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December 2020**

**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**

**With confidential *ex parte* Annex A [Prosecution and Defence]**

**URGENT**

**Corrigendum to ‘Public redacted version of ‘Urgent Defence request for disclosure’  
(ICC-01/12-01/18-829-Conf)’**

**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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**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

## **I. Introduction**

1. For approximately a year, the Defence has requested the Prosecution to disclose key documents and information that relate to the Prosecution's knowledge and complicity in Mr. Al Hassan's arrest, detention, and mistreatment in Mali ('the Requested Information').<sup>1</sup> The Defence has provided the Prosecution with specific dates, and descriptions of the Requested Information, and, notwithstanding the absence of any Statutory obligation to do so, has provided concrete justifications as concerns the factual and legal basis for disclosure.
2. After much correspondence and the Prosecution repeatedly responding to such requests by merely stating that it would communicate "all disclosable material", it is now clear that, in the absence of a judicial ruling, the Prosecution will not disclose the Requested Information.
3. The Requested Information falls squarely within the parameters of Article 67(2) of the Statute. The Prosecution has also adduced no security or protection reasons for withholding disclosure and has in fact disclosed this information in connection with other documents in this case. The Prosecution's refusal to disclose the Requested Information also generates concrete prejudice as concerns the ability of the Defence to establish specific facts that are of direct relevance to the Defence Termination Request.
4. The Defence therefore respectfully requests the Single Judge to order the Prosecution to disclose the Requested Information, on an urgent basis. Should disclosure not be possible for national security or witness protection issues, the Prosecution should be ordered to adduce relevant admissions of fact in lieu of disclosure.

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<sup>1</sup> See para. 5 below, and ICC-01/12-01/18-827-Conf-Exp, pp. 9-13.

## II. Submissions

### *The Requested Information falls within the scope of Article 67(2) and/or Rule 77 of the Statute*

5. Rather than disclosing correspondence, or contemporaneous minutes, contact logs, or investigators notes as concerns its contacts with national authorities (including the DGSE) in relation to Mr. Al Hassan, the Prosecution disclosed one note, drafted on 1 May 2020, which lists the dates of such contacts or correspondence, and provides only a very cursory summary of the content.<sup>2</sup> The name of [REDACTED] (which is unredacted in other investigators' notes), is redacted from this one. The Prosecution adopted the same approach as concerns the disclosure of requests pertaining to its access to the alleged Facebook accounts of Mr. Al Hassan [REDACTED].<sup>3</sup> The disclosed notes omitted key details, including as concerns whether the Prosecution had direct or indirect access to DGSE or Barkhane files concerning Mr. Al Hassan [REDACTED] before or during its interviews with Mr. Al Hassan. The Defence therefore requested the Prosecution to disclose the following documents, particulars, and information ('the Requested Information'):

- The minutes of the meeting between the ICC investigations, and the DGSE [REDACTED], on [REDACTED] 2017, which concerned [REDACTED] Mr. Al Hassan, and the lifting of the redaction concerning the name of [REDACTED];
- The Mali Request for Assistance ('RFA') of [REDACTED] concerning the modalities of interviews [REDACTED];
- The Mali RFA of [REDACTED] concerning Prosecution requests to receive personal data and DGSE [REDACTED] Mr. Al Hassan, and related follow up requests;
- The French RFA [REDACTED] to access private data and evidence obtained by Barkhane concerning Mr. Al Hassan, related follow up requests, and the French response dated [REDACTED];

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<sup>2</sup> [REDACTED].

<sup>3</sup> [REDACTED].

- Information as to whether the Prosecution interviewed or requested to interview, obtained information, requested to obtain information, or interviewed persons in relation to [REDACTED]; and
- RFAs to Ireland, and requests to Facebook to obtain access to the Facebook accounts of Mr. Al Hassan [REDACTED].

6. These items fall squarely within the Prosecution’s disclosure obligations.

*a), b), and c): The minutes of a meeting between the ICC investigators, and [REDACTED], which concerned [REDACTED] Mr. Al Hassan, the lifting of the redaction concerning the name of [REDACTED], the Mali RFAs [REDACTED], and [REDACTED], and follow up requests*

7. The Defence has consistently informed the Prosecution that information concerning the date on which the Prosecution first obtained either direct or indirect access to interview records concerning Mr. Al Hassan, is of material relevance to the Defence, since it allows the Defence to determine whether the information would have informed the Prosecution interviews with Mr. Al Hassan. For this reason, the Defence cannot rely on chain of custody information stored in the Court’s electronic disclosure system<sup>4</sup>, as there may be a difference between the date on which materials were communicated to the Prosecution through formal channels, as compared to the date on which the Prosecution was first briefed in relation to the contents of the materials through verbal discussions or ‘screening’ in situ. The Defence has thus underlined the importance of obtaining full contemporaneous minutes/contacts logs, and any Prosecution correspondence that refers to the content of such materials.<sup>5</sup>

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<sup>4</sup> E.g. Ringtail metadata.

<sup>5</sup> Annex A, Email of 10 May, where the Defence indicated that the Prosecution’s “claim that “Concernant par ailleurs ‘the link between the collection of [...] information by domestic authorities & OTP investigation of AH’”, cela peut être fait par les métadonnées des documents communiqués” fails to address or satisfy the basis for this request. As set out in the table (see row 2.3), the Defence needs to have access to the specific point in time where the Prosecution first had access to the content of information collected by national authorities in relation to the detained individuals, through interrogations/surveillance conducted by such authorities. This access can of course include information provided through ‘screenings’ and verbal briefings. This access would then have informed subsequent requests to have formal access to certain data, which will have then been conveyed through formal channels. The ringtail metadata will only reflect the date on which the Prosecution received the latter records, and not the date on which the Prosecution first had access to the information in question.”

See also Email of 28 April 2020, where the Defence requested the following:

8. Apart from the fact that the Prosecution has refused to disclose these materials, the investigators' note, which summarises these materials, has been drafted in such a vague manner that it is not possible to pin-point these key dates concerning the exchange of information, and the content of such exchanged information.
9. Specifically, only four days after the Prosecution met with [REDACTED], the Prosecution filed [REDACTED].<sup>6</sup> The investigator's note does not, however, contain any detail as concerns the [REDACTED]. Moreover, although the investigator's note states that the "note d'entretien" was later received and disclosed to the Defence, it does not specify whether this note, and its contents, were discussed during any meetings with the DGSE, including [REDACTED].
10. There are, moreover, grounds to believe that the Prosecution [REDACTED] during this meeting. This is consistent with the fact that:
  - The Prosecution accessed [REDACTED];<sup>7</sup>
  - On [REDACTED];<sup>8</sup>
  - The Prosecution clearly had sufficient information concerning the existence and content of the "note d'entretien" to submit a formal request for its transmission; and
  - On [REDACTED] 2018, Prosecution investigators informed Mr. Al Hassan that "based on the evidence that we have ... uh ... collected during our investigations and what you told us", they had grounds to believe that he might be responsible for [REDACTED]:<sup>9</sup> an assertion that implied that they had obtained information on this point from sources other than Mr. Al Hassan.

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In order to facilitate timely Defence investigations, the Defence further requests the Prosecution to specify, for such information, if the Prosecution is not in possession of the requested information because:

- A) the Prosecution never sought access to it;
- B) the Prosecution gained access to the information, but did not seek to obtain copies of the records/information/data in question; or
- C) the information provider refused to provide access.

<sup>6</sup> ICC-01/12-45-Conf-Exp, para. 19.

<sup>7</sup> See for example, [REDACTED], which refers to the [REDACTED] presenting to the Prosecution a '*Synthèse de briefing*' concerning [REDACTED] (which has never been disclosed to the Defence).

<sup>8</sup> [REDACTED].

<sup>9</sup> [REDACTED].

11. Similarly, even if the Prosecution did not receive particular materials pursuant to [REDACTED]RFA, the Defence has a direct interest in knowing:
  - Which materials were requested by the Prosecution; and
  - The basis for the Prosecution’s belief that such materials existed, and were relevant to its ongoing investigation
12. On the one hand, even if the Malian authorities did not transmit certain materials, it is still possible that Prosecution was made privy to their contents, or provided a description of their contents, before the RFA was sent. There are, indeed, examples where the Prosecution reviewed domestic interrogations notes during such meetings, without requesting the formal transmission of the information in question.<sup>10</sup> The specific manner in which the items are described in the RFA will clearly illuminate this point, and thereby assist Defence preparation within the framework of Rule 77.<sup>11</sup>
13. On the other hand, the fact that the Prosecution considered these items to be relevant to its investigation of Mr. Al Hassan also means that they will be relevant to the preparation of his Defence: the description set out in the RFA would facilitate the ability of the Defence to formulate its own requests to the Malian authorities, or, depending on the particular response of the Malian authorities, provide a basis for the Defence to ask the Chamber to draw certain inferences as concerns information that was not provided to the Prosecution. To give a concrete example, if the Malian authorities claimed verbally that they had certain evidence or sources as concerns Mr. Al Hassan’s [REDACTED], and yet failed to adduce such evidence or sources, then their failure to do so would provide a basis to draw inferences as concerns the reliability of these initial claims, and the extent to which the Court can safely rely on similar claims made by the Prosecution.
14. Given that Mr. Al Hassan notified the Prosecution, on 13 July 2017, that he had been interrogated, tortured, and threatened by the DGSE that they would kill him unless he

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<sup>10</sup> As reflected by the fact that the Defence has not received the [REDACTED] “*Synthèse de briefing*” concerning [REDACTED] and [REDACTED], which was screened by the Prosecution.

<sup>11</sup> Given the low threshold for disclosure, and the fact that “the defence is at a disadvantage in being able to make a case given its inability to access the withheld information” ([ICC-02/11-01/15-915-Red](#), para. 1), the likelihood that the contents would address an issue that is relevant to Defence preparation is sufficient.

told the ‘truth’, it is also necessary for the Defence to receive disclosure of the [REDACTED] RFA (and related follow-up correspondence) so that the Defence can establish the purpose for which the Prosecution was seeking assistance: that is, whether the Prosecution was seeking access so that it could rely on the contents of the materials to further its investigations and interviews of Mr. Al Hassan as a suspect, or doing so for the purpose of investigating and documenting the existence of torture [REDACTED]. By the same token, disclosure of the [REDACTED] RFA (and related follow-up correspondence) is necessary so that the Defence can ascertain whether the Prosecution requested or obtained any assurances concerning the origins of the information, and the manner in which it was obtained. These details are, in turn, directly related to the overarching issue as to whether the Prosecution’s reliance on information and assistance provided by the DGSE amounts to complicity in torture or cruel and inhumane treatment.<sup>12</sup> And finally, given the inhumane conditions of Mr. Al Hassan’s detention at the DGSE, the contents of the RFA are relevant to the issue of whether the Prosecution progressed its investigation of Mr. Al Hassan, and requested his ICC arrest, with sufficient diligence.

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<sup>12</sup> See email of 10 May 2020, where the Defence informed the Prosecution that the Requested Information was “relevant to a pending Defence application to terminate the proceedings due to the Prosecution’s reliance on a) information and evidence obtained from individuals, who had been subjected to torture/cruel and inhumane treatment, and b) cooperation from entities that were involved in torture/cruel and inhumane treatment.”

See also ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’, 4 February 2009, [A/HRC/10/3](#), paras. 54-55:

54. *The Special Rapporteur is concerned about the participation of foreign agents in the interrogation of persons held in situations that violate international human rights standards. The difference that some Governments make between intelligence and law enforcement personnel is of limited relevance, as the active participation through the sending of interrogators or questions, or even the mere presence of intelligence personnel at an interview with a person who is being held in places where his rights are violated, can be reasonably understood as implicitly condoning such practices. The continued engagement and presence of foreign officials has in some instances constituted a form of encouragement or even support. In the view of the Special Rapporteur, the responsibility of the receiving State may be triggered also by even more passive and geographically distant forms of creating a demand for intelligence information obtained through internationally wrongful means. Therefore, the Special Rapporteur believes that the active or passive participation by States in the interrogation of persons held by another State constitutes an internationally wrongful act if the State knew or ought to have known that the person was facing a real risk of torture or other prohibited treatment, including arbitrary detention.*

55. *The Special Rapporteur emphasizes that not only active participation in interrogations where people are tortured would constitute a violation of human rights law, but also taking advantage of the coercive environment. At a minimum, States which know or ought to know that they are receiving intelligence from torture or other inhuman treatment, or arbitrary detention, and are either creating a demand for such information or elevating its operational use to a policy, are complicit in the human rights violations in question. The Special Rapporteur believes that reliance on information from torture in another country, even if the information is obtained only for operational purposes, inevitably implies the “recognition of lawfulness” of such practices and therefore triggers the application of principles of State responsibility. Hence, States that receive information obtained through torture or inhuman and degrading treatment are complicit in the commission of internationally wrongful acts. Such involvement is also irreconcilable with the obligation erga omnes of States to cooperate in the eradication of torture.*



15. As concerns the [REDACTED] RFA, given the existence of credible, open source allegations concerning the existence of systematic torture and extra-judicial killings in Bamako prisons (in particular, in relation to Tuaregs, accused of being ‘terrorists’),<sup>13</sup>

<sup>13</sup> Amnesty International, [‘Mali: new briefing exposes ‘appalling’ human rights abuses in Bamako detention centres’](#), 7 June 2013: “Amnesty’s delegates, who have just returned from a lengthy visit to Mali, have been able to speak to more than 80 of the 200 detainees held in the capital Bamako, most of them charged with acts of terrorism and other offences. Many of the detainees said they had been tortured or ill-treated and some were reportedly denied medical treatment. A number of them had marks and scars of burnings and cuts - including on their backs, chests and ears. At least five detainees died in the facility in April, most of them apparently as a result of the appalling conditions of detention and lack of medical care.

For example, Akassane Ag Hanina was arrested in the city of Timbuktu and taken to Bamako’s Maison centrale d’arrêt on 4 April, where he died seven days later. Before his death, he told other detainees he had been beaten up by the military in Timbuktu. One of Ag Hanina’s co-detainees told Amnesty: “He told the prison guards that he was ill but never got any medical treatment. The night before he died, we asked for help, but no one came until the morning. When they arrived, he was dead.”

When Amnesty visited the detention centre, several child soldiers, some as young as 13 years old, were being held with adults. The authorities in Mali recognised that some human rights violations had been committed and said a number of cases were being investigated, but so far no one has been brought to justice.

Amnesty is also concerned that the French military, as well as West African (AFISMA) troops - including forces from Chad and Niger - have handed over prisoners to the Malian authorities when they knew or should have known the detainees were at real risk of being tortured or ill-treated.

Amnesty International researcher Gaëtan Mootoo said:

“The Malian security forces’ human rights record since January is, simply, appalling. They continue to violate human rights with apparently no fear of being held accountable.

“Ensuring that all those responsible for human rights abuses face justice will not be an easy task, but it’s the key to a lasting stabilisation and rebirth of a country torn apart for more than 18 months.

“In the run up to the deployment of the UN Stabilisation Mission in Mali, it is essential to ensure that the Malian army and any other armed forces respect and protect human rights so people living in the north of the country can be reassured they will be safe.”

Extra-judicial

killings

Mohamed Lemine and Mohamed Tidjani were arrested by the Malian security forces on 28 January, the day the French and Malian armies entered the city of Timbuktu.

Their bodies were found a few days later and a relative told Amnesty: “Both wore the same clothes and shoes they had on the day of their arrest, Mohamed Lemine had a white boubou [robe] and black trousers while his friend was wearing a boubou. We preferred not to displace the bodies and recovered the tomb with sand.””

Human Rights Watch, [‘Mali: Two Torture Victims Die in Detention: Investigate Deaths, Improve Central Prison Conditions’](#)

Two ethnic Tuareg men who had been arrested on February 15, 2013, and tortured by Malian soldiers in the town of Léré, Timbuktu region, have died in detention at the Central Prison in Bamako.

Human Rights Watch had interviewed and documented the torture inflicted on seven men, including the two who died, in a [March 26](#) news release. They had been transferred on March 5 to Gendarme Camp 1 in Bamako, where they received some medical attention. In late March, they were transferred to the Central Prison in Bamako.

“The Malian government’s failure to investigate the torture of the seven men is made all the worse by the death of two of them in prison,” said [Corinne Dufka](#), senior West Africa researcher at Human Rights Watch, who interviewed the men before their transfer to the central prison. “These men are the most recent to perish in custody on account of severely substandard conditions. The government needs to take concrete action to improve both treatment and conditions for all its detainees.”

People who knew the two men told Human Rights Watch that they died during the night of April 6 and 7 as a result of excessive heat, possibly combined with the injuries from their earlier mistreatment. The torture may have left them vulnerable to rapid deterioration. While detained by the army, one of the deceased had been injected with a caustic substance, and had suffered a fractured rib and burns on his back. However, one person who knew them said that, “When they left the gendarmerie, the men’s health was improving.”

A person who spoke with several of the detainees in prison in late March, said the seven men were detained in a small room with no ventilation, and had complained about the excessive heat both in the daytime and at night. March through May are the warmest months in [Mali](#); the average temperature in Bamako during these months is over 100 degrees Fahrenheit (38 degrees Celsius). Temperatures within an enclosed room without ventilation

the Prosecution either knew, or had reason to know that detained individuals (particularly those associated with ‘terrorist groups’) were at risk of torture. The Defence has a direct interest in ascertaining whether the Prosecution requested, and obtained sufficient assurances concerning the modalities of interviews [REDACTED], in order to ensure that its participation in such interviews would not amount to complicity in torture/cruel and inhuman treatment, or otherwise create potential risks for the detained individuals in question.

16. Regarding the name of [REDACTED], there is no basis for redacting this name, particularly given that the Prosecution has disclosed the name of [REDACTED], [REDACTED], and the [REDACTED] and [REDACTED].<sup>14</sup> Once again, the identity of this individual is relevant to the issue as to whether the Prosecution took sufficient measures to ensure that its reliance on his assistance (and information provided by him), did not condone or amount to complicity in torture, or otherwise place [REDACTED] at risk.
17. In sum, the Requested Information, as set out in a), b), and c) above, falls within Mr. Al Hassan’s right to access information that concerns the ICC Prosecution’s reliance on information and assistance from a detaining authority, that was publicly, and credibly accused of engaging in systematic torture, including in particular, of the category that Mr. Al Hassan fell within. The Requested Information is relevant to the admissibility of Mr. Al Hassan’s statements (including the Prosecution’s reliance on the statements for the purposes of justifying Mr. Al Hassan’s detention, his monitoring, and protection measures in this case),<sup>15</sup> and the broader issue as to

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would drive this temperature considerably higher. The witness quoted one of the detainees who later died as saying: “If we are not moved from that room, all of us are going to die from the heat.” The witness said that the remaining five men were moved on April 9 to a room with improved ventilation.

The army had detained and tortured the seven Tuareg men between the ages of 21 and 66 in Léré on February 15 on suspicion of their support for armed Islamist groups. In interviews with a Human Rights Watch researcher on March 20, the seven described being severely beaten and kicked, burned, injected with a caustic substance, and threatened with death while in army custody. One said he was subjected to simulated drowning akin to “waterboarding.” Another went blind in one eye after being clubbed in the face with a gun butt, while another had gone partially deaf after being kicked repeatedly in the head. The Malian army had retaken Léré in late January as part of a French-led offensive to recapture northern Mali from Islamist armed groups.

<sup>14</sup> [REDACTED].

<sup>15</sup> See [Garcia Alva v. Germany](#), para. 39; WGAD Guideline 13, [A/HRC/30/37](#), p. 18: “The detaining authority shall provide all relevant information to the judge, the detainee and/or his or her lawyer. Disclosure is to include exculpatory information, which includes not only information that establishes an accused person’s innocence but also other information that could assist the detainee, for example, in arguing that his or her detention is not lawful or that the reasons for his or her detention no longer apply.” See also al Baluchi, [A/HRC/WGAD/2017/89](#), para. 56: “The Working Group is particularly concerned that information regarding

whether the Prosecution's conduct, and reliance on DGSE co-operation, amounts to an abuse of process.<sup>16</sup> The relatively low threshold for disclosure is clearly satisfied.<sup>17</sup>

18. Apart from the fact that duplication is not, in itself, a basis to withhold disclosure,<sup>18</sup> the Requested Information is also not captured by other Prosecution evidence. None

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the alleged torture of Mr. al Baluchi under the Agency programme has not been provided to his lawyers. This is potentially exculpatory material in the capital charges against Mr. al Baluchi if it indicates that statements made by him were not voluntary. This information is also necessary for the investigation of alleged acts of torture upon Mr. al Baluchi and for the provision of physical and psychological rehabilitation to him for those acts." Prompt disclosure of evidence of torture is directly related to the "right to the truth" (and the right to an effective investigation): *Djamila Bendib v. Algeria*, Communication No. 376/2009 (CAT), paras. 6.6, 8; *El Masri v. Macedonia*, 39630/09, paras. 175, 191. See also al Baluchi, *A/HRC/WGAD/2017/89*, para. 56.

<sup>16</sup> Information that is relevant to an abuse of process application, including one based on the Prosecution's reliance on particular third parties, falls within Rule 77/Article 67(2): ICC-01/04-01/06-2434-Red2, paras. 30-34; 136-147. See also ICC-01/04-01/06-772, para. 42, which suggests that a diligent Defence Counsel should seek the assistance of the Chamber to obtain access to any correspondence/materials that would demonstrate the existence of concerted action between the Prosecution and national authorities, or, that the ICC Prosecution's investigations were influenced or otherwise benefited from the illegal actions in question. See also *Prosecutor v. Simic et al.*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', 18 October 2000, paras. 43-45, and para. 59, where the Chamber elaborated that: "The purpose of the Defence Motion is to secure certain information and documents, which the accused believes to be in the custody and control of SFOR, and which will assist him in his motions challenging the legality of his arrest. The main contention of both SFOR and the Prosecution in opposing this Motion is that the Motion should be dismissed because Todorovic is not entitled to the relief he seeks, even if his allegations were to be accepted. This argument proceeds on the assumption that the evidence is complete. That assumption is erroneous, as what Todorovic is seeking is further evidence from SFOR which will assist him to obtain the relief which he seeks. Only when Todorovic has had the opportunity to present all the available evidence will it be possible for the Trial Chamber to determine whether he is entitled to the relief he seeks." See also *Order of 8 March 2000*, in which the Trial Chamber requested the ICTY Prosecutor to disclose:

- a. Copies of all correspondence and all reports by SFOR relating to the apprehension of the accused, Stevan Todorovic, insofar as such correspondence or reports are in the control or custody of the Prosecution;
- b. the original or a copy of all audio and video tapes made by SFOR on 27 September 1998 of the initial detention and arrest of the accused, Stevan Todorovic, at the Tuzla Air Force base, if such tape is in the custody or control of the Prosecution;
- c. the original or a copy of all audio and video tapes made by the Prosecution on 26 or 27 September 1998 of the detention and arrest of the accused, Stevan Todorovic, at the Tuzla Air Force base;
- d. copies of all SFOR pre- and post-arrest operations reports relating to the arrest and detention of the accused, Stevan Todorovic, within the custody or control of the Prosecution;
- e. the identity, if known, of the individual or individuals who transported the accused, Stevan Todorovic, by helicopter to the Tuzla Air Force base, Bosnia and Herzegovina, on or about 26 and 27 September 1998;
- f. the identity, if known, of the individual or individuals who placed the accused, Stevan Todorovic, under arrest and who served the arrest warrant issued by the International Tribunal on the accused, Stevan Todorovic, on or about 28 September 1998; and
- g. the identity of the individual who represented the Office of the Prosecutor at the arrest of the accused, Stevan Todorovic, on or about 26 and 27 September 1998;

<sup>17</sup> *ICC-02/05-03/09-501*, para. 42: "the Appeals Chamber finds that any assessment of whether information is material to the preparation of the defence pursuant to rule 77 should indeed be made on a prima facie basis. This places a low burden on the defence. It is emphasised that rule 77 concerns material that the defence is entitled to have disclosed to it in order to prepare its defence. It may be that information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it. Yet, the defence is still entitled to this information on the basis of a prima facie assessment".

<sup>18</sup> *ICC-01/04-01/06-1401*, para. 60; In *ICC-02/05-03/09-501*, at para. 40, the Appeals Chamber noted that although the Trial Chamber might exempt the Prosecution from disclosure of duplicates if it would create a disproportionate burden for the Prosecution, "caution should be exercised intaking such an approach as it must

of the documents cited by the Prosecution address the extent to which the Prosecution had access to DGSE information and records concerning Mr. Al Hassan [REDACTED], and the specific point of investigations as to which the Prosecution first obtained such access. Nor do these documents address the issue as to whether, given the Prosecution's professed inability to intervene in Malian procedures, the Prosecution obtained guarantees or assurances in advance of their interviews as concerns the health (physical and medical) of Mr. Al Hassan, and the conditions that would apply to him during the course of their interviews with him.

19. The 'confidential' nature of the Requested Information is also not a sufficient basis to withhold disclosure. The Prosecution's investigation of Mr. Al Hassan is complete, and the Defence is aware of the existence of these meetings, RFAs, and correspondences. Conversely, given the relevance of the Requested Information to Defence preparation, even if there is a valid impediment to disclosure, there is a need for firstly, judicial authorization as concerns non-disclosure, and secondly, a remedy as concerns the consequences of non-disclosure through appropriate counter-balancing measures (such as admissions of fact). The Prosecution cannot simply withhold the Requested Information, and proffer a manifestly deficient summary instead.

*d) The French RFA of [REDACTED] to access private data and evidence obtained by Barkhane concerning Mr. Al Hassan, related follow up requests, and the French response dated [REDACTED];*

20. Operation Barkhane arrested and detained Mr. Al Hassan due to its belief that Mr. Al Hassan [REDACTED]. Mr. Al Hassan was questioned by French authorities repeatedly, both during his initial detention by Barkhane, and subsequently, while detained at the DGSE.
21. The ICC Prosecution questioned Mr. Al Hassan repeatedly in relation [REDACTED], and further informed him that his responses were relevant to its overall assessment of

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not undermine the paramount right of the defence to disclosure of all information material to the preparation of the defence." The question as to whether information is in fact an exact duplicate cannot be assessed by the Prosecution alone, as it may depend on the purpose for which the Defence intends to use the information: see [ICC-01/05-01/08-1594-Red](#), para. 23.

his credibility and truthfulness.<sup>19</sup> The Prosecution also indicated that it considered him to be a suspect, under the Statute, in respect to crimes related [REDACTED].<sup>20</sup> The Prosecution has since relied upon allegations concerning Mr. Al Hassan's [REDACTED]), and to demonstrate that Mr. Al Hassan is [REDACTED] who is a risk to witnesses [REDACTED].

22. Given the impact of these allegations on the proceedings against Mr. Al Hassan, the Defence has a clear interest in ascertaining:

- The factual basis for the allegation that Mr. Al Hassan [REDACTED], whether this 'evidence' was itself, obtained from a tainted source);
- The extent to which the ICC Prosecution took steps to independently investigate or verify the factual basis for the allegations that Mr. Al Hassan [REDACTED];
- The extent to which the Prosecution had direct or indirect access to information concerning Mr. Al Hassan, that was collected by Barkhane/French authorities [REDACTED]);
- The specific point in time of its investigations (and interviews with Mr. Al Hassan), where the Prosecution obtained direct or indirect access to information concerning Mr. Al Hassan, that was collected by Barkhane/French authorities during [REDACTED]);
- Whether the Prosecution had reason to believe that the French authorities were in possession of relevant information concerning Mr. Al Hassan (or particular items of evidence), that were not transmitted by the French authorities; and
- The reasons, if any, provided by the French authorities for not transmitting specific requested items concerning Mr. Al Hassan.

23. As was the case concerning the [REDCATED] Mali RFA, even if the Malian authorities did not transmit certain materials, it is still possible that Prosecution was made privy to their contents, or provided a description of their contents, before the RFA was sent. The specific manner in which the items are described in the RFA will

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<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

clearly illuminate this point. On the other hand, the fact that the Prosecution considered these items to be relevant to its investigation of Mr. Al Hassan also means that they will be relevant to the preparation of his Defence: the description set out in the RFA will enable the Defence to formulate its own requests to the French authorities, or, depending on the particular response of the French authorities, provide a basis for the Defence to ask the Chamber to draw certain inferences as concerns information that was not provided to the Prosecution. Indeed, given that the French authorities collected [REDACTED], the absence of evidence or information, or inability to furnish information or evidence is directly relevant to Defence preparation, and could form a basis for certain inferences of fact.

24. The same arguments concerning prejudice, and the absence of a valid basis to withhold the Requested Information, also apply. The Requested Information is also not captured in other disclosed materials.

*e) Information as to whether the Prosecution interviewed or requested to interview, obtained information, requested to obtain information, or interviewed persons in relation to Mr. Al Hussein Ag Assaleh*

25. On 5 March 2018, [REDACTED], Mr. Al Hassan informed the Prosecution that there was a [REDACTED], but Mr. Al Hassan said he didn't think [REDACTED] had such a link.<sup>21</sup> Mr. Al Hassan told the Prosecution before being brought to his cell, that [REDACTED] had been kept in chains [REDACTED], with no electricity or ventilation.<sup>22</sup> Mr. Al Hassan further informed the Prosecution that [REDACTED]'s arrest was due to [REDACTED].<sup>23</sup> [REDACTED] had also told Mr. Al Hassan that there had been a problem between Mr. Al Hassan's tribe and another two families, after Mr. Al Hassan's arrest, and [REDACTED] got involved.<sup>24</sup> [REDACTED] informed Mr. Al Hassan that the problem arose because Mr. Al Hassan was the chief of a CMA base, and their families were divided in two, some were in favour of the 'Platform' and others, the 'CMA',<sup>25</sup> and Mr Al Hassan had insisted that because there

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<sup>21</sup> [REDACTED].

<sup>22</sup> [REDACTED].

<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

had been a peace accord agreement in Algeria, each should rest in his position until the agreement had been executed. Others were not in agreement with this stance, there had been a verbal disagreement, and two months afterwards, Mr. Al Hassan was arrested. After Mr. Al Hassan's arrest, [REDACTED] there had been clashes, and fights, and as a result, [REDACTED].<sup>26</sup>

26. The information [REDACTED] is directly relevant to the basis for Mr. Al Hassan's arrest by Barkhane, and the reliability of allegations that Mr. Al Hassan [REDACTED]. Given that these allegations fell within the scope of the Prosecution's investigations and the Prosecution has continued to rely on these allegations, the Defence has a direct interest in establishing:

- Whether the Prosecution fulfilled its duty, under Article 54(1), to collect evidence or information that might be exculpatory or relevant to the truth, including which specific steps were taken by the Prosecution to investigate the information [REDACTED];
- If so, which specific information was obtained directly or indirectly (i.e. through verbal briefings); and
- If the Prosecution was unable to [REDACTED], the reason/s why this was the case (which is relevant to the question as to whether there might be a basis to certain inferences concerning the reasons why the Prosecution was denied access).

*f) RFAs to Ireland, and requests to Facebook to obtain access to the Facebook accounts of Mr. Al Hassan[REDACTED].*

27. If the Facebook account in question has been attributed to Mr. Al Hassan, then he is the data owner, and he has the right to access all documents and legal steps that led to the transmission of this data to the ICC Prosecution.<sup>27</sup> This is particularly the case since it appears that the Irish authorities relied on the existence and content of the RFA, and accompanying documentation (presumably provided by the ICC

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<sup>26</sup> [REDACTED].

<sup>27</sup> Rotaru v. Romania, 28341/95, paras. 70-71; Valenzuela Contreras v. Spain (58/1997/842/1048); Kruslin v. France (11801/85) para. 35; See also Digital Rights Ireland Ltd (C-293/12), para.54 (ECJ)).

Prosecution), to establish the legal and factual basis for access.<sup>28</sup> It is not possible for the Defence to analyse and potentially challenge the lawfulness of the Prosecution's access unless it obtains access to the RFA, and related accompanying documentation. Given that the Prosecution has included extracts from these accounts on its list of evidence, the Defence also has the right to obtain this information so that it can contest their admissibility. The Requested Information therefore falls squarely within the parameters of ICC case law concerning RFAs that are related to the legality of the collection of evidence.<sup>29</sup> Since the Prosecution communicated its initial request to a public Facebook portal,<sup>30</sup> there is also no basis for concluding that the contents are so sensitive that they cannot be disclosed to Mr. Al Hassan himself or his Defence.<sup>31</sup>

28. The particular wording of the RFA is also relevant to the question as to whether the Prosecution considered, in December 2017, that Mr. Al Hassan was the target of its investigation, and whether it possessed evidence supporting a reasonable suspicion that Mr. Al Hassan committed crimes under the Rome Statute. This information relates to the diligence of Prosecution investigations, bearing in mind the Prosecution's knowledge that Mr. Al Hassan was detained in conditions amounting to torture or cruel and inhumane treatment.

29. The Defence also has a direct interest in ascertaining the basis for attributing these accounts to Mr. Al Hassan. According to the Irish Production Order, the RFA (relied upon by the Irish authorities to grant the request) was dated [REDACTED].<sup>32</sup> It therefore followed a [REDACTED] BSQ interview where the Prosecution asked Mr. Al Hassan to provide personal details so that they could monitor his safety and security and that of his family. This included social media accounts.<sup>33</sup> Although Mr.

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<sup>28</sup> [REDACTED].

<sup>29</sup> It is 'imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them' [ICC-02/04-01/15-457](#), paras 13-14; [ICC-02/04-01/15-1161](#), para. 3; see also, [ICC-01/05-01/13-1234](#), para. 13;

Appeals Chamber, The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor's request for nondisclosure in relation to document "OTP/DRC/COD-190/JCCD-pt", 27 May 2013, ICC-01/04-01/06-3031, para. 12; Trial Chamber VII, The Prosecutor v. Jean-Pierre Bemba Gombo et al., Decision on Bemba Defence Request for Disclosure and Lifting of Redactions Related to Collection of Telecommunication Evidence, 17 February 2016, [ICC-01/05-01/13-1632](#), para. 20

<sup>30</sup> [REDACTED].

<sup>31</sup> The Prosecution has also accepted that Rule 81(1) does not apply to interactions with entities outside the Prosecution: [ICC-01/11-01/11-392-Red](#), para. 2; [ICC-02/04-01/15-462](#), fn. 36. For judicial decisions, see ICC-02/04-01/15-468, para. 1; [ICC-01/05-01/13-1658](#), para. 6; [ICC-01/05-01/13-1632](#), para. 19.

<sup>32</sup> Although the '13' appears to have been crossed and replaced with what could be a 7: [REDACTED].

<sup>33</sup> [REDACTED].



Al Hassan provided the details of two accounts, the Prosecution also obtained access to an additional account under the name of [REDACTED].<sup>34</sup> The Defence has a direct interest in ascertaining:

- The factual basis for the Prosecution’s belief that this third account was linked to Mr. Al Hassan or its investigations; and
- Whether the Prosecution relied upon information obtained from its [REDACTED] BSQ session to further its investigation of Mr. Al Hassan, including justifying its access to the Facebook accounts.

30. The first point concerns the reliability of allegations that Mr. Al Hassan (as opposed to other persons with similar names, who were involved in terrorist activities)<sup>35</sup> was communicating with, or working with particular armed groups at the time of his arrest. The second point is relevant to Prosecutorial conduct, and the extent to which the Prosecution exploited Mr. Al Hassan’s vulnerability, and situation as a detainee at the DGSE, to further its investigations, or otherwise acted in a manner which was inconsistent with Articles 54(1)(b) and (c), and Article 68(1) of the Statute, and the principles set out in the Istanbul Protocol as concerns interviews with detainees/torture victims.

### ***Timing of disclosure***

31. The Requested Information is directly relevant to the Defence Termination Request. The Defence has submitted a request to vary the deadline of this Request, such that, if granted, it will be due on 16 June 2020. It is therefore imperative that the Defence receives the Requested Information as soon as possible, and in any case, no later than 1 June 2020. In the event that this timing is not feasible, the Defence would then need to vary the deadline requested for the Defence Termination Request, such that it is due, no earlier than 14 days from the date on which the Requested Information is disclosed to the Defence.

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<sup>34</sup> [REDACTED].

<sup>35</sup> [REDACTED].

### III. Relief sought

32. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Single Judge to:

- Order the Prosecution to disclose the Requested Information on an urgent basis; and
- Make any necessary adjustments to the deadline for the Defence Termination Request.



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Melinda Taylor  
Lead Counsel for Mr. Al Hassan

Dated this 28<sup>th</sup> Day of May 2020  
At The Hague, The Netherlands