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Date: **8 October 2018**

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

**Second Decision on the Principles Applicable to Victims' Applications for
Participation**

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

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

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”), as of 28 March 2018,¹ decides as follows.

I. Procedural history

1. On 20 March 2018, the Prosecutor filed an application (“Prosecutor’s Application”) seeking the issuance of a warrant of arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan”).²
2. On 27 March 2018, pursuant to article 58 of the Rome Statute (“Statute”), the Chamber issued a warrant of arrest for Mr Al Hassan.³
3. On 31 March 2018, Mr Al Hassan was surrendered to the Court, and he is currently in custody at the Court’s detention centre in The Hague.⁴
4. On 3 April 2018, the Single Judge scheduled the first appearance for 4 April 2018.⁵
5. On 4 April 2018, the first appearance hearing was held, at which the date for the start of the confirmation hearing was set for Monday, 24 September 2018.⁶

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

² “*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 the Defence Team for 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.

³ “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.

⁴ ICC-01/12-01/18-11-US-Exp.

⁵ “Order Scheduling the First Appearance of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 3 April 2018, ICC-01/12-01/18-12-tENG.

⁶ Transcript of the first appearance hearing, 4 April 2018, ICC-01/12-01/18-T-1-CONF-FRA ET.

6. On 9 May 2018, the Chamber received observations from the Registry on the admission process for victims seeking to participate in the proceedings.⁷

7. On 18 May 2018, the Registry filed a report on the identity documents currently available in Mali which the victims could use to prove their identity in compliance with rule 85 of the Rules of Procedure and Evidence (“Rules”), and it proposed two forms: one for the organizations and institutions referred to under rule 85(b) of the Rules, and another for groups of victims.⁸

8. The Prosecution and the Defence made no submissions in response.

9. On 24 May 2018, the Single Judge issued the “Decision Establishing the Principles Applicable to Victims’ Applications for Participation” (“Decision of 24 May 2018”),⁹ in which, among other things, he established the system to be used in the *Al Hassan* case for processing victims’ applications for participation¹⁰ and instructed the Registry to classify the applicants into three categories: “(a) applicants who clearly qualify as victims (‘Group A’); (b) applicants who clearly do not qualify as victims (‘Group B’); and (c) applicants for whom the Registry could not make a clear determination for any reason (‘Group C’).”¹¹ The Single Judge also instructed the Registry to transmit all complete applications to the Chamber and all Group C applications to the parties, and to provide regular reports listing the applications for participation and classifying them according to the three groups, and assessment reports highlighting the difficulties encountered regarding Group C applications.¹²

⁷ “Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings”, 9 May 2018, reclassified as public on 11 May 2018, ICC-01/12-01/18-28-Conf and two annexes, ICC-01/12-01/18-28-Conf-Exp-AnxI and ICC-01/12-01/18-28-Conf-AnxII.

⁸ “Registry’s Report on Proof of Identity Documents Available in Mali and Transmission of Proposed Application Forms for Rule 85(b) RPE Victims and Groups of Victims”, 18 May 2018, ICC-01/12-01/18-33, and four annexes, ICC-01/12-01/18-33-AnxI, ICC-01/12-01/18-33-Conf-Exp-AnxII, ICC-01/12-01/18-33-Conf-Exp-AnxIII and ICC-01/12-01/18-33-Conf-Exp-AnxIV.

⁹ ICC-01/12-01/18-37.

¹⁰ Decision of 24 May 2018, paras. 42-55.

¹¹ Decision of 24 May 2018, para. 59(i).

¹² Decision of 24 May 2018, para. 59.

10. On 20 July 2018, the Single Judge postponed the confirmation hearing to 6 May 2019.¹³

11. On 17 September 2018, the Registry filed a first transmission report of Group A applications for victim participation¹⁴ and a first transmission report of Group C applications for victim participation.¹⁵

12. On the same day, the Registry filed a first assessment report on the 34 applications for victim participation, including information on the steps taken in this regard, the assessment criteria applied, the approach adopted in relation to Group A applications, and the difficulties encountered when assessing Group C applications (“Registry’s First Assessment Report”, “First Assessment Report”).¹⁶

13. The Prosecution and the Defence made no submissions in response.

II. Applicable law

14. The Single Judge refers to article 21, 57(3)(c) and 68 of the Statute, rules 85 and 89 of the Rules, regulation 86 of the Regulations of the Court and regulations 107 and 109 of the Regulations of the Registry.

III. Analysis

15. The Single Judge notes the explanations of the Victims Participation and Reparations Section (“VPRS”) concerning the examination – in accordance with

¹³ “Decision Postponing the Date of the Confirmation Hearing”, 20 July 2018, ICC-01/12-01/18-94-Conf-Exp-tENG. On the same day, the Single Judge issued a public redacted version of the decision, ICC-01/12-01/18-94-Red-tENG.

¹⁴ “Registry’s First Transmission of Group A Applications for Victims’ Participation in Pre-Trial Proceedings”, 17 September 2018, ICC-01/12-01/18-127, and 20 annexes classified as confidential *ex parte* available only to the Registry.

¹⁵ “Registry’s First Transmission of Group C Applications for Victims’ Participation in Pre-Trial Proceedings”, 17 September 2018, ICC-01/12-01/18-128, and 14 annexes classified as confidential *ex parte* available only to the Registry as well as redacted versions of the annexes.

¹⁶ “Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings”, 17 September 2018, ICC-01/12-01/18-126, and a confidential annex, ICC-01/12-01/18-126-Conf-AnxA.

the Decision of 24 May 2018 – of the applications for participation received to date, including the VPRS’s observations on the form used in the present case and the approach adopted in regard to minor discrepancies, as have been identified in certain applications for participation.

16. Furthermore, the VPRS highlights three difficulties raised by the Group C applications. The Single Judge will address each one of them in turn.

A. Temporal scope

17. The VPRS notes that it is unable to make a clear determination on certain applications for participation that do not include the precise date of the alleged crimes.¹⁷ It explains that the victims may lack familiarity with the Western calendar system or may not recall the precise date of events because of the trauma suffered.¹⁸ To compensate for the lack of a precise date of the incident that they had endured and to provide temporal parameters in their applications, the victims adduced information about the context in which the incidents occurred. The VPRS provides several examples of this in annex A.¹⁹

18. The Single Judge considers that the question before him is the following: can an application for participation be considered complete if, instead of the precise date on which the crime was allegedly committed, it includes information about the context in which the crime is to have occurred or less precise time frames?

19. The Single Judge refers to regulation 86(2)(d) of the Regulations of the Court, according to which applications for participation must contain a description of the incident that the victim suffered, including the date on which the incident occurred. The Single Judge notes that this information must be included on the form “to the extent possible” and that, therefore, it is not a condition *sine qua non*. In the view of the Single Judge, when victims have difficulties providing a precise date for the

¹⁷ Registry’s First Assessment Report, para. 19.

¹⁸ Registry’s First Assessment Report, para. 19.

¹⁹ Registry’s First Assessment Report, paras. 20-21 and ICC-01/12-01/18-126-Conf-AnxA.

crimes alleged, consideration should be given to their personal situation and allowances made for this as far as is possible.

20. In this regard, the Single Judge recalls the established precedent according to which the omission of information need not automatically result in the rejection of an application for participation.²⁰ This principle also applies in all cases where the victim presenting the application does not provide the precise date of the alleged acts. The victim must demonstrate *prima facie* that he or she satisfies the conditions set forth in rule 85(a) of the Rules.

21. To make a determination in accordance with the “*prima facie*” standard of proof, the applications must be assessed case by case on the basis of their intrinsic coherence, taking into consideration any information suggesting that the acts occurred within the time frame of the case before the Chamber and, where appropriate, corroboration by information included in other victim applications.²¹

22. In cases where the victim presenting an application has difficulties providing a precise date for the alleged acts, he or she must provide information relating to the overall context in which the alleged acts occurred in order to substantiate the claim that they occurred within the time frame of the present case. The victims must provide sufficient information that, taken as a whole, supports the conclusion that the application for participation does fall within the time frame of the case at bar.²²

²⁰ See, for example, Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, “Decision on victims’ participation status”, 7 January 2016, [ICC-02/11-01/15-379](#), para. 45 and references cited; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, “Corrigendum to the Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings”, 6 February 2013, ICC-02/11-01/11-384-Corr, para. 37 and references cited; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on 270 applications by victims to participate in the proceedings”, 25 October 2011 (French version registered on 16 June 2016), [ICC-01/05-01/08-1862](#), para. 24 and references cited.

²¹ See, for example, Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, “Decision on victims’ participation status”, 7 January 2016, [ICC-02/11-01/15-379](#), para. 46; Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Fourth Decision on Victims’ Participation”, 12 December 2008 (French version registered on 8 January 2009), [ICC-01/05-01/08-320](#), para. 31.

²² See, for example, Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights”, 27 November 2015, [ICC-02/04-01/15-350](#), paras. 13-14.

23. Thus, for example, because the Chamber concluded that there are reasonable grounds to believe that the armed groups Al-Qaida in Islamic Maghreb (AQIM) and Ansar Dine had taken control of Timbuktu and held the city from early April 2012 to 17 January 2013,²³ the Single Judge considers a reference to “2012”, along with words such as “jihadist”, “rebels” or “armed men”, or even simply a reference to the occupation of Timbuktu, to be sufficient for the application to be considered as within the time frame of the present case.

24. Accordingly, the Single Judge authorizes the VPRS, in accordance with its proposal²⁴ and through its intermediaries, to request victims submitting applications for participation to include in their applications – to the extent possible – information on the context, circumstances and period in which the alleged acts occurred in order clearly to place their applications within the time frame of the present case.

B. Material scope

25. In its First Assessment Report, VPRS stated that it was unable to make a clear determination on the material scope of the crime of persecution on religious or gender grounds,²⁵ considering that, as indicated in the Decision of 24 May 2018, the harm suffered must be the result of an incident falling within the material parameters of the present case.²⁶

26. VPRS requests that the Single Judge inform it whether the acts underlying the crime of persecution, as described by the victims, are strictly limited to the crimes that appear on the warrant of arrest for Mr Al Hassan, or whether they may also include any act under article 7(1) of the Statute or any crime within the jurisdiction of the Court.

²³ “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, para. 5.

²⁴ Registry’s First Assessment Report, para. 20.

²⁵ Registry’s First Assessment Report, para. 22.

²⁶ Decision of 24 May 2018, para. 48.

27. The Single Judge notes first and foremost that article 7(1)(h) of the Statute does not limit the range of material acts constituting the crime of persecution. The acts reported by victims in their applications may, therefore, take various forms.

28. Furthermore, the crime of persecution against an identifiable group or community can be prosecuted under article 7(1)(h) of the Statute only if the act was committed in connection with another crime within the jurisdiction of the Court, “thus filtering out discriminatory measures that would not fall within the Court’s jurisdiction if committed without such connection”.²⁷ Such a requirement concerns the group or community as a whole and not each victim individually. Accordingly, an individual may claim to be the victim of a crime of persecution if he or she, as a member of a group or community that is the victim of persecution, has suffered a severe deprivation of his or her fundamental rights (such as, for example, the right to freedom of expression, freedom of assembly and association, or the right to private property²⁸) even if, by itself, such deprivation would not constitute a crime of persecution in the absence of an act or crime within the jurisdiction of the Court.

29. The Single Judge wishes also to recall that, under article 7(1)(h) of the Statute, it is essential to report the discriminatory grounds of acts constituting the crime of persecution. As set out in the warrant of arrest for Mr Al Hassan, religious and gender grounds are significant for the purposes of the present case.²⁹ It will, therefore, be up to the VPRS to consider the reason for which the acts, which caused harm to the victims, were committed.

²⁷ Pre-Trial Chamber III, *Situation in the Republic of Burundi*, “Public Redacted Version of ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi’, ICC-01/17-X-9-US-Exp, 25 October 2017”, 9 November 2017, ICC-01/17-9-Red, para. 131.

²⁸ Pre-Trial Chamber III, *Situation in the Republic of Burundi*, “Public Redacted Version of ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi’, ICC-01/17-X-9-US-Exp, 25 October 2017”, 9 November 2017, ICC-01/17-9-Red, para. 132. See also Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda”, 9 June 2014 (French version registered on 15 December 2017), [ICC-01/04-02/06-309](#), para. 58.

²⁹ “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, para. 12.

30. As a result, the Single Judge authorizes the VPRS to consider as admissible those applications that describe any form of underlying act constituting the crime of persecution to the extent that the applications also report: (i) the victim's membership of the group or community subjected to the alleged persecution; and (ii) the religious or gender grounds for the commission of the act.

C. Eyewitnesses

31. The VPRS explains in its First Assessment Report that it was unable to make a clear determination on the applications of those who witnessed crimes perpetrated against other members of the population of Timbuktu but who are not members of their family.³⁰ The VPRS observes that, if this type of harm was considered indirect, these individuals could not be admitted to participate in the proceedings because they would be unable to establish a family relationship with the direct victims, as required in the Decision of 24 May 2018.³¹

32. The question now before the Single Judge is whether those who witnessed crimes perpetrated against other members of the population of Timbuktu may be considered direct victims who have sustained psychological harm.

33. The Single Judge refers to the conclusions of the Appeals Chamber, according to which the harm referred to under rule 85(a) of the Rules and suffered by a natural person can take various forms – material, physical or psychological – when suffered personally by the victim.³²

34. Concerning psychological harm, the Single Judge notes that Trial Chamber II, invoking the case law of the Inter-American Court of Human Rights, recognized the

³⁰ Registry's First Assessment Report, para. 23.

³¹ Registry's First Assessment Report, para. 23 and Decision of 24 May 2018, para. 51.

³² Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", 11 July 2008 (French version registered on 27 August 2008), [ICC-01/04-01/06-1432](#), paras. 1, 32, 34, 38; See also Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, "Order for Reparations", 2 March 2015 (French version registered on 28 July 2016), [ICC-01/04-01/06-3129-AnxA](#), para. 10.

psychological harm of victims who established that they had been affected by the attack on Bogoro, in that their presence during the attack and their having seen or fled from the massacres and atrocities perpetrated were sufficient to have caused – and for them to be presumed to have suffered – major repercussions on their mental health.³³ The Single Judge considers this approach to be applicable in the present case.

35. Nonetheless, the Single Judge considers that psychological harm must meet a certain threshold to be considered as such. In this regard, the Single Judge recalls the conclusions of the Chamber, in its previous composition, that

[s]ince the applicant did not see the attack, but only heard gunfire from the direction of the camp, the Chamber is of the view that the [victim]'s experience of the attack is too remote to satisfactorily establish that he suffered psychological harm as a result of it.³⁴

The same Chamber added that

the fact of having heard about the attack and the death of AU soldiers (who were neither family members nor other close associates of the applicant) does not attain the level of psychological harm within the meaning and for the purposes of rule 85(a) of the Rules.³⁵

In the present case, the victims must show that they were present in Timbuktu and that they witnessed a crime committed against someone else.

36. Aware that the standard of proof is low at this stage of the proceedings, the Single Judge considers that, for the victims to prove their presence in Timbuktu at the time when the crimes were committed against others, a detailed description of the events and proof of residence in Timbuktu will be considered sufficient in the present case.

37. Consequently, the Single Judge authorizes the VPRS to consider as victims who have sustained psychological harm those applicants who witnessed crimes

³³ Trial Chamber II, *The Prosecutor v. Germain Katanga*, “Order for Reparations pursuant to Article 75 of the Statute”, 24 March 2017, [ICC-01/04-01/07-3728-tENG](#), paras. 123-129.

³⁴ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Decision on Victims’ Participation at the Hearing on the Confirmation of the Charges”, 29 October 2010 (French version registered on 22 October 2014), ICC-02/05-03/09-89, para. 34.

³⁵ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Decision on Victims’ Participation at the Hearing on the Confirmation of the Charges”, 29 October 2010 (French version registered on 22 October 2014), ICC-02/05-03/09-89, para. 39.

perpetrated against other members of the population of Timbuktu, subject to the conditions set out above.

FOR THESE REASONS, the Single Judge

AUTHORIZES the VPRS to consider as falling within the time frame of the present case all applications containing the information set out in paragraphs 20 to 24 above;

AUTHORIZES the VPRS to consider as admissible those applications that describe any form of underlying act constituting the crime of persecution to the extent that the applications also report: (i) that the victim belongs to the group or community subjected to the alleged persecution, and (ii) the religious or gender grounds for these acts;

AUTHORIZES the VPRS to consider as victims who have sustained psychological harm those who witnessed crimes perpetrated against other members of the population of Timbuktu, subject to the conditions set out in paragraphs 33 to 37 above.

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

[signed]

Judge Péter Kovács

Single Judge

Dated this 8 October 2018

At The Hague, Netherlands