

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**

Date: **31 May 2019**

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**

**Confidential *Ex Parte*
Available to Defence only**

***With Confidential Ex Parte Annex
Available to Defence Only***

**Urgent request to vary a deadline for filing an application concerning Mr. Al
Hassan's arrest, detention and interrogation in Mali**

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:

The Office of the Prosecutor

Counsel for the Defence

Melinda Taylor
Marie-Hélène Proulx

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

Amicus Curiae

States Representatives

REGISTRY

Registrar

Counsel Support Section

Peter Lewis

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

1. Introduction

1. Pursuant to Regulation 35 of the Regulations of the Court, the Defence for Mr. Al Hassan respectfully requests the Honourable Pre-Trial Chamber to vary any deadline that might exist for filing a request to stay the proceedings on grounds concerning:
 - a. The illegality of Mr. Al Hassan's arrest and detention in Mali; and
 - b. The ICC Prosecution's reliance on evidence and information that were obtained in an environment of extreme coercion and duress.
2. This application concerns fundamental questions of human rights, based on extremely complex factual and legal issues. The Defence has not had adequate time and facilities to investigate these matters, in the manner required by its professional duties to Mr. Al Hassan. In particular, although the Defence has identified specific evidence and expertise that would be relevant to such an application, it has not yet received the evidence, nor has it been possible to appoint the expert in question, and complete the relevant procedures, prior to the confirmation hearing.
3. Nonetheless, given that Mr. Al Hassan is presently detained, it would also be inconsistent with Mr. Al Hassan's right to expeditious proceedings to delay the confirmation hearing further.
4. The deferral or suspension of any deadline for filing an application on the issues arising from Mr. Al Hassan's treatment in detention in Mali would therefore be the most appropriate means of achieving a fair balance between Mr. Al Hassan's right to expeditious proceedings, which is of paramount importance given the length of his detention, and his right to adequate time and facilities to prepare an application which concerns fundamental aspects of his defence.

2. Level of Classification

5. The present request has been filed confidential *ex parte* (Defence only) due to the fact that it concerns confidential Defence preparation and strategy. The Defence should

not be required to disclose the existence of a particular strategy or line of investigations, before it is in a position to seek instructions from the client as to whether there are sufficient grounds to seise the Chamber with a specific application. Given that this Pre-Trial Chamber has not imposed a specific deadline for filing applications of this nature, the present request does not impact on any existing procedural rights of the Prosecution. The Prosecution will also have the opportunity to address issues of timeliness in connection with any future Defence requests for disclosure, as and when such issues are addressed directly on an *inter partes* basis with the Prosecutor, or before the Pre-Trial Chamber.

3. Submissions

6. The Defence has seised the Pre-Trial Chamber with the current application, in light of the Appeals Chamber's finding, in the *Katanga* case, that:¹

In the absence of a provision in the Statute, the Rules of Procedure and Evidence, and the Regulations of the Court stipulating time limits for the filing of motions allegation pre-surrender unlawful arrest and seeking a stay of the proceedings, the Trial Chamber has the discretion to determine the timeliness of such motions.

[...]

Motions alleging unlawful arrest and detention of a suspect prior to his or her surrender to the Court and seeking a stay of proceedings must, as a general rule, be brought before the Pre-Trial Chamber.

7. There is, nonetheless, good cause to either exempt the present case from this 'general rule', or to otherwise vary its application in order to afford the Defence more time to file an application concerning the consequences of Mr. Al Hassan's detention and treatment in Mali.

¹ ICC-01/04-01/07-2259, paras. 1-3.

8. In the *Katanga* judgment itself, the Appeals Chamber appears to have accepted that the application of this 'general rule' may depend on the particular circumstances of the case, and the possibilities available to the Defence to bring the application at an earlier point in time.² Whereas the Appeals Chamber found it pertinent that the Katanga Defence had not raised the issue of Mr. Katanga's unlawful detention with the Trial Chamber until an advanced point in the post-confirmation phase,³ Counsel for the Defence addressed the issue of Mr. Al Hassan's treatment in the first possible filing following appointment,⁴ and cannot, therefore, be deemed to have waived Mr. Al Hassan's right to seek such remedies as might be available, in light of his treatment.
9. Of further importance, the future Defence application in this case will not be limited to the question of the illegality of Mr. Al Hassan's detention and arrest, but will extend to the larger issue of the impact of illegal arrest and arbitrary detention on the quality and reliability of evidence and information obtained under such conditions.⁵ It is, therefore, significant that following the *Katanga* judgment, other Trial Chambers continued to adjudicate the merits of requests to stay the proceedings, which concerned the manner in which evidence was collected, even though they were filed after the confirmation hearing, and prior to the commencement of the trial.⁶ Indeed, given the variance in the standard of proof between the pre-confirmation phase, as compared to the trial phase, and the right of the parties to re-litigate issues of

² ICC-01/04-01/07-2259, para. 2: "***Based on the facts and circumstances of the present case***, the Trial Chamber committed no error of law, fact or procedure when it held that the "Defence motion for a declaration on unlawful detention and stay of proceedings" (hereinafter: "Defence Motion") was filed too late" (emphasis added). See also paras. 18-20.

³ ICC-01/04-01/07-2259, para. 59.

⁴ ICC-01/12-01/18-343-Conf-Exp-Corr.

⁵ "The Special Rapporteur is concerned about the participation of foreign agents in the interrogation of persons held in situations that violate international human rights standards. The difference that some Governments make between intelligence and law enforcement personnel is of limited relevance, as the active participation through the sending of interrogators or questions, or even the mere presence of intelligence personnel at an interview with a person who is being held in places where his rights are violated, can be reasonably understood as implicitly condoning such practices. The continuous engagement and presence of foreign officials has in some instances constituted a form of encouragement or even support. In the view of the Special Rapporteur, the responsibility of the receiving State may be triggered also by even more passive and geographically distant forms of creating a demand for intelligence information obtained through internationally wrongful means. Therefore, the Special Rapporteur believes that the active or passive participation by States in the interrogation of persons held by another State constitutes an internationally wrongful act if the State knew or ought to have known that the person was facing a real risk of torture or other prohibited treatment, including arbitrary detention." Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 4 February 2009, [A/HRC/10/3](#), para. 54.

⁶ ICC-01/09-02/11-868-Red; ICC-02/05-03/09-410.

admissibility before the Trial Chamber,⁷ it is arguable that it would not be in the interests of judicial economy to bring a complaint – concerning evidential issues - at the pre-confirmation phase. Indeed, the rejection of the charges in whole or in part may render the application moot, or significantly curtail its ambit.

10. It follows, therefore, that where the application is related to the evidence relied upon to substantiate the confirmed charges, the Defence should be afforded the right to raise such issues before the Trial Chamber, particularly if the alternative relief concerns the exclusion of particular items of evidence.

11. The nature of human rights and due process protections concerning allegations of torture and mistreatment also distinguishes the present application from the *Katanga* case. Mr. Al Hassan is a torture victim, and is entitled to have his allegations of torture investigated fairly and fully, with due care and diligence.⁸ Such issues require particular expertise and sensitivity. In line with these considerations, the Defence identified a particular psychological expert in this field, and requested the Registry to approve her appointment as soon as possible. It takes time for experts to be vetted and added to the list of Court experts, and, given the emotional repercussions that arise from discussing such matters, the prospective expert has agreed that it would not be advisable to commence consultations during Ramadan (which is immediately followed by Mr. Al Hassan's first meeting with his family in over two years), or in the immediate lead up to the confirmation hearing. It is therefore not feasible for the Defence to obtain the expertise in question before the confirmation hearing.

12. A final ground for varying or suspending the deadline arises from Mr. Al Hassan's right to collect and receive the disclosure of any information or evidence that might assist him to substantiate his allegations.⁹ The Defence has identified individuals,

⁷ ICC-01/04-01/06-1084, paras. 4-5.

⁸ Articles 12-14 of the Convention against and Other Cruel, Inhuman or Degrading Treatment or Punishment; Articles 8-9 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as adopted by General Assembly resolution 3452 (XXX) of 9 December 1975.

⁹ *Binyam Mohamed v. Secretary of State*, [2008] EWHC 2048 (Admin), para. 147; See also *Binyam Mohamed v. Secretary of State*, [2010] EWCA Civ 65, paras. 180-184 (Lord Justice Thomas) concerning the Court's responsibility to publicly reveal information concerning the involvement of public officials in acts of torture concerning detainees, as part of the 'right to know' set out in Article 10 of the European Court of Human Rights. See also *Prosecutor v. Simic et al.*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', 18 October 2000, para. 59.

who have direct knowledge of the mistreatment endured by Mr. Al Hassan, but their ongoing detention at the same facility raises specific protective concerns, and risks of retaliation.¹⁰ Additional time would enable the Defence to exhaust alternative avenues for obtaining this information. In this regard, the Defence has conveyed several requests for disclosure to the Prosecution, which relate to this prospective application. The Defence has underscored the urgency of these requests, and will seise the Chamber promptly, if necessary to do so.

13. To put it simply, the issues are not ripe for consideration until the Defence has had adequate time to exhaust relevant and reasonable avenues for obtaining probative information on the issues that will be put before the Chamber. The allocation of additional time will, in turn, ensure that the Chamber in question will be better placed to make an informed and fair ruling.

4. Conclusion

14. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Honourable Pre-Trial Chamber to suspend or otherwise vary any deadline for filing an application based on the circumstances of Mr. Al Hassan's arrest, detention and interrogation in Mali.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 31st day of May 2019

At The Hague, The Netherlands

¹⁰ Annex: Confidential Ex parte Defence only, assessment advice.