

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 8 March 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*, only available to the Prosecution,  
Defence and Victims and Witnesses Unit**

**Prosecution's Response to Defence Request for Leave to Appeal the "*Ordonnance  
fixant une date butoir pour le dépôt des requêtes en vue du dépôt du document  
contenant les charges*" (ICC-01/12-01/18-261-Conf-Exp)**

**Source: Office of the Prosecutor**

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

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**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. The Defence request for leave to appeal<sup>1</sup> the “*Ordonnance fixant une date butoir pour le dépôt des requêtes en vue du dépôt du document contenant les charges*”<sup>2</sup> should be rejected. Based on the particular measures to protect witnesses the Prosecution had to undertake before filing the Document Containing the Charges (“DCC”), the Decision set 15 March 2019 as the deadline for the Prosecution to submit its redaction requests concerning witnesses that may have a bearing on the date for the submission of the DCC, and following this date the Single Judge will fix the final date for the DCC’s filing and the conduct of the confirmation of charges hearing.<sup>3</sup>

2. The Defence Request to appeal this Decision does not identify any appealable issue within the meaning of article 82(1)(d) of the Statute. Both proposed ‘issues’ are predicated on a misreading of the Decision,<sup>4</sup> or merely disagree with the Chamber’s reasoned assessment.<sup>5</sup> In any event, the Request does not meet the remaining cumulative requirements under article 82(1)(d) of the Statute.

## II. Confidentiality

3. This request is filed as confidential and *ex parte*, pursuant to regulation 23bis(2) of the Regulations of the Court as it responds to a request of the same status.<sup>6</sup>

## III. Submissions

### A. The Request fails to identify an appealable issue

4. The Defence seeks leave to appeal for the following two issues:

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<sup>1</sup> ICC-01/12-01/18-261-Conf-Exp (“Request”).

<sup>2</sup> ICC-01/12-01/18-255 (“Decision”).

<sup>3</sup> Decision, para. 17.

<sup>4</sup> See ICC-01/04-01/10-487, paras. 32-33; ICC-01/05-01/13-1278, para. 9.

<sup>5</sup> ICC-01/04-168 OA3, para. 9; ICC-01/12-01/18-130- tENG, para. 31.

<sup>6</sup> ICC-01/12-01/18-261-Conf-Exp.

- whether the Single Judge in his Decision misinterpreted article 60(4) and failed to uphold the high standard set by this provision; and whether the Single Judge erred by making a determination based on rule 121(7) when this rule was never relied on by the Prosecution (“First Issue”);<sup>7</sup> and
- whether the Single Judge failed to provide a reasoned decision, which effectively resulted in the prolongation of AL HASSAN’s detention (“Second Issue”).<sup>8</sup>

5. Both issues mischaracterise the Decision. Contrary to the Defence’s argument in its Request, the Decision specifically considered both factors in article 60(4). In its view, under Article 64 of the Statute, the Pre-Trial Chamber must ensure that pre-trial detention does not extend excessively because of unjustifiable delay attributable to the Prosecutor.<sup>9</sup> The Decision then proceeded to assess whether these requirements were satisfied on the facts of the case, and again contrary to the Request,<sup>10</sup> provided a reasoned opinion justifying the extension of time for filing the redaction requests and the ensuing prolongation of time to file the DCC and of pre-trial detention.<sup>11</sup>

6. Noting that under article 60(4), a Chamber had to strike the appropriate balance between the competing interests,<sup>12</sup> the Single Judge in his Decision considered that the terms “unduly” and “inexcusable delays” (from the Prosecution) in article 60(4) must be interpreted “au vu des circonstances propres à chaque affaire.”<sup>13</sup> In the Single Judge’s view, the “circonstances particulières relatives à la procédure en cours,”<sup>14</sup> including the important number of witness protection

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<sup>7</sup> Request, paras. 12-19.

<sup>8</sup> Request, paras. 29-32.

<sup>9</sup> Decision, para. 15.

<sup>10</sup> Request, paras. 29-32, 40.

<sup>11</sup> Decision, paras. 15-17.

<sup>12</sup> Decision, paras. 15-16.

<sup>13</sup> Decision, para. 15.

<sup>14</sup> Decision, para. 16.

requests that have been filed and still have to be filed before submitting the DCC<sup>15</sup>— and in respect of which the Single Judge found the extension of time requested by the Prosecution to not have been unreasonable under article 60(4)<sup>16</sup> —justified the adjustments in the time-lines for filing the remaining redaction requests, and following which time-lines the Chamber will fix the final date for DCC's filing and the conduct of confirmation of charges hearing.<sup>17</sup>

7. The Defence thus incorrectly argues that the Decision did not address whether the delay was inexcusable due to Prosecution failings.<sup>18</sup> The Defence also merely disagrees with the Single Judge's assessment. Moreover, given that the limited extension of the time for filing requests for redactions envisaged in the Decision was inseparable from an extension of time to file the DCC and the ensuing pre-trial detention, the Defence misreads the Decision for allegedly failing "to provide grounds on which it found that the prolongation of detention was not unreasonable."<sup>19</sup>

8. Ultimately, the Defence simply ignores the Single Judge's exercise of discretion based on holistic assessment of all information available concerning the overarching witness and victim protection needs caused by insecurity in Mali that had to be addressed by the Prosecution before filing the DCC.<sup>20</sup> The Defence therefore also merely disagrees with the Single Judge's careful assessment of the facts. This is insufficient to identify an appealable issue.<sup>21</sup>

## **B. The remaining article 82(1)(d) criteria are not met**

9. Even assuming *arguendo* that the Chamber were to determine that the Request identifies appealable issues, it nevertheless fails to meet the remaining two

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<sup>15</sup> Decision, para. 16.

<sup>16</sup> Decision, para. 16.

<sup>17</sup> Decision, paras. 16-17.

<sup>18</sup> Request, paras. 12-14; 21.

<sup>19</sup> Request, para. 40.

<sup>20</sup> Decision, paras. 16-17.

<sup>21</sup> ICC-01/04-168 OA3, para. 9; ICC-01/12-01/18-130- tENG, para. 31.

cumulative requirements under article 81(1)(d). As framed, the issues do not significantly affect the fairness of the proceedings or the outcome of the trial. Their immediate resolution would actually delay, not materially advance, the proceedings.<sup>22</sup>

10. The Defence incorrectly asserts and speculates, among others, that since the Decision did not set a new date for the confirmation hearing, it left open the possibility for the Single Judge to grant an extension even lengthier than that requested by the Prosecutor; that the Single Judge could postpone it even until the summer recess and that the postponement is indefinite, granting the Prosecution a *carte blanche* power to even request further delays.<sup>23</sup>

11. To the contrary, the Decision establishes clear and predictable time-lines. As noted, the Decision set 15 March 2019 as the deadline for the Prosecution to submit its redaction requests, following which the Single Judge specifically commits to fixing the final date for the DCC's filing and the conduct of the confirmation hearing.<sup>24</sup> In the same context of ensuring expeditiousness, the Single Judge ordered the Prosecution to discharge its disclosure obligations in an efficient and timely manner.<sup>25</sup>

12. The Defence does not show how the largely clear and short delays noted above would significantly undermine the fairness or the outcome of the confirmation proceedings. In any event, unless and until the above unsubstantiated possibilities for a stretched-out and/or indefinite delay, that the Defence speculates, have occurred, any expeditious and fairness concerns from the Decision are premature.

13. Furthermore, in the context of preserving fairness of the proceedings, the Decision also specifically recalls that the Defence will receive the DCC sixty days

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<sup>22</sup> *Contra* Request, paras. 20-27; 33-45.

<sup>23</sup> Request, paras. 22, 37.

<sup>24</sup> Decision, para. 17.

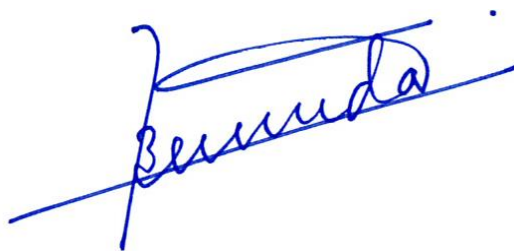
<sup>25</sup> Decision, para. 18.

before the confirmation hearing to allow adequate defence preparation under rule 76 of the Rules.<sup>26</sup>

14. Finally, the Request does not show that immediate appellate intervention is warranted.<sup>27</sup> The Request incorrectly seeks this intervention allegedly to reinstate AL HASSAN's right to know the basis for his prolonged detention.<sup>28</sup> The warrant of arrest identified and provided the basis for his arrest and detention.<sup>29</sup> In any event, the largely clear and relatively short anticipated delays for submitting the DCC and conducting a confirmation of charges hearing envisaged by the Decision mean that appellate intervention would merely delay rather than advance the proceedings in this case.

#### IV. Relief Sought

15. For the reasons set out above, the Defence Request should be rejected.



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**Fatou Bensouda, Prosecutor**

Dated this 8<sup>th</sup> day of March 2019  
At The Hague, The Netherlands

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<sup>26</sup> Decision, para. 18.

<sup>27</sup> Request, para. 45.

<sup>28</sup> Request para. 45.

<sup>29</sup> See also ICC-01/04-01/07-572, para. 11.