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TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public
with Confidential *Ex Parte* Annexes A to D, Defence only and
Confidential *Ex Parte* Annex E, Prosecution and Defence Only

Public Redacted Version of “Submissions pursuant to ‘Order Scheduling First Status Conference’”

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:**The Office of the Prosecutor**

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I. Introduction

1. The Defence for Mr. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the ‘Defence’) files these submissions pursuant to the Trial Chamber’s ‘Order Scheduling First Status Conference’¹ (‘Scheduling Order’) and in accordance with Articles 64(2), 64(3) and 64(6) of the Statute. In this context, the Defence informs the Trial Chamber that it has met with the Prosecution in order to facilitate *inter partes* discussions with regard to the Scheduling Order.

II. Classification

2. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, these submissions as well as Annex E are filed confidential *ex parte*, Prosecution and Defence only, as they refer to matters arising in filings of the same classification. A public redacted version of these submissions will be filed concomitantly. Annexes A to D are filed on a confidential *ex parte*, Defence only basis as they relate to confidential investigations.

III. Submissions

A. Commencement date of the trial

3. The Defence welcomes the anticipated commencement of trial before the summer recess in accordance with Mr. Al Hassan’s right to be tried without undue delay and with due regard to his current status of detention.
4. Mr. Al Hassan has been detained in the Hague since 31 March 2018; prior to that, he was detained in Mali since his arrest at the hands of French military forces since April 2017. Each day that Mr. Al Hassan spends incarcerated and awaiting trial adds to this already excessive tally, which runs contrary to his right to be presumed innocent and represents a real risk of arbitrary detention. Any further delay to the anticipated commencement of trial must be considered in this light and alternative considerations including the possibility of provisional release must be seriously considered.
5. In order for the proposed schedule to be maintained, it is critical that appropriate measures are taken to facilitate timely and effective Defence preparation, in line with Mr. Al Hassan’s right to adequate time and facilities to prepare his case. The feasibility of this start date is therefore predicated on several conditions, as detailed throughout these submissions, that would need to be met before the trial can commence. Two critical areas concern disclosure and resources. To this end, the Defence respectfully requests that the Trial Chamber schedule

¹ [ICC-01/12-01/18-507](#).

regular status conferences or pre-trial meetings in the lead-up to the commencement of trial. This would enable the Defence to inform the Chamber in a timely manner of any obstacles to trial preparation and provide a forum for an expeditious resolution of the issues in question.

6. Further, as was raised at the Confirmation Hearing, the Defence intends to submit an application in relation to Mr. Al Hassan's detention and questioning in Mali.² [REDACTED]. To be in a position to do so, it is essential that the Defence be provided with all relevant information within the custody of the Prosecution. This includes information which is the subject of redaction or non-disclosure decisions issued by the Single Judge at the pre-trial stage. The basis for these decisions has been rendered moot by virtue of the fact that the Defence has been disclosed the identity of the individuals in question. The Defence understands that the Prosecution will seize the Trial Chamber with requests to lift such measures, and therefore requests that the Prosecution be ordered to submit such requests as a matter of urgency, and to further implement all outstanding disclosure requests related to this matter, as soon as possible.
7. In terms of the right to adequate resources, the Defence informs the Chamber that it has requested the Registry to provide sufficient funds to maintain the current composition of the Defence team for the current stage, and to provide additional funds to convert part-time positions to full-time posts in the immediate lead up to the commencement of the trial. There are no issues that are ripe for judicial determination by the Chamber on this point, but the Defence will seize the Chamber if and when such issues arise.

B. Anticipated Evidence

8. While the Defence is not currently in a position to file substantive submissions as regards anticipated Defence evidence, it hereby provides the following submissions with the aim of facilitating the commencement of trial before the summer recess.
 - i. *Estimated number of witnesses and hours of in-court testimony*
9. The Defence considers that an updated Prosecution Witness List, filed as soon as possible and prior to the final disclosure deadlines,³ would assist in maintaining the anticipated trial start date. This list should indicate the type of witness (i.e. whether they are fact or opinion,

² See ICC-01/12-01/18-T-007-Red-ENG, pp. 33-34.

³ See, ICC Chambers Practice Manual, 2019 ("[Chambers Practice Manual](#)"), para. 76(iii).

expert, or insider witnesses);⁴ their mode of testimony (i.e. whether *viva voce* or Rule 68 statements); as well as a schedule of anticipated appearances of witnesses, which would include the order in which they are expected to appear and the estimated lengths of their examination-in-chief. Such information would allow better understanding of the Prosecution case for both the Trial Chamber and the Defence and would facilitate effective management and prioritisation of Defence resources.

ii. Expert Witnesses

10. Litigation as concerns the status of expert witness should be front-loaded in order to prevent any delays to the commencement of trial. This would be assisted by the imposition of deadlines for the submissions of applications for expert status of witnesses and/or for disclosure of any expert reports/statements to be tendered at trial.
11. In this regard, the Defence's ability to make an informed decision as to whether it intends to contest the expert status of the witness or the admissibility of their reports/statements is contingent on full and timely disclosure of relevant information from the Prosecution. This includes, but is not limited to *curriculum vitae*; terms of references; draft versions of the reports; all correspondence between the Prosecution and the expert, including original and subsequent instructions and communication of Prosecution feedback; and all material relied on by the expert in the drafting of their report/statement.⁵ Similarly, [REDACTED] and appear to have prepared reports. As such, the Defence would benefit from clarification as to the status of these witnesses and whether the Prosecution intends to formally designate them as experts. Whilst the scope of expert-related disclosure is not a matter which requires judicial determination at this stage, the Defence will seize the Chamber if and when such issues arise.

iii. Audio- and video-link testimony

12. The Defence strongly opposes any testimony by audio-link. Accepting audio-link testimony would severely impede the Trial Chamber in its assessment of a witness's demeanour and therefore credibility. It cannot be in the interests of justice to hamstring the Trial Chamber judges in their exercise of such a fundamental judicial function. Further, testimony via audio-link would be vulnerable to a veritable litany of abuses, whether in relation to the verification

⁴ The Defence notes that it has been made aware of the existence of about 100 witnesses in this case; in relation to a number of these witnesses, the Defence is yet to be disclosed witness statements or summaries.

⁵ STL-11-01/PT/PTJ, [Prosecutor v. Ayyash et al.](#), Decision on Sabra's Seventh Motion for Disclosure – Experts, 24 May 2013, paras 6, 12, 27.

of a witness's identity; ensuring that a witness is not unduly consulting material during their testimony; or ensuring that witnesses are not testifying under duress.

13. As regards testimony by video-link, the Defence will address such applications on a case-by-case basis.

iv. Documentary evidence

14. The Defence requests the Trial Chamber to invite submissions, and convene a separate status conference on the use of bar table motions, as well as other significant issues that relate to the conduct of proceedings – including the system of evidence the Trial Chamber intends to rely on in these proceedings, witness proofing protocols, and victim participation – should be scheduled at the earliest opportunity in order to provide clarity and finality with regard to key aspects of the trial proceedings.

v. Use of Rule 68

15. As abovementioned, the Defence requests that the Trial Chamber set a deadline by which time the Prosecution must indicate the witnesses in relation to whom the Prosecution intends to rely on Rule 68 of the Rules, as well as the specific elements of evidence that it intends to tender through said rule. This deadline should be one that allows the Parties sufficient time to litigate, and the Trial Chamber to decide on, applications brought under this rule, prior to the commencement of the trial.

C. Agreed Facts Under Rule 69

16. The Defence is currently in the process of providing agreement to a limited number of facts; however, its ability to complete its review of the remaining majority of facts is contingent on further clarity as to the scope of the charges in this case and the fulfilment of the Prosecution's disclosure obligations.
17. On a related note, the Defence seeks clarity from the Prosecution as to its position concerning the status of findings in the *Al Mahdi* case in these proceedings. This should be placed on the record as soon as possible in the interests of clarity and certitude going forward.

D. Transcription and Translation

18. While Mr. Al Hassan can fully read and understand Arabic, he is unable to read and understand written French. As such, to ensure the preservation of Mr. Al Hassan's right to

necessary translations in accordance with Article 67(1)(f), the Defence requests that daily transcripts of hearings be translated into Arabic upon the completion of each hearing.⁶

19. At trial, the Defence intends to make its legal submissions, both oral and written, in English and French. The Defence is not currently in a position to provide specific information as to the language(s) in which Defence witnesses will testify.

E. Disclosure and related issues

i. Prosecution investigations

20. Prosecution investigations in the context of these proceedings should largely have been completed prior to the Confirmation Hearing,⁷ subject to limited and demonstrated exceptions.⁸ The Defence reserves its right to adduce further submissions at the Status Conference on this issue, in the event that the Prosecution seeks to continue post-confirmation investigations to the detriment of Mr. Al Hassan's statutory rights.

ii. Disclosure of outstanding evidence

21. In order to ensure that the trial can commence in accordance with the Trial Chamber's anticipated schedule, it is essential that the Prosecution fulfils its disclosure obligations under Article 67(2) of the Statute and Rules 76 and 77 of the Rules in a timely manner. To date, the Prosecution has disclosed [REDACTED] documents – roughly a quarter of its holdings⁹ – to the Defence, of which [REDACTED] were disclosed as incriminatory pursuant to Rule 76, and [REDACTED] disclosed under Rule 77. Only [REDACTED] documents have been disclosed as exculpatory, pursuant to Article 67(2). The Defence recalls the Prosecution's duty to investigate both exonerating and incriminating circumstances equally pursuant to Article 54(1).
22. A disclosure workplan is therefore necessary whereby the disclosure of all outstanding evidence pursuant to Article 67(2) and Rules 76 should be completed by the end of January 2020, at the latest. Such a workplan would help to ensure that the Defence is provided sufficient opportunity to analyse disclosed evidence and conduct investigations accordingly, while leaving sufficient time to seize the Trial Chamber on related matters should the need arise. The Defence further requests that the Trial Chamber implement rolling disclosure

⁶ The Defence does not intend to request a live Arabic transcript.

⁷ [ICC-01/09-02/11-728](#), paras 118-119.

⁸ See, [ICC-01/09-02/11-728](#), para. 120.

⁹ As of February 2019; see [REDACTED].

deadlines in the lead-up to the final deadline of end January 2020, so as to prevent large volumes of evidence being disclosed to the Defence at once.¹⁰

23. Further, and in order to facilitate *inter partes* disclosure communications, the Defence requests that the Trial Chamber establish a distinct regime for *inter-partes* disclosure requests.¹¹ Pursuant to this regime, the Defence proposes that the Party to whom the request is addressed (“Addressed Party”) be afforded five days to issue a response to *inter partes* disclosure requests and disclose the sought material. Where the Addressed Party is either unable or unwilling to address the request in this timeframe, it must indicate within three days that: (i) it is unwilling to comply with the request, and provide sufficient justification for this unwillingness; or (ii) it is willing to comply with the request, but will require additional time. The Addressed Party should provide justification for this delay, as well as a reasonable anticipated timeline for compliance. Any failure to comply with the requirements of the regime would constitute constructive denial, in which case the Party that sent the request is free to seize the Trial Chamber if necessary.
24. In this regard, the Defence requests the Chamber, pursuant to Regulation 35 of the Regulations of the Court, to implement shortened deadline for responses i.e. five-days for disclosure-related motions (absent a request for an extended deadline) to ensure that such litigation is dealt with as expeditiously as possible.

iii. Transcripts and translation issues

25. The Defence requests that all Rule 76 material be translated into Arabic. As things stand, the Defence has received roughly [REDACTED] text documents, of which [REDACTED] contain written text in a language that Mr. Al Hassan cannot understand.¹² In addition, noting the delay with which documents are translated into Arabic, the Defence requests that the Trial Chamber order that the Defence be provided resources to appoint a full time language assistant, in order to assist Mr. Al Hassan to review the evidence against him.¹³ The Defence also requests that all evidentiary material be translated into one of the two working languages

¹⁰ See, [Chambers Practice Manual](#), para. 76(ii).

¹¹ STL-11-01/PT/PTJ, [Prosecutor v. Ayyash et al.](#), Order on Working Plan and on the Joint Defence Motion Regarding Trial Preparation, 25 October 2012, paras 24-30.

¹² Conversely, only [REDACTED] of the [REDACTED] documents have been translated into Arabic.

¹³ [ICC-01/05-01/08-307](#) paras. 14, 18; [ICC-01/04-01/06-268](#), pp. 7-8, [ICC-01/04-01/07-127](#), para. 43 and [ICC-01/04-01/07-304](#), pp. 4, 7.

of the Court;¹⁴ and likewise, that transcripts for all video and audio evidentiary material be provided to the Defence in one of the two working languages.¹⁵

iv. Protective measures and delayed disclosure

26. To date, a significant proportion of the evidence disclosed to the Defence has been heavily redacted; similarly, the Prosecution has disclosed numerous summaries of witness statements, rather than the statements or transcripts themselves. Moreover, the Prosecution has withheld the identities of 59 of the 99 witnesses in relation to whom the Prosecution has disclosed evidence to the Defence.¹⁶
27. The Prosecution has frequently relied on the fact that the proceedings were in the Pre-Trial phase to justify the extensive application of redactions, as well as the withholding of identities of witnesses and evidence.¹⁷ For its part, in granting these requests, the Pre-Trial Chamber considered the limited scope of the pre-trial stage and expressly noted that identities of the Prosecution witnesses must be disclosed to the Defence at the commencement of trial.¹⁸
28. It is self-evident that the Prosecution's continuing withholding of information regarding the identities of its witnesses has had, and continues to have, a severely detrimental impact on Defence preparations and investigations. Should the Prosecution intend to seek delayed disclosure with regard to any of its witnesses, it should be ordered to do so by the end of January 2020. Again, in light of the extensive protective measures already in place in these proceedings, there is no valid reason why the Prosecution would not know the witnesses for whom it intends to seek delayed disclosure.
29. In addition, should any such delayed disclosure applications be granted by the Trial Chamber, information subject to delayed disclosure should be disclosed to the Defence on a rolling basis, in the lead-up to the final deadline, so as to mitigate the prejudice to the Defence, and allow sufficient time for Defence preparation and investigation. Given the sheer quantity of redactions and undisclosed witness identities in these proceedings, simultaneous bulk delayed disclosure immediately prior to the commencement of trial would inevitably occasion delay.

¹⁴ [REDACTED] documents are not in a working language of the court, of which the Defence has received French or English translations of only [REDACTED] documents.

¹⁵ The Defence has received [REDACTED] elements of audio or video material, of which only [REDACTED] transcripts have been provided.

¹⁶ See Annex D. [REDACTED].

¹⁷ See e.g. [ICC-01/12-01/18-185-Red2](#), para. 52, [REDACTED].

¹⁸ See, e.g., [ICC-01/12-01/18-122-Red2](#), para. 41. See also [REDACTED].

This impact would be compounded by the logistical obstacles rendering the Defence unable to conduct on-the-ground investigations on short notice.

30. The final cut off point for delayed disclosure should also be established sufficiently in advance of the commencement of the trial to enable the Defence to conduct investigations in relation to the individual in question. This deadline must take into account the current security situation in Mali, which renders it impossible to organise effective and secure missions at short notice. Further, the disclosure of witnesses' identities subject to Article 55 and 56 measures should be accompanied by video and/or audio recordings of their testimony, in order to enable the Defence to identify errors in translation or transcription in a timely manner.

v. Disclosure of Article 54(3) material

31. The Defence recalls [REDACTED].¹⁹ The Defence reserves its right to adduce further submissions at the Status Conference on this issue, in the event that the situation has changed.

F. Defence Disclosure

32. The Defence is currently investigating the possibility of raising defences in accordance with Articles 31(1)(d) and 33(1). However, the Defence notes it is not currently in a position to fulfil any notice obligations under Rules 79 and 80, pending clarity on the scope of the charges; the fulfilment of Prosecution disclosure obligations under Article 67(2) and Rule 76; and the lifting of extensive redactions as regards witnesses' identities and evidence.

G. Prosecution Pre-Trial Brief

33. The Defence requests that the Prosecution's Pre-Trial Brief takes into account the Pre-Trial Chamber's findings in the Confirmation Decision, any new evidence the Prosecution seeks to rely on, and the lifting of existing redactions. As for timing, this should be submitted no later than four months prior to the commencement of trial. Further following the Appeals Chamber's findings in *Bemba et al.*,²⁰ the Defence seeks clarity as to the operative charging section of the Confirmation Decision, particularly given its length and scope. Such clarity would assist in providing a clear and readily accessible statement of the facts underlying the confirmed charges against Mr. Al Hassan. In this regard, the Defence recalls Mr. Al Hassan's right to be informed promptly and in detail of the nature, cause and content of the charges

¹⁹ [REDACTED]

²⁰ [ICC-01/05-01/13-2275-Red](#), paras. 195-200.

against him, pursuant to Article 67(1)(a); Article 64(8)(a), which will require, at the commencement of trial, that the Trial Chamber satisfy itself that Mr. Al Hassan understands the nature of the charges against him; and Article 74(2), according to which the Trial Chamber's decision on the guilt or innocence of the accused must not exceed the facts and circumstances described in the charges and any amendments to the charges. In addition, the Defence requests that the Trial Chamber set deadlines for challenges as regards the scope of, and defects in, the charging document. [REDACTED].²¹ The Defence will provide its submissions in this regard at the appropriate juncture with particular regard to the timing and impact of such a request at this stage of the proceedings.

H. Protocols

i. *E-Court Protocol*²²

34. The Defence does not require any additional amendments to the E-Court Protocol and considers that the metadata fields assist with the searchability of documents particularly where certain material within a document is redacted. However, the Defence does require additional clarification as to the current implementation of the E-Court Protocol and in particular with regard to the scope of facilitation of *inter partes* disclosure strictly conducted by the Registry.²³
35. Currently, parties are instructed to transmit all potential evidence i.e. all *inter partes* disclosed material, to the Registry in order for it to be uploaded into the electronic system and provided with a unique document identification. Whilst this process allows for conformity in the registration of disclosed documents, any strict application of the process poses two issues for the Defence. First, whilst appreciating the dedication of the Registry in uploading the potential evidence, there are inevitably circumstances whereby the schedule of the parties or the proceedings would favour exchanging material directly on an *inter partes* basis prior to any transmission to the Registry. This can be done by way of email or physical transfer on an *ad hoc* basis in order to speed up *inter partes* disclosure. This does not require any changes to the E-Court Protocol; the Defence only seeks confirmation that parties are not precluded from engaging this route when necessary.

²¹ [REDACTED].

²² [ICC-01/12-01/18-31-Anx.](#)

²³ [ICC-01/12-01/18-31](#), paras. 36-42

36. Second, currently the uploading of documents to the E-Court system allows for *inter partes* disclosure to be communicated to the Chamber *as well* as the victims participating in the proceedings or their legal representatives. Whilst the Defence acknowledges and respects the procedural rights of a participating victim,²⁴ there may be instances whereby disclosure is warranted only on a strict *inter partes* basis between Defence and Prosecution only. This applies not only to material disclosed by the Defence, with particular regard to the Defence's disclosure obligations under Rules 78 and 79 of the Rules, but also in relation to certain Prosecution material disclosed to the Defence pursuant to Rule 77. The current implementation of the E-Court Protocol and registration of documents does not allow for access to be restricted between the Defence and Prosecution only. The Defence therefore seeks clarification as to whether the above mentioned process involving direct *inter partes* disclosure between the Prosecution and Defence is permissible in these circumstances, with the additional variance that such documents would be communicated to the Chamber but would not be uploaded onto E-Court unless a party intends to rely on it at trial.

*ii. Redactions Protocol*²⁵

37. At the outset, with respect to existing redactions, the Defence highlights the need for the Prosecution to conduct a thorough review of redactions previously approved by the Pre-Trial Chamber in the context of these proceedings as well as those redactions approved by another Chamber in previous proceedings.²⁶ This includes a review of all additional redactions authorised by the Single Judge to prevent disclosure of witness identities during the pre-trial stage including for example, [REDACTED].²⁷ Further, the Defence considers that a redaction workplan should be established so that a review of all redactions applied in the *Al Mahdi* case should be completed immediately and with all appropriate applications pursuant to Regulation 42 of the Regulations of the Court submitted on an expedited basis in order to either lift or maintain the redactions as warranted.

38. As part of this redaction workplan, the Defence considers that the immediate review of all existing redactions should also be coupled with periodical reviews conducted on at least a bi-monthly basis. Where lesser redactions versions are justified, disclosure must be effected

²⁴ [ICC-01/12-01/18-289-Red](#), paras. 41-53.

²⁵ [ICC-01/12-01/18-31](#), paras. 27-35.

²⁶ [ICC-01/05-01/13-959-Anx](#), p.2.

²⁷ [REDACTED].

immediately, or alternatively, submissions of applications under Regulation 42(3) of the Regulations of the Court should be made within a specified time-frame.

39. In this regard, it would be beneficial for Trial Chamber X to adopt the additional clarifications and timelines for the implementation of categories of redactions as implemented by prior Trial Chambers.²⁸ A clear approach as to the timeline of review process will assist with ensuring that the redactions remain necessary and proportionate on a continuous basis in accordance with the jurisprudence of the Appeals Chamber,²⁹ and in order to: (i) prevent obstructions to the Defence's ability to prepare its case; and (ii) flag any deficiencies in the Prosecution's case which may otherwise be obscured by the application of unnecessary and disproportionate redactions.
40. With regard to any additional redactions, the Defence does not object to maintaining the Redactions Protocol with the following exceptions and conditions. First, the Defence's agreement to the Prosecution's *proprio motu* application of redactions is contingent on the explicit confirmation that in relation to all redaction challenges, without exception and including in relation to challenges concerning classes of redactions, the burden remains with the Prosecution to justify the measure in question.³⁰ To ensure timely disclosure, the Defence further proposes that the Chamber establish an expedited filing regime, namely, where the Chamber has been seized of a redaction challenge by the Defence, then the Prosecution should have three and not five days to file its response unless otherwise decided by the Chamber on exceptional basis. This timeframe is consistent with firstly, the more recent application of the redaction protocol in *Yekatom*,³¹ and secondly, the fact that the Prosecution would have already had the opportunity to consolidate its position during *inter partes* consultations ahead of the Chamber being seized.³² Additionally, the Defence seeks confirmation that its ability to raise a challenge to *proprio motu* redactions is not subject to any time bar taking into account the developments of the Defence's own investigations which may alter its position on specific redactions.
41. Second, whilst the Defence agrees to *proprio motu* procedure applicable to the redaction categories set out in paragraph 29 of the Redaction Protocol it does so with exception to "Category B.5: Other redactions under Rule 81(4) of the Rules". Given the potentially broad

²⁸ See for example, [ICC-01/05-01/13-959-Anx](#), pp. 4-9; [ICC-02/11-01/11-737-AnxA](#), paras. 15-47; [ICC-01/04-02/06-411-AnxA](#), paras 15-47; [ICC-01/09-01/11-458-AnxA-Corr](#), paras. 30-65; [ICC-01/09-02/11-495-AnxA-Corr](#), para. 30-65.

²⁹ [ICC-01/04-01/07-475](#), para. 73.

³⁰ [ICC-01/12-01/18-31](#), para.31.

³¹ [ICC-01/14-01/18-64-Red](#), para. 30.

³² [ICC-01/12-01/18-31](#), para.31.

nature of this category, the Defence considers that all redactions which would fall under this category should also be the subject of a discrete application to the Chamber. Whilst the Redaction Protocol was considered fit for purpose by the Pre-Trial Chamber for the confirmation stage, it has been the practice of Trial Chambers including the last constituted Trial Chamber IX,³³ with the recent exception of Trial Chamber VIII in the *Al Mahdi* case,³⁴ to require the Prosecution to submit discrete applications in relation to all “non-standard” redactions i.e. all redactions falling outside of categories A.1-A.8 and B.1-B.4. This allows a Trial Chamber to have greater judicial control over the application of redactions bearing in mind the standard of proof at trial as well as the extended period of proceedings before the Trial Chamber as compared to Pre-Trial Chambers. In contrast the *Al Mahdi* case is distinguishable in that it concerned a guilty plea and if anything highlights the need for greater intervention by Trial Chamber X in the absence of any judicial review of redactions in that case. The Defence does not therefore consider there to be any justifiable reason for departing from the practices of other Chambers at trial.

42. Third, all applications for redactions or non-disclosure as set out in paragraph 33 of the Redaction Protocol,³⁵ should be submitted at the earliest opportunity to ensure that such litigation is front-loaded to allow for the Defence to complete full investigations at the earliest juncture and to avoid interference with substantive preparations for trial. Additionally, where applications for non-standard redactions are submitted, the Defence considers that, in accordance with the practice of other Trial Chambers,³⁶ the Prosecution should simultaneously provide the Defence with disclosure of the material with the proposed redactions applied. This will reduce any delay in disclosure and provide the Defence with a fuller opportunity to respond to the application for non-standard redactions.³⁷

³³ [ICC-02/04-01/15-224](#), para. 7. See also [ICC-01/05-01/13-959-Anx](#), paras 48-50; [ICC-02/11-01/11-737-AnxA](#), para. 48-50; [ICC-01/04-02/06-411-AnxA](#), paras. 48-50; [ICC-01/09-01/11-458-AnxA-Corr](#), para. 66; [ICC-01/09-02/11-495-AnxA-Corr](#), para. 62.

³⁴ [ICC-01/12-01/15-9](#), para. 4.

³⁵ The Defence confirms that the procedure as set out in paragraph 33 of the Redaction Protocol should be maintained.

³⁶ [ICC-02/04-01/15-224](#), para. 7.

³⁷ [ICC-01/09-02/11-495-AnxA-Corr](#), para. 73(b).

iii. *Protocol on the handling of confidential information during investigations and contact between a party and a participant and witnesses of the opposing party or of a participant*³⁸

43. The Defence requests the Chamber to clarify the definition of a ‘witness’ for the purposes of the Protocol, and to insert additional language as concerns the parties’ obligation to inform witnesses of their status.
44. As concerns the first point, the Protocol defines the term “witness” as persons in relation to whom the party or participant has conveyed a clear intention to rely upon them as a witness.³⁹ This definition is unambiguous in terms and reflects the language adopted in the Chamber’s Practice Manual,⁴⁰ as well as a raft of ICC jurisprudence, in which various Trial Chambers have, at the request of the Prosecution, confirmed that this term should be interpreted narrowly.⁴¹
45. The Prosecution’s attempt to expand the definition of “witness” 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,⁴² is unjustified, and would prevent the Defence from independently investigating this case in a manner which is consistent with Defence confidentiality and Mr. Al Hassan’s privilege against self-incrimination. When considering the reality of this case, there remains no justifiable reason which would warrant a broad interpretation of the term. The Prosecution has invariably met with a number of individuals in connection to the Situation in Mali. Not all of these individuals are relied upon by the Prosecution in this case and yet, as has already been demonstrated, some will have exculpatory information which is likely to assist the Defence.⁴³
46. If the protocol were to apply automatically and without exception to such persons, it would mean that the Defence would be compelled to record all of its interactions and communications with potential Defence witnesses, and to disclose such recordings to the Prosecution, irrespective as to whether the Defence intends to rely on the individual or evidence in question. In practice, this means that the Defence would be compelled to conduct its investigations under the microscope of the Prosecution – a notion which runs roughshod

³⁸ [ICC-01/12-01/18-40-Anx.](#)

³⁹ [ICC-01/12-01/18-40-Anx](#), para. 4(f).

⁴⁰ [Chambers Practice Manual](#), Annex, para. 4(f).

⁴¹ E.g. [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); ICC-01/14-01/18-35, para. 8.

⁴² [ICC-01/12-01/18-460](#), para. 115.

⁴³ [ICC-01/12-01/18-426-Red](#), para 5.

over Mr. Al Hassan's right to silence, and the statutory principle that the Defence should be entitled to investigate, and call witnesses under the same conditions as the Prosecution.⁴⁴ This proposal is particularly unnecessary and prejudicial in circumstances where the Defence has identified, and made consensual contact with an individual through its own independent investigations, and only discovered that the individual provided a Rule 77 or Article 67(2) statement subsequently. The Defence should not be hindered in its ability to conduct its investigations in such circumstances – otherwise, the Prosecution's duty to investigate and collect exculpatory information would serve to obstruct rather than facilitate Defence preparation.

47. In connection to this issue, the Defence notes the difficulties it has faced when investigating persons who either: (i) have been in prior contact with the Prosecution but whose identity has been withheld from the Defence; (ii) are not informed of the fact that the Prosecution intends to rely on them as a witness; and/or (iii) have been instructed to maintain the confidentiality of their meetings with the Prosecution. The Defence considers that it would be beneficial for the Prosecution to inform all individuals whom it intends to rely on as actual witnesses of this fact and to instruct them to inform the Defence of this issue upon any initial contact.
48. Further, where inadvertent contact has been made with a Prosecution witness by the Defence, the procedures following such contact are adequately provided for within the Protocol.⁴⁵ [REDACTED]. The Defence does not consider that any additional amendments need to be made to the Protocol in this regard. Any order for the Defence to disclose transcripts or recordings of such inadvertent contacts would run contrary to the confidentiality of defence investigations particularly when considering individuals may not be forthcoming with the fact that they are Prosecution witnesses and in light of the delayed disclosure in this case.
49. Finally, in so far as any additions to the Protocol are required, the Defence requests for a specific provision allowing it to exceptionally meet with Prosecution witnesses in the absence of the Prosecution. This would be limited to interviews concerning issues which do not relate to the charges and would only be conducted with the consent of the witness and leave of the Chamber. The Defence requests this addition to allow it to continue its investigations in relation to issues concerning the detention and treatment of Mr. Al Hassan and other witnesses in Mali. This exception is consistent with ICC case law,⁴⁶ and takes into

⁴⁴ [ICC-01/05-01/13-907](#), para. 14. See also IT-99-36, *Prosecutor v. Brđjanin & Talić*, Decision on Motion by Prosecution for Protective Measures, 3 July 2002, paras. 46-49.

⁴⁵ [ICC-01/12-01/18-40-Anx](#), para. 31.

⁴⁶ [ICC-01/05-46](#), paras. 11-12; [ICC-01/05-01/08-3070](#), paras. 13-18.

consideration the sensitivity of otherwise requiring such individuals to discuss the circumstances of their interrogations, in the presence of the Prosecution (that is, the party that interrogated them).

iv. Additional protocols

50. The Defence considers that a Familiarisation Protocol is necessary for these proceedings and that such a protocol should be adopted at the earliest opportunity. However, given the diverging applications of familiarisation protocols within the Court's jurisprudence, the Defence requests that parties be given the opportunity to make submissions on the scope and nature of this protocol prior to its adoption.

I. Other Issues

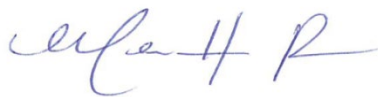
51. Pursuant to Paragraph 5 of the Scheduling Order, the Defence expresses its wish to add the following items to the agenda for the Status Conference: (i) the assignment of an alternative judge; and (ii) the suspension of deadlines for key filings, if they arise during the judicial recess.

IV. Conclusion

52. The Defence respectfully submits that the aforementioned schedules and orders will ensure effective case management of these proceedings necessary to maintain the proposed commencement of trial before the summer recess.



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Dated this 6th Day of December 2019
At The Hague, The Netherlands