

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

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

Date: **14 June 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**

Confidential
Ex parte, Defence

**Decision on the Urgent Request of the Defence for Variation of the Deadline of an
Application concerning the Arrest, Detention and Interrogation of Mr Al Hassan in
Mali**

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

Office of the Prosecutor

Counsel for the Defence

Ms Melinda Taylor

Ms Marie-Hélène Proulx

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 Other
Section**

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 decides as follows.

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").²
2. On 31 March 2018, Mr Al Hassan was surrendered to the Court; he is now held at its Detention Centre in The Hague.³
3. On 3 April 2018, the Single Judge set the first appearance for 4 April 2018.⁴
4. 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.⁵
5. On 16 May 2018, the Single Judge issued the "*Décision relative au système de divulgation et à d'autres questions connexes*" ("Decision on Disclosure Protocol"),⁶ directing submissions from the Prosecutor on a provisional time frame for evidence disclosure, which takes into account translation and witness protection needs, if any.

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 "Order Scheduling the First Appearance of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud", 3 April 2018, ICC-01/12-01/18-12-tENG.

⁵ Transcript of the initial appearance hearing, 4 April 2018, ICC-01/12-01/18-T-1-CONF-FRA ET.

⁶ ICC-01/12-01/18-31.

6. On 22 May 2018, the Chamber issued the "Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud".⁷

7. On 20 July 2018, the Single Judge issued his "Decision Postponing the Date of the Confirmation Hearing" ("Decision Postponing the Date of the Hearing"),⁸ whereby he set the hearing for 6 May 2019. In the decision, the Single Judge also instructed the Prosecutor to enter into the record, no later than 30 days before the date of the confirmation hearing ("Hearing"), the Arabic translation of the document containing the charges ("DCC") and of the list of the evidence which the Prosecutor intends to present at the Hearing.⁹

8. On 5 October 2018, the Chamber issued its "Decision on the Defence Request concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges".¹⁰ In the decision, the Chamber directed the Prosecutor to file in the record the DCC and the list of evidence, no later than 60 days before the date of the Hearing,¹¹ which had initially been scheduled for 6 May 2019.

9. On 9 November 2018, the Prosecutor gave particulars of the discharge of her duties of disclosure and witness protection.¹²

10. On 7 February 2019, the Single Judge directed specific submissions from the Prosecutor on the applications which she intended to enter in relation to the proceedings before the start of the Hearing.¹³ The Prosecutor filed submissions on

⁷ ICC-01/12-01/18-35-Red2.

⁸ ICC-01/12-01/18-94-Red-tENG.

⁹ Decision Postponing the Date of the Hearing, p. 12.

¹⁰ ICC-01/12-01/18-143-tENG.

¹¹ Decision on the Date of the Filing of the DCC, para. 27 and p. 13.

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

¹³ "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.

12 February 2019 and sought further time in which to file the DCC.¹⁴ The Defence responded on 19 February 2019, objecting to the further time sought and to the postponement of the Hearing.¹⁵

11. On 25 February 2019, the Single Judge issued an "*Ordonnance fixant une date butoir pour le dépôt des requêtes en vue du dépôt du document contenant les charges*" ("Order Setting a Deadline for the Filing of Applications"), directing the Prosecutor to make all of her applications so as to file the DCC by 15 March 2019, deferring the date of the Hearing and advising that it would be rescheduled after 15 March 2019.¹⁶

12. On 18 April 2019, the Single Judge issued a decision directing the Prosecutor to file the DCC by Wednesday, 8 May 2019 and rescheduled the confirmation hearing for Monday, 8 July 2019 ("Decision of 18 April 2019").¹⁷

13. On 2 May 2019, the Registrar informed the Chamber that by letter of 2 May 2019 Ms Melinda Taylor had been appointed Defence Counsel ("Ms Melinda Taylor", "Defence Counsel") to represent Mr Al Hassan before the Court.¹⁸

14. On 8 May 2019, the Prosecutor filed the DCC against Mr Al Hassan.¹⁹

15. On 10 May 2019, the Defence filed observations on a report submitted by the Registry²⁰ and on the Prosecutor's response to the report,²¹ wherein it sought

¹⁴ "*Éléments 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 Submissions"). The Prosecutor filed a secret, *ex parte* redacted version of her application, which was made available to the Defence on 14 February 2019 (ICC-01/12-01/18-243-Secret-Exp-Red), and a public redacted version on 15 February 2019 (ICC-01/12-01/18-243-Red2).

¹⁵ "Defence response to the Prosecution's '*Éléments 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 Response"). The Defence filed a public redacted version on 21 February 2019, ICC-01/12-01/18-250-Red.

¹⁶ ICC-01/12-01/18-255, para. 15.

¹⁷ "Decision Rescheduling the Date of Filing of the Document Containing the Charges and the Commencement of the Confirmation Hearing", ICC-01/12-01/18-313-tENG, paras. 18-20.

¹⁸ "Notification of the Appointment of Ms Melinda Taylor as Counsel for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud", ICC-01/12-01/18-323.

¹⁹ ICC-01/12-01/18-335-Conf.

²⁰ "Registry's additional Report on the two incidents that occurred during the active monitoring of Mr. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud's Telephone Conversation", 12 April 2019, ICC-01/12-01/18-307-Conf-Exp. On 3 May 2019, at the behest of the Chamber, the Registry filed a No. **ICC-01/12-01/18**

modification of the restrictions on Mr Al Hassan's non-privileged contact²² ("Defence Observations of 10 May 2019").

16. On 11 May 2019, the Prosecutor filed an amended and corrected version of the DCC against Mr Al Hassan.²³

17. On 23 May 2019, the Registrar informed the Chamber by letter of 22 May 2019 that Ms Marie-Hélène Proulx had been appointed Associate Counsel to represent Mr Al Hassan before the Court.²⁴

18. On 31 May 2019, the Defence filed an urgent request to vary the deadline for filing an application concerning Mr Al Hassan's arrest, detention and interrogation in Mali ("Request").²⁵

19. On 7 June 2019, the Prosecutor filed the DCC in Arabic.²⁶

20. On 11 June 2019, the Prosecutor filed the Arabic version of the DCC with footnotes.²⁷

confidential redacted version of its report, making it available to the Defence (ICC-01/12-01/18-307-Conf-Exp-Red).

²¹ "Réponse du Bureau du Procureur au 'Registry's additional Report on the two incidents that occurred during the active monitoring of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud's telephone conversation'", 25 April 2019, ICC-01/12-01/18-318-Conf-Exp. On 7 May 2019, at the behest of the Chamber, the Prosecutor filed a confidential redacted version of its response, making it available to the Defence (ICC-01/12-01/18-318-Conf-Exp-Red).

²² "Defence Observations on Registry Report ICC-01/12-01/18-307-Conf-Exp and Prosecution Response ICC-01/12-01/18-318-Conf-Exp, and Request for Variation", 10 May 2019, ICC-01/12-01/18-343-Conf-Exp. The Defence filed a corrected version of the observations on 13 May 2019, ICC-01/12-01/18-343-Conf-Exp-Corr.

²³ ICC-01/12-01/18-335-Conf-Corr.

²⁴ "Notification of the Appointment of Ms Marie-Hélène Proulx as Associate Counsel for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud", ICC-01/12-01/18-354.

²⁵ "Urgent request to vary a deadline for filing an application concerning Mr. Al Hassan's arrest, detention and interrogation in Mali", ICC-01/12-01/18-360-Conf-Exp and confidential annex, *ex parte* Defence.

²⁶ ICC-01/12-01/18-366.

²⁷ ICC-01/12-01/18-370.

II. Analysis

A. Defence arguments

21. The Defence moves the Single Judge to suspend or vary any deadline for filing an application for a stay of the proceedings on grounds connected to the circumstances of Mr Al Hassan's arrest, detention and interrogation before he was surrendered to the Court.²⁸

22. The Defence states that it is investigating the illegality of the conditions of Mr Al Hassan's arrest and detention in Mali and the impact of the conditions on the quality and reliability of evidence gathered by the Prosecutor in an environment of extreme coercion and duress.²⁹ The Defence however makes the point that it has not had adequate time and facilities to complete its investigation of those matters, for, among other reasons, the difficulty in gathering certain information or evidence that might assist it to substantiate its allegations.³⁰

23. Specifically, the Defence says that it has identified individuals, who have first-hand knowledge of the mistreatment endured by Mr Al Hassan, but their ongoing detention at the same facility in Mali raises specific protection concerns and risks of retaliation were they to communicate with the Defence.³¹ The Defence goes on to submit that the opinion of the psychological expert, which it wanted to put before the Chamber in relation to Mr Al Hassan's allegations of torture, cannot be obtained before the confirmation hearing, on account of the time needed for experts to be added to the Court's list of experts and the fact that the prospective expert does not consider it advisable to commence consultations with Mr Al Hassan during Ramadan or in the run-up to the confirmation hearing.³²

24. In the view of the Defence, the deferral or suspension of any deadline for filing an application on the issues arising from Mr Al Hassan's treatment in detention

²⁸ Request, paras. 1, 14.

²⁹ Request, paras. 1-2.

³⁰ Request, paras. 2, 11-12.

³¹ Request, para. 12.

³² Request, para. 11.

in Mali is the most appropriate means of achieving a fair balance between Mr. Al Hassan's right to expeditious proceedings, which is of paramount importance given the length of his detention, and his right to adequate time and facilities to prepare an application which concerns fundamental aspects of his defence.³³

25. The Defence submits that the holding of the Appeals Chamber in *Katanga* – viz., that motions alleging unlawful arrest and detention of a suspect prior to his or her surrender to the Court and seeking a stay of proceedings must, as a general rule, be brought before the Pre-Trial Chamber – does not find application here.³⁴ In its opinion, there is good cause to exempt the case from that general rule or to vary its application in order to afford the Defence more time to file an application on the consequences of Mr Al Hassan's detention and treatment in Mali.³⁵

26. Lastly, the Defence states that its application will not be limited to the question of the illegality of Mr Al Hassan's detention and arrest, but will address the wider issue of the impact of illegal arrest and arbitrary detention on the quality and reliability of evidence obtained by the Prosecutor under such conditions.³⁶ In that connection, and in the interests of judicial economy and considering the difference between the standard of proof at the confirmation of charges phase and at the trial phase, the Defence argues that it would be expedient for such an application, which goes in part to the manner in which certain evidence in support of the charges against Mr Al Hassan was collected, to be put directly before the Trial Chamber for consideration.³⁷

B. Applicable law

27. The Single Judge refers to articles 61 and 67 of the Statute, rule 122(3) of the Rules of Procedure and Evidence ("Rules") and regulation 35 of the Regulations of the Court.

³³ Request, para. 4.

³⁴ Request, paras. 6-7.

³⁵ Request, para. 7.

³⁶ Request, paras. 1, 9.

³⁷ Request, paras. 9-10.

C. Determination of the Single Judge

28. The Single Judge notes the holdings of the Appeals Chamber in *Katanga*, adverted to by the Defence, on the timing of motions alleging unlawful pre-surrender arrest and detention and seeking a stay of proceedings:³⁸

In the absence of a provision in the Statute, the Rules of Procedure and Evidence and the Regulations of the Court stipulating time limits for the filing of motions alleging pre-surrender unlawful arrest and detention and seeking a stay of proceedings, the Trial Chamber has discretion under article 64 (2) of the Statute to determine the timeliness of such motions.

[...]

Motions alleging unlawful arrest and detention of a suspect prior to his or her surrender to the Court and seeking a stay of proceedings must, as a general rule, be brought before the Pre-Trial Chamber.

29. The Single Judge sees, however, that the issue of the “timeliness” of a motion of this nature is an issue of fact which depends on the particular circumstances of the case. The Single Judge therefore points out that to strike a fair balance between the rights of the accused and the requirement for expeditious proceedings, the Appeals Chamber has made clear that “where the accused person could not reasonably be expected to raise the matter at that [pre-trial] stage” the issue could be raised at a subsequent stage of the proceedings.³⁹

30. In relation to pre-trial proceedings, the Single Judge also notes that rule 122(3) of the Rules provides:

3. Before hearing the matter on the merits, the Presiding Judge of the Pre-Trial Chamber shall ask the Prosecutor and the person whether they intend to raise objections or make observations *concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing*. [Emphasis added].

31. Turning to the case at hand, the Single Judge underscores that, through its Request, the Defence gave the Pre-Trial Chamber notice of its intention to file an

³⁸ Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled ‘Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’”, 12 July 2010, ICC-01/04-01/07-2259 (“Appeals Judgment of 12 July 2010”), paras. 1, 3.

³⁹ Appeals Judgment of 12 July 2010, para. 48.

application concerning the consequences of Mr Al Hassan's arrest and alleged treatment in detention in Mali.⁴⁰ The Single Judge also sees that the Defence put the issue before the Chamber in its Observations of 10 May 2019,⁴¹ one week after Ms Melinda Taylor was appointed Defence Counsel for Mr Al Hassan.⁴²

32. The Single Judge further notes that the Defence states that it has not had adequate time and facilities to investigate the illegality of Mr Al Hassan's arrest and detention.⁴³ Specifically, the Single Judge points to the Defence's claim that until now it has not been possible for it to gather certain evidence to substantiate its allegations because of concerns about the protection of potential witnesses detained in Mali.⁴⁴

33. The Single Judge also notes the considerable volume of incriminating evidence which the Prosecutor has disclosed and underscores that the Hearing was deferred several times to allow the Prosecutor to file all of her applications to withhold the witnesses' identities so that she could file her DCC.⁴⁵

34. Lastly, the Single Judge notes that the Defence is careful not to interfere with Mr Al Hassan's right to expeditious proceedings by seeking, at this juncture, a stay of the proceedings and a postponement of the Hearing.⁴⁶ The Single Judge takes note of the impact that a Defence application to that end would have on the course of the Pre-Trial proceedings and makes the point that such an application need not be entertained were the Pre-Trial Chamber not to confirm the charges against Mr Al Hassan.

35. Having regard to those considerations, the Single Judge is of the view that the Defence has complied as to form with the principle laid down at rule 122(3) of the Rules by giving the Pre-Trial Chamber notice of its intention to file an application on

⁴⁰ Request, para. 7.

⁴¹ Observations of 10 May 2019, paras. 28-29.

⁴² Annex 1 to "Notification of the Appointment of Ms Melinda Taylor as Counsel for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud", ICC-01/12-01/18-323.

⁴³ Request, para. 2.

⁴⁴ Request, paras. 2, 12-13.

⁴⁵ See above, paras. 7, 11-12.

⁴⁶ Request, para. 3.

the circumstances of Mr Al Hassan's arrest, detention and interrogation before he was surrendered to the Court.

36. That notwithstanding, as regards the filing of such an application later in the proceedings, should the charges be confirmed, the Single Judge does not see fit to predetermine the decision the Trial Chamber might take on the admissibility of the application. Accordingly, the Single Judge dismisses, at the outset, that limb of the Request for lack of jurisdiction.

FOR THESE REASONS, the Single Judge

TAKES NOTE of the intention of the Defence to file, when it sees fit, an application on the circumstances of Mr Al Hassan's arrest, detention and interrogation before his surrender to the Court; and

DISMISSES, at the outset, the remainder of the Request for lack of jurisdiction.

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

[signed]

Judge Péter Kovács
Single Judge

Dated this 14 June 2019

At The Hague, Netherlands