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TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

Public redacted version of Defence request for leave to appeal the “*Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement de procédure et de preuve*” (ICC-01/12-01/18-460-Conf-Exp-Red)

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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1. Introduction

1. Pursuant to Article 82(1)(d) of the Statute, the Defence for Mr. Al Hassan respectfully requests the Pre-Trial Chamber to grant leave to appeal the ‘Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement de procédure et de preuve’ (‘the Decision’), in relation to whether the Pre-Trial Chamber exercised judicial oversight over the pre-confirmation phase in a manner that was fair and impartial, and consistent with the principle of equality of arms, and the right to expeditious proceedings.
2. This notion of ‘judicial oversight’ should be assessed by reference to the cumulative impact of the Chamber’s rulings on a range of sub-issues, which were raised by the Defence in accordance with Rule 122(3) of the Rules of Procedure and Evidence (‘the Rules’). The sub-issues in question concern:
 - a. The Chamber’s assessment that the Prosecution had fulfilled its disclosure duties in a timely manner, notwithstanding the number of items that were disclosed immediately before, or after the commencement of the confirmation hearings, and notwithstanding the number of items that the Prosecution had failed to identify as ‘exculpatory’;
 - b. The Chamber’s finding that the Prosecution’s failure to identify exculpatory materials did not prejudice the Defence;¹
 - c. The Chamber’s finding that the Prosecution did not violate its disclosure obligations;
 - d. The Chamber’s reconsideration of the definition of ‘witness’ under the Witness Protocol;
 - e. The Chamber’s finding that it had exercised sufficient and timely oversight over the disclosure process; and
 - f. The conduct of the confirmation process.
3. The Defence would also like to clarify that it will not request suspensive effect, in the event that leave to appeal is granted for some or all of these issues. It would therefore be in the interests of expeditious proceedings for the case file to be transmitted to the Trial Chamber as soon as practicable.

¹ Decision, para. 73.

2. Classification

4. In accordance with Regulation 23*bis*(2) of the Regulations of the Court ('the RoC'), this request is classified as confidential *ex parte* available to the Prosecution and the Defence only, as it relates to a Decision classified the same. The Defence requests the reclassification of this filing as public.

3. Submissions

3.1 Whether the Pre-Trial Chamber exercised judicial oversight over the pre-confirmation phase in a manner that was fair and impartial, and consistent with the principle of equality of arms, and the right to expeditious proceedings

5. According to the Appeals Chamber, an issue is "an identifiable subject or topic requiring a decision for its resolution which is essential for the determination of matters arising in the judicial cause under examination, not merely a question over which there is disagreement or conflicting opinion".²
6. When the Defence raised issues under Rule 122(3) of the Rules, the Chamber was called upon to make a determination as to whether these issues had affected the proper conduct of the proceedings prior to the confirmation hearing, and thereby undermined the prospect of convening a fair and impartial hearing, that was consistent with the rights of Mr. Al Hassan.
7. The Pre-Trial Chamber ultimately determined that the issues raised by the Defence did not require any remedies or corrective measures, in order to address specific disclosure violations or procedural inequalities. It is the position of the Defence that in reaching this determination, the Chamber erred – both by reference to the manner in which the Chamber addressed each issue – and also by virtue of the Chamber's failure to consider the cumulative impact of particular disclosure violations and procedural anomalies, on the fairness, impartiality, and expeditiousness of the proceedings as a whole. The approach of the Pre-Trial Chamber was, moreover, marked by undue and unwarranted deference to the Prosecution, notwithstanding clear indicia that the Prosecution had failed to identify and disclose PEXO materials

² Appeals Chamber, Situation in the DRC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 9.

in a full and timely manner. The Chamber also resolved key issues (such as the interpretation and application of the Witness Protocol) in an arbitrary and unfair manner. The purpose of Rule 122(3) is to ensure that there is effective judicial oversight over the confirmation proceedings. The Chamber's disposition of the sub-issues below therefore raises the issue as to whether the Pre-Trial Chamber exercised judicial oversight over the pre-confirmation phase in a manner that was fair and impartial, and consistent with the principle of equality of arms, and the right to expeditious proceedings.

3.1.1 The Chamber's deferral to the Prosecution's assessment as to exculpatory information, notwithstanding the number of 'exculpatory' items that the Prosecution had failed to identify as 'exculpatory'

8. The Chamber found that, notwithstanding the fact that the Prosecution only disclosed 22 PEXO items during the pre-confirmation process, it had no reason to 'doubt' that the Prosecution had interpreted the scope of its PEXO obligations in a correct manner.³ But at the same time, the Chamber also recognized that the Prosecutor had failed to identify, *proprio motu*, certain information as PEXO.⁴
9. The Chamber's suggestion that the Prosecution might not have been aware of the relevance of certain information to the Defence also does not hold water: the Prosecutor's disclosure duties require it to anticipate potential Defence lines of inquiry independently of the actual strategies that may or may not be pursued by the Defence.⁵ To conclude otherwise would denude the Prosecutor's obligation to identify and disclose both PEXO and Rule 77 information on a *proprio motu* basis of any force. [REDACTED].
10. The presumption that the Prosecution has interpreted and applied its disclosure obligations in good faith is displaced in circumstances where the Defence is able to refer to concrete instances where the Prosecution has failed or refused to identify information as PEXO.⁶ This sub-issue therefore ties into the larger question as to

³ Decision, para. 65.

⁴ Decision, para. 77.

⁵ ICC-02/05-03/09-501, para. 34.

⁶ ICTR, *Prosecutor v. Nahimana*, '[Decision on Ferdinand Nahimana's Motions for Disclosure of Material in the Prosecutor's Possession Necessary for the Appellant's Defence and for Registry's Assistance to Conduct further Investigations at the Appeal Stage](#)', 8 December 2006, para. 7. See also ICTY, *Prosecutor v. Seselj*, 'Decision on Vojislav Seselj's Interlocutory Appeal against the Trial Chamber's Decision on form of Disclosure', 17 April 2007, para. 14, "concerning the fact that the normal deference to discretion is displaced if the entity in question has applied an incorrect legal standard, or abused its discretion."

whether the Chamber was correct to defer to the Prosecutor's appreciation and definition of PEXO elements, in such circumstances, and whether its deferral was itself, symptomatic of the lack of effective oversight exercised by the Chamber during the pre-confirmation phase.

3.1.2 The Chamber's assessment that Prosecutor correctly balanced its disclosure obligations with Rule 68, by disclosing investigator's summaries rather than the original [REDACTED]

11. [REDACTED] they had been beaten and mistreated [REDACTED].⁷ The Prosecution did not reveal or disclose this information to the Defence until [REDACTED]⁸ and [REDACTED],⁹ that is, after the deadline for filing Defence evidence for the confirmation hearing.
12. The names of these individuals were known to the Defence. Nonetheless, although the Defence requested access to [REDACTED], the Prosecution disclosed summaries instead.
13. The Prosecution did not request prior authorization to disclose an investigator's summary *in lieu* of the original [REDACTED], and there is absolutely no indication that Mr. Al Hassan or his Defence represent a risk to these particular individuals (or at the very least, to the individuals whose names have been disclosed to the Defence).
14. Apart from the fact that the Prosecution disclosed this information after the deadline for filing Defence evidence had expired, an investigator's summary is also not admissible evidence.¹⁰ The Chamber nonetheless failed to consider or remedy the prejudice to the Defence occasioned by firstly, the tardy nature of the disclosure, and secondly, the disclosure of investigator's summaries rather than [REDACTED].

3.1.3 The Chamber's assessment that the Prosecution had disclosed all relevant information concerning its correspondence with France and the Malian authorities, notwithstanding the evidence to the contrary

15. Contrary to the position advanced by the Prosecution, the Chamber affirmed that correspondence with national authorities is not exempt from disclosure, if the contents

⁷ [REDACTED]

⁸ ICC-01/12-01/18-392-Conf-AnxA.

⁹ ICC-01/12-01/18-403-Conf-AnxA.

¹⁰ ICC-01/05-01/13-2275-Red, paras. 304-305.

are relevant to Defence preparation.¹¹ And, contrary to the Prosecution's claim that the Defence request was too vague to comply with, the Prosecution's summary of its contacts and correspondence with the Malian authorities concerning Mr. Al Hassan's health and conditions of detention demonstrated that the Prosecution had sufficient information to identify which type of correspondence would be relevant to the Defence.¹² There was, therefore, no objective justification as concerns either the Prosecution's failure to disclose this information at an earlier juncture of the proceedings, or its ongoing refusal to disclose the underlying source of information or correspondence, which it summarized in its contacts report.¹³ The Chamber's acceptance of the Prosecution's claim that it had complied with its disclosure obligations to the extent of its ability – notwithstanding the clear indicia to the contrary – demonstrates the lack of thorough judicial oversight concerning the Prosecution's compliance with critical disclosure obligations. This lack of oversight was further compounded by the absence of any remedy as concerns the delays in disclosure.

3.1.4 The Chamber's failure to provide a remedy as concerns Prosecution's failure to take steps to identify which witnesses were participating victims

16. The Prosecution is obliged to collect any information concerning dual victim-witnesses that might be exculpatory. In terms of the scope of this duty, Pre-Trial Chamber II has affirmed that:¹⁴

victim application forms of dual status victim-witness individuals may contain exculpatory information or information material for the preparation of the Defence. The Chamber recalls that, pursuant to article 54(1)(a) of the Statute, the Prosecutor has an obligation to investigate incriminating and exonerating circumstances equally. In the context of the present Request, this means that, in order to properly discharge her statutory obligations, the Prosecutor must obtain and provide the Defence with the victim application forms of dual status victim-witness individuals.

¹¹ Decision, para. 88.

¹² [REDACTED]

¹³ [REDACTED].

¹⁴ ICC-01/14-01/18-339.

17. This duty is of central importance to the fairness of the proceedings, particularly since the names of several victim-witnesses have not been disclosed to the Defence, and as such, the Defence cannot independently obtain this information.
18. During the confirmation proceedings, the LRV offered to disclose all victim applications to the parties.¹⁵ The Prosecution's application [REDACTED] also demonstrated that the Prosecution was aware of the fact that at least some Prosecution witnesses, [REDACTED], were participating as victims. The Prosecution therefore had the means to collect such information from the LRV or from the witnesses themselves. The Prosecution nonetheless flat-batted a Defence request for disclosure of the links between participating victims and Prosecution witnesses (i.e. the identity of dual victim-witnesses) with the claim that it had no information on this point.
19. The Chamber, in turn, made no explicit determination as to the prejudice caused to the Defence by the Prosecution's failure to take such steps. Moreover, although the Chamber acknowledged that the witness statement of [REDACTED] was exculpatory,¹⁶ the Chamber did not order the Prosecution to disclose the statement to the Defence. As a result, the Defence was, and continues to be deprived of a relevant source of exculpatory information (the link between victim applications and witness statements, and their application forms) for the entire confirmation process.

3.1.5 The Chamber's reconsideration of the plain terms of its own decision concerning the Protocol, and adoption of an interpretation, which eliminates the right to conduct confidential Defence investigations, denudes Article 67(2) of any practical utility for the Defence, and contradicts appellate case law concerning the burden of non-disclosure

20. Unlike certain civil law countries, the ICC Statute imbues the Defence with the right to conduct its own investigations, in an adversarial manner. The Defence does not require the permission of the Prosecutor or the Pre-Trial Chamber to do so. Article 67(1)(e) also gives the Defence the right to investigate and collect potential witness testimony, under the same terms as the Prosecution. In line with this right, the Appeals Chamber has recognized firstly that,¹⁷

¹⁵ ICC-01/12-01/18-T-005-CONF-FRA, Ins. 7-24; ICC-01/12-01/18-429, para. 28.

¹⁶ [REDACTED]

¹⁷ ICC-01/04-01/07-476, para. 62.

in principle, the Defence is entitled to contact persons who the Prosecutor either has interviewed or is about to interview prior to their becoming prosecution witnesses and recognises that such persons may have information which is potentially relevant to the Defence; and

secondly, that although it might be necessary to redact certain identities of potential sources:¹⁸

adequate procedural safeguards should be in place to ensure that the interests of the Defence are protected so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms.

21. These interests were adequately balanced by the plain language of the Protocol adopted in this case, which stipulated that the rules governing contact only applied after a party had clearly conveyed its intention to rely on the person in question as a witness in the proceedings. There was no ambiguity in this language, or scope for further ‘interpretation’.
22. This language was incorporated pursuant to an explicit request from the Prosecution itself. When the Prosecution first requested the Single Judge to adopt a Witness Contact Protocol, the Prosecution submitted a proposed text using a restricted definition of a witness, which was based on the language included in protocol adopted in the *Gbagbo* case, *inter alia*.¹⁹ This restrictive nature of this language was intentional. This is reflected by the Prosecution’s reliance on the *Gbagbo* decision, where the Single Judge rejected a Defence request to broaden the definition of ‘witnesses’ to include potential witnesses, finding that:²⁰

the definition suggested by the Defence is too broad and would lead to application of the Protocol to individuals who are only remotely linked to the Court and/or who are not likely to be called to testify. In the view of the Single Judge, this would not usefully serve the purpose of the Protocol, which is mainly intended to protect the safety of witnesses and preserve the integrity of investigations.

23. In a decision issued in May 2018, the Single Judge specifically invited the Prosecutor to justify why it had requested the Chamber to incorporate wording, which defined

¹⁸ ICC-01/04-01/07-476, para. 63.

¹⁹ ICC-01/12-01/18-23, fns. 1 and 2 (citing ICC-01/04-02/06-412-Anx and ICC-02/11-01/15-200-Anx).

²⁰ ICC-02/11-01/15-200, para. 14.

‘witness’ in a more restrictive manner.²¹ The Prosecution responded, in turn, that this restrictive definition was to be preferred to the broader language set out in the Chamber’s Practice Manual, for the following reasons:²²

Paragraph 4(f): “provided that such intention has been conveyed to the non-calling party or participant by means that establish a clear intention on behalf of the calling party or participant to rely upon the individual as a witness”. The Prosecution submits that this language used as part of the definition of a ‘witness’ of a calling party should be retained, because it is not otherwise clear for the investigating or opposing party whether or not an individual is a witness of a calling party. Accordingly, the investigating party should not be prohibited from making contact with an individual unless it has been clearly communicated to them that the calling party does intend to rely upon them as a witness.

24. In the resultant decision, the Single Judge accepted the Prosecution’s arguments, and adopted the proposed text,²³ with the restrictive definition of a witness.
25. In a December 2018 filing in the *Yekatom* case, the Prosecution, which is one organ, further confirmed that it understood that the definition of a ‘witness’ in the *Al Hassan* Protocol should be interpreted and applied in a restrictive manner – such that it only encompasses individuals in relation to whom the party or participant has conveyed a clear intention to rely upon them as a witness.²⁴
26. It is therefore indisputable that the term ‘witness’ was intended to be restricted to individuals, in connection with whom the parties had conveyed a clear intention to rely upon them as a witness in the proceedings.
27. As concerns the potential application of the Protocol to P-612,[REDACTE].²⁵ [REDACTED],²⁶ [REDACTED]. This statement was disclosed exclusively under Article 67(2): the accompanying disclosure note provided no indication that the information in the statement could be incriminating or otherwise fall under Rule 76.²⁷

²¹ ICC-01/12-01/18-30-tENG, para. 12: “[...] provided that such intention has been conveyed to the non-calling party or participant by means that establish a clear intention on behalf of the calling party or participant to rely upon the individual as a witness”.

²² ICC-01/12-01/18-32, para. 17.

²³ ICC-01/12-01/18-40-tENG.

²⁴ ICC-01/14-01/18-35, para. 8.

²⁵ [REDACTED]

²⁶ [REDACTED]

²⁷ ICC-01/12-01/18-131-Conf-AnxA.

P-612 also expressed no security concerns vis-à-vis Mr. Al Hassan or the Defence. There was therefore no objective justification for the Prosecution not to include P-612 in their list of evidence or to convey a clear intention to rely upon him as a witness, if the Prosecution had formed a genuine intention to rely upon P-612 as a Prosecution witness. At the very least, if the Prosecution was of the view that certain elements of his statement were incriminating, then it had a positive obligation to convey this assessment to the Defence in unequivocal terms. The statement therefore outside the plain terms of the Protocol.

28. The Defence therefore had no obligation to inform the Prosecution that P-612 [REDACTED]. It is, moreover, notable that when the Defence informed the Prosecution that P-612 [REDACTED], the Prosecution did not convey its intention to rely upon P-612 as a Prosecution witness. Instead, after several weeks elapsed, the Prosecution expressed the blatantly erroneous position that the Protocol should be interpreted broadly, to encompass all persons, whose statement had been disclosed pursuant to Rule 77 or Article 67(2), irrespective as to whether the Prosecution intended to rely upon such persons as a witness.²⁸

29. The Prosecution has a duty to act in good faith in its interactions with the Defence. The fact that there was a change in Counsel in the immediate lead up to the confirmation hearing heightened the Prosecution's duty to refer to previously litigated matters in a full and accurate manner.

30. This Chamber has expressed the view that the Statute and Rules do not permit the parties to seek reconsideration of a previously adjudicated issue.²⁹ The Appeals Chamber has also affirmed that no burden should be placed on the Defence as concerns the ability of the Defence to access withheld information.³⁰ A broader definition of a 'witness' in the Witness Protocol further restricts the ability of the Defence to access information and potential testimony. It follows, therefore, that the burden for requesting and justifying further restrictions would have fallen on the Prosecution, and not the Defence.

31. Given this backdrop, it is concerning that:

²⁸ [REDACTED]

²⁹ ICC-01/12-01/18-378-Conf-Exp, para. 48.

³⁰ ICC-02/11-01/15-915-Red, para. 1.

- (i) first, the Prosecution advanced an interpretation of the Protocol (i.e. that it applied to any person who had been interviewed by the Prosecution, irrespective as to whether the Prosecution had conveyed an intention to call them as a witness), which they knew to be incorrect, and inconsistent with the stated purpose of a definition, which the Prosecution had itself proposed; and
- (ii) as a result of the Prosecution's conduct, the Chamber subsequently reversed a previously adjudicated position – without characterizing this reversal as a 'reconsideration' – and further suggested that the burden fell on the Defence to request that the Chamber maintain the previously adjudicated position.

32. The Prosecution's approach to this issue has resulted in an arbitrary, inconsistent and unfair application of the protocol, which touches directly on the fairness and impartiality of the pre-confirmation proceedings, and the overarching question as to whether they were conducted in a manner which fully respected the rights of the Defence, and the principle of equality of arms. The error lies with the Prosecution and not the Defence; in this regard, it is objectionable that the Defence has been accused of violating the Protocol when it followed the position advanced by the Prosecution. This approach is emblematic of a very real attempt to obstruct and impede the Defence from attempting to defend Mr. Al Hassan before this Court. It is an approach that should have been deprecated, and not condoned by the Chamber responsible for upholding Mr. Al Hassan's right to fair, impartial and adversarial proceedings.

3.1.6 The manner in which the confirmation proceedings were conducted, and the extent to which they respected the right to adversarial proceedings

33. The Pre-Trial Chamber's role is analogous to that of an Accusation Chamber, rather than an investigating judge.³¹ This role therefore presupposes that the Chamber will oversee the confirmation process in an objective and impartial manner, which is independent of the parties and participants. The questions formulated by the Chamber ahead of the Confirmation of charges hearing nonetheless created an appearance that the Chamber was actively prosecuting the case against Mr. Al Hassan, rather than

³¹ K. Ambos, 'Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik', in Kaleck, Ratner and Weiss (eds.), 'International Prosecution of Human Rights Crimes': 'Springer, 2006, pp. 55 at 56.

independently evaluating whether there was sufficient evidence to confirm the charges for further prosecution.

34. The fair balance of adversarial proceedings was further disturbed by the fact that the Chamber permitted the Legal Representatives of Victims (LRV) to play an evidential role, which exceeded the terms of the decision on victim participation. There is a clear distinction, in this regard, between authorizing the LRV to make written and oral observations and treating those observations as evidence of fact. The Chamber veered towards the latter, when it relied upon the LRV's assertions of fact in the questions it put to the parties.³² In the confirmation decision itself, the Chamber also placed undue weight on anonymous indirect evidence from NGOs affiliated with the LRV,³³ witnesses, who had participated in a domestic complaint submitted by the LRV,³⁴ and uncorroborated anonymous victims.³⁵ In the latter instance, the Chamber jettisoned the legal principles concerning anonymous testimony, which it had established at the beginning of this case.³⁶
35. As a result, there is an appearance that the proceedings were not conducted in an impartial manner, and that insufficient procedural safeguards were applied to protect the defendant's right to fair and impartial proceedings.

3.1.7 Whether the Chamber exercised effective and timely judicial supervision, when seized of issues by the Defence

36. The Chamber determined that, because it eventually issued decisions on Defence requests concerning disclosure issues, it had adequately safeguarded the rights of the Defence, notwithstanding the fact that these decision were issued after the commencement of the confirmation hearings.³⁷ The Chamber did not address the issue of prejudice that had resulted from the delay in adjudication, or the lack of certainty in the interim.
37. The Chamber also further averred that the Defence should have initiated further litigation concerning the Prosecution's failure to respond to, or comply with

³² ICC-01/12-01/18-399-Anx-Red, ICC-01/12-01/18-T-003-ENG ET WT 08-07-2019, p. 12, ln. 12 to p. 14, ln.

6.

³³ Decision, para. 701, fn. 1911.

³⁴ ICC-01/12-01/18-461-Conf, paras 98, 566, 581, 727.

³⁵ [REDACTED]

³⁶ ICC-01/12-01/18-122-Conf-Red-36.

³⁷ Decision, para. 127.

disclosure requests,³⁸ even though there was already a backlog of pending decisions arising from Defence attempts to obtain a judicial ruling on such matters. The Chamber did not address the Defence arguments that firstly, additional litigation would have diverted Defence resources from essential pre-confirmation preparation, and secondly, that there was no prospect that the Defence would have obtained a ruling in a timely manner.

38. Accordingly, in reaching its ultimate determination that the Chamber had exercised effective oversight, the Chamber failed to consider firstly, the cumulative impact of a range of different disclosure issues, which impeded Defence investigations and inquiries, and secondly, whether the proposed remedy (to have seized the Chamber in each such instance) would have resulted in an effective remedy, that was consistent with Mr. Al Hassan's right to expeditious proceedings, and his right to have adequate time and facilities to prepare his defence.

39. The Chamber's approach to each of the sub-issues set out in the Rule 122(3) application also confirms that even if the Defence had raised these issues before the confirmation hearing, it would not have obtained a timely and effective remedy. Indeed, the very fact that the Chamber took a further two months to issue the Rule 122(3) decision – notwithstanding the impact of these issues on ongoing Defence investigations and preparation – highlights the illusory nature of such a remedy.

3.2 The issue impacts on the fair and expeditious conduct of the proceedings, and/or the outcome of the proceedings

40. The nature and content of judicial supervision over the pre-confirmation process are integral to the fair and expeditious conduct of the proceedings. The fact that Mr. Al Hassan – an uncharged suspect – was detained for the duration of these proceedings also imposed a duty of special diligence on the Court to ensure that the proceedings were conducted expeditiously, and with full respect for Mr. Al Hassan's fair trial rights. Although the charges have now been confirmed, the pre-confirmation process failed to respect key adversarial principles. Disclosure was conducted in a tardy, piecemeal and incomplete manner. As a result, the Defence was unable to challenge the Prosecution's reliance on key witness statements (such as that of Mr. Al Hassan). The Defence has also yet to receive a range of important documentation and evidence

³⁸ Decision, para. 130.

on issues, which are central to the charged incidents. This includes exculpatory information concerning dual victim-witnesses. The Chamber provided no remedy in relation to these investigative and disclosure violations.

41. The absence of effective oversight and effective remedies in relation to such issues has also postponed the resolution of key issues to the trial stage, which is contrary to Mr. Al Hassan's right to be tried without undue delay. It also calls in to question the reliability of the charges themselves, and thus the outcome of the proceedings.

3.3 An immediate resolution would materially advance the proceedings

42. The charges form the core plank of the proceeding before the ICC. The possibility that the charges have been confirmed on the basis of a flawed and unfair confirmation process would contaminate the trial process, and subject Mr. Al Hassan to an unnecessary deprivation of his liberty. An immediate resolution of this issue by the Appeals Chamber would rid "the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial",³⁹ and further "remove doubts about the correctness of a decision or map a course of action along the right lines."⁴⁰

4. Conclusion

43. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Pre-Trial Chamber to grant leave to appeal in relation to the issue as to whether the Pre-Trial Chamber exercised judicial oversight over the pre-confirmation phase in a manner that was fair and impartial, and consistent with the principle of equality of arms, and the right to expeditious proceedings.

³⁹ Appeals Chamber, Situation in the DRC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 14.

⁴⁰ Appeals Chamber, Situation in the DRC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 15.



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Dated this 7th day of October 2019
At The Hague, The Netherlands