

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **4 May 2020**

Date of submission: **22 May 2020**

PRE-TRIAL CHAMBER I

Before:

**Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou**

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 “Prosecution response to the “Defence request for leave to appeal Pre-Trial Chamber I’s ‘*Décision portant modification des charges confirmées le 30 septembre 2019 à l’encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*’” (ICC-01/12-01/18-767-Conf)”, ICC-01/12-01/18-784-Conf, 4 May 2020

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court*
to:

The Office of the Prosecutor
 Ms Fatou Bensouda, Prosecutor
 Mr James Stewart

Counsel for the Defence
 Ms Melinda Taylor
 Ms Marie-Hélène Proulx
 Mr Thomas Hannis

Legal Representatives of the Victims

Mr Seydou Doumbia
 Mr Mayombo Kassongo
 Mr Fidel Luvengika Nsita

Unrepresented Victims

Legal Representatives of the Applicants

Unrepresented Applicants

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
 Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit
 Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

I. Introduction

1. The Defence for Mr Al Hassan's application for leave to appeal ("Request"),¹ the *Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*,² issued confidentially by Pre-Trial Chamber I ("Chamber"), should be dismissed.
2. The two purported issues identified by the Defence as arising from the Decision amount to nothing more than disagreements with the Chamber's findings. Since disagreements or such conflicts of opinion are not appealable issues within the terms of article 82(1)(d) of the Rome Statute ("Statute"),³ the Request must fail on this basis alone.
3. Nevertheless, even if they are considered appealable issues arising from the Decision, none of the issues meet the criteria for leave to appeal under article 82(1)(d), because they would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and an immediate resolution by the Appeals Chamber would not materially advance the proceedings.

II. Confidentiality

4. Pursuant to regulation 23bis(2) of the Regulations of the Court ("Regulations"), this response is filed confidentially because it responds to a Request and makes reference to a Decision of the same classification.

III. Procedural background

5. On 28 April 2020, the Defence sought leave to appeal the Decision. The Request identifies two purportedly appealable issues which allegedly arise from the Decision, namely:

) "Whether, as a matter of law, the Pre-Trial Chamber correctly defined the standard of diligence and notion of 'availability' that apply as concerns applications to include

¹ ICC-01/12-01/18-774-Conf ("Request").

² ICC-01/12-01/18-767-Conf. On 1 May 2020, the Chamber issued confidentially the "Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf," ICC-01/12-01/18-767-Conf-Corr ("Decision").

³ See e.g. Appeals Chamber, Judgement on the Prosecutor's application for extraordinary review of Pre-Trial Chamber I's 31 March 2006 Decision denying leave to appeal, ICC-01/04-168 OA3, 13 July 2006, para. 9; Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the prosecution and defence applications for leave to appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters", ICC-01/04-01/06-1557, 16 December 2008, para. 30.

additional incidents, after the confirmation of the charges, in a case involving a detained individual ('the First Issue'); and

- J Whether the Pre-Trial Chamber abused its discretion or exercised its discretion in an unreasonable manner as concerns the manner in which it balanced Mr. Al Hassan's rights under the Statute (including his right to adequate time and facilities, and his protection against unreasonably lengthy detention), as compared to the Prosecution's right to request the addition of new incidents, based on evidence known to the Prosecution, before the issuance of the first confirmation decision ('the Second Issue')",⁴ (together, "the Issues").

IV. Submissions

6. The Issues on which the Defence seeks leave to appeal the Decision do not constitute appealable issues within the terms of article 82(1)(d) of the Statute.

7. In addition, the Issues would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and an immediate resolution by the Appeals Chamber would not materially advance the proceedings.

A. The Issues are not appealable issues within the terms of article 82(1)(d) of the Statute

(i) First Issue

8. The First Issue brought by the Defence in its Request is not an appealable issue under article 82(1)(d) of the Statute. Instead, the Defence merely disagrees with the Chamber's assessment of the facts before it. Furthermore, to the extent that the Defence mischaracterises the Chamber's findings in the Decision, the First Issue does not arise from it.

9. In its Decision, the Chamber found that the Prosecution had provided sufficient justification regarding the fact that the new evidence was not known or available before the filing of the Document Containing the Charges ("DCC") on 11 May 2019 or could not have been collected.⁵ The Chamber had previously recalled relevant case-law, by reference to a decision from Pre-Trial Chamber II in the *Kenyatta* case.⁶ In part of the passage cited by the

⁴ Request, para. 1.

⁵ See Decision, para. 31.

⁶ See Decision, para. 19 ("*la jurisprudence suivante [...] qui selon [la Chambre] fixe le standard à appliquer*"), citing Pre-Trial Chamber II, *Prosecutor v. Uhuru Muigai Kenyatta*, "Decision on the 'Prosecution's Request to

Chamber, Pre-Trial Chamber II stated that:⁷

“[...] the continued investigation should be related only to such essential pieces of evidence which were not known or available to the Office of the Prosecutor prior to the confirmation hearing or could not have been collected for any other reason, except at a later stage. In these circumstances, the Prosecutor is expected to provide a proper justification to that effect in order for the Chamber to arrive at a fair and sound judgment regarding any request for amendment put before it [...]”

10. First, the Defence mischaracterises the First Issue “as a matter of law”,⁸ regarding whether “the Pre-Trial Chamber correctly *defined* the standard of diligence and notion of availability that apply”.⁹ However, the Defence does not cite any source to support its submission. Article 61(9) does not regulate any ‘standard’. Moreover, the Defence does not take issue with the approach of the *Kenyatta* Amendment UDCC Decision relied on by the Chamber.¹⁰

11. Second, the Defence simply disagrees with the Chamber’s assessment of the facts before it to determine that the new evidence was not known or available to the Prosecution prior to filing the DCC, or could not have been collected. In doing so, the Defence repeats its earlier submissions,¹¹ which the Chamber already considered.¹² The Defence also repeats its argument that the Prosecution should have notified the Chamber regarding purported issues faced in the collection of evidence before the date of the confirmation hearing or requested to

Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, ICC-01/09-02/11-700 (“*Kenyatta* Amendment UDCC Decision”), para. 37-38 (see ICC-01/09-02/11-700-Corr for the available version of this decision). See also Decision, para. 17 (recalling that the date of the filing of the DCC is the more appropriate date to take into consideration rather than the date of the confirmation hearing), 18, 20. See further ICC-01/12-01/18-608-Conf, and public redacted version ICC-01/12-01/18-608-Red (“Decision on Applicable Procedure”), para. 54 (finding that the relevant date in this case was 11 May 2019, as that was the date when the Prosecution filed the corrected and amended version of the DCC).

⁷ *Kenyatta* Amendment UDCC Decision, para. 37. See also Decision, para. 19, citing *Kenyatta* Amendment UDCC Decision, para. 37-38

⁸ Request, para. 1, 11.

⁹ Request, para. 11 (emphasis added). See also para. 1. See further para. 9 (arguing that the Chamber’s findings “equate to a very low legal threshold as concerns the *standards* of diligence, and availability, that must be demonstrated”) and 10 (arguing the Chamber “appears to *define* the notion of prosecutorial diligence in a lenient manner”) (emphasis added).

¹⁰ See e.g. Request, para. 6 (citing Decision on Applicable Procedure, para. 53 and noting that the Chamber adopted the conclusion of Pre-Trial Chamber II, as in the cited passage the Chamber cited Pre-Trial Chamber II’s *Kenyatta* Amendment UDCC Decision, para. 36-38).

¹¹ See Request, para. 7, citing Decision, para. 21, 27-29, and Request, para. 9 (referring to [REDACTED]). Compare with ICC-01/12-01/18-664-Conf, 16 March 2020 (“Defence Response”), para. 18, 20, 21, 24.

¹² See e.g. Decision, para. 26-29, referring *inter alia* to Defence Response, para. 20, 21, 23, 24.

delay the hearing.¹³ The Chamber rejected this argument on the basis that the explanations given by the Prosecution showed that the circumstances in question [REDACTED] were inherent to any investigation and did not reveal any negligence on the Prosecution's part in conducting such investigation.¹⁴

12. Third, the Defence mischaracterises the Decision when it states that "the Pre-Trial Chamber appears to define the notion of Prosecutorial diligence in a lenient manner, such that it is sufficient for the Prosecution to demonstrate that it *did not* collect the evidence before the relevant deadline (including for reasons of evolution of strategy or convenience), rather than it *could not* for reasons that were beyond its control".¹⁵ The Defence does not cite any source for its proposition, nor does it specify the passage in the Decision where the purported finding was made. The Chamber's reasoning¹⁶ does not reflect the characterisation by the Defence.

(ii) Second Issue

13. Like the First Issue, the Second Issue brought by the Defence in its Request is not an appealable issue under article 82(1)(d) of the Statute, but merely a disagreement with the Chamber's evaluation of the facts before it. Likewise, to the extent that the Defence

¹³ Request, para. 8. Compare with Defence Response, para. 9-11.

¹⁴ See Decision, para. 30 (citing Defence Response, para. 9-11).

¹⁵ Request, para. 10 (emphasis in the original).

¹⁶ See e.g.: Decision, para. 17 (« de telles preuves n'avaient pu être recueillies »), para. 18 (« n'ont pu être recueillies »), para. 19 ("which were not known or available to the Office of the Prosecutor prior to the confirmation hearing or could not have been collected for any other reason, except at a later stage"), para. 20 (« Dans le droit fil de cette jurisprudence, la Chambre, dans le cas de l'espèce, s'attachera donc à déterminer si le Procureur fournit une justification suffisante concernant le fait que les Nouveaux éléments de preuve n'étaient pas connus ou disponibles avant le dépôt du DCC, ou, qu'ils ne pouvaient être recueillis pour toute autre raison hors du contrôle du Procureur »), para. 21 (« Concernant les raisons pour lesquelles les Nouveaux éléments de preuve ne pouvaient être recueillis avant le dépôt de son DCC ») ([REDACTED] « a donné son accord pour devenir un témoin du Procureur devant la Cour et que le témoin n'a ensuite été disponible pour un entretien que [REDACTED] [REDACTED] « son témoignage n'a ensuite pu [REDACTED] », para. 24 (« il reviendra alors au Procureur de fournir une justification suffisante sur son incapacité à recueillir ces éléments de preuve ainsi avant le dépôt de son DCC »), para. 25 (« toujours à la condition que les Nouveaux éléments de preuve n'aient pas été disponibles au moment du dépôt du DCC »), para. 27 (« [REDACTED] que le Procureur explique que ce témoin n'a donné son accord formel pour devenir un témoin du Procureur devant la Cour qu'[REDACTED] [REDACTED] [...] il ne saurait être reproché au Procureur des décisions qui n'appartiennent qu'au témoin, concernant la volonté de cette dernière ou de ce dernier de témoigner, ou la date à laquelle elle ou il peut se montrer disponible pour un entretien avec le Procureur »), para. 28 ([REDACTED], le Procureur « n'a obtenu ces informations que [REDACTED] [...] ne considère pas que le document mentionné par la défense soit de nature à remettre en cause l'affirmation du Procureur »), para. 29 (« [REDACTED] n'était d'abord pas un témoin considéré comme étant de première importance, mais qu'[REDACTED] [REDACTED] d'un témoin etc.) »), para. 31 (« le Procureur a fourni des justifications suffisantes concernant le fait que les Nouveaux éléments de preuve n'étaient pas connus ou disponibles avant le dépôt du DCC, ou, qu'ils ne pouvaient être recueillis »).

mischaracterises the Decision, the Second Issue similarly does not arise from it.

14. The Chamber considered the fact that the amendment of confirmed charges would have no impact on the ongoing proceedings before the Trial Chamber (“*procédure en cours en première instance*”) and would not delay the beginning of the trial. It considered that the amendment concerned a relatively limited number of new factual allegations (or victims) (“*de nouveaux cas (ou victimes)*”) falling within already confirmed charges, which reduced the amendment’s “real and undeniable” impact on the organisation of defence work in this phase of the preparation for trial.¹⁷ In seeking to balance the rights of the Defence and the necessary search for truth by the Prosecution, the Chamber found that this impact did not justify failing to include new factual allegations, supported by new evidence, in support of already confirmed charges.¹⁸

15. The Defence frames the Second Issue as an error in the exercise of the Chamber’s discretion.¹⁹ However, in doing so, the Defence merely disagrees with the Chamber’s evaluation of the facts before it.

16. First, the Defence incorrectly argues that the Chamber did not refer to certain specific factual circumstances of the case.²⁰ However, the Chamber considered these circumstances, but it reached a different conclusion from the Defence. For example, the Defence argues that the Chamber did not refer to the purported “significant increase in the scope of the case and charges” as a result of the addition of the new factual allegations,²¹ while the Chamber found that the amendment concerned only a relatively limited number of new factual allegations/victims falling within the existing charges.²² The Chamber also found that the amendment would not delay the commencement of trial,²³ thus belying the Defence assertion that the Chamber did not refer to the trial’s scheduled start and the amount of time between it granting the amendment of charges and the trial’s commencement.²⁴

17. Second, the Defence’s submission that “the Chamber then addressed the impact on the rights of the Defence in one short paragraph” does not make the Second Issue an appealable

¹⁷ Decision, para. 33.

¹⁸ Decision, para. 33.

¹⁹ Request, para. 13.

²⁰ Request, para. 12.

²¹ Request, para. 12(f).

²² Decision, para. 33.

²³ Decision, para. 33. *See also* para. 3.

²⁴ Request, para. 12 (c).

issue under article 82(1)(d) of the Statute.²⁵ Moreover, in the paragraph following the paragraph on which the Defence focuses,²⁶ the Chamber stated that in deciding to assess the merits of the Prosecution's request to amend the charges, it had considered the Prosecution's submissions regarding the timing of the collection of the new evidence, *the rights of the Defence as well as the impact on the proceedings before the Trial Chamber*.²⁷

18. Third, as the Chamber in charge of the pre-confirmation phase, the Defence does not substantiate that it would have overlooked the length of the Accused's detention,²⁸ of the confirmation phase,²⁹ or the number of anonymous witnesses.³⁰

19. Finally, in the way it frames the Second Issue, the Defence considers as a relevant factor whether or not the new evidence was "known to the Prosecution *before the issuance of the first confirmation decision*",³¹ when in fact the relevant consideration as found by the Chamber was *inter alia* whether it was known or available *before the date of filing of the DCC*,³² and the Defence does not take issue otherwise with the Chamber's determination of this being the relevant date.

B. The Issues would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

20. The Defence also fails to substantiate that the Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

(i) The Issues would not significantly affect the fair and expeditious conduct of the proceedings

21. The Defence fails to demonstrate that the Issues would significantly affect the fair and expeditious conduct of the proceedings. Instead the Defence re-argues its understanding of

²⁵ Request, para. 12.

²⁶ Request, para. 12.

²⁷ See Decision, para. 34.

²⁸ Request, para. 12(a).

²⁹ Request, para. 12(b).

³⁰ Request, para. 12(d).

³¹ Request, para. 1, 13 (emphasis added).

³² See Decision, para. 17 (recalling that the date of the filing of the DCC is the more appropriate date to take into consideration rather than the date of the confirmation hearing), 18, 20, 31. See also Decision on Applicable Procedure, para. 54 (finding that the relevant date in this case was 11 May 2019, as that was the date when the Prosecution filed the corrected and amended version of the DCC).

the permitted scope of the Prosecution's investigation after the confirmation of charges.³³ These submissions should be rejected on these bases alone, since the Chamber already dealt with this question.³⁴ In any event, the Defence's submissions do not seem to be correct.

22. First, the Defence does not substantiate how the Issues would significantly affect the fair and expeditious conduct of the proceedings *in this particular case*.³⁵ Instead, the Defence speculates *in the abstract* that any decision authorising amendment of charges after confirmation prejudices the accused's rights. This is not correct, since article 61(9) is not *ultra vires* the Statute.

23. Second, the Defence argues that there is a "clear dissonance" between the Chamber's approach to article 61(9) "and previous case-law",³⁶ relying in support of this contention, on decisions by the Appeals Chamber in *Mbarushimana*,³⁷ and by Pre-Trial Chamber II in *Ruto and Sang*³⁸ and Trial Chamber V in *Kenyatta* (a different decision).³⁹ However, the "clear dissonance" between the Chamber's approach and previous case-law as put forward by the Defence is not apparent. In its Decision,⁴⁰ the Chamber noted that in its previous decision on the procedure applicable to the Prosecution's request for amending the charges, it had recalled relevant Appeals Chamber case-law. According to the Chamber, this case-law considered that ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing, even if this was not a requirement under the Statute. It cited *inter alia* the *Mbarushimana* Decision relied upon by the Defence in support.⁴¹ In *Kenyatta*, the

³³ Compare Request, para. 14-20 with Defence Response, para. 13-16.

³⁴ See Decision, para. 17-20.

³⁵ See Request, para. 14-18. *But see* para. 19-20 (addressed further below).

³⁶ Request, para. 15.

³⁷ Request, para. 15, citing Appeals Chamber, *Prosecutor v. Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", ICC-01/04-01/10-514, 30 May 2012 ("*Mbarushimana* Decision"), para. 44.

³⁸ Request, para. 15, citing Pre-Trial Chamber II, *Prosecutor v. Ruto and Sang*, Decision on the "Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", ICC-01/09-01/11-859, 16 August 2013 ("*Ruto and Sang* Decision"), para. 37.

³⁹ Request, para. 15, citing Trial Chamber V, *Prosecutor v. Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, ICC-01/09-02/11-728, 26 April 2013, para. 119.

⁴⁰ Decision, para. 17, citing *Mbarushimana* Decision, para. 54 and, as "see also", *Lubanga* Decision, para. 44. See also next footnote, below.

⁴¹ Decision, para. 17; Decision on Applicable Procedure, para. 53, citing *inter alia* *Mbarushimana* Decision, para. 54. Note, however, that the Chamber must have referred to para. 44, which states "As previously indicated by the Appeals Chamber, the investigation should largely be completed at the stage of the confirmation of charges hearing", citing "*Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', 13 October 2006, ICC-01/04-01/06-568 (OA 3), para. 54 (acknowledging that the Prosecutor may continue his investigation beyond the confirmation hearing, but stating that 'ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing')". ("*Lubanga* Decision").

Trial Chamber likewise referred to the *Mbarushimana* Appeals Chamber's decision which, as noted, the Chamber considered.⁴² In any event, in accordance with *Kenyatta*, in this case the Prosecution sought to confirm the charges after having "a sufficient overview of the evidence available and the theory of the case".⁴³ Moreover, in *Ruto & Sang*, the Pre-Trial Chamber did not make the finding that the Defence quotes. Rather, the Pre-Trial Chamber made that finding in the *Kenyatta* Amendment UDCC Decision, which is precisely the decision considered and relied upon by the Chamber in its Decision in the instant case.⁴⁴

24. Third, in arguing that the implication of previous case-law is *inter alia* that "it is preferable for the [confirmation] hearing to be postponed, to allow for the collection of additional evidence, rather than deferring such matters to a future Article 61(9) application",⁴⁵ the Defence overlooks relevant jurisprudence. In *Lubanga*, the Appeals Chamber confirmed that post-confirmation hearing investigations are permitted, including to support an amendment to the charges, and in particular where ruling out further investigations would otherwise deprive the Court of significant and relevant evidence.⁴⁶ Notably, the Appeals Chamber rejected an argument that investigations after the confirmation hearing would be to

⁴² ICC-01/09-02/11-728, para. 118-119, fn. 209. *See also* para. 119, fn. 210, 212 (referring to the *Lubanga* Decision). *Compare with* para. 124. Note that according to fn. 211, the line of reasoning in para. 119-124 is adopted by Majority (Judge Eboe-Osui not joining in the line of reasoning).

⁴³ ICC-01/09-02/11-728, para. 119. *See also* para. 118 (expressing concern *inter alia* at the considerable volume of evidence collected by the Prosecution post-confirmation), 122 (Majority noting that, in that case, at least 24 of the Prosecution's fact witnesses were interviewed for the first time after the confirmation hearing, and in addition a large quantity of documentary evidence appears to have been collected post-confirmation).

⁴⁴ *Compare* ICC-01/09-01/11-859, para. 37 with ICC-01/09-02/11-700 (*Kenyatta* Amendment UDCC Decision), para. 37. In any event, in the *Ruto and Sang* Decision, Pre-Trial Chamber II found that: "The Single Judge is cognizant that the Prosecutor is not barred, under the legal framework of the Court, from continuing her investigation post confirmation of charges when needed for her case and for the principal goal of determining the truth. This power is inherent in the Prosecutor's discretion to conduct her investigation, as provided by the legal texts of the Court. However, the exercise of such discretion should be diligent and professional and should also not lead to abuse." (ICC-01/09-01/11-859, para. 34).

⁴⁵ Request, para. 16.

⁴⁶ *See Lubanga* Decision, para. 53 ("[t]he fact that article 61 (9) of the Statute does not make reference to the investigation indicates that the Prosecutor's flexibility with respect to the investigation that is acknowledged by article 61(4) of the Statute remains unaffected by the confirmation of the charges; the Prosecutor does not need to seek permission from the Pre-Trial Chamber to continue his investigation. Furthermore [...] the possibility to amend the charges after their confirmation, albeit with the permission of the Pre-Trial Chamber, must necessarily mean that the investigation could continue after the confirmation of the charges. If it were otherwise the sole purpose of article 61(9) of the Statute with respect to the amendment or withdrawal of confirmed charges would be to allow the Prosecutor to correct errors in the evaluation of evidence."), 54 ("The Appeals Chamber notes that, ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing [...] this is not a requirement of the Statute. The Appeals Chamber accepts [...] that in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence –particularly in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing"), 56 ("[i]f further investigations lead the Prosecutor to reassess his theory about the suspect's liability for the crimes charged, he may seek, within the limits of article 61(9) of the Statute, an amendment or withdrawal of the charges, as necessary").

the accused's detriment, observing that other safeguards were possible, such as disclosure of the information and material sufficiently in advance of trial.⁴⁷

25. Fourth, the Defence also relies on a decision in the *Katanga* case in support of its argument that the Issues affect the fair and expeditious conduct of the proceedings.⁴⁸ However, in *Katanga*, the Trial Chamber stated that the charges must be contained in the confirmation decision and that new factual allegations cannot be introduced during trial. It did not rule that a Pre Trial Chamber cannot amend the charges pursuant to article 61(9) of the Statute before the trial starts, as the Chamber has done. By suggesting that charges cannot be amended after confirmation, the Defence in fact challenges the validity of article 61(9) of the Statute.

26. Fifth, the Defence does not demonstrate that “the post-confirmation inclusion of additional incidents impacts on the overall efficiency of Defence preparation”, insofar as the Defence needs to (1) “conduct a new review of evidence and statements concerning the common plan, in order to ascertain the linkage to these incidents, and cross-reference potential inconsistencies”; (2) “re-interview potential witnesses and sources, in order to determine whether these persons have information that is relevant to the new incidents”.⁴⁹ Any potential prejudice is limited by the fact that all of the confirmed factual allegations relate to pre-existing charges and are consistent with the other factual allegations underlying those charges. Indeed, as found by the Chamber, the amendment concerned a relatively limited number of new factual allegations (or victims) falling within already confirmed charges, which reduced the amendment's impact on the organisation of defence work in this phase of the preparation for trial.⁵⁰ In fact, the Defence itself acknowledges that the “new incidents [...] concern allegations of a similar type to the existing charges, and do not elucidate new or important aspects concerning the alleged common plan.”⁵¹

27. Likewise, given the limited nature of the amendment, and the disclosure to the Defence of the evidence in support several months in advance of the trial, it is unclear that “the current prospects” for the Defence to have adequate time and facilities to “investigate, collect and

⁴⁷ *Lubanga* Decision, para. 55.

⁴⁸ Request, para. 17, citing Trial Chamber II, *Prosecutor v. Katanga*, Decision on the Filing of a Summary of the Charges by the Prosecutor, ICC-01/04-01/07-1547-tENG, 21 October 2009 (“*Katanga* Decision”), para. 22-23.

⁴⁹ Request, para. 19.

⁵⁰ Decision, para. 33.

⁵¹ Request, para. 12 (g).

present evidence, and call witnesses on [the Accused's] behalf" are "extremely limited".⁵²

(iii) The Issues would not significantly affect the outcome of the trial

28. The Defence argues that had "the Pre-Trial Chamber [...] adopted a more stringent definition of 'availability' for the purposes of this case, or placed more weight on issues concerning the impact on the rights of the Defence, the incidents would not have been included in the charges. Each incident can lead to a conviction, if upheld at trial".⁵³

29. However, the Defence argument would be applicable—irrespective of the issue raised—to all decisions to confirm and amend the charges. Yet, the Statute does not foresee the direct appeal of decisions under article 61(7) and (9), and the Court's case-law has instead recognised that the Statute restricts interlocutory appeals to a few strictly-defined exceptions.⁵⁴

30. With this argument, the Defence only demonstrates that the purported Issues simply constitute disagreement with the entire Decision.

C. An immediate resolution of the Issues would not materially advance the proceedings

31. Finally, the Defence fails to demonstrate that an immediate resolution of the Issues by the Appeals Chamber would materially advance the proceedings. The Defence argues that it "will not have sufficient time to prepare in advance of the trial date scheduled for 14 July 2020", nor will it "be able to 'catch up' during the trial itself" in the context of "significant amount of post-confirmation disclosure" and "the COVID-19 pandemic".⁵⁵ The Defence however does not explain how an immediate resolution of the Issues by the Appeals Chamber would address those concerns. It would take time and resources for the parties to brief any appeal and for the Appeals Chamber to decide on it, and unless the Trial Chamber suspends the start of the trial pending the appeal's resolution, the clock would continue ticking. If any, concerns regarding Defence preparation before trial and throughout the trial itself,⁵⁶ should be brought by the Defence before the Trial Chamber managing the trial in order to seek appropriate remedy from it.

⁵² *Contra* Request, para. 20.

⁵³ Request, para. 21.

⁵⁴ See ICC-01/12-01/18-498-Red2, para. 37, and authorities cited therein.

⁵⁵ Request, para. 22.

⁵⁶ See Request, para. 22.

V. Requested Relief

32. For the reasons set out above, the Prosecution requests that the Chamber deny the Defence Request.



Fatou Bensouda, Prosecutor

Dated this 4 May 2020

At The Hague, The Netherlands