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**International
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May 2020**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF

***THE PROSECUTOR v. AL HASSAN AG ABDLOUL AZIZ AG MOHAMED AG
MAHMOUD***

Public

**Public redacted version of 'Defence request for leave to appeal Pre-Trial
Chamber I's "*Décision portant modification des charges confirmées le 30
septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
Mahmoud*" (ICC-01/12-01/18-767-Conf)'**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
Mahmoud

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

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I. Introduction

1. The Defence for Mr. Al Hassan seeks leave to appeal the ‘Décision portant modification des charges confirmées le 30 septembre 2019 à l’encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud’ (‘the Decision’),¹ in relation to the following two issues (‘the Two Issues’):
 - Whether, as a matter of law, the Pre-Trial Chamber correctly defined the standard of diligence and notion of ‘availability’ that apply as concerns applications to include additional incidents, after the confirmation of the charges, in a case involving a detained individual (‘the First Issue’); and
 - Whether the Pre-Trial Chamber abused its discretion or exercised its discretion in an unreasonable manner as concerns the manner in which it balanced Mr. Al Hassan’s rights under the Statute (including his right to adequate time and facilities, and his protection against unreasonably lengthy detention), as compared to the Prosecution’s right to request the addition of new incidents, based on evidence known to the Prosecution, before the issuance of the first confirmation decision (‘the Second Issue’).
2. The Two Issues arise squarely from the Decision and played a central role in the Pre-Trial Chamber’s decision to amend the charges to include these additional incidents against Mr. Al Hassan. The manner in which the Chamber resolved these issues therefore impacts on the outcome of the proceedings. The Chamber’s approach to both issues also impacts directly on a range of defence rights under Article 67(1), including the right to be informed promptly of the nature and content of the charges, the right to adequate time and facilities, and the protection against unreasonably lengthy proceedings and detention. As things presently stand, the Defence will clearly be unable to conduct meaningful investigations before the start of the trial. This will mean either that the trial date will have to be shifted or that there will be delays later in the proceedings as the Defence will have to undertake significant investigations during the trial itself. This will have significant ramifications as concerns the efficient and expeditious conduct of the trial proceedings. Given the key significance of these

¹ ICC-01/12-01/18-767-Conf.

issues to the scope and nature of the charges, an immediate decision by the Appeals Chamber would materially advance the proceedings.

3. In determining whether to grant leave to appeal, the Chamber's assessment should be confined to the determination as to whether the criteria under Article 82(1)(d) are fulfilled: it is neither necessary nor appropriate to pre-condition this decision on an assessment as to whether the Defence has demonstrated that the Pre-Trial Chamber committed specific errors of law, fact or procedure.²
4. This request is without prejudice to the Defence's position that the charges are flawed as a result of other legal, procedure and evidential issues. Given the specific criteria for interlocutory appeal, the fact that the Defence has not included some issues in this request does not constitute waiver, for the purposes of raising these issues at trial.

II. Submissions

1. *The Two Issues arise from the Decision*

5. According to the Appeals Chamber, an issue is "an identifiable subject or topic requiring a decision for its resolution which is essential for the determination of matters arising in the judicial cause under examination, not merely a question over which there is disagreement or conflicting opinion".³ The Two Issues were essential components in the Pre-Trial Chamber's resolution of the Article 61(9) application introduced by the Prosecution.
6. In its decision of 21 February 2020, the Pre-Trial Chamber underscored that the Prosecution did not have an unfettered right to have recourse to Article 61(9), particularly if it would impact negatively on the rights of the Defence.⁴ It was, therefore, necessary to exercise judicial control as to whether the reasons for filing the

² Pre-Trial Chamber II, *Prosecutor v. Kony et al.*, [Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Application for Warrants of Arrest under Article 58](#), ICC-02/04-01/05-US-EXP, 19 August 2005, para. 15.

³ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), ICC-01/04-168, 13 July 2006, para. 9.

⁴ ICC-01/12-01/18-608-Red, para. 53.

request were substantiated and justified, taking into account any competing interests. The Pre-Trial Chamber further adopted the conclusion of Pre-Trial Chamber II, that:⁵

the continued investigation should be related only to such essential pieces of evidence which were not known or available to the Office of the Prosecutor prior to the confirmation hearing or could not have been collected for any other reason, except at a later stage.

7. In the Decision itself, the Pre-Trial Chamber recounted the following justifications provided by the Prosecution as concerns the introduction of its request five months after the charges were confirmed:⁶

- P-[REDACTED], [REDACTED], and the Prosecution then interviewed her [REDACTED] 2019,;
- Even though the Prosecution received [REDACTED]'s [REDACTED] in [REDACTED] 2016, and the Prosecution requested [REDACTED]'s contact details from [REDACTED] in 2016, the Chamber accepted the Prosecution's claim that "c'est seulement le [REDACTED] 2019 qu'elle a obtenu l'identité et les coordonnées de ce témoin ; son témoignage n'a ensuite pu être recueilli qu'en [REDACTED] 2019 pour des raisons logistiques, et personnelles, propres au témoin";
- For P-[REDACTED], the Prosecution obtained this person's identity and coordinates on [REDACTED] 2019, first contacted the witness in [REDACTED] 2019 and collected the person's testimony in [REDACTED] 2019;
- For [REDACTED], the Prosecution was aware of this person, and their prospective evidence, but only decided to take a statement from this person after the confirmation hearing and only obtained this person's identity and coordinates on [REDACTED] 2019; and
- The Prosecution claimed that it needed to analyse these interviews, and address issues regarding translation, consent, credibility and security, before formulating and submitting the charges in late January 2020

⁵ ICC-01/12-01/18-608-Red, para. 53.

⁶ ICC-01-12-01/18-767-Conf, paras. 21, 27-29.

(approximately 6 months after the Prosecution had collected the last item of evidence).

8. The Pre-Trial Chamber found that the reasons provided by the Prosecution constituted sufficient justification, and, as concerns the evidence known to and, at least partially, in the possession of the Prosecution before the confirmation hearing, the Chamber further found that the Prosecution was under no obligation to either notify the Chamber as concerns any issues it faced as concerns the collection of evidence before the date of the hearing, or to request the Chamber to delay the hearing, in order to allow the additional incidents to be included within the confirmation hearing.⁷
9. As a matter of law, these findings therefore equate to a very low legal threshold as concerns the standards of diligence, and availability, that must be demonstrated by the Prosecution in order to avail itself of Article 61(9) of the Statute. Specifically, the notion of ‘unavailability’ of evidence covers evidence:
 - a. Collected by the Prosecution before the 30 day deadline set out in Rule 121(3) of the RPE (P-[REDACTED]);
 - b. Known to the Prosecution before the 30 day deadline set out in Rule 121(3), and for which the Prosecution has not referred to any impediment as concerns its ability to obtain contact details, and collect evidence in a more timely manner (P-[REDACTED], P-[REDACTED]); and
 - c. Known to sources, with whom the Prosecution liaised regularly, throughout its investigations (P-[REDACTED]).
10. Similarly, the Pre-Trial Chamber appears to define the notion of Prosecutorial diligence in a lenient manner, such that it is sufficient for the Prosecution to demonstrate that it *did not* collect the evidence before the relevant deadline (including for reasons of evolution of strategy or convenience), rather than that it *could not* for reasons that were beyond its control. Conversely, the Chamber did not consider, or make any finding as concerns Defence arguments that the notion of Prosecutorial diligence must be construed more strictly, when the defendant has been held in pre-

⁷ ICC-01/12-01/18-767-Conf, para. 30.

trial detention for a substantial length of time.⁸ These findings affect the legal interpretation of Article 61(9), and the extent to which the existence of continuing investigations, and the generation of additional evidence, can be used to invoke it.

11. The First Issue therefore arises as concerns whether, as a matter of law, the Pre-Trial Chamber correctly defined the standard of diligence and notion of availability that apply as concerns applications to include additional incidents after the confirmation of the charges, within the context of Article 61(9) proceedings, in a case involving a detained individual.
12. After deciding that the evidence from P-[REDACTED], P-[REDACTED], P-[REDACTED], and P-[REDACTED] was not previously available, the Chamber then addressed the impact on the rights of the Defence in one short paragraph. The Chamber recognized that the inclusion of these incidents would impact on Defence preparation and organization, but concluded that the additions were justified, because they are comprised of a small number of incidents, and they fall within the scope of the existing framework of the charges. In reaching this conclusion, the Chamber did not refer to the specific factual circumstances of this case, namely that:
 - a. Mr. Al Hassan has been detained in the ICC detention unit since March 2018;
 - b. The first pre-confirmation phase lasted for 18 months, and the Prosecution had actively investigated Mr. Al Hassan as a suspect since at least mid-2017;
 - c. The trial is scheduled to commence on 14 July 2020 (just over two and half months after the issuance of the decision);
 - d. There were a significant number of anonymous witnesses during the pre-confirmation phase, which meant that the Defence was unable to conduct effective investigations during that phase, and there is a significant backlog as concerns evidential review and investigations that need to be conducted within an extremely limited time period;

⁸ ICC-01/12-01/18-664-Conf, paras. 6, 35, 37.

- e. In light of the COVID-19 pandemic lockdown measures and travel restrictions, the ability of the Defence to investigate the new incidents is extremely limited;
 - f. There has been a significant increase in the scope of the case and charges as a result of the fact that there are four new incidents under Count 2, four new incidents under Count 4, four new incidents under Count 5, seven new incidents under Count 6, two new incidents under Count 8, two new incidents under Count 9, two new incidents under Count 10, five new incidents under Count 11, five new incidents under Count 12, and twelve new incidents under Count 13, and each individual incident could, if upheld at trial, result in a conviction; and
 - g. The new incidents are not of a compelling nature, in the sense that they concern allegations of a similar type to the existing charges, and do not elucidate new or important aspects concerning the alleged common plan, or Mr. Al Hassan's personal responsibility.
13. The Second Issue therefore arises as to whether the Pre-Trial Chamber abused its discretion or exercised its discretion in an unreasonable manner by placing too much weight on the Prosecution's interest in bringing additional incidents, where those incidents based on evidence known to the Prosecution before the issuance of the first confirmation decision, and insufficient weight as concerns the substantial prejudice that the additional incidents will cause to fundamental rights of the defendant.

2. *The Two Issues impact on the fair and expeditious conduct of the proceedings*

14. Exclusion of evidence is one of the remedies, which applies in connection with improper post-confirmation investigations.⁹ It follows, therefore, that the interpretation and application of Article 61(9) (including as concerns the admissibility of evidence collected during or after the confirmation hearing) should be consistent with the ICC case law concerning the permissible scope of post-confirmation investigations; otherwise, the remedy becomes ineffective or illusory. There is, however, a clear dissonance between the manner in which the Pre-Trial Chamber

⁹ ICC-01/09-02/11-728, para. 121.

defined notions of availability and diligence within the context of Article 61(9) in relation to the First Issue, and previous case law, emphasizing the Prosecution's duty to exercise all reasonable efforts to complete its investigations before the confirmation of the charges hearing. This dissonance affects, and undermines key fair trial objectives, including the right to prompt notice of the nature and cause of the charges, the right to adequate time and facilities to prepare the defence, the right to be tried within a reasonable time, and the protection against unreasonably lengthy detention.

15. In terms of the latter body of case law, in the *Mbarushimana* case, the Appeals Chamber underlined that most evidence should, in principle, be available before the confirmation hearing, and as such, the Prosecution was obliged to collect it, and place it before the Chamber, and, where circumstances precluded the Prosecution from doing so, Article 61(7) allowed the Prosecution to seek a postponement.¹⁰ In *Ruto and Sang*, the Trial Chamber explained that a continued investigation should be related “only to such essential pieces of evidence which were not known or available to the Office of the Prosecutor prior to the confirmation hearing or could not have been collected for any other reason, except at a later stage”.¹¹ Similarly, in *Kenyatta*, the Majority averred that “[t]he Prosecutor should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case”.¹²
16. The implications of these findings are that firstly, the Prosecution must exercise all reasonable efforts to collect evidence before the hearing, and secondly, in line with the principle that investigations should largely be complete before the case proceeds to trial, it is preferable for the hearing to be postponed, to allow for the collection of additional evidence, rather than deferring such matters to a future Article 61(9) application.

¹⁰ Appeals Chamber, *Prosecutor v. Mbarushimana*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”](#), ICC-01/04-01/10-514, 30 May 2012, para. 44.

¹¹ Pre-Trial Chamber II, *Prosecutor v. Ruto and Sang*, [Decision on the “Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61\(9\) of the Statute”](#), ICC-01/09-01/11-859, 16 August 2013, para. 37.

¹² Trial Chamber V, *Prosecutor v. Kenyatta*, [Decision on defence application pursuant to Article 64\(4\) and related requests](#), ICC-01/09-02/11-728, 26 April 2013, para. 119.

17. The link between Prosecutorial diligence, post-confirmation investigations, and key fair trial rights, was further elaborated in later decisions in the *Kenya* cases, where the Trial Chambers expressed concern regarding the impact of continuing investigations on timely disclosure, Defence preparation, and the right to fair and expeditious proceedings.¹³ Similarly, in the *Katanga* case, Trial Chamber II underscored the importance of crystallising the facts and circumstances of the charges, before the case proceeds to the trial phase, and the linkage to the right to be informed promptly, of the nature, cause and content of the charges:¹⁴

Thus it should be recalled that the filing of the Confirmation Decision represents not the starting point of the preliminary proceedings but in fact their termination. In the Chamber's view, the decision on the confirmation of the charges crystallises the facts and circumstances accepted in that decision in support of the charges it has confirmed. This is one of the fundamental reasons for the existence of the Pre-Trial Chamber, the purpose of which is to enable the trial to be conducted, as expeditiously as

¹³ Trial Chamber V, *Prosecutor v. Kenyatta*, [Decision on defence application pursuant to Article 64\(4\) and related requests](#), ICC-01/09-02/11-728, 26 April 2013, paras. 118-119: "The Chamber is concerned by the considerable volume of evidence collected by the Prosecution post-confirmation and the delays in disclosing all relevant evidence to the Defence. Whilst the Chamber does not consider that the Statute prohibits the Prosecution from conducting post-confirmation investigations, it is mindful of the Appeals Chamber's recent statement in *Mbarushimana* that the investigation should be "largely completed" by the Confirmation Hearing. Although there may be no formal preconditions for the Prosecutor to continue investigating the same facts and circumstances after they have been confirmed, this is not an unlimited prerogative. In particular, the Majority of this Chamber (Judge Eboe-Osuji not joining in the reasoning) is of the view that under the procedural framework of the Statute, the Prosecution is expected to have largely completed its investigation prior to the confirmation hearing. Article 54(l)(a) of the Statute requires the Prosecutor to "extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally." As the Appeals Chamber has pointed out, this obligation is specifically linked to the Prosecutor's responsibility to establish the truth. The Prosecutor is not responsible for establishing the truth only at the trial stage by presenting a complete evidentiary record, but is also expected to present a reliable version of events at the confirmation hearing.²¹³ The Prosecutor should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case."

See also Trial Chamber V, *Prosecutor v. Kenyatta*, [Concurring Opinion of Judge Christine Van den Wyngaert to "Decision on defence application pursuant to Article 64\(4\) and related requests"](#), ICC-01/09-02/11-728-Anx2, 26 April 2013, para. 5: "I find that the Prosecution failed to properly investigate the case against the accused prior to confirmation in accordance with its statutory obligations under article 54(1)(a) of the Statute. In so doing, the Prosecution has also violated its obligation under article 54(1)(c) of the Statute to fully respect the rights of persons arising under the Statute. In particular, by the extremely late and piecemeal disclosure of an inordinate amount of totally new evidence, which was the immediate consequence of the Prosecution's failure to investigate properly prior to confirmation, the Prosecution has infringed upon the accused's rights under article 67(1)(a), (b) and (c) as well as article 67(2) of the Statute."

¹⁴ Trial Chamber II, *Prosecutor v. Katanga*, [Decision on the Filing of a Summary of the Charges by the Prosecutor](#), ICC-01/04-01/07-1547-tENG, 21 October 2009, paras. 22-23.

possible, on factual bases that are clear and certain, and accessible to the accused. (... it is incumbent upon the Prosecutor to present, during the pre-trial phase, all of the facts and circumstances relating to his case. To hold otherwise would be to call into question the very purpose of a pre-trial phase, at the close of which the charges are fixed and settled.

18. The right to prompt notification of the charges is also tied to the right to silence. The decision of the Defence to present a case during the confirmation hearing rested on the legitimate expectation that at the end of the hearing, the charges would be crystallised, and the collection of incriminating evidence would be completed. This expectation is vitiated in circumstances where the Prosecution postpones the collection of evidence (including as concerns known witnesses) until after the Prosecution has heard Defence arguments presented during the hearing, and does not notify the Defence that such investigations are ongoing.
19. It can be deduced from the above that timely investigations and timely notification of the specific scope and content of the charges impact significantly on key fair trial rights. Conversely, the Pre-Trial Chamber's approach to Article 61(9) imbues a less stringent approach as concerns the timeliness of Prosecution investigations, and further allows the Prosecution to introduce additions and modifications to the charges, without imposing a corollary obligation to notify the Defence, at the earliest available opportunity, of its intention to do so. It follows, therefore, that irrespective of the correctness of the Pre-Trial Chamber's approach, it is one that necessarily impacts on key fair trial rights. To the extent that this includes the right to adequate time and facilities to investigate and respond to the charges, the approach also affects the expeditious conduct of the proceedings. Indeed, the post-confirmation inclusion of additional incidents impacts on the overall efficiency of Defence preparation, and thus the expeditiousness of the proceedings. The Defence now has to conduct a new review of evidence and statements concerning the common plan, in order to ascertain the linkage to these incidents, and cross-reference potential inconsistencies. It is also necessary for the Defence to re-interview potential witnesses and sources, in order to determine whether these persons have information that is relevant to the new incidents. The First Issue thus impacts significantly on the fair and expeditious conduct of the proceedings.

20. This conclusion is equally applicable to the Second Issue. Specifically, the Pre-Trial Chamber has unreasonably prioritized the Prosecutor's power, under Article 54(1)(a) to extend its investigation to all facts and circumstances relevant to the charges, over its duty, under Article 54(1)(c), to fully respect Mr. Al Hassan's rights arising under the Statute, including his right to a speedy trial, his protection against unreasonably lengthy detention, and his right to adequate time and facilities to prepare his Defence. Article 67(1)(e) enshrines Mr. Al Hassan's right to investigate, collect and present evidence, and call witnesses on his behalf. This right, which is essential to fair and adversarial proceedings, would be wholly illusory unless the defendant is also afforded adequate time and facilities to exercise it. And yet, as the Pre-Trial Chamber is aware, the current prospects for doing so are extremely limited. The superficial manner in which the Pre-Trial Chamber addressed this concern now presents the defendant with the dilemma that he must sacrifice either his right to a speedy trial (and accept the prospect of a further prolongation of his detention), or his right to be defended effectively. It therefore impacts significantly on both the fair and expeditious conduct of the proceedings.

3. *The Two Issues impact on the outcome of the proceedings*

21. The Pre-Trial Chamber addressed the Two Issues, as a precursor to its assessment of the sufficiency of the evidence tendered by the Prosecution: they are both gateway issues in this sense. If the Pre-Trial Chamber had adopted a more stringent definition of 'availability' for the purposes of this case, or placed more weight on issues concerning the impact on the rights of the Defence, the incidents would not have been included in the charges. Each incident can lead to a conviction, if upheld at trial. The Pre-Trial Chamber's resolution of the Two Issues therefore impacts on the outcome of the proceedings.

4. *An immediate decision of the Appeals Chamber in relation to the Two Issues would materially advance the proceedings*

22. It would not be fair and effective to address these issues on appeal. By that point, the witnesses will have been subjected to the rigours of testifying in Court. Mr. Al Hassan's detention will have been unnecessarily prolonged. The very inclusion of such incidents also generates a public stigma. The new incidents also do not concern matters that fall within Mr. Al Hassan's personal knowledge. It will be necessary for

the Defence to investigate the different incidents, in order to give effect to Mr. Al Hassan's rights under Article 67(1)(e) of the Statute. The inclusion of the additional incidents will divert and drain a significant portion of Defence resources from vital Defence trial preparation, at a time, when the Defence is already struggling with the burdens generated by the significant amount of post-confirmation disclosure in this case, and the logistical obstacles caused by the COVID-19 pandemic. Put simply, the delicate balance in this case has now been destroyed. The Defence will not have sufficient time to prepare in advance of the trial date scheduled for 14 July 2020. Given the difficulties faced by the Defence in conducting investigations in certain areas (where exculpatory witnesses are most likely to reside), the Defence will not be able to 'catch up' during the trial itself. There will continue to be repercussions, that will affect and undermine Defence preparation throughout the trial itself.

23. An authoritative determination by the Appeals Chamber would thus rid "the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial",¹⁵ and advance the proceedings by ensuring that the charges in this case are not affected by errors that would "cloud or unravel the judicial process".¹⁶

III. Relief sought

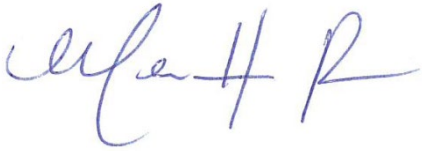
24. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Honourable Pre-Trial Chamber to grant leave to appeal as concerns the Two Issues identified above.

¹⁵ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), ICC-01/04-168, 13 July 2006, para. 14.

¹⁶ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), ICC-01/04-168, 13 July 2006, para. 16.



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Dated this 28th Day of April 2020
At The Hague, The Netherlands