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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Single Judge

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF

***THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD***

Public

Public redacted version of the Defence response to the Prosecution's "Éléments d'information concernant notamment la communication des éléments de preuve et les requêtes aux fins d'expurgation à venir et demandes d'extension de délai pour déposer le Document contenant les charges ainsi que la Liste des témoins et des éléments de preuve"

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

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

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I. Introduction

1. The Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the “Defence”) submits the present response to the Prosecution’s “*Éléments d’information concernant notamment la communication des éléments de preuve et les requêtes aux fins d’expurgation à venir et demandes d’extension de délai pour déposer le Document contenant les charges ainsi que la Liste des témoins et des éléments de preuve*”.¹
2. The Defence submits that the *Request for a second postponement* raises serious concerns over the Prosecution’s case management and ability to bring forward its case against Mr Al Hassan while respecting his rights to be informed promptly of the content of the charges against him and to have a fair and expeditious trial. The Defence is, in particular, strongly opposed to the Prosecution’s request for extension of time to file the Document Containing the Charges (the “DCC”) and to postpone the Confirmation of Charges hearing to July 2019. Further, the Defence wants to draw the Pre-Trial Chamber’s (the “Chamber”) attention to disclosure failures and delays not mentioned in the *Request for a second postponement*, and which constitute an additional burden on the Defence at this crucial stage of the pre-trial proceedings. Finally, the Defence notes that the *Request for a second postponement* fails to balance between the interests of the Prosecution and the guarantees of the Suspect’s rights as provided for under Articles 60(4) and 67(1)(c) of the Rome Statute (the “Statute”).

II. Classification

3. In accordance with Regulation 23*bis*(2) of the Regulations of the Court (the “RoC”), this response is classified secret *ex parte*, available to the Prosecution, the Defence and the Victims and Witnesses Unit, as the filing to which it relates is classified the same. This filing is also classified as confidential *ex parte* pursuant to Regulation 23*bis*(1) [REDACTED].

¹ *Al Hassan*, Secret redacted version of the ‘*Éléments d’information concernant notamment la communication des éléments de preuve et les requêtes aux fins d’expurgation à venir et demandes d’extension de délai pour déposer le Document contenant les charges ainsi que la Liste des témoins et des éléments de preuve*’, ICC-01/12-01/18-243-Secret-Exp, 12 February 2019, notified to the Defence on 14 February 2019 (the Prosecution’s *Request for a second postponement*). All cases referenced in this document are related to the *Al Hassan* case unless stated otherwise.

III. Procedural History

4. On 12 April 2018, the Prosecution submitted observations to the Chamber in relation to the disclosure and redaction practices,² and on 8 May 2018 filed additional information on the status of the Office of the Prosecutor’s transcripts and translations.³
5. On 16 May 2018, the Single Judge issued the “Decision on the Evidence Disclosure Protocol and Other Related Matters”.⁴
6. [REDACTED],⁵ [REDACTED].
7. On 7 June 2018, the Single Judge ordered the Defence to file observations on the detention conditions of Mr Al Hassan following the filing of the Registry’s report of 22 May 2018 and the Prosecutor’s response of 6 June 2018.⁶ In compliance with the instructions of the Single Judge, the Defence filed its observations on 14 June 2018.⁷
8. On 29 June 2018, the Single Judge issued the “Decision on the In-Depth Analysis Chart of Disclosed Evidence”, ordering the Prosecution to begin the disclosure of evidentiary materials to the Defence and rejecting the Defence request for an in-Depth Analysis Chart (IDAC), notably because it would delay the Confirmation of Charges to September 2019.⁸ On 4 July 2018, the Defence filed a request for an alternative mechanism to facilitate disclosure or, in the alternative, for leave to appeal the Decision on the Analysis Chart.⁹
9. On 2 July 2018, the Single Judge instructed the parties to file observations on a possible postponement of the confirmation hearing.¹⁰ On 9 July 2018, the Defence¹¹ and the Prosecutor¹² filed their observations on the date of the confirmation hearing. The Prosecution requested a postponement of the confirmation of charges to the end

² ICC-01/12-01/18-18-Conf-Exp-Red.

³ ICC-01/12-01/18-27-Conf-Exp.

⁴ ICC-01/12-01/18-31-tENG.

⁵ ICC-01/12-01/18-34-Conf-Exp; ICC-01/12-01/18-43-Conf-Exp-Red.

⁶ ICC-01/12-01/18-46-Conf-Exp.

⁷ ICC-01/12-01/18-51-Conf-Exp.

⁸ ICC-01/12-01/18-61, para. 22.

⁹ ICC-01/12-01/18-65.

¹⁰ ICC-01/12-01/18-64.

¹¹ ICC-01/12-01/18-74-Conf.

¹² ICC-01/12-01/18-75-Red.

of May 2019. The Defence did not oppose to a reasonable postponement of the Confirmation of Charges hearing.

10. On 20 July 2018, in the decision on “Postponing the Date of the Confirmation Hearing”,¹³ the Single Judge postponed the confirmation to 6 May 2019 (the “*Postponement Decision*”), and ordered that the Arabic translation of the DCC be filed at the latest 30 days prior to the hearing, while the original version should be filed as soon as ready to be translated.
11. [REDACTED].¹⁴ [REDACTED],¹⁵ [REDACTED].¹⁶
12. On 18 September 2018, the Chamber rendered the “Decision on the Defence “Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts””¹⁷ rejecting the Defence’s request of 4 July 2018.¹⁸
13. On 5 October 2018, the Chamber granted the Defence’s request to fix the deadline for filing the DCC at 60 days prior to the confirmation hearing.¹⁹ In this Decision, the Chamber also gave specific instructions to the Prosecution regarding the level of details required and the structure of the DCC.
14. [REDACTED],²⁰ [REDACTED],²¹ [REDACTED],²² [REDACTED],²³ [REDACTED],²⁴ [REDACTED]²⁵ [REDACTED].
15. On 13 November 2018, the Defence was notified of the Prosecution’s “*Éléments d’information concernant notamment la communication des éléments de preuve, les requêtes aux fins d’expurgation [REDACTED] et les questions de traduction*” (the

¹³ ICC-01/12-01/18-94-Red (the “*Postponement Decision*”).

¹⁴ ICC-01/12-01/18-93-Conf-Exp-Red.

¹⁵ ICC-01/12-01/18-62-Conf-Exp.

¹⁶ ICC-01/12-01/18-43-Conf-Exp-Red.

¹⁷ ICC-01/12-01/18-130.

¹⁸ ICC-01/12-01/18-65.

¹⁹ ICC-01/12-01/18-143.

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED]

“*November Éléments d’information*”).²⁶ Therein, the Prosecution estimated that it would be able to file the DCC in the course of April 2019, with a Confirmation of Charges hearing to be held at the end of May 2019. It did not, however, request the Chamber to postpone the hearing.

16. [REDACTED],²⁷ [REDACTED].

17. [REDACTED].²⁸

18. [REDACTED].²⁹ [REDACTED].³⁰

19. Also on 7 February 2019, the Chamber issued an “Ordonnance enjoignant au Procureur de déposer des observations précises quant aux requêtes concernant la procédure qu’elle entend déposer avant le début de l’audience de confirmation des charges”,³¹ recalling that “la date prévue pour le dépôt du DCC est actuellement fixée au 6 mars 2019.”³²

20. On 14 February 2019, the Defence was notified of the Prosecution’s *Request for a second postponement*, which contains *Éléments d’information* and a request to postpone the date for filing the DCC and that of the Confirmation of Charges hearing.³³

IV. Submissions

21. The Defence notes that since the beginning of the proceedings in the present case, the Chamber has set clear deadlines and given the Prosecution clear instructions with regards to the timeline to be respected, and to what the Prosecution must achieve within this timeline.

22. Since the *Postponement Decision*, the Chamber has repeatedly reaffirmed its commitment to holding the Confirmation of Charges hearing on 6 May 2019. In spite

²⁶ ICC-01/12-01/18-180-Conf-Red (the *November Éléments d’information*).

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ ICC-01/12-01/18-236.

³² ICC-01/12-01/18-236, para. 8.

³³ ICC-01/12-01/18-243-Secret-Exp-Red.

of this, the Prosecution seems determined to impose its own deadlines on the Defence and the Chamber by refusing to streamline its case in compliance with the 6 May deadline. The Defence submits that this disregard for the Chamber's orders is confounding.

23. It is somewhat alarming that the Prosecution, so close to the long-set deadline for filing the DCC, is now requesting a substantial extension of time for doing so. The factors that are allegedly preventing the Prosecution from respecting the fixed deadlines should have been brought before the Chamber at an earlier stage of the proceedings and in any event, do not constitute good cause to postpone the Confirmation of Charges for the second time.
24. The Chamber has consistently issued decisions that assisted the Prosecution in meeting its deadlines by removing any burden that may impede its progress in preparing the case for confirmation. For instance, the Single Judge rejected the Defence's request for the production of an in-depth analysis chart ("IDAC"), which the Prosecution claimed would lead to an administrative burden and delay the confirmation of charges hearing to September 2019,³⁴ due to "the burden the production of an IDAC of evidence would place on the parties, and especially on the Prosecution".³⁵
25. The Single Judge has also provided the Prosecution with the opportunity to indicate the time it needs for the production of several elements, such as transcripts and translations,³⁶ and "to inform the Single Judge of any other difficulties, in particular those related to the protection of witnesses, which it considers could delay the commencement of the confirmation of charges hearing".³⁷
26. In addition, the Single Judge has granted all of the Prosecution's requests in relation to the withholding of identity of witnesses, and has allowed the Prosecution to submit summaries of witness statements, under Article 61(5) of the Statute.

³⁴ ICC-01/12-01/18-61, para. 22.

³⁵ ICC-01/12-01/18-61-tENG, para. 15.

³⁶ ICC-01/12-01/18-64-tENG, paras 11-12.

³⁷ ICC-01/12-01/18-64-tENG, para. 13.

27. [REDACTED]³⁸ [REDACTED].³⁹ [REDACTED].
28. In light of this, the Defence is concerned and appalled by the revelations contained in the *Request for a second postponement* regarding the state of the disclosure and the slow progress in the preparation of the DCC.
29. First, the Defence submits that the *Request for a second postponement* is in fact a request for reconsideration of an existing Pre-Trial Chamber’s decision, which fails to meet the requisite standard. Second, the Defence argues that the Prosecution has failed to show good cause pursuant to Regulation 35 of the RoC. Third, the Defence highlights that the Prosecution’s shortcomings in the ongoing disclosure process cannot serve as a justification for the requested second postponement of the Confirmation of Charges. Finally, the Defence argues that a second postponement would cause prejudice to the Defence and violate the rights of the Suspect’s which are protected under the Statute.
- (A) *The Request for a second postponement is a request for reconsideration that does not meet the requisite threshold*
30. The Defence submits that the *Request for a second postponement* is a masked request for reconsideration of the *Postponement Decision*. However, as this Chamber already determined, “the legal framework established by the Statute and the Rules does not provide for motions for reconsideration as a procedural remedy against a decision taken by a Pre-Trial Chamber or Single Judge, and that Pre-Trial Chambers have constantly denied requests for reconsideration as having no statutory support”.⁴⁰
31. A reconsideration of the Chamber’s decision must be “exceptional and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment”.⁴¹
32. The Trial Chamber in *Lubanga* has previously found that “a court can depart from earlier decisions that would usually be binding if they are manifestly unsound and

³⁸ [REDACTED]

³⁹ [REDACTED]

⁴⁰ ICC-01/12-01/18-130-tENG, para. 25 (footnotes omitted).

⁴¹ *Ongwen*, ‘Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance’, ICC-02/04-01/14-468, 15 June 2016, para. 4.

their consequences are manifestly unsatisfactory, because for instance, a decision was made in ignorance of relevant information”.⁴²

33. However, the Prosecution has not identified, in the *Request for a second postponement*, the specific grounds that could constitute a change of circumstances or a clear error of reasoning by the Chamber. In fact, the Chamber has “noted that the rescheduled date for the confirmation of charges hearing has been set with regard for the new time frame with which the Prosecutor is required to comply”.⁴³ This includes the consideration given by the Single Judge to the Prosecutor’s intended “applications for leave to withhold the identity of 10 or so witnesses”,⁴⁴ [REDACTED]⁴⁵ and the Prosecutor’s “detailed and sensible timetable to which she intends to adhere” and that justify “the further time argued to complete here preparation for the confirmation of hearing”.⁴⁶ The *Request for a second postponement*, in essence, repeats the same arguments that were already settled by the Single Judge in the *Postponement Decision*.
34. In July 2018, the Prosecution’s factual basis put forward to support the postponement of the Confirmation of Charges hearing to May 2019 was based on two specific circumstances: (1) the protective measures that needed to be put in place and (2) [REDACTED].⁴⁷ Both arguments were taken into consideration in the *Postponement Decision*, which pushed the Confirmation of Charges hearing from 24 September 2018 to 6 May 2019. As it now appears, the Prosecution failed to respect the deadlines imposed by the Chamber and invokes unchanged factual circumstances to request a second postponement of the Confirmation of Charges hearing.
35. In the *Request for a second postponement*, the Prosecution repeats in essence the same arguments put forward in July 2018, and merely refers to “développements *supra* sur les requêtes aux fins d’expurgation, notamment s’agissant des témoins P-0537 et P-

⁴² *Lubanga*, ‘Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010’, ICC-01/04-01/06-2705, 30 March 2011, para. 18; See also *Ruto and Sang*, ‘Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits’, ICC-01/09-01/11-1813, 10 February 2015, para. 19.

⁴³ *Postponement Decision*, para. 27.

⁴⁴ *Postponement Decision*, para. 22.

⁴⁵ [REDACTED].

⁴⁶ *Postponement Decision*, para. 23.

⁴⁷ ICC-01/12-01/18-75-Red, para. 3.

0582 [...]”.⁴⁸ The Prosecution also refers to the time required to file motions to submit redacted statements of Witnesses P-0537 and P-0582.⁴⁹

36. However, while the length of these witnesses’ statements is new information for the Defence, the Prosecution was fully aware of their magnitude since the *Postponement Decision*. There has been no change of circumstances in this regard. It was the Prosecution’s responsibility to undertake to comply with the Chamber’s deadlines, which were imposed well ahead and gave ample time to the Prosecution to effectively manage its case. It appears that instead, the Prosecution anticipated that the Chamber would grant all of their requests and did not consider the time required to redact these statements.
37. The Defence submits that the Prosecution should have, immediately following the *Postponement Decision*, raised the issue of P-0537 and P-0582, and informed the Chamber that the deadlines set were only feasible if the requests in their regard were to be granted. Instead, the Prosecution appears to have taken for granted that the Chamber would adjust the deadlines to the Prosecution’s wishes.
38. The Defence submits that it was incumbent upon the Prosecution, since the *Postponement Decision*, ie July 2018, to ensure that all of its requests and measures take into account the date of 6 May 2019. The Prosecution also should have taken into account the possibility that some or all of its requests could be rejected by the Chamber.
39. [REDACTED].
40. Consequently, the Prosecution fails to demonstrate any clear error of reasoning in the *Postponement Decision*, any risk of injustice arising from it, or any new facts or arguments arising since the *Postponement Decision* was rendered. Insofar as the *Request for a second postponement* constitutes a request for reconsideration, the Chamber must reject it.

(B) *The Prosecution has not shown good cause*

41. According to Regulation 35 of the RoC,

⁴⁸ *Request for a second postponement*, para. 43.

⁴⁹ *Request for a second postponement*, para. 32.

...

2. The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.

42. The Defence submits that the Prosecution casually refers to Regulation 35 without even attempting to demonstrate good cause for postponing the Confirmation of Charges hearing for an exceptional second time. In addition, the Prosecution fails to balance its request with the prejudice caused to the Defence.
43. Pre-Trial Chambers have rarely found good cause for a second postponement of the Confirmation of Charges hearing, and where they have, the reasons for it were very specific. For instance, in *Bemba*, the original date of the hearing was first postponed for a month, and a second time by two additional months. The reason for granting the second postponement was “leave of absence to a judge of the Chamber due to grave family circumstances”.⁵⁰
44. In *Gbagbo*, the second postponement of the Confirmation of Charges hearing was due to issues related to Mr Gbagbo’s fitness to take part in the proceedings.⁵¹ In *Blé Goudé*, a modest postponement of one week was granted upon a request by the Defence in order to investigate new allegations appearing in the DCC.⁵²
45. The instant case is entirely different, since the Prosecution is here invoking its own shortcomings as a reason for the second postponement, while not being completely transparent as to the full extent of its failures to comply with Chamber’s instructions. In this regard, the Defence submits that a party cannot invoke its own negligence in support of a request such as the present one, and this cannot constitute good cause pursuant to Regulation 35. This is even more so considering the real and immediate

⁵⁰ *Bemba*, ‘Decision on the Postponement of the Confirmation Hearing’, ICC-01/05-01/08-304, 2 December 2008, para. 5.

⁵¹ *Gbagbo*, ‘Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing’, ICC-02/11-01/11-201, 2 August 2012, para. 22.

⁵² *Blé Goudé*, ‘Decision on ‘The Defence request for a variation of a time limit’’, ICC-02/11-02/11-139, 1 September 2014, paras 7-8.

prejudice that will be caused to Mr Al Hassan should the second postponement be granted.⁵³

(C) *The Prosecution has failed to comply with its disclosure obligations*

46. On 9 July 2018, following the Single Judge's instructions,⁵⁴ the Prosecution offered a calendar of disclosure as basis for requesting the hearing to be moved from September 2019 to the end of May 2019.⁵⁵ The Single Judge took into consideration the Prosecution's arguments and calendar in postponing the confirmation of charges to 6 May 2019.⁵⁶
47. Following this decision the Prosecution offered an updated calendar in the *November Éléments d'information*. The calendar suggested by the Prosecution therein was notably not compatible with the *Postponement Decision*, implying that the DCC could only be filed in April 2019, with a Confirmation of Charges hearing in the second half of May 2019. Interestingly, the *November Éléments d'information* did not include a request for reconsideration of the *Postponement Decision*, nor an extension of time to file the DCC.
48. As demonstrated below, the Prosecution did not fulfil its disclosure obligations in accordance with the calendars submitted to the Chamber on 9 July 2018⁵⁷ and 9 November 2018⁵⁸ and does not offer justification for such delays. The Defence will address the categories of violations in order.

(i) *Unjustified delays in the requests for protective measures and the disclosure of Witness statements*

49. Already in July 2018, the Prosecution was aware of the time required to request protective measures before the disclosure of evidentiary material.⁵⁹ The Prosecution then stated that the disclosure of evidentiary material not concerned with protective measures would be concluded by 31 October 2018 and that all requests to take

⁵³ The issue of prejudice will be addressed below, Section (D).

⁵⁴ ICC-01/12-01/18-64.

⁵⁵ ICC-01/12-01/18-75-Red.

⁵⁶ *Postponement Decision*, para. 28.

⁵⁷ ICC-01/12-01/18-75-Red.

⁵⁸ *November Éléments d'information*.

⁵⁹ ICC-01/12-01/18-75-Red.

protective measures for witnesses should be filed by 31 October 2018.⁶⁰ The Chamber agreed with this suggested timeline.⁶¹ Nonetheless, neither of these deadlines was fully complied with by the Prosecution.

50. Indeed, since 31 October 2018, the Prosecution disclosed thirteen disclosure packages for a total of more [REDACTED].⁶² These packages contain a majority of public documents and documents for which the basis of confidentiality does not depend on protective measures.⁶³ The Prosecution has not offered any justification for the delays in disclosing these documents, which have been in the possession of the Prosecution for many months.⁶⁴
51. The Prosecution also recognised that numerous requests for withholding identity and protective measures remained pending in violation of the 31 October 2018 deadline, when stating on 9 November 2018, that the “*situation des six témoins P-0081, P-0542, P-0580, P-0603, P-0610 et P-0622 est pendante*”.⁶⁵
52. The Defence remains in the dark regarding the status of disclosure for Witnesses P-0580, P-0610 and P-0622. The Prosecution no longer mentions these witnesses in the *Request for a second postponement*, [REDACTED].⁶⁶ It is only by reading in concomitance with the *November Éléments d’information*, that the Defence can

⁶⁰ ICC-01/12-01/18-75-Red, para. 2.

⁶¹ *Postponement Decision*, paras 22, 28.

⁶² ICC-01/12-01/18-170 + Conf-AnxA, ICC-01/12-01/18-178 + Conf-AnxA, ICC-01/12-01/18-179 + Conf-AnxA, ICC-01/12-01/18-192 + Conf-AnxA, ICC-01/12-01/18-196 + Conf-AnxA, ICC-01/12-01/18-203 + Conf-AnxA, ICC-01/12-01/18-213 + Conf-AnxA, ICC-01/12-01/18-214 + Conf-AnxA, ICC-01/12-01/18-221 + Conf-AnxA, ICC-01/12-01/18-233 + Conf-AnxA, and ICC-01/12-01/18-248+Conf-AnxA.

⁶³ For example, Pre-Confirmation INCRIM package 21, 23 November 2018: MLI-OTP-0060-2070; MLI-OTP-0060-2071; MLI-OTP-0060-2072; MLI-OTP-0060-2073; MLI-OTP-0060-2074; MLI-OTP-0060-2075; MLI-OTP-0060-2076; MLI-OTP-0060-2077; MLI-OTP-0060-2078; MLI-OTP-0060-2079; MLI-OTP-0060-2080; MLI-OTP-0060-2081; MLI-OTP-0060-2082; MLI-OTP-0060-2083; MLI-OTP-0060-2084; MLI-OTP-0060-2085; MLI-OTP-0060-2086 MLI-OTP-0060-2087; MLI-OTP-0060-2088; MLI-OTP-0060-2089 MLI-OTP-0060-2090; MLI-OTP-0060-2091; MLI-OTP-0060-2092; MLI-OTP-0060-2093; MLI-OTP-0060-2094; MLI-OTP-0060-2095; MLI-OTP-0060-2096; MLI-OTP-0060-2097; MLI-OTP-0060-2098; MLI-OTP-0060-2099; MLI-OTP-0060-2100; MLI-OTP-0060-2122; MLI-OTP-0060-2172; MLI-OTP-0060-2173; MLI-OTP-0060-2174; MLI-OTP-0060-2175; MLI-OTP-0060-2176; MLI-OTP-0060-2177; MLI-OTP-0060-2178; MLI-OTP-0060-2179. Pre-Confirmation INCRIM package 23, 21 December 2018: MLI-OTP-0065-0898, MLI-OTP-0066-0391, MLI-OTP-0066-0394, MLI-OTP-0066-0396, MLI-OTP-0066-0397.

⁶⁴ For example, MLI-OTP-0060-2072, chain of custody begins with OTP-FSS on 10 June 2018.

⁶⁵ *November Éléments d’information*, para. 22.

⁶⁶ *Request for a second postponement*, para. 15.

understand that the situation remains pending for incriminatory witnesses P-0580, P-0610, P-0622 and P-0626, and for Rule 77 witnesses P-0021⁶⁷ and P-0625.⁶⁸

(ii) Late addition of a new witness

53. The Defence is also alarmed by the reference to a new witness, namely Witness P-0626.⁶⁹ This is the first time that the Defence has heard of this Witness. The Prosecution admits that the transcriptions of P-0626's interview are not even finalized, and yet, the Prosecution intends to rely on this Witness's evidence for the DCC and the Confirmation of Charges hearing.
54. The Defence submits that the late mention of the existence of this Witness and the untimely request for withholding his identity are unjustifiable and cause a prejudice to the Defence by not allowing it to understand the nature and scope of the case against the Suspect in time for the Confirmation of Charges. The Prosecution should have anticipated that the timing of its request concerning P-0626 meant that his evidence could not be properly disclosed and integrated to the DCC in time for the 6 March 2019 deadline as determined by the Chamber. This delay constitutes a violation of Rule 76 which states that the communication of the Witness's prior statement "shall be done sufficiently in advance to enable the adequate preparation of the defence".
55. As a result, the Defence submits that the evidence of this Witness must be disclosed as soon as possible under Rule 77 and not be relied on at the confirmation stage.

(iii) Failures in Rule 77 disclosures

56. In the *November Éléments d'information*, the Prosecution misleadingly stated having disclosed under Rule 77 the evidentiary material of P-0015, P-0132, P-0205 and P-0206.⁷⁰ In fact, these Witnesses are not part of the eCourt database available to the Defence and the Defence has not received evidentiary material related to these Witnesses in any disclosure batches.

⁶⁷ *Request for a second postponement*, para. 42.

⁶⁸ *Request for a second postponement*, para. 41. It is worth mentioning that this is the Prosecution's first mention of Witness P-0625.

⁶⁹ *Request for a second postponement*, para. 19.

⁷⁰ *November Éléments d'information*, para. 26.

(iv) [REDACTED]

57. [REDACTED]⁷¹ [REDACTED].
58. [REDACTED],⁷² [REDACTED].
59. [REDACTED]⁷³ [REDACTED],⁷⁴ [REDACTED].⁷⁵

(v) Delays due to translation

60. Early after the transfer of Mr Al Hassan to the Court, the Single Judge cautioned against the delays that could be caused by the need to translate incriminatory evidence, stating that in such case, the Prosecution should “confer with the Defence to learn which extracts of those statements, once translated, might be sufficient to meet the needs the Defence considers essential for preparing the defence of Mr Al Hassan”.⁷⁶
61. Despite these early warnings by the Chamber, the Prosecution has not been forthcoming regarding the state of the required translations. For example, as stated in the Defence response of 22 November 2018 to the Prosecution’s *November Éléments d’information*, and contrary to the Prosecution’s promise by email in December 2018 (to deliver it “as soon as possible in January”), the Prosecution has still not provided the Arabic translation of the lesser redacted version of its Article 58 application.⁷⁷
62. [REDACTED],⁷⁸ the Defence requests that any translation holding up the process should be disclosed under Rule 77 and not relied on at the Confirmation of Charges.

(vi) Conclusion on the disclosure violations

63. The Prosecution fails to explain how the eight-month extension granted by the Single Judge in the *Postponement Decision* was not sufficient to prepare for the Confirmation of Charges. The Prosecution also fails to explain its numerous failures to respect the disclosure calendars established in July and November 2018.

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ ICC-01/12-01/18-31-tENG, para. 23.

⁷⁷ ICC-01/12-01/18-190-Conf, para. 9.

⁷⁸ [REDACTED].

64. The Single Judge has previously stated that “the Prosecutor shall disclose such evidence immediately after having identified any such evidence, unless some justifiable reasons prevent her from doing so”.⁷⁹ In this case, the justification for the delays is almost completely absent from the Prosecution’s *Request for a Second Postponement*.
65. Therefore, these unjustified delays should not be used as grounds for an exceptional second postponement of the Confirmation of Charges at the expense of the Suspect’s right “to be tried without undue delay”.
- (D) *Granting the Request would cause a prejudice to Mr Al Hassan and violate his rights to an expeditious trial*
66. Expeditiousness and fairness should be an integral part of the current discussion. As previously found by the Single Judge, Article 60(4) of the Statute binds the Pre-Trial Chamber to “ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor”.⁸⁰ This must also be read together with Article 67(1)(c) guaranteeing the right “[t]o be tried without undue delay”.
67. As stated above,⁸¹ the Prosecution has been on notice as to the expectations of the Chamber.⁸² It had the tools and opportunities to notify the Chamber and the Defence of any reasons that may prevent it from complying with these expectations.
68. Mr Al Hassan has been held in detention since April 2017.⁸³ Following his transfer to the ICC on 31 March 2018, [REDACTED].⁸⁴
69. Granting the *Request for a second postponement* would mean that the overall period of pre-trial detention and restrictive measures imposed on Mr Al Hassan extends to at least 16 months between his initial appearance and the eventual decision on the Confirmation of Charges.⁸⁵ [REDACTED].

⁷⁹ ICC-01/12-01/18-31-tENG-Corr, para. 24. See also ICC-01/14-01/18-64-Red, par.16; Ongwen Disclosure Decision, ICC-02/04-01/15-203, para. 18.

⁸⁰ ICC-01/12-01/18-94-Red, para. 18.

⁸¹ See *supra*, paras 21-22, 24-27.

⁸² Khan, K., ‘Article 60: Initial proceedings before the Court’, in Triffterer and Ambos (eds), “Rome Statute of the International Criminal Court: A Commentary”, 3rd edition, Beck, Hart and Nomos, 2016, p. 1473.

⁸³ See, for example, MLI-OTP-0061-1622, p. 1627.

⁸⁴ ICC-01/12-01/18-93-Conf-Exp-Red-tENG, paras 86-87.

⁸⁵ See Regulation 53 of the RoC.

70. This would exceed the delays brought forward in the drafting history of the Rome Statute,⁸⁶ and would largely exceed the average time of ten months between initial appearance and the decision on the confirmation of charges, as demonstrated by the Court's previous practice.⁸⁷
71. Given the impact on Mr Al Hassan, [REDACTED], delaying the proceedings any further would be "unreasonable", for an "inexcusable delay by the Prosecutor",⁸⁸ and would certainly prejudice Mr Al Hassan right to be "tried without undue delay".⁸⁹
72. The Prosecution has an obligation "to conduct the review of the evidence as soon as it is collected during the investigation on an ongoing basis, so as to be ready to comply expeditiously with the disclosure obligations upon surrender of the suspect to the Court".⁹⁰ The investigations in the Situation in Mali have been active at least since the start of the *Al Mahdi* case in 2015, if not earlier. In this context, the Defence submits that little could in fact justify the substantial delay requested by the Prosecution.
73. While the Defence accepts that the Prosecution may continue to investigate between the Suspect's initial appearance and the confirmation hearing and is not precluded from using the results at the confirmation hearing, doing so is only allowed if the Prosecution is still meeting its disclosure obligations.⁹¹ [REDACTED].

V. Conclusion

74. In light of the foregoing, and to protect Mr Al Hassan's rights under Article 67(1) of the Statute to be informed promptly of the content of the charges against him and to be tried without undue delay, the Defence respectfully requests the Pre-Trial Chamber to:

⁸⁶ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, UN Doc A/51/22, p. 130; *see also* Jacobs, 'Article 60: Procédure initiale devant la Cour', in Fernandez and Parceau (eds), "Statut de Rome de la Cour pénale internationale", Editions Pedone, Vol. II, 2012, p. 1378.

⁸⁷ *See* Keïta, Fourçans et al., 'Article 67, Droits de l'accusé', in Fernandez and Parceau (eds), "Statut de Rome de la Cour pénale internationale", Editions Pedone, Vol. II, 2012, p. 1507.

⁸⁸ Article 60(4) of the Statute.

⁸⁹ Article 67(1)(c) of the Statute.

⁹⁰ *Yekatom*, Public Redacted Version of "Decision on Disclosure and Related Matters", ICC-01/14-01/18-64-Red, 23 January 2019, para. 14.

⁹¹ *Blé Goudé*, 'Second Decision on Issues Related to Disclosure of Evidence', ICC-02/11-02/11-67, 5 May 2014, para. 9.

REJECT the Prosecution's request for an extension of time for filing the Document Containing the Charges and for a second postponement of the Confirmation of Charges hearing;

REAFFIRM the dates of 6 March 2019 and 6 May 2019 as the dates for the filing of the DCC and the Confirmation of Charges hearing, respectively;

ORDER the Prosecution to comply with its disclosure obligations within the time frame set by the Chamber in its previous Decisions and Orders;

DETERMINE that any material not disclosed to the Defence within a reasonable time prior to the date of filing of the Document Containing the Charges cannot be used at the confirmation stage, but must be disclosed under Rule 77 of the Rules or as exculpatory material, as the case may be.



Yasser Hassan
Lead Counsel for Mr Al Hassan

Dated this 19th Day of February 2019
At The Hague, The Netherlands