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PRE-TRIAL CHAMBER I

Before:

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

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF

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

Public

**With Secret *Ex Parte* Annexes A to E
Available only to the Prosecution and the Defence**

**Public redacted version of the “Prosecution’s response to Defence’s written
submissions under rule 122(3) of the Rules of Procedure and Evidence”,
30 July 2019, ICC-01/12-01/18-440-Secret-Exp**

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I. Introduction

1. The Defence's claims of impropriety in the Prosecution's discharge of its obligations are unsupported by fact or law, as are its allegations levelled against Pre-Trial Chamber I (the "Chamber"). Its last-minute claims of prejudice are based on misrepresentation of facts, often taken out of context, unsubstantiated generalisation premised on a selection of a few inaccurate examples, and incorrect interpretation of the relevant legal standards.
2. The record of the case shows that the Prosecution has properly fulfilled its disclosure obligations in a timely manner, under the Chamber's supervision and conducted a fair investigation with the sole purpose of eliciting the truth. Similarly, the allegation of lack of judicial oversight is unfounded. Indeed, the Chamber has taken into careful consideration the interests of the Defence throughout the pre-trial proceedings while steering astutely between competing interests and duties. Finally the Defence's attempt to recast issues previously litigated and rejected as grounds to support its claims is both improper and unpersuasive.¹

II. Submissions

There is no legal or factual basis to grant the reliefs requested by the Defence

3. The Defence requests the Chamber not to confirm the charges against AL HASSAN, and suggests alternative steps to be taken.² There is no legal or factual basis for granting any of these reliefs.
4. Under article 61(7)(b) of the Statute, the Chamber may only decline to confirm the charges "in relation to which it has determined that there is insufficient evidence". Even if the Chamber were to find a procedural violation, this is not a ground on which it may decline to confirm the charges. With respect to the first of the alternative reliefs requested by the Defence³, the Defence fails to explain how alleged violations affect the reliability of, or weight to be attached to, specific items of evidence. Nor does it show how any of these alleged violations affected the fairness of the proceedings.
5. In this regard, the Prosecution notes that the ICC statutory instruments do not contain specific rules regarding sanctions that may be imposed in case of disclosure violations.

¹ Pursuant to regulation 23bis(2) of the Regulations of the Court, this document is filed as secret, available only to the Prosecution as it contains information that is currently classified as such. The Prosecution will file forthwith a secret *ex parte* redacted version, available to the Prosecution and the Defence to respect the same classification of the Defence Submissions to which this filing responds.

² ICC-01/12-01/18-426-Secret-Exp ("Request"), para. 2.

³ Request, para. 2.

However, the approach taken by the *ad hoc* tribunals⁴ suggests that should the defence seek a remedy for a violation of disclosure obligations by the Prosecution, it must: (i) identify specifically the materials sought, present a *prima facie* showing of its probable exculpatory nature, and prove the Prosecution's custody or control of the materials requested; (ii) establish that the Prosecution has failed to discharge its obligations; and (iii) satisfy the Chamber that it has actually been prejudiced by such failure.⁵ Only then can the appropriateness of a remedy be considered. In this case, the Defence has failed to establish any of the above points.

6. The Defence request regarding disclosure of "all outstanding rule 77 and article 67(2) materials" is overly broad and, most importantly, unfounded since the Prosecution has complied with its disclosure obligations. As confirmed by the Appeals Chamber, "[a]rticle 67(2) of the Statute requires disclosure of evidence which the Prosecutor *believes* meets the criteria set out therein. Similarly, rule 77 of the Rules leaves to the Prosecutor the assessment of whether the objects are 'material to the preparation of the defence'".⁶ This principle also has been confirmed by this Chamber.⁷ Should the Defence seek additional information, it must establish *prima facie* relevance.⁸

7. There is also no basis to grant the Defence's request for a confirmation from the Chamber that the Prosecution cannot require the Defence to disclose its questions in advance of any interviews with Prosecution investigators. Firstly, as explained below, the Prosecution never required but only requested a list of proposed questions from the Defence in order to make an assessment of the Defence's request to interview its investigators. Secondly, if the Defence was unwilling to provide the Prosecution with questions and more detailed reasons as to why it seeks to interview OTP investigators, it should have raised the matter at the time before the Chamber, with detailed legal and factual basis for its position. The Defence failed to do so. The type of ruling sought by the Defence cannot be issued in the abstract.

⁴ Rule 68 *bis* of the ICTY Rules of Procedure and Evidence: "The pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules."

⁵ *Prosecutor v. Miroslav*, Decision on Access to *Ex Parte* Materials and Disclosure of Mitigating Materials, 30 August 2006, IT-95-17-A, para. 31.

⁶ ICC-01/04-02/06-1330, para. 23.

⁷ See, for example,

ICC-02/05-03/09-501 OA4, para. 42.

The Prosecution has properly discharged its obligations with regard to investigation and disclosure

8. The Defence fails to show a breach of the Prosecution's disclosure obligations, let alone one that would justify such a far-reaching remedy that it seeks. Nor does it show any prejudice to its ability to prepare its case. It relies on unsubstantiated assertions and inferences to generate a tardy and general claim of prejudice.

1. The Defence's ill-founded claims regarding the Prosecution's duty pursuant to articles 54(1) and 67(2) of the Statute

9. Consistent with its obligations, the Prosecution conducts its investigations for the purpose of establishing the truth. The interviews conducted by the Prosecution in this case demonstrate that the Prosecution pursues both incriminatory and exculpatory aspects of the case. For instance, the Defence's entire case thus far is built solely on evidence collected by the Prosecution.⁹ Interviews of AL HASSAN as well as key insiders and other witnesses are exemplary of the equal pursuit of all sides of the case.¹⁰ In its investigations, the Prosecution seeks to identify individuals who possess relevant knowledge about the events of the case, and interviews each witness to elicit the truth unconditionally. This includes putting questions to witnesses to pursue potential exculpatory lines. For instance, in P-0520's interview with the Prosecution, she confirms that [REDACTED]

[REDACTED]¹¹ It is the Prosecution's investigations that verified this issue in detail to the benefit of the Defence and the establishment of the truth.¹² Even the very examples put forward by the Defence demonstrate the impartial manner in which the Prosecution conducted its investigation and show the unfounded nature of the Defence's claims.

10. The interview of P-0612 is a clear example of how the Prosecution specifically directed its investigation to obtaining potentially exculpatory information. The fact that P-0612 possessed potentially exculpatory information was clear [REDACTED] to the

⁹ Indeed, the Defence has not disclosed any evidence pursuant to rules 78 and 79 of the Rules and only relied, in its oral and written submissions for the purposes of the confirmation proceedings, on the evidence disclosed by the Prosecution.

¹⁰ See e.g. ICC-01/12-01/18-394-Conf, para. 30, where the Defence relies on [REDACTED] evidence to argue that "as concerns all key allegations of criminal activity, [REDACTED] confirms that individuals other than Mr. Al Hassan exercised control and decision-making powers"; S [REDACTED] 01/12-01/18-394-Conf, para. 178, where the Defence relies on [REDACTED] evidence that "AL HASSAN [...] on lui demande un petit truc, il faut qu'il demande à KHALID"; Al Hassan's transcripts are clear in showing that he freely gave his accounts, at times denying or limiting his role or otherwise providing information in his defence, see e.g. MLI-OTP-0051-0891, p. 0894, l. 95-99 (denying his presence when the armed group entered Timbuktu); MLI-OTP-0060-1298, p. 1309, l. 349-358 (stating he does not remember the role for the Islamic Police in the amputation).

¹¹ P-0520's Statement, MLI-OTP-0060-1857, para. 91.

¹² [REDACTED]

Prosecution, [REDACTED].¹³ Not only did the Prosecution fulfil its duty to investigate equally incriminating¹⁴ and potentially exculpatory evidence but it also did so diligently and promptly.¹⁵ The Prosecution further disclosed the witness's statement, including his identifying information, in a timely manner.¹⁶ The limited redactions to his statement were applied to protect family members and other persons at risk and to avoid prejudice to the Prosecution investigation, and accepted as justified by the Chamber.¹⁷

11. The Defence claims that the Prosecution failed to pursue exculpatory lines of inquiry in relation to the information on AL HASSAN [REDACTED], which was mentioned in P-0612's statement. However, in the Prosecution's assessment, this information is not *per se* of exculpatory nature.¹⁸ The information that AL HASSAN may have made [REDACTED] in his role within the Islamic Police is not inconsistent with the Prosecution's case that he made essential contributions to the implementation of the common plan. Indeed, as discussed in the Document Containing the Charges ("DCC"), the use of his [REDACTED] was part of such contributions.¹⁹ In any event, this information from P-0612 has been duly recorded and, as noted by the Chamber, the redaction to the source of this information did not prevent the Defence from conducting its own investigation on the basis of the information provided by P-0612.²⁰

12. Based on passages in the statements of P-0608 and [REDACTED] taken out of context, the Defence suggests that the Prosecution failed to pursue the issue of the application of Islamic law before the arrival of Ansar Dine.²¹ In fact, the relevant sentence of P-0608 in paragraph 32 reads as follows: [REDACTED]

[REDACTED].²² Moreover, P-0608 further clarified in paragraph 49 that:

¹³ [REDACTED], MLI-OTP-0060-0369, disclosed in PEXO package 03, on 21 September 2018.

¹⁴ P-0612's statement also contains incriminating evidence.

¹⁵ [REDACTED]

¹⁶ P-0612 [REDACTED].

¹⁷ [REDACTED]

¹⁸ DCC, ICC-01/12-01/18-335-Conf-Corr, para. 267.

¹⁹ [REDACTED]

²⁰ Request, para.6.

²¹ See P-0608 [REDACTED].

[REDACTED]

[REDACTED]²³

13. Similarly, the relevant passage in [REDACTED] statement reads :

[REDACTED]

[REDACTED]²⁴

14. Contrary to the Defence's claim²⁵, neither witness suggests that Islamic law was applied as a governing law in Timbuktu, a territory part of a secular state, Mali, before the arrival of the armed groups in April 2012. At best, both statements make it clear that the type of religious tradition that had been practiced by the population prior to the arrival of the armed groups was lenient and by choice, unlike a set of restrictive rules imposed by these groups. With respect to a system of justice, [REDACTED]'s statement indicates that the population had a choice of going to the justice system of the government or the Islamic judge. During the period of the occupation, however, they had no choice but to go to the Islamic judge.

15. In any event, the fact that Islam was practiced in Timbuktu before the arrival of the armed groups in no way disproves the existence of the common plan as presented in the DCC. Rather, the above statements support the Prosecution's contention that they had a common plan to assume power and control over Timbuktu, its region and its population and to impose its own ideological and religious vision.²⁶

16. The Defence takes a piecemeal approach in reading P-0608's statement on the question of rape.²⁷ P-0608 indicates that she does not believe that rapes occurred in the cell located at the *Banque Malienne de Solidarité* (BMS) because it was small and visible from the street and also because she does not trust what she reads in the Malian press.²⁸ This is not inconsistent with the evidence of victims who indicate that they were taken to and raped in another room

²³ P-0608's statement, MLI-OTP-0060-9414-R01, p.9426, para. 32.

²⁴ [REDACTED] statement, MLI-OTP-0003-0002-R01, p.0041, para.146.

²⁵ Request, para. 6.

²⁶ DCC, ICC-01/12-01/18-335-Conf-Corr, para. 212.

²⁷ See Request, para.6 and P-0608, MLI-OTP-0060-9414-R01, p.9432, para.76.

²⁸ P-0608's statement, MLI-OTP-0060-9414-R01, p.9432, para.75.

at the BMS,²⁹ or that they were raped after the night fell.³⁰ P-0608 further states that she heard from another person a case of rape [REDACTED]

[REDACTED] but that she does not know when it occurred.³¹ In this context, she highlights the delicate nature of recounting rape, [REDACTED]

[REDACTED]³²

17. Read in proper context, her evidence in relation to rapes is not particularly exculpatory. The fact that this witness does not have direct knowledge of rapes occurring in the small ATM room at the BMS does not in itself mean that no rapes occurred at the BMS's building, or at the ATM room when the witness was not around, particularly given that [REDACTED].³³ Furthermore, there was no need for the Prosecution to seek additional information regarding the description of the BMS, which is discussed in detail in the expert reports on the forensic mission conducted on site in June 2013.³⁴

2. The Defence's incorrect claims regarding the Prosecution's disclosure obligations

18. As discussed above, the case law clearly establishes that an assessment of whether an item of evidence falls under article 67(2) of the Statute or rule 77 of the Rules of Procedure and Evidence (the "Rules") is in the first place left to the Prosecution.³⁵ The Prosecution does not have "an obligation to provide the defence with all the material relating to an issue that is in its possession, to enable the accused to analyse it and to assess for himself whether or not it is relevant to the submissions he wishes to advance".³⁶ As stated by Trial Chamber III in *Bemba*: "The prosecution does not have the obligation of 'handing the defence the keys to the warehouse' in this way".³⁷

19. Contrary to the Defence's claim,³⁸ the Prosecution has reviewed all the material in its possession and control and disclosed items which it identified as potentially exculpatory

²⁹ P-0547's statement, MLI-OTP-0039-0861-R01, p.0872-0873, para.41-43.

³⁰ P-0542's statement, MLI-OTP-0039-0167-R01, p.0172-0173, para. 26-28; P-0574's statement, MLI-OTP-0049-0098-R01, p.0106-0107, para.39-42.

³¹ P-0608's statement, MLI-OTP-0060-9414-R01, p.9432, para.76.

³² P-0608's statement, MLI-OTP-0060-9414-R01, p.9432, para.76.

³³ P-0608's statement, MLI-OTP-0060-9414-R01, p.9417, para.15-16, [REDACTED]

MLI-OTP-0039-0611; MLI-OTP-0060-1939.

³⁵ ICC-01/04-02/06-1330, para. 23.

³⁶ ICC-01/05-01/08-632, para.26.

³⁷ ICC-01/05-01/08-632, para.26.

³⁸ See Request, para.43.

evidence under article 67(2) of the Statute, or evidence that is material to the preparation of the Defence under rule 77 of the Rules as soon as practicable. 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 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.

20. Disclosure and inspection under article 67(2) of the Statute and rule 77 of the Rules is an on-going obligation. In this case, the Prosecution has duly discharged this obligation, as shown, in particular, by the regularity with which disclosure packages have been communicated to the Defence over several months³⁹ in accordance with the Chamber's decision on disclosure.⁴⁰

21. Contrary to the Defence's assertion,⁴¹ the Prosecution did not make disclosure contingent on the Defence provision of its lines of inquiries. The Prosecution invited the Defence to share its potential line(s) of defence, and emphasised that "this is intended to accommodate any specific lines [the Defence] may wish to share with the Prosecution, without infringing on the suspect's right to remain silent".⁴² This was intended to assist the Defence, not to impose conditions for disclosure because the Prosecution's ability to identify material relevant to the Defence is limited to its understanding of what the lines of the defence might be. Indeed, as some lines of defence became apparent, the Prosecution has conducted additional reviews of information in its possession and disclosed relevant material on an on-going basis.⁴³

22. The Defence's claims of late disclosures by the Prosecution are based on misrepresentation of facts. For example, rule 77 material disclosed on 18 July 2019, cited by the Defence,⁴⁴ consists of investigation notes related to the video material collected on 9 July 2019, only 6 days before its disclosure.⁴⁵ Similarly, the Defence disregards the fact that P-0111's [REDACTED] interviews conducted [REDACTED] could not be disclosed until 21

³⁹ See Annex A.

⁴⁰ ICC-01/12-01/18-31, para.21.

⁴¹ Request, paras 12-14.

⁴² Request, Annex B, p. 2.

⁴³ See, for example, section 3 below.

⁴⁴ Request, para.43.

⁴⁵ The notes disclosed in Rule 77 package 30 are in relation to the video materials disclosed on 15 July 2019 in Rule 77 package 25 only 6 days after their collection on 9 July 2019.

May 2019 when the Chamber decided the Prosecution's request for the non-disclosure of his identity.⁴⁶

23. The Defence also misinterprets the Single Judge's decision regarding the obligation to highlight the passages relevant to article 67(2) of the Statute.⁴⁷ Footnote 26 to the relevant passage referred to paragraph 25 of the decision in the *Gbagbo* case.⁴⁸ This paragraph is included in a section entitled "*note de communication*" specifically concerning evidence disclosed under article 67(2) of the Statute. Since the disclosure process started in July 2018, until now, this practice has never been challenged by the Defence. Had the Defence disagreed with the Prosecution's approach, it should have raised the issue before the Chamber at an earlier stage. Further, the Defence cannot abdicate its duty to analyse the evidence disclosed since its interpretation of the evidence must necessarily vary from that of the Prosecution and is based on defence lines that it chose not to share.⁴⁹

24. In any event, contrary to the Defence's claims,⁵⁰ no prejudice was caused to the Defence, which identified, for example, the statement of P-0608 regarding the rapes at the BMS as relevant. Most tellingly, the Defence in its 100-page submissions clearly demonstrated that it has been capable of identifying what it considers to be exculpatory or material to its preparation within evidence disclosed by the Prosecution.⁵¹ This also had no impact on the Chamber's ability to exercise effective judicial oversight over redaction and non-disclosure requests. For each request, the Prosecution has provided the Chamber with the item in question in an unredacted format, enabling the Chamber to evaluate freely the relevance of the information in its full context and the extent to which redaction is justified. The Prosecution also drew the Chamber's attention to the relevance of the information subject to its requests

⁴⁶ [REDACTED]

ICC-01/12-01/18-31, para. 24.

⁴⁸ ICC-02/11-01/11-30-tFRA, para. 25.

⁴⁹ ICC-01/05-01/13-177, para. 10: "the Defence cannot abdicate its duty and responsibility to examine such materials, which examination is necessary for it to be in a position to decide whether to challenge the evidence or its reading by the Prosecutor, as well as to identify portions which it deems relevant for the purposes of the Chamber's determinations under article 61(7) of the Statute".

⁵⁰ Request, para. 17.

⁵¹ For example, [REDACTED]

for redactions or non-disclosure.⁵² As discussed in paragraph 60, the Chamber carefully reviewed each proposed redaction or non-disclosure and instructed the Prosecution to implement modifications when it deemed necessary, including to provide additional information to the Defence.⁵³

3. Disclosure of information pertaining to Al HASSAN's treatment in detention in Mali

25. Contrary to the Defence submissions,⁵⁴ the Prosecution disclosed [REDACTED]
[REDACTED]
[REDACTED].

26. The Prosecution disclosed to the Defence the audio recordings and transcripts of interviews with AL HASSAN regarding his security assessment, before the deadline of 8 May 2019: Upon a Defence request on 12 February 2019 to receive the security questionnaire of AL HASSAN,⁵⁵ the Prosecution promptly disclosed the audio recordings of interviews relating to his security assessment on 20 February 2019;⁵⁶ the transcripts of the audios were disclosed to the Defence on 3 May 2019.⁵⁷

27. The Prosecution has also taken the necessary steps to ensure the disclosure of information related to [REDACTED] following a request from the Defence dated 31 May 2019.⁵⁸ Although the request was very broad,⁵⁹ the Prosecution endeavoured to review [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁵² See e.g. [REDACTED]
[REDACTED].

See for example [REDACTED].

⁵⁴ Request, paras 18-20.

⁵⁵ [REDACTED] See Request, Annex B, pp. 6-8.

⁵⁶ INCRIM package 25 (20 February 2019).

⁵⁷ INCRIM package 31 (03 May 2019).

⁵⁸ [REDACTED] See Request, Annex B, p. 23.

⁵⁹ [REDACTED] See Request, Annex B, p. 41.

⁶⁰ Rule 77 package 26 (28 June 2019).

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁶³

28. Finally, the Defence argues that the Prosecution should have disclosed the transcripts of the [REDACTED] instead of investigation notes.⁶⁴ [REDACTED] contain [REDACTED] [REDACTED] that is irrelevant to the Defence, which should not be disclosed to protect the safety and security of witnesses, family members and other innocent third parties, pursuant to rule 81(4) of the Rules. The Prosecution therefore extracted information falling under article 67(2) of the Statute or rule 77 of the Rules contained in the [REDACTED] and included it into investigation notes. In a similar situation, when the Defence in the *Ntaganda* case opposed this practice and requested to obtain the [REDACTED] [REDACTED] in their original format, Trial Chamber VI rejected such request on the ground that the relevant information had been disclosed through an investigation note.⁶⁵ The Prosecution therefore acted properly in response to the Defence requests and in conformity with its obligations.

29. It should also be noted that the Prosecution has repeatedly proposed to further interview AL HASSAN on the alleged mistreatment since [REDACTED]

[REDACTED]⁶⁶

4. Disclosure of correspondence between the OTP and French and Malian governments

30. The Prosecution has disclosed all documents received from the French and Malian authorities relating to AL HASSAN's arrest and detention by Opération Barkhane and his subsequent transfer to the Malian authorities. The Prosecution does not possess any correspondence concerning AL HASSAN's transfer to the Court. Under rule 184 of the Rules, it is the Registrar who is responsible for the transfer of suspects to the custody of the Court.

31. Requests for Assistance ("RFAs") and other correspondence with State authorities are confidential and not generally subject to disclosure. RFAs are usually *pro forma* letters to

⁶¹ Rule 77 package 26 (28 June 2019).

⁶² ICC-01/12-01/18-66.

⁶³ [REDACTED]
[REDACTED]
[REDACTED].

Request, paras 22-23.

⁶⁵ ICC-01/04-02/06-1440-Red, paras 5, 6, 22.

⁶⁶ [REDACTED]
[REDACTED]
[REDACTED]

State authorities which, as their name connotes, merely request information or materials relevant to Prosecution investigations. There could be circumstances which would justify the exceptional disclosure of RFAs and other confidential correspondence between the Prosecution and State authorities, such as when incriminating evidence was specifically sought and obtained through RFAs.⁶⁷ However, the Defence has failed to establish, even on a *prima facie* basis, that the present situation gives rise to such circumstances.⁶⁸

32. Nothing in the RFAs and other correspondence with the French and Malian authorities indicates that “there was concerted action between the Prosecution and domestic authorities” with regard to his alleged mistreatment.⁶⁹ In his interviews with the OTP, AL HASSAN consistently indicated that he was willing to proceed, and that he responded to the questions on his own free will.⁷⁰ Tellingly, AL HASSAN was very clear on the occasion he did not wish to respond to a question. He simply exercised his right to not respond.⁷¹ He was regularly reminded of his rights, including his rights to remain silent and to not incriminate himself.⁷²

33. As noted above, the material received from the French and Malian authorities in execution of RFAs has already been disclosed to the Defence. The Defence does not point to any information in this material which supports the alleged mistreatment of detainees such as AL HASSAN and which may indicate that the correspondence itself might contain relevant material.⁷³ Indeed, AL HASSAN’s medical certificate and [REDACTED]

[REDACTED] t no health issues precluded [REDACTED] from being transferred to the Malian authorities.⁷⁴ The transfer dossiers of AL

⁶⁷ See, for example, ICC-01/05-01/13-1234, para. 13.

⁶⁸ ICC-02/05-03/09 OA4, para. 42.

⁶⁹ Request, para. 26.

⁷⁰ For example, MLI-OTP-0060-1403, p. 1404, l. 14-19 ; MLI-OTP-0051-0912, p. 0913, l. 22-24 ; MLI-OTP-0051-0967, p. 0968, l. 10-13 ; MLI-OTP-0051-1257, p. 1259, l. 39-42; MLI-OTP-0051-0790, p. 0796, l. 189-199; MLI-OTP-0051-1257, p. 1294, l. 1220-1229; MLI-OTP-0051-0692, p. 0698, l. 182-193; MLI-OTP-0060-1565, p. 1577, l. 373-380; MLI-OTP-0062-0988, p. 1011-1012, l. 773-783; MLI-OTP-0062-1014, p. 1032, l. 601-610; MLI-OTP-0062-1095, p. 1117, l. 737-741; MLI-OTP-0062-1187, p. 1189, l. 35-39; MLI-OTP-0062-1268, p. 1276, l. 264-272

⁷¹ For example, MLI-OTP-0060-1791, p. 01808-1809, l. 551-617; MLI-OTP-0060-1352, p. 1358-1359, l. 198-224

⁷² For example, MLI-OTP-0051-1233, p.1246, l. 451-462; MLI-OTP-0051-0376, p.0379, l. 99-106; MLI-OTP-0051-0798, p. 0800-0802, l. 63-118; MLI-OTP-0060-1289, p. 1291-1294, l. 48-170; MLI-OTP-0060-1580, p. 1581-1582, l. 28-73; MLI-OTP-0062-0940, p. 0942-0943, l. 45-129; MLI-OTP-0051-1067, p. 1077-1078, l. 341-346.

⁷³ Request, para. 26.

⁷⁴ MLI-OTP-0071-0105; MLI-OTP-0071-0104; MLI-OTP-0071-0106.

HASSAN [REDACTED] include photos taken upon [REDACTED] capture and prior to [REDACTED] transfer to the Malian authorities.

34. While the Prosecution maintains that the Defence request is overly broad and general,⁷⁵ it nonetheless further reviewed the information in its possession to determine whether there is any additional material that may be relevant to the specific issues raised by the Defence. As a [REDACTED] [REDACTED] concerning AL HASSAN's health, security and detention conditions, which will be disclosed soon.

35. Should the Chamber determine, however, that the Defence Request *prima facie* bears merit, the Prosecution proposes that, in advance of any order for the disclosure of any RFA or other correspondence, the Chamber inspect the relevant documents on an *ex parte* basis. This will afford the Chamber the opportunity to make concrete determinations as to whether the items under consideration warrant disclosure.

5. Defence request to interview OTP investigators

36. The Defence fails to establish any violation or prejudice caused by the lack of opportunity to interview OTP investigators, who had conducted interviews of AL HASSAN and [REDACTED], which would have affected the fairness of the confirmation proceedings.

37. Contrary to the Defence submissions,⁷⁶ there was nothing inappropriate regarding the Prosecution's request for a list of questions intended to be posed to OTP investigators. As was made clear in its *inter partes* communications, the Prosecution requested the Defence to provide a list of proposed questions only for the purpose of taking a position on the Defence request.⁷⁷ The general reasons provided by the Defence [REDACTED] [REDACTED] have been insufficient for the Prosecution to assess whether other measures would be available or adequate to provide the information being sought.⁷⁸ [REDACTED] the Prosecution accordingly reiterated its request for proposed questions,⁷⁹ to which it

Request, p. 50

⁷⁶ Request, para. 30-31.

⁷⁷ [REDACTED] Request, Annex B, p.52; [REDACTED]

[REDACTED] Request, Annex B, p.50.

[REDACTED] Request, Annex B, p.50.

received no answer from the Defence. This did not amount to a denial of the Defence request. In any event, if the Defence disagreed with the Prosecution's approach, it could and should have raised the matter with the Chamber prior to the confirmation of charges hearing ("confirmation hearing"). It failed to do so.

38. The situation at hand is similar to the *Bemba et al.* case, in which Trial Chamber VII dismissed the Arido Defence's request that the Chamber order, or invite, the OTP investigators, who conducted the interviews of two Prosecution witnesses, to be interviewed by the Arido Defence.⁸⁰ The Chamber noted, *inter alia*, that: (i) the Prosecution has not definitively refused the requested interviews; (ii) the Prosecution has provided other avenues to the Arido Defence to obtain the information sought, for example, *via* the submission of a list of questions; and (iii) persons other than the investigators and the two witnesses were present at the relevant interviews.⁸¹

39. The circumstances in this case are distinguishable from the *Abu Garda* case on which the Defence seeks to rely.⁸² In that case, the Defence proposed to call an OTP investigator as a witness for the purpose of the confirmation hearing, to which the Prosecution opposed.⁸³ PTC I dismissed the Prosecution request for the removal of this proposed witness from the Defence list of witnesses but imposed several conditions and restrictions on the Defence questioning of its proposed witness.⁸⁴

40. Other decisions cited by the Defence are also irrelevant to the current issue.⁸⁵ None of these decisions indicate that the Prosecution may not request proposed questions to be provided in advance in order to properly assess the Defence's request to interview the OTP investigators.

⁸⁰ ICC-01/05-01/13-1279, para. 6.

⁸¹ ICC-01/05-01/13-1279, para. 6.

⁸² Request, para. 30.

⁸³ ICC-02/05-02/09-186.

⁸⁴ ICC-02/05-02/09-186, p.4.

⁸⁵ The ICC Appeals Chamber's judgement in *Lubanga* related to the issue of whether the scope of prosecution disclosure was to be altered by the timing at which a line of defence was revealed, see ICC-01/04-01/06-1433, para. 53-55; The ICTY Appeals Chamber's decision concerned the proposed addition of a retired United States (US) army officer as a Prosecution witness to testify at trial with respect to confidential information provided by the US Government under rule 70 of the ICTY Rules, and whose scope of cross-examination was subject to the limitations placed by the said government, see *Prosecutor v. Milutinovic et al.*, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65th Witness List", 20 April 2007, IT-05-87-AR73.1, para. 2-6. The ICTY Appeals Chamber considered that the limitation on the scope of his cross-examination placed by the Rule 70 provider would render the proceedings unfair. *Ibid.*, para. 20.

41. The Prosecution also notes that information relating to arrest, detention and/or interrogation of AL HASSAN⁸⁶ [REDACTED]⁸⁷ has been disclosed in advance of the confirmation hearing. In addition, the Defence has not shown that other avenues, such as interviewing the lawyers appointed pursuant to articles 55(2) and/or 56 of the Statute who were present at the relevant interviews, are insufficient to obtain the information it seeks.⁸⁸

6. Disclosure [REDACTED] during Al Hassan's interview

42. Contrary to the Defence argument,⁸⁹ the Prosecution fulfilled its disclosure obligations [REDACTED] during AL HASSAN's interview. Consistent with the disclosure protocol established by this Chamber,⁹⁰ the Prosecution [REDACTED]

43. As such, the timing and the manner in which the Prosecution was able to disclose [REDACTED] [REDACTED] were all subject to the Chamber's scrutiny, and in compliance with its specific instructions. The Defence's decision not to bring the matter to the Chamber's attention until this late stage of the proceedings demonstrates that there was no prejudice caused to the Defence.

7. Disclosure of Hard Drive and associated items

44. [REDACTED]⁹³ [REDACTED]⁹⁴ [REDACTED]⁹⁵ [REDACTED]⁹⁶

⁸⁶ As noted in the Request at para. 19, the Prosecution disclosed audio recordings of AL HASSAN's bibliographical security questionnaire on 20 February 2019 and their transcripts on 3 May 2019.

⁸⁷ [REDACTED]

As discussed in paragraph 52, the Defence did not follow up on its intended interview with [REDACTED] despite [REDACTED]'s consent to be interviewed by the Defence, as communicated by the Prosecution, see *inter partes* communications in Annex C.

⁸⁹ Request, para. 33.

⁹⁰ ICC-01/12-01/18-31.

⁹¹ [REDACTED]
⁹² [REDACTED]
⁹³ [REDACTED]
⁹⁴ [REDACTED]
⁹⁵ [REDACTED]

⁹⁶ Request, para. 36.

[REDACTED]
[REDACTED]⁹⁷

45. Moreover, the Defence's argument that it had a limited opportunity to analyse this Hard Drive⁹⁸ is ill founded for the following reasons: (1) the Defence was provided in January 2019 - almost 6 months before the confirmation hearing – with a forensic copy of the laptop, fully accessible and searchable with appropriate technical knowledge, which mirrors exactly what the Prosecution also has in its possession;⁹⁹ (2) since its disclosure in January 2019, the Defence had the opportunity to contact the Registry to seek technical assistance. [REDACTED]
[REDACTED]

[REDACTED];¹⁰⁰ (3) to further assist the Defence, the Prosecution provided, at the earliest opportunity possible, an additional user-friendly copy of the Hard Drive in which the Defence can easily navigate and search through the content of the Hard Drive, which obviates the need for a separate directory;¹⁰¹ (4) the Defence had sufficient means to readily understand the materials available in Arabic and Tamasheq on the Hard Drive, since these two languages are fully understood by AL HASSAN himself,¹⁰² or it could seek the assistance of members of the Defence team who also speak Arabic, or any available competent interpretation or translation services.

46. Further, the Defence seems to argue that in disclosing incriminating elements from the Hard Drive after the Single Judge's decision,¹⁰³ the Prosecution has violated its disclosure obligations. The Defence disregards the fact that the Single Judge has expressly authorised the Prosecution to disclose the incriminating elements from the Hard Drive that it intends to rely on during the confirmation hearing.¹⁰⁴ Therefore, there was no violation in doing so.

⁹⁷ [REDACTED]

⁹⁸ Request, paras. 34-38.

⁹⁹ See [REDACTED]

¹⁰⁰ [REDACTED]

¹⁰¹ A [REDACTED]

P-0398's statement, MLI-OTP-0051-1257 p.1267, l.316-323, in which AL HASSAN states that he speaks Tamasheq as his native language, and he also speaks Arabic among others; AL HASSAN also chose Arabic as the language he fully understands for the purposes of the proceedings before the Court, see ICC-01/12-01/18-T-001-CONF-ENG ET, p. 7, l. 1-4; see also MLI-OTP-0061-1622, p. 1624.

¹⁰³ See Request, para.35.

¹⁰⁴ See ICC-01/12-01/18-290, p. 13.

8. Witness Protocol

47. The Defence violated its obligations when it contacted P-0612 without informing the Prosecution, or following the prerequisite procedures and safeguards under the “Witness Protocol”.¹⁰⁵

48. The Defence’s interpretation of the Witness Protocol would allow unregulated contact with P-0612, including interviewing him regarding information redacted from his statement. This interpretation runs contrary to a clear prohibition in the Witness Protocol against adopting any interpretation that may “derogate any general rule of confidentiality or other protection accorded to witnesses, victims or other persons at risk [...]”.¹⁰⁶

49. On 8 May 2019, the Defence informed the Prosecution of the [REDACTED] in an opaque manner without expressly stating that he was a Prosecution witness, or that it interprets the Witness Protocol in a manner allowing the Defence to contact such witness,¹⁰⁷ despite its knowledge of his status, and its own prior practice when contacting P-0518 whose statement was also not disclosed as incriminatory evidence.¹⁰⁸ Given that [REDACTED] is a common name in the region, the Prosecution had to ask for further information about this person. Only then did the Defence indicate that this person is actually Witness P-0612.¹⁰⁹ This information was given to the Prosecution as a “*fait accompli*” - after the Defence [REDACTED].

50. The Defence claims that [REDACTED].¹¹⁰ Be that as it may, it remains inexcusable that the Defence [REDACTED] this contact and [REDACTED] - all with the knowledge that he is a Prosecution witness¹¹¹ and without a prior notice to the Prosecution.

51. Witnesses, including key witnesses on whom a party may heavily rely, often provide information that can be used by the opposing party. Witness P-0612 indeed provided important incriminating information in support of the Prosecution’s case including evidence on AL HASSAN’s authority and his ability to frustrate the commission of the crimes. For

¹⁰⁵ Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, ICC-01/12-01/18-40-Anx-tENG.

¹⁰⁶ Witness Protocol, para. 2.

¹⁰⁷ [REDACTED] attached as Annex D.

¹⁰⁸ See email exchange in Annex C. see also, P-0518’s statement MLI-OTP-0042-0486 which was disclosed in Rule 77 package 14 (09 November 2018).

¹⁰⁹ See [REDACTED] in Annex D.

Request, Annex B, p. 69.

¹¹¹ P-0612 [REDACTED].

instance, P-0612 stated that it is because of [REDACTED]

[REDACTED]¹¹² This information is material to the Prosecution case, and [REDACTED]

[REDACTED]¹³ Disclosing witness statements under article 67(2) of the Statute at the confirmation stage, where the threshold is lower and where the Prosecution is not required to use all its witnesses, is without prejudice to its choice to use additional witnesses at trial.¹¹⁴ Further, nowhere in the Witness Protocol is it mentioned that its applicability would be dependent on the disclosure classification of the information provided by the witness.

52. The Defence's own practice supports the Prosecution's position and demonstrates its knowledge of the fact that the Witness Protocol must be applied regardless of the disclosure classification. Indeed, it had properly applied the Witness Protocol, since 8 February 2019, regarding P-0518 whose evidence was disclosed under rule 77 of the Rules at this stage.¹¹⁵ This was before the Defence's interaction with P-0612,¹¹⁶ which shows that the Defence is aware of the correct interpretation of the Protocol, but decided not to apply it in relation to P-0612. The Defence should have contacted the Prosecution and, if need be, seized the Chamber of the matter, before its contact and [REDACTED]

53. The Defence is well aware since 15 April 2019 of the Prosecution's position regarding the mislabelling of witnesses as "exculpatory witnesses".¹¹⁷ On 4 June 2019, the Prosecution further made it clear to the Defence that witnesses whose evidence was disclosed under Rule 77 of the Rules or article 67(2) of the Statute should be considered as Prosecution witnesses within the meaning of the Witness Protocol. As noted, nothing prevents the Prosecution from calling at a later stage witnesses whose statements contain information that fall under article

¹¹² P-0612 [REDACTED].

¹¹³ It should be noted that, the Witness Protocol is drafted in the context of both confirmation and trial proceedings. It remains applicable, as with other decisions by the Pre-Trial Chamber after the confirmation of charges proceedings are terminated, until otherwise decided by the Trial Chamber seized of the case. The language in the Witness Protocol permits its application for the purposes of the confirmation of charges and at trial, see e.g. Witness Protocol, para. 4, 6, 7, 11. Further, it is established in the jurisprudence of the Court, that parties are allowed to continue their investigations after the confirmation proceedings, it would be contrary to the purpose of the Protocol if the parties in the conduct of their proceedings after confirmation, disregarded the Witness Protocol in their contact with the witnesses of the opposing party.

¹¹⁴ It is also common for the Prosecution to decide to re-interview a witness to clarify certain points.

¹¹⁵ [REDACTED]

The Prosecution was informed of [REDACTED] about three months after the Defence followed the proper procedure for P-0518.

¹¹⁷ [REDACTED]

67(2) of the Statute. It would defeat the purpose of the Protocol if its procedure were not applied to witnesses like P-0612 until the Prosecution can finalise its witness list for trial. Moreover, the Prosecution cannot fulfil its critical protection obligations under article 68 of the Statute if it is not made aware of contacts between the Defence and Prosecution witnesses.

54. It should be emphasised that the Defence has never been barred from contacting Prosecution witnesses. Indeed as the Defence was reminded by the Prosecution,¹¹⁸ it can do so, but within the legal framework established in the case, which is designed to strike a balance between the rights of the suspect and the protection of other competing interests such as the safety of witnesses, victims and innocent third parties. It is untenable to suggest that following the right procedure would undermine or otherwise hinder the Defence's investigations.¹¹⁹

9. Request regarding MLI-OTP-0061-1884 to MLI-OTP-0061-1932

55. The CD containing material MLI-OTP-0061-1884 to MLI-OTP-0061-1932 was disclosed on 2 November 2018 in the form in which they were collected.¹²⁰ The material could not be viewed by the Defence because they lacked the requisite software.¹²¹ The Prosecution did not re-disclose the material as it did not wish to alter its original form. However, as recorded in an email from the Registry to the Chamber dated 8 May 2019, the "*OTP case manager got in touch with the Defence earlier [that day] and explained the file format issue*".¹²² Technical assistance is the responsibility of the Registry pursuant to rule 20 of the Rules.¹²³ The Defence could have sought from the Registry the required assistance.

10. Disclosure of the victim status of Prosecution's witnesses

56. As stated to the Defence,¹²⁴ the Prosecution does not know which of its witnesses have been granted the right to participate as victims in the case. In relation to the specific case of P-0577, the Prosecution relied on her victim's application form¹²⁵ in the DCC, but only [REDACTED] It did not rely on this statement in the confirmation of charges proceedings.¹²⁶ The Prosecution filed a motion for authorisation to

¹¹⁸ [REDACTED]

¹¹⁹ Indeed, when the Defence sought to meet P-0518, the Prosecution facilitated such contact in accordance with the Protocol. However, the Defence eventually did not follow up on its contact request, see Annex C.

¹²⁰ INCRIM package 19 (02 November 2018).

¹²¹ Request, para. 39; Email from the Registry to the Chamber, dated 8 May 2019. See Request, Annex B, pp. 16-17.

¹²² Email from the Registry to the Chamber, dated 8 May 2019 at 20:07. See Request, Annex B, p. 16.

¹²³ [REDACTED]

¹²⁴ [REDACTED]

¹²⁵ This application form was disclosed on 3 August 2018 in INCRIM package 12 (3 August 2018).

¹²⁶ [REDACTED]

withhold her identity on 16 July 2019, precisely in order to be able to disclose it to the Defence under rule 77 of the Rules.¹²⁷

There was proper judicial supervision by the Chamber

57. The Defence fails to demonstrate any inordinate delays in the issuance of rulings by the Chamber or a lack of judicial oversight. It does not explain how the alleged absence of timely rulings on its requests caused concrete prejudice to the preparation of its case or prevented recourse to appellate review. As such, the prejudice allegedly suffered by the Defence is purely speculative.

58. The Defence contention that “many” decisions were only issued after the commencement of the confirmation proceedings is unsupported by the facts.¹²⁸ Firstly, one of the three decisions cited by the Defence¹²⁹ relates to a decision of the plenary of judges, rather than this Chamber, in relation to the disqualification request submitted on 14 June 2019.¹³⁰ [REDACTED]

[REDACTED],¹³¹ a fact which in itself is insufficient to show prejudice in the circumstances of the case.

59. The Defence argues that the delay in the issuance of the decision on its request for lifting of redactions regarding material disclosed under article 67(2) of the Statute¹³² hampered its investigations. While it claims that the decision resolved a pending dispute with the Prosecution,¹³³ th [REDACTED] [REDACTED]

[REDACTED]¹³⁴ [REDACTED]¹³⁵, the Defence request was submitted only on 31 May 2019, about one month before the commencement of the confirmation hearing, with no indication as to any urgency required in its adjudication. There was nothing that prevented the Defence from seeking appellate review of this decision, or resubmitting a more detailed request. In any event, if the Defence was

¹²⁷ [REDACTED]

Request, para. 50.

¹²⁹ Request, fn. 104.

¹³⁰ ICC-01/12-01/18-398.

¹³¹ [REDACTED]

¹³² [REDACTED]

¹³³ Request, para. 52.

¹³⁴ [REDACTED]

¹³⁵ [REDACTED]

concerned about any prejudice that might be caused by the delay in the resolution of its requests, it could have submitted its filings on an urgent basis or urged the Chamber to issue a decision within a specific time frame. It did not do so. Nor did it seek more time to prepare its case.

60. The Defence's complaint of lack of judicial oversight is unsupported. On the contrary, decisions regarding the Prosecution requests demonstrate careful judicial oversight exercised by the Chamber. For example, the Chamber carefully considered each redaction proposed by the Prosecution in each specific item of evidence and instructed the Prosecution to implement modifications when it deemed necessary, including to provide additional information to the Defence.¹³⁶

III. Conclusion

61. For the reasons set out above, the Prosecution submits that none of the alleged violations, taken individually or cumulatively, supports the granting of the reliefs requested by the Defence. The Request must therefore be rejected in its entirety.



Fatou Bensouda, Prosecutor

Dated this 30th day of July 2019
At The Hague, The Netherlands

¹³⁶ [REDACTED]