 22-26, 45.

are more demanding than is usual. The Prosecutor considers that, were the Pre-Trial Chamber to grant all of her applications to that end, the examination of witnesses in accordance with article 56 of the Statute would not, in effect, be completed before late March 2019.³⁹ She further explains that, were the Single Judge to grant her applications, the preparation of the document containing a detailed description of the charges would be affected, as it could be finalized only once the witnesses have been examined.⁴⁰

22. The Prosecutor also states her intention to file applications for leave to withhold the identity of 10 or so witnesses [REDACTED] and, [REDACTED] she expects to have filed all of her applications for redactions by 31 October 2018, [REDACTED].⁴¹

23. The Single Judge notes, moreover, that, in justification of the further time argued to complete her preparation for the confirmation hearing, the Prosecutor sets out a detailed and sensible timetable to which she intends to adhere and describes the knock-on effect of some time frames on others.

24. The Single Judge has taken note [REDACTED] he sees that [REDACTED] the Prosecutor's presentation of evidence, much time is needed to satisfy the prerequisites for holding a confirmation hearing. The Single Judge has given careful consideration to the Prosecutor's argument on the impact on the time frames which will result from the examination of witnesses pursuant to article 56 of the Statute: "[TRANSLATION] in view of the purpose of article 56, it will save time later on, at trial. And so, were the charges to be confirmed, the total duration of the proceedings as a whole should not be unduly affected."⁴² The Single Judge is also of the view [REDACTED].

³⁹ Prosecutor's Observations, paras. 3, 45.

⁴⁰ Prosecutor's Observations, paras. 44-45.

⁴¹ Prosecutor's Observations, paras. 33-34.

⁴² Prosecutor's Observations, para. 30.

25. The Single Judge would further recall that the Pre-Trial Chamber is the guarantor of the rights of any person subject to a warrant of arrest,⁴³ which include the right “[t]o have adequate time and facilities for the preparation of the defence”.⁴⁴ Furthermore, the Single Judge recalls, rule 121 of the Rules prescribes that the Prosecutor “provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.” That rule is intended to allow the person and the Defence sufficient time in advance of the confirmation hearing in which to acquaint themselves with the charges and prepare for the hearing.

26. Considering furthermore the right which article 67(1)(a) of the Statute vests in the person concerned to receive, in a language which he fully understands and speaks, the documents which inform him “in detail of the nature, cause and content of the charge” against him, the Single Judge, in his Decision on Disclosure Protocol, ruled “that, at a minimum, the Prosecution must, with the assistance of the Registry if necessary, enter in the record of the case an Arabic version of the document containing the charges and the list of evidence submitted pursuant to article 61(3) of the Statute and rule 121(3) of the Rules.”⁴⁵ It is the Single Judge’s view that the two provisions – concerning respectively the 30-day time limit, and the right of the suspect to be informed of the nature, cause and content of the charge against him in a language which he fully understands and speaks – must be read together. Effect is given to a suspect’s right to understand the nature, cause and content of the charge against him, only if the person receives, in a language which he fully understands and speaks, the document containing a detailed description of the charges together

⁴³ The Single Judge notes that under rule 121(1) of the Rules, the person concerned enjoys the rights set forth in article 67 of the Statute as of his or her first appearance before the Pre-Trial Chamber. See Pre-Trial Chamber II, Case of *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, para. 32 (“Decision of 27 February 2015”), footnote 15.

⁴⁴ Article 67(1)(b) of the Statute.

⁴⁵ Decision on Disclosure Protocol, para. 26 referring to Decision of 27 February 2015, para. 32.

with a list of the evidence which the Prosecutor intends to present at the confirmation hearing, “no later than 30 days before the date of the confirmation hearing”. Yet, in the Prosecutor’s reckoning, the translation of the document containing a detailed description of the charges into Arabic will take “[TRANSLATION] considerably more than a month”.⁴⁶ Accordingly, the Single Judge hereby instructs the Prosecutor to enter into the record, no later than 30 days before the date of the confirmation hearing, an Arabic translation of the document containing a detailed description of the charges and of the list of the evidence which the Prosecutor intends to present at the hearing, so that the suspect may acquaint himself with the document and participate meaningfully in the preparation of his defence, and do so in advance of the hearing.

27. Accordingly, the Single Judge further instructs the Prosecutor to enter into the record of the case the original version of the document containing a detailed description of the charges and 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 the victims who have been admitted to participate in the proceedings. The Single Judge notes that, in the absence of an in-depth analysis of the evidence at the time of its disclosure,⁴⁷ those documents will, moreover, put the Defence in a position to better prepare for the confirmation hearing. It is to be noted that the rescheduled date for the confirmation hearing has been set with regard for the new time frame with which the Prosecutor is required to comply.

28. Accordingly, having entertained the submissions and requests of the parties regarding a possible postponement of the confirmation hearing, [REDACTED] and all of the factors set out above, the Single Judge sees fit, in the interest of the proceedings as a whole, to postpone the confirmation hearing to 6 May 2019.

⁴⁶ Prosecutor’s Observations, para. 44.

⁴⁷ See Decision on Analysis Chart.

FOR THESE REASONS, the Single Judge

DENIES the Defence request to defer observations from the parties on a rescheduled date for the confirmation hearing;

DECIDES that the confirmation hearing is postponed to 6 May 2019;

INSTRUCTS the Prosecutor to enter into the record, no later than 30 days before the date of the confirmation hearing, an Arabic translation of the document containing a detailed description of the charges and of the list of the evidence which the Prosecutor intends to present at the confirmation hearing; and

INSTRUCTS the Prosecutor to enter into the record of the case the original version of the document containing a detailed description of the charges and of the list of evidence, preferably to be provided in French, as soon as that version is ready for translation into Arabic.

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

[signed]

Judge Péter Kovács

Single Judge

Dated this 20 July 2018

At The Hague, Netherlands