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TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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

With confidential Annexes A and B

**Public redacted version of “Prosecution response to Defence rule 134(1) motion”,
22 June 2020, ICC-01/12-01/18-892-Conf**

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

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I. Introduction

1. On 10 June 2020, the Defence filed its motion under rule 134(1) (“Motion”),¹ in which it requests the Chamber² to:
 -)] Order the Prosecution to streamline its case, by imposing a limit on the number of witnesses and hours allocated to the Prosecution case (“First Request”); and
 -)] Reconsider the date for the commencement of substantive testimony in the case after taking into consideration: (i) the ability of the Defence to conduct [REDACTED] investigations [REDACTED], and receive relevant information through disclosure and/or State cooperation requests; and (ii) the ability of the Defence to meet the Accused in person and for the Accused to attend the trial hearings in person (“Second Request” or “Postponement Request”).
2. The Prosecution opposes the First Request. It is unwarranted and ignores the measures already taken by the Chamber and the Prosecution to streamline the case. The Motion advances no plausible justification for the requested relief. It seeks to remedy the apparent deficiencies in managing the Defence’s own investigations for two years since the start of the proceedings. It also infringes on the Prosecution’s right to present its case contrary to the established jurisprudence of the Court.
3. The Prosecution is not privy to all the information underpinning the Second Request. It is ready to provide further submissions, if necessary, when additional information becomes available, in particular the expected Registry reports due on 22 June 2020. However, based on the information currently available, the Prosecution submits that there are many factors that should be considered which in the Prosecution’s views, militate against granting the request.
4. These factors notably include:
 -)] The long period (two full years) within which the Defence could/should have conducted its full investigations prior to the restrictions caused by the COVID-19 pandemic;
 -)] The Defence’s access to all the detailed documents filed in the case setting out the nature, cause and content of the charges against the Accused and;

¹ [REDACTED].

² Trial Chamber X (“Chamber”).

) The Defence's knowledge of the Prosecution evidence, the disclosure of which has been effected on a regular and continuous basis throughout the proceedings.

5. The Defence's ability to conduct full investigations over the course of the proceedings is clearly manifested in its ability to advance an affirmative defence supported by a pool of evidence collected through its own investigations including Defence witness statements and expert reports. Further, the Defence's intention to call Defence witnesses to testify before the commencement of the Prosecution case is also telling of its readiness.
6. Subject to the Registry's observations on the matter, the Prosecution understands that the Accused is maintaining privileged communications with his Defence team even within the context of the COVID-19 restrictions, and that medical and/or psychological support is readily available when required.
7. The Prosecution further notes that, if the Accused's physical attendance in the hearings is not feasible, there are alternative means available to ensure his attendance and participation in the proceedings with the use of audio/video link technology while maintaining direct and immediate privileged communications with his counsel during the proceedings.³ Such measures have been recently used effectively in the initial appearance hearing in the *Abd-Al-Rahman* case,⁴ and could therefore be equally used during the trial hearings in this case.
8. Finally, the Defence's use of this Motion as a platform to express its disagreements with judicial decisions issued in this case is both improper and unwarranted. Its attempt to rehash arguments or re-litigate issues that have already been decided should therefore be summarily denied.

II. Confidentiality

9. This response is filed as confidential pursuant to regulation 23bis(1) of the Regulations of the Court as it responds to a filing with the same classification.

³ See regulation 47 of the Regulations of the Registry.

⁴ ICC-02/05-01/20-T-001-ENG ET, p. 3, l. 6-15 and p. 4, l. 7-12.

III. Submissions

A. *The Chamber and the Prosecution have already taken measures to streamline the Prosecution case within the present circumstances:*

10. It should be noted that the Defence's First Request, while worded differently, replicates arguments already made by the Defence in a recent application pending before the Chamber.⁵ The Prosecution incorporates its arguments already presented in its response thereto⁶ to avoid unnecessary repetition and advances the following submissions in support of its position.
11. In principle it is established that "the calling party is best placed to determine the order of appearance of its witnesses".⁷ Absent compelling reasons, the calling party should be given the necessary discretion to call its witnesses in the best way it deems appropriate to present its case.
12. The Chamber has also set up a system to streamline the presentation of the Prosecution case, including *inter alia*:
-) In response to a request from the Defence for an up-to-date list of witnesses as soon as possible,⁸ the Chamber has instructed the Prosecution to provide a provisional list of witnesses on 31 January 2020 to accommodate the Defence's request, followed by a final list, which the Prosecution provided;⁹
 -) The Chamber further instructed the parties to liaise with a view to reaching agreements about non-contentious issues,¹⁰ however the Defence has not finalised yet the first consultation despite the Prosecution's repeated requests.¹¹ The Prosecution encourages the Defence to engage further in a more meaningful way to reach said agreements in order to streamline the case and focus it on contentious issues;
 -) The Chamber had instructed the Prosecution to file detailed summaries of all its witnesses, setting out the main issues about which each witness is expected to

⁵ [REDACTED]
⁶ [REDACTED].

⁷ ICC-01/04-02/06-1900, para. 46.

⁸ ICC-01/12-01/18-T-008-ENG, p. 45, l. 7-9.

⁹ ICC-01/12-01/18-548, para.3.

¹⁰ ICC-01/12-01/18-548, para. 20.

¹¹ See Annexes A and B.

testify, relevance to the charges, duration of examination, language of testimony, and list of exhibits to be shown to the witness;¹² and

-) The Chamber also gave directions for the filing of any application for introduction of evidence under rule 68(2) and (3), and motivated applications seeking the Chamber's authorisation to call any of its witnesses as an expert.

13. As previously noted,¹³ the Prosecution is already at a disadvantage in presenting its case, which will not follow the order the Prosecution would have preferred. Due to the COVID-19 pandemic and associated restrictions and other logistical challenges, the Prosecution is prevented from calling its witnesses in the optimal order necessary to present its case in a coherent, logical and gradual manner. Instead, practical considerations have been the primary force shaping the order of witnesses.

14. In this context, the Prosecution has already taken measures to streamline its case, in accordance with the Chamber's instructions, and with a view to accommodating the requests of the Defence to the extent possible within this context:

-) The Prosecution has prioritised witnesses who seem to be able to come to testify, either at the seat of the Court or by audio and video link;
-) The Prosecution has filed 14 applications under rule 68(3) and intends to file further applications under rule 68(2) within the time set by the Chamber.¹⁴ If granted, the duration originally estimated for the examination of the witnesses concerned will be significantly reduced. Resorting to rule 68(2) and/or (3) is an effective tool to streamline the Prosecution case and one that the Defence seems to suggest as a preferred course of action to ensure better trial management;¹⁵
-) In line with the views of the Defence and the Legal Representatives of Victims, the Prosecution placed [REDACTED] in the first Block of witnesses;

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ [REDACTED]

¹⁵ Motion, para. 16.

-) In direct response to a suggestion by the Defence,¹⁶ the Prosecution excluded from the first block of witnesses [REDACTED];
-) Contrary to the Defence's exaggerated assertion,¹⁷ the Prosecution gave full consideration to the list of witnesses proposed by the Defence to be called in the beginning of the Prosecution case. Of the 16 witnesses proposed by the Defence,¹⁸ seven witnesses are included in the first block of witnesses¹⁹ (and eight of these 16 witnesses will be subject to applications to introduce their evidence under article 68(2)(b),²⁰ while one witness²¹ is no longer on the list of Prosecution's witnesses)²²;
-) The Prosecution submitted detailed summaries of all its witnesses as instructed and ensured that disclosure of evidence related to each witness has been provided in a timely fashion in accordance with the timeframe set by the Chamber;²³ and
-) Lastly, having taking into account *inter alia* the Defence comments²⁴ and logistical considerations, the Prosecution now intends to call [REDACTED].

B. The Defence's allegations regarding the Prosecution's disclosure practice are ill-founded

15. The Defence's claim of impropriety in the Prosecution's discharge of its disclosure obligations or in the Chamber's exercise of its oversight powers over the Prosecution disclosure obligations is without merit and largely raises issues that have been decided and rehashes arguments that have been previously rejected.

¹⁶ [REDACTED]

²² [REDACTED]

²³ [REDACTED]

²⁴ [REDACTED]

16. In the Motion, the Defence expresses its disagreement with decisions rendered by the Chamber which resolved disputed issues of disclosure, and the Chamber's underlying reasoning.²⁵ Obviously, Rule 134(1) is not envisaged as an additional review mechanism for judicial decisions issued in the case.²⁶ The Defence's attempt to re-litigate issues that have already been decided should be summarily dismissed.

17. The Defence's approach in this instance reflects its unwarranted strategy to excessively re-litigate issues,²⁷ which has negatively impacted on the efficient conduct of the proceedings, causing the parties, participants and the Chamber to dedicate their scarce time and resources to deal unnecessarily with issues that have already been resolved. Continuation of this approach will further hamper the efficient conduct of the proceedings.²⁸

B.1. Investigating and disclosing material falling under article 67(2) and rule 77

18. As it did in its rule 122(3) litigation, the Defence incorrectly relies on the number of items labelled as PEXO to argue that the Prosecution failed to investigate and disclose information falling under article 67(2) of the Statute or rule 77 of the Rules. This argument was rejected by the Pre-Trial Chamber,²⁹ as it should be in this instance too.

19. As submitted previously in response to this line of arguments, the Prosecution explained that, in cases where an item of evidence contains multiple categories of information, the Prosecution has informed the Defence accordingly. For instance, when the overarching nature of an item is potentially exculpatory, this item is labelled as PEXO and disclosed in

²⁵ Motion, para. 2, 5 (h), 25-30.

²⁶ Review of judicial decisions by the Court is only allowed under specific circumstances and through specific procedures such as the set procedures for appealing a decision or seeking leave to appeal a decision or exceptionally through applications for reconsideration. Challenging court decisions beyond the permissible scope as in this instance, derails the proceedings and depletes the limited time and resources available to the parties, participants and the Chamber.

²⁷ See for example, [REDACTED]

[REDACTED] All this has not prevented the Defence from rehashing the same arguments again in its Motion and other filings alike [REDACTED]

Considering this pattern, it is likely that the Defence may continue its excessive unwarranted litigation using similar avenues such as the one envisaged under rule 134(2).

²⁹ ICC-01/12-01/18-460-Red2, para. 53, 59, 64.

a PEXO package. The same is true of incriminatory evidence: when the overarching nature of an item is incriminatory, it is labelled and disclosed as such, and the Prosecution has indicated in the disclosure letter that the material may also contain information that fall under rule 77 of the Rules or article 67(2) of the Statute.³⁰

20. The Defence is aware of this explanation which is reiterated every time an INCRIM or Rule 77 package is disclosed. Yet, it elects to omit it in its Motion and insists on portraying this incomplete image to the Chamber.

21. Further, when PEXO information is contained in an item that is otherwise disclosed as INCRIM or Rule 77, the Prosecution has identified this information to the Defence,³¹ following the Pre-Trial Chamber's clarifications.³²

22. Again, the Defence is well aware of this fact but omits to mention it in the Motion and instead states that “[i]t 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*”³³ which inaccurately suggests that the Prosecution failed to identify the potentially exonerating information when contained in materials not disclosed under the overarching category of PEXO.

23. Relying on isolated information taken out of context, the Defence advances sweeping and unsubstantiated allegations on the way the Prosecution conducted its investigations, claiming that the Prosecution was ‘cherry pick[ing]’ information in support of its case, or has actively dissuaded information providers from providing information to avoid

³⁰ ICC-01/12-01/18-440-Red2, para. 19.

³¹ *See e.g.* [REDACTED]

[REDACTED]

ICC-01/12-01/18-460- Red2, para. 72.

³³ Motion, para. 12 (emphasis added).

disclosure to the Defence.³⁴ As explained below, these allegations are unfounded and speculative.

24. With regard to document [REDACTED], it concerns an introductory meeting held between the OTP and [REDACTED], in which the Prosecution representatives introduced [REDACTED] to the mandate of the Office and the guiding rules and principles applicable to any information she may provide, including any resulting disclosure obligations. As per practice, the Prosecution provides this introductory information to witnesses and other contacted persons so that they can take an informed decision if they decide to cooperate with the Prosecution and the Court as a whole.
25. The scope of this meeting, which was held before there was even a case against Mr Al Hassan, was to gather lead information only and to assess the possibilities for potential cooperation with [REDACTED], who due to her professional obligations, 'would not be able or even allowed to testify'.³⁵ Contrary to the Defence's claim, the Prosecution was actually restricted in obtaining information from [REDACTED] due to her professional obligations.
26. Likewise, document [REDACTED] concerns an introductory meeting between the OTP and [REDACTED], where introductory remarks and concerns were shared, [REDACTED]. Nothing in this document suggests impropriety in the Prosecution's collection of information. Potential discussions with [REDACTED], which the Defence refers to, were intended to ensure protection of individuals and entities cooperating with the Court within the parameters of the Prosecution's disclosure obligations and protection obligations under article 68.
27. Document [REDACTED] describes a meeting held [REDACTED] and OTP representatives, in which [REDACTED]. The Prosecution did not collect a copy of this document, but it recorded the relevant information related to those five individuals and their presumed link to the armed groups in Timbuktu and Gao in 2012, and duly disclosed it to the Defence.

³⁴ Motion, para. 23.

³⁵ [REDACTED]

28. Document [REDACTED] describes OTP's contacts [REDACTED] regarding [REDACTED], in which the OTP's representatives were shown [REDACTED] [REDACTED]. Contrary to the Defence's claim, the Prosecution did not cherry pick from the information available or took notes which it did not disclose to the Defence. As clearly stated in this note, the OTP's representatives were only allowed to review and take notes in relation to these documents. Given this restriction, the Prosecution took note of the relevant information contained therein and duly disclosed it to the Defence.³⁶
29. Finally, regarding [REDACTED], the Defence claims in a footnote, and without further explanations, that in the collection of [REDACTED], the Prosecution relied on screening criteria that did not appear to take into account issues of potential relevance to future defendant.³⁷ The criteria which the Defence seems to refer to follows a broad and logical method [REDACTED] [REDACTED]. As explained in the note, while the focus was on events in Timbuktu, this did not mean that other cases were not of interest.³⁸ There is nothing improper about these criteria which take into account the relevance of the case, [REDACTED] [REDACTED].
30. As such, the Defence's allegations in this respect are nothing more than unsubstantiated speculations based on isolated information taken out of context and should therefore be disregarded.

B.2. Volume of material disclosed in the lead up to trial

31. In support of the Defence's claim of prejudice due to the volume of material disclosed in the lead up to trial, the Motion points out that there were 5,222 documents disclosed in the period between 14 April and 9 June 2020. Before addressing the merits of this claim, it is prudent to shed some light on the nature of these disclosed items which can be divided as follows:

³⁶ [REDACTED].

³⁷ Motion, footnote 17.

³⁸ [REDACTED].

-) 3,355 photographs (2,897 photographs disclosed as Rule 77 and 458 photographs disclosed as INCRIM). The majority of those photographs are duplicative of other photographs that were previously disclosed prior to the confirmation hearing;³⁹
-) 884 translations and transcripts (664 translations⁴⁰ and 220 transcripts⁴¹). There are only 68 new translations and 137 new transcripts. The remaining translations/transcripts relate to materials previously disclosed, or are final/corrected versions of preliminary versions previously disclosed;
-) 104 investigation notes, most of which were disclosed in response to specific requests made by the Defence [REDACTED];⁴²
-) The remaining items contain *inter alia* lesser redacted versions of items previously disclosed, items that were subject to non-disclosure decisions from the Pre-Trial Chamber,⁴³ and items recently obtained.

32. First, the majority of these items are not new, are disclosed out of completeness of materials related to witnesses the Prosecution decided to call [REDACTED] and for which analogous and/or almost identical items have already been disclosed in the first disclosure packages back in July 2018;
33. Second, these materials include items disclosed upon specific requests from the Defence or intended to assist in the Defence preparation in light of the newly developed lines of defence.

³⁹ [REDACTED]

34. Third, when the Defence refers to the discrete time period from 12 May to 9 June 2020, it inaccurately states that it received 447 documents after the disclosure deadline.⁴⁴ 301 documents out of those 447 documents mentioned by the Defence were disclosed within the deadline on 12 May 2020, the actual deadline for disclosure.⁴⁵ As such and contrary to the Defence's assertions, the Prosecution only disclosed 146 documents between 13 May 2020 and 9 June 2020, out of which only 67 documents were disclosed as incriminatory material: these documents are not included in the Prosecution's list of evidence; many of them are subject to pending regulation 35 applications, others were disclosed at the Defense request.⁴⁶

⁴⁴ Motion, para. 9.

⁴⁵ See INCRIM packages 76 and 77 and in Rule 77 package 52.

⁴⁶

[REDACTED]

35. Fourth, as to the newly collected items, when compared to the totality of the evidence disclosed in this case, they represent a very small percentage,⁴⁷ rendering the Defence's claim of prejudice unsound and misplaced.

36. Further, in collecting post-confirmation evidence, the Prosecution was in compliance with its duties. In accordance with the principles established by the Appeals Chamber, while investigation should largely be completed at the stage of the confirmation of charges hearing,⁴⁸ "the Prosecutor's duty to establish the truth is not explicitly limited to the time before the confirmation hearing. Therefore the Prosecutor must be allowed to continue [her] investigation beyond the confirmation hearing, if this is necessary in order to establish the truth".⁴⁹ In the present case, the large majority of the Prosecution investigations were concluded prior to the confirmation of charges. A few investigative steps were taken in the few months following the confirmation of charges within a challenging security situation [REDACTED] and, subsequently, under the travel restrictions associated with COVID-19 pandemic. These steps, while limited, were taken primarily to finalize specific investigative activities aimed at establishing the truth in light of the parameters of the case as confirmed by the Pre-Trial Chamber.

37. As the record reflects, the evidence collected as a result of this investigation was also disclosed on a regular basis, in a short period after its collection, and within the deadlines established for disclosure, which balances the Prosecution's duty to discharge its duties while providing the Defence with adequate time and facilities for the preparation of the trial.

[REDACTED]

Out of more than 16000 incriminatory items disclosed in the case, the Prosecution only disclosed around 660 newly registered incriminatory items in the period referred to by the Defence. After exclusion of translations/transcriptions whose sources were previously disclosed, the remaining incriminatory items registered in this period would be around 170 items only.

⁴⁸ ICC-01/04-01/06-568 OA3, para. 54.

⁴⁹ ICC-01/04-01/06-568 OA3, para. 52.

C. Defence's request to disregard certain witnesses and incidents

38. The Defence's unfounded claim of prejudice, due to the Prosecution's collection of new evidence, purportedly underpins its request for the Chamber to direct the Prosecution to disregard certain witnesses and incidents as a way to streamline the Prosecution case.⁵⁰ This request is both vague and inherently contradictory.
39. First, beyond an opaque description that "many of the new witnesses and incidents have very little relevance",⁵¹ the Defence fails to specify which witnesses or incidents the Prosecution should disregard. Nor does it provide any concrete assessment of why those witnesses and incidents bear low relevance to the case.
40. Second, the Defence's claim that these incidents have low-relevance cannot be reconciled with its subsequent contradictory argument that they can still result in independent convictions.⁵² In any event, the relevance of all the Prosecution's witnesses is clearly set out in the summaries of their expected testimony. In the absence of any concrete argument to the contrary, the Defence's request should be denied.

D. Regulation 55 notice and amendments of the charges do not cause prejudice to the Defence

41. The Defence's contention that the Prosecution's upcoming request for notice under regulation 55 is prejudicial to its preparation is also unpersuasive.
42. Without further explanation, the Defence adds the notice for possible legal re-characterisation under regulation 55 as an additional element that affects the Accused's fundamental fair trial rights. As established by the Appeals Chamber, "article 67(1)(a) of the Statute does not preclude the possibility that there may be a change in the legal characterisation of facts in the course of the trial, and without a formal amendment to the charges".⁵³ While giving notice under regulation 55 is not dependant on a request from the Prosecution and can be given by the Trial Chamber *proprio motu* at any time during the

⁵⁰ The Motion, para.17.

⁵¹ The Motion, para. 14.

⁵² The Motion, para. 15.

⁵³ ICC-01/04-01/06-2205, para. 84.

trial,⁵⁴ an advance notice at this stage of the proceeding is in fact intended for the benefit of the Defence and is in conformity with the case law of the Appeals Chamber.⁵⁵

43. Furthermore, the possibility of giving notice under regulation 55 cannot be argued to have come as a surprise to the Defence as it was already foreshadowed in decisions by the Pre-Trial Chamber (including in the confirmation decision itself) with reference to specific facts that, in its view, may be considered for re-characterisation.⁵⁶

44. As for the amendments of the charges authorised under article 61(9) in this case, they rather constitute factual allegations with respect to pre-existing charges. The amendments are consistent with the other factual allegations underlying the charges. They were sought at an early stage of the proceedings⁵⁷ (nearly seven months prior to the scheduled appearance of the first witness in the case) providing the Defence with sufficient time to prepare. The Defence was given an extension of time to prepare its response to the Prosecution's request for amendment,⁵⁸ and indeed it was able to provide a detailed position regarding these amendments.⁵⁹

45. The Prosecution therefore, submits that all the grounds advanced by the Defence taken individually or cumulatively do not support its claim of prejudice and should be disregarded.

E. Factors that should be considered when assessing the Postponement Request

46. With respect to the Postponement Request, there are several aspects underlying this request to which the Prosecution is not privy. These include the nature and scope of the information the Defence is requesting from the States, its relevance to the case, and the timing of when it was requested (to assess whether such delay is attributable to the Defence, the party requesting the postponement) and when a response from the States is

⁵⁴ Regulation 55(2). See also ICC-01/04-01/07-3363, para. 17, 19-24; ICC-02/11-01/15-369, para. 51; ICC-01/14-01/18-542, para. 12. This "may become apparent to the Trial Chamber at any time before a decision under article 74 of the Statute is rendered.

⁵⁵ ICC-01/04-01/07-3363, para. 24. See also ICC-01/14-01/18-542, para. 12.

⁵⁶ See e.g. ICC-01/12-01/18-461-Conf-Corr, para. 315, 676, 677, 678, 679, 680, 681, 682. See also ICC-01/12-01/18-608-Conf, para. 44, 45, 46, 47.

⁵⁷

⁵⁹

expected (to assess the necessity, if any, and the duration of the requested postponement). The Defence should provide these clarifications for the Chamber's proper consideration of the matter.

47. Upon instructions from the Chamber, the Registry is directed to provide additional information on issues raised in the Motion with any relevant updates and concrete solutions, including timelines, in response to Defence submissions regarding: (i) Mr Al Hassan's ability to attend trial hearings in person; (ii) Mr Al Hassan's ability to meet in person with his Defence team; and (iii) issues raised in relation to the Defence ability to conduct [REDACTED] investigations.⁶⁰

48. The Prosecution is ready to provide further submissions, if necessary, upon availability of additional information on the issues at stake. However, within the extent of the available information, the Prosecution submits that the following factors should be considered when assessing the Postponement Request:

- J The Defence had nearly two full years to conduct its investigations, prior to the COVID-19 outbreak and its related limitations.⁶¹ Undeniably, restrictions caused by COVID-19 have its bearing on the activities of all parties and participants including the Defence. However, it should be noted that these restrictions did not bring the Defence's investigations to a full disrupt. Newly disclosed evidence by the Defence demonstrates that the Defence was able to continue its investigations within these restrictions;⁶²
- J The Defence should not wait until the disclosure of the final piece of evidence to commence its investigations, as it seems to suggest.⁶³ In line with the practice of the Court, after the final disclosure deadline, the Defence is allowed a period of a few months to finalize its preparation;
- J The Prosecution is not in a position to verify the Defence's claim in recent communications and filings that it is only now starting its investigations, however there are clear indications to the contrary, [REDACTED]

⁶⁰ [REDACTED].

⁶¹ From March 2018 until March 2020.

⁶² [REDACTED].

⁶³ [REDACTED].

[REDACTED].⁶⁴ That being said, the Defence's assertion remains in itself a strong indication that the Defence cannot blame others for the current state of affairs, especially when considered in the context of the information available to the Defence about the Prosecution case and its underlying evidence since the start of the proceedings. As previously noted, the Defence is well aware of the contours of the Prosecution case through detailed documents setting out clearly and in sufficient details the nature, cause and content of the charges against the Accused;⁶⁵

-) Further, the Defence was also in a position to build its own case and direct its investigation relying on the Accused as an important source of information from the early days of the proceedings;
-) As mentioned above, the Defence's ability to conduct investigation is clearly manifested in its ability to advance an affirmative defence supported by a pool of evidence collected through its own investigations including Defence witness statements and expert reports.⁶⁶ Further, the Defence's intention to call its own witnesses to testify before the commencement of the Prosecution case is also telling of its ability to investigate;⁶⁷
-) The Prosecution has discharged its disclosure obligations scrupulously and fairly in accordance with the statutory regime of the court and under the scrutiny of the relevant Chambers throughout the proceedings. The Prosecution ensured that its disclosure is effected on a regular basis⁶⁸ to facilitate and assist the Defence preparations. The Prosecution engaged in lengthy *inter parte* communications with the Defence to ensure that the Defence's requests and concerns are addressed.

⁶⁴ *Ibid.*

⁶⁵ [REDACTED]

⁶⁸ [REDACTED] disclosure packages were provided to the Defence almost on a steady weekly basis and sometimes multiple packages were disclosed within the same week. This regularity was maintained in both pre-confirmation and pre-trial phases.

Moreover, in some instances, the Prosecution went beyond its disclosure obligations in order to accommodate disclosure requests from the Defence;⁶⁹

- J The Prosecution further notes that if the Accused's physical attendance in the hearings is not feasible, there are alternative means available to ensure his attendance and participation in the proceedings with the use of audio/video link technology while maintaining direct and immediate privileged communications with his counsel during the proceedings.⁷⁰ Such measures have been recently used effectively in the initial appearance hearing in the *Abd-Al-Rahman* case,⁷¹ and could therefore be equally used during the trial hearings in this case.
- J Subject to the Registry's observations on the matter, the Prosecution understands that the Accused is maintaining privileged communications with his Defence team even within the context of the COVID-19 restrictions, and that medical and/or psychological support is readily available when required.

49. Barring any information unknown to the Prosecution, these factors militate against granting the Postponement Request.

Conclusion

50. For the foregoing reasons, the Prosecution submits that the First Request should be rejected. With respect to the Second Request, the Prosecution defers to the Chamber's discretion in assessing all relevant factors in its disposition of such request. Should the Chamber deem it necessary, the Prosecution is ready to provide further submissions when new information becomes available.



Fatou Bensouda, Prosecutor

Dated this 22 June 2020

At The Hague, The Netherlands

⁶⁹ See e.g., ICC-01/12-01/18-859, para. 18, 21.

⁷⁰ See regulation 47 of the Regulations of the Registry.

⁷¹ ICC-02/05-01/20-T-001-ENG ET, p. 3, l. 6-15 and p. 4, l. 7-12.