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TRIAL CHAMBER X

Before: Judge Kimberly Prost, Single Judge

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF

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

Public

Defence submissions on modalities of victims' participation

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

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

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I. Introduction

1. Victim participation is a right that is to be exercised in a manner which is consistent with the defendant's right to fair, impartial and expeditious proceedings.
2. The Defence for Mr. Al Hassan fully supports the right of victims to have their voices heard and considered on issues that affect their personal interests in the resolution of the confirmed charges before the Chamber. The Defence therefore submits the current proposals, with a view to balancing that right, with key fair trial protections, including, in particular,
 - The right to an impartial tribunal;
 - The right to a speedy trial;
 - The right to be informed promptly of the scope, nature, and content of the charges.
 - The right to receive the case against the defendant before the start of the trial; and
 - The Prosecutor's duty to search for, and disclose exculpatory information.
3. After considering the various application modalities that have been employed at the Court, and the particular specificities of this case, the Defence submits that the above rights can be ensured in the most effective manner by:
 - Confirming that pursuant to Rule 89 of the Rules of Procedure and Evidence (RPE), the parties have the right to receive the applications of all victims, who wish to exercise active/direct forms of participation;
 - Restricting the judicial adjudication of 'victim status' to victims, who intend to participate in a direct/active manner and basing this adjudication exclusively on information that has been transmitted to the Defence;
 - Directing the Registry to transmit all victim applications (in an unredacted format) to the Prosecution;
 - Determining that the broad definition of participating 'victim' employed thus far should be restricted to victims participating through the Legal Representatives for Victims (LRV); and that a more concise definition

should be applied in connection with victims, who intend to participate in an active manner; and

- Setting a strict cut-off point before the commencement of the trial, as concerns the admission of victims, who wish to participate in an active manner, and further stipulating that the identifies of such victims must be disclosed to the Defence in advance of the trial.

II. Submissions

4. The Defence endorses the general principles and procedures set out at paragraphs 95 and 96 of the Chamber's Practice Manual, specifically, that:¹

(i) victims who wish to participate in the proceedings must make written application to the Registrar; (ii) the application is transmitted to the Chamber; (iii) a copy of the application is provided to the Prosecutor and the Defence, who are entitled to reply within a time limit to be set by the Chamber; and (iv) the Chamber, proprio motu or upon request of the Prosecutor or the Defence, may reject the application inter alia if the person does not qualify as a victim.

5. The Pre-Trial Chamber deviated from these procedures during the pre-confirmation phase. The parties only received copies of applications if the Registry classified them in category 'C', and the Pre-Trial Chamber reserved judicial pronouncements to this 'category'. As a result, the defendant's right to be heard was restricted to category 'C' applicants, and a significant number of participating victims were never subjected to judicial vetting.
6. It is now difficult to rectify this judicial lacuna without creating a disparity between applicants, who were granted the right to participate at different phases of the proceedings. There is also the risk that entangling the Trial Chamber (rather than the Pre-Trial Chamber) in such matters could divert judicial time and resources during this crucial period leading up to the trial, and affect the impartiality of the trial proceedings. The Defence therefore requests the Trial Chamber to adopt the following procedures and safeguards, with a view to avoiding any further prejudice to the fairness and impartiality of the proceedings.

¹ [Chamber's Practice Manual](#), paras. 95-96.

First, the parties should be entitled to receive copies of the applications of all individuals requesting to actively participate in the case through Rule 89.

7. This right derives from the clear text of Rule 89(1) RPE ('the Registrar shall provide a copy of the application to the Prosecutor and the Defence, who shall be entitled to reply within a time limit set by the Chamber'), and is not dependent on whether the individual falls into a particular category (i.e. category 'C').
8. Although this right is subject to provisions of the Statute (including Article 68(1)), the Statute must be interpreted and applied in a manner which is consistent with the fair trial rights set out in Article 67(1), and internationally recognized human rights. While it might be a necessary and proportionate protective measure to redact victim applications prior to their transmission to the Defence, the fact that such redactions entail additional time and resources is not a valid basis to withhold all applications, and thus defeat the underlying right. The Chamber's Practice Manual recognises as such, underlining that:²

Consistent with Article 68(1) of the Statute, which is also explicitly referred to in Rule 89(1) of the Rules, if there exist security concerns in case the applicant's identity and involvement with the Court were to be known to the Defence, the Registry transmits the application, and any supporting documentation, to the Defence in redacted form, expunging the person's identifying information. The predictability of this requirement places the Registry in a position to start preparing the redactions vis-à-vis the Defence, as warranted, as soon as applications are collected or received, rather than waiting until the competent Single Judge/Chamber issues a decision on the system for admission of victims. Furthermore, the use of a simplified application form of one page only facilitates the redaction process, as the Registry would need to redact, as appropriate, only this page and the supporting document.

9. It is, moreover, entirely illogical to posit on the one hand, that the purpose of victim participation is to ensure that affected individuals can play a meaningful role in a criminal trial, while on the other, shielding them from the normal processes of basic verification that apply to individuals participating in a criminal trial. It is similarly illogical to transmit the application forms of some applicants (category 'C') and not others, even though they may eventually fall under the same category (accepted or

² [Chamber's Practice Manual](#), 2019, para. 96(vi).

rejected applications) or be related as concerns the individuals in question, or the alleged incident.

10. The Registry's admission that applications have not been redacted on an ongoing basis³ should not result in a *fait accompli*, as concerns the system feasible to redact all the applications in advance of the trial, then the system for admission to be adopted at trial. If it is no longer must be modified to ensure firstly, that key Defence's rights are not adversely impacted, and secondly, that the clear process set out in Rule 89 does not become redundant. Accordingly, rather than jettisoning the explicit wording and safeguards set out in Rule 89, the applicants, which have not been submitted to both parties, should be registered in the proceedings through Rule 93. Specifically, Rule 93 allows the Chamber to receive observations or submissions from 'other victims' i.e. individuals, who have not been the subject of a Rule 89 determination as to whether they fulfil the definition of Rule 85, within the context of the parameters of the charges before the Chamber.⁴

Second, the Chamber's adjudication as to whether an applicant meets the definition of a victim (on a prima facie basis) should be confined to victims seeking to exercise active rights of participation during the trial stage. This adjudication should also be restricted to information which has been disclosed in advance to the parties.

11. If individualized and more active forms of participation are at stake (i.e. the impact on the proceedings and adjudicative process is greater), then the defendant's right to be heard in relation to the propriety of such participation is of heightened importance. In such cases, in order for this right to be effective, it is imperative that the defendant has the ability to present meaningful submissions as concerns the standing of the individual, the nature of his or her personal interests, the propriety of the requested form of active participation, and any link to other testimony or admitted evidence in this case. The principle of open justice also prescribes that any judicial adjudication of such matters should be restricted to information that has been disclosed to the

³ ICC-01/12-01/18-563-Conf-Anx-Red, para. 16.

⁴ [ICC-01/04-01/06-1432](#), fn. 60: "In addition to the procedure under rule 89 (1) of the Rules, the Appeals Chamber notes the possibility of victim participation pursuant to rule 93, second sentence, of the Rules. This provision vests the Chamber with a discretion to call "other victims" which could potentially include victims who are not victims of the crimes for which the accused person has been charged."

parties. This holds true irrespective as to whether the Registry has labelled them as category ‘A’, ‘B’ or ‘C’ victims.

12. The distinction between different types of participation overlaps with the submissions due on 27 February 2020. Nonetheless, since the application process is not an end in itself, but a means for assessing participatory standing, the process should be tailored to the type of participation requested by the applicant, specifically,

- Any applicant, who is assessed by the Registry as fulfilling the criteria established by the Chamber, is granted the general right to participate through Legal Representatives for Victims. The Chamber and the Defence should receive the Registry report to this effect and the Prosecution should receive all unredacted applications (including those which the Registry has assessed as not meeting the Rule 85 definition).
- As an independent Minister of Justice, it would be incumbent on the Prosecution to inform the Chamber and the Defence if it is aware of any reasons which militate against the participation of particular applicants in the case. The Prosecutor may also address the Registry if it is of the position that the Registry has incorrectly excluded individuals or failed to take into consideration relevant information.
- Any individual/organization wishing to exercise active forms of participation (to be elaborated in the submissions due on 27 February) shall be subjected to a prior judicial determination as to whether they fulfil the Rule 85 definition of a victim, after hearing from the parties. This adjudication shall be conducted on the basis of information disclosed to both parties.
- The Prosecution would remain obliged to review the applications transmitted to it, and disclose to the Defence any applications that fall within its disclosure obligations (with redactions, if necessary and proportionate).

13. The proposed distinction between the application process for victims, participating exclusively through LRVs, and victims wishes to exercise active or direct roles, has been applied in previous ICC cases, where it was considered apposite in cases

involving a high volume of applicants.⁵ In contrast, the *Gbagbo* case, maintained the strict requirements of Rule 89(1) for all applicants, due to the limited number expected to be submitted before the commencement of the trial.⁶

14. The issue as to whether any additional information needs to be provided by ‘active victims’ at the point where they submit a specific request to intervene directly should be addressed in the submissions as concerns the modalities of victim participation.

Third, all unredacted applications should be transmitted to the Prosecution.

15. The proposals set out in Options 1 and 2 of the Registry submissions would result in the non-transmission of Category A and B applications to the Prosecution. This would eliminate a key safeguard as concerns the integrity of the proceedings, and impede the ability of the Prosecutor to discharge its duties under Article 54(1) of the Statute.
16. Past cases have demonstrated that the victim application process can be exploited by false victims, or fraudulent intermediaries. Neither the Registry (a neutral organ) nor the Chamber have any competence to investigate offences against the administration of justice. This role – and duty – falls squarely on the shoulders of the Prosecutor. Even if the conduct falls below or outside the scope of Article 70, the Prosecutor, as an impartial Minister of Justice, has a duty to take steps to protect the integrity of the process, and the Court’s ability to impartially and accurately determine the truth. The Prosecutor must therefore be placed in a position where she can execute this responsibility, in an effective manner.
17. The process in Article 89(1) must also be construed in a manner, which is consistent with other provisions of the Statute, including the Prosecutor’s duty to search for, collect, and disclose information, which is relevant to the determination of the truth. ICC case law has consistently underlined that information in victim application forms may fall within the Prosecutor’s disclosure obligations.⁷ If the Defence has a Statutory right to receive Rule 77 and PEXO information that might be within such application

⁵ [ICC-01/09-01/11-460](#), paras. 25-29; [ICC-01/04-02/06-449](#), paras. 38-39.

⁶ [ICC-02/11-01/11-800](#), paras. 49-50.

⁷ [ICC-02/11-01/15-915-Red](#), *Prosecutor v. Gbagbo et al.*, Public Redacted Version Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016, 31 July 2017, para. 56.

forms, it follows that the Prosecution has a corresponding duty to collect, and review them in the first place (or at the very least, make all reasonable efforts to do so).

18. Indeed, the Appeals Chamber's has affirmed that the Prosecution's receipt and disclosure of such information forms a core plank in the fairness of the victim participation process at the ICC. Thus, the Appeals Chamber's finding that victims have no general obligation to disclose exculpatory information in their possession was subject to the caveats that:
 - Firstly, "where the submissions in the victims' applications for participation indicate that victims may possess potentially exculpatory information, the Prosecutor's investigation should extend to discovering any such information in the victims' possession. Such information would then be disclosed to the accused pursuant to article 67 (2) of the Statute and rule 77 of the Rules of Procedure and Evidence";⁸ and
 - Secondly, "[u]nder rule 89 (1) of the Rules of Procedure and Evidence, the Prosecutor receives copies of victims' applications for participation."⁹
19. If the Prosecution is unwilling or unable to play the role of disclosure watchdog as concerns victim applications, then it would be necessary to revisit the issue, and adopt the safeguards applied at the Special Tribunal for Lebanon, where participating victims are subject to direct disclosure obligations.¹⁰
20. The *Ongwen* protocol for dual victim-witnesses, endorsed by Trial Chamber X in this case,¹¹ also anticipates that the Prosecution must be in a position to identify whether

⁸ [ICC-01/04-01/07-2288](#), para 81.

⁹ [ICC-01/04-01/07-2288](#), fn. 136.

¹⁰ [STL Rules of Procedure and Evidence](#) (as amended April 2019):

Rule 112 bis Disclosure by Victims Participating in the Proceedings: "Where the Trial Chamber grants a victim participating in the proceedings the right to call evidence, the Chamber shall decide on the corresponding disclosure obligations that shall be imposed."

Rule 113 Disclosure of Exculpatory Material: "(A) Subject to the provisions of Rules 116, 117 and 118, the Prosecutor shall, as soon as practicable, disclose to the Defence any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence. (B) Victims participating in the proceedings shall have the same obligations as set out in paragraph (A). Before disclosing to the Defence any information that victims participating in the proceedings have reason to believe falls under Rule 116 or 117, they shall disclose that material to the Prosecutor."

¹¹ ICC-01/12-01/18-562, para. 6.

an individual is both a victim and a Prosecution witness (i.e. has ‘dual status’).¹² Given that firstly, the LRV will not know the identity of Prosecution witnesses until an advanced point of the proceedings, and secondly, the VWU will not know the names of participating victims or applicants, the identification of dual status individuals can only occur in a timely manner if all unredacted applications are transmitted to the Prosecution. There also does not appear to be any legal or security reason *not* to do so, as evidenced by the Registry’s acknowledgement that at least some categories of applications can be transmitted to the parties.¹³ It would also be illogical, and contrary to the dictates of fairness and open justice, for the ICC to carve out a special privilege for this type of information, notwithstanding the absence of any statutory basis for doing so.

21. The legal and logistical interest in ascertaining whether an individual, who has applied to participate as a victim, is also a witness (and *vice versa*) is also not confined to the situation of individuals, who have received a favourable determination as to their request to apply. The application might be pending due to a failure to provide relevant documentation, or the application might be rejected. In the former case, the interests of expeditious proceedings and witness protection militate in favour of placing the Prosecution in a position, where they can identify potential dual status individuals at the earliest juncture possible. In the latter case, the Prosecutor’s duty under Article 54(1) of the Statute impels it to search for any information that might be relevant to the reliability and credibility of its witnesses.¹⁴ Not every inconsistency or mistake will do so, but, at the very least, the Prosecution has a positive duty to examine whether that is the case, and then make an informed decision as to whether to maintain the individual in question as a reliable witness of truth. This can only occur if all unredacted applications are transmitted to the Prosecution.

¹² “As soon as the Prosecution becomes aware that one of the witnesses it will call to testify is also a victim, it will inform legal representative of a dual status witness the Defence and the legal representative of the dual status witness”: [ICC-02/04-01/15-504-Anx2](#)

¹³ See also ICC-01/12-01/18-502, paras. 3, 10-11, where the Prosecution stated that no security issues would arise from providing it with all application forms for participating victims, and that the LRVs agreed with this position. The LRVs expressed their approval themselves during the confirmation hearing: ICC-01/12-01/18-T-005-Red-Eng, p. 100, lines 8-21.

¹⁴ [ICC-01/05-01/13-1202](#), *Prosecutor v. Bemba et al.*, Decision on Joint Request to Strike Prosecution Witnesses P-198 and P-201 from the Witness List, 31 August 2015, para. 12; [ICC-01/09-01/11-1655-Red](#), *Prosecutor v. Ruto et al.*, Decision on Joint Defence Application for Further Prosecution Investigation Concerning [REDACTED] of Certain Prosecution Witnesses, 12 January 2015, paras. 37-39.

Fourth, the broad definition of ‘victim’ employed thus far should be restricted to victims participating through LRV. A more concise definition should be applied in connection with victims, who intend to participate in an active manner.

22. The Registry has foreshadowed that the definition of a ‘victim’ employed by the Pre-Trial Chamber could encompass over 780,000 individuals.¹⁵ The sheer number of such ‘victims’ would, in itself, affect the public perception of Mr. Al Hassan’s presumption of innocence, and generate a significant level of stigmatisation for Mr. Al Hassan that would be difficult to disperse in the event of an acquittal. The ICC has deliberately eschewed terms such as ‘alleged’ or ‘putative’ victim, or ‘complainant’, or ‘applicant’ in lieu of ‘victim’.¹⁶ The choice to employ this emotive term triggers a corollary responsibility to ensure that the scheme for victim participation scheme in this case does not give rise to an appearance of alleged or actual culpability, which is not commensurate with the actual charges in the case, or the presumption of innocence. It is therefore imperative that the scheme for victim participation clarifies that the hundreds (and potentially) thousands of victims, admitted as participants in this case, are not necessarily victims of the charged incidents concerning Mr. Al Hassan’s individual responsibility.
23. The purpose of this trial is not to provide a forum or remedy as concerns every single incident that occurred in Timbuktu in 2012 and 2013; it is to determine Mr. Al Hassan’s criminal responsibility as concerns the specific incidents set out in the charges.¹⁷ In line with this objective, and the Appeals Chamber’s ruling in the *Lubanga* case, the notion of a Rule 85 ‘victim’ should be confined to individuals who have suffered harm as the result of the specific incidents set out in the confirmed charges.¹⁸ If this definition is adhered to in the present case – there should not be a significant disjunct between the victims identified in the charges, and the number of Rule 85 victims participating in the case. At the very least, the nexus between the harm suffered by the individual, the charged incidents giving rise to this harm, and the defendant’s conduct, should be apparent.

¹⁵ ICC-01/12-01/18-563-Anx-Red2, fn. 14.

¹⁶ Previous requests to change the terminology of ‘victim’ to align with the language used domestically or by human rights mechanisms were not accepted (see [ICC-02/05-126](#), fn. 1).

¹⁷ [ICC-01/14-01/18-403-Red](#), para. 57.

¹⁸ [ICC-01/04-01/06-1432](#), paras. 1-2.

24. Conversely, if, for the purpose of victim-participation at trial, the Trial Chamber were to engage in a judicial determination that individuals (and indeed, an entire population) are Rule 85 ‘victims’, notwithstanding the absence of such a nexus, this determination would derail the purpose of the trial, or at the very least, render it largely superfluous. Similarly, if the criteria for determining ‘victim status’ have no clear nexus to the issues at stake in the trial process, then the judicial determination lacks meaning, and would result in abstract forms of participation that fail to satisfy the key objectives underpinning the decision to craft an independent role for victims in the process – that is, to allow the distinct voices of harmed persons to be heard in their own right, rather than through the parties.
25. As things stand, the definition employed by the Single Judge at the pre-confirmation phase fails to adhere to the definition set by the Appeals Chamber. In contradistinction to the Appeals Chamber’s specific direction on this point,¹⁹ the Single Judge conflated the notion of an abstract interest in the proceedings themselves, with that of a personal interest in the judicial resolution of the specific charges before the Chamber. For example, the Single Judge adopted the broad assumption that ‘witnesses’ can be categorised as ‘victims’.²⁰ Nonetheless, apart from the stipulation that the “victims must show that they were present in Timbuktu and that they witnessed a crime committed against someone else”,²¹ the Single Judge failed to set out any further guidelines as to whether this sufficed for all witnesses (irrespective of their relationship to the victim of the crime), and all types of offences.
26. Depending on the nature of the incident, some witnesses do suffer psychological harm, but this cannot be presumed to be the case. Indeed, it would be perverse if an ‘insider’, or co-perpetrator, who witnessed an incident, could be deemed a victim. For

¹⁹ [ICC-01/04-01/06-1432](#), paras. 63-64: “The Appeals Chamber agrees with the Prosecutor’s contention that the parameters set forth in the charges define the issues to be determined at trial and limit the Trial Chamber’s authority to the determination of those issues. Therefore, any determination of the Trial Chamber under article 68 (3) of the Statute read with rules 85 and 89 (1) of the Rules, in relation to a victim’s status and/or participatory rights which is unrelated to the specific charges against the accused would fall outside this framework. It is for the Trial Chamber to determine within this framework whether an applicant is a victim, because he or she suffered harm in connection with the particular crimes charged, and if so, whether the personal interests of the applicant are affected. If the applicant is unable to demonstrate a link between the harm suffered and the particular crimes charged, then even if his or her personal interests are affected by an issue in the trial, it would not be appropriate under article 68 (3) read with rule 85 and 89 (1) of the Rules for his or her views and concerns to be presented”.

²⁰ [ICC-01/12-01/18-146-tENG](#), para. 35.

²¹ [ICC-01/12-01/18-146-tENG](#), para. 35.

this reason, the Appeals Chamber has stressed that the question as to whether an indirect victim has suffered personal harm must be assessed by reference to their particular circumstances, for example, whether there was a close relationship between the physical victim, and the indirect victim.²² The Appeals Chamber also noted that Rule 85(b) sets out a more stringent definition of a ‘victim’ as concerns property harm suffered by institutions or organisations.²³

27. Individuals, who have not applied to participate as a group, have also been assessed by reference to their group characteristics, rather than the question as to whether they, as an individual, suffered personal harm.²⁴ This also falls foul of the appellate direction that harm must be “personal to the individual”.²⁵
28. Of further concern, the Registry’s assertion that the “Decision on Confirmation of Charges determined that the Ansar Dine/AQMI attack targeted the population of Timbuktu region which encompassed approximately 780.000 inhabitants during the relevant period”, also appears to confuse the chapeau elements of the charges, with the charged incidents concerning Mr. Al Hassan’s individual responsibility.
29. Although the ship may have sailed as concerns the 880 individuals admitted on the basis of above approach, looking forward, the fairest, and most appropriate solution would be to:
 - designate all individuals, who were granted the status of ‘participating victim’ through a process that did not comply with Rule 89 or the Chamber’s Practice Manual, as ‘Rule 93’ victims; and
 - reserve the designation of ‘Rule 89’ victims to those individuals who have/will apply to actively participate in the proceedings, and whose

²² [ICC-01/04-01/06-1432](#), para. 32.

²³ [ICC-01/04-01/06-1432](#), para. 30.

²⁴ [ICC-01/12-01/18-146-tENG](#), para. 28: “Furthermore, the crime of persecution against an identifiable group or community can be prosecuted under article 7(1)(h) of the Statute only if the act was committed in connection with another crime within the jurisdiction of the Court, “thus filtering out discriminatory measures that would not fall within the Court’s jurisdiction if committed without such connection”. Such a requirement concerns the group or community as a whole and not each victim individually. Accordingly, an individual may claim to be the victim of a crime of persecution if he or she, as a member of a group or community that is the victim of persecution, has suffered a severe deprivation of his or her fundamental rights (such as, for example, the right to freedom of expression, freedom of assembly and association, or the right to private property) even if, by itself, such deprivation would not constitute a crime of persecution in the absence of an act or crime within the jurisdiction of the Court.”

²⁵ [ICC-01/04-01/06-1432](#), para. 1.

application has complied with the safeguards set out in Rule 89 (including as concerns the transmission of the application form to the Defence).

30. This approach would be consistent with the Appeals Chamber's determination that, rather than expanding the definition of Rule 85 to encompass individuals who have not suffered harm as a result of the confirmed charges, the Chamber could rely upon Rule 93 to hear from 'other victims'.²⁶
31. Given the pendency of further submissions concerning the modalities of participation at trial, the Defence will address the 'Rule 85' definition that should apply to 'active' participants in those submissions.

Fifth, the Trial Chamber should establish a strict cut-off point (before the commencement of the trial), as concerns the admission of victims, who wish to participate in an active manner, and further stipulate that the identities, and applications of such victims must be disclosed to the Defence in advance of the trial

32. In previous cases, ICC Trial Chambers have established a cut-off point for the submission of victim applications, which fell before the commencement of the trial proceedings.²⁷ This cut-off point was held to be of integral importance to the defendant's right to adequate time and resources to prepare and participate in the trial proceedings.
33. In the event that the Chamber does decide to allow applications to be submitted beyond a particular cut-off point, or after the commencement of the trial, this should be subject to the proviso that:

- The Trial Chamber establishes a strict cut-off point as concerns the submission and adjudication of individuals, wishing to participate on an active basis, and this cut-off expires before the commencement of the trial; and

²⁶ [ICC-01/04-01/06-1432](#), fn. 60: "In addition to the procedure under rule 89 (1) of the Rules, the Appeals Chamber notes the possibility of victim participation pursuant to rule 93, second sentence, of the Rules. This provision vests the Chamber with a discretion to call "other victims" which could potentially include victims who are not victims of the crimes for which the accused person has been charged".

²⁷ See for example, *Ntaganda*, [ICC-01/04-02/06-449](#), para. 24; *Gbagbo*, [ICC-02/11-01/11-800](#), para. 51; *Katanga*, [ICC-01/04-01/07-933-tENG](#), para. 27.

- Applications for general participation are not transmitted to the Trial Chamber and are not the subject of judicial adjudication.

34. As concerns the first aspect, the defendant has the right to be informed promptly of the nature, cause, and content of the charges. The defendant also has the right to adequate time and facilities to prepare his strategy for trial, and to make informed decisions as concerns any defences or lines of questioning advanced during the Prosecution stage. Mr. Al Hassan will not be able to benefit from these rights, and formulate a coherent defence strategy, if he is forced to enter the trial proceedings without a clear idea as to the identity of persons (be they victims or witnesses), who might give evidence against him.
35. Although the Appeals Chamber confirmed, in the *Katanga* case, that victims were not obliged to disclose prospective evidence before the start of the trial,²⁸ this finding did not address the preliminary question as to whether, at the very least, the defendant has the right to know, in advance of the trial, the identity of the pool of individuals who have expressed a potential interest in either being heard in person, or tendering evidence at trial.
36. The Appeals Chamber also underlined, in the same judgment, that the Trial Chamber should “take any other measures necessary to ensure the accused’s right to a fair trial, in particular the right to ‘have adequate time and facilities for the preparation of the defence’.”²⁹ In terms of the nature of such measures, it is notable that this ruling was issued in the context of a case where the related victims were not anonymous, and the identities of participating victims were largely disclosed before the start of the trial.³⁰ The cut-off point for participation was also prior to the commencement of the trial.³¹
37. In contrast, setting aside three newly identified dual status victims, the Defence has not received the identity of any victims in this case. The possibility that certain victims might wish to exercise active forms of participation impacts directly on Defence preparation and the formulation of a holistic strategy. If the identity of active

²⁸ [ICC-01/04-01/07-2288](#), para. 37.

²⁹ [ICC-01/04-01/07-2288](#), para. 55.

³⁰ [ICC-01/04-01/07-1788-tENG](#) paras. 21, 92.

³¹ [ICC-01/04-01/07-933-tENG](#), para. 27.

participants were to be disclosed only at the point that the individual submits a concrete request for a concrete form of active participation, the Defence's right to know the case against it would be vitiated through the piecemeal and partial transmission of the case against Mr. Al Hassan. The Defence may have to request the Chamber to recall Prosecution witnesses if a link between such witnesses and active victims is only apparent after the late disclosure of the names of such active victims. The same would hold true if, after receiving an application after the commencement of proceedings, the Defence learns that a Prosecution witness might have been in position to clarify or provide exculpatory information on matters set out in the victim application. Bearing in mind the security situation in Mali, it will also be impossible for the Defence to conduct effective and suitably cautious investigations into issues that might pertain to the identity of active victims, within the window of time allocated to this phase.

38. It is therefore essential that the Defence is aware of the identity of such active victims before the commencement of the trial so that it can advise and represent Mr. Al Hassan effectively as concerns the strategy to be adopted and deployed from day one of the trial proceedings.
39. It would be equally problematic if active participation could be extended to victims, who have applied to participate after the commencement of the trial. Given the publicity of proceedings, and the realities of the digital world, the ongoing acceptance and admission of 'active victims' would create a risk that applicants could tailor their applications, to the evidence unfolding in the trial. The Defence would face a mutating case, which is informed by Defence submissions and questioning, and witness reactions to Defence questioning, as broadcast in public hearings.
40. The specific modalities for victim participation must also be tailored to the defendant's right to expeditious proceedings. This case commenced in 2018, and the Registry has invested significant efforts in publicizing the procedures for victim participation. Open source articles also refer to the various efforts of multiple NGOs as concerns the collection of victim applications (dating back several years). Given these considerations, the defendant's right to prepare his case before the commencement of the trial and his right to expeditious proceeding must be given appropriate deference, and should not undermined through the ongoing submission

and admission of applications concerning individuals, who wish to supplement or modify the evidential fabric of the case, by exercising active forms of participation.

41. Finally, bearing in the trial start date, and the volume of material which the Defence must review in the lead up to the trial, the cut-off should be set in such a manner that all applications are transmitted to the Defence, no later than 45 days before the commencement of the trial.

III. Conclusion

42. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Honourable Trial Chamber to adopt the modalities listed at paragraph 3 above, and set out in these submissions.



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Dated this 3rd Day of February 2020
At The Hague, The Netherlands