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PRE-TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

**Public redacted version of Defence response to Prosecution Request for Corrections
and Amendments concerning the Confirmation Decision**

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. The Prosecution ‘Request for corrections and amendments concerning the Confirmation Decision’¹ (the Request) should be rejected entirely. It is untimely and based on previously available or discoverable information. The new Allegations listed in Annex D to the Request could have been included in the revised DCC filed on 11 May 2019, had the Prosecution been diligent and thorough in the conduct of its investigations. In addition, granting the sought amendments at this stage risks delaying the proceedings, which would run counter to the interests of justice and the defendant’s right to expeditious proceedings. The new allegations increase the seriousness of the charges, and there is a risk that holding a pre-trial hearing to assess the merits of the Prosecution Request would delay the start of the trial, and hamper the Defence’s ability to prepare ahead of the trial. Finally, the incidents underpinning the Request are evidentially unsubstantiated and fail to fulfil the elements of the offences.

II. Classification

2. In accordance with Regulation 23*bis*(1) of the Regulations of Court (the “RoC”), this request is classified as confidential, as it relates to a confidential filing.

III. Submissions

A. *Preliminary remarks*

3. The defendant is entitled to participate fully in the confirmation process: in practice, this means that the Pre-Trial Chamber may not rely on any information or arguments that have not been transmitted to the Defence, sufficiently in advance.²
4. The Prosecution has run roughshod over this principle of adversarial fairness by:
 - i. Submitting *ex parte* argumentation on key issues that are in contention as concerns the timing and manner in which it collected certain evidential items;³ and
 - ii. Basing its description of the alleged charges on information/evidence that has been redacted from the Defence or disclosed in a manner, which impedes meaningful analysis or investigation.⁴

¹ ICC-01/12-01/18-568-Conf (the “Request”, or “Prosecution Request”). The Response is based on the evidence and translations disclosed to the Defence as of 24 February 2020. See Annex A, ICC-01/12-01/18-625-Conf-Red, para. 33, and ICC-01/12-01/18, p. 24.

² Rule 81(5), Rules of Procedure and Evidence.

³ See ICC-01/12-01/18-625-Conf-Red, which contains information redacted from the Defence in paras. 18, 23, 25, 26, 27, 30 and 31.

5. These redactions/*ex parte* arguments have radically reduced the scope for meaningful Defence participation in this process: the disclosed details are so scanty that the only room for response is a blanket denial.⁵ The Prosecution has thus contravened the Appeals Chamber's directive that such protective measures cannot be used in a manner that is prejudicial to, or inconsistent with the defendant's right to a fair and impartial confirmation process, that respects the principle of equality of arms.⁶

B. The Request is untimely due to the prior availability of the evidence, and the Prosecution's lack of diligence

6. The appropriate standard of diligence must be viewed through the lens of the purpose of the confirmation hearing, which is to crystallise the charges for trial, and ensure that the case is then 'trial ready'.⁷ This purpose is vitiated in circumstances where the

⁴ For example:

- Request, para. 49 relies on paragraphs 92 to 93 of [REDACTED]'s statement MLI-OTP-[REDACTED], which are so heavily redacted that it is impossible to piece together the narrative of events, and the basis for attributing certain actions to Mr. Al Hassan.
- Request, paras. 30-32 relies on MLI-OTP-[REDACTED], at pages 302-303, even though page 302 is entirely redacted, and information on identities and allegations is heavily redacted at following pages 303-306 at paras. 46-50, 53, 56. Request, para. 32 relies on paras. 57-59, 61 and 62 of MLI-OTP-[REDACTED], which are heavily redacted, and MLI-OTP-[REDACTED], at page 167, where significant information related to the cited incident is redacted. Request, para. 34 relies on MLI-OTP-[REDACTED], where the context in information preceding and following the cited para. 48 at pages 303-304 are heavily redacted.
- Request, paras. 52-53 refers to MLI-OTP-[REDACTED] where the cited pages 167-168 at paras. 133, 136 and 137 are heavily redacted.
- Request, para. 61 repeatedly relies on the heavily redacted paragraphs 63, 69 and 90 of MLI-OTP-[REDACTED].
- Request, paras. 59 and 60 relies on the heavily redacted paragraphs 212 to 213 of [REDACTED]'s statement MLI-OTP-[REDACTED]. Most seriously, while the information regarding public whipping [REDACTED] is present in the unredacted parts of those paragraphs (the second allegation in para. 59), the unredacted version does not state that [REDACTED] was arrested for [REDACTED], the first allegation in para. 59.

⁵ See *Prosecutor v. Krnojelac*, [Decision on the Defence Preliminary Motion on the Form of the Indictment](#), para. 40: "The inability of the prosecution to provide proper particulars may itself demonstrate sufficient prejudice to an accused person as to make a trial upon the relevant charge necessarily unfair. The fact that the witnesses are unable to provide the needed information will inevitably reduce the value of their evidence. The absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance."

⁶ [ICC-01/04-01/06-773](#), para. 2; ICC-01/04-01/07-476, para. 63: "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".

⁷ [ICC-01/04-01/07-1547-tENG](#), paras. 22-23: "Thus it should be recalled that the filing of the Confirmation Decision represents not the starting point of the preliminary proceedings but in fact their termination. In the Chamber's view, the decision on the confirmation of the charges crystallises the facts and circumstances accepted in that decision in support of the charges it has confirmed. This is one of the fundamental reasons for the existence of the Pre-Trial Chamber, the purpose of which is to enable the trial to be conducted, as expeditiously as possible, on factual bases that are clear and certain, and accessible to the accused. If the Prosecutor were to be entitled to present at the confirmation hearing a mere sample of the facts with which he intends to charge the accused, and to reserve the right subsequently to add new facts at the trial, this requirement of certainty could not be satisfied. The Chamber thus considers that it is incumbent upon the Prosecutor to

Prosecution brings its case against the defendant in a piecemeal, staggered, and tardy manner. That is the case at present: the Defence has one foot stuck in the pre-confirmation phase, and one in the trial phase, and its limited resources are spread between the two. And of paramount concern, Mr. Al Hassan has held been in ICC custody since March 2018. The confirmation hearing, which was initially set for 24 September 2018, was postponed twice at the request of the Prosecution. The pre-confirmation process in this case (18 months) was one of the longest ever before the ICC. The charges could and should have been crystallised at a much earlier juncture, and it is simply too late to reopen the factual matrix of this case.

7. Although Article 61(9) of the Statute stipulates that an amendment to the charges may be requested ‘before the trial has begun’, this should not allow a request for amendment which, while requested before the start of the trial, could have been submitted at a much earlier stage, or could have been part of the initial charges. This is the case here. Despite being afforded an opportunity to explain the tardiness of its Request,⁸ the Prosecution merely put forward some general arguments about its right to continue its investigations post-confirmation and the security situation in Mali, while providing limited, unconvincing explanations with regard to each individual new witness. In fact, it is apparent that the Prosecution was able to collect the statements of these witnesses and include the new allegations at a much earlier stage of the proceedings, but failed to do so. In this context, the Request is an attempt at covering a lack of diligence and correcting omissions in the course of investigating the case, rather than being founded on evidence that was previously unavailable.
8. The Prosecution also had the opportunity under Rule 121(4) and (5) to amend the charges, and add new evidence that it had received during the course of May and June 2019. If this did not present sufficient time to do so, the Prosecutor could have invoked Rule 121(7), and requested the Chamber to postpone the hearing. If such a request were to be declined, the Prosecutor could have raised an objection under Rule 122(3). These procedural mechanisms and related deadlines would be rendered otiose if the Prosecution could funnel evidence and incidents into a post-confirmation amendment

present, during the pre-trial phase, all of the facts and circumstances relating to his case. To hold otherwise would be to call into question the very purpose of a pre-trial phase, at the close of which the charges are fixed and settled. Such a solution would, moreover, render useless the months of work devoted by the Pre-Trial Chamber to preparing the case for trial and, to a large extent, would make it pointless even to hold a confirmation hearing where evidence is presented, and at the close of which the trial is supposed to commence”.

⁸ ICC-01/12-01/18-608-Conf, para. 55.

request, or, otherwise suspend the collection of evidence in order to first obtain further insight into the manner in which the Chamber evaluates certain types of evidence or offences.

9. The Prosecution chose not to avail itself of any of these mechanisms.⁹ It also claimed that Defence arguments, raised under Rule 122(3), should be rejected due to the fact that the Defence did not seek relief and/or alert the Chamber and parties *as soon* as it was aware that there *might* be an issue concerning the composition of the Chamber.¹⁰ This position, concerning the obligation of a party to raise issues that impact on the conduct of the proceedings, as soon as the party is aware of the issue in question, was endorsed by judges in this Chamber,¹¹ and the majority of judges sitting in Plenary.¹² This duty of diligence is not, however, restricted to the Defence, or issues concerning the composition of the Chamber: it applies equally to the Prosecutor, and any matters that are likely to have an impact on the expeditious conduct of the proceedings. The Appeals Chamber has thus underlined that:¹³

expeditiousness is a recurrent theme in the Court's legal instruments. The Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations. The duty applies to the Chambers of the Court, the parties and participants.

And further that:¹⁴

It is vital for cases to be properly managed from the start to forestall unnecessary delays. Undoubtedly, delays in proceedings are inimical to the proper administration of justice. For instance, witnesses to the alleged crime may become unavailable, or may, with the passage of time, forget what transpired. Material evidence, both incriminatory and exculpatory, may disappear or may be rendered useless by exposure to the elements. In this case, both the prosecution and the accused may be prejudiced.

⁹ ICC-01/12-01/18-460-Red2, paras. 29-30: "Du point de vue procédural, la procédure de confirmation des charges a notamment pour objectif de fixer les paramètres de l'affaire aux fins du procès, de façon à ce que les charges soient formulées clairement et ne présentent pas de vice de forme, ainsi que de régler d'éventuelles questions de procédure, de façon à éviter qu'elles entachent le procès. La Chambre note ainsi qu'avant l'ouverture des débats sur le fond à l'Audience, elle a invité les parties à soulever des exceptions ou présenter des observations au sujet de questions touchant à la régularité des procédures qui ont précédé l'audience, conformément à la règle 122-3 du Règlement. À cet égard, la Chambre observe que le Procureur a indiqué n'avoir aucune exception ou observation à présenter concernant la régularité des procédures ayant précédé l'audience".

¹⁰ ICC-01/12-01/18-436-Conf, para. 6.

¹¹ ICC-01/12-01/18-448, paras. 25-27; ICC-01/12-01/18-446-Conf, paras. 11, 47-52; ICC-01/12-01/18-458, paras. 28-29.

¹² ICC-01/12-01/18-458, paras. 28-29.

¹³ [ICC-01/04-01/07-2259](#), para. 43.

¹⁴ [ICC-01/04-01/07-2259](#), paras. 45-46.

10. Within the specific context of the confirmation of charges process, if an issue is known to one of the parties, and the party fails to seek timely relief from the Pre-Trial Chamber, then in accordance with Rule 122(4), the party waives its right to seek relief at a later point of the process.¹⁵ As explained by the Appeals Chamber, “a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right’ in order for the relevant chamber ‘to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness’”.¹⁶ Notably, in support of this approach, the Appeals Chamber cited with approval a judgment of the Inter-American Court of Human Rights, which stressed the need for such procedural rules to respect equality and an appropriate balance between the parties.¹⁷ It follows, therefore, that in order to obtain the ultimate goal of expeditious proceedings, the rigorous standards applied to the Defence must apply equally to the Prosecution.
11. In line with these principles, the Chamber should carefully scrutinise the justifications underpinning the Request, taking into consideration the following factors, which have guided both the disposition of requests to rely upon or disclose ‘additional evidence’ after the expiration of a particular deadline, and the adjudication of indictment amendment requests at the *ad hoc* Tribunals:¹⁸
- whether the Prosecution provided sufficient information/justification as to why it was unable to obtain the evidence for reasons beyond its control;¹⁹
 - whether the Prosecution failed to adopt an appropriate strategy for identifying and collecting the material at an earlier stage;²⁰ and
 - whether the Prosecution brought to the attention of the Chamber in a timely manner the difficulties it was experiencing in obtaining the evidence in question.²¹

¹⁵ [ICC-02/04-01/15-1562](#), para. 129.

¹⁶ [ICC-02/04-01/15-1562](#), para. 135, citing [ICC-01/04-01/07-2259](#) OA10, para. 54.

¹⁷ *Mémoli v. Argentina*. Judgment, 22 August 2013. Series C no. 265, paras. 31-32, cited at fn. 262 of [ICC-02/04-01/15-1562](#).

¹⁸ [ICC-01/05-01/08-767-Red2](#), para. 26.

¹⁹ [ICC-01/05-01/08-680](#), para. 12.

²⁰ [ICC-01/05-01/08-680](#), para. 12.

²¹ [ICC-01/05-01/08-680](#), para. 12. See also *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-AR50, [Appeals Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004](#), para. 16, where the ICTR Appeals Chamber held that it was appropriate to consider “whether the Prosecution was diligent in pursuing its investigations and in presenting the motion, whether the Accused and the Trial Chamber had prior notice of the Prosecution’s intention to seek leave to amend the indictment”.

12. In the *Katanga* case, Trial Chamber II further determined that if the Prosecution was aware of, but not in possession of the evidence prior to the deadline for filing it, and did not seek an extension of the deadline prior to its expiration, the Chamber would only permit the Prosecution to rely on the additional evidence if the Prosecution could demonstrate firstly, the existence of exceptional circumstances, and secondly, that it was unable to request a timely extension of the deadline due to reasons outside of the Prosecution's control.²² In terms of what constitutes 'exceptional circumstances':
- An excessive workload or a persistent lack of resources are not valid excuses for failing to act with due diligence and failing to respect right of the defence to adequate time and facilities and to be tried without undue delay;²³ and
 - An inability to conduct investigative missions due to the security situation on the ground does not constitute 'exceptional circumstances', since it is a well-known circumstance, which the Prosecution should take it into consideration when planning its strategy and advising the Chamber as to the Prosecutor's ability to comply with deadlines.²⁴
13. Article 61(9) must also be interpreted in a manner which is consistent with more recent case law concerning the permissible scope of post-confirmation investigations.²⁵ Thus, although the Appeals Chamber acknowledged that the Prosecution was not absolutely precluded from conducting such investigations, the possibility of doing so was very much tied to the following considerations:²⁶
- in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence - particularly in situations where the ongoing nature of the conflict results in **more compelling evidence** becoming available **for the first time** after the confirmation hearing. (emphasis added)
14. In *Kenyatta*, the Chamber explained that, a continued investigation should be related "only to such essential pieces of evidence which were not known or available to the

See also *Prosecutor v. Lukic & Lukic*, [Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment](#), 2 July 2008, paras. 52-54, where the Trial Chamber found that the Prosecution had failed to act with sufficient diligence, due to its failure to request an extension of the deadline set out in the pre-trial work plan. See also paras. 61-62 concerning the Prosecution's failure to alert the Chamber expeditiously of the possibility of an amendment.

²² [ICC-01/04-01/07-1336](#), para. 7.

²³ [ICC-01/04-01/07-1336](#), para. 6.

²⁴ [ICC-01/04-01/07-1515](#), para. 28.

²⁵ ICC-01/12-01/18-608-Red, para. 53.

²⁶ [ICC-01/04-01/06-568](#), para. 54.

Office of the Prosecutor prior to the confirmation hearing or could not have been collected for any other reason, except at a later stage”.²⁷ In these circumstances, the Prosecutor’s exercise of discretion as concerns the conduct of such investigations “should be diligent and professional and should also not lead to abuse”.²⁸ In *Mbarushimana*, the Appeals Chamber further underlined the Prosecutor’s duty to ensure that its investigations were “largely completed” at the confirmation stage, and to seek an adjournment, under Rule 121(7), in the event that it requires more time to complete investigations that are necessary to substantiate certain charges.²⁹

15. The core principles that can be distilled from the above, are that:

- i. *An Article 61(9) application should be motivated by the collection of additional, and more compelling evidence, that become available for the first time after the confirmation hearing;*
- ii. *If the Prosecution was aware of the existence of the evidence prior to the confirmation hearing, then it can only rely on such evidence if it can demonstrate the existence of exceptional circumstances, that prevented the Prosecution from collecting the evidence in a timely manner; and*
- iii. *If the Prosecution had the means to raise any impediments or obstacles before the Chamber (i.e. through Rule 122(2)) or to seek a postponement for the purposes of completing its investigation, but failed to do so, then it waives its right to seek relief (i.e. through Article 61(9)) at a later stage.*

16. As will be established in the following section, many of the new allegations were integrally available before the confirmation of charges, while others could have been discovered and investigated, had the Prosecution been diligent in its investigations. The Prosecution also fails to put forward any argument to show that the new evidence is “necessary in order to establish the truth.”³⁰ The Request therefore falls at the first hurdle.

i. The evidence on the new allegations was available before the confirmation of charges hearing

17. The 17 new allegations listed in Annex D to the Prosecution Request were either known to the Prosecution at the time of filing the DCC, or, could have been easily discovered and investigated at an earlier stage of the proceedings.

- ***[REDACTED]***

²⁷ [ICC-01/09-02/11-700-Corr](#), para. 37.

²⁸ [ICC-01/09-01/11-859](#), para. 34.

²⁹ [ICC-01/04-01/10-514](#), para. 44.

³⁰ [ICC-01/09-02/11-700-Corr](#), para. 35.

18. The Prosecution had several interactions with [REDACTED] since [REDACTED]:³¹ [REDACTED].³² The Prosecution nonetheless fails to provide a cogent explanation as to why [REDACTED] firstly, did not give a statement at an earlier time, and secondly, did not [REDACTED] the Prosecution [REDACTED] other new witnesses at an earlier stage. The Prosecution cannot reasonably allege that it did not have an earlier opportunity to obtain the evidence of [REDACTED], while admitting that this witness [REDACTED] for over [REDACTED] before the confirmation of charges hearing. Given the continuity of contact, issues of security were clearly not a determining factor. Nor were issues of consent: the Prosecution had [REDACTED] before the confirmation hearing, and had in fact conducted an interview in [REDACTED].³³ The Prosecution could and should have exercised reasonable diligence to obtain a statement, before the expiration of the deadlines for adding new amendments and evidence to its list. At the very least, Rule 122(2) impelled the Prosecution to bring to the attention of the Chamber any issues that might have prevented the Prosecution from doing so. The Prosecution's silence deprived the Chamber of the ability to exercise effective judicial oversight over the fair and expeditious conduct of these proceedings. It can also be inferred from the Prosecution's failure to add the evidence or request an adjournment at the time that the Prosecution was aware that the probative value of [REDACTED]'s testimony, and the related reasons for delay (i.e. [REDACTED]) were not sufficiently compelling to justify such measures.
19. In addition, the new allegations, which cite [REDACTED]'s statement as a source, are all based on other evidence, which was already available prior to the date of her statement. Allegations 12, 15 and 16, as listed in Annex D to the Request, all refer to multiple sources of previously available evidence, which would have allowed the Prosecution to include these allegations prior to the confirmation of charges hearing.³⁴

- ***[REDACTED]***

20. The Prosecution stated that "[i]t was only during 2019[REDACTED], that the Prosecution obtained the name and contact details for [REDACTED]".³⁵ However, the Prosecution fails to mention that firstly, [REDACTED] knew [REDACTED] since at

³¹ [REDACTED], paras. 1, 11-12.

³² [REDACTED], paras. 11-12.

³³ ICC-01/12-01/18-625-Conf-Red, para. [REDACTED].

³⁴ [REDACTED]

³⁵ ICC-01/12-01/18-625-Conf-Red, [REDACTED].

least [REDACTED] 2015,³⁶ secondly, the Prosecution was in possession of [REDACTED]'s [REDACTED] since [REDACTED] 2016,³⁷ and thirdly, the Prosecution requested, and obtained contact details for [REDACTED] in 2016.³⁸ The Prosecution could have reached [REDACTED] and collected her evidence at a much earlier stage. The Prosecution disposed of sufficient opportunities to bring Allegation 12 prior to the filing of the DCC,³⁹ while the two new allegations, which rely exclusively on her statement,⁴⁰ could have been discovered and investigated in time for their inclusion in the DCC.

- **[REDACTED]**

21. The Prosecution links the meeting of [REDACTED] in [REDACTED] 2019 with [REDACTED].⁴¹ This [REDACTED] was in contact with the Prosecution as early as [REDACTED] 2016,⁴² and the Prosecution has conceded that they knew [REDACTED] before his interview, but did not consider him a person of interest.⁴³ The Prosecution seemingly only decided to interview [REDACTED] after determining that [REDACTED].⁴⁴
22. Insofar as the Prosecution decided to take a statement from [REDACTED] to obtain information regarding [REDACTED] and formulate new allegation 1 listed in Annex D, this was unnecessary. Allegation 1 could have been incorporated in the DCC on the basis of Witnesses [REDACTED]⁴⁵ and [REDACTED]⁴⁶ as well as documentary evidence in the custody of the Prosecution.⁴⁷ The explanation given by the Prosecution does not justify the subsequent addition of this allegation, or, the two new allegations based solely on [REDACTED]'s statement.⁴⁸
23. The Prosecution's explanations concerning the delays in collection of evidence are also undermined by its own evidence, and the record of this case. Whereas the Prosecution

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ Annex B, [REDACTED]

³⁹ [REDACTED] (available since [REDACTED] 2016); [REDACTED] (available since [REDACTED] 2015); [REDACTED] (available since [REDACTED] 2017).

⁴⁰ Annex D, Allegations 13 and 14.

⁴¹ ICC-01/12-01/18-625-Conf-Red, [REDACTED].

⁴² [REDACTED].

⁴³ ICC-01/12-01/18-625-Conf-Red, [REDACTED].

⁴⁴ ICC-01/12-01/18-625-Conf-Red, [REDACTED].

⁴⁵ MLI-OTP-[REDACTED] ([REDACTED] 2018).

⁴⁶ MLI-OTP-[REDACTED] ([REDACTED] 2018).

⁴⁷ [REDACTED] (available since [REDACTED] 2013); [REDACTED] (available since [REDACTED] 2018); [REDACTED] (available since [REDACTED] 2015); [REDACTED] (available since [REDACTED] 2015).

⁴⁸ Annex D, Allegations 2 and 3.

has claimed that the “organisations involved had expressed reluctance in sharing such documents with the Prosecution”, the Prosecution’s own investigator’s notes suggest the contrary: that the [REDACTED] involved would be likely to disclose such information if approached in the correct manner,⁴⁹ and the Prosecution had also experienced [REDACTED].⁵⁰ [REDACTED].⁵¹ It can thus reasonably be assumed that various avenues were open to the Prosecution to obtain this information, at earlier stages of the process. A far greater degree of initiative is expected and indeed required as concerns the investigation and prosecution of a detained individual.

- **[REDACTED]**

24. The Prosecution’s submissions are vague as regards the circumstances which led to their meeting with [REDACTED]. Intermediary [REDACTED], on whom no information has been made available to the Defence, allegedly provided the Prosecution with the witness’s identity in [REDACTED] 2019. Although this may be correct, it is equally correct that the Prosecution was in possession of [REDACTED]’s identity, and had the means to contact him, from a much earlier point in time. [REDACTED].⁵² Second, [REDACTED] is a member of [REDACTED].⁵³ [REDACTED],⁵⁴ it appears unlikely that the Prosecution was unaware of [REDACTED]’s relevance prior to July 2019, or that it otherwise lacked the means to interview him, in a more timeous manner.
25. In this context, it appears that new Allegations 4 to 7, and 9 to 11 in Annex D, which are exclusively based on the evidence of [REDACTED] could have been discovered and investigated at an earlier stage of the present proceedings. Failure to do so was caused by a lack of diligence on the Prosecution’s part, which cannot justify the late addition of these allegations. In addition, Allegation 8, which is partly based on the statement of [REDACTED], could have been included in the DCC based on the evidence of [REDACTED], previously available.⁵⁵

- **[REDACTED]**

⁴⁹ [REDACTED].

⁵⁰ See [REDACTED].

⁵¹ [REDACTED].

⁵² ICC-01/12-01/18-625-Conf-Red, [REDACTED]. The Defence notes that [REDACTED] also seems to be referred to in the evidence of [REDACTED], [REDACTED], dated [REDACTED] 2017.

⁵³ [REDACTED], paras. 24-26.

⁵⁴ [REDACTED] (where [REDACTED] is named, and his role in [REDACTED] is explained).

⁵⁵ [REDACTED] (available since [REDACTED] 2014).

26. In Allegation 17, the Prosecution requests the addition of [REDACTED] as a victim under Counts 6 and 13 of the DCC.⁵⁶ The Islamic police report⁵⁷ and the Islamic Tribunal Judgement⁵⁸ on the [REDACTED] have been in the possession of the Prosecution for seven years. The Prosecution even interrogated [REDACTED] in early 2018.⁵⁹ The omission of [REDACTED] as a victim in the DCC can only be viewed as a gross lack of diligence.

ii. The Prosecution's lack of diligence should not be cured by a request to amend the charges

27. The factual and legal basis for amending the charges at this stage is therefore wholly insufficient. This in and of itself should lead to the *in limine* dismissal of the Prosecution Request.

C. The new allegations constitute more serious charges

28. Despite the Prosecution's assertions to the contrary,⁶⁰ the new allegations constitute more serious charges. The notion of a new or additional 'charge' relates to the question as to whether the incident/s in question constitute a separate basis for conviction.⁶¹ That is the case: each of the 17 Allegations could, if upheld at trial, constitute an independent basis for conviction. It would, moreover, be nonsensical to argue that the addition of 17 Allegations, and as many new victims, does not have any impact on the gravity of the charges. The Appeals Chamber in this case recently stated that while "[q]uantitative criteria alone, including the number of victims, are not determinative of the gravity of a given case"⁶² it is nonetheless a relevant factor in this assessment. The inclusion of additional incidents with additional victims thus inevitably increases the seriousness of the charges.

29. Although hearings were not convened in the *Kenyatta* and *Ruto* cases, this is because in *Kenyatta*,⁶³ the Prosecution's request was confined to one limited factual allegation, while in *Ruto*,⁶⁴ the requested amendment merely sought to add two days to the temporal scope of the case. In both cases, the amendments were deemed insufficiently

⁵⁶ ICC-01/12-01/18-625-Conf-Red, para.73.

⁵⁷ [REDACTED] (available since [REDACTED] 2013).

⁵⁸ [REDACTED] (available since [REDACTED] 2013).

⁵⁹ [REDACTED].

⁶⁰ ICC-01/12-01/18-568-Conf, paras. 2, 27, 29.

⁶¹ *Prosecutor v. Lukic & Lukic*, [Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment](#), 2 July 2008, para. 32.

⁶² ICC-01/12-01/18-601-Conf, para. 94.

⁶³ [ICC-01/09-02/11-700-Corr](#), para. 26.

⁶⁴ [ICC-01/09-01/11-859](#).

serious to trigger the obligation to convene a hearing. In contrast, the Request, with 17 new victims, is tantamount to an entirely new case. Mr. Al Hassan has a statutory right to have such allegations considered at a hearing, which comports fully to the principles of open and adversarial justice. Conversely, if there is a risk that convening such a hearing could delay the trial or otherwise undermine the defendant's right to adequate time and facilities to prepare for trial, then the correct approach would be to dismiss the Request, rather than sacrificing a key right for the defendant.

D. Granting the Request will cause a disproportionate level of prejudice to the Defence

30. A request for amendment of the charges at the post-confirmation/pre-trial stage is exceptional,⁶⁵ and should not be granted in circumstances where the amendment:⁶⁶
 - will negatively affect other competing interests, such as the fairness and expeditiousness of the proceedings, which would result in causing prejudice to the rights of the accused.
31. In line with these principles, the requested amendments would result in an unfair burden and cause disproportionate prejudice to the Defence.⁶⁷
32. *First*, the statements from the new witnesses were taken immediately following the confirmation hearing, during which the Prosecution set out its case, showing graphic videos and photographs (which allegedly identified certain perpetrators and locations), over the course of two days. The hearings were widely reported in Mali, including *via* media reports, over the radio, television, newspapers, and the internet.
33. The possibility that the publicity of the pre-trial proceedings, in the course of which the Prosecution took over two days to set out their case against Mr. Al Hassan, could have had an impact on the content of the witnesses' evidence cannot be discounted, or taken lightly.⁶⁸ This is particularly the case since firstly, the Defence expressed its opposition

⁶⁵ [ICC-01/09-02/11-700-Corr](#), para. 21.

⁶⁶ [ICC-01/09-01/11-859](#), para. 31.

⁶⁷ [ICC-01/09-01/11-859](#), para. 41.

⁶⁸ *Prosecutor v. Limaj et al.* [Trial Judgment](#), para. 534: "The Chamber is quite satisfied that both Vojko and Ivan Bakrac testified honestly. There are circumstances, however, which can render the evidence of a particular witness unreliable even though that evidence was given in a perfectly honest fashion. In this case, in particular, the events which both Ivan and Vojko Bakrac went through at the camp were extremely traumatic. They occurred some years ago. In the intervening years, Ivan Bakrac, and possible Vojko Bakrac, have been influenced by television and internet coverage in which it appears that Fatmir Limaj was depicted. These considerations may well bear, in the Chamber's view, upon the ability of either or both of them to reliably identify one or more of the Accused." See also, Shaw, J.I. and Skolnick, P. (2004), '[Effects of Prejudicial Pretrial Publicity From Physical and Witness Evidence on Mock Jurors' Decision Making](#)', *Journal of Applied Social Psychology*, 34: 2132-2148.

to the prospect of “having a lengthy public recital of specific evidential details, at a time when the charges [had] yet to be confirmed, and investigations are ongoing”,⁶⁹ and secondly, although at least one witness acknowledged that his recollection of events had been impacted by media reportage,⁷⁰ the Prosecution did not explore or attempt to ascertain the likely impact of reports concerning the confirmation proceedings on their memories.

34. The fact that the Prosecution conducted several interviews after it heard key Defence arguments concerning the evidential and logical flaws in its case, also constitutes an abuse of discretion, since it allowed the Prosecution to “mould its evidence” to fill in gaps,⁷¹ or otherwise respond to these arguments. By the same token, by submitting its request after the Pre-Trial Chamber issued its decision on the confirmation of the charges (even though it had the capacity to do so beforehand), the Prosecution was able to exploit its own delays, in order to obtain a tactical advantage.⁷²
35. *Second*, the Request, if granted, has the potential to derail the scheduled trial date, to the detriment of Mr. Al Hassan’s right to a speedy trial.⁷³ This aspect of prejudice must be assessed by reference to the extraordinarily long pre-confirmation phase in this case (18 months, which is two weeks shy of being the longest at the ICC thus far), and likely delays that will be generated by the amendment. The additional workload generated by the Request has already caused concrete delays: the Prosecution has submitted requests for extensions of time as concerns key procedural acts, such as the deadline for filing redaction requests, and its trial brief, due its claim that it cannot cope with its *current* workload.⁷⁴ It is therefore reasonable to conclude that the amendment will only serve to

⁶⁹ ICC-01/12-01/18-365, para. 8.

⁷⁰ [REDACTED].

⁷¹ [ICC-01/04-01/07-1547-tENG](#), para. 23.

⁷² Cf *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-AR50, [Appeals Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004](#), para. 16: “The Trial Chamber should also consider such factors as (...) whether the Accused and the Trial Chamber had prior notice of the Prosecution’s intention to seek leave to amend the indictment, when and in what circumstances such notice was given, whether the Prosecution seeks an improper tactical advantage (...)”.

⁷³ *Prosecutor v. Delic*, [Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment](#), 13 December 2005, para. 62: “The closer to trial the Prosecution makes its motion seeking leave to amend, the more likely it is that the Trial Chamber will deny the motion on the ground that to grant leave to amend would cause unfair prejudice to the accused by, for example, depriving him of an adequate opportunity to prepare an effective defence.”

⁷⁴ ICC-01/12-01/18-552-Conf-Exp; ICC-01/12-01/18-609-Red, para. 7: “L’Accusation a une masse de travail considérable.”

further impede the Prosecution's ability to adhere to the schedule established by the Trial Chamber.

36. The fact that the Prosecution has now disclosed the materials relied upon for the amendment also does not cure the related prejudice caused by such late disclosure: as underlined by the ICTR Appeals Chamber:⁷⁵

[t]he fact that the expansion of counts charged may be derived from material already disclosed to the Accused also does not automatically nullify prejudice to the Accused. It is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges.

37. The Prosecution also requested, and obtained authorisation to withhold the identities of the underlying witnesses.⁷⁶ This means that the Defence has not yet been able to commence effective investigations as concerns these incidents, and its ability to do so at a later point will be severely obstructed by the current travel restrictions (caused by the Coronavirus), Ramadan, and the need to address the already excessive backlog of materials that have yet to be disclosed in full. The Defence is already struggling to conduct investigations into the 2012 events, due to the conditions in Northern Mali, and the lack of a proper safety net for Defence team members.⁷⁷ The addition of 17 new incidents less than four months ahead of the trial would create an additional burden which the Defence cannot be expected to carry at this stage. Indeed, the same security and resource factors, that the Prosecution has relied upon to explain delays in the collection of statements, apply with even greater force as concerns Defence investigations. The Prosecution's proposal to call these witnesses at a later stage also does not cure this prejudice. The Defence does not have the resources and capacity to conduct investigations while simultaneously participating in the trial. Counsel also cannot obtain instructions from Mr. Al Hassan as concerns defence strategy, and the implications of waiving the right to silence on issues that might be raised through cross-examination, unless the Defence can finalise its review and investigation of the Prosecution case, before the commencement of the trial.
38. *Third*, the sought amendments are highly prejudicial because they reflect investigations that were directed towards the gathering of incriminating evidence, at the expense of

⁷⁵ *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-AR73, [Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005](#), 12 May 2005, para. 22.

⁷⁶ ICC-01/12-01/18-545-Red, paras. 20-30.

⁷⁷ ICC-01/12-01/18-T-011-CONF-ENG, p. 20-26.

the Prosecutor's enhanced duty to focus on exculpatory issues, at the post-confirmation stage. This is reflected by the fact that the Prosecution has disclosed 1783 incriminating items that were collected after the confirmation hearing, but only one such PEXO item.

39. It would also appear that the Prosecution is cherry picking the new elements that suit its theory of the case and seeking to amend the charges to the detriment of Mr. Al Hassan. For example, the recently obtained statement of [REDACTED]⁷⁸ clearly contradicts the evidence and the incidents related to [REDACTED], which the Prosecution has recognised.⁷⁹ The Prosecution has not, however, sought to remove, or modify the confirmed incidents regarding [REDACTED]. Similarly, the Prosecution has neglected to take into account [REDACTED],⁸⁰ or to the identity and affiliation of certain alleged perpetrators.⁸¹
40. This approach can only be prejudicial to the Defence, which must address a high number of new incriminating incidents, without being able to conversely benefit from newly acquired elements which undermine the confirmed charges.
41. *Fourth*, the requested amendments do not enhance the clarity of the existing charges or cure existing defects concerning the vague manner in which they were pleaded; to the contrary, the new incidents are undated, many fail to identify specific, named perpetrators, and the related pleadings do not establish the link between these incidents and the acts and conduct of Mr. Al Hassan. As recalled by the Defence ahead of the confirmation hearing,⁸² Regulation 52 of the RoC provides that the DCC must include "a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court".
42. The Prosecution nonetheless uses unacceptably vague language, as regards the time of the alleged commission of 16 new allegations:
 - a. Request, para. 30: "Victim [REDACTED] was arrested during the period of the occupation in 2012-2013 by members of the Group..."
 - b. Request, para. 34: "[REDACTED] heard from [REDACTED] that during the occupation by the Groups in 2012-2013..."

⁷⁸ ICC-01/12-01/18-T- (19 October 2019).

⁷⁹ ICC-01/12-01/18-487-Conf-Exp-Red, para. 7.

⁸⁰ [REDACTED].

⁸¹ See for example, ICC-01/12-01/18-647-Conf-Red, [REDACTED].

⁸² ICC-01/12-01/18-394-Conf, para. 9.

- c. Request, para. 36: “During the occupation in 2012 to 2013, [REDACTED] was arrested and imprisoned by the Groups...”
 - d. Request, para. 43: “[REDACTED] describes [REDACTED] that took place after the arrival of the Islamists and before the victimisation of [REDACTED].”
 - e. Request, para. 45: “During the 2012-2013 occupation...”
 - f. Request, para. 47: “[REDACTED] was living in Timbuktu, and describes a number of victims of crimes perpetrated during the 2012-2013 occupation by the Groups.”⁸³
 - g. Request, para. 52: “During the occupation in 2012-2013...”
 - h. Request, para. 63: “The two victims described below were arrested, imprisoned and raped by members of the Groups during the occupation in 2012-2013.”⁸⁴
43. The Prosecution has been investigating the *Al Hassan* case for several years. It is therefore impermissible and unduly prejudicial to retain language, which would allow the Prosecution to place its alleged incidents in time as it sees fit, within the vague 2012-2013 temporal scope. Although it might not be possible to provide an exact date for each incident, “in accordance with regulation 52 of the Regulations, each specific incident should be dated as precisely as possible”.⁸⁵
44. The new allegations are also vague as concerns the identity of the alleged perpetrators, who are described using unspecific phrases such as “members of the Groups”,⁸⁶ “armed men”,⁸⁷ or “Islamists”.⁸⁸ This, combined with the vagueness of the time of the alleged crimes, renders it impossible to determine which, of the many armed groups who were present at one time or another in 2012-2013, could have perpetrated the alleged offences. The lack of any identifying information concerning the individual perpetrators in several new allegations further impedes the Defence from establishing – one way or the other – whether Mr. Al Hassan could have known of the alleged incidents, and whether his particular role in the common plan contributed to the conduct of the perpetrators.
45. The above errors of vagueness cannot be cured at trial: if a material fact is confirmed in a vague or ambiguous manner, the Prosecution cannot subsequently correct this error, but must proceed to trial on this basis.⁸⁹ To hold otherwise would, improperly, allow

⁸³ This applies to Allegations 4 to 11 listed in Annex D of the Request.

⁸⁴ This applies to Allegations 15 and 16.

⁸⁵ [ICC-01/05-01/08-424](#), para. 68.

⁸⁶ Request, paras. 30, 34, 64, 71.

⁸⁷ Request, paras. 31, 65.

⁸⁸ Request, paras. 32, 36, 37, 40, 43, 45, 54, 61, 70.

⁸⁹ [ICC-01/04-01/07-1547-tENG](#) at para. 19.

the Prosecution to either mould its case to fit the evidence,⁹⁰ or, rewrite the confirmed scope of Article 74 of the Statute and trial proceedings at the ICC.⁹¹

E. *The proposed incidents do not fulfil the elements of the offences*

46. The Defence incorporates by reference its position that even if the Prosecution could establish the existence of a non-international armed conflict taking place in Mali in 2012-2013, it has failed to demonstrate the required nexus between the charged conduct and incidents, and the NIAC in question.⁹² The new allegations suffer from the same defect. The Prosecution fails to demonstrate that these new allegations are “closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict” and that as such, these acts were committed in the context of the armed conflict to which humanitarian law applies. The Prosecution has also failed to tie these discrete, discombobulated events to an organisational policy or a widespread or systematic attack against the civilian population.
47. In terms of the underlying elements of the offences, the alleged facts underpinning Allegations 1-3, 5-10 and 12 (as numbered in Annex D) give no indication that would suggest the issuance of a conviction or sentence,⁹³ as required for inclusion under Count 6. None of these allegations contain any suggestion that the alleged victims were brought before a judge, or that a court/judge-imposed sentence was carried out against them.
48. Similarly, new Allegations 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, and 15 hinge upon the arrest and detention of alleged victims. However, the allegations, as formulated, are impermissibly vague as concerns the length and conditions of detention,⁹⁴ and, taken at

⁹⁰ [ICC-01/04-01/07-1547-tENG](#), para. 23: “it is incumbent upon the Prosecutor to present, during the pre-trial phase, all of the facts and circumstances relating to his case. To hold otherwise would be to call into question the very purpose of a pre-trial phase, at the close of which the charges are fixed and settled. Such a solution would, moreover, render useless the months of work devoted by the Pre-Trial Chamber to preparing the case for trial and, to a large extent, would make it pointless even to hold a confirmation hearing where evidence is presented, and at the close of which the trial is supposed to commence. As the ad hoc international criminal tribunals have stressed, the Prosecutor “is expected to know [his] case before it goes to trial. It is not acceptable for the Prosecut[or] to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.””

⁹¹ [ICC-01/04-01/06-2205](#), paras. 89-93; [ICC-01/04-02/12-3-tENG](#), para. 14.

⁹² ICC-01/12-01/18-394-Conf, paras. 123-137.

⁹³ Cf ICC-01/12-01/18-461-Corr-Red, paras. 358-359.

⁹⁴ Preventative, or pre-conviction detention is not in and of itself unlawful, and is not tantamount to either a sentence or a conviction (cf Request, paras. 34-35).

their highest, do not appear to fulfil the required elements of the crimes charged under Counts 2,⁹⁵ 4⁹⁶ and 5⁹⁷ of the DCC.

49. In Allegation 4, the Prosecution fails to demonstrate that the alleged facts meet the threshold necessary to charge them under Counts 2,⁹⁸ 4,⁹⁹ 5¹⁰⁰ and 13¹⁰¹ of the charges. The mere fact that [REDACTED] was arrested [REDACTED], which is a crime under any national jurisdiction, would not constitute persecution, inhumane acts or cruel treatment. The threat aspect of the allegation also cannot fulfil this threshold.
50. As concerns Allegation 17, the Prosecution fails to address the fact that in sanctioning [REDACTED], the report and judgement were fully compatible with applicable Malian law, which penalises [REDACTED] under the Malian Penal Code.¹⁰² The sentence imposed by the Islamic Tribunal judgment, [REDACTED],¹⁰³ is considerably milder than the sentence imposed under Malian criminal law. The addition of [REDACTED] as a victim in the present case therefore appears unjustified, and in any case, has no nexus to an armed conflict.
51. Finally, the Defence maintains, as argued at the pre-confirmation phase,¹⁰⁴ that the manner in which the Prosecution has framed the incidents charged under Count 13 (persecution) is impermissibly vague, and fails to disclose a clear link to criminal acts falling under Articles 7 and 8 of the Statute. This continues to hold true for all 17 new allegations, which fail to rise to the level of a crime against humanity, which would attract individual criminal responsibility under the Rome Statute.

F. The Prosecution has failed to satisfy the requisite evidential threshold

52. Finally, the Defence notes that the following allegations are not sufficiently substantiated on the available evidence:¹⁰⁵

- **Allegation 1:** the sources for this allegation are problematic: the witness statements either come from an anonymous witness, or do not identify the victims; the evidence is

⁹⁵ “The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.”

⁹⁶ “The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.”

⁹⁷ “The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.”

⁹⁸ “The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.”

⁹⁹ “The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.”

¹⁰⁰ The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.

¹⁰¹ “The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.”

¹⁰² [REDACTED].

¹⁰³ ICC-01/12-01/18-625-Conf-Red, para. 75.

¹⁰⁴ ICC-01/12-01/18-394-Conf, paras. 31-37.

¹⁰⁵ Annex C.

heavily redacted or based on hearsay and/or partial knowledge. Other sources are of low probative value, such as media reports.

- **Allegations 2 and 3** are based exclusively on hearsay, as recounted by [REDACTED], an anonymous witness. The relevant paragraph in [REDACTED]'s statement is also heavily redacted. No other cited evidence corroborates these alleged incidents.
- **Allegation 4** is based exclusively on hearsay, as recounted by [REDACTED]. No other cited evidence corroborates the alleged incident. In addition, the relevant paragraphs of [REDACTED]'s statement are heavily redacted, and relate to events, which allegedly concern an anonymous victim. The Defence was only disclosed the identity of [REDACTED] on 6 March 2020,¹⁰⁶ thereby rendering any investigation of this allegation impossible for the purposes of the present response.
- **Allegation 7:** the source of the witness's knowledge is unclear, but seems to be based on partial knowledge and hearsay, as recounted by [REDACTED]. The allegation concerns an unidentified and anonymous alleged victim, and the relevant paragraphs are heavily redacted. No other cited evidence corroborates this alleged incident.
- **Allegation 8** concerns an anonymous alleged victim; the two witness statements cited in support of this allegation contradict each other as concerns [REDACTED]'s knowledge.
- **Allegation 9** concerns an anonymous alleged victim, and is based on [REDACTED]'s partial knowledge. No other cited evidence corroborates this alleged incident.
- **Allegation 10** concerns an anonymous alleged victim. No other cited evidence corroborates this alleged incident.
- **Allegation 11** is based on facts, which do not constitute criminal behaviour, as recounted by [REDACTED]. No other cited evidence corroborates these alleged incidents.
- **Allegation 13** is based on partial knowledge and hearsay, as recounted by [REDACTED]. The alleged events concern an anonymous and unnamed victim. No other cited evidence corroborates this alleged incident.
- **Allegation 14** concerns anonymous and unnamed victims. No other cited evidence corroborates this alleged incident.
- **Allegations 15 and 16** are largely based on the hearsay of [REDACTED] and concern anonymous victims; redactions applied to the cited evidence do not allow the Defence to ascertain whether they concern the same alleged victims.

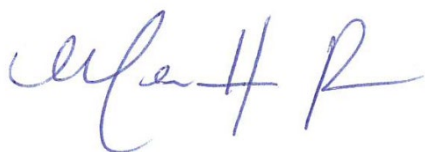
IV. Conclusion

53. For these reasons, the Defence respectfully requests the Pre-Trial Chamber to dismiss the Prosecution Request in its entirety.

¹⁰⁶ INCRIM package 57.



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Dated this 16th Day of March 2020
At The Hague, The Netherlands