

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**
Date: **01 December 2021**
Date of submission: **28**
January 2022

TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

With Confidential Annexes A to G

Public Redacted Version of “Defence Consolidated Response to the LRVs’ Requests to Call Witnesses”, 1 December 2021, ICC-01/12-01/18-2022-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:

The Office of the Prosecutor

Karim A. A. Khan QC
Gilles Dutertre

Counsel for the Defence

Melinda Taylor
Kirsty Sutherland

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. The cardinal principles underlying victim participation at the ICC prescribe that evidence concerning the views and concerns of participating victims can be adduced only within the strict parameters of the charged incidents in this case.¹ The victim's procedural possibility to call evidence should not usurp the Prosecutor's primary role in establishing the responsibility of the defendant.² The introduction of such evidence must also be exercised in strict accordance with the defendant's statutory right to a fair, impartial and expeditious trial.³ Should the Chamber be minded to grant the Requests in whole or in part, then it is of paramount importance that the Defence is given full disclosure of information that impacts on the credibility and reliability of these witnesses and, further, afforded adequate time and facilities to investigate these new allegations.
2. Having carefully viewed the Requests submitted by the Legal Representatives for the Victims (LRVs) ('the Requests')⁴ through this regulatory prism, the Defence for Mr Al Hassan respectfully:
 - (i) Requests the Chamber to reject (a) unsubstantiated requests that fail to demonstrate a nexus to the charges⁵ or (b) requests in which the extent of the redactions impedes the Defence from being meaningfully heard on issues of prejudice;⁶
 - (ii) Opposes the introduction of evidence concerning persecutory acts against children, on the grounds that this falls outside the scope of the confirmed charges;
 - (iii) Opposes the request to call evidence based on hitherto undisclosed allegations pertaining to acts and conduct of Mr Al Hassan;
 - (iv) Opposes the request to call a/20455/19, on the grounds that her evidence and participation would constitute an impermissible vehicle for evading the

¹ [ICC-01/04-01/06-1432](#), paras 2, 93; [ICC-02/04-01/15-1199-Red](#), paras 57-59.

² [ICC-01/04-01/06-1432](#), para. 3; [ICC-02/04-01/15-1248](#), para. 13.

³ Articles 64(2), 67(1), and 68(3), in particular.

⁴ ICC-01/12-01/18-1922-Conf; ICC-01/12-01/18-1935-Conf; ICC-01/12-01/18-1942-Conf

⁵ [ICC-01/04-01/06-2032-Anx](#), para. 39.

⁶ [ICC-02/04-01/15-1021](#), paras 5-6.

requirements of notice and disclosure concerning the witnesses and victims linked to her evidence;

(v) Requests that the Chamber order the LRVs to adduce more concrete information concerning the qualifications and scope of expertise related to the proposed expert concerning the impact of trauma on women and children victims;⁷ and

(vi) In the event that the Requests are granted in whole or in part, requests the Chamber order that the LRV disclose:

i. The identities of their witnesses, and unredacted applications forms/accounts, at least 8 weeks before the commencement of the LRV case; and

ii. All other materials on a rolling basis, and no later than four weeks before the commencement of the LRV case.

(vii) Requests that the deadline for filing the Defence list of witnesses and exhibits be varied, such that it falls four weeks after the conclusion of the LRV case.

II. Confidentiality

3. Pursuant to Regulation 23bis(2) of the Regulations of the Court, this response has been filed confidentially as it responds to filings of the same classification. A public redacted version will be filed forthwith.

III. Submissions

General Observations Concerning the Degree of Victim Involvement in this Specific Case

4. The ICC Statute prescribes a possibility and not an absolute entitlement for victims to adduce evidence or to appear in person. This possibility must be regulated in accordance

⁷ ICC-01/12-01/18-1942-Conf, paras 24-34.

with the specific characteristics of the case in question. As explained by Trial Chamber II:⁸

The Chamber would point out that this is not a right, but a mere possibility granted to the victims, under certain conditions, in order to give full effect to the provisions of article 68(3) of the Statute, after having duly balanced their interests with those of the accused.⁹⁸ In this respect, the Chamber notes that, during the drafting of the Statute, proposals for the victims to be able to present evidence for the purpose of establishing the criminal responsibility of the accused via their legal representatives were not retained in the final version of the Statute.

5. The LRVs have been afforded substantial opportunities to adduce evidence throughout the investigation and prosecution of this case. Nonetheless, the Requests do not identify any areas of direct relevance to the confirmed charges in which the views and concerns of participating victims were not represented through the testimonial evidence presented thus far. The LRVs have played a significant role in investigation and prosecution of this case, and the identification of evidence and testimony presented during the Prosecution case. The introduction of additional evidence is unnecessary, and would be contrary to equality of arms and Mr Al Hassan's statutory right to notice and adequate time and facilities to prepare his case.
6. [REDACTED].⁹ [REDACTED].¹⁰ [REDACTED],¹¹ [REDACTED].¹² The Prosecution also consulted with Me Doumbia in relation to the identification of [REDACTED] witness [REDACTED],¹³ [REDACTED]. The LRVs have played a meaningful role in the manner in which the charges were formulated and prosecuted: in 2020 and 2021, the charges were amended¹⁴ [REDACTED].
7. Direct synergies also existed between Me Kassongo and the Prosecution's investigation of the facts and circumstances in this case. As recorded in [REDACTED], [REDACTED] linked with the events in Timbuktu in 2012, whose files were communicated to the

⁸ [ICC-01/04-01/07-1788-tENG](#), para. 52.

⁹ [REDACTED]. These complaints were linked to [REDACTED].

¹⁰ The Prosecution received the domestic complaints, and associated *procès-verbaux*, in May 2015: [REDACTED], in September 2015: [REDACTED], and in February and March 2016: [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ Trial Chamber X gave notice that the charges in relation to P-0542, P-0547, [REDACTED], P-0570 and P-0574 were subject to change in decisions on 17 December 2020: ICC-01/12-01/18-1211-Conf, 20 September 2021: ICC-01/12-01/18-1739-Conf, and 8 November 2021: ICC-01/12-01/18-1897.

Prosecution [REDACTED].¹⁵ Of the files received by the Prosecution, the Prosecution indicated that they were interested in the files of [REDACTED],¹⁶ and [REDACTED].¹⁷

8. The Prosecution recently confirmed that it will not be calling several witnesses,¹⁸ [REDACTED], presumably for reasons related to the need to streamline the proceedings and avoid duplicative evidence.¹⁹ As a result of late notice of this decision, the Defence has expended a significant amount of time and resources preparing for these specific witnesses. If the LRVs were to be authorised to call witnesses testifying on similar issues, the objective of streamlining and expediting the proceedings would be undermined. This would be compounded by the burden placed upon the Defence to commence preparations for new witnesses from ‘scratch’. The current situation therefore falls squarely within the scenario where such requests have been rejected as being overly duplicative.²⁰

The Chamber should reject unsubstantiated requests that fail to demonstrate a nexus to the charges²¹

9. It is incumbent upon the LRVs to demonstrate that their proposed evidence is anticipated to provide testimony that falls within the scope of the confirmed charges.²² Previous Trial Chambers have noted the necessity of limiting the scope of victim testimony in light of

¹⁵ [REDACTED].

¹⁶ The comments in this document note that the Prosecution indicated that it was interested in the files of [REDACTED].

¹⁷ [REDACTED].

¹⁸ Since 1 July 2021, the Prosecution has withdrawn a total of 14 witnesses [REDACTED].

¹⁹ [REDACTED].

²⁰ See Ntaganda, [ICC-01/04-02/06-1780-Red](#), para 19: “the Chamber notes that the Prosecution has called several witnesses who testified in relation to these events, and considers that it would not be appropriate to hear further testimony in relation to those areas.”

²¹ [ICC-01/04-01/06-2032-Anx](#), para. 39.

²² *Ongwen*, [ICC-02/04-01/15-1199-Red](#), paras. 55-59; *Ongwen*, [ICC-02/04-01/15-T-65-Red-ENG](#), p. 55, line 14 to p. 56, line 16; *Ongwen*, [ICC-02/04-01/15-1248](#), 26 April 2018, para. 13; *Lubanga*, [ICC-01/04-01/06-2032-Anx](#), para. 39: ‘In all the circumstances, these applicants have each demonstrated that the evidence they seek to present affects their personal interests and, in each instance, it is directly related to the charges brought against the accused. Therefore, they may give evidence.; This is reflected in the Single Judge’s recent decision (Annex A, p. 2), as well as reflected extensively in the jurisprudence of this Court: *Lubanga*, [ICC-01/04-01/06-2032-Anx](#), para. 43 (requiring ‘[a] witness statement or other comprehensive summary of the evidence that is to be given by each victim, together with their application forms (in full or with necessary redactions)’); *Katanga and Ngudjolo*, [ICC-01/04-01/07-1665-Corr](#), paras. 25-28 (requiring ‘a signed statement of the victim, containing a comprehensive summary of the testimony that is to be given by the victim’); *Bemba*, [ICC-01/05-01/08-2091](#), paras. 15-17 (requiring written statements); *Bemba*, [ICC-01/05-01/08-2220](#), 24 May 2012, para. 12 (requiring ‘the relevant portions of the ex parte annexes to the Chamber’s decisions on victims’ applications (see confidential Annex to the present Decision), less redacted versions of the victims’ application forms, and less redacted versions of the victims’ written statements’); *Gbagbo and Blé Goudé*, [ICC-02/11-01/15-205](#), paras. 30-31 (requiring ‘[a] witness statement and/or a detailed summary of the expected testimony’); *Ongwen*, [ICC-02/04-01/15-1021](#), 13 October 2017, paras. 5-6 (requiring ‘anticipated testimony summaries for all witnesses’).

the evidence already on the record,²³ and rejected the requested presentation of testimony that exceeds the scope of the charges.²⁴ The LRV have failed to satisfy this requirement due to:

- (i) The lack of necessary detail concerning the key jurisdictional aspects of the allegations that will be proffered by the victims in question; and
- (ii) The inclusion of witnesses who will testify in relation to uncharged allegations concerning children.

Lack of necessary detail

10. Contrary to the repeated clear instructions of the Chamber,²⁵ the list of potential witnesses furnished by Me Kassongo includes several individuals for whom there is insufficient information to determine whether the allegations fall within the parameters of the confirmed charges in this case. While a more lenient approach might have been adopted for victim participation, such an approach is wholly inappropriate as concerns the exceptional mechanism of introducing evidence of guilt or innocence outside the framework of Article 69, and has been found to be a basis for rejecting such requests.²⁶ Although Me. Kassongo has framed his Request in terms of presenting views and concerns rather than evidence, he is also characterizes them as ‘witnesses’: any expansion

²³ [ICC-01/04-02/06-1780-Red](#), para. 22 (*emphasis added*).

²⁴ [ICC-02/04-01/15-1199-Red](#), paras. 55-59 (*emphasis added*). See also [ICC-02/04-01/15-T-65-Red-ENG](#), p. 55, line 14 to p. 56, line 16, particularly: “[...] the LRV may not ask questions as the Prosecution bis, irrespective of whether the Prosecution elicited information on the same point or not. The Chamber will sustain objections if it determines that, for example, the LRVs are attempting to elicit evidence which aims to prove the elements of the crimes charged or Mr Ongwen’s role in their commission. However, the LRV may appropriately ask certain questions to witnesses about other matters which are relevant to the personal interests of the victims. This may include questions about harms which the witness personally suffered or harms of other victims which the witness observed. As always, the Chamber emphasises that objections will be received and resolved on a case-by-case basis” and [ICC-02/04-01/15-1248](#), para. 13: “In general, the role of the Legal Representatives and any evidence elicited by them serves a different purpose to that of evidence presented by the Prosecution. The Chamber reiterates that the burden of proof regarding the guilt of the accused lies with the Prosecution and therefore it is the role of the Prosecution, and not the Legal Representatives, to present, in principle, incriminating evidence. The Chamber further recalls the oral decision of 4 April 2017 on the scope of questioning permitted by the LRV, which applies equally to the Legal Representatives and the presentation of evidence by them (‘Oral Decision’). While the Chamber will decide the issue on a case-by-case basis, the Legal Representatives should not attempt to ‘elicit evidence which aims to prove the elements of the crimes charged or Mr Ongwen’s role in their commission’.”

²⁵ [ICC-01/12-01/18-1756](#), paras 5-6; Annex A, p. 2: [REDACTED]; Annex A, pp. 3-4: [REDACTED].

²⁶ [ICC-01/04-02/06-1780-Red](#), para. 28: “In light of the information provided by the LRV in its Request, and despite the additional information provided upon request of the Chamber,³² it does not appear clearly where [REDACTED], or when the displacement from [REDACTED] took place. Noting this uncertainty as to exact time and place of certain of these events, the Chamber does not consider that it would be sufficiently assisted by this victim’s expected evidence or that it would be appropriate in the circumstances to call her as a witness when the proximity to the temporal and geographical location of the charges has not been adequately demonstrated”.

of the proposed role will necessary trigger the Chamber's protective powers and duties to the Defence.

11. The redacted summary of [REDACTED] is comprised of five sentences.²⁷ The only timeframe given is 2012.²⁸ No geographic locations have been specified. The perpetrators are described as 'armed men'. There are no indicia that would allow the Chamber to affirm that there is a link to the confirmed charges in this case.
12. The redacted summary of [REDACTED], which is comprised of three sentences, does not furnish any details concerning the date or geographic location of the alleged incidents or the specific group implicated.²⁹ There are insufficient indicia to establish a link to the confirmed charges in this case.
13. The witness summary of [REDACTED] is composed of six sentences despite allegedly describing two distinct incidents.³⁰ For the first incident, no geographic indication is given over than referring to a market in Timbuktu, and the perpetrators are merely described as 'two men'.³¹ For the second incident, no temporal indication is given, no geographic indication is given and the perpetrators are described only as 'jihadists'.³² There are insufficient indicia to establish a link to the confirmed charges in this case.
14. The witness summary of [REDACTED] comprises seven sentences and, of greatest concern, contains evidence alleging Mr Al Hassan's physical perpetration.³³ There are no temporal indications of when these events allegedly occurred, the perpetrators are described only as 'jihadists' and the alleged victim is said to not know the number or identities of the people [REDACTED].³⁴ These omissions make this highly prejudicial allegation impossible to investigate or interrogate.
15. The summary of [REDACTED] has been redacted to such a large degree that it is not possible to ascertain the likely time period of the alleged incident, or the potential

²⁷ ICC-01/12-01/18-1935-Conf-AnxA, p.2.

²⁸ ICC-01/12-01/18-1935-Conf-AnxA, p.2.

²⁹ ICC-01/12-01/18-1935-Conf-AnxA, p.3.

³⁰ ICC-01/12-01/18-1935-Conf-AnxA, p. 4.

³¹ ICC-01/12-01/18-1935-Conf-AnxA, p. 4.

³² ICC-01/12-01/18-1935-Conf-AnxA, p. 4.

³³ ICC-01/12-01/18-1935-Conf-AnxA, p. 5.

³⁴ ICC-01/12-01/18-1935-Conf-AnxA, p. 5.

prejudice stemming from the request, since the identity of an alleged perpetrator has been redacted.³⁵

16. The summary of [REDACTED] comprises only five sentences, the alleged village in which the victim lives is redacted, and the perpetrators are described only as ‘armed men’.³⁶ While information is given alleging that the facts concerned occurred in July 2012 in Timbuktu, the lack of detail and extent of redactions concerning these key elements mean that there are insufficient indicia to establish a link to the confirmed charges in this case.
17. As concerns [REDACTED], the LRV has not provided the location of the village where the victim was allegedly apprehended and has further redacted the name of the person who the victim purports to have remembered. These omissions prevent the Defence from either challenging the alleged nexus to this case or adducing arguments on prejudice.
18. The summary concerning [REDACTED] is similarly vague, rendering it impossible to identify the location or temporal period of the alleged events.³⁷ Important information concerning the identity of the victim’s alleged husband [REDACTED] has not been disclosed. Again, it is currently impossible for the Defence to challenge the alleged nexus to this case or adduce arguments on prejudice.

Uncharged allegations pertaining to harm suffered by children

19. The LRVs seek to introduce evidence regarding harm suffered by children, including through [REDACTED].³⁸ Persecution on the grounds of age constitutes a separate and uncharged form of persecution.³⁹ The need for unequivocal and timely notice that issues of age would comprise part of the charges is of particular importance in relation to an area or population, where the age of individuals cannot easily be ascertained or verified. In particular, given the limited time allocated to cross-examination and the vagaries of interpretation,⁴⁰ there were many instances where the Defence did not pursue this issue,

³⁵ ICC-01/12-01/18-1935-Conf-AnxA, p. 6.

³⁶ ICC-01/12-01/18-1935-Conf-AnxA, p. 7.

³⁷ ICC-01/12-01/18-1942-Conf, paras 13-18.

³⁸ ICC-01/12-01/18-1942-Conf, paras 15, 20

³⁹ Cf the crime of persecution is defined in the ‘Self-contained set of charges’ as [REDACTED]; ICC-01/12-01/18-923-Conf-AnxA, para 19.

⁴⁰ For example, in Tamasheq, the word [REDACTED].

on the understanding that no prejudice would arise as such matters fell outside the scope of the confirmed charges. The Chamber's rulings during the course of the Prosecution case further impressed this understanding, for example during the testimony of P-0654, the Chamber opined that matters concerning [REDACTED] were not relevant to the charges.⁴¹ The late introduction of these aspects would trigger a significant amount of prejudice that is incapable of being fully remedied at this advanced juncture of the proceedings. Crucially, the LRV have also not adduced any explanation or argument as to why they did not raise this factor, either in pre-confirmation submissions, or in the context of argument during the confirmation hearing, with a view to having this factor crystallised in the confirmed charges. The ability to present independent evidence does not exempt the LRV from their duty to raise the views and concerns of victims in a timely and diligent manner, with a view to ensuring that their interests of their clients were fully represented through the charges presented by the Prosecution.

The Chamber should not permit the LRVs to call evidence based on hitherto undisclosed allegations pertaining to acts and conduct of Mr Al Hassan

20. [REDACTED] extremely short and vague witness summary indicates that the LRVs seek to call evidence alleging Mr Al Hassan's physical perpetration in relation to an incident that does not form part of the confirmed charges.⁴² For the reasons stated above, this summary cannot be considered sufficient to satisfy the LRVs' notice requirements. Fundamentally, evidence purporting to go to the acts and conduct of Mr Al Hassan ought to have been disclosed prior to the commencement of the Prosecution case to allow the Defence to elicit exculpatory evidence from Prosecution witnesses who would have been in a position to controvert these claims or to discredit [REDACTED]. The prejudice is further aggravated by the fact that unlike the Prosecution, the LRV are under no duty to search for, or disclose evidence of an exculpatory nature concerning this individual. Given that the victim provided this testimony on the basis of an interview [REDACTED], there are grounds for concern that this evidence was not elicited in a rigorous and probing manner. At the same time, no information has been provided as concerns why this individual was not called by the Prosecution.

⁴¹T-135-Conf-Eng, p. 36,

⁴² ICC-01/12-01/18-1935-Conf-AnxA, p. 5.

21. The oft-repeated claim that the victims are not a second prosecutor must be given full effect as underscored by Trial Chamber IX in *Ongwen*.⁴³

the LRV may not ask questions as the Prosecution bis, irrespective of whether the Prosecution elicited information on the same point or not. The Chamber will sustain objections if it determines that, for example, the LRVs are attempting to elicit evidence which aims to prove the elements of the crimes charged or Mr Ongwen's role in their commission.

22. The Trial Chamber subsequently confirmed that the above ruling “applies equally to the Legal Representatives and the presentation of evidence by them” and that as such, “the Legal Representatives should not attempt to ‘elicit evidence which aims to prove the elements of the crimes charged or Mr Ongwen’s role in their commission’”.⁴⁴ The evidence [REDACTED] should therefore be excluded so as to ensure that the procedural safeguards set out in Articles 54(1) and Article 67(1) and (2) are not undermined through evidence tendered by the LRV.

The Chamber should not permit the LRVs to call a/20455/19, on the grounds that her evidence and participation would constitute an impermissible vehicle for evading the requirements of notice and disclosure concerning the witnesses linked to her evidence

23. Although the LRVs have not provided the name of a/20455/19,⁴⁵ the Defence has reason to believe that this individual is [REDACTED]. This is particularly significant as the LRVs previously resisted disclosure of [REDACTED] identity to the Defence on the basis that such a request lacked foundation.⁴⁶

24. The LRVs’ proposition that [REDACTED], that is, in a manner that prevents these accusations from any form of adversarial scrutiny and the attendant safeguards that would normally apply to evidence of this type.

25. There is no indication that [REDACTED] was present in Timbuktu during the time period, which would concern the subject matter of her testimony. Her knowledge of these events derives from interactions that were directed towards both [REDACTED]. [REDACTED],⁴⁷ [REDACTED].⁴⁸ Her testimony is therefore directly analogous to that

⁴³ [ICC-02/04-01/15-T-65-Red-ENG](#), p. 55, line 14 – p. 56, line 16

⁴⁴ [ICC-02/04-01/15-1248](#), para. 13.

⁴⁵ ICC-01/12-01/18-1942-Conf, para. 19.

⁴⁶ ICC-01/12-01/18-1465-Conf, paras 16-22.

⁴⁷ ICC-01/12-01/18-1547-Conf, para. 8 and fns 12-18.

of a Prosecution [REDACTED] and should be treated as such, in terms of the specific safeguards that govern such testimony.

26. The ICTY has held in this connection that the evidence of a prosecution investigator which is based on the supposed evidence of a number of possible or even prospective witnesses is to be excluded on, *inter alia*, the bases that such evidence would constitute a particularly prejudicial form of hearsay as to the events that he or she had concluded the prospective witnesses had seen or heard.⁴⁹ The Appeals Chamber expressed particular concern relation to the inability of the Chamber to test or assess the underlying reliability of the witness evidence, which was being introduced through the mouths of the investigator.⁵⁰ In *Perisic*, the Chamber further affirmed that the investigator could only testify in relation to issues for which he had a direct knowledge, that is, the “provenance and chain of custody of the documents he has obtained in the context of his employment with the OTP”: he could not, however, ‘summarise’ the contents of evidence to which he had been exposed as an investigator.⁵¹ Where such individuals have been called at the ICC, their evidence has been restricted to issues concerning chain of custody or investigative methodology, including contacts with witnesses: they have not been permitted to testify in relation to the truth of the contents of persons they have interviewed.⁵²

27. Although the Defence would not object to *a/20455/19* testifying in relation to her role [REDACTED], [REDACTED], the LRV have indicated that they intend [REDACTED]. If *a/20455/19* were to testify in relation to economic harm suffered by [REDACTED], [REDACTED]. If she were, however, to testify in relation to [REDACTED], then the only effective means for the Chamber or Defence to test this evidence would be to access information concerning the specific [REDACTED]. There is no indication that the LRV are willing or able to furnish such information, and as such, her evidence would constitute

⁴⁸ ICC-01/12-01/18-T-159-ENG RT, p.13 ln. 1 to p. 16 ln. 7.

⁴⁹ ICTY, *Milosevic*, [Decision on Admissibility of Prosecution Investigator’s Evidence](#), 20 September 2002, paras. 22-24.

⁵⁰ *Ibid.*, para. 24.

⁵¹ ‘[Decision On Defence Motion In Limine For Prosecution Witness Bretton Randall](#)’, 11 February 2009, para. 15.

⁵² [ICC-01/04-01/07-1603](#) paras. 17-19; [ICC-02/05-02/09-186](#) pp. 5-6; *Prosecutor v. Katanga et al.*, Transcript, 25 November 2010, pp. 65, lines 17-20; [ICC-01/04-01/06-T-335-Red2-ENG](#), pp. 29-30; ICC-01/04-01/06-T-299-Red-ENG, pp. 9-15;

a highly subjective and opaque account that is incapable of assisting the Chamber to establish the truth.

28. Whereas [REDACTED] might be an appropriate mechanism for the exercise of procedural rights (or to receive information concerning reparations), it is an inappropriate channel for the provision of individual testimony which bears on the Chamber's determination of the truth and of Mr Al Hassan's culpability of alleged war crimes and crimes against humanity.

The Chamber should order the LRVs to adduce more concrete information concerning the qualifications and scope of expertise related to the proposed expert concerning the impact of trauma on women and children victims.⁵³

29. The LRVs propose to call an expert witness '*sur les questions liées à la spécificité du traumatisme vécu par les femmes et enfants victimes des crimes de genre commis par les groupes djihadistes*'.⁵⁴ The LRVs have indicated that:⁵⁵

[REDACTED]

The LRVs have not identified such an expert nor have they demonstrated why such an expert would be necessary.

30. As Trial Chamber V(A) explained in *Ruto and Sang*, before admitting expert testimony, a Chamber must, *inter alia*:

- (i) make a discretionary determination as to whether testimony in the relevant subject area of expertise would be of assistance, and
- (ii) determine that the anticipated testimony falls within the expertise of the witness and does not usurp the functions of the Chamber as the ultimate arbiter of fact and law'.⁵⁶

31. Furthermore, admission of expert testimony to 'address issues on which the Chamber has . . . heard testimony'⁵⁷ is inappropriate:⁵⁸

⁵³ ICC-01/12-01/18-1942-Conf, paras 24-34.

⁵⁴ ICC-01/12-01/18-1942-Conf, para 24.

⁵⁵ ICC-01/12-01/18-1942-Conf, paras 26-27.

⁵⁶ [ICC-01/09-01/11-844](#), para. 12. See also [ICC-01/12-01/18-989-Red 21-10-2020](#), para. 16.

⁵⁷ [Karemara, Decision on Prosecution Prospective Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee](#), para. 22.

The Chamber does not need expert testimony to assist in its evaluation of those testimonies. Whether the Prosecution has proven the elements of the crimes charged will depend on the Chamber's assessment of the credibility of the testimonies that have been adduced.

32. Evidence concerning the impact of alleged sexual violence on victim witnesses (including stigma connected with marriage to members of the armed groups [REDACTED]) has been elicited by both the Prosecution and the LRVs during the Prosecution case,⁵⁹ the Chamber has recently rejected a Prosecution request to call an expert witness to supplement fact witness testimony concerning the impact of the alleged events⁶⁰ [REDACTED].⁶¹ As concerns the proposed Prosecution witness, [REDACTED],⁶² [REDACTED],⁶³ [REDACTED],⁶⁴ [REDACTED],⁶⁵ [REDACTED],⁶⁶ [REDACTED].⁶⁷ Given these multiple changes to the scheduling of [REDACTED]'s testimony, many of which were last minute after considerable Defence preparation, the Defence submits that if the Chamber considers that there is a need for such testimony, it should be in the form of [REDACTED]'s testimony. Furthermore, the Defence notes that the LRVs made no submissions or requests concerning [REDACTED]'s testimony when [REDACTED] testimony was postponed or adjourned, despite the fact that it is now their position that such testimony is relevant to the Chamber's determination of the truth.
33. Given these matters, and the fact that the LRVs suggest that the expert witness would testify on the issue of [REDACTED] and thus exceed the scope of the confirmed charges, the proposed testimony is prejudicial. The request as concerns this expert should be rejected.
34. In the event that the Chamber is minded to consider permitting the LRVs to call this witness, the Defence requests that it urgently be provided with sufficient information

⁵⁸ Karemara, [Decision on Prosecution Prospective Experts Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee](#), para. 24.

⁵⁹ P-0602: ICC-01/12-01/18-T-085-CONF-ENG ET 19-05-2021, p. 44, line 11 to p. 45, line 9 (the Prosecution eliciting evidence concerning the impact of the alleged forced marriage on P-0602's everyday life and her relationships with her family and her friends); P-0636: ICC-01/12-01/18-T-071-CONF-ENG ET 15-03-2021, p. 63, line 16 to p. 65, line 3 (the LRVs eliciting evidence [REDACTED]).

⁶⁰ ICC-01/12-01/18-1844.

⁶¹ [REDACTED].

⁶² Annex B.

⁶³ Annex C [REDACTED].

⁶⁴ Annex D [REDACTED].

⁶⁵ Annex E [REDACTED] and Annex F [REDACTED].

⁶⁶ Annex G, p. 2.

⁶⁷ ICC-01/12-01/18-1597-Conf.

regarding the qualifications of the proposed expert to enable it to provide informed submissions as to their suitability.

The Defence's inability to investigate the claims made by the LRVs' proposed witnesses runs counter to Mr Al Hassan's statutory rights and the settled jurisprudence of this Court

35. As indicated above, the LRVs have not provided sufficient detail and notice of the proposed evidence they wish to present. This is especially problematic for Mr Al Hassan's basic fair trial rights as:

- First, unlike earlier ICC cases, the Defence did not receive copies of the applications corresponding to the victims who were granted a right to participate, and as such, had no prior notice of their identity or the gravamen of their claims;⁶⁸
- Second, in contrast to earlier cases,⁶⁹ the Chamber imposed no cut-off point as concerns the receipt of new victim applications and, as a result, has admitted victims who may have followed evidential developments in the case. This triggers a direct interest on the part of the Defence in conducting thorough inquiries as concerns the reliability of the accounts furnished by these individuals, which in turn, is dependent on the provision of detailed information concerning the victims' accounts, the manner in which they provided them to the LRV, and any linkages to Prosecution witnesses;
- Third, it frustrates any ability of the Defence to investigate the matters contained therein, particularly as Defence resources are concentrated on conducting necessary investigations both as the Prosecution case draws to its conclusion and in preparation of its own case, at a time when additional travel and quarantine restrictions are being imposed by various countries due to the new Covid variant;⁷⁰
- Fourth, Defence investigative resources will need to be deployed in December and January to the investigation [REDACTED], a delayed disclosure witness [REDACTED] (that is, just after the judicial recess and immediately before the time period that the Chamber has presaged for the presentation of the LRV case).

⁶⁸ In Katanga & Ngudjolo, for example, the majority of the participating victims disclosed their identities prior to the commencement of the trial and as such, the Defence had the benefit of notice throughout the Prosecution case: [ICC-01/04-01/07-1788-tENG](#), paras. 91-92.

⁶⁹ See for example, Ntaganda, [ICC-01/04-02/06-449](#), para. 24; Gbagbo, [ICC-02/11-01/11-800](#), para. 51; Katanga, [ICC-01/04-01/07-933-tENG](#), para. 27.

⁷⁰ ICC-01/12-01/18-1756, paras 7-18.

36. The accused's right to have adequate time and facilities to prepare his/her defence under Article 67(1)(b) of the Statute has been specifically invoked in the context of LRVs calling witnesses in *Katanga & Ngudjolo*,⁷¹ *Bemba*,⁷² *Banda*,⁷³ *Ntaganda*⁷⁴ and *Ongwen*.⁷⁵ This is, indeed, inherent to the Chamber's consideration of whether to permit the LRVs to call evidence at all.⁷⁶
37. For these reasons, and in line with previous practice before this Court and the intention of the Chamber, the Defence further requests an adjournment of eight weeks between the provision of the identities and related application forms/accounts of the LRVs' witnesses and the commencement of the testimony of LRV witnesses.⁷⁷ There should also be at least four full weeks from the conclusion of all relevant disclosure and the commencement of such testimony, with disclosure occurring as soon as practicable and on a rolling basis.⁷⁸ The requested period will be necessary to ensure that the Defence is afforded the proper opportunity to conduct requisite investigations and to analyse the allegations in light of the case file. Further delays to necessary LRV disclosure may threaten the deadline for the Defence's final list of evidence and witnesses and attendant disclosure as currently set out in the Chamber's Fifth Decision.⁷⁹
38. Finally, it is not feasible to require the Defence to investigate the Prosecution and LRVs' case concurrently while simultaneously attempting to finalise the Defence list of witnesses and exhibits. The right to silence, enshrined in Article 67(1)(i) presupposes that "the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the Defence, or in any other

⁷¹ [ICC-01/04-01/07-2288](#), paras. 48, 55, 114.

⁷² [ICC-01/05-01/08-2138](#), para. 23.

⁷³ [ICC-02/05-03/09-545](#), para. 25.

⁷⁴ [ICC-01/04-02/06-1780-Red](#), para. 11.

⁷⁵ [ICC-02/04-01/15-1199-Red](#), para. 84.

⁷⁶ Rome Statute, Article 68(3) (*emphasis added*): "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

⁷⁷ [ICC-01/04-02/06-1780-Red](#), para. 51; [ICC-02/04-01/15-1166](#), para. 4 (the names were disclosed by the LRV at least three months before the individuals were scheduled to testify); ICC-01/12-01/18-1756, para. 6.

⁷⁸ Meaning sufficiently detailed summaries of their anticipated testimony, unredacted application forms of close family members ([ICC-02/04-01/15-1199-Red](#), paras. 80-81) and any exhibits which the LRV wish to use with the victim in question.

⁷⁹ ICC-01/12-01/18-1756, para. 11.

way”.⁸⁰ The right to notice, viewed in conjunction with the right to silence, also presupposes that the Defence has been fully informed of the contours and content of potential incriminating evidence before it is required to disclose the details of the Defence case.⁸¹ The Defence is also entitled to finalise its list of witnesses and exhibits after hearing the full content of incriminating evidence adduced at trial – this is, after the completion of the LRV case. Indeed, should the Prosecution use the LRV case as a mechanism for fleshing out details of its own case, the Defence will have a clear interest in addressing such matters through additional evidence or witnesses.⁸² Since additional details or allegations can emerge on the stand, the Defence also cannot be expected or required to investigate all such matters in advance. In line with these Statutory protections and clear legal precedent, the Defence deadline for submitting its list of exhibits and witnesses must therefore fall after the conclusion of the LRV case and allow the Defence adequate time to conduct follow up investigations following the conclusion of that case.

III. Relief Sought

39. For all of the reasons expounded herein, the Defence respectfully requests that the Trial Chamber grant the relief set out in paragraph 2.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 1st Day of December 2021
At The Hague, The Netherlands

⁸⁰ [ICC-01/04-01/06-1235-Corr-Anx1](#), para. 27.

⁸¹ [ICC-02/04-01/15-1199-Red](#), para. 84.

⁸² See [ICC-01/04-02/06-1965](#), which indicates that the Defence were afforded at least 6 additional weeks, after the conclusion of LRV case, to submit their final list of experts. In Ongwen, the final date for submission of the Defence list was 4 June 2018, that is, approximately a month after the conclusion of the LRV case: [ICC-02/04-01/15-1272-Red2-Corr](#), para. 6.