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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

Public redacted version of the Defence request for leave to appeal the Single Judge's "Ordonnance fixant une date butoir pour le dépôt des requêtes en vue du dépôt du document contenant les charges" issued on 25 February 2019

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. On 7 February 2019, the Single Judge issued an “Ordonnance enjoignant au Procureur de déposer des observations précises quant aux requêtes concernant la procédure qu’elle entend déposer avant le début de l’audience de confirmation des charges”.¹
2. On 14 February 2019, the Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan” and the “Defence”) was notified of the “*Éléments d’information concernant notamment la communication des éléments de preuve et les requêtes aux fins d’expurgation à venir et demandes d’extension de délai pour déposer le Document contenant les charges ainsi que la Liste des témoins et des éléments de preuve*”.² The Defence provided its response on 19 February 2019 as instructed in an email by the Chamber.³
3. On 25 February 2019, the Single Judge issued an “Ordonnance fixant une date butoir pour le dépôt des requêtes en vue du dépôt du document contenant les charges”,⁴ which the Defence, in the present submissions, respectfully requests leave to appeal.
4. The Defence identifies two appealable issues in the Impugned Decision that impact on the fairness and expeditiousness of the conduct of the proceedings and that require an immediate resolution by the Appeals Chamber.

II. Classification

5. In accordance with Regulation 23bis(1) of the Regulations of the Court (the “RoC”), this response is classified as confidential *ex parte*, available only to the Defence, Prosecution and the Victims and Witnesses Unit as it contains sensitive information relating to the conditions of the Suspect’s detention.

¹ *Al Hassan*, ICC-01/12-01/18-236, All cases referenced in this document are related to the *Al Hassan* case unless stated otherwise.

² *Al Hassan*, ICC-01/12-01/18-243-Secret-Exp (the Prosecution’s “**Request for a second postponement**”).

³ ICC-01/12-01/18-250-Secret-Exp; ICC-01/12-01/18-250-Red.

⁴ ICC-01/12-01/18-255 (the “**Impugned Decision**”).

III. Applicable law

6. Pursuant to Article 82(1)(d) of the Rome Statute (the “Statute”), either party may appeal 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”. The purpose of such procedure is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.⁵ The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue;⁶ however when determining whether leave to appeal should be granted, the Pre-Trial Chamber must not justify or defend the correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.⁷
7. According to Rule 155(1) of the Rules of Procedure and Evidence (the “Rules”), a party shall make a written application for leave to appeal to the Chamber that issued the decision, setting out the reasons for the request for leave to appeal. The application for leave to appeal shall state the name and number of the case and shall specify the legal and/or factual reasons in support thereof, in accordance with Regulation 65(1) of the RoC. It shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.⁸
8. The Appeals Chamber has ruled that only an “issue” may form the subject-matter of an appealable decision, which it defined as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.⁹ Further, an issue is “a subject the resolution of which is essential for the determination of the matters arising in the judicial

⁵ *Situation in the Democratic Republic of the Congo*, Judgement on the Prosecutor’s Application for the Extraordinary Review of Pre-Trial Chamber I’s 31 March 2016 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 19. (The “**DRC situation Decision**”)

⁶ DRC situation Decision, para. 20.

⁷ See e.g. *Situation in the Republic of Kenya*, Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 18 August 2011, ICC-01/09-02/11-253, para. 28.

⁸ Regulation 65(2) of the RoC.

⁹ DRC situation Decision, para. 9.

cause under examination” and may be “legal or factual or a mixed one”.¹⁰ The issue must be one apt to “significantly affect”, that is, in a material way, either the fair and expeditious conduct of the proceedings, or the outcome of the trial.¹¹ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.¹²

9. The Appeals Chamber has defined the term “fair” as being associated with the norms of a fair trial and corresponding human rights, as per Articles 64(2) and 67(1) of the Statute.¹³ In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial”.¹⁴ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹⁵
10. The Appeals Chamber also held that an issue will be appealable “where the possibility of error in an interlocutory or intermediate decision may have a bearing” on the outcome of the trial.¹⁶ The Pre-Trial Chamber, when deciding on a request for leave to appeal, “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, thereby forecasting the consequences of such an occurrence.¹⁷
11. Regarding the second aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber has held that this criterion will be satisfied if the relevant Chamber rules that an authoritative determination on the appeal would “move forward” the proceedings and “remove doubts about the correctness of the decision or map a course of action along the right lines”.¹⁸ The issue at stake must also be “such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome

¹⁰ DRC situation Decision, para. 9.

¹¹ DRC situation Decision, para. 10.

¹² DRC situation Decision, para. 10.

¹³ DRC situation Decision, para. 11.

¹⁴ DRC situation Decision, para. 11.

¹⁵ DRC situation Decision, para. 12.

¹⁶ DRC situation Decision, para. 13.

¹⁷ DRC situation Decision, para. 13.

¹⁸ DRC situation Decision, paras 14-15.

of the trial”.¹⁹ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.²⁰

IV. Submissions

(A) First Appealable Issue

12. The Defence submits that the Impugned Decision misinterprets Article 60(4) of the Statute and fails to uphold the high standard set by this provision. The Impugned Decision also errs by making a determination based on Rule 121(7) when this Rule was never relied on by the Prosecution.
13. Article 60(4) of the Statute does not relate to an ‘inexcusable’ delay in the general sense, but rather an ‘inexcusable delay *by the Prosecutor*’. This holds the Prosecution to a high standard where the Single Judge must assess whether the delays were caused by reasons beyond the Prosecution’s control. This must be read in conjunction with Regulation 35 of the RoC where the requesting party is required to “demonstrate that he or she was unable to file the application within the time limit for *reasons outside of his or her control*.” (emphasis added). In addition, “[w]hat is “inexcusable” is intertwined with the responsibilities stemming from that Office. The Prosecutor brings a prosecution and is expected to pursue it diligently and to the highest standards.”²¹
14. The Impugned Decision did not hold the Prosecution to either standard. First, neither the Impugned Decision, nor the Prosecution’s Request for a second postponement, addressed whether the prolongation of Mr Al Hassan’s time spent in detention without charges, as a natural consequence of the requested postponement of the confirmation of charges, was reasonable. The Defence is unable to even guess the grounds on which the Single Judge found the extension of the detention to be not unreasonable.²² As such, the Defence submits that there is a clear error in the reasoning of the Single Judge.

¹⁹ DRC situation Decision, para. 14.

²⁰ DRC situation Decision, para. 15.

²¹ Khan, K., *Article 60: Initial proceedings before the Court*, in Triffterer and Ambos (eds), “Rome Statute of the International Criminal Court: A Commentary”, 3rd edition, Beck, Hart and Nomos, 2016, p. 1168.

²² Impugned Decision, paras 15-16.

15. The Defence submits that not only the Single Judge had to make a determination on the reasonableness of the length of the detention at the ICC, but also take into consideration the time spent in detention prior to Mr Al Hassan's transfer. The Single Judge failed to do either in the Impugned Decision.
16. Second, neither the Impugned Decision nor the Prosecution's Request for a second postponement even attempted to demonstrate that the extension of time requested under Regulation 35 of the RoC was justified by reasons *beyond the Prosecution's control*. The Single Judge merely referred to the "particular circumstances"²³ of the case, without mentioning what these circumstances were. It did not, at any point, make a finding that the reasons justifying the postponement of the confirmation of charges were beyond the Prosecution's control.
17. The Defence submits that an assessment of the reasonableness of the delay should not only be based on (a) the length of the delay and (b) complexity of the case, but also on (c) the conduct of the parties and (d) the prejudice to the accused.²⁴ It is therefore crucial to assess whether the Prosecution has observed 'special diligence' in the conduct of the proceedings, whether the delays were due in large part to the conduct of the accused or the Prosecution, and whether there were measures taken by the Prosecution to expedite proceedings.²⁵
18. The Pre-Trial Chamber, in previous cases where it exercised its discretion on the postponement of the confirmation of charges, has in fact assessed, *inter alia*, whether the delay was beyond the Prosecution's control.²⁶

²³ Impugned Decision, para. 16.

²⁴ *Mugiraneza*, Decision on prosper Mugiraneza's interlocutory appeal from trial chamber ii decision of 2 October 2003 denying the motion to dismiss the indictment, demand speedy trial and for appropriate relief, 27 February 2004, ICTR-99-50-AR73, p.3; *Perisic*, Decision on motion for sanctions for failure to bring the accused to trial without undue delay, 23 November 2007, IT-04-81-PT, para. 12; *C. Bizimungu et al.*, Decision on Justin Mugenzi's motion alleging undue delay and seeking severance, 14 June 2007, ICTR-99-50-T, para. 11.

²⁵ *Scott v. Spain*, no. 84/1995/590/676, ECHR, 18 December 1996, para. 74; *Jablonski v. Poland*, no. 33492/96, § 80, ECHR 21 December 2000, *Kalashnikov v Russia*, no. 47095/99, §§114-121, ECHR 2002; *O'Dowd v United Kingdom*, no. 7390/07, §§68-70, ECHR (2010).

²⁶ *Mbarushimana*, Decision on the Prosecution's request for the postponement of the confirmation hearing, 31 May 2011, ICC-01/04-01/10-207, pp. 8-9.

19. Finally, the Defence also submits that the Single Judge erred in granting an extension of time pursuant to Rule 121(7) of the Rules, whereas the Prosecution did not base its request on this provision. In previous cases before the ICC, parties requesting the postponement of the Confirmation of Charges hearing have indeed, at least, cited Rule 121(7) and upheld a burden of adequately justifying their request.²⁷ This was not the case here.

i. The first appealable issue impacts on the fairness and expeditiousness of the conduct of the proceedings

20. In assessing the reasonableness of the detention period prior to potential trial, the Single Judge has only stated that the “le délai supplémentaire demandé par le Procureur ne semble pas être déraisonnable.”²⁸ While a request for the delay, *per se*, may be ‘not unreasonable’, the question as to whether the delay was caused by *the Prosecution* must be raised regardless of the length requested.

21. The Single Judge, in exercising his discretion, has found that the delay was not unreasonable, due to the “nombre important de requêtes aux fins de protection des témoins et des victimes.”²⁹ As mentioned above, the Defence notes that Article 60(4) of the Statute does not merely address inexcusable delay, it specifically addresses “inexcusable delay by the Prosecutor”. This requires that the Chamber make a specific determination on the Prosecution’s responsibility in the delay. While there might be motions still to be filed in the present case, the delays in filing them were not beyond the Prosecution’s control. Even if they were, this should have been clearly assessed and stated in the Impugned Decision, but was not. Granting a request for extension of a set deadline must be preceded by an assessment of the shortcomings that caused the non-compliance with the deadline in the first place.

²⁷ *Mbarushimana*, Prosecution’s request in terms of Rule 121(7) for the postponement of the confirmation hearing to preserve the fairness of the proceedings, 25 May 2011, ICC-01/04-01/10-189; *Ongwen*, Public Redacted Version of “Request to Postpone Confirmation of Charges Hearing”, filed on 6 November 2015, 13 Nov. 2015, ICC-02/04-01/15-336-Red; *Ongwen*, Public redacted version of “Prosecution’s Application for Postponement of the Confirmation Hearing”, 10 February 2015, ICC-02/04-01/15-196-Conf-Exp, 12 February 2015, ICC-02/04-01/15-196-Red2.

²⁸ ICC-01/12-01/18-255, para. 16.

²⁹ Impugned Decision, para. 16.

22. This clearly affects the expeditiousness of the proceedings since the Single Judge vacated the date of the confirmation of charges and did not set a new date, thereby leaving open the possibility that it will grant an extension even lengthier than that requested by the Prosecution. Indeed, while the Prosecution requested to schedule the confirmation hearing for early July, it is not out of the realm of possibilities that the Single Judge could decide to postpone it even more, until after the summer recess. In such case, the Prosecution would obtain more than it requested, without having to explain or be accountable for the delays in any way and without having to take into account the consequences on Mr Al Hassan's detention. This not only affects the fairness of the proceedings, where Mr Al Hassan does not know the true reasons for the delay, but also the expeditiousness of the proceedings, as the confirmation hearing has been postponed indefinitely and the Prosecution now is in possession of a *carte blanche* to request further delays in the proceedings at a later stage, without having to justify its requests.
23. The appealable issue also impacts the fairness of the proceedings because the Prosecution's Application under Article 58, at this stage of the proceedings, is not a sufficient basis for the continuation of Mr Al Hassan's detention. As consistently found by the ECtHR, "[t]he persistence of a reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings."³⁰
24. Therefore, a delay in submitting the Document Containing the Charges (DCC) and List of Evidence is a delay in informing Mr Al Hassan of the basis of his continued detention. This should have been counter-balanced with a thorough assessment of the grounds for prolonging the deprivation of his liberty.

³⁰ *Jablonski v. Poland*, no. 33492/96, § 80, ECHR 21 December 2000,

25. All decisions issued by the Court postponing the confirmation of charges for a second time were preceded by the Prosecution's submission of a document containing the charges and the list of evidence. In *Lubanga*, the second postponement decision was issued on 5 October 2006, and the detailed description of the charges and the list of evidence were submitted on 28 August 2006.³¹ In *Bemba*, the second postponement was decided on 2 December 2008,³² while the DCC was submitted on 1 October 2008.³³ In *Mbarushimana*, the second postponement was decided on 16 August 2011,³⁴ and the DCC and list of evidence were filed on 15 July 2011.³⁵ In *Gbagbo*, the second postponement was issued on 2 August 2012,³⁶ and the DCC was filed on 16 May 2012.³⁷ In *Blé Goudé*, the second postponement was issued on 1 September 2014³⁸, while the DCC had been submitted 22 August 2014.³⁹
26. This clearly demonstrates that in the current case, contrary to the practice of the Court and of the Prosecution, the DCC and the List of Evidence, which were supposed to be filed the day after tomorrow, are not ready for submission at all. This directly affects the fairness and expeditiousness of the proceedings.
27. The Impugned decision does not make a distinction between the standards for a first postponement as opposed to a second postponement. Extending the deadlines without assessing the shortcomings that prevented compliance with the initial dates is a practice that will seriously affect the conduct of the proceedings.

³¹ *Lubanga*, Décision sur la date de l'audience de confirmation des charges, 5 October 2006, ICC-01/04-01/06-521, pp. 3-4.

³² *Bemba*, Decision on the Postponement of the Confirmation Hearing", 2 December 2008, ICC-01/05-01/08-304.

³³ *Bemba*, Prosecution's submission of Public Redacted Version of the Document Containing the Charges against Jean-Pierre Bemba Gombo, 1 October 2008, ICC-01/05-01/08-136.

³⁴ *Mbarushimana*, Decision postponing the commencement of the confirmation hearing, 16 August 2011, ICC-01/04-01/10-374.

³⁵ *Mbarushimana*, Prosecution's document containing the charges and List of Evidence submitted pursuant to article 61(3) and Rule 121(3), 15 July 2011, ICC-01/04-01/10-287.

³⁶ *Gbagbo*, Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing, 2 August 2012, ICC-02/11-01/11-201

³⁷ *Gbagbo*, Document de notification des charges, 16 May 2012, ICC-02/11-01/11-124.

³⁸ *Blé Goudé*, Decision on the "Defence request for a variation of a time limit", 1 September 2014, ICC-02/11-02/11-139.

³⁹ *Blé Goudé*, Document de notification des charges, 22 August 2014, ICC-02/11-02/11-124.

ii. Immediate resolution by the Appeals Chamber will materially advance the proceedings

28. The Pre-Trial Chamber has an obligation to oversee the good conduct of proceedings and hold each party accountable, where appropriate, to their shortcomings. This sets a standard for the conduct of proceedings, and this standard will ensure the high quality of proceedings, which is an integral part of a fair trial. A resolution by the Appeals Chamber would advance the proceedings since it would allow this principle to be abided by and therefore maintain the fairness of the proceedings intact at this stage.

(B) Second Appealable Issue

29. A decision to postpone the confirmation hearing is not a purely procedural matter. The lack of reasoning also prevents the Defence team from explaining to Mr Al Hassan the reason for the prolongation of his detention, and, in his present case, the extension of the strict active monitoring imposed on him. The Defence submits that the Single Judge erred by not providing a reasoned opinion. While the Defence is privy to the Prosecution's submissions, albeit redacted and not holistic, no reasoning was provided by the Single Judge.
30. The Single Judge stated in the Impugned Decision that "les rédacteurs du Statut [ont] volontairement choisi de ne pas mentionner de délai"⁴⁰ regarding the reasonable length of detention pursuant to Article 60(4) of the Statute. The Defence submits that this does not mean that Single Judge can deviate from the obligation to 'exercise [...] jurisdiction [...] in accordance with internationally recognised human rights norms'.⁴¹
31. The Single Judge's discretion does not exempt him from the obligation to provide a reasoned opinion. This is consistent with the Pre-Trial Chamber's practice to provide full reasoning in similar cases related to the postponement of the confirmation hearing, including *Lubanga*,⁴² *Katanga and Ngudjolo*,⁴³ *Abu Garda*,⁴⁴

⁴⁰ ICC-01/12-01/18-255, para. 15.

⁴¹ Article 21(3) of the Statute.

⁴² *Lubanga*, Decision on the postponement of the confirmation hearing and the adjustment of the timetable set in the decision on the final system of disclosure, 24 May 2006, ICC-01/04-01/06-126, pp. 4-9; and *Lubanga*, Décision sur la date de l'audience de confirmation des charges, 5 October 2006, ICC-01/04-01/06-521, pp. 3-4.

Banda and Jerbo,⁴⁵ *Mbarushimana*,⁴⁶ *Gbagbo*,⁴⁷ *Ruto and Sang*,⁴⁸ *Ntaganda*,⁴⁹ *Bemba*,⁵⁰ *Blé Goudé*,⁵¹ *Ongwen*.⁵²

32. While the Defence submits that the Impugned Decision contains serious appealable issues, the very lack of reasoning in the Decision is itself an issue and hinders Mr Al Hassan ability to fully exercise his right to appeal the Decision. This prejudice is of a particular gravity given that the Impugned Decision has a direct consequence of prolonging Mr Al Hassan's detention [REDACTED].⁵³

⁴³ *Ngudjolo*, Decision on the Defence Request for Postponement of the Confirmation Hearing, 25 April 2008, ICC-01/04-01/07-446, pp. 5-8.

⁴⁴ *Abu Garda*, Decision on the Prosecutor's requests for extension of time-limit, 11 September 2009, ICC-02/05-02/09-98, pp. 4-5.

⁴⁵ *Banda and Jerbo*, Decision postponing the confirmation hearing and setting a deadline for the submission of the suspects' written request to waive their right to attend the confirmation hearing, 22 October 2010, ICC-02/05-03/09-81, paras 2, 10 and 11.

⁴⁶ *Mbarushimana*, Decision postponing the commencement of the confirmation hearing, 16 August 2011, ICC-01/04-01/10-374, p. 3: "NOTES that the full reasoning behind the present decision will be released in the forthcoming decision [...]" (Emphasis added); See also *Mbarushimana*, Decision on "Defence request to deny the use of certain incriminating evidence at the confirmation hearing" and postponement of confirmation hearing, 16 August 2011, ICC-01/04-01/10-378, paras 14-27.

⁴⁷ *Gbagbo*, Decision on the "Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012", 12 June 2012, ICC-02/11-01/11-152-Red, paras 23-40.

⁴⁸ *Ruto et al.*, Urgent Decision on the "Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List of Evidence", 12 August 2011, ICC-01/09-01/11-260, paras 10-16.

⁴⁹ *Ntaganda*, Decision on the "Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing" and Setting a New Calendar for the Disclosure of Evidence Between the Parties, 17 June 2013, ICC-01/04-02/06-73, paras 12-49.

⁵⁰ *Bemba*, Urgent Decision on the Postponement of the Confirmation Hearing, 17 October 2008, ICC-01/05-01/08-170-tENG, paras 18-25; and *Bemba*, Urgent Decision on the Postponement of the Confirmation Hearing, 2 December 2008, ICC-01/05-01/08-304, paras 3-7.

⁵¹ *Blé Goudé*, Decision on the "Prosecution's Request for Variation of Time Limits Pursuant to Regulation 35 concerning the Confirmation of Charges", 11 July 2014, ICC-02/11-02/11-108-Red, paras 7-14.

⁵² *Ongwen*, Decision Postponing the Date of the Confirmation of Charges Hearing, 6 March 2015, ICC-02/04-01/15-206, paras 22-37.

⁵³ [REDACTED].

i. The second appealable issue impacts on the fairness and expeditiousness of the conduct of the proceedings

Prolongation of detention must be justified

33. “Any extension of the period of deprivation of liberty detention [sic] must be based on adequate reasons setting out a detailed justification, which must not be abstract or general in character.”⁵⁴
34. As repeatedly stressed by the European Court of Human Rights, any period of detention on remand requires appropriate motivation by the competent authorities which, are thereon obliged to display “special diligence” in the conduct of the proceedings.⁵⁵ “Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities.”⁵⁶ Accordingly, if continued detention is ordered, reasons must be given.⁵⁷
35. In *Lubanga*, an appealable issue was brought before the Single Judge due to a lack of reasoning ‘in light of the fact that [her decision] was issued during *ex parte* proceedings [...]’. The Single Judge in that case had found that the ‘alleged lack of factual reasoning [...] is an issue which would significantly affect the fair and expeditious conduct of the proceedings [...]’.⁵⁸
36. It is undeniable that the Single Judge’s findings were partially based on redacted elements in Prosecution’s submissions. The lack of reasoning and the information not accessible to the Defence seem to render the system of pre-trial detention automatic. This constitutes a clear violation of Mr Al Hassan’s right to liberty.
37. The Impugned Decision has rendered the proceedings unpredictable and unforeseeable for the Defence. A concrete example is, by vacating the date of the

⁵⁴ Working Group on Arbitrary Detention, Deliberation No.9, UN Doc. A/HRC/22/44 (2012), para. 67.

⁵⁵ *Patsuria v. Georgia*, no. 30779/04, §62, ECHR 2007; *Nikolaishvili v. Georgia*, no. 30748/04, §76 ECHR 2009; See *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, §§102-107, 116-119, Inter-American Court (2007); *Aleksanyan v. Russia* no. 46468/06, §179 ECHR 2008; *Tase v. Romania* no. 29761/02, §41, ECHR 10 June 2008.

⁵⁶ *Belchev v. Bulgaria*, no. 39270/98, Judgement, para. 82 ECHR 2004. See also *Medvedyev and Others v. France* no. 3394/03, Judgement, paras. 119, 121 and 122, ECHR, 2010; cited at Working Group on Arbitrary Detention, Deliberation No.9, UN Doc. A/HRC/22/44 (2012), para. 66.

⁵⁷ *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, §§117-118, Inter-American Court (2007); See *Bronstein and others v Argentina* (11.205 et al), §19. Inter-American Commission on Human Rights (1997).

⁵⁸ *Lubanga*, Decision on Second Defence Motion for Leave to Appeal, 28 September 2006, ICC-01/04-01/06-489, pp. 12 and 14.

confirmation hearing indefinitely, Mr Al Hassan simply does not know when he is going to have an opportunity to defend himself, for the first time in more than two years since his arrest. Therefore, the Defence submits that the second appealable issue has an impact on the fairness of the proceedings.

Habeas corpus

38. Mr Al Hassan has an inherent right to challenge the lawfulness of his detention and of the prolongation of his detention.⁵⁹ A reasoned decision extending detention not only explains to the suspect why his deprivation of liberty is maintained,⁶⁰ but also provides a guarantee to the detained person that the lawfulness of his detention is being decided expeditiously.⁶¹
39. As found by the ECtHR, one of the functions of a reasoned decision is “to demonstrate to the parties that they have been heard. Moreover, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.”⁶²
40. The Impugned Decision briefly addresses the reasons for the delay in the proceedings, namely based on the Prosecution’s pending requests in relation to witnesses. However, the Impugned Decision fails to provide the grounds on which it found that *the prolongation of detention* was not unreasonable.
41. The Prosecution’s incomplete investigative activities causing a delay in trial and the prolongation of detention are two distinct issues that should have been addressed separately in the Impugned Decision.

⁵⁹ Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR), Article 7(6) of the American Convention on Human Rights (ACHR), and Article 5(4) of the European Convention on Human Rights (ECHR).

⁶⁰ *Fox, Campbell and Hartley v. UK*, no. 12244/86; 12245/86; 12383/86, para 40, ECHR, 30 August 1990; See also Karel de Meester, and al, “Chapter 3: Investigation, Coercive Measures, Arrest, and Surrender” in Goran Sluiter and al, *International Criminal Procedure: Principles and Rules*, p. 343.

⁶¹ Karel de Meester, and al, “Chapter 3: Investigation, Coercive Measures, Arrest, and Surrender” in Goran Sluiter and al, *International Criminal Procedure: Principles and Rules*, p. 343.

⁶² *Suominen v. Finland*, no. 37801/97, para.37 ECHR, 1 July 2003.

42. While the Defence stresses that, under any circumstance, a prolongation of detention must be reasoned, the ambiguity over Mr Al Hassan's actual detention is further exacerbated given that no Document Containing Charges has been filed yet.⁶³
43. The Impugned Decision's failure to provide any reasoning in relation to the prolongation of detention, regardless of whether it considered it not to be unreasonable, has deprived Mr Al Hassan of his right to present full arguments pertaining to his *habeas corpus* rights, which is well-established in the ICC jurisprudence,⁶⁴ and international human rights law.⁶⁵ This has also hindered Mr Al Hassan from sufficiently identifying appealable issues in the Impugned Decision.⁶⁶
44. The fairness and expeditiousness of the proceedings are therefore clearly affected by the second appealable issue.

ii. Immediate resolution by the Appeals Chamber will materially advance the proceedings

45. An immediate resolution by the Appeals Chamber will reinstate Mr Al Hassan's right to know the basis of his prolonged detention [REDACTED], as well as the right to challenge the legality of his detention. Without the Appeal Chamber's intervention, the legality of Mr Al Hassan's detention will be affected which would damage the integrity of the proceedings.

V. Conclusion

46. The Defence respectfully requests Pre-Trial Chamber I to grant leave to appeal the two issues described above in the Impugned Decision.

⁶³ See above, paras 24-25.

⁶⁴ *Bemba*, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", 16 December 2008, ICC-01/05-01/08-323, para. 32; *see also Katanga and Ngudjolo*, Germain Katanga's Defence's Observations concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing, 9 June 2008, ICC-01/04-01/07-564, para. 12.

⁶⁵ Article 9(4) of the ICCPR, Article 7(6) of the ACHR, and Article 5(4) of the ECHR.

⁶⁶ *See, Salov v. Ukraine*, no. 65518/01, para. 92, ECHR, 6 September 2005.



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Dated this 4th of March 2019
At The Hague, The Netherlands