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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**

Public Document

Decision on the “*Requête de l’Accusation sollicitant l’augmentation du nombre de pages autorisées pour le dépôt du Document contenant les charges*”

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

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REGISTRY

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Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Péter Kovács, designated 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 hereby delivers a decision on an extension of the page limit for the Document Containing the Charges (“DCC”).

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 Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan” and “Warrant of Arrest”).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. 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.⁴
4. On 22 May 2018, the Single Judge issued his decision on the Warrant of Arrest (“Decision on the Warrant of Arrest”).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 the Evidence Disclosure Protocol”).⁶

¹ “Decision Designating a Single Judge”, dated 28 March 2018 and reclassified as public on 31 March 2018, ICC-01/12-01/18-6-tENG (“Decision of 28 March 2018”).

² “Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 27 March 2018, ICC-01/12-01/18-2-tENG.

³ ICC-01/12-01/18-11-US-Exp.

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

⁵ “Decision on the Prosecutor’s Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 22 May 2018, ICC-01/12-01/18-35-Conf-Exp-Red-tENG. A public redacted version was filed that day.

⁶ [ICC-01/12-01/18-31](#).

6. On 20 July 2018, the Single Judge issued his “Decision Postponing the Date of the Confirmation Hearing” (“Decision Postponing the Date of the Hearing”),⁷ setting the hearing for 6 May 2019.

7. 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” (“Decision on the Date of Filing of the DCC”).⁸

8. On 12 February 2019, the Prosecutor filed information on the disclosure of the evidence and on the forthcoming applications to make redactions, along with a request for more time to file the document containing the charges.⁹

9. On 25 February 2019, the Single Judge issued the “*Ordonnance fixant une date butoir pour le dépôt des requêtes en vue du dépôt du document contenant les charges*”, in which he instructed the Prosecutor to file all of her applications for the purpose of filing the document containing the charges by 15 March 2019, deferred the date of the confirmation hearing and advised that it would be rescheduled after 15 March 2019.¹⁰

10. On 28 March 2019, the Prosecutor filed a request to extend the page limit for the filing of the DCC (“Request”).¹¹

11. On 8 April 2019, the Defence filed its response to the Prosecution’s Request (“Response”).¹²

⁷ ICC-01/12-01/18-94-Red-tENG.

⁸ ICC-01/12-01/18-143-tENG.

⁹ “*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*”, 12 February 2019, ICC-01/12-01/18-243-Secret-Exp. On 15 February 2019, the Prosecution filed a public redacted version of this document, ICC-01/12-01/18-243-Red2.

¹⁰ ICC-01/12-01/18-255, para. 15.

¹¹ “*Requête de l’Accusation sollicitant l’augmentation du nombre de pages autorisées pour le dépôt du Document contenant les charges*”, 28 March 2019, ICC-01/12-01/18-296-Conf-Exp. The same day the Prosecutor filed a public redacted version of its request, ICC-01/12-01/18-296-Red.

¹² “*Defence response to the ‘Requête de l’Accusation sollicitant l’augmentation du nombre de pages autorisées pour le dépôt du Document contenant les charges’*”, ICC-01/12-01/18-304-Conf-Exp. That day the Defence filed a public redacted version of its request, ICC-01/12-01/18-304-Red.

II. Analysis

A. Submissions of the parties

12. The Prosecutor seeks, pursuant to regulation 37(2) of the Regulations of the Court, an extension of the page limit of the DCC to 500 pages, owing to the exceptional circumstances which are particular to producing the DCC in the case at bar.¹³

13. The Prosecutor puts forward several factors as “exceptional circumstances” which, she believes, justify granting her request. First, the Prosecutor adverts to the substantial number of charges against Mr Al Hassan.¹⁴ Next, the Prosecutor maintains that the page limit prescribed by the Regulations of the Court precludes compliance with the Chamber’s instructions on the structure and content of the DCC.¹⁵ The Prosecutor states that, in accordance with the Chamber’s instructions, she has presented the DCC in a single part and its structure is informed by legal considerations as opposed to a purely fact-based analysis.¹⁶ That approach requires that for each crime and each applicable mode of criminal responsibility, the underlying legal and factual elements be specifically addressed at length.¹⁷ Furthermore, the Prosecutor recalls her obligation to be sufficiently specific and exhaustive in her presentation and description of the events relating to the crimes alleged and to provide for each statement of fact in the DCC a footnote referring to the supporting evidence.¹⁸ That entails, in the Prosecutor’s view, substantial explanation and a concomitant considerable increase in the number of pages of the DCC.¹⁹

14. Lastly, as she has not, at this stage, secured an agreement as to evidence in accordance with rule 69 of the Rules of Procedure and Evidence (“Rules”),

¹³ Request, paras. 1-2, 4.

¹⁴ Request, para. 2.

¹⁵ Request, para. 4.

¹⁶ Request, paras. 2, 6-7.

¹⁷ Request, paras. 2, 6-8.

¹⁸ Request, paras. 2, 9-11.

¹⁹ Request, paras. 2, 6-11.

the Prosecutor states that she must treat at considerable length several aspects which she had thought were uncontested.²⁰

15. The Prosecutor emphasizes that extending the page limit of the DCC is not prejudicial to the Defence; on the contrary, the additional pages will be conducive to affording the Defence better notice of the charges and giving the Chamber, the victims and the general public a better understanding of the case.²¹

16. The Defence moves the Single Judge to dismiss the Prosecutor's request.²² The Defence submits that the Prosecutor's request to extend the DCC to 500 pages is excessive and disproportionate and that that length would likely cause delays in the proceedings and violate Mr Al Hassan's right to an expeditious trial.²³ The Defence emphasizes that it is the settled view of the Court that the confirmation hearing is neither a "trial before the trial" nor a "mini trial", and that, considering the limited ambit of the confirmation hearing, a DCC of that size cannot be allowed.²⁴

17. The Defence states that the circumstances of the case do not warrant a 500-page DCC.²⁵ Although the Chamber gave clear indications regarding the structure and content of the DCC, it did not, in the Defence's view, suggest that the DCC could run to that length.²⁶ The Defence adds that the number of charges in the case is not unprecedented, pointing to *Ongwen*, in which Pre-Trial Chamber II confirmed 70 counts of war crimes and crimes against humanity, whereas the DCC filed by the Prosecutor contained only 49 pages.²⁷

18. The Defence is of the view that in the DCCs in other cases before the Court the detailed presentation of the legal arguments related to the contextual elements of war crimes and crimes against humanity never required inordinate extensions to

²⁰ Request, paras. 2, 12.

²¹ Request, para. 13.

²² Response, paras. 2, 25.

²³ Response, paras. 2, 4.

²⁴ Response, para. 8.

²⁵ Response, p. 4.

²⁶ Response, para. 9.

²⁷ Response, para. 10.

page limits.²⁸ The Defence cites the examples of the DCCs in *Ntaganda* and in *Bemba*, where the Prosecutor was also required to prove the contextual elements of the alleged crimes and yet said documents nonetheless ran to 60 and 40 pages, respectively.²⁹ Furthermore, the Defence explains that the Prosecutor has been fully aware of the specific nature of this case and that, therefore, contrary to what she asserts, the circumstances of the case are not new or unforeseeable.³⁰ Moreover, the Defence points out that the instructions given by the Chamber have already taken into account the specific circumstances of the case and the specificity required is entirely in line with the requirement to provide a “detailed description” in accordance with rule 121(3) of the Rules.³¹ Lastly, while the presentation of the DCC as a single document might increase the number of footnotes, the final document should not run to 500 pages.³²

19. The Defence goes on to argue that the extension requested will cause unnecessary delays in the proceedings.³³ The Prosecutor’s request is late and should have been made well before the date when the DCC was supposed to be filed, 6 March 2019; the Prosecutor has had ample opportunity to do so and is already slowing the conduct of the proceedings.³⁴ The Defence notes that it has already highlighted the Prosecutor’s repeated failure to raise in an expeditious manner issues that could seriously affect the conduct of the proceedings.³⁵

20. The Defence asserts that the DCC is and should remain a working document, which allows the suspect to be informed promptly and in detail of the nature of the charges brought against him.³⁶ A 500-page DCC would constitute too heavy a workload for both the Defence and the Chamber and would require the Defence to request additional resources, which would likely be provided too late for it to

²⁸ Response, para. 11.

²⁹ Response, para. 11.

³⁰ Response, para. 12.

³¹ Response, para. 13.

³² Response, para. 14.

³³ Response, p. 6.

³⁴ Response, paras. 15, 17.

³⁵ Response, para. 16.

³⁶ Response, para. 18.

analyse fully the contents.³⁷ Such a DCC would also have consequences throughout the trial, should the charges be confirmed; were the DCC alone to amount to 500 pages, the decision on the confirmation of charges could be just as long, and so the Defence ponders how long a closing brief at trial would be to cover the charges and evidence in a 500-page DCC.³⁸ The Defence asserts that the absurd and disproportionate nature of the request cannot be denied.³⁹

21. Lastly, the Defence states its concerns regarding the Arabic translation of the DCC.⁴⁰ The Defence recalls that the Chamber ordered the Arabic version of the DCC to be filed 30 days before the confirmation hearing, and it seems obvious that the translation of 500 pages will be longer and more difficult than that of a standard size DCC.⁴¹ The Defence notes in passing that it has still not received the translation of the version of the Application for a Warrant of Arrest containing fewer redactions.⁴² Without an Arabic translation of the DCC, Mr Al Hassan's right to be informed of the charges against him in a language he fully understands and speaks will be violated and the Defence will be unable to perform its task.⁴³ The Defence submits that significant delays have already beset the pre-trial proceedings and that any further delay would jeopardize Mr Al Hassan's right to be tried without undue delay.⁴⁴

22. For all of those reasons, the Defence objects to an extension of the page limit of the DCC to 500 pages.⁴⁵ The Defence nonetheless accepts a possible extension of no more than 50 additional pages.⁴⁶ Were the Chamber to grant an extension of the page limit, it should make clear that the final DCC shall include all three charging

³⁷ Response, paras. 19-20.

³⁸ Response, para. 21.

³⁹ Response, para. 21.

⁴⁰ Response, para. 23.

⁴¹ Response, para. 23.

⁴² Response, para. 23.

⁴³ Response, para. 23.

⁴⁴ Response, paras. 23-24.

⁴⁵ Response, para. 25.

⁴⁶ Response, para. 26.

documents and that no other written document of that nature shall be filed by the Prosecutor before the confirmation hearing.⁴⁷

B. Applicable law

23. The Single Judge refers to articles 61(3) and 67(1)(a) and (b) of the Statute, rule 121 of the Rules, and regulations 37 and 38 of the Regulations of the Court.

C. The Single Judge's determination

24. The Single Judge notes that in his Decision on the Date of Filing of the DCC he instructed the Prosecutor as follows:

29. Turning to the structure of the DCC, the Chamber asks that the Prosecutor provide a single document, consisting of one part only and in which each statement of fact has a footnote referring specifically, by means of hyperlinks, to the supporting evidence, as was done in the Application for the Issuance of a Warrant of Arrest [...] the Chamber would like all references to the evidence to be contained in the DCC and not in a separate document. [Footnote omitted]

25. The Single Judge calls the attention of the Prosecutor to the fact that a single document avoids repetition among documents and the need for the reader to collate the contents of various documents in order to have a clear idea of the charge *and* the evidence in support.

26. Regarding the number of pages in the DCC, the Single Judge notes that regulations 38(1)(a) and 38(3)(g) of the Regulations of the Court respectively limit the "pre-trial brief" to 120 pages and "the description of the charges by the Prosecutor" to 30 pages. The Single Judge further notes regulation 37(2) of the Regulations of the Court, which authorizes the Chamber, "at the request of a participant [...] in exceptional circumstances", to "extend the page limit". The Single Judge finds merit in the Prosecutor's arguments that the degree of specificity demanded⁴⁸ and the

⁴⁷ Response, paras. 25-27.

⁴⁸ See the Decision of 5 October 2018, para. 30 ("The Chamber further notes that the Prosecutor must be sufficiently specific and exhaustive in her presentation and description of the events relating to the crimes alleged, so that the Chamber can be equally specific and exhaustive in its decision on the confirmation of the charges. The Chamber recalls in this connection that the 'charges', which may ultimately be confirmed and delimit the scope of the trial, consist of, among other ingredients, 'facts',

requirement to include in the footnotes to the DCC all of the evidence in support of the charges may call for considerable detail in the document and require the page limit to exceed the abovementioned limits prescribed by regulation 38 of the Regulations of the Court and even their sum-total. The Single Judge therefore agrees to the Prosecutor's request to extend to 500 the page limit of the single document containing the charges described above.

27. The Single Judge nonetheless recalls in this regard that page limits are imposed on parties' submissions to make them present their arguments in a manner that is concise and provides a coherent overview. The Single Judge must therefore underline that the additional pages are allowed in this instance for the purpose of *specifying* the facts, but not at the expense of the concision and clarity with which the Prosecutor must present her case.

28. Regarding the structure of the DCC, the Single Judge does, however, note the Defence's concern at the difficulty of having to identify the exact charges laid against Mr Al Hassan from a 500-page document. Accordingly, the Single Judge requires the Prosecutor to set out the charges against Mr Al Hassan in a clear and exhaustive manner in the DCC.⁴⁹ It is for the Prosecutor to choose the most appropriate way to do so; of prime importance is that the charges, whose confirmation the Prosecutor seeks, can be readily identified by the Defence and the Chamber – whether, for example, they appear in the introduction to the various

as described in regulation 52 of the Regulations of the Court, which include, among other particulars, the time and place of the alleged crimes and provide a sufficient legal and factual basis to bring the person charged to trial. Accordingly, the Chamber emphasizes the need for the Prosecutor to be as specific and exhaustive as possible in respect of those facts in her DCC. Nonetheless, the Chamber is of the view that the degree of specificity expected from the Prosecutor in her description of the facts depends on the nature of the crimes in question and the circumstances of the case brought by the Prosecutor before the Chamber. Where crimes such as torture or rape are concerned, the Prosecutor must describe the criminal acts in issue, stating the date and place of the acts, along with the number of victims, or at the very least a clear estimate of that number, and their identities as far as at all possible. However, where by their nature the crimes are directed against a group or collectivity of people, as in the case of the crime of persecution, a like degree of specificity cannot be expected of the Prosecutor's description of the facts; nonetheless, the Prosecutor must endeavour to pinpoint as much as possible places, times and approximate numbers of victims and to provide the necessary particulars to make out the elements of the crimes.”).

⁴⁹ In this regard, the Single Judge reminds the Prosecutor that the distinction between material facts and subsidiary facts has been rejected by the Appeals Chamber, see ICC-02/11-01/11-572, para. 37.

parts of the DCC or at the end of the document – and without reference to the evidence.

29. The Single Judge further recalls his instructions to the Prosecutor in the Decision of 5 October 2018:

29. [...] legal considerations, as opposed to a purely fact-based analysis, must inform the DCC's structure, which must differentiate clearly between war crimes and crimes against humanity, and, under each such head, differentiate clearly between the various crimes charged and between the various modes of responsibility.

The Single Judge requires that, to that end, the Prosecutor be guided by the structure of the Decision on the Warrant of Arrest.

30. Regarding the Arabic translation of the DCC, the Single Judge notes that, in his Decision Postponing the Date of the Hearing, he

instruct[ed] 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.⁵⁰

Therefore, the Prosecutor was informed in July of 2018 of the need to file an Arabic version of the DCC one month before the date of the hearing. The time frame for the translation, resulting primarily from the Prosecutor's decision regarding the size of the DCC, should under no circumstances cause prejudice to the suspect. To enable the Defence, together with Mr Al Hassan, to begin analysing the DCC as soon as possible, the Prosecutor is hereby invited to ensure that, as stated above, priority is given to the translation and disclosure of the part(s) of the DCC where the charges are set out in detail.

31. Lastly, regarding the Defence's concern that the size of the DCC could entail further delays to the present proceedings, the Single Judge sees that the Prosecutor has chosen to submit her request late with no certainty that the Single Judge would grant it and so she risks getting into difficulty. Moreover, the DCC was initially due by 6 March 2019 and so, not counting the time needed for the Prosecutor to finalize it in accordance with the Single Judge's decisions on her requests to withhold

⁵⁰ Decision Postponing the Date of the Hearing para. 26, p. 12.

witnesses' identities, the DCC should be ready by now. Consequently, no additional time should, in principle, be granted to the Prosecutor owing to the length of the DCC.

FOR THESE REASONS, the Single Judge

GRANTS the Prosecutor's request for an extension of the page limit for filing the Document Containing the Charges;

INSTRUCTS the Prosecution to file a single document containing a detailed description of the charges and all of the factual and legal explanations in support of the charges, and a list of the evidence;

DECIDES that the page limit of that document containing the charges shall be 500;

INSTRUCTS the Prosecutor to set out the charges in a clear and exhaustive manner in the DCC, without reference to the evidence;

REMINDS the Prosecutor that, in the case at bar, she must file the document containing the charges no later than 60 days before the confirmation hearing, whose date will be communicated shortly;

REMINDS the Prosecutor that she must file an Arabic version of the document containing the charges no later than 30 days before the confirmation hearing.

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

[signed]

Judge Péter Kovács
Single Judge

Dated this 18 April 2019

At The Hague, Netherlands