

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: French

No.: ICC-01/12-01/18  
Date: 18 September 2018

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE REPUBLIC OF MALI**

**IN THE CASE OF  
*THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED  
AG MAHMOUD***

**Public Document**

**Decision on the Defence “Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts”**

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**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Section**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**PRE-TRIAL CHAMBER I** of the International Criminal Court (“Chamber” and “Court”, respectively) 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”)<sup>1</sup> upon the application of the Prosecutor (“Application for the Issuance of a Warrant of Arrest”).<sup>2</sup>
2. On 31 March 2018, Mr Al Hassan was surrendered to the Court. He is currently in custody at the Court’s detention centre in The Hague.<sup>3</sup>
3. On 4 April 2018, Mr Al Hassan made his first appearance before the Single Judge, in the presence of his counsel and the Prosecution.<sup>4</sup>
4. On the same day, the Prosecution filed a request seeking instructions from the Single Judge on disclosure and redaction practices and, specifically, the adoption of the protocol used in *The Prosecutor v. Ahmad Al Faqi Al Mahdi*.<sup>5</sup>
5. The Defence made no submissions.
6. On 6 April 2018, the Single Judge instructed the Prosecution to submit to him additional information on the nature of the material to be disclosed and on the redactions that may be necessary.<sup>6</sup>

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<sup>1</sup> “Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 27 March 2018, reclassified as public on 31 March 2018, [ICC-01/12-01/18-2-tENG](#).

<sup>2</sup> “*Requête urgente du Bureau du Procureur aux fins de délivrance d’un mandat d’arrêt et de demande d’arrestation provisoire à l’encontre de M. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*”, 20 March 2018, ICC-01/12-01/18-1-Secret-Exp. A confidential *ex parte* version available only to the Office of the Prosecutor and Defence Team for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (ICC-01/12-01/18-1-Conf-Exp-Red2) and a public redacted version (ICC-01/12-01/18-1-Red) of the application were filed on 31 March 2018.

<sup>3</sup> ICC-01/12-01/18-11-US-Exp.

<sup>4</sup> Transcript of the first appearance hearing, 4 April 2018, [ICC-01/12-01/18-T-1-Red-FRA](#).

<sup>5</sup> “Prosecution’s Request in relation to its Disclosure and Redaction Practice”, 4 April 2018, [ICC-01/12-01/18-15](#).

<sup>6</sup> “Order for Information from the Prosecution further to the ‘Prosecution’s Request in relation to its Disclosure and Redaction Practice’”, 6 April 2018, [ICC-01/12-01/18-17-tENG](#).

7. On 12 April 2018, the Prosecution submitted its observations to the Chamber,<sup>7</sup> and on 8 May 2018, the Prosecution filed additional information on the status of the Office of the Prosecutor’s transcripts and translations.<sup>8</sup>

8. On 16 May 2018, the Single Judge issued the “Decision on the Evidence Disclosure Protocol and Other Related Matters” (“Decision on the Evidence Disclosure Protocol”),<sup>9</sup> in which he directed the parties to submit observations on a possible analysis of the evidence exchanged.<sup>10</sup>

9. On 24 May 2018, the Prosecution filed observations,<sup>11</sup> to which the Defence responded on 6 June 2018.<sup>12</sup>

10. On 29 June 2018, the Single Judge issued the “Decision on the In-Depth Analysis Chart of Disclosed Evidence” (“Decision on the Analysis Chart”, “Decision”),<sup>13</sup> in which – in view of the arguments presented by the parties – he found that, in the present case, parties should not be required to provide any evidence analysis chart at the time of disclosure.<sup>14</sup>

11. On 4 July 2018, the Defence filed a request for an alternative mechanism to facilitate disclosure or, in the alternative, for leave to appeal the Decision on

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<sup>7</sup> “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 disclosure and Redaction Practice””, with a confidential *ex parte* annex, 12 April 2018, ICC-01/12-01/18-18-Conf-Exp. The Prosecutor subsequently filed two confidential redacted versions on 13 April 2018 and 17 April 2018, respectively ICC-01/12-01/18-18-Conf-Exp-Red and ICC-01/12-01/18-18-Conf-Exp-Red2.

<sup>8</sup> ICC-01/12-01/18-27-Conf-Exp.

<sup>9</sup> [ICC-01/12-01/18-31-tENG](#).

<sup>10</sup> [Decision on the Evidence Disclosure Protocol](#), para. 51 and p. 21.

<sup>11</sup> “Prosecution’s observations regarding the ‘*Décision relative au système de divulgation et à d’autres questions connexes (ICC-01/12-01/18-31)*’”, ICC-01/12-01/18-38-Conf-Exp, and its confidential *ex parte* annex ICC-01/12-01/18-38-Conf-Exp-AnxA. Subsequently, on 25 April 2018, the Prosecution filed a confidential redacted *ex parte* version, reclassified as confidential *ex parte* available only to the Prosecution and the Defence, ICC-01/12-01/18-38-Conf-Exp-Red, with a confidential redacted annex, ICC-01/12-01/18-38-Conf-Exp-AnxA, as well as a public redacted version, [ICC-01/12-01/18-38-Red2](#).

<sup>12</sup> “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”, ICC-01/12-01/18-45-Conf-Exp. On the same day, the Defence also filed a public redacted version of its response, [ICC-01/12-01/18-45-Red](#).

<sup>13</sup> [ICC-01/12-01/18-61-tENG](#).

<sup>14</sup> [Decision on the Analysis Chart](#), para. 23 and p. 11.

the Analysis Chart (“Request”).<sup>15</sup> The Prosecution filed its response on 9 July 2018 (“Response”).<sup>16</sup>

## II. Analysis

### A. The Parties’ arguments

12. The Defence argues that the evidence disclosure system adopted by the Single Judge in his Decision on the Analysis Chart, which provides no tool to assist with the organization and presentation of evidentiary material, does not meet the minimum guarantees set out in article 67(1)(a) and 67(1)(b) of the Statute.<sup>17</sup> The Defence, therefore, requests that the Single Judge order the adoption of an alternative mechanism to facilitate the disclosure of evidentiary material between the parties.<sup>18</sup> In the alternative, the Defence requests that the Single Judge grant it leave to appeal the Decision on the Analysis Chart.<sup>19</sup>

13. The Defence states the difficulties encountered in the absence of such a tool, maintaining that it is unfairly burdened in the preparation of the case because it is impossible for it to connect the material with the charges sought against its client, and also difficulties resulting from inaccuracies, highlighted by the Chamber itself, and contained in the Application for the Issuance of a Warrant of Arrest.<sup>20</sup>

14. The Defence, therefore, requests the adoption of a table for the analysis of evidentiary material – it provides a template for this in the annex to its Request – which, it says, would obligate the Prosecution to clearly set out its case.<sup>21</sup> The Defence also requests that the document containing a detailed description of the

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<sup>15</sup> “Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts”, [ICC-01/12-01/18-65](#).

<sup>16</sup> “Prosecution’s Response to ‘Defence Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts’”, [ICC-01/12-01/18-76](#).

<sup>17</sup> Request, paras. 1, 9, 27-29.

<sup>18</sup> Request, para. 2.

<sup>19</sup> Request, para. 2.

<sup>20</sup> Request, paras. 10-12.

<sup>21</sup> Request, paras. 12, 13-17.

charges be filed 60 days before the date of the confirmation hearing, in accordance with rule 121(3) of the Rules of Procedure and Evidence (“Rules”), and that the Prosecution fulfil its obligations under rule 121(4) and 121(5) of the Rules 45 days before that date.<sup>22</sup> The Defences proposes that this document be accompanied by a table in which each paragraph of the document containing a detailed description of the charges is aligned to the corresponding evidentiary material, based on the model adopted in the *Abu Garda* case.<sup>23</sup>

15. In the alternative, the Defence requests that the Single Judge grant it leave to appeal the Decision on the Analysis Chart, which, it argues, fails to ensure a fair trial.<sup>24</sup> The Defence submits that the Decision, which lacks clear reasoning, fails to assess and consider several factors which, together, would result in the suspect not being informed of the charges brought against him sufficiently in advance of the confirmation hearing and him not having adequate time and facilities for the preparation of his defence, as required under article 67(1)(a) and 67(1)(b) of the Statute.<sup>25</sup> According to the Defence, the factors to be taken into consideration in the present case are the following: the absence of an analysis chart;<sup>26</sup> the Prosecution’s observations on the estimated timing for completion of the Arabic translation, ordered by the Single Judge, of the Application for the Issuance of a Warrant of Arrest;<sup>27</sup> and the fact that the Prosecution is not obligated to file the document containing a detailed description of the charges ahead of the deadline of 30 days before the confirmation hearing.<sup>28</sup> The Defence also submits that the current disclosure system exacerbates the already existing disparities in terms of resources between the Defence and the Prosecution and, in this way, threatens the principle of equality of arms.<sup>29</sup> In the view of the Defence, because the disclosure system has a bearing on the suspect’s right to a fair trial and the principle of equality of arms,

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<sup>22</sup> Request, para. 21.

<sup>23</sup> Request, para. 20.

<sup>24</sup> Request, paras. 2, 35.

<sup>25</sup> Request, paras. 25-27.

<sup>26</sup> Request, para. 26.

<sup>27</sup> Request, para. 30.

<sup>28</sup> Request, para. 31.

<sup>29</sup> Request, paras. 11, 33.

a transparent and organized system should be established at the outset of the proceedings to prevent larger problems during any appeals proceedings at a later stage of the proceedings.<sup>30</sup> The Defence believes that immediate resolution of this matter may materially advance the proceedings in that respect.<sup>31</sup>

16. The Defence maintains that the conditions required under article 82(1)(d) of the Statute for granting leave for an interlocutory appeal have, therefore, been met.<sup>32</sup>

17. The Prosecution responds that that the Defence Request should be dismissed by the Single Judge.<sup>33</sup> The Prosecution maintains that the Single Judge should dismiss the Defence's request seeking the adoption of an alternative mechanism because it is, in reality, a veiled request for reconsideration.<sup>34</sup> The Prosecution asserts that the criteria for the Single Judge to reconsider the decision have not been met, to the extent that the Defence has not demonstrated a clear error of reasoning or the necessity of preventing an injustice.<sup>35</sup>

18. The Prosecution maintains that the Defence's request for leave to appeal is similarly without merit.<sup>36</sup> The Prosecution alleges that the Defence does not identify any appealable issue.<sup>37</sup> The Prosecution submits that the Defence misreads the Single Judge's decision and merely disagrees with it.<sup>38</sup> The Prosecution asserts that the Request does not meet either of the two cumulative criteria contained in article 82(1)(d) of the Statute to the extent that the Defence does not show how the fair and expeditious conduct of proceedings or the outcome of the trial would be significantly affected, or that immediate appellate resolution is warranted.<sup>39</sup>

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<sup>30</sup> Request, para. 34.

<sup>31</sup> Request, para. 34.

<sup>32</sup> Request, para. 24, making reference to *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, "Decision on the 'Demande d'autorisation d'interjeter appel de la décision orale rendue par la Chambre de première instance le 4 septembre 2017'", 11 October 2017, ICC-02/11-01/15-1051, para. 4.

<sup>33</sup> Response, para. 20.

<sup>34</sup> Response, paras. 2, 4-7.

<sup>35</sup> Response, paras. 2, 4-7.

<sup>36</sup> Response, paras. 3, 8.

<sup>37</sup> Response, paras. 3, 9.

<sup>38</sup> Response, paras. 3, 11-13.

<sup>39</sup> Response, paras. 3, 14-19.

## B. Applicable law

19. The Chamber refers to articles 57(2)(b), 61(3), 67(1)(a) and (b), and 82(1)(d) of the Statute, rules 121(2) and 155 of the Rules, and regulation 65 of the Regulations of the Court.

## C. Findings of the Chamber

20. The Chamber wishes to distinguish the three requests made by the Defence in its Request: first, the adoption in the present proceedings of the table presented in the annex to its Request; second, and in the alternative, leave to appeal the Decision on the Analysis Chart; and third, the adoption of different time frames than those set out in rule 121(3) – for filing the document containing the charges, (4) and (5) of the Rules.

21. The Chamber will address the first two requests of the Defence in the present decision and the third in a later decision.

### 1. Adoption of the table presented in the annex to the Request

22. Regarding the first request, namely the adoption in the present proceedings of the table presented in the annex to the Request, the Chamber recalls that, in the Decision on the Evidence Disclosure Protocol, the Single Judge<sup>40</sup> directed the parties to submit observations on a possible analysis of the evidence exchanged.<sup>41</sup> As stated above, on 24 May 2018, the Prosecution filed observations,<sup>42</sup> to which

<sup>40</sup> "Decision Designating a Single Judge", 28 March 2018, reclassified as public on 31 March 2018, ICC-01/12-01/18-6-tENG.

<sup>41</sup> [Decision on the Analysis Chart](#), para. 23 and p. 11.

<sup>42</sup> "Prosecution's observations regarding the 'Décision relative au système de divulgation et à d'autres questions connexes (ICC-01/12-01/18-31)'", ICC-01/12-01/18-38-Conf-Exp, and its confidential *ex parte* annex ICC-01/12-01/18-38-Conf-Exp-AnxA. Subsequently, on 25 April 2018, the Prosecution filed a confidential redacted version, *ex parte* available only to the Prosecution and the Defence, ICC-01/12-01/18-38-Conf-Exp-Red, with a confidential redacted annex, ICC-01/12-01/18-38-Conf-Exp-AnxA, as well as a public redacted version, [ICC-01/12-01/18-38-Red2](#).



the Defence responded on 6 June 2018.<sup>43</sup> In its submissions, the Defence requested that the Single Judge reject the Prosecution's arguments and the suggestion of an alternative disclosure table set out in the annex to its observations, and order the production of an in-depth analysis chart of incriminatory evidence following the model provided by the Single Judge in the Decision on the Evidence Disclosure Protocol.<sup>44</sup>

23. On 29 June 2018, the Single Judge issued the Decision on the Analysis Chart, in which – in view of the arguments presented by the parties – he found that, in the present case, parties should not be required to provide any evidence analysis chart at the time of disclosure.<sup>45</sup>

24. By repeating, in the present Request, its request that the Single Judge adopt an analysis chart, the Defence, in essence, is seeking reconsideration of the Decision on the Analysis Chart and that the Single Judge rule again on the matter.

25. The Chamber, however, recalls that the legal framework established by the Statute and the Rules does not provide for motions for reconsideration as a procedural remedy against a decision taken by a Pre-Trial Chamber or Single Judge,<sup>46</sup> and that Pre-Trial Chambers have constantly denied requests for reconsideration as having no statutory support.<sup>47</sup>

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<sup>43</sup> "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'", ICC-01/12-01/18-45-Conf-Exp. On the same day, the Defence also filed a public redacted version of its response, [ICC-01/12-01/18-45-Red](#).

<sup>44</sup> [ICC-01/12-01/18-45-Red](#), paras. 5, 41, 45.

<sup>45</sup> [Decision on the Analysis Chart](#), para. 23 and p. 11.

<sup>46</sup> See Pre-Trial Chamber II, "Decision on a Request for Reconsideration or Leave to Appeal the 'Decision on the "Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014'"", 22 September 2014, French translation registered on 2 October 2014, ICC-RoC46(3)-01/14-5, para. 5; *The Prosecutor v. Bosco Ntaganda*, "Decision on the 'Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014'", 4 July 2014, ICC-01/04-02/06-322, para. 27, "Decision on the Defence Request for Leave to Appeal", 13 January 2014, ICC-01/04-02/06-207, p. 16, footnote 50; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, "Decision on the 'Defence Request for Leave to Appeal the "Urgent Decision on the 'Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence'" (ICC-01/09-01/11-260)'"", 29 August 2011, ICC-01/09-01/11-301, para. 18; *The Prosecutor v. William Samoei Ruto, Henry Kiprono*

26. The Defence's Request seeking the adoption of the table presented in the annex to its Request is, therefore, rejected *in limine*.

## 2. Request for leave to appeal

27. Regarding the second request, namely the request for leave to appeal the Decision on the Analysis Chart, the Chamber wishes to recall the restrictive character of the remedy provided for under article 82(1)(d) of the Statute, already recalled by Pre-Trial Chamber I, in its previous composition, which noted in this regard that "the drafting history of article 82 indicates that interlocutory appeals were meant to be admissible only under limited and very specific circumstances".<sup>48</sup>

28. Article 82(1)(d) of the Statute provides as follows:

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

29. The Chamber recalls that these criteria are cumulative and that the party requesting leave to appeal must demonstrate that the impugned decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" *and* that "in the opinion of the Pre-Trial or

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*Kosgey and Joshua Arap Sang*, "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 May 2011, ICC-01/09-01/11-101, para. 42, "Decision on the 'Prosecution's Application for Extension of Time Limit for Disclosure'", 10 May 2011, ICC-01/09-01/11-82, para. 11; Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal", 23 June 2006, ICC-01/04-01/06-166, paras. 10-12.

<sup>47</sup> See Pre-Trial Chamber II, "Decision on a Request for Reconsideration or Leave to Appeal the 'Decision on the "Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014"', 22 September 2014, ICC-RoC46(3)-01/14-5, para. 5, footnote 10 and references cited.

<sup>48</sup> Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 31 March 2006, ICC-01/04-135-tEN, para. 22. See also paras. 21, 23-24.

Trial Chamber, an immediate resolution [of the issue] by the Appeals Chamber may materially advance the proceedings”.

30. In this regard, the Chamber emphasizes that, pursuant to article 82(1)(d) of the Statute, it is for the Pre-Trial or Trial Chamber whose decision is impugned to determine – at its discretion – which issues are appealable and which are not.<sup>49</sup> The Appeals Chamber, however, stated that the right to appeal a decision under article 82(1)(d) arose only if the Pre-Trial or Trial Chamber was of the opinion that an impugned decision must receive the immediate attention of the Appeals Chamber.<sup>50</sup>

31. Lastly, the Chamber emphasizes that, before examining the two criteria mentioned above, based on the Appeals Chamber’s previous decisions, the Chamber must first be certain that the issue at stake is an “appealable issue”.<sup>51</sup> In this regard, the Chamber recalls that:

[t]here may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.<sup>52</sup>

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<sup>49</sup> Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled ‘Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court’”, 18 December 2015, ICC-02/11-01/15-369, para. 18 (“The Appeals Chamber observes that article 82(1)(d) of the Statute clearly vests power solely in the Pre-Trial and Trial Chambers to certify appealable issues and to determine whether appellate resolution will materially advance the proceedings.”). See also *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’”, 1 November 2016, ICC-02/11-01/15-744, para. 13 (“More recently, the Appeals Chamber [...] declined to conduct its own assessment of the criteria of article 82(1)(d) of the Statute, noting the lack of a legal basis to do so.”).

<sup>50</sup> *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”, 13 July 2006, ICC-01/04-168 (“Judgment of 13 July 2006”), para. 20; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’”, 1 November 2016, ICC-02/11-01/15-744, para. 12.

<sup>51</sup> Judgment of 13 July 2006, para. 9.

<sup>52</sup> Judgment of 13 July 2006, para. 9. See also Pre-Trial Chamber I, *Situation in Darfur, Sudan*, “Décision relative à la requête sollicitant l’autorisation d’interjeter appel du conseil ad hoc pour la Défense”, 23 November 2006, ICC-02/05-33, p. 5.

32. The Chamber notes that the Pre-Trial Chambers have consistently denied requests for leave to appeal when the requesting party has not demonstrated the existence of an appealable issue,<sup>53</sup> for example, when a Pre-Trial Chamber found that “the alleged issue amount[ed] to a mere disagreement with the findings of the Chamber, stemming from the exercise of its discretionary powers to freely assess the evidence submitted”<sup>54</sup> or a mere disagreement on the interpretation of an article of the Statute.<sup>55</sup>

33. The Chamber finds that, in the present case, the Defence has not identified an appealable issue. By claiming that the Single Judge did not correctly take into account the specific circumstances of the case because, had he done so, he would have decided otherwise, the Defence simply shows its disagreement with the outcome of the Single Judge’s exercise of discretionary power, as emphasized by the Prosecution. In previous rulings, Pre-Trial and Trial Chambers have considered that a mere disagreement with the reasoning of a decision made by a chamber (i.e. the position taken on the substance of the issue) did not itself constitute a valid

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<sup>53</sup> See, for example, Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, “Joint decision on the applications for leave to appeal the ‘Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute’”, 23 January 2015, ICC-01/05-01/13-801; *The Prosecutor v. Bosco Ntaganda*, “Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’”, 4 July 2014, ICC-01/04-02/06-322; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the ‘Defence Request to review or, in the alternative, for leave to appeal, the Decision on a number of procedural issues raised by the Registry’”, 14 July 2009, ICC-01/04-01/07-1301, paras. 13 (“The present Application falls short of these essential requirements. The Defence has failed to clearly and unequivocally set out what constitutes the appealable issue or from which part of the impugned Decision it arises. General disagreement with the procedure adopted by the Chamber, or indeed the opinion that the Chamber should already have decided the issue in favour of the applicant, are not appealable issues in the sense of article 82(1)(d).”), 17; Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges”, 24 May 2007, ICC-01/04-01/06-915.

<sup>54</sup> Pre-Trial Chamber I, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigay Kenyatta*, “Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges”, 9 March 2012, ICC-01/09-02/11-406, para. 76; *The Prosecutor v. Bahar Idriss Abu Garda*, “Decision on the ‘Prosecution’s Application for Leave to Appeal the “Decision on the Confirmation of Charges”’”, 23 April 2010, ICC-02/05-02/09-267, para. 25.

<sup>55</sup> Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges”, 24 May 2007, ICC-01/04-01/06-915, para. 74.

ground for appeal under article 82(1)(d) of the Statute,<sup>56</sup> and the Appeals Chamber has considered that an appealable issue was not “merely a question over which there is disagreement or conflicting opinion”.<sup>57</sup>

34. As mentioned above, the Defence submits that the impugned decision, which lacks clear reasoning, fails – it believes – to assess and consider several factors which, together, would result in the suspect not being informed of the charges brought against him sufficiently in advance of the confirmation hearing and him not having adequate time and facilities for the preparation of his defence, as required under article 67(1)(a) and 67(1)(b) of the Statute.<sup>58</sup> In the view of the Chamber, the Defence’s argument is insufficient to identify a clearly appealable issue that, according to previous rulings, is a matter of law, of fact or of law and fact.<sup>59</sup> Rather than identifying an appealable issue, the Defence simply seeks leave to appeal the decision in its entirety.<sup>60</sup>

35. Considering that the Chamber is of the opinion that the Defence, in the Request, has not identified an appealable issue, there is no need for the Chamber to examine the two criteria contained in article 82(1)(d) of the Statute. The Defence’s request to be granted leave to appeal the Decision is, therefore, rejected.

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<sup>56</sup> See Trial Chamber V, *Situation in the Republic of Kenya*, “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Disclosure of Information related to Prosecution Intermediaries’”, 8 October 2013, ICC-01/09-01/11-1018-Red, para. 6, “Decision on the joint defence request for leave to appeal the decision on witness preparation”, 11 February 2013, ICC-01/09-01/11-596, para. 6 (“The Chamber observes that the Appeals Chamber’s reasoning in that regard is fully consistent with the jurisprudence of the ad hoc tribunals, which rejects the mere dispute over the correctness of a Chamber’s reasoning as a proper course of submissions for leave to appeal an interlocutory decision”). See also Pre-Trial Chamber II, *The Prosecution v. Bosco Ntaganda*, “Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’”, 4 July 2014, ICC-01/04-02/06-322, para. 33.

<sup>57</sup> Judgment of 13 July 2006, para. 9.

<sup>58</sup> Request, paras. 25-27.

<sup>59</sup> See Judgment of 13 July 2006, para. 9; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the ‘Prosecution’s Request for Leave to Appeal the Trial Chamber’s Oral Ruling Denying Authorisation to Add and Disclose Additional Evidence after 30 November 2009’”, 28 January 2010, ICC-01/05-01/08-680, para. 34.

<sup>60</sup> Request, para. 26.

**FOR THESE REASONS, the Chamber**

**REJECTS** *in limine* the Defence's request that the table provided in the annex to its Request be adopted; and

**REJECTS** the Defence's request to be granted leave to appeal the Decision on the Analysis Chart.

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

[signed]

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**Judge Péter Kovács**

**Presiding Judge**

[signed]

[signed]

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**Judge Marc Perrin de Brichambaut    Judge Reine Adélaïde Sophie Alapini-Gansou**

Dated this 18 September 2018

At The Hague, Netherlands