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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding
Judge Marc Perrin de Brichambaut
Judge Reine Alapini-Gansou

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD

Public

With Secret *ex parte* annexes A to E

Public redacted version of Submissions requested by the Pre-Trial Chamber

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

1. The Prosecution has failed to comply with key statutory duties in this case. Investigations were conducted in a manner that excluded any investigative avenues that did not serve its theory regarding Mr. Al Hassan's culpability. It also failed to distinguish between material disclosable under Rule 76, Rule 77 and Article 67(2) of the Statute (also known as 'PEXO' materials). The Prosecution's repeated denials of relevant Defence disclosure requests impeded Defence investigations and undermined the fairness of the proceedings. The Prosecution's *ultra vires* interpretation of the Witness Contact Protocol has also obstructed the Defence from using the very limited PEXO information that it received, to further its own investigations. This prejudice was exacerbated by the lack of timely and rigorous judicial supervision. Although non-disclosure should be the exception and disclosure the rule, the Prosecution was allowed to withhold vast quantities of identities, information, and statements (see Annex E). The Defence was never afforded a meaningful opportunity to contextualise the rationale for such decisions. Although the rationale of filing disclosure in the record is to ensure judicial oversight over the disclosure process, no such oversight occurred.
2. As a result of these factors, the confirmation proceedings failed to comply with equality of arms, and the right of the Defence to participate in an effective manner. This constitutes grounds to not confirm the charges. Alternatively, the Pre-Trial Chamber should:
 - i. Assess these investigations and disclosure violations when determining the reliability and weight of Prosecution evidence (including [REDACTED]);
 - ii. Order the Prosecution to disclose all outstanding Rule 77 and Article 67(2) materials; and
 - iii. Confirm that the Prosecution cannot require the Defence to disclose its questions in advance of any interviews with Prosecution investigators.

2. Submissions

2.1 The Prosecution has failed to investigate the case in a manner which fully respects Article 54(1) of the Statute

3. As affirmed by Trial Chamber VII,

Article 54(1)(a) of the Statute provides that the Prosecution shall in order to establish the truth, extend the investigation to cover all facts and evidence

relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally'. The Chamber considers that this provision obligates the Prosecution to make sufficient efforts to question witnesses about their knowledge of the case in the course of its investigation.

4. This obligation is particularly important in a case where firstly, the Prosecution has had advance access to the situation territory, and secondly, the evolving security situation is likely to prevent the Defence from enjoying a similar degree of access.¹ It is, therefore, a matter of considerable concern that the Prosecution conducted its investigations in an entirely partial manner, focussing exclusively on incriminating elements, whilst ignoring exculpatory evidence or lines of inquiry. These investigative failures – as described here and in the sections below – necessarily impact on the reliability of the Prosecution's case, and the weight of evidence and allegations affected by these failures.²
5. In terms of a clear example of a failure to pursue exculpatory lines of inquiry, on 27 April 2018, P-0612 wrote to the Prosecution in order to convey information that was relevant to the charges.³ When the Prosecution interviewed P-0612 in [REDACTED],⁴ P-0612 provided a range of exculpatory information,⁵ and potential exculpatory sources.⁶ This included several persons who knew Mr. Al Hassan at the time of the events,⁷ at least one of whom confirms that Mr. Al Hassan was acting as an interpreter.⁸ These names were all redacted from the statement provided to the Defence in September 2018. But at the same time that its redactions prevented the Defence from following up on such matters, there is no indication that the Prosecution itself attempted to do so. This prejudice was aggravated by the Prosecution's position that the Defence would be in violation of the witness contact protocol, if it were to investigate these issues independently with P-0612.
6. A further example concerning the Prosecution's failure to investigate potentially exculpatory lines of inquiry related to the manner in which they questioned P-0608 and

¹ [REDACTED]

² [ICC-01/09-02/11-382-Red](#), para. 63.

³ See MLI-OTP-0060-0369-R01.

⁴ MLI-OTP-0061-0960-R01.

⁵ MLI-OTP-0061-0960-R01, p. 0967, para. 33.

⁶ MLI-OTP-0061-0960-R01, p. 0967, para. 34.

⁷ MLI-OTP-0061-0960-R01, p. 0967, para. 37.

⁸ MLI-OTP-0061-0960-R01, p. 0967, para. 48.

P-0004. Witnesses P-0608⁹ and P-0004¹⁰ both stated that Islamic law was applied in Timbuktu before the arrival of Ansar Dine. The absence of any other information about this in their respective statements seems to indicate that the matter was not pursued by OTP investigators, notwithstanding the relevance of such matters to the parameters of the common plan in this case. P-0608 also stated that in her view, there was no rape at the prison of the Islamic police. The space was very small, and the door of the cell opened directly on the street. P-0608 states that she does not know of any rape victim.¹¹ This information is clearly exculpatory, yet it was disclosed in an Incriminatory package, and there is no indication that Prosecution attempted to elicit corroborating information from P-0608 or other witnesses, or to otherwise verify her description.

2.2 The Prosecution has interpreted its Article 67(2) duties in an overly narrow and erroneous manner

7. Article 54(1) of the Statute entrusts the Prosecutor with wide powers and corresponding duties, including the “duty to investigate exonerating and incriminating circumstances equally.”¹² The rationale for doing so is that the drafters of the Statute wanted to “build a bridge between the adversarial common law approach to the role of the Prosecutor and the role of the investigating judge in certain civil law systems.”¹³ In doing so, and being aware that the Defence could not benefit from the same authority and standing to request State assistance, the drafters opted to impose “a clear and binding mandate for the Prosecutor to investigate both sides of the case equally” (emphasis added).¹⁴
8. As concerns both Article 67(2) and Rule 77, the Appeals Chamber has also confirmed that the Prosecution must identify and disclose information under these provisions independently of any request from the Defence, and the Defence is not required to disclose its lines of defence in order to obtain such disclosure.¹⁵ This ICTY/ICTR approach to disclosure – whereby the Defence must set out its lines of inquiry and justify

⁹ MLI-OTP-0060-9414-R01, p. 9422, para. 32.

¹⁰ MLI-OTP-0003-0002-R01, p. 0041, para. 146.

¹¹ MLI-OTP-0060-9414-R01, p. 9432, para. 76

¹² [ICC-01/04-01/07-2288](#), para. 81.

¹³ Otto Triffterer and Kai Ambos, *Rome Statute of the International Criminal Court: A commentary*, (3rd Edition, C.H. Beck Hart Nomos 2016) p. 1382.

¹⁴ Otto Triffterer and Kai Ambos, *Rome Statute of the International Criminal Court: A commentary*, (3rd Edition, C.H. Beck Hart Nomos 2016), p. 1382.

¹⁵ [ICC-01/04-01/06-1433](#), paras. 36, 45-46, 50; See also [ICC-01/05-01/08-102-Corr-tENG](#), paras. 7-12.

the materiality of its requests – is not applicable to the ICC disclosure process.¹⁶ Within the framework of this particular case, the Single Judge also stipulated that firstly, the Prosecution must identify which specific information falls under Article 67(2), and secondly, that this information must be disclosed as soon as practicable, and sufficiently in advance of the confirmation hearing so that the Defence is in a position to make effective use of the information in question.¹⁷ The Appeals Chamber has also underlined the Prosecution’s obligation to ensure that all redaction requests appropriately and accurately reflect the potential relevance and exculpatory value of information placed before the Chamber.¹⁸

9. Notwithstanding this clear legal framework, the Prosecution:

- a. Failed to disclose PEXO information, and failed to identify PEXO information that was included in other disclosure materials; and
- b. Made disclosure contingent on the Defence waiving its right of silence, and providing its defence and lines of inquiries as a pre-condition for receipt of disclosure; and

10. The Prosecution has investigated the 2012 events in Mali for over six years. And yet, to date, the Prosecution has only disclosed 22 items under Article 67(2), the last two of which are media articles which were disclosed during the confirmation of charges hearings (thus after the deadline for the disclosure of Defence evidence).

11. In light of this discrepancy, in correspondence dated 7 May 2019, the Defence noted that documents disclosed under Article 67(2) only constituted 0.1% of all material disclosed in the case.¹⁹ In order to address the possibility that the Prosecution may have adopted an

¹⁶ ICC-02/05-03/09-501, para. 34: “the disclosure process is 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. This must remain paramount in decisions that are taken in relation to disclosure. The Prosecutor has an obligation to disclose information that is material to the preparation of the defence pursuant to rule 77 independently of any request from the defence. In this regard, the Appeals Chamber notes the difference in wording between rule 77 and its equivalent at the ICTY and the International Criminal Tribunal for Rwanda (hereinafter: “ICTR”), in which specific provision is included for a request by the defence to be made. No such requirement appears in rule 77.”

¹⁷ [ICC-01/12-01/18-31-tENG-Corr](#), para. 24.

¹⁸ [ICC-01/04-01/06-3031](#), para. 8.

¹⁹ Email from Defence to OTP, 7 May 2019, at 10:09, Annex B, p. 14.

overly narrow approach to Article 67(2) in this case, the Defence requested the Prosecution to provide the search terms used to identify exculpatory material.²⁰

12. More than two weeks later, on 24 May 2019, the Prosecution expressed its view that it had fully respected its obligations to investigate exonerating circumstances, and further requested the Defence reveal its lines of defence.²¹ The Prosecution also stated that it had disclosed “6 Pre-Confirmation PEXO packages and 24 Pre-Confirmation Rule 77 packages, totalling over 11,000 items”²² under both Article 67(2) and Rule 77, and further added that items disclosed under Rule 76 could also potentially contain information that was exculpatory or material to the preparation of the Defence. The Prosecution did not respond to the Defence request for its search terms.

13. During the first day of the confirmation hearing, the Prosecution also attempted to justify its approach, by claiming that²³

It is true that there are a few items of exculpatory material, exclusively exculpatory material, but we had requested of defence some specific guidelines or some indications, but we did not get any response. Pursuant to Rule 77 we disclosed a number of documents, including exculpatory material. We also disclosed witness interviews which also include all types of information mostly incriminatory but also Article 77 information that could be exculpatory, and it is up to the Defence, based on its strategy, to determine which evidence falls under what category.

14. These responses demonstrate that the Prosecution has failed to comply with its duty to assess the relevance and potentially exculpatory nature of evidence in its control, in a manner that is independent of the Defence. If information appears – on a prima facie basis – to be potentially relevant to Defence preparation, then the Prosecution must disclose it. The manner in which the request has been formulated is completely irrelevant since a request is not a precondition for disclosure.

15. The Prosecution’s constant stalling and constructive rejections have also effectively reversed the burden for justifying non-disclosure. The concrete effect of the

²⁰ This is in line with Trial Chamber II acknowledgment that the manner in which the Prosecution conducts its investigation and identifies disclosure is relevant to its assessment of the case: [ICC-01/04-01/07-T-81-Red-ENG](#), pp. 5, 6, 18.

²¹ The Prosecution had already made a similar request by email dated 1 August 2018, at 7.58. The Defence had declined to reveal its lines of defence by email dated 9 August 2018, at 12.04. Annex B, p. 2.

²² [REDACTED].

²³ ICC-01/12-01/18-T-003-CONF-ENG ET, p. 40, lns. 2-11.

Prosecution's refusal to accede to the Defence requests is that the Defence is forced to then raise the matter with the Single Judge, and justify why disclosure should be granted. This reverses the burden in practice, and diverts limited Defence time and resources away from necessary pre-confirmation preparation. As will be elaborated in section 2.7, this prejudice was heightened by the absence of timely rulings on disclosure requests.

16. The Prosecution has also failed to comply with the Single Judge's direction to specifically label information, which falls under Rule 76, Rule 77 and Article 67(2). The Defence has been provided with reams of heavily redacted, decontextualized documents; it is not, therefore, in a position to assess what might be exculpatory as concerns the credibility of Prosecution witnesses. The Prosecution is not only far better placed to make such an assessment; in many instances, it is the only participant who will be aware of specific linkages that might affect the credibility or reliability of its evidence. By placing the burden on the Defence to 'guess' what may or may not be exculpatory, the Prosecution has denuded Article 67(2) of any utility for the Defence, and thereby prevented the Defence from making use of exculpatory information in its investigations or preparation.
17. The prejudice is also particularly acute as concerns the impact of this mis/non-labelling on the ability of the Single Judge to review redaction and non-disclosure requests, and to otherwise exercise effective judicial review, as required by Article 67(2) of the Statute. This important provision is drained of any utility if the Prosecution avoids potential disputes concerning the redaction or non-disclosure of PEXO material by simply leaving off the PEXO label. Since the Chamber might be unaware that certain information is PEXO, it cannot exercise effective oversight over the redaction process. As a result, there is a grave risk that the underlying purpose of the confirmation process – which is to filter out weak cases – has been frustrated in this case. In the same manner that charges against Mr. Muthaura had to be withdrawn after it came to light that PEXO information had been improperly redacted and withheld from the Defence during the pre-confirmation phase,²⁴ there is a significant risk that the true weakness of Prosecution evidence has been hidden through multiple redactions, and the mislabelling of PEXO information. This conclusion is further buttressed by specific interactions with the Prosecution, which demonstrate that

²⁴ [ICC-01/09-02/11-728](#), paras. 24, 25, 36, 93-95.

the Prosecution has failed to understand, and comply with its disclosure obligations in this case.

2.3 Disclosure correspondence pertaining to information concerning Mr. Al Hassan's treatment in detention in Mali

18. From the date of Mr. Al Hassan's initial appearance,²⁵ it should have been clear that the admissibility and reliability of statements that Mr. Al Hassan gave to the Prosecution while detained in Mali would be contested during the course of the proceedings. Any material or information pertaining to his treatment, or that of other Prosecution witnesses detained in Malian custody, therefore fell under Article 67(2) of the Statute. And yet the Prosecution failed to disclose any information on these issues on a *proprio motu* basis. The Defence was also compelled to request the Prosecution to disclose Mr. Al Hassan's own security questionnaire,²⁶ even though the information emanated from Mr. Al Hassan and contained information that related directly to the question as to whether Mr. Al Hassan was in a position to provide informed consent within such an environment.
19. The Prosecutor belatedly recognised the relevance of this information to the Defence, and disclosed these portions in audio format on 20 February 2019,²⁷ and in transcribed format on 3 May 2019.²⁸ The Prosecution has nonetheless refused to disclose the equivalent information as concerns other witnesses. Namely, although the Defence requested this information on 31 May 2019,²⁹ and provided very specific details as concerns the basis for all of its requests concerning Mr. Al Hassan's detention,³⁰ the Prosecution rejected the request, on the grounds that it was too 'broad'.³¹
20. One week before the confirmation hearing (and after the expiration of the deadline for the submission of Defence evidence), the Prosecution disclosed [REDACTED],³² and then continued to disclose additional documents throughout the confirmation hearings

²⁵ ICC-01/12-01/18-T-1-CONF-ENG ET, p. 8.

²⁶ Email from Defence to OTP, 12 February 2019, at 15.46, Annex B, pp. 7-9.

²⁸ MLI-OTP-0069-1728 and MLI-OTP-0069-1754, Pre-Confirmation INCRIM package 31 (3 May 2019), ICC-01/12-01/18-326.

²⁸ MLI-OTP-0069-1728 and MLI-OTP-0069-1754, Pre-Confirmation INCRIM package 31 (3 May 2019), ICC-01/12-01/18-326.

²⁹ Email from Defence to OTP, 31 May 2019, at 13.32, Annex B, p. 23.

³⁰ Email from Defence to OTP, 6 June 2019, at 9:36, Annex B, pp. 41-43

³¹ Email from OTP to Defence, 8 June 2018, at 17.07, Annex B, p. 41.

³² Pre-Confirmation INCRIM [package 26](#) (28 June 2019), ICC-01/12-01/18-392: [REDACTED]

(including at the very end).³³ The Prosecution has never confirmed whether or not this disclosure encompasses all [REDACTED].

21. The [REDACTED] contain information which is highly exculpatory, and which should have been disclosed as soon as the Prosecution became aware of the information. For example, [REDACTED].³⁴ This information corroborates Mr. Al Hassan's claims of torture and threats: it should therefore have been transmitted to the Defence immediately, that is in [REDACTED], and not [REDACTED] (towards the very end of the confirmation process).
22. [REDACTED], there is also no justification for disclosing this information in the format of an 'investigator's note', as opposed to disclosing the actual transcripts of this segment of the interviews (or the relevant extracts). This information is intrinsically linked to the admissibility of the related statement and transcripts of the interviews, and therefore falls under either Article 67(2) or Rule 77.
23. The Appeals Chamber has affirmed in this regard that although security assessments do not fall under the Prosecutor's Rule 76 obligations, the Prosecution remains obliged to disclose any elements that might affect the reliability and credibility of the witness in question, or which might otherwise be material for the preparation of the Defence.³⁵ As far as the Defence is aware, the Prosecution also did not seek judicial authorisation to disclose the Rule 77/Article 67(2) information in the form of a summarised note, rather than in its original format.

2.4 Defence request for disclosure of [REDACTED]

24. [REDACTED].³⁶
25. [REDACTED].
26. [REDACTED].³⁷ [REDACTED].³⁸ [REDACTED].³⁹ [REDACTED] [REDACTED].⁴⁰

³³ Pre-Confirmation INCRIM [package 27](#) (8 July 2019), ICC-01/12-01/18-403; Pre-Confirmation Rule 77 [Package 28](#) (12 July 2019), ICC-01/12-01/18-407; Pre-Confirmation Rule 77 [Package 29](#) (15 July 2019), ICC-01/12-01/18-409; Pre-Confirmation Rule 77 [Package 30](#) (18 July 2019), ICC-01/12-01/18-411.

³⁴ MLI-OTP-0070-1670-R01, p. 1670, para. 3.

³⁵ [ICC-01/04-02/06-1330](#), para. 33.

³⁶ Email from Defence to OTP, 27 May 2019, at 10.02, Annex B, pp. 53-54.

⁴⁰ [REDACTED].

⁴⁰ [REDACTED].

27. [REDACTED].

2.5 Defence request to [REDACTED]

28. [REDACTED]⁴¹ [REDACTED].⁴²

29. [REDACTED].⁴³

30. [REDACTED],⁴⁴ [REDACTED].⁴⁵ [REDACTED].

31. [REDACTED].⁴⁶ [REDACTED].

32. [REDACTED]. [REDACTED].⁴⁷

2.6 [REDACTED]

33. [REDACTED].⁴⁸ [REDACTED].⁴⁹ [REDACTED].⁵⁰

2.7 Requests regarding [REDACTED]

34. [REDACTED],⁵¹ [REDACTED].⁵² [REDACTED].⁵³ [REDACTED].

35. [REDACTED]⁵⁴ [REDACTED].⁵⁵ [REDACTED]⁵⁶ [REDACTED] ⁵⁷ [REDACTED]⁵⁸

⁴⁰ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [ICC-02/05-02/09-186](#).

⁴⁵ [REDACTED].

⁴⁶ ICC-01/12-01/18-T-003-ENG CT WT, p. 44, lns. 6-9; p. 54, lns 9-12.

⁴⁷ ICTY: [Prosecutor v. Milutinovic et al.](#), ‘Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65^{ter} Witness List’, 20 April 2007, IT-05-87-AR73.1, paras. 20, 22-23.

⁴⁸ [REDACTED]

⁴⁹ [REDACTED].

⁵⁰ ICTY: [Prosecutor v. Stanisic and Simatovic](#), Decision on Prosecution’s Appeal Against Decision on Provisional Release, 3 December 2004, IT-03-69-AR65.2, para. 9.

⁵¹ ICC-01/12-01/18-179-Conf-AnxA, p. 5.

⁵² ICC-01/12-01/18-213-Conf-AnxA, p. 3.

⁵³ MLI-OTP-0050-0443.

⁵⁴ ICC-01/12-01/18-263-Conf-Exp.

⁵⁵ ICC-01/12-01/18-290, para. 21.

⁵⁶ ICC-01/12-01/18-290-Conf-Exp-Red.

⁵⁷ ICC-01/12-01/18-284-Conf-Exp-Red, para. 23.

⁵⁸ [REDACTED]

36. [REDACTED].⁵⁹ [REDACTED],⁶⁰ [REDACTED]⁶¹ [REDACTED],⁶² [REDACTED].
[REDACTED].⁶³ [REDACTED].

37. [REDACTED]⁶⁴

38. [REDACTED].⁶⁵ [REDACTED].

2.8 Requests regarding MLI-OTP-0061-1884 to MLI-OTP-0061-1932

39. On 8 May 2019, the Registry informed the Prosecution that the CD containing material MLI-OTP-0061-1884 to MLI-OTP-0061-1932, disclosed on 2 November 2018 was unreadable.⁶⁶ The Registry suggested that the files should be saved in a different format and re-disclosed. To the Defence's knowledge, no follow up was done by the Prosecution. The material was not re-disclosed, and is still not accessible, in spite of the fact that the Prosecution relies on part of this material in the DCC.⁶⁷

2.9 Request to disclose which witnesses are [REDACTED]

40. [REDACTED].⁶⁸ [REDACTED]⁶⁹ [REDACTED].⁷⁰

41. [REDACTED],⁷¹ [REDACTED].⁷² [REDACTED].⁷³ [REDACTED]

2.10 The Prosecution has failed to disclose Rule 77 and Article 67(2) information 'as soon as practicable'

42. Mr. Al Hassan has a right to speedy proceedings: a core element of this right concerns the right to obtain the disclosure of information in a timely manner. This right is of heightened importance as concerns a defendant who has been held in pre-confirmation

⁵⁹ ICC-01/12-01/18-308-Conf-AnxA.

⁶⁰ [REDACTED].

⁶¹ [REDACTED]

⁶² [REDACTED].

⁶³ ICC-01/12-01/-18-392-AnxA: MLI-OTP-0069-3003-R01.

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED]

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

detention at the ICC for over 15 months. As set out below, the Prosecution's disclosure practices in this case have run roughshod over this right.

43. On 9 July 2018, the Prosecution informed the Chamber and the Defence that it would complete the disclosure process at the latest by 31 October 2018, except for witnesses for whom protective measures would be sought.⁷⁴ The Prosecution added that all of its redaction requests would be filed at the latest by 31 October 2018.⁷⁵ In reality, the Prosecution has continued to disclose Rule 76 material up until 25 June 2019,⁷⁶ while Rule 77 material has been disclosed as recently as 18 July 2019.⁷⁷ It is clear that the Prosecution has still not finished its disclosure process, since the Defence has recently received two new requests for the Chamber to authorise redactions and approve the non-disclosure of the identity of new witnesses.⁷⁸
44. As set out in Annex C, the Prosecution has been in possession of a significant amount of the material that was disclosed in the immediate lead up to the confirmation hearing, long before these materials were disclosed. No justification has been provided for these delays, nor is there any objective justification for failing to disclose information that was in the control of the Prosecution. A specific example concerns the delayed disclosure of Rule 77 materials concerning P-0111. P-0111 provided a statement to the Prosecution on [REDACTED],⁷⁹ and on [REDACTED], the Single Judge authorised the non-disclosure of his identity.⁸⁰ Following a Prosecution request concerning the potential availability of P-0111,⁸¹ the Defence requested the expedited disclosure of his statement,⁸² which was then disclosed on 21 December 2018.⁸³ On [REDACTED]. Although P-0111 provided exculpatory information concerning Mr. Al Hassan's lack of control and authority in Timbuktu,⁸⁴ the statements were only disclosed to the Defence on 31 May 2019, and under Rule 77, not Article 67(2).⁸⁵ No justification was provided for this four month day, which resulted in the Defence obtaining highly relevant information, at a time when it

⁷⁴ ICC-01/12-01/18-75-Red, para. 2.

⁷⁵ ICC-01/12-01/18-75-Red, para. 34.

⁷⁶ Pre-Confirmation Incrim [Package 40](#) (25 June 2019), ICC-01/12-01/18-389.

⁷⁷ Pre-Confirmation Rule 77 [Package 30](#) (18 July 2019), ICC-01/12-01/18-423.

⁷⁸ ICC-01/12-01/18-410-Conf-Red, ICC-01/12-01/18-397-Conf-Red.

⁷⁹ MLI-OTP-0024-2571-R01.

⁸⁰ ICC-01/12-01/18-174-Conf-Exp-Red.

⁸¹ ICC-01/12-01/18-195-Conf-Exp-Red.

⁸² [REDACTED].

⁸³ ICC-01/12-01/18-214.

⁸⁴ MLI-OTP-0069-1266-R01, pp. 1287-1288, lns 719-755; MLI-OTP-0069-1293-R01.

⁸⁵ ICC-01/12-01/18-362.

had insufficient time to filter this information into investigations and preparation, or to seek remedies from the Chamber as concerns the ongoing non-disclosure of P-0111's identity.

45. Of further concern, although the Appeals Chamber has emphasised that “the Prosecutor's investigations should be “largely completed” by the time of the confirmation hearing,”⁸⁶ a significant amount of material has been withheld in order to protect the Prosecution's ongoing investigations (i.e. under Rule 81(2)).⁸⁷ Whereas the redactions might have been justified on an individual basis, the cumulative impact of such a substantial amount of non-disclosure is contrary to the defendant's right to be informed promptly of the nature, cause and content of the charges, and the right to adequate time and facilities to prepare the Defence. It suggests, quite simply, that this case is not trial ready, and should not, therefore, be confirmed for trial.

2.11 The Prosecution's erroneous interpretation of the witness protocol has obstructed Defence investigations

46. On 27 May 2019, the Defence requested the Prosecution to confirm that pursuant to the Witness Protocol,⁸⁸ individuals whose statements were disclosed under Rule 77, as opposed to Rule 76, and who have not been listed as Prosecution witnesses or otherwise relied upon in the DCC, are not considered to be ‘Prosecution witnesses’ for the purposes of the Witness Protocol.⁸⁹ On 4 June 2019, the Prosecution responded that in its view, all individuals, in connection with whom statements have been disclosed under Rule 77 and Article 67(2), are Prosecution witnesses under the Witness Protocol.⁹⁰
47. On the same day, the Defence requested the Prosecution to clarify the basis for its position in light of the fact that this interpretation of the Witness Protocol would (1) effectively run roughshod over the notion that there is no property in a witness; (2) create a complete inequality of arms by virtue of the fact that the Prosecution has commenced its investigations at an earlier point in time; and (3) drain the Prosecutor's duty to collect exculpatory information of any value for either the Defence or the overarching interests

⁸⁶ [ICC-01/04-01/06-3031](#), para. 9, citing to ICC-01/04-01/10-514 (OA 4), para. 44.

⁸⁷ See Annex E.

⁸⁸ ICC-01/12-01/18-40-Anx-tENG.

⁸⁹ Email from Defence to OTP, 27 May 2019, at 10.02, Annex B, p. 18.

⁹⁰ Email from OTP to Defence, 4 June 2019, at 9.12, Annex B, pp. 25-26.

of a fair and impartial trial.⁹¹ The Prosecution confirmed its initial position, stating that in its view, that this did not obstruct Defence investigations and preparation.⁹² On 13 June 2019, the Defence expressed the view that the position of the Prosecution is not supported by the plain text of the Witness Protocol and therefore not binding on the Defence, while any expansion of the definition would require a prior judicial determination.⁹³ On the same day, the Prosecution maintained its position.⁹⁴

48. On 8 July 2019, in open court and based on its all-encompassing interpretation, the Prosecution accused the Defence of violating the Witness Protocol in relation to exculpatory witness P-0612, whose statement was disclosed pursuant to Article 67(2).⁹⁵ This unfounded accusation was seemingly made without having seized the Chamber of the alleged violation,⁹⁶ contrary to the Defence's suggestion that an expansion of the definition of witness would require a prior judicial determination.
49. The Prosecution's interpretation is ultra vires, and has had a chilling effect on Defence investigations. The Appeals Chamber has confirmed that the Defence has a legitimate interest in contacting persons, who might have been interviewed by the Prosecution, but who have not, nor not yet been designated as Prosecution witnesses.⁹⁷ The definition of a 'witness' in the Witness Protocol in this case was also informed by prior ICC litigation on this point, rejecting the broad definition advanced by the Prosecution. Thus, in the Muthaura case, the Prosecution argued that a definition – which encompassed any individual interviewed by a party – “was far too broad and could include virtually everyone, forcing the OTP to reveal all the individuals that it meets. This in turn could seriously jeopardise their security.”⁹⁸ The Trial Chamber agreed that this broad definition was unworkable and would capture individuals who may never be called at trial; in contrast, restricting the definition to ‘actual witnesses’ was fair and would occasion no prejudice to the parties.⁹⁹ As a result of the Prosecution's intransigence on this point, the

⁹¹ Email from Defence to OTP, 4 June 2019, at 12.04, Annex B, p.24.

⁹² Email from OTP to Defence, 4 June 2019, at 16.36, Annex B, p. 24.

⁹³ Email from Defence to OTP, 13 June 2019, at 12.34, Annex B, pp.66-67.

⁹⁴ Email from OTP to Defence, 13 June 2019, at 19.14, Annex B, p. 66.

⁹⁵ ICC-01/12-01/18-T-003-ENG, p. 30, lns 18-20.

⁹⁶ Email from OTP to Defence, 16 July 2019, at 08.58, Annex B, p. 68.

⁹⁷ [ICC-01/04-01/07-476](#), para. 62.

⁹⁸ [ICC-01/09-02/11-440-Anx1](#), p. 2.

⁹⁹ [ICC-01/09-02/11-469](#), para. 6.

Defence was compelled to scale back its investigations and inquiries, pending the Single Judge's issuance of the pending decision on PEXO issues (see below).

3. The Chamber did not exercise sufficient judicial supervision when faced with delays and violations, or when seized by the Defence

50. While the motions filed by the Prosecution have been assessed and adjudicated promptly, there was a significant time lag as concerns the adjudication of Defence requests: indeed, many decisions were only issued after the commencement of the confirmation proceedings.¹⁰⁰ The appearance that Prosecution preparation was prioritised over that of the Defence is inconsistent with the principle of equality of arms.¹⁰¹ The delays in issuing rulings also amounted to a constructive denial of adjudication and assistance, and deprived the Defence of the protection of the law.¹⁰²

51. The absence of timely rulings also deprived the Defence of any legal guidance concerning issues of contention between the parties, and the Single Judge's approach to the formulation and specificity required in such requests. The issuance of rulings at the very end of the confirmation phase also meant that the Defence was effectively deprived of the opportunity of requesting and obtaining appellate review, in order to ensure that the confirmation phase followed the right course.¹⁰³ The delays and lack of judicial oversight manifested itself in the following, non-exhaustive matters.

4. Access to lesser redacted versions of materials disclosed under Article 67(2) of the Statute

52. On 13 February 2019, the Defence requested the Prosecution to lift certain specific redactions applied to material disclosed under Article 67(2) and to disclose additional material under that provision.¹⁰⁴ The Prosecution refused to do so, except for two minor redactions contained in a screening note.¹⁰⁵ The Defence then seized the Chamber of the same issue on 14 March 2019.¹⁰⁶ The Chamber's decision on this motion was only

¹⁰⁰ ICC-01/12-01/18-398; ICC-01/12-01/18-408-Conf-Exp; ICC-01/12-01/18-413-Conf-Exp-Red.

¹⁰¹ See for example, ICC-01/12-01/18-290-Conf-Exp-Red, para. 25, where the Single Judge found that the Prosecution's resources should be concentrated on drafting its voluminous charging document, rather than disclosing materials in a readable and useable format.

¹⁰² ECCC, *Case 002*, PTC, [Decision on Ieng Sary's Appeal regarding the Appointment of a Psychiatric Expert](#), 21 October 2008. 002/19-09-2007-ECCC/OCIJ (PTC10), para. 22.

¹⁰³ ICC-01/04-168, para. 15.

¹⁰⁴ [REDACTED].

¹⁰⁵ Email from OTP to Defence, 21 February 2019, at 14.46, Annex B, p. 9.

¹⁰⁶ ICC-01/12-01/18-276-Conf-Exp.

issued after the confirmation hearing, on 18 July 2019, more than four months after the request was filed.¹⁰⁷ Although the Chamber denied the motion, its clarification that the Defence was free to conduct its own inquiries as concerns redacted information, resolved a pending dispute with the Prosecution (see paragraph 47 above). The delay therefore unnecessarily hampered Defence investigations, and also prevented the Defence from seeking appellate review in a timely manner.

5. Disclosure of dates of interviews of Prosecution witnesses

53. On 7 May 2019, the Defence requested the Prosecution to lift redactions applied to the dates of interviews of a number of witness statements and summaries of witness statements, as there are material to the preparation of the Defence.¹⁰⁸ On 24 May 2019, the Prosecution stated that the redactions have been applied in compliance with the redaction protocol and/or with the Chamber's authorisation. On 31 May 2019, the Defence filed a motion requesting these redactions to be lifted,¹⁰⁹ to which the Prosecution objected.¹¹⁰ The Chamber's decision was only issued during the confirmation hearing, on 16 July 2019. It denied the Defence's request, on the basis that it was too broad.¹¹¹ The delay in issuing this decision again prevented the Defence from either seeking appellate review, or resubmitting a more detailed request.

Conclusion

54. The Defence for Mr. Al Hassan respectfully requests the Honourable Pre-Trial Chamber to find that the above violations have undermined the fairness and adversarial nature of the confirmation proceedings. Alternatively, the Defence seeks the relief set out in paragraph 2.



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¹⁰⁷ ICC-01/12-01/18-408-Conf-Exp.

¹⁰⁸ Email from Defence to OTP, 7 May 2019, at 10.09, Annex B, pp. 14-15.

¹⁰⁹ ICC-01/12-01/18-361.

¹¹⁰ ICC-01/12-01/18-371-Conf-Exp.

¹¹¹ ICC-01/12-01/18-408-Conf-Exp.

Lead Counsel for Mr Al Hassan

Dated this 22nd Day of July 2019
At The Hague, The Netherlands