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TRIAL CHAMBER X

Before: **Judge Antoine Kesia-Mbe Mindua, Presiding Judge**
Judge Tomoko Akane
Judge Kimberly Prost

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 "Defence Rule 134(1) observations"

Source: **Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud**

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I. Introduction

1. The Defence for Mr. Al Hassan files the following observations concerning the conduct of the proceedings, dating from the confirmation of charges decision, to the present stage.[1]

2. Mr. Al Hassan's fundamental fair trial rights have been impacted by the following:

    a. The extent of post-confirmation investigations and disclosure of incriminating evidence, the inclusion of 13 additional incidents at an advanced stage of the proceedings, and the Prosecution's presaged intention to file a Regulation 55 notice;
    b. The impact of COVID-19 and the security situation in the North of Mali on the ability of the Defence to conduct investigations, and the judicial approach to disclosure: specifically, the overly strict manner in which the Single Judge has defined "relevance", and the overly broad manner in which the Prosecution has been permitted to rely on summaries in *lieu* of the disclosure of original materials; and
    c. The inability of Mr. Al Hassan to meet with his Defence team or his family, in the key months leading up to the trial, and the hypothetical possibility that Mr. Al Hassan will not be physically present in the courtroom during trial hearings.

3. The cumulative impact of each element has a multiplier effect as concerns the fairness of the proceedings. For example, the prejudice occasioned by the impediments to Defence investigations is compounded by firstly, the extraordinary amount of new, post-confirmation disclosure, secondly, the extremely limited amount of PEXO disclosure, and the arduous and restrictive nature of judicial remedies as concerns the disclosure process, and thirdly, the difficulties faced by the Defence in obtaining privileged instructions from Mr. Al Hassan *via* in person consultations. Whereas the Defence can indicate that it intends to raise challenges under Article 32 at trial, the impediments to Defence investigations have also prevented the Defence from ascertaining whether there is a sufficient foundation to raise a defence under Article 31(1)(d).

4. It would be unfair and overly prejudicial to commence the trial while these issues are outstanding and unresolved. Mr. Al Hassan should not be compelled to renounce his right to be physically present at trial, nor should the Defence be required to examine Prosecution

[1] These observations have been filed on a confidential ex parte (Defence, Registry only basis), due to the fact that the filing refers to information with this level of classification. The Defence will simultaneously file a confidential redacted version.

witnesses without the benefit of investigations, and effective instructions. But at the same time, unless underlying structural issues are resolved, an adjournment is not necessarily a sufficient remedy in light of:

d. The impact on Mr. Al Hassan's length of detention, which is of particular concern given the difficult nature of the current conditions of detention; and
e. The possibility that certain impediments will remain in force, even if the proceedings are adjourned.

5. Accordingly, before determining the necessity and length of an adjournment in an abstract manner, the Defence submits that it is first necessary to:

f. Order the Prosecution to streamline its case, rather than expand it ever further; and
g. Resolve underlying structural issues concerning the ability of the Defence to conduct *in situ* investigations in the North of Mali;
h. Reconsider the approach to disclosure, in order to ensure that the Defence can rely on disclosure requests, as a supplementary form of investigations;
i. Ascertain the point at which Mr. Al Hassan will be able to meet with his Defence in person, and attend hearings in person; and
j. Take steps to ensure that Mr. Al Hassan can spend a meaningful amount of time with his family, at regular intervals.

6. The Defence will address issues concerning defects in the wording of the charges in the separate filing, due on 12 June 2020. The Defence further understands, in light of the Appeals Chamber's ruling in the *Kenya* cases, that challenges to the definition of offences, and the contours of the elements of the crimes, are not jurisdictional in nature, but are "matters for trial".[2]

II. Submissions

The extent of post-confirmation investigations and disclosure of incriminating evidence

7. Rather than focusing on making this case ready for trial (through timely disclosure), the Prosecution continued to conduct an array of post-confirmation investigations, which

[2] ICC-01/09-02/11-425, paras. 36-37.

included interviewing new individuals, conducting new interviews, with known individuals, and re-interviewing existing witnesses, in order to obtain further incriminating materials. The Prosecution's focus on such investigations has had a direct impact on the length of the proceedings, as reflected by the multiple adjournments that have been requested in the last 6 months, on the grounds that the Prosecution did not have sufficient time and resources to prepare redaction requests, and implement disclosure.[3]

8. This impact is also reflected in both the disclosure timeline, the sheer volume of material that has been disclosed in the immediate lead up to the trial, and the multitude of Regulation 35 requests to add new items to the Prosecution's list of evidence.

9. This is reflected by the following statistics:

> From 14 April to 9 June 2020, the Prosecution disclosed 5222 documents, of which 664 were translations (243 Arabic translations and 421 English or French translations). Of these documents, 1601 were incriminating (231 were Arabic translations, and 409 were English or French translations), 3620 documents were disclosed under Rule 77 (12 were Arabic translations, and 12 were English), and only one document was disclosed as PEXO;
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> In the discrete time period from 12 May to 9 June 2020 (that is, after the disclosure deadline), the Defence received 447 documents (of which 168 were translations: 88 Arabic translations and 80 English or French translations). Of these documents, 321 documents were incriminating (76 were Arabic translations, and 68 were English or French translations), and 126 documents were disclosed under Rule 77 (12 were Arabic translations and 12 were English translations). None of these additional disclosures were PEXO.

10. Some of these delays are attributable to the COVID-19 pandemic. But it is also clear that if the Prosecution had focused its resources on disclosing existing materials, rather than drafting and litigating amendment requests, adding new witnesses (including experts), and re-interviewing witnesses, the delays would have been of a reduced nature.

11. The Defence has already filed detailed submissions concerning the impact of late disclosure on its ability to prepare in relation to the first block of witnesses.[4] The issue nonetheless goes beyond the initial steps of the trial, and affects the trial process as a whole, and in particular,

[3] OTP extension of time requests: ICC-01/12-01/18-552-Conf-Red, ICC-01/12-01/18-609-Conf, ICC-01/12-01/18-646-Conf-Red, ICC-01/12-01/18-665-Conf, ICC-01/12-01/18-760-Conf and ICC-01/12-01/18-832-Conf.
[4] ICC-01/12-01/18-825-Conf-Red, paras. 16-32.

the defendant's right to timely notice as concerns the nature, cause and content of the charges in this case.

12. The Prosecution's duty to establish the truth is not one-sided but encompasses a duty to investigate incriminating and exonerating circumstances equally. And yet none of the Prosecution's post-confirmation investigations appear to have been directed towards exonerating issues (or matters that might have assisted the Defence in its preparation). This is reflected by the fact that the Prosecution has only disclosed one exculpatory item in the last 4 months (and this item had been in its custody since 2014). It is also no answer for the Prosecution to rely on disclosure under Rule 77, since Rule 77 encompasses items that are incriminating or material to Defence preparation. Rather, if information is exculpatory, it should be identified as such, both because clear identification assists the Defence to prioritise the review of information, and because there may be different legal consequences as concerns the delayed disclosure or redaction of PEXO materials.

13. The Prosecutor's powers under Article 54 must also be exercised in a manner which is consistent with the defendant's right to a fair trial.[5] As a result, the Prosecution must ensure that further investigations, and additional disclosure caused by such investigations, do not prejudice the defendant's right to timely notice, and his protection against unreasonably lengthy proceedings (that will impact directly on the length of pre-trial detention). As emphasized recently by Pre-Trial Chamber II:[6]

> the Prosecutor is duty-bound to timely honour all relevant statutory obligations and recalls that the Prosecutor's investigation 'should largely be completed at the stage of the confirmation of charges hearing', as well as the Appeals Chamber's determination to the effect that the Prosecutor can only investigate beyond the confirmation hearing to the extent that 'this is necessary in order to establish the truth' and when failing to do so might result in 'depriv[ing] the Court of significant and relevant evidence'.

14. Notwithstanding these legal directives, many of the new witnesses and incidents have very little relevance as concerns the Chamber's adjudication of the individual responsibility of Mr. Al Hassan. These are matters of which Mr. Al Hassan has no personal knowledge, and the vague nature of the related allegations as concerns dates, and the identity of individual perpetrators will also render it particularly difficult for the Defence to investigate the veracity

[5] ICC-01/04-01/06-1486, para. 42.
[6] ICC-01/14-01/18-538, para. 19.

and reliability of these allegations. Their inclusion also has a disproportionately prejudicial impact on the length of the proceedings, and the right to adequate time and resources to prepare Defence lines of examination and argument.

15. These difficulties are further aggravated by the COVID-19 pandemic. Even if the Defence is able to conduct *in situ* investigations at some point, its ability to do so is likely to be limited. It is therefore essential that the Defence can focus such investigations on the core evidence and elements of the charges. And yet, the new allegations and evidence render it very difficult for the Defence to do so. Even if the probative value and relevance of the new allegations are low, they can still result in independent convictions. The Defence therefore has an ethical duty to investigate them.

16. Prosecution and Registry filings have also foreshadowed the likelihood of disruptions in the scheduling of witnesses, due to difficulties in predicting when witnesses will be able to travel. This will impact on the overall length of the Prosecution case. The existence of empty slots in the trial schedule might also act as a disincentive to effective trial management: that is, in order to fill such slots, the Prosecution might call live testimony on issues that are either irrelevant, or which should be introduced through Rule 68(2) or (3). This risk is particularly acute in light of the absence of any existing limit as concerns the number of witnesses or trial hours for the Prosecution case. These witnesses will simply exhaust time and Defence resources, which would be better deployed in reviewing disclosure, and conducting Defence investigations, so that Defence is placed to address the core elements of the case, in a fair and equitable manner.

17. Articles 60(4), 64(2) and 67(1) impel the Trial Chamber to manage the conduct of the proceedings in such a manner as to pre-empt delays. The perfect storm caused by the Prosecution's failure to pay sufficient heed to the impact of post-confirmation investigations on the rights of Mr. Al Hassan, the security situation in Mali, and the COVID-19 pandemic, cannot be remedied by a few delays throughout the trial. Instead, the fairest and more effective approach would be to direct the Prosecution to overhaul and streamline its case, and discard peripheral witnesses and incidents, with a view to presenting a case that can be heard within a reasonable time, notwithstanding the likely delays that will be caused by the ongoing COVID-19 pandemic.

The impact of the COVID-19 pandemic and the security situation in the North of Mali on Defence investigations, and the disclosure regime in this case

18. As things stand, it is entirely uncertain if and when the Defence will be able to conduct missions to Mali, or the surrounding countries. The current suspension also applies to *in situ* missions, conducted by local resource persons.

19. Apart from the measures related to the COVID-19 pandemic, there are also a range of structural issues that have yet to be resolved. This includes:

    a. [REDACTED]
    b. [REDACTED]
    c. [REDACTED]
    d. Whether the Defence can be indemnified or provided temporary ICC insurance if they are required to sign UN waivers.[7]

20. Unlike the *Banda* case, these issues do not affect the Prosecution and the Defence equally. The Prosecution was able to access Timbuktu from a very early point in 2013, and has since conducted multiple missions to Mali. The Prosecution also benefited, and continues to benefit [REDACTED], who have conducted multiple *in situ* investigations to Timbuktu and its environs, the MINUSMA, and the Malian authorities, who referred the situation to the Prosecution, and have since provided a significant degree of assistance by way of access to files, and the identification and location of potential witnesses. There is also a higher concentration of potential Prosecution witnesses based in Bamako. In contrast, the nature of these charges, and linkages to Al-Qaeda and allegations of terrorism (which have been ventilated repeatedly by the Prosecution in public filings and hearings), create a clear disincentive to cooperation. [REDACTED].[8]

21. The structural impediments to Defence investigations have also not been counter-balanced through Prosecution disclosure, due to firstly, the Prosecution's failure to conduct full, and impartial investigations into both incriminating and exculpatory issues, and secondly, the restrictive and onerous disclosure regime that has been applied in this case.

[7] It is the understanding of the Defence that on 20 March 2020, the Office of the Director of the DJSS indicated to the ICCBA that it would look into this issue further, and revert. The Defence has not received any subsequent further information or updates.
[8] [REDACTED]

22. As concerns the first aspect, the drafters of the Rome Statute were aware that the Defence "would not be able to wield similar authority [as the Prosecutor] to enlist support or assistance with a view to preparing the defence as broadly, if necessary. This is one area where the civil law approach of an investigative judge showed the way to a workable solution to this problem, which relates essentially to potential inequality of recours between parties."[9] Article 54(1) was consequently drafted with the intent to create a "clear and binding mandate for the Prosecutor to investigate both sides of the case equally".[10] These investigative powers were not created as an end in themselves, but as a means of ensuring the production of evidence in court, including through the disclosure of information to the Defence.[11] Thus, whereas the *ad hoc* Tribunals confined the scope of disclosure obligations to information that is in the custody of the Prosecution, the ICC has gone further, and found that Article 54(1)(a) translates to a positive obligation on the part of the Prosecution to collect and disclose information that might be relevant to the Defence or exculpatory.[12] This additional layer of obligation is of critical importance in situations, like Mali, where the Defence lacks the means to investigate in an effective manner, or where the security or political situation might render it more difficult to access particular evidence in the future. The full execution of the Prosecution's Rule 77 obligations is thus "essential in ensuring the fairness of the proceedings and that the rights of the defence are respected, in particular the principle of equality of arms."[13]

23. The Prosecution has, however, frustrated this objective through its investigative and disclosure practices. Rather than collecting information in a comprehensive and impartial

[9] M. Bergsmo P. Krueger, 'Duties and Powers of the Prosecutor' page 715-725 in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft at page 716, para. 2.
[10] M. Bergsmo P. Krueger, 'Duties and Powers of the Prosecutor' page 715-725 in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft at page 716, para.2.
[11] ICC-01/04-01/06-1486, para. 41: "It follows from article 54 (1) of the Statute that the investigatory activities of the Prosecutor must be directed towards the identification of evidence that can eventually be presented in open court, in order to establish the truth and to assess whether there is criminal responsibility under the Statute".
[12] ICC-01/04-01/06-718, p. 4; ICC-01/05-01/13-T-37, pp. 8-9 (concerning investigative failure under Article 54(1(a) arising from Prosecution's failure to request and obtain statements taken by national authorities). The ICTR has also found that, in the interests of justice, the Prosecution might be required to request, and disclose statements taken by national authorities (particularly if it is better placed to do so): Prosecutor v. Kajelijeli, "Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO", 2 November 2001, para. 20; Prosecutor v. Bagilishema, Decision of the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses, Y, Z, and AA, 8 June 2000; Prosecutor v. Gatete, Decision on Defence Motion for Disclosure of Rwandan Judicial Records Pursuant to Rule 66(A)(ii) and Order to the Prosecution to Obtain Documents, 23 November 2009, para. 13; Prosecutor v. Nzabonimana, Decision on Callixte Nzabonimana's Motion for an Order Concerning Disclosure of Gacaca and Judicial Material relating to Prosecution Witnesses, 29 October 2009, para. 30 ("a practice has developed at the ICTR of requiring the intervention of the Prosecution to obtain and disclose certain records, specifically Rwandan judicial records of Prosecution witnesses, in the interests of justice.")
[13] ICC-02/05-03/09-501, para. 34 (specifically noting the difference in wording between the ICC rule, and the respective provisions at the ICTY and ICTR).

manner, the Prosecution has actively dissuaded information providers from providing information or full records, due to the implications this could have *vis-à-vis* disclosure to the Defence.[14] The Prosecution has also 'screened' information *in situ*,[15] and then either took notes of the original document (notes, which have not been disclosed in full to the Defence),[16] or cherry picked from the available information, when submitting subsequent Prosecution requests for the official transmission of the records in question.[17] This selection process means that the Prosecution only possesses items which support its case, which in turn, necessarily circumscribes the content of Rule 77 and PEXO information disclosed to the Defence. As a result, the Defence is compelled to seek access to the original materials at an advanced stage of the case, and under considerably less advantageous co-operation conditions.

24. As cautioned by Judge Kaul in relation to possible failures to conduct investigations that comply with both the letter and spirit of Article 54(1)(a):[18]

> any investigation meeting these standards only partially and unsatisfactorily will probably lead to problems and difficulties not only for an effective and successful prosecution but also for the work of the Chamber concerned and for the Court in general. This may be the case, for example, if the investigation in a concrete case de facto does not cover all facts and evidence of that case, or if not all possible measures are taken to make the investigation effective; then the consequence may be that there will be only a limited amount of evidence or - in extremis - scarcity of evidence. Another example of such unsatisfactory investigation would be an approach which de facto is aiming, in a first phase, (only) at gathering enough evidence to reach the "sufficiency standard" within the meaning of article 61(7) of the Statute, maybe in the expectation or hope that in a further phase after the confirmation proceedings, additional and more convincing evidence may be assembled to attain the 'beyond reasonable doubt' threshold, as required by article 66(3) of the Statute. I believe that such an approach, as tempting as it might be for the Prosecutor, would be risky, if not irresponsible: if after the confirmation of the charges it turns out as impossible to gather further evidence to attain the decisive threshold of 'beyond reasonable doubt', the case in question may become very difficult or may eventually collapse at trial, then with many serious consequences, including for the entire Court and the victims who have placed great hopes in this institution.

[14] [REDACTED]
[15] [REDACTED]
[16] See [REDACTED] The disclosed investigator's note (drafted on [REDACTED] April 2020), only contains a one sentence description of these documents.
[17] For example, [REDACTED]
[18] ICC-01/09-01/11-373, para. 47.

25. The imbalance that this practice has created has been further widened by the disclosure regime in this case. In accordance with the established case law of the ICC:

a. Disclosure is the rule, and non-disclosure the exception;
b. The Prosecution has a positive obligation to identify and disclose Rule 77 and Article 67(2) materials: the Defence should not be required to disclose its lines of inquiry in order to trigger this obligation;
c. The threshold for ascertaining 'relevance' under Rule 77 is low, and captures an array of information that could "significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case",[19] "undermine the prosecution case or support a line of argument of the defence,"[20] "inform the defence's decision whether to call a particular witness", "assist in developing cross-examination strategy",[21] or for which access is "necessary to mount a challenge to the admissibility of evidence".[22] It also extends to information that is "not directly linked to exonerating or incriminating evidence";[23]
d. Communications with third parties and State have no specific privilege under the Statute and Rules and are disclosable, on a case by case basis, under the standard Rule 77 and Article 67(2) procedures;[24]
e. In case of dispute as concerns the disclosure of exculpatory information, it is necessary for the Chamber to review the underlying material and either order disclosure or authorise non-disclosure;
f. In case the Prosecution implements redactions or uses summaries as a protection measure, the burden rests on the Prosecution to justify the ongoing necessity and proportionality of such measures, and any determination as to whether the redacted information might be relevant to the Defence must take into consideration the difficulties faced by the Defence in demonstrating the materiality of withheld information; and

[19] *Prosecution v. Lubanga*, Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses, 12 November 2010, ICC-01/04-01/06-2624, para 16; ICC-01/05-01/08-1594-Red, para. 21.
[20] ICC-01/04-01/06-2624, para. 16; ICC-01/05-01/08-1594-Red, para. 21.
[21] *Prosecution v. Katanga and Ngudjolo*, Public Redacted Version of Decision on the Application by the Defence for Germain Katanga for Disclosure of the Audio Records of Interview of Witness P-219, 30 August 2010, ICC-01/04-01/07-2309-Red-tENG, para 4; ICC-01/05-01/08-1594-Red, para. 20.
[22] *Ayyash et al*, Decision Reconsidering 'Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance', 7 November 2014, 6 March 2015, para. 18.
[23] ICC-01/04-01/06-1433, para. 77.
[24] ICC-02/04-01/15-457, para. 13.

g. Summaries are a measure of last resort, which should only be resorted to, where no other measure is adequate. Their use is subject to prior judicial authorization as concerns the adequacy of the summary, and the potential necessity for other counter-balancing measures.

26. And yet, in this case:

a. The use of testimonial summaries, for entire categories of information (such as BSQs or RFAs), has become the rule;
b. There is no clear record as concerns whether the Prosecution sought, and obtained case by case judicial authorization to use summaries in relation to specific items of evidence, nor has the Defence been afforded an opportunity to be heard in relation to the case by case implementation of such measures (when applied to evidence, other than witness statements or witness summaries);
c. The burden has been placed on the Defence to request the lifting of such protective measures (or the disclosure of originals in lieu of testimonial summaries);25
d. The notion of 'relevance' has been defined in an overly restrictive manner;26 and
e. Extraneous issues, such as the impact on State cooperation, have been given undue weight.27

27. The current approach creates additional work and litigation for the Defence, delays the timing of disclosure, and deprives the Defence of important contextual information that is present in

[25] See ICC-01/12-01/18-859-Conf, para. 23, which rejected a Defence request to obtain access to a RFA (rather than the testimonial summary of the RFA, which had already been disclosed under Rule 77), on grounds that the Defence arguments in support of access were "grossly speculative". In contrast, the Appeals Chamber has emphasized that where materials have already been disclosed under Rule 77 (which was the case here), no burden can be placed on the Defence to justify the relevance of the withheld information (ICC-02/11-01/15-915-Red, paras. 62-63).
[26] For example, Trial Chamber VII found that that the Defence is entitled to the disclosure of RFAs that "may assist" the Defence to test the reliability of the procedures used to collect evidence against them (ICC-01/05-01/13-1234, para. 13)Trial Chamber IX has adopted the same approach (ICC-02/04-01/15-1161, para. 3). The STL also found that "[t]he Defence is entitled to access the information necessary to frame their arguments for the exclusion of the evidence. Having access to the requests for information that resulted in the data being provided to the Prosecution may assist defence counsel in framing their application" (Ayyash et al, Decision Reconsidering 'Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance', 7 November 2014, 6 March 2015, para. 18). The Prosecution in this case requested, and obtained access to statements conducted by national authorities with Mr. Al Hassan, and personal medical data collected during these interviews ([REDACTED]). It has relied on these statements in submissions to the Court ([REDACTED] used in ICC-01/12-01/18-335-Conf-Corr, ICC-01/12-01/18-223-271-Conf-Exp-Red, para 39, [REDACTED] , ICC-01/12-01/18-335-Conf-Corr para 34). Given that these materials pertain to Mr. Al Hassan, the Defence also has a clear right to receive all documentation concerning the transmission of these materials to the Prosecution. And yet, the Defence request to access the RFAs, which led to this information and private data being transmitted to the Prosecution (for use in Prosecution investigations and submissions), was rejected as being "speculative" (ICC-01/12-01/18-795-Conf, paras. 20, 22).
[27] ICC-01/12-01/18-859-Conf, para. 9.

the original versions of documents.[28] There is also an element of unpredictability and unfairness arising from the fact that the Defence has been denied access to materials that are regularly disclosed in other ICC cases.

28. The use of testimonial summaries also makes the Prosecution a witness in this case, which can be highly problematic in case the summaries contain inaccuracies, or, omit important details. Although judicial oversight reduces the likelihood of such omissions, it does not eliminate them, as there is always a risk that the Chamber might be unaware of the relevance of certain details.[29] This is why the presumption in favour of full disclosure exists, and summaries are very rarely approved for Rule 77 or exculpatory information at the trial stage.

29. This risk of inadvertent or advertent non-disclosure is also higher in relation to summaries. If the protective issues are addressed through redactions, there will be a clear record that information exists, but has been withheld. In contrast, in the case of summaries, the Defence is entirely in the dark as to whether such further detail exists, and whether it has been withheld intentionally for protective reasons or merely omitted by accident. This risk is particularly high as concerns testimonial summaries (i.e investigators' notes that have been drafted specifically for disclosure purposes), that have not been the subject of a specific filing, requesting non-disclosure or redactions for identified information, for identified reasons.[30]

30. There also does not appear to be a clear and accessible remedy in case the disclosed summaries lack detail or are overly vague. Whereas an earlier decision suggested that the

[28] This is exemplified by the difference between disclosed investigators' notes which are summaries, and those which contain verbatim extracts. For example, [REDACTED]

[29] See ICC-01/09-02/11-728, paras. 24, 25, 36, 93-95 (concerning judicial approval of redactions to exculpatory information, caused by the Prosecution's mislabeling of PEXO information).

[30] These testimonial summaries appear to collate data from underlying Prosecution records (i.e. contacts logs or investigator's notes prepared contemporaneously with the corresponding event). Since they constitute a summary of the original documents (rather than the disclosure of the original documents), the Prosecution is still required to submit them for judicial approval. It is, however, unclear as to if and when this has occurred. Rather, it would appear from a recent decision that the underlying materials have not been submitted to the Chamber, in advance of the disclosure of the testimonial summary. Specifically, the Chamber found that since the Prosecution did not possess the [REDACTED], the Defence request was moot (ICC-01/12-01/18-859-Conf, para. 16). The Defence had in fact requested access to the original, contemporaneous contacts logs/notes concerning the 2017 meeting between the Prosecution and [REDACTED] (and which formed the underlying foundation for the 2020 testimonial summary). The Single Judge thus seemed to be unaware of the existence of these underlying materials (which were produced by the Prosecution, and are thus in the custody of the Prosecution). The Defence also has no record as to if and when the Prosecution requested and obtained judicial authorisation to disclose a summary of its correspondence with [REDACTED] (rather than the original correspondence – see [REDACTED]), even though the content clearly fell under Rule 77 and Article 67(2), and the disclosure of the summary occasioned prejudice to the Defence, due to the inability of the Defence to consider additional (undisclosed) details in light of [REDACTED], and [REDACTED].

Defence should seek such detail through correspondence with the Prosecution,[31] a more recent Decision suggests that it is inappropriate for the Defence to do so.[32]

31. In light of the above issues, Rule 77 and Article 67(2) disclosures have not proved to be an adequate substitute for Defence investigations. And, given the significant advantage that the Prosecution enjoys by virtue of the factors set out in paragraph 20 above, if substantive trial hearings commence without any further adjustments to the disclosure regime, or developments concerning the ability of the Defence to conduct *in situ* investigations, the Defence will not be in a position to exercise its right to examine witnesses under the same conditions as the Prosecution. Put simply, there will be a fundamental inequality of arms.

32. The Defence is open to any suggested solutions that would address or remedy these issues. But the Defence cannot be expected to put Mr. Al Hassan's future at risk by starting the trial on an unfair footing, in the hypothetical hope that things might improve.

Issues concerning Mr. Al Hassan's ability to meet with his Defence, or his family, in the key months leading up to the trial, and his presence in the courtroom during trial hearings

33. At this point in time, the Defence has not received any concrete indication as to:

    a. When the Defence will be able to visit Mr. Al Hassan at the Detention Centre;
    b. When Mr. Al Hassan will be able to attend hearings in person; and
    c. When his family will be able to travel to The Hague to have a family visit, although this did not appear to be possible in the near future.

34. In the absence of such details, these submissions are akin to 'shadow-boxing'. But given that the Rule 134 deadline impels the Defence to raise all relevant issues before the start of the trial, the Defence cannot wait to receive further details.

35. A trial is a harrowing process, which can lead to "public stigmatisation and other negative consequences for the person over the foreseeable long time span of a trial".[33] These consequences are likely to resonate particularly with Mr. Al Hassan, a torture survivor, and

[31] ICC-01/12-01/18-777-Conf, para. 27, in particular, the possibility of disclosing more detailed summary upon receipt of more detailed Defence lines of inquiry.
[32] ICC-01/12-01/18-859-Conf, paras. 19, 23.
[33] ICC-01/09-01/11-373, para. 14.

highly vulnerable detainee and defendant, who has enjoyed a significantly reduced degree of social contacts and effective interactions with his Defence, over the last three months.

36. ICC proceedings are also of an extraordinarily complex nature, when compared to domestic trials. For this reason, the Appeals Chamber found that the drafters had deliberately enshrined "rights of a higher degree",[34] in order to ensure that defendants could follow the proceedings and participate in an effective manner. Domestic responses to the COVID-19 pandemic are thus not necessarily transposable to the ICC, or the specific case of Mr. Al Hassan.

37. In particular, Mr. Al Hassan has expressed discomfort with the prospect of participating in the proceedings through a video-link from the Detention Centre: this process recalls memories of being interrogated, while being filmed. Since the Defence will not be sitting directly in front of him, the Defence will also not be able to monitor this discomfort or provide any re-assurance. Mr. Al Hassan also has dissociation disorder. There is a risk that if he is participating remotely, he may dissociate from the trial and trial evidence, which will deprive the Defence of an extremely important source of information and instruction.[35]

38. Mr. Al Hassan's presence in the courtroom is also evidentially relevant. Judgements may mention a defendant's demeanour in the courtroom, and whether they showed respect for the judges or the witnesses.[36] This is not a factor that can be assessed in the same manner from a video link. There is a greater risk that he will be viewed in a negative manner if Mr. Al Hassan is a disembodied face, rather than a living breathing person in the courtroom.

39. The Defence recognizes that the right to be present might not be absolute, but before the Chamber determines whether it is necessary or proportionate to commence substantive hearings, without Mr. Al Hassan being present in the courtroom, it is necessary, at the very least, for the Defence to meet Mr. Al Hassan in person, so that it can gauge the likely impact of such a possibility on his effective participation at trial.

40. Finally, as and when it is possible to organize a family visit, the Defence further requests the Chamber to organize a break in the proceedings, so that Mr. Al Hassan can maximise the

[34] ICC-01/04-01/07-522, para. 49.
[35] See **'Commentary: The Coronavirus Act, the right to a fair trial and remote justice',** Fair Trials, 30 April 2020, concerning potential risks arising from the participation of vulnerable defendants (i.e those with psychological conditions) participating by video-link.
[36] See for example, *Prosecutor v. Delalic et al,* Trial Judgment, para. 1244.

amount of time that he can spend with his family. Such breaks should also be scheduled throughout the trial process in order to accommodate at least two visits a year.

III. Relief Sought:

41. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Trial Chamber to:

    d. Order the Prosecution to streamline its case, by imposing a limit on the number of witnesses, and hours allocated to the Prosecution case; and

    e. Reconsider the date for the commencement of substantive testimony in this case, taking into consideration:

        – The ability of the Defence to conduct *in situ* investigations in the North of Mali, and receive relevant information through disclosure and/or State cooperation requests; and

        – The ability of the Defence to meet Mr. Al Hassan in person, and for Mr. Al Hassan to attend trial hearings in person.

Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 10th Day of June 2020
At The Hague, The Netherlands