



Original: **English**

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

Date: **7 June 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***

Public

Defence Observations on the Confirmation of Charges Hearing

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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1. Introduction

1. The Defence for Mr. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the “Defence”) presents the following observations pursuant to the Single Judge’s “*Ordonnance portant sur l’organisation de l’audience de confirmation des charges*”, dated 29 May 2019.¹

2. Submissions

2.1 Written submissions pursuant to Rule 121(9) of the Rules of Procedure and Evidence

2. The Defence estimates that its written submissions pursuant to Rule 121(9) will amount to around 100 pages. The Defence will aim to present its arguments in a concise and efficient manner – however, the number of issues which must be raised at this stage justifies an increase of the page limit. The Defence intends to raise a challenge of the case’s admissibility pursuant to Articles 17(d) and 19 of the Statute, in addition to arguments pertaining to the charges and underlying evidence contained in the Document containing the Charges (the “DCC”). This challenge will be limited to the issue of the gravity of the case and the Defence estimates that it will only dedicate between 10 and 20 pages of its submissions on this issue. Considering its limited scope and length, the Defence’s admissibility challenge should be joined to the confirmation hearing pursuant to Rule 58(2), as this will not cause undue delay.
3. While the Prosecution should not need to make additional written submissions on the charges at this stage, if they do so, said submissions must be limited in length. Increasing the page limit of written submissions additional to the 500-page DCC already submitted would be disproportionate and incompatible with the right of the Defence to fair and expeditious proceedings. Any Prosecution response on the Defence’s limited admissibility challenge should be done orally during the confirmation hearing.

¹ ICC-01/12-01/18-357.

4. In relation to participating victims, the Single Judge determined that while their participation should be useful, the manner in which they intervene in the proceedings should not be antithetical to the respect of the rights of the defence, or to fair trial requirements.² In this light, and pursuant to the clear wording of Rule 121(9) of the Rules, only the Prosecution and Defence should be allowed to file pre-confirmation submissions. The three-day delay between the filing of such submissions and the confirmation of charges hearing does not allow for a thorough review by the Defence of any written submissions by the LVRs, in addition to the preparation for the hearing, including the preparation linked to the Judges' questions.

2.2 Oral submissions during the confirmation of charges hearing

5. The confirmation of charges hearing in this case should not be unduly lengthy on the sole basis of the unusual size of the DCC. The Prosecution's request for two and a half day of presentation³ is excessive and not justified by the facts and actual size of the case.
6. The Court has consistently emphasised that "the confirmation hearing is neither a "trial before the trial" nor a "mini-trial"; 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".⁴ Therefore given the limited nature of the confirmation procedure, there is no need to have a lengthy hearing.

² ICC-01/12-01/18-289-Red, para. 44.

³ ICC-01/12-01/18-363, para. 8.

⁴ *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.

7. While the DCC may be oversized, it is largely repetitive. The 13 charges brought against Mr. Al Hassan are far fewer than the 70 charges against Dominic Ongwen (6 days of confirmation hearing in total), or than the 18 charges against Ntaganda (5 days' confirmation hearing). In the *Blé Goudé* case, the confirmation of charges hearing lasted only 4 days in total, and in *Al Mahdi*, a single day.
8. Publicity is also not a valid ground for artificially prolonging the length of the confirmation of charges hearing.⁵ The public interest in knowing the nature of the charges and hearing submissions on key legal issues does not extend to an interest in having a lengthy public recital of specific evidential details, at a time when the charges have yet to be confirmed, and investigations are ongoing.
9. With this in mind, the Defence proposes the following schedule for the confirmation hearing:
10. The Prosecution's opening statement should be limited to one or two hours. This should be sufficient to succinctly summarise its submissions as requested by the Single Judge⁶ and present arguments related to admissibility, if any.
11. The Defence will adopt the same approach and limit its opening statement to 1 to 2 hours, subject to the modalities and the actual content of the Prosecution's submissions. Should the Prosecution be granted the requested two and a half days, the Defence reserves the right to make submissions of equivalent length in response.
12. While the LRVs may present their views orally at the beginning and end of the hearing,⁷ their intervention should be strictly limited in time and in scope. To this day, the Defence still has not been given access to any victims' application. This means that the Defence is unaware of the identity of the participating victims, where they are from and the reasons why they have been deemed to qualify as victims in this case. In addition, any exercise of their right to express their views and preoccupations should

⁵ Cf ICC-01/12-01/18-363, paras 5, 7.

⁶ See ICC-01/12-01/18-357, para. 20.

⁷ ICC-01/12-01/18-289-Red, para. 51.

not impose an undue burden on the Defence and result in Mr. Al Hassan having to face a second prosecutor.

13. The Single Judge determined that while the victims' participation should be useful, the manner in which they intervene in the proceedings should not be antithetical to the respect of the rights of the defence, or to fair trial requirements.⁸ For this reason, the oral arguments of the LRVs should not go beyond about 30 minutes in total, and should be limited to presenting the views and preoccupations of the victims they represent.
14. Following the opening statements and the responses to questions from the Chamber, the closing statements should be similarly short. The parties should both be afforded 30 minutes to give their closing statements, while the LRVs should be given no more than 15 minutes.
15. Pursuant to the accepted practice before the Court, the Defence must be able to have the last word.⁹ It should be allowed to present its opening and closing statements after the Prosecution and the LRVs, and be given an opportunity to reply to any response to its submissions.
16. Finally, any outstanding issues following the hearing should be addressed in writing, in a manner that respects the Defence's right to have the last word.¹⁰ Supplemental submissions could be filed by the Prosecution on 17 July 2019, and any last observations of the Defence could be filed by 19 July 2019.

⁸ ICC-01/12-01/18-289-Red, para. 44.

⁹ ICC-01/04-02/06-245, para. 8; ICC-02/04-01/15-401, para. 5; ICC-01/12-01/15-T-2-Red2-ENG, p. 3, line 19. See also Rule 141(2).

¹⁰ This is consistent with *Ntaganda*: ICC-01/04-02/06-292-Red2, ICC-01/04-02/06-294; *Mbarushimana*, ICC-01/04-01/10-450; *Katanga and Ngujolo*, ICC-01/04-01/07-698, ICC-01/04-01/07-699; *Lubanga*, ICC-01/04-01/06-764; Bemba, ICC-01/05-01/08-413; *Gbagbo*, ICC-02/11-01/11-429-Red, ICC-02/11-01/11-647; *Blé Goudé*, ICC-02/1102/11-179-Corr-Red; *Kenyatta et al.*, ICC-01/09-02/11-372; *Ruto et al.*, ICC-01/09-01/11-355; Abu Garda, ICC-02/05-02/09-237; *Banda and Jerbo*, ICC-02/05-03/09-T-9-Red-ENG, p. 50; *Bemba et al.*, ICC-01/05-01/13-443, p. 5.

3. Conclusion

17. The Defence for Mr. Al Hassan respectfully submits that the modalities described above will ensure a swift and fair confirmation hearing for all parties and participants.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 7th day of June 2019
At The Hague, The Netherlands