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

**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. The Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the “Defence”) submits the present response to the “Requête de l’Accusation sollicitant l’augmentation du nombre de pages autorisées pour le dépôt du Document contenant les charges”.¹
2. The Defence submits that the Prosecution’s request for an extension of the page limit for the Document Containing the Charges (the “DCC”) to 500 pages is excessive and disproportionate. A DCC of such extreme length is likely to cause delays in the proceedings which will lead to a violation of Mr Al Hassan’s right to an expeditious trial. The Prosecution’s request should be denied.

II. Classification

3. In accordance with Regulation 23bis(2) of the Regulations of the Court (the “RoC”), this response is classified confidential *ex parte*, available to the Prosecution and the Defence, as the filing to which it relates is classified the same.

III. Submissions

4. The Prosecution argues that “exceptional circumstances” related to the structure of the DCC, the important number of charges, the degree of precision required by the Chamber, the need to make specific legal arguments and the absence of agreed facts are all factors justifying that the page limit for the DCC be increased to 500 pages.²
5. Regulation 38(3)(g) of the RoC stipulates that a description of the charges filed pursuant to Rule 121(3) of the Rules of Procedure and Evidence (the “Rules”) shall not exceed 30 pages, while Regulation 38(2)(i) sets the page limit of a pre-trial list of evidence to 60 pages. A pre-trial brief should not exceed 120 pages, as per Regulation 38(1)(a). Therefore, a consolidated document containing the DCC, the list of evidence and the pre-trial brief should normally not exceed 210 pages.

¹ *Al Hassan*, Requête de l’Accusation sollicitant l’augmentation du nombre de pages autorisées pour le dépôt du Document contenant les charges, 28 mars 2019, ICC-01/12-01/18-296-Conf-Exp (the Prosecution’s Request). All cases referenced in this document are related to the *Al Hassan* case unless stated otherwise.

² Prosecution’s Request, para. 2.

6. The Prosecution requests that the Chamber increase this figure by 238%. Yet, the reasons for this extravagant demand are unconvincing.
7. On the one hand, the Defence stresses on the importance of providing a detailed account of the law and facts forming the basis for the charges that will be brought against Mr Al Hassan. On the other hand, the manner in which the Prosecution wishes to present the DCC should not come at the expense of Mr Al Hassan's rights to prepare his defence, defend himself and be tried without undue delay. The requested extension of page numbers is therefore unjustified, excessive and will undoubtedly delay the conduct of the proceedings.
8. The limited scope and purpose of the confirmation hearing has been well established by the ICC jurisprudence. The Court has consistently emphasised that: "the confirmation hearing is neither a "trial before the trial" nor a "mini-trial"; that the main goal is to ensure "that no case goes to trial unless there is sufficient evidence to establish substantial grounds to believe that the person committed the crime with which he or she has been charged".³ Therefore given the limited nature of the confirmation hearing, the Prosecution's request to submit such an extensive DCC cannot be justified.

A. The circumstances of the case do not justify a 500-page limit for the pre-trial charging documents

9. While the Chamber gave clear indications as to the structure and content of the DCC, it did not suggest that this should amount to more than double the number of pages for the three charging documents at the pre-trial stage.

³ *Katanga and Ngudjolo*, Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12, ICC-01/04-01/07-412, 18 April 2008, p. 4 [citing ICC-01/04-01/07-411, para. 5]; see also Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428-Corr, 25 April 2008, paras 5-6; Decision on the Defence Request for Postponement of the Confirmation Hearing, ICC-01/04-01/07-446, 25 April 2008, p. 7; ICC-01/04-01/07-T-25-ENG, p. 14, lns 5-11; Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, para. 100; Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, para. 64; *Abu Garda*, Second Decision on issues relating to Disclosure, ICC-02/05-02/09-35, 15 July 2009, para. 10; *Lubanga*, Décision sur la confirmation des charges, ICC-01/04-01/06-803, 29 January 2007, para. 37.

10. First, the number of charges in the present case is not unprecedented. Indeed, in the *Ongwen* case, Pre-Trial Chamber II confirmed 70 charges of war crimes and crimes against humanity in a 104-page decision,⁴ while the DCC submitted by the Prosecution contained only 49 pages.⁵
11. Second, the legal arguments related to the contextual elements of war crimes and crimes against humanity have been made in the documents containing the charges in other ICC cases, without having to resort to extreme increases of page limits. In addition to *Ongwen* mentioned above, the DCC in *Ntaganda*, dated 10 January 2014, contained arguments related to both sets of crimes separated into 18 counts and six modes of responsibility. It was nonetheless limited to 60 pages.⁶ The *Bemba* case also required the Prosecution to prove the contextual elements of Article 7 and 8 of the Statute, although admittedly for fewer charges. Yet, the Amended Document containing the charges filed ahead of the confirmation hearing, on 17 October 2008, only had 44 pages.⁷
12. Third, the Prosecution's justifications for the request mainly rely on the Chamber's Décision relative à la requête de la défense concernant le délai de dépôt par le Procureur du document contenant un état détaillé des charges (the "Decision of 5 October 2018").⁸ However, the circumstances of the case as described by the Prosecution are not new to the Prosecution or the Chamber, nor were they unforeseeable. The Prosecution has been fully aware of the specific nature of this case and indeed referred to it in its observations on the disclosure system already in May 2018.⁹
13. The Chamber's instructions in the Decision of 5 October 2018 were mindful of the specific circumstances of the case. The arguments raised by the Prosecution in relation to the alleged crimes committed in Timbuktu, as well as the contextual elements of Articles 7 and 8 of the Statute, were all available to the Chamber prior to its decision related to the content and structure of the DCC. In any event, the level of

⁴ *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15, 23 March 2016.

⁵ *Ongwen*, Document containing the Charges, ICC-02/04-01/15-375-AnxA-Red, 22 December 2015.

⁶ *Ntaganda*, Document Containing the Charges, ICC-01/04-02/06-203-AnxA, 10 January 2014.

⁷ *Bemba*, Amended Document containing the charges, ICC-01/05-01/08-169-Anx3A, 17 October 2008.

⁸ ICC-01/12-01/18-143.

⁹ ICC-01/12-01/18-38-Red2.

precision required by the Decision of 5 October 2018 is well in line with the requirement of providing a “detailed description” under Rule 121(3) of the Rules.

14. While the presentation of a single document might increase the number of footnotes, even the 130 pages of footnotes the Prosecution is requesting¹⁰ should not lead to a 500-page DCC.¹¹

B. The requested increase will cause unnecessary delays in the proceedings

15. The Prosecution’s request for an extension of page numbers is untimely and already slows down the conduct of the proceedings. The submission of the DCC was supposed to take place on 6 March 2019. Any intention or awareness of the need to increase the page number of the DCC should have been raised well prior to this date. The Prosecution’s request for a second postponement of the confirmation hearing was filed on 12 February 2019, ie 21 days prior to the deadline for submission of the DCC.¹² It would defy any logic to claim that the Prosecution was not aware of the need to extend the page numbers at least on 12 February 2019.
16. The Defence has underlined the Prosecution’s repeated failure to bring forward, in an expeditious manner, questions that could seriously affect the delays in the proceedings. This includes [REDACTED],¹³ the request for a second postponement of the confirmation hearing,¹⁴ and the delays in relation to the witness protection measures.¹⁵ The request demonstrates, once again, the Prosecution’s practice of imposing a piecemeal assessment of the exceptions it seeks vis-à-vis the conduct of proceedings. This leads to an assessment in instalments and has an inevitable impact on expeditiousness and judicial economy.
17. The Prosecution had ample opportunities to raise its concerns in relation to the length of the DCC. It could have well raised this issue when the Single Judge instructed the parties to submit observations on the postponement of the confirmation hearing on

¹⁰ Prosecution’s request, paras 1 and 11.

¹¹ The combination of a regular 30-page DCC, a 60-page list of evidence and 130 pages of footnotes would only amount to 220 pages, less than half the number of pages requested.

¹² ICC-01/12-01/18-243-Red2.

¹³ [REDACTED].

¹⁴ ICC-01/12-01/18-250-Red, para. 23.

¹⁵ ICC-01/12-01/18-250-Red, paras 48-56.

2 July 2018,¹⁶ when the Prosecution filed its *Éléments d'informations* in November 2018,¹⁷ or when the Single Judge instructed the Prosecution to file observations on 7 February 2019.¹⁸ In any event, if the extension of page number is a result of the Chamber's instructions in the Decision of 5 October 2018, the Prosecution should have raised it then.

18. While the Defence, much like the Chamber, would welcome a detailed account of the charges, it is however opposed to the submission of a DCC so lengthy that it would be counterproductive and cause further delays in the proceedings. Indeed, the DCC is and should remain a working document, thereby allowing the Suspect to be informed promptly and in detail of the nature, cause and content of the charges brought against him.
19. In *Katanga and Ngudjolo*, the Trial Chamber considered that the 244-page decision confirming the charges was too lengthy for the purposes of the trial and ordered the submission of a summary of the charges to allow a better appraisal of the charges brought against the Accused.¹⁹ Similarly, a 500-page DCC would represent an unmanageable task for both the Defence and the Chamber.
20. Indeed, the resources of the Defence at the pre-trial stage are severely limited, and the Defence cannot, in principle, submit a request based on an estimation of an upcoming document or disclosure. In any event, even if additional resources were to be requested and granted, they would likely be provided too late for the Defence to be able to fully analyse the 500-page DCC, formulate a response and prepare its own pre-trial documents. Likewise, such a DCC would probably also have an impact on the work of the Chamber, and/or, potentially result in an extension of its own 60-day deadline for issuing the Confirmation of Charges decision.²⁰
21. The disproportionate character of the requested extension could also have consequences throughout the trial proceedings, should the charges be confirmed. Indeed, if the DCC alone stands at 500 pages, one can wonder how many pages long

¹⁶ ICC-01/12-01/18-64.

¹⁷ ICC-01/12-01/18-180-Conf-Red

¹⁸ ICC-01/12-01/18-236.

¹⁹ *Katanga and Ngudjolo*, Décision relative au dépôt d'un résumé des charges par le Procureur, ICC-01/04-01/07-1547, 21 October 2009, paras 12-13.

²⁰ See Regulation 53, RoC.

will the decision on the confirmation be. Similarly, at the end of a potential years-long trial, how long will the final trial brief have to be, to cover the charges and the evidence based on a 500-page DCC? The absurd and disproportionate nature of the requested extension cannot be denied.

22. The Defence has previously stressed on the unprecedented nature of the Chamber's decision to postpone to the confirmation of charges hearing for a second time while the DCC has still not been submitted.²¹ Any possibilities of further delays will further exacerbate the impact on the fairness and expeditiousness of the proceedings.
23. The Defence is also wary of delays in translation. The Chamber determined that the DCC should be filed in Arabic at least 30 days prior to the confirmation hearing.²² However, it seems obvious that the translation of 500 pages will be longer and more challenging than that of a regularly-sized DCC. The Defence notes in passing that the Prosecution still has not communicated to the Defence the lesser redacted Arabic version of the Prosecution's Article 58 application, which had been announced as imminent by the Prosecution in November 2018.²³ After yet another inquiry by the Defence, by email sent on 27 February 2019,²⁴ the Prosecution responded that they were "working on it as soon as possible".²⁵ Over a month later, the Defence still has not received the translation. It is more than likely that similar, if not worse, delays in translation will occur should the DCC be extended to 500 pages, with consequences that will be entirely suffered by Mr Al Hassan, whose right to be informed of the charges against him in a language he fully understands and speaks, will be violated. It goes without saying that without the Arabic translation of the DCC, the Defence will be unable to perform its duties and Mr Al Hassan will be deprived of his fundamental rights.

²¹ ICC-01/12-01/18-261-Red, para. 25.

²² ICC-01/12-01/18-94-Red, para. 26.

²³ ICC-01/12-01/18-180-Conf-Red, para. 41.

²⁴ Email from Defence to OTP, 27 February 2019 at 09:54.

²⁵ Email from OTP to Defence, 27 February 2019 at 13:06.

24. The Defence submits that significant delays already occurred in the pre-trial proceedings.²⁶ Any further delays would jeopardise Mr Al Hassan's right to be judged promptly and without undue delay.²⁷

IV. Conclusion

25. For these reasons, the Defence opposes the requested extension.
26. If the Chamber is minded to grant an extension of page limit, the Defence submits that it should be minimal, and not above 50 additional pages.
27. The Chamber should also make clear that should an extension of pages be granted, the consolidated DCC will include all three charging documents (DCC, list of evidence and pre-trial brief) and that no other written submission of this nature will be filed by the Prosecution before the confirmation hearing.



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Dated this 8th Day of April 2019
At The Hague, The Netherlands

²⁶ ICC-01/12-01/18-243-Red2; ICC-01/12-01/18-250-Red.

²⁷ Article 67(1)(c) of the Statute.