

1 International Criminal Court  
2 Trial Chamber X  
3 Situation: Republic of Mali  
4 In the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag  
5 Mahmoud - ICC-01/12-01/18  
6 Single Judge Kimberly Prost  
7 Status Conference - Courtroom 3  
8 Tuesday, 30 June 2020  
9 (The hearing starts in open session at 10.00 a.m.)  
10 THE COURT OFFICER: [10:00:21] All rise.  
11 The International Criminal Court is now in session.  
12 Please be seated.  
13 JUDGE PROST: [10:00:48] Good morning, everyone.  
14 Court officer, could you please call the case.  
15 THE COURT OFFICER: [10:00:54] Thank you, your Honour.  
16 The situation in Mali, in the case of The Prosecutor versus Al Hassan Ag Abdoul Aziz  
17 Ag Mohamed Ag Mahmoud, case reference ICC-01/12-01/18.  
18 For the record, we are in open session.  
19 JUDGE PROST: [10:01:12] Thank you very much.  
20 Good morning and welcome to everyone.  
21 This status conference will consist of two sessions of one hour and a half and the first  
22 session therefore will last until around 11.30 and will resume at 12.15 for the second  
23 session.  
24 Could those present please introduce themselves for the record.  
25 MR DUTERTRE: [10:01:36](Interpretation) Good morning, your Honour.

- 1 THE INTERPRETER: [10:01:46] Correction, correction, Mr Dutertre.
- 2 MR DUTERTRE: [10:01:51](Interpretation) Good morning, your Honour.
- 3 Your Honour, I'll introduce my team members.
- 4 At the last row, Marie-Jeanne Sardachti, trial lawyer; behind me, Dianne Luping, trial
- 5 lawyer; and myself Gilles Dutertre, senior trial lawyer.
- 6 Thank you.
- 7 JUDGE PROST: [10:02:21](Interpretation) Thank you, Mr Dutertre.
- 8 MS TAYLOR: [10:02:31] Good morning, your Honour. On behalf of Mr Al Hassan
- 9 I am appearing today, my name is Melinda Taylor, and I'm appearing with
- 10 Ms Dolly Chahla and Mr Michael Rowse.
- 11 Thank you very much.
- 12 JUDGE PROST: [10:02:41] Thank you, Ms Taylor.
- 13 Mr Dubuisson.
- 14 I'm sorry (Interpretation) I apologise.
- 15 (Speaks English) Please proceed.
- 16 MR KASSONGO: [10:02:57](Interpretation) Thank you.
- 17 I am Mr Kassongo Mayombo representing my fellow LRVs \*Ms Doumbia, who is in
- 18 Mali, and Mr Fidel Nsita Luvengika, who is not far away, and with me is
- 19 Claire \*Laplace, legal assistant.
- 20 Thank you, your Honour.
- 21 JUDGE PROST: [10:03:25](Interpretation) Thank you very much.
- 22 MR DUBUISSON: [10:03:31](Interpretation) Good morning, your Honour.
- 23 Representing the Registry today it is only myself representing Mr Peter Lewis, and I
- 24 am Marc Dubuisson, director of \*the Division of Judicial Services.
- 25 JUDGE PROST: [10:03:49](Interpretation) Thank you, Mr Dubuisson.

1 (Speaks English) I note that Mr Al Hassan has waived his right to be present today  
2 and a waiver has been filed on the record.

3 The agenda for today's hearing was provided in my order of 23 June and let me  
4 emphasise the purpose of this status conference, as we move closer towards trial  
5 proceedings, is to highlight points of agreement and disagreement amongst the  
6 parties, participants and the Registry on various issues. And it is very important  
7 that we try and narrow matters down at this stage and given or time constraints, I  
8 would ask everyone to try and remain specific and focused in their submissions today  
9 so that we can really progress on various issues.

10 In principle, this status conference will be held in open session, but the parties and  
11 participants should advise if there is a need at any time to go into private session.

12 And for the Single Judge that moment is now. I would ask to go into private session,  
13 please.

14 (Private session at 10.05 a.m.)

15 THE COURT OFFICER: [10:05:10] We are in private session, your Honour.

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Status Conference

(Private Session)

ICC-01/12-01/18

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15 (Open session at 10.09 a.m.)

16 THE COURT OFFICER: [10:09:19] We are back in open session, your Honour.

17 JUDGE PROST: [10:09:22] Thank you very much.

18 So we will start with the first agenda item, which is on agreed facts. It's a very

19 important item. The Chamber has throughout the preparation phase been

20 encouraging the parties to reach agreement on facts within Rule 69. It's been raised,

21 I believe, as far back as February of 2020 and I know that there have been approaches

22 and discussions.

23 I just wish to really emphasise that we are counting on inter partes consultations on

24 these matters and we hope to hear some encouraging news this morning. So I would

25 like to now hear from the parties as to how matters are progressing. I will give the

1 floor initially to the Prosecution.

2 Please, Mr Dutertre.

3 MR DUTERTRE: [10:10:13](Interpretation) Thank you, your Honour.

4 My colleague, Marie-Jeanne Sardachti will be dealing with this issue. Thank you.

5 MS SARDACHTI: [10:10:24](Interpretation) Thank you, your Honour, for allowing  
6 me to address the Court.

7 I will now deal with the first point on the agenda, which has to do with agreements  
8 regarding evidence under Rule 69. My observations should take less than  
9 10 minutes.

10 JUDGE PROST: [10:10:46] Sorry, Counsel, really, we have such little time this  
11 morning. Could we shorten that too. I just really need a sense of where things are  
12 at on the agreed facts. So if you could do your best to -- I don't think we can afford  
13 10 minutes on one representation. Thank you.

14 MS SARDACHTI: [10:11:02](Interpretation) Very well, your Honour, I'll be very  
15 brief.

16 You asked whether the news was encouraging. Unfortunately, the news is not  
17 particularly encouraging. We have made several attempts, we have approached  
18 the Defence on several occasions. And regarding the first agreements, that we had  
19 come to four facts having to do with the marital status of Mr Al Hassan, his tribal  
20 affiliation, we were able to agree with four points and we do have a draft filing.  
21 And that filing included a number of references to evidence. We clearly indicated in  
22 the draft that the references were merely for the information of the Chamber; that is to  
23 say, the agreements didn't have to do with the actual references, but to assist  
24 the Chamber in its work, but rather, the references were to assist the Chamber in  
25 March. We -- and in June we made --

1 THE INTERPRETER: [10:12:14] Correction --  
2 MS SARDACHTI: [10:12:15](Interpretation) In March we made several new  
3 attempts and we're still at the same state. We reverted to the Defence in June.  
4 If you recall, during the last status conference, the Defence had said that when it came  
5 to additional facts it would be premature to agree to additional facts. Why?  
6 Because the decision regarding the amendment of the charges had not been handed  
7 down at that time and disclosure of evidence had not finished.  
8 Yet, since that time, the Defence has received the final list of witnesses, as well as the  
9 final list of incriminating evidence. In June we reverted to the Defence, we sent 24  
10 proposals for additional agreements and the Defence came back to us on Friday,  
11 26 June saying that they were not able to agree with us because they were not in  
12 a position to speak with Mr Al Hassan physically, face to face.  
13 Now, the Defence is completely able to consult Mr Al Hassan using different channels.  
14 He has had access to the evidence and the Defence is able to communicate with  
15 Mr Al Hassan. So that is where things stand right now.  
16 We did agree to a number of simple facts and a number of videos as you encouraged  
17 us to do during the last status conference.  
18 We were able to agree on some documents and video footage. This is what we have  
19 done. So this is where we are at right now when it comes to these additional facts.  
20 The Defence did revert to us with some proposals on a number of general topics, but  
21 without specifics. General topics that are either beyond the scope of the charges or  
22 have to do with contested facts.  
23 So I'm sorry to announce that the news is not particularly encouraging, but that is  
24 where we stand right now.  
25 Thank you very much, your Honour.

1 JUDGE PROST: [10:14:48] Well, thank you very much for those submissions. That  
2 at least gives me an idea. I'm pleased to see there is -- at least some agreement has  
3 been reached on some technical matters.

4 I will now ask Ms Taylor to hear your comments on this issue. Thank you.

5 MS TAYLOR: [10:15:05] Thank you very much, your Honour, and I feel like we are  
6 in a little bit of an alternative reality here because before we can discuss agreements of  
7 fact, there is a pyramid of needs that need to be fulfilled.

8 Firstly, we need, as the Defence, to assess whether Mr Al Hassan is in a position to  
9 give informed consent and to instruct us on such points and to do that he needs to  
10 have informed and effective legal advice as to the implication, the consequences of  
11 agreed facts.

12 So for that to happen, we need the factual matrix of this case to be settled. We then  
13 need to be able to conduct investigations to verify the foundation of the proposed  
14 agreed facts. None of these preconditions have been met.

15 We cannot meet Mr Al Hassan in person and I cannot ascertain whether he is in  
16 a position to give full, free informed consent to specific agreements.

17 As concerns the factual matrix of the case, the Prosecution has recently filed  
18 a Regulation 55 notice request and that shifts the importance and relevance of certain  
19 facts, and that in turn affects our ability to advise Mr Al Hassan of the consequences  
20 until we get a decision of that.

21 We've all seen from the Katanga case how this can play out, so as, on part of the  
22 Defence, I think we'd be very reluctant to advise him until we know the full scope of  
23 a possible Regulation 55 recharacterisation.

24 And as I will discuss later in the hearing, we haven't been able to investigate and fully  
25 ascertain the foundation for the proposed fact.

1 And ICC case law is very clear. That we can be encouraged to reach agreement of  
2 facts but that's where it stops. And I'd like to point out that in the Lubanga case,  
3 the Defence reached no agreements of fact. Katanga, it was only seven out of 149.  
4 Bemba, it was only a few facts and those teams were not facing the issues we are.  
5 And the Statute imposes no duty on Mr Al Hassan to cooperate with the Prosecution  
6 or waive the burden of proof. And the duty of the Prosecutor to ensure a speedy  
7 trial remains intact, irrespective of whether he chooses to exercise these procedural  
8 rights at his disposal. And that is because the duty to ensure a full -- a fair, full and  
9 speedy trial falls primarily on the state authorities, that is, the Court and  
10 the Prosecution.

11 And I think we've shown from our Rule 68 response that we're very willing to be  
12 reasonable. We don't oppose measures or proposals just for the sake of opposing  
13 them and we are open to discuss issues that will expedite the proceedings and we  
14 have in fact submitted counterproposals to the Prosecution on the issue of agreed  
15 facts.

16 But we shouldn't have to barter or negotiate with the Prosecution when fundamental  
17 fair trial rights are at stake. And if we need more time to exercise key rights, then  
18 that should constitute good cause. And if the trial would take too long, if every  
19 witness testifies in relation to every incident, then the obligation falls primarily on  
20 the Prosecution to shorten and streamline its case. That obligation should not be  
21 shifted on a detained defendant who cannot get effective legal advice at this point in  
22 time.

23 Thank you.

24 JUDGE PROST: [10:18:45] Thank you, Ms Taylor.

25 To begin with, of course we are going to discuss the issue of your ability to access

1 Mr Al Hassan later in the proceedings. It is an issue, you know the Chamber is very  
2 interested and concerned by the issue and we will have discussions on that. So it is  
3 certainly not a matter that we are ignoring in any way and we do understand the  
4 effect of it.

5 But at the same time, we hope that we are able to at least make some progress on  
6 matters under the current conditions, which are not the fault of anyone in the room in  
7 terms of the existence of the pandemic. So we need to keep that in context.

8 You are of course completely correct and there is no obligation on the Defence to  
9 enter into agreed facts whatsoever. This is not a question of shifting burden nor is  
10 the Chamber suggesting that it is going to intervene.

11 But, at the same time, it is in the interests of everyone, in particular your client, to  
12 have as efficient a proceeding as possible and, in the Chamber's view, it would be  
13 more efficient if we did not have to spend court time on matters which are relevant  
14 but not contested. That's the simple issue, that we are trying to encourage the  
15 parties to seek agreement. Of course, if there are matters that relate to the core of  
16 your charges, matters of direct proof onto the incident, that of course is for  
17 the Defence to decide what, if anything, they wish to agree on.

18 But the fact is that if each fact of relevance has to be proven, without any agreement  
19 on non-contentious matters, it will take longer. But I certainly acknowledge it is for  
20 the Defence to decide whether or not to agree.

21 That having been said, I don't know the evidence in the case nearly as well as both of  
22 the parties do, but I would revert to what I said in a previously status conference, if  
23 some consideration could be given to issues such as geography, identification of  
24 places, timing of arrivals of Ansar Dine into Timbuktu, the existence of different  
25 institutions within the armed groups. Some of these may be highly contested, I don't

1 know, but some of them may not be. The identification of certain locations. Things  
2 of this nature. I'm simply encouraging again consideration of those factors. But I  
3 stress, Ms Taylor, I accept your submissions, I am not in any way imposing anything,  
4 but I would ask you once again as we lead up to the proceedings if you could -- we  
5 could have a bit of an effort on matters. And again I appreciate that you have  
6 difficulties in terms of communications, but you do have communication with  
7 Mr Al Hassan, and if we are in areas of this nature, perhaps it is easy to deal with  
8 them. Again, in the hands of the Defence.

9 So I'm not going to say anything more.

10 Mr Dutertre, did you wish to make I hope a constructive and helpful short comment.

11 Thank you.

12 MR DUTERTRE: [10:21:54](Interpretation) Thank you, your Honour. Very quickly.

13 It is quite natural -- well, we are not trying to force the Defence's hand, but there are  
14 some matters that are not very secret, not very contestable or -- and that was the  
15 proposed agreement that we had offered.

16 While being constructive, I do realise that the Defence is trying to explain that they  
17 are not in a position to advise their client. I'm very surprised by that, because there  
18 was the warrant of arrest, the Document Containing the Charges, the decision  
19 regarding the confirmation of the charges, the decision regarding the amendments to  
20 the charges, and all of that, the confirmation of charges decision and the amendments  
21 to the charges. So the parameters of the case are quite clearly defined and have been  
22 quite clear to the Defence for quite a while.

23 As for the Regulation 55 notice, it can be given at any time. It has no direct link to  
24 agreements and the Defence knows full well what is in that notice.

25 Furthermore, when it comes to the matter of verifying facts investigated, it has been

1 two years now, Mr Al Hassan has been here for two years and the Defence could have  
2 been reviewing matters.

3 The point is not to engage in controversy. Are we in -- are we open to further  
4 agreements with the Defence? Well, we will bring forward further proposals.

5 JUDGE PROST: [10:23:46] Thank you, Mr Dutertre.

6 Unless it's -- I think we've aired the issue. Again, I understand the Defence  
7 submissions, and I simply would encourage consideration of these noncontroversial  
8 areas that might be the basis, I believe it will be in everyone's interest. So I am  
9 simply exhorting the parties to give one more try to whether or not there can be some  
10 agreement and perhaps picking some areas that are obvious.

11 So I leave that with the parties. I think the Chamber has expressed as much of its  
12 view as it can.

13 Let's move on to the next issue which is a very important one, obviously, which is  
14 the Prosecution's presentation of witnesses.

15 I would like to hear from the parties and the participants regarding the witnesses to  
16 be called by the Prosecution, the first witnesses, including the order and mode of  
17 testimony. And here again we're trying to focus in on where we can get some  
18 agreement, and I think there is potential for that, and where there remains  
19 disagreement and how we might work through that.

20 So can I start by asking the Prosecution for, again, a focused submission of where  
21 things are at in that context.

22 Mr Dutertre.

23 MR DUTERTRE: [10:25:06](Interpretation) Thank you, your Honour.

24 I do have some information items for the Chamber, very quickly in terms of context.

25 I would just remind the Chamber that we have established the order of witnesses and

1 we have a preferred order, a logical order of witnesses, of course, but bearing in mind  
2 the travel difficulties, because of the pandemic that continues: We have 87 witnesses  
3 in total, 77 will be appearing before the Chamber either in person or by way of an  
4 audio-visual link. And we have 13 other witnesses for whom we will be filing  
5 applications under 68(2)(b) and (c).

6 Now, if I could come to the first block of witnesses who are going to be testifying as of  
7 August 2020, and I do hope that I can make the following comments. First of all, the  
8 possibility of these witnesses coming to the Court to give testimony as provided for  
9 and then the order of appearance within the block of witnesses, and then, third, the  
10 issue of testimony in the courtroom or by way of audio-visual link.

11 So that is really just for block one, which contains 26 witnesses.

12 There will be many expert witnesses and international witnesses, as well as a number  
13 of fact-based witnesses.

14 I'm sure you'll recall on the basis of our filings that this was one of the Defence  
15 suggestions to have expert witnesses in the first block of witnesses because their  
16 travel would be facilitated, but also because this would mean less of a burden on  
17 the Defence for their preparation of cross-examination, even though for fact witnesses  
18 we were of the view that the Defence has had ample time to carry out their  
19 investigations.

20 I'll be more specific: Of the 26 witnesses in block number one, there's about 12  
21 expert witnesses, one witness who is technical, Witness 93; four international  
22 witnesses, 0007, for example, 00010, 0067, and then we will have 0055. Of these 26  
23 witnesses we have 18 who should be able to travel and give testimony without any  
24 particular difficulty.

25 Then, in block one we have eight remaining witnesses: Seven are factual witnesses

1 such as P-646, one witness who is partly expert and partly factual, this is P-0643. For  
2 these eight witnesses, and given the information available to date, the Prosecution  
3 argues that their testimony is possible during block one, even there may be more  
4 unexpected developments because of the COVID-19 pandemic. We will do all we  
5 can to bring these witnesses to the Court and we may have to have recourse to  
6 audio-visual links. And I believe the Registry may wish to comment on that. These  
7 audio-visual links will be from Bamako.

8 Now, to summarise, for this first block of witnesses, on the basis of information  
9 available, the majority of these witnesses can come and give testimony.

10 Now, regarding the actual order of witnesses, I think you'll recall that the Prosecution,  
11 subject to your leave, is considering delaying P-643 and P-648 to -- 646, 643 and 646 to  
12 the end of block one - that was mentioned in a recent filing - and the Defence didn't  
13 seem to want to begin with those particular witnesses.

14 In practical terms, that would mean that we would begin with P-65 who was  
15 first -- the third person in filing 805, in the annex, annex A. He was initially  
16 scheduled third. And this person will then be followed by P-7, P-10 and other  
17 witnesses.

18 Other than that change with the two first witnesses, who will now be appearing at the  
19 end of the block rather than at the beginning, with your leave, the order remains  
20 unchanged, even though we can't rule out unusual circumstances relating to  
21 a particular expert witness, but it's too early to say whether we will have any  
22 difficulties in this regard.

23 Now, I would draw your attention to a very recent filing of ours relating to P-603 and  
24 the possibility of having that witness testifying within block one, and that is in the  
25 hands of the Chamber. The filing was just notified in a redacted form to the Defence.

1 With your leave, your Honour, I'll move very quickly -- I would like to ask for us to  
2 move very quickly into closed session.

3 JUDGE PROST: [10:32:51] Closed session, please -- or private session.

4 (Private session at 10.32 a.m.)

5 THE COURT OFFICER: [10:33:10] We are in private session, your Honour.

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10 (Open session at 10.36 a.m.)

11 THE COURT OFFICER: [10:37:02] We are in open session.

12 MR DUTERTRE: [10:37:18](Interpretation) Now, your Honour, with regards to the

13 impact of the termination request submitted by the Defence as to the order of

14 witnesses, as some of these witnesses are indeed concerned by this termination

15 request, the fact is that even though the Office of the Prosecutor would have preferred

16 to have had this issue resolved in advance of the trial, the tardiness of the request, it's

17 significance and breadth, and the drastic remedies sought have made this virtually

18 impossible. Therefore, it is in the interests of justice and at the expeditiousness of the

19 proceedings that the trial continue in parallel.

20 JUDGE PROST: [10:38:14] Mr Dutertre, if you could focus your comments on how

21 this is going to affect the order of witnesses. We are not here to -- the termination

22 motion has been filed, the Prosecution is being heard on paper, I do not wish to deal

23 with the substance of that. So simply you said the point related to how this will

24 impact on the order of witnesses. If there are some factual elements, can you focus

25 on those, please. Thank you.

1 MR DUTERTRE: [10:38:36](Interpretation) Yes, indeed, your Honour. The fact is  
2 that some of the witnesses in block one are concerned by this request. We contend  
3 or our submission is that the Chamber is comprised of professional judges that are  
4 only too capable of conducting some form of triage, if you like, and ascertain what is  
5 and what is not admissible so we can continue conducting --

6 THE INTERPRETER: [10:39:05] Too fast, too fast to interpret when people are  
7 overlapping and speaking at speed.

8 JUDGE PROST: [10:39:11] My apologies to the interpreters.

9 Just to make the point, Mr Dutertre, we are not going to deal with that issue today.  
10 If there was a specific issue about order, but I have the point, but this a matter that is  
11 before the full Chamber and I won't go near it today.

12 So are there other points you wish to highlight with respect to the order of witnesses  
13 or any other issues on the Prosecution's list of potential witnesses in block one?

14 MR DUTERTRE: [10:39:37](Interpretation) No, not at all, your Honour.

15 Only with regard to the audio-visual links. The aim is to have the maximum  
16 number of witnesses come to testify in situ in this very courtroom. We know that  
17 this will not be possible for P-102, for example, and the Prosecution will be filing  
18 submissions when they have all the information on this subject.

19 Furthermore, with regard to some of the witnesses, that is to say including P-065, we  
20 could have a backup solution which would be a video link for this witness, but that  
21 depends on the information that the Registry will be furnishing to us as to the manner  
22 in which P-056 can travel, or whether this individual can travel or not. And, of  
23 course, the OTP is only too aware of the fact that this information can change on  
24 a daily basis and that it is very difficult for the Registry to take out its crystal ball and  
25 to know what will be possible tomorrow.

1 Now, in total, what I would like to convey to the Chamber and to the parties is that  
2 the OTP is at the ready, ready to start and that we will clearly need a little bit of  
3 flexibility as to the transport issues which might arise for various individuals that  
4 might affect the order of appearance of the witnesses as to whether they can travel or  
5 whether they need to be heard via video link.

6 And of course the OTP will make sure that as soon as it has information with regard  
7 to one witness or another, it will make it available.

8 Thank you very much, your Honour.

9 JUDGE PROST: [10:41:48] Thank you very much, Mr Dutertre. And certainly we  
10 will be hearing from the Registry as well on how this can be approached in terms of  
11 the requirements for the witnesses and we note that the request for flexibility which is  
12 necessitated by the circumstances.

13 Ms Taylor, could I hear from you at this stage now on the question of these witnesses  
14 in block one. Thank you.

15 MS TAYLOR: [10:42:15] Thank you very much, your Honour.

16 Just to preface my remarks. Once again, we feel like we are a little bit in an  
17 alternative reality here and I am reminded of recent filings in this case where  
18 the Prosecution explained that even though it had the names of witnesses in 2016, and  
19 only interviewed them in 2019, and only filed an application in 2020, it acted with  
20 complete diligence.

21 So that was the framework for the Prosecution and yet we are hearing today that  
22 the Defence, when it gets a name in February this year, just before COVID, when it  
23 does its utmost to investigate and finding that it's unable to do so, files an application  
24 as soon as it can, that's considered to be tardy. Now if that's the calculus we are  
25 using here, that's a clear inequality of arms.

1 And we have two main concerns today:

2 Firstly, we have the right to develop a coherent defence strategy in advance of the  
3 trial. To do that, we need adequate time and facilities to prepare our case. Given  
4 the link between different witnesses, different accusations, that means conducting  
5 comprehensive investigations, not just piecemeal ones concerning individual  
6 witnesses, otherwise we miss the links and we may have to recall witnesses. That's  
7 not fair or efficient.

8 And apart from the fact that we need more time to investigate this case in general,  
9 there are specific witnesses in block one that would generate a considerable degree of  
10 prejudice if those particular witnesses were to be called upfront.

11 Now the Prosecution has been investigating this case since 2013. It interviewed  
12 some of the block one witnesses in 2014. It was supposed to be trial-ready in 2019.

13 And yet, even though the Prosecution was supposed to file its proposed order of  
14 witnesses on 14 April, that got pushed back to 12 May.

15 The Prosecution's trial brief, initially due on 14 April, was filed eventually on 29 May.

16 So if the Prosecution is trial-ready today it's because they've been given the time to be  
17 trial-ready. And if these issues of security in the field and COVID was so  
18 extraordinary, if they affected the Prosecution to such an extent that it was necessary  
19 and reasonable to push back these deadlines for the Prosecution, this begs the  
20 question as to why the Prosecution wants to adopt a business-as-usual approach for  
21 the Defence and maintain dates that were directly impacted by COVID and the  
22 extensions granted to the Prosecution.

23 And, if anything, we have less resources and less capacity to address the delays  
24 caused by COVID. We don't have seven years of investigative resources to draw on.  
25 We don't have NGOs at our disposal. And, most importantly, the COVID

1 restrictions came into force at the most crucial time for us.

2 As set out in annex F to our COVID submissions, there are six fact witnesses in block  
3 one whose identities and unredacted statements were disclosed in 2020. This  
4 includes P-65, P-645, P-638 and P-4.

5 So if these witnesses were essentially anonymous to us for the first year and a half of  
6 this case, how are we supposed to investigate them? How are we supposed to test  
7 their reliability, their credibility if we don't know their names? And I've gone  
8 through the statements that were disclosed in 2019 and they are heavily redacted,  
9 there are pages and pages with absolutely no information. So there may have been  
10 some accusation there, but it was disembodied accusation which made it impossible  
11 to test.

12 And in annex E of our filing to the COVID submissions we also set out the fact that  
13 we finally received names of five PEXO and Rule 77 witnesses and we received them  
14 between 25 March and 6 May, that is at the very point where our ability to investigate  
15 on the ground disappeared.

16 And during the last two years until we got that list of witnesses, if we tried to identify  
17 possible leads or sources, since we didn't know who was or wasn't a Prosecution  
18 witness, it was like playing Russian roulette every time we dialled the number of  
19 a potential witness. And the Prosecution's repeated and unfounded claim each time  
20 that our good-faith attempts to contact these witnesses violated the protocol, that had  
21 a real chilling effect as concerns our willingness to contact witnesses without first  
22 receiving the Prosecution's list of witnesses. And at the very point where we  
23 received this list, where we received meaningful disclosure, COVID came into place,  
24 our planned missions were cancelled and our backup plans could not be  
25 implemented.

1 And apart from security issues, there are just some missions that have to be done in  
2 person, either because the witness doesn't want to speak on the phone to a stranger  
3 from The Hague that they have never heard of or met or the witness lives somewhere  
4 where there's no phone reception. And here we're discussing quite a few swathes of  
5 territory in the north of Mali.

6 So in order not to derail the trial we submitted a proposed list of witnesses to  
7 the Prosecution, that's correct, but of the 16 names we proposed, the Prosecution only  
8 included seven in the first block out of a total of 26.

9 The Prosecution also included several witnesses who we hadn't been able to  
10 investigate. And I don't intend to go through every such witness and we don't object  
11 to every witness in the first block. There's two specific fact witnesses and just  
12 a handful of expert witnesses who were affected by the termination request.

13 So for the sake of time I will focus on the fact witnesses.

14 P-65, number three on the list and has suddenly moved up to number one, a person  
15 met very early on in the Prosecution investigations who has been interviewed on  
16 multiple occasions, including January this year, which generated new statements for  
17 us. And as I mentioned at the beginning, we only received his identity in February.  
18 And the statements we had, yes, we had them, but they were heavily redacted, which  
19 made it impossible to draw links between witnesses and to address issues of  
20 credibility. And we have attempted to investigate and we haven't been able to, so,  
21 yes, we have submitted a request to meet these witnesses, which is our entitlement  
22 under the protocol. And this is in fact someone we tried to contact ourselves and  
23 couldn't because they're a Prosecution witness. So we have tried to investigate this  
24 case in a diligent manner as we could, so now is not the time to say our rights should  
25 be suspended or in any way diluted because of reasons beyond our control.

1 This witness is also linked to P-136 and we haven't even received a statement from  
2 P-136 from the Prosecution, which again makes it very difficult to explore the  
3 connection unless we can interview P-65.  
4 I'll then turn to P-150, and I don't intend to go into a considerable degree of detail,  
5 suffice to say there are multiple statements and there are several issues and we would  
6 wish to interview this persons, for various reasons. But we are working on solutions.  
7 We're not just throwing up our hands in the air and saying this trial isn't possible.  
8 We're doing everything we can. But the solutions aren't ready yet.  
9 So the Prosecution may say this case is trial-ready, but the real question is what type  
10 of a trial are we talking about? If we're talking about a one-way trial organised to  
11 convict, then of course, but if we want a real adversarial process where we can stand  
12 before you and bring our own evidence and effectively cross-examine, then we are  
13 not ready.  
14 Thank you.

15 JUDGE PROST: [10:51:50] Thank you, Ms Taylor.

16 Now, we are at a stage of these proceedings where I know there are issues on both  
17 sides as to timing and interruption by the situation with the pandemic, but I don't  
18 think it will be -- it's helpful today especially to focus on who did what when or  
19 what's happened. The Chamber accepts that there have been issues for both sides  
20 with respect to the pandemic and certainly accepts that the Defence is in a particularly  
21 different position. So that is all understood.

22 What we want to try and do here is progress on this witness list so that we have  
23 a way forward. And I would like to stress that at this stage the focus need not  
24 necessarily be on block one as a whole. Because we're trying to look at prioritising,  
25 say, the first 10 witnesses that might be able to testify initially and we perhaps can

1 make some progress if that was the focus between the parties. Again, we're trying to  
2 encourage the parties to work on this issue.

3 I note, and Ms Taylor you mentioned it, having reviewed the lists ourselves, and  
4 the Chamber is certainly looking through all this material carefully, there are seven  
5 witnesses who are common to both the Defence and Prosecution lists. I raise with  
6 the parties, is there some potential in that fact that there are seven witnesses which  
7 are agreed?

8 Mr Dutertre, I know in normal circumstances of course the Chamber gives a huge  
9 amount of leeway to parties in terms of designing their lists and their order of  
10 witnesses, but we are in extraordinary circumstances, so in that context I would invite  
11 the parties to consider whether there is some potential for some progress by looking  
12 at those points of agreement instead of the points of disagreement.

13 And I would also highlight the fact that there are fact witnesses who seem to be the  
14 most sensitive and the most difficult, and Ms Taylor's submissions today focused on  
15 the difficulties with fact witnesses, which are understandable in the current  
16 circumstances.

17 So a second question would be: is there a way to place the fact witnesses in  
18 a particular time frame where they may give more time? Because of course again  
19 we're talking about a block of witnesses, 26 witnesses, this is going to run more than  
20 a few weeks. So I would encourage the parties to look at those possibilities.

21 I'm not going to touch on any specifics that were raised today. Obviously,  
22 the Chamber will deal with any filings about any particular witnesses. Any  
23 particular problems that the Defence has as well with particular witnesses, those can  
24 be brought to the attention of the Chamber. The Chamber does not wish to  
25 intervene at this stage directly - and obviously it would have to be the Chamber and

1 certainly not me here today - but I would ask you to look for those kinds of points of  
2 agreements. I know you said there are some experts, Ms Taylor, who are directly  
3 affected by your motion, perhaps there are also some experts on that list. Yes,  
4 reviewing the list myself I was wondering about some, as to why they might be  
5 problematic, maybe relooking at which ones precisely are really implicated. So I  
6 would encourage you to take those approaches and see if we can at least try and make  
7 some progress in coming to a list that is the Prosecution's proposal but which is  
8 agreeable from the Defence perspective of their work.

9 And I think we should probably, unless there's very practical matters, I think we  
10 should leave this issue at that point. But before moving on, I do want to emphasise  
11 this, we are seized, the Chamber is seized of a broader request by the Defence for  
12 the Chamber to intervene in terms of restrictions on witnesses and total hours. This  
13 request is under active consideration by the Chamber. The Judges are conducting an  
14 in-depth review of the material that provides an overview of the Prosecution case  
15 with a view to identifying possible issues for dialogue with the Prosecution, potential  
16 duplications, things of that nature. And I -- but I stress at the same time, once again  
17 in the balance, it would also be helpful in terms of this presentation of evidence,  
18 taking into account all that you said earlier, Ms Taylor, that agreement on certain facts  
19 can also help in this process. And I can indicate that on a principle basis this  
20 Chamber is of the view that the calling party should be given flexibility, a great deal  
21 of flexibility in the presentation of its case, but nonetheless this Chamber is ultimately  
22 responsible for the fair and expeditious conduct of the proceedings and it is within  
23 our Article 64 functions to intervene when and as necessary that the presentation of  
24 the evidence is conducted efficiently - and especially in the difficult circumstances  
25 we're facing - and the Chamber will take into account the particular circumstances for

1 the Defence.

2 So we may decide to intervene at the beginning, we may decide to intervene as we're  
3 going along, so I want the parties to be very clear, this Chamber intends to exercise its  
4 responsibilities. But we trust and have faith in the parties being able to come to  
5 some kind of an agreement, especially in light of the difficult circumstances we are all,  
6 we are all facing.

7 So I hope that that creates -- and again I would -- I know there are difficult issues on  
8 both sides, but I would encourage that you look past the who has done what when  
9 issue and try and see if we could come forward with something, something agreeable  
10 to -- in order to ensure that this trial can proceed, but of course fairly in terms of the  
11 Defence rights.

12 So I'm going to leave it at that and we'll move to the next agenda item, which is notice  
13 under Article 31 and 32 of the Statute.

14 Briefly, Mr Dutertre, do you have -- or I see one of your colleagues is rising. Please  
15 proceed.

16 MS LUPING: [10:58:22] Good morning, your Honour.

17 Actually the issue we seek to address is in relation to Articles 31 and 33 of the Statute.

18 JUDGE PROST: [10:58:30] Apologies.

19 MS LUPING: [10:58:32] And I will not be repeating submissions that  
20 the Prosecution's previously made, but just to explain that the Prosecution is asking  
21 the Single Judge to order the Defence to comply with its obligations under Rule 78, 79  
22 and 80 and to provide proper notice of its potential defences and disclosure of  
23 supporting evidence and in advance of trial, including the defences it has already  
24 initially indicated under Article 31(1)(d) and Article 33.

25 Now, your Honour's aware of the Chamber's powers to order this notice and

1 disclosure under those rules, as well as Article 64 and 68 and Regulation 54(p) of the  
2 Regulations of the Court.

3 I will just briefly touch on two issues. The first as to why this notice and disclosure  
4 is needed before the trial starts. And secondly why we would argue there really isn't  
5 a good reason for not providing that notice.

6 Now I'm just going to refer to the submissions we've already made on why there is  
7 this obligation to provide for proper notice and disclosure, and I refer to our previous  
8 submissions at the last status conference, that's transcript T-11 at page 62 to page 63,  
9 and at filing 615 at paragraphs 99 to 103 in terms of the conduct of proceedings.

10 But just one issue to stress, your Honour, is the fact that this notice and this disclosure,  
11 time wise, we do need this sufficiently in advance of the start of trial so that we can  
12 properly prepare and so we can adequately respond to assist the Chamber in its own  
13 determination.

14 Now your Honour's aware, as we mention in our filing 615 at paragraph 100, that  
15 trial chambers have already held that these obligations under Rule 79 and 80 for both  
16 notice and disclosure is before the start of trial, and the fact that providing for this  
17 notices does not infringe on the accused's right to remain silent. And I just remind  
18 your Honour, the trial chambers in Ongwen and Lubanga, and in the Bemba  
19 Article 70 case, they've all interpreted, in particular Rule 79, as require notice prior to  
20 commencement of trial.

21 And why do we need this before trial, both the notice and disclosure? Because  
22 basically this, the defences that can be put forward have a direct impact on the way  
23 we're going to conduct our case. We can't know what final evidence we might need  
24 on any eventual list of evidence, what additional witnesses we might need to add to  
25 our list or, even for those witnesses that are on our list, what evidence we actually

1 need to elicit from them until we have these final purported defences and what  
2 they're meant to be based on. I mean it's clear, right, it's interests of trial -- interests  
3 of a fair trial, efficient proceedings. It helps nobody if the Prosecution has to recall  
4 its own witnesses to deal with evidence that we could have elicited from the start.  
5 And it's certainly in the interest of the accused as well if we can be eliciting evidence  
6 throughout the trial and not just simply parking the issues till the defence part of the  
7 case.

8 Just turning briefly on why we would say that there really isn't a really good excuse  
9 or reason not --

10 JUDGE PROST: [11:02:11] I think -- thank you very much, Counsel. I think we  
11 have detailed submissions on this, so I think that's -- unless there is a specific point  
12 that you wanted to raise, but we certainly, the Chamber is fully aware of the  
13 regulations and the rule and the jurisprudence.

14 MS LUPING: [11:02:29] Certainly, your Honour.

15 And just one point, because this is something that has not been touched in prior  
16 Prosecution submissions, and that's the issue of the timing of the defences and when  
17 the Defence has been aware of them. And I just remind the Chamber that it was  
18 actually already as at 4 July of 2019 that the Defence first flag in its post-confirmation  
19 hearing submissions that the accused allegedly didn't know that the legal process  
20 before the Islamic tribunals was illegal or that the application of Sharia law was  
21 unlawful, which is akin to a defence under Article 33. It's obviously already raised.  
22 Also these, explicitly these two defences under 31(1)(d) and 33(1), on 6 December 2019  
23 and 6 June 2020.

24 Now, your Honour, you're already aware of the arguments that the Defence has  
25 raised in relation to why it apparently is not able to provide this notice or the

1 disclosure already, and with your leave I would just like to briefly touch on those  
2 stated reasons.

3 JUDGE PROST: [11:03:35] No, I think that's fine, Counsel, because we are aware of  
4 the points that have been raised.

5 MS LUPING: [11:03:42] All right. Thank you, your Honour.

6 For those reasons, though, and I refer then to our filing indeed, 892 and 855, I would  
7 ask that the Single Judge order that both notice and disclosure be given by  
8 the Defence using your powers under Rule 78, 79, 80, and clearly Articles 64, in  
9 particular 3(c), 6(d), 6(f), 9(b), Article 68 and Regulation 54(p) of the Regulations of  
10 the Court.

11 Thank you, your Honour.

12 JUDGE PROST: [11:04:18] Thank you very much, Counsel.

13 Ms Taylor.

14 MS TAYLOR: [11:04:24] Thank you very much, your Honour.

15 As a first point, I note that there is differing case law, but I won't go into it because I'm  
16 guided by your Honour that this has already been addressed in written filings.

17 Now I can give you notice that duress is likely to be raised but I cannot give a list of  
18 witnesses because I cannot give what I do not have. And in order to raise this,  
19 the Defence needs to identify persons from the same milieu as Mr Al Hassan in  
20 Timbuktu, and these aren't persons I can find in Albert Heijn.

21 And it should be obvious that any witness who would be in a position to speak to  
22 questions of duress would be equally scared to speak to us on the telephone and  
23 would not be the person who would identify themselves to the Defence openly.

24 So in order to avoid any issues of waiver, we do give notice of this.

25 But we would also submit that while we agree that it is of course prejudicial to have

1 to recall witnesses, and that's a point that we have made ourselves, any issues of  
2 prejudice here are nonexistent or minimal, given that the Prosecution has itself  
3 argued that there was a general atmosphere of coercion in Timbuktu. So we are not  
4 raising any defences or lines of argument that are unanticipated or unknown to  
5 the Prosecution.

6 That brings me to the next issue which is issues of fitness to stand trial.

7 Now, in our termination request we had specifically raised the issue that  
8 Mr Al Hassan is not fit to stand trial because he has given evidence -- because he is  
9 unable to give evidence in his defence. And we would submit that the Prosecution  
10 has had the particulars of this for a significant amount of time. Dating back from  
11 May 2019, we first indicated that Mr Al Hassan had been diagnosed with PTSD by the  
12 detention unit psychiatrist and we have drawn this link between his PTSD, his  
13 welfare, his need for rehabilitation, and the conditions of his participation in this case.  
14 In March 2020, we filed further particulars in our interim release request concerning  
15 Dr Porterfield's assessment that Mr Al Hassan's treatment needs had not been met  
16 and his situation had worsened due to ongoing restrictions imposed because of  
17 COVID.

18 We then filed both Dr Cohen's and Dr Porterfield's reports in May and in our 22 May  
19 COVID submission we specifically indicated that our termination request would  
20 argue that Mr Al Hassan's experiences had impacted his ability to affectively  
21 participate in the proceedings. And those arguments were then incorporated in the  
22 request focusing specifically on the impact of his ongoing trauma on his ability to  
23 testify.

24 But, here today we cannot exclude the possibility that his impairment goes beyond  
25 this and encompasses other aspects of his participation.

1 Three months have passed since we last met Mr Al Hassan. And during those three  
2 months Mr Al Hassan has not met anyone apart from the detention unit personnel  
3 and the persons authorised to go in, and there has now been a cumulative buildup of  
4 the effects of being subjected to an extremely restrictive detention regime. And for  
5 this reason in several filings we have specifically mentioned the need to meet  
6 Mr Al Hassan to assess, beyond giving testimony, the extent to which his conditions  
7 impact on other aspects of his participation and that includes our interim release  
8 request and paragraph 3 of filing 870.

9 And of course I regret that we have been unable to do that for reasons beyond our  
10 control.

11 And during this time Mr Al Hassan has indicated that to the extent possible he  
12 doesn't want to think about these things or talk about them. And in her report  
13 Dr Porterfield noted that Mr Al Hassan has pushed through the discomfort and  
14 discussed these issues, but as Dr Porterfield writes, it is clear that these come at a cost  
15 to him as he becomes highly distressed and in some cases physically incapacitated  
16 afterwards.

17 The problem is that at present we can't meet him before or afterwards to check if he is  
18 okay and to help him through the aftermath.

19 So while we would have prepared -- or preferred to have a more current and  
20 comprehensive evaluation, looking into other issues concerning his participation in  
21 the trial, it hasn't been feasible to do so, bearing in mind the potential impact on him.  
22 So if and when we see Mr Al Hassan, if the impact of the last three months has been  
23 greater than what we could have anticipated or determined through phone  
24 communications, then what we are saying here today is that we should have the right  
25 to raise that with the Chamber as soon as we have grounds to do so. But right now it

1 is a hypothetical abstract point until we can actually meet him and assess whether  
2 there are grounds to raise this before the Chamber.

3 In terms of other issues concerning positive defences, Articles 32 do not require or do  
4 not have the same disclosure obligations, and it is notable that the issues raised by  
5 the Prosecution today have been based on pleadings, so again, there is no issue of  
6 prejudice, but of course we will be guided by the Chamber on those matters.

7 Thank you.

8 JUDGE PROST: [11:11:04] Thank you, Ms Taylor.

9 Mr Duterte, I don't need -- unless it's something very specific, we have the filings on  
10 this issue, we have the law, and I don't want to get into a back-and-forth over details,  
11 unless it's something completely short, on point. Briefly.

12 MR DUTERTRE: [11:11:30](Interpretation) Very briefly, your Honour, thank you.

13 This is the first time that the Prosecution has heard anything about fitness for trial. It  
14 was never mentioned beforehand. There was the issue of fit to give testimony, but  
15 fitness for trial, no. If that's the case, the Defence must make a filing immediately  
16 and not in this manner at the last minute.

17 JUDGE PROST: [11:12:01] Thank you.

18 I stopped you by hand motion simply because I will start with these points that,  
19 Ms Taylor, obviously it is open for you to bring whatever motions you consider  
20 appropriate and the proper way is indeed, if it is a question of a fitness motion, then  
21 the proper way forward, it is for you to determine. You have mentioned these issues  
22 in your main -- your termination motion, but evidently this is not something we are  
23 going to deal with today, nor does this constitute a means of introducing that issue  
24 before the Chamber.

25 And to the other point of issues that you might bring forward once you have had

1 a chance to meet with Mr Al Hassan, of course any matters can be brought before  
2 the Chamber as you receive the information. Once again, we will discuss this issue  
3 later. The Chamber is sympathetic to the situation you are facing in terms of  
4 discussions with your client, so that all having been said.

5 I just want to deal with this in a very short way. The Chamber believes that a  
6 regulatory framework provides sufficient guidance on this issue pursuant to Rules 79  
7 to 80. The notification that is sufficiently in advance to enable the Prosecutor to  
8 prepare adequately and to respond implies a notification prior to the commencement  
9 of trial. I don't think there's any more stringent deadline required at this point, but  
10 that is the interpretation of the Chamber.

11 And when I say notification, Ms Taylor, I know you were arguing the various  
12 pleadings as a demonstration of prejudice, but the point is it has to be a formal  
13 notification on these matters which will need to be filed prior to the commencement  
14 of trial.

15 And I note that the schedule sets a substantial break between the opening of trial and  
16 the start of the evidentiary phase. I consider that the Prosecution will have adequate  
17 time to respond to the Defence, which assess and seek any remedy, or any other  
18 matters or any issues of the surrounding disclosures. So I think the Chamber's  
19 position is quite clear and we will proceed on that basis.

20 And if we could then move to the next issue.

21 I see we have about 15 minutes. It's a difficult issue. I'm wondering though before  
22 we do so, Mr Dubuisson, I neglected earlier to give you the floor with respect to any  
23 issues related to the Prosecution's witnesses and the order of witnesses. And I don't  
24 know if you want to make any interventions at this point on the question of the  
25 arrangements for video, et cetera.

1 MR DUBUISSON: [11:14:56] (Interpretation) Thank you, your Honour.

2 I'll be brief. Since we are in open session I won't give details. I'd just like to say that  
3 we do have a temporary location where we can have audio-visual links as of the  
4 late -- end of August, namely, when the Prosecution case begins. We have another  
5 location that is more definitive in nature as of late October. So we will be able to use  
6 AV links from the field as of the end of August.

7 JUDGE PROST: [11:15:45] AV links as of the end of August from the field? From  
8 the -- okay. That's very interesting news, thank you.

9 And in addition, what was mentioned by the Prosecution, I assume that the -- I know  
10 it's quite a burden on the Registry, but that the Registry can put in place perhaps  
11 alternative plans if we have a situation of a witness who is expected to come live and  
12 then we have some difficulties in that respect, that it may take, take timing, but I  
13 assume the Registry has the options, if we are talking about witnesses, for example, in  
14 Europe, for example.

15 MR DUBUISSON: [11:16:26](Interpretation) We are bound by the medical protocol  
16 which applies for entry to this building and also to the presence of people in the  
17 actual courtroom. And it applies to everyone, in actual fact. It applies to witnesses  
18 or to the accused person. So, yes, indeed, that protocol changes regularly and is  
19 adjusted in light of developments relating to the COVID-19, and the measures will be  
20 becoming more flexible, not just here but also at the detention centre.

21 Thank you.

22 JUDGE PROST: [11:17:12] Thank you very much, Mr Dubuisson.

23 I have not called on counsel for the LRVs to this point because I did not consider that  
24 there was any matters of particular relevance, but I have not forgotten you and we  
25 will now move to the agenda item which relates to COVID-19 and I will hear from the

1 LRVs in due course on this issue as well.

2 So I think we might as well use the time and proceed, begin with this agenda item of  
3 issues related to COVID-19, including those related to the visits at the detention  
4 centre and Mr Al Hassan's presence at trial.

5 And I would prefer to commence with what are very important issues, which is -- and  
6 they have already been mentioned repeatedly, the Defence issues relating to  
7 communication with Mr Al Hassan.

8 I want to emphasise before we go into this discussion that I have read all of the  
9 submissions carefully that have already been made on this. I'm aware of the various  
10 protocols which are in place, I don't need to hear repetition of those. What I hope we  
11 can do today is identify some ways forward or at least matters that can be explored in  
12 this regard.

13 And I would like to start actually with Mr Dubuisson because I believe the Defence  
14 has particularly highlighted repeatedly what their challenges are, and I would like to  
15 focus on these two distinct issues of his presence here in the courtroom. We are not  
16 talking anymore about his participation presence at preparatory hearings, we are  
17 talking about the commencement of the trial proceedings, and that is quite  
18 a significant matter. And the recent Registry submissions are unclear as to whether  
19 Mr Al Hassan will be able to be physically present during the trial commencement,  
20 and we simply are going to need some clarity, I appreciate it can't necessarily be  
21 today, but we are going to need this issue clarified.

22 And, Mr Dubuisson, I want to emphasise the Chamber and I certainly appreciate  
23 the Registry's solemn obligations, difficult obligations with respect to the detention  
24 facility and the uncertainties of the current situation. I also fully understand it is  
25 a shared facility, but at the same time, this is a facility which houses individuals while

1 their judicial proceedings are ongoing, and with part of its mandate being to facilitate  
2 and support those proceedings. And in that context there is equally an obligation on  
3 the Registry to ensure its policies and measures are sufficiently tailored so as to not  
4 impede fair and efficient proceedings unnecessarily.

5 So it is, it is a difficult balance, I appreciate, and the Chamber of course has an  
6 ultimate responsibility on fairness and efficiency.

7 So I would appreciate hearing from the Registry. You mentioned there might be  
8 some progress. Can you please give us an update on this situation with the  
9 detention facility, both on the issue of his presence here, potentially, as well as visits,  
10 physical visits by the Defence. Thank you.

11 MR DUBUISSON: [11:20:41] (Interpretation) Thank you, your Honour.

12 If you don't mind, I will begin with visits to the detention centre. Indeed, we have  
13 always allowed communication over the telephone to occur and the Defence team  
14 makes use of this channel to a great deal. We said that it was preferable to have  
15 visual contact with the person and we provided counsel with the opportunity to use  
16 a video conference. So this possibility has been in place for more than two weeks  
17 now to allow any Defence team to have visual contact with the person at the  
18 detention centre.

19 Today, we have received -- well, yesterday evening actually, confirmation of approval  
20 by the Presidency relating to the Registry's conditions having to do with COVID-19.

21 However, this time the Presidency was more specific and is asking the Registry to  
22 find solutions to facilitate person -- personal visits, face-to-face visits with people at  
23 the detention centre. We have heard the views of the doctor because we respect and  
24 of course we depend on the physician. We have always followed the medical advice  
25 of the medical director of the centre and he is working on a roadmap, a roadmap that

1 will set out a number of measures to be taken within the detention centre so as to  
2 allow visits, for example, plexiglas, hand gel, all the measures that now exist. But of  
3 course changes must be gradual over a specific period of time.

4 This morning we received confirmation that the detention centre and -- well, namely  
5 that the warden and -- correction, the chief custody officer and the physician are  
6 working on these measures and the Presidency has approved the Registrar's  
7 application up until 13 July. Up until 13 July there will be no visits to the detention  
8 centre.

9 So that is the situation as it now stands.

10 As for the presence here in the courtroom, there is video conference technology that  
11 can be used at any time. And to allow a person to actually come here to the  
12 courtroom, we saw it was possible, that was the case in another case recently. There  
13 is a protocol, quarantine is put into place. Now whether the physician at the medical  
14 centre of the detention centre will also impose quarantine after the person comes to  
15 the courtroom here, that I cannot give you an answer, but we are working on both  
16 scenarios, a physical visit to the detention centre and then physical attendance here in  
17 the courtroom.

18 JUDGE PROST: [11:24:32] Ms Taylor, do you have any comments before I make  
19 some comments?

20 MS TAYLOR: [11:24:40] Thank you very much, your Honour.

21 We do have extensive submissions on this so I will be guided as to whether I should  
22 give those submissions now or after you have commented. But let me say that with  
23 the greatest respect things do still seem to be about as clear as mud in terms of  
24 knowing as and when we can meet Al Hassan and when he can be here in the  
25 courtroom.

1 JUDGE PROST: [11:25:00] I think what might be most productive at this point,  
2 having heard from the Registry as to the current status, is if we took our break at this  
3 point and perhaps we are allowed to come back five minutes early if we break five  
4 minutes later in order -- I don't want to break up any submissions you will have,  
5 Ms Taylor, and also I would prefer to comment after I have heard from both of you.  
6 I don't know if the Prosecution will have comments on this particular aspect, but  
7 there will be an opportunity for other comments on this issue. And we are doing  
8 fairly well as this is the second last issue on the agenda. So I would suggest we  
9 adjourn at the moment and we will come back in, I believe it's 45 minutes, in order to  
10 recommence the session then.

11 Thank you.

12 THE COURT OFFICER: [11:25:56] All rise.

13 (Recess taken at 11.25 a.m.)

14 (Upon resuming in open session at 12.12 p.m.)

15 THE COURT OFFICER: [12:12:19] All rise.

16 Please be seated.

17 JUDGE PROST: [12:12:39] Thank you.

18 We'll proceed with the agenda item we were dealing with on COVID-19.

19 Ms Taylor, please.

20 MS TAYLOR: [12:12:50] Thank you very much, your Honour.

21 On 5 May 2020, the Trial Chamber invited the Registry to specifically look into  
22 solutions for us to be able to meet Mr Al Hassan in person. And today I'm hearing  
23 that it's because of a decision from yesterday that the Registry is looking into  
24 solutions, a decision from the Presidency, and we're hearing about roadmaps and  
25 looking into things, and we're hearing that we still won't be able to see him for two

1 weeks. And for the reasons I will set out, and with the greatest respect, this isn't  
2 good enough to secure Mr Al Hassan's right to a fair trial.  
3 He's waived his right to participate today because it was a procedural hearing and he  
4 did not have the option of attending in person. But for the trial itself - as long as he  
5 doesn't risk being quarantined each and every time he attends a hearing - he does  
6 wish to attend in person, not through video link and he should be given the full  
7 opportunity to do so.  
8 And I'm not arguing today the video link is automatically unfair or inappropriate.  
9 The position of the Defence is that it depends on the nature of the hearing and the  
10 personal circumstances of the defendant. And as concerns the nature of the hearing,  
11 there's a vast difference between an appellate hearing concerning questions of law as  
12 compared to one where we have witness testimony. And if there's a witness on the  
13 stand that Mr Al Hassan knows personally, it's absolutely crucial that we have the  
14 means to obtain ongoing instructions in a discreet manner.  
15 And we cannot signal to the courtroom at large each and every time we want his  
16 views on an issue. That would ruin our ability to cross-examine effectively. It  
17 would be the equivalent of raising a red flag every time we think the witness has said  
18 something of concern.  
19 The European Court has also emphasised in *Stanford v UK* that the right to be present  
20 is a right to follow the proceedings. And the proceedings here are exceptionally  
21 complex. They're not always easy to follow for a lawyer, let alone a layperson  
22 following in a different language from afar.  
23 It is therefore of crucial importance that the Defence and the Chamber can assess  
24 whether Mr Al Hassan is able to follow the proceedings effectively, and in general it's  
25 extremely difficult to do that in relation to someone with Mr Al Hassan's profile.

1 And we have filed detailed factual and medical submissions concerning our position  
2 that Mr Al Hassan is a torture survivor, who suffers from post-traumatic stress  
3 syndrome with chronic dissociative features.  
4 Put simply, he is not okay. According to these reports, he lives and breathes what he  
5 went through. He told Dr Porterfield that these traumatic events - the beatings, the  
6 threats - they are in his head all the time. It looks like a movie altogether, he said.  
7 It flashes altogether. I watch it all the time. Because of this constant intrusion of  
8 traumatic events into his thoughts and processes, if we are not with him in the same  
9 courtroom, we have no way to gauge his level of distress and the impact for him.  
10 We can't assess if he's effectively participating or whether he's coping by dissociating,  
11 by switching off.  
12 And it's for these reasons that video links are not recommended for vulnerable  
13 defendants. The UK Crown Prosecution Service's guidelines for suspects with  
14 mental health conditions notes the Prosecutor should be cautious as concerns the use  
15 of video-link evidence as it might make it harder to identify whether the defendant  
16 suffers from an impairment.  
17 The UK Equality and Human Rights Commission also published a report which  
18 concluded:  
19 "... that video hearings can significantly impede communication and understanding  
20 for disabled people with certain impairments, such as a learning disability, autism  
21 spectrum disorders and mental health conditions."  
22 And PTSD is a mental health condition; that's well recognised.  
23 So -- I don't have someone next to me to give me a Post-it Note, so I'm very sorry and  
24 I'm very grateful.  
25 So we do understand that with COVID there needs to be a new normal. But this

1 new normal shouldn't be unfair and we shouldn't ignore the particular circumstances  
2 of this case and the defendant. We can't put a temporary Band-Aid on the scars of  
3 Mr Al Hassan's mental health and soldier on.

4 And that brings me to my next point, which is our meetings with him. We've been  
5 told we can't meet him. He can't attend hearings in person. And to be honest, we  
6 don't really know why. Nor do we know for how long this will last.

7 And we're being asked today to address issues with far-reaching implications, but  
8 we're doing so in a complete factual vacuum. It's very speculative to talk about a  
9 witness order if we don't know if he's going to be here or not. And when we

10 requested the medical advice, which was relied upon for these measures, we didn't  
11 get it. So all we know is that there's a medical officer who's recommended certain  
12 measures and that he wants to be cautious.

13 But with all due respect, that's not a good enough reason to deprive Mr Al Hassan of  
14 his fundamental right to meet with his Defence. Particularly in the absence of an  
15 individualised assessment as concerns the specific impact of such measures on  
16 Mr Al Hassan.

17 And the Host State has decided that legal visits can occur for Dutch detainees and  
18 some of them are clearly old. So why can't Mr Al Hassan receive visits? If anything,  
19 his need is greater. He doesn't have a family here who can visit him and he has no  
20 idea when he can see his family in person.

21 So we are by default his family here. And we are not being allowed to see him, to  
22 check in on him and make sure that after three and a half months of extreme  
23 lockdown, he's okay.

24 And this isn't just for social purposes. It should be clear from my earlier submission  
25 that we need to meet him to review evidence in person, obtain instructions on

1 sensitive issues that he won't discuss on the phone. This includes investigative leads  
2 and verify whether he's understanding things that are being discussed with him.  
3 And for that, it's crucial to have proper body language.  
4 And I refer here to written submissions as well that Mr Al Hassan for personal  
5 reasons which are genuine does not want to at this time use the video connections.  
6 And because we don't know when we can see Mr Al Hassan, we have no clear idea  
7 when this will change and how to change it. And for three and a half months,  
8 information has been parsed out in two-week allotments and that's made it very  
9 difficult to plan and very difficult to advise Mr Al Hassan. And we can't defend him  
10 effectively in this manner.  
11 If we had known in April that we will be standing here today still arguing about  
12 access to the detention unit, we would have appealed the decision on interim release  
13 in May.  
14 And if we are told today, if we get clear information from the Registry that visits  
15 won't be allowed for a further three months and that the same restrictions will apply  
16 to investigations, then we will file another request for interim release and we will ask  
17 you to suspend this trial.  
18 But if all we hear is that we're looking into options, that we've made decisions for two  
19 weeks only or we'll soon get back to you, it becomes impossible for us to assess the  
20 full extent of prejudice, obtain a proper remedy and advise our client.  
21 So what we are respectfully asking for today is for solutions to be found today. Not  
22 down the line. And if a solution really can't be found and if no firm commitment to  
23 an immediate solution is given, then we would ask for that to be clearly stated for the  
24 record so that we can then inform Mr Al Hassan that that's the case and we can get  
25 instructions as to what remedy might be needed.

1 Thank you.

2 JUDGE PROST: [12:22:21] Thank you very much, Ms Taylor.

3 I don't believe the Prosecution or Mr Dutertre, do you have anything on this  
4 particular issue? It really is I believe a matter between the Defence and the Registry.

5 Thank you.

6 And I imagine the same for the LRVs. I will come to you though shortly.

7 Mr Dubuisson, do you have any additional comments to make on this issue?

8 MR DUBUISSON: [12:22:51](Interpretation) Thank you, your Honour. No, I will  
9 just hold myself to the submissions exchanged with the Defence on 22 June. It is  
10 nothing new. As the Defence says, this was a measure that was taken in the month  
11 of March and the Defence is fully in the know that this measure was taken in the  
12 month of March, that it was approved by the Presidency because we on a rolling basis  
13 continually inform the Defence teams in general and the individuals concerned at the  
14 detention facility.

15 We are effectively in a situation that, subsequent to your hearing, we put in place  
16 some new mechanisms, that is to say, the possibility of having a video link with the  
17 detention centre. This is a new situation; it doesn't exist in the Dutch system. We  
18 were not aware when we discussed this recently that it wasn't possible for the  
19 Defence. This is a new piece of information for us.

20 But we're taking this into account and we're now going to look at the roadmap that  
21 the doctor is preparing for us, whether it will indeed enable the essential visits to the  
22 detention facility by counsel, but also any other visits to the detention facility within  
23 the -- within the circumstances of COVID and the pandemic.

24 Thank you.

25 JUDGE PROST: [12:24:31] Thank you, Mr Dubuisson.

1 Evidently, the Chamber has to respect and does of course respect that the matters  
2 with respect to the detention centre fall within the purview and mandate of the  
3 Registry and the Presidency.

4 Nonetheless, I think I can say that the Chamber is very concerned about this issue and  
5 these issues because, as detailed by Defence counsel today, they have a direct impact  
6 on the fairness and efficiency of the proceedings before this Chamber. So I don't  
7 think it's inappropriate that the Chamber expresses its concern about both issues,  
8 about the ability of the Defence to visit with their client physically.

9 I believe we all appreciate the efforts that have been taken to install a facility for  
10 communication, which is available to the Defence, and that was certainly a helpful  
11 step. But I do take the Defence's submissions that there is no replacement for an  
12 actual physical meeting with a client and especially, I would emphasise,  
13 Mr Dubuisson, the circumstances of this case. Separating it from other proceedings  
14 that are pending and other detainees at the detention unit, we are very close to the  
15 opening of the trial of this individual; so this is a very important issue.

16 So I would very much urge, and also obviously the Chamber can take whatever steps  
17 it considers appropriate vis-à-vis the Presidency, but I would urge consideration on  
18 the first issue of the ability of the Defence to meet physically with their client.

19 There's been much discussion. These measures have been in place since March.

20 There's been much evolution in The Netherlands, now here at the Court, to take those  
21 into account. And in particular, I note what the Defence is saying and I would  
22 emphasise that there is a blanket policy and the question is, can there be a more  
23 tailored policy that takes into account the particular circumstances of the individual  
24 accused? In terms of the stage of his proceedings as well as his circumstances in the  
25 detention unit? If those factors could be taken into account in assessing this issue on

1 an individual basis.

2 Again, I fully respect you have the expertise, the medical expertise, and you have a  
3 large responsibility and we also respect the Presidency. I just raise those  
4 considerations.

5 Also similarly, I cannot stress strongly enough how important it is for this Chamber  
6 to have Mr Al Hassan present for his trial proceedings. All of the points which have  
7 been made by the Defence are very valid. It is very different from preparatory to the  
8 actual hearing of the case and so we hope that all possible efforts will be made to  
9 allow for that.

10 I trust that the Registry is taking into account the practice we've all been hearing  
11 about in the Dutch courts in terms of visits of counsel as well as what the situation  
12 may be in terms of the physical presence of the accused.

13 I note that the FMU has done an impressive job in terms of installations here. With  
14 respect to the Judges, I would suggest that there could be some very simple measures  
15 put in place. I'm no expert - and I certainly would not presume to be - but it seems  
16 again, I would simply hope that there is an appreciation of how important this is for  
17 the Chamber.

18 So I would ask that those factors be taken into account. And in particular, in terms  
19 of the attendance of the accused for the trial proceedings, the requirement for a  
20 14-day quarantine post every departure to and from the building, it would present  
21 significant difficulties. So I hope that that issue will also be considered and I simply  
22 relay those comments, again respecting the jurisdiction here which is not mine. But I  
23 hope you will take those in the spirit.

24 Ms Taylor, the Chamber remains very concerned about these issues. We understand  
25 the submissions you've made and the position you've taken and we will continue to

1 do as much as we can in order to try and see if we can facilitate both your physical  
2 visits with the accused and with the attendance at the trial proceedings.

3 Of course none of us have control over the pandemic circumstances and the measures  
4 that are necessary to obviously protect health and safety, but we will do the best we  
5 can in the circumstances.

6 So unless there's anything further on those particular issues, I would like to give an  
7 opportunity first to the Prosecution and then to the LRVs to raise any specific issues  
8 at this stage with respect to COVID, if there is anything. I'm not certain that the  
9 Prosecution would have any matters.

10 Mr Dutertre.

11 MR DUTERTRE: [12:29:50](Interpretation) Thank you, your Honour. Nothing in  
12 particular outside what we've already written in our submissions with regards to  
13 investigations that are suspended at the moment and they are still floating, as it were.

14 JUDGE PROST: [12:30:07] Thank you. And yes, again, we are looking at changes in  
15 evolution, so hopefully as we approach the evidence phase, at the least perhaps the  
16 scenario will be different. We're all, we're all hopeful.

17 Finally, yes. Please, Counsel, please proceed if you have any issues that you wish to  
18 raise on this COVID-19 issue.

19 MR KASSONGO: [12:30:29](Interpretation) Thank you, your Honour. Just a  
20 clarification. The Legal Representatives of Victims notes that there have been a lot of  
21 deaths with COVID-19 for the victims. Taking into account their local context and  
22 the environment in which they live, it's very difficult and we hope to -- they hope to  
23 see the end of the trial, but they are currently in despair. So we maintain our  
24 comments and observations that have been written in that regard.

25 Thank you.

1 JUDGE PROST: [12:31:10] Thank you very much for that, and yes, of course all of  
2 the submissions that have been made on this issue certainly the Chamber is fully  
3 aware of them and will take those into account, so we appreciate that.  
4 Is there anything further? If there's nothing further on this topic -- Ms Taylor, there  
5 are no other issues that we'll deal with in this context on those matters.  
6 Then we can proceed then to the final issue of other procedural issues affecting the  
7 schedule.  
8 Now on this, today's agenda I've raised this issue only in a procedural sense. I do  
9 not want any submissions on pending requests or motions which are before the  
10 Chamber. Those will be decided by the Chamber in due course.  
11 I have one discrete issue related to the Defence termination motion that I would like  
12 to raise. The Prosecution filed last Friday its request in which it seeks a variety of  
13 matters and that motion is of course currently under consideration by the Chamber.  
14 But in it the Prosecution stated that delaying trial commencement date is not  
15 necessary as the Defence agree that the request may be adjudicated after opening  
16 statements, indicating their view that this should be done before the presentation of  
17 evidence.  
18 The excerpt of the Defence filing that the Prosecution cited did say "take steps to  
19 ensure the timely resolution of the Defence termination request, including any related  
20 evidentiary hearing, in advance of the commencement of substantive testimony".  
21 And without prejudice to what the Chamber might decide on this, I would like to  
22 hear -- we have fully your submissions, Ms Taylor, that you want it adjudicated  
23 before the hearing of evidence. I know the Prosecution's position. I'm simply  
24 looking for your confirmation or not as to whether the Defence does agree that the  
25 termination motion can be adjudicated upon after opening statements.

1 MS TAYLOR: [12:33:25] Thank you very much, your Honour.

2 And again, I don't have instructions from Mr Al Hassan on this specific issue, and I  
3 apologise if perhaps the wording in our request wasn't entirely clear, but there are a  
4 range of related issues here. One of them concerns our position that one of the  
5 consequences of the facts set out in the request is that Mr Al Hassan cannot be  
6 considered fit to stand trial because of his inability to testify.

7 I would respectfully suggest that that might be an issue that would need to be  
8 resolved before he enters a plea. We would also need to meet him before he enters a  
9 plea. So there's another issue there that it's a precondition before the start of the  
10 hearing in the sense that if it's merely the Prosecution standing up and giving an  
11 opening statement, or is it a hearing where the defendant is being asked to give a plea?  
12 So there is that consequence related to the opening statements.

13 JUDGE PROST: [12:34:32] Thank you on that, Ms Taylor. I can appreciate there  
14 could be other issues such as you've raised, the meeting with him and whether you've  
15 been able to do that and questions of fitness which, as we've discussed, is a separated  
16 matter.

17 On the adjudication, though, of the termination motion itself, if you could just  
18 separate that, is it the Defence position it must be adjudicated upon and decided by  
19 the time of opening statements - putting aside those other issues which I take as  
20 caveats, that those could prevent - or is it acceptable -- from your wording it seemed  
21 to be that your view was before the evidentiary stage in terms of the substantive  
22 adjudication of the motion. That's simply what I'm trying to clarify.

23 MS TAYLOR: [12:35:16] Out of an abundance of caution I would ask to be able to go  
24 back to the client and to write to the Chamber and parties this afternoon with his  
25 position, just in the sense that I haven't received -- I haven't been able to consult with

1 him on this specific point before this hearing and it's hard to do so right now.

2 JUDGE PROST: [12:35:32] No, I can certainly understand that and that's perfectly

3 fine, and you can do that by email. That would be fine. If you could just

4 simply -- it's obviously very helpful for the Chamber in terms of -- again, the

5 Chamber will decide what we will decide, but it would be very helpful if we're very

6 clear on these issues, which is very important in terms of the opening. So if you

7 could obtain your client's instruction on the point, that would be very helpful.

8 Thank you.

9 All right. So that is the only issue I wanted to raise under the topic of procedural

10 matters that could affect the opening of the trial. Is there any, any further

11 submissions from any -- I see the Prosecution.

12 Yes, please proceed.

13 MS LUPING: [12:36:15] Thank you, your Honour. It's really, we're in your hands,

14 your Honour, but there is an issue that we were hoping to be able to address today

15 for the sake of expeditiousness. We were wanting to update you on where we're at

16 in terms of disclosure related to the request because there has been further

17 correspondence between the Prosecution and the Defence, and if you would prefer,

18 I can make our submissions now, or if you would prefer not to hear us on this issue of

19 an update on disclosure, we can file. It's as you wish.

20 JUDGE PROST: [12:36:48] And this is disclosure specifically related to the motion,

21 the termination motion?

22 MS LUPING: [12:36:53] It's the -- indeed, it's disclosure related to the termination

23 motion, it's disclosure specifically in relation to the four consultants' reports that have

24 been appended and been relied upon in that motion. I can update you. We've

25 received now an email from the Defence yesterday in relation to one of those

1 consultants and now we're in a position actually to make also an explicit request for  
2 disclosure under Article 64. But it's as you prefer. I can now make the submissions  
3 or we can file and make written submissions.

4 JUDGE PROST: [12:37:31] I think particularly taking into account that my colleagues  
5 are not with me today, I would prefer if you did that by way of written submission.  
6 It's obviously a very important issue. The Chamber is carefully considering all  
7 submissions in this respect, so I think that's preferable if it came by way of a filing.

8 MS LUPING: [12:37:50] As you wish, your Honour. Thank you.

9 JUDGE PROST: [12:37:52] Thank you.

10 Nothing else from the Prosecution.

11 Anything else from the Defence on procedural issues that could affect opening of trial,  
12 other than what -- other than what you've already identified?

13 Ms Taylor.

14 MS TAYLOR: [12:38:03] Thank you very much, your Honour. We would like to  
15 respectfully request clarification, given in mind the presumption of innocence and the  
16 principle of openness of the proceedings, whether the Chamber's ruling this morning  
17 will extend to press comments from the Prosecution at the opening statements.

18 Mr Al Hassan's responsibility is obviously *sub judice*. He has a protected right to the  
19 presumption of innocence. And we note that in past occasions the Prosecution has  
20 given press statements on the opening of trial summarising their opening statements  
21 and also tweeted those and had an array of public media accompanying it.

22 So we would respectfully ask whether the directive that any publication of summaries  
23 of party submissions on *sub judice* issues applies equally to everyone in the courtroom,  
24 including the Prosecution and including the LRV, who might also be giving press  
25 statements on the positions of their clients, which may include assertions that their

1 clients are victims of Mr Al Hassan.

2 JUDGE PROST: [12:39:24] Ms Taylor, the issue was dealt with and I think the  
3 Chamber was very clear. We were dealing with a very specific incident. And we're  
4 in public session so I'm not going to go into the specifics. We will address any  
5 situation that is brought to our attention with respect to public statements by any  
6 party, any participant to those proceedings, or otherwise. We will deal with that on  
7 a specific basis.

8 We addressed a specific issue and I think the message was quite clear. And there is  
9 a significant difference between statements which are recounted -- are made in this  
10 courtroom and are recounted by a press statement or release. But of course any  
11 issue that anyone sees can be brought to the attention of the Chamber and the  
12 Chamber will address it.

13 But the message was this is a trial that will be conducted in this courtroom and before  
14 this Chamber and that's the position. So I believe that's a sufficient clarification on  
15 that point.

16 Is there any other matter that anyone wishes to raise under any other business? I  
17 have one --

18 Please proceed, Counsel.

19 MR KASSONGO: [12:40:30](Interpretation) Thank you, your Honour. In principle  
20 the Legal Representatives will meet with the victims in order to take their concerns in  
21 a physical way. It's very difficult with the confinement measures that have been  
22 taken, so contact has been extremely difficult. We didn't want to go into the  
23 Defence's presentation, but we are paying careful attention to what has been said so  
24 that the statements, substantive statements are not harmed -- or are not reproduced in  
25 the press. And that would not be justified in terms of submissions being made to the

1 Defence. Thank you.

2 JUDGE PROST: [12:41:23] I thank you very much for that clarification and the  
3 Chamber -- I'm appreciative and I'm sure the Chamber is as well of that approach  
4 being taken by the counsel for the LRVs. Thank you.

5 If there is -- thank you. If there is nothing else under any other business, I had one  
6 point I wanted to return to because it's obviously I think one of the most important  
7 discussions of the day. So we had a lengthy discussion both on agreed facts and on  
8 the witness order.

9 The Chamber remains hopeful and optimistic and that some kinds of agreements can  
10 be reached on both agreed facts, and we already know there are some. And in  
11 addition, we are hopeful that perhaps we can have, shall I say, for the first ten  
12 witnesses a non-contentious list that might be put forward.

13 But in order that the Chamber can plan and make its decisions, we would request that  
14 the parties advise us by close of business on 13 July both with respect to agreed facts  
15 that have been reached at that point and also as to progress with respect to the  
16 Prosecution list of witnesses.

17 So if you could submit information by that date, that would be appreciated, and  
18 hopefully that will be a joint submission in the Chamber's hope anyway.

19 Ms Taylor.

20 MS TAYLOR: [12:43:05] Thank you very much. We will certainly endeavour to do  
21 so. If I can respectfully suggest that from our perspective in terms of putting forth  
22 concrete proposals, which we are willing to do so, it would be extremely helpful to  
23 know if substantive witness testimony will start on 25 August. Because for us it will  
24 be extremely difficult to conduct investigations while being in the court. So in terms  
25 of our ability to structure ourselves and know what we can do feasibly and to actually

1 put forward a concrete proposal as to witness order, it would be helpful to know  
2 when that order will happen. Because there's a big difference between witnesses  
3 coming in August in a certain order and witnesses coming in September in a certain  
4 order.

5 JUDGE PROST: [12:44:07] To my knowledge the date for the opening of substantive  
6 evidence remains as set by the, by the Trial Chamber. I'm not sure if you're -- so at  
7 the moment that is the date that has been set where we did contemplate substantive  
8 evidence being presented at that time.

9 If there's motions to be brought to change that, of course that's the parties' right to  
10 bring a motion, but I'm not sure if you thought there was some suggestion from the  
11 Chamber to the contrary, Ms Taylor.

12 MS TAYLOR: [12:44:43] In both our May COVID submissions and also in our  
13 observations on the conduct of the proceedings we had made specific submissions  
14 concerning the prejudicial impact of starting substantive hearings now. So we had  
15 understood that the Chamber was actively seized of the matter in the sense that it is  
16 our position that starting with substantive witness testimony in August is absolutely  
17 impossible for the Defence. Impossible.

18 We have not done the investigations we need to do. We have not obtained the  
19 instructions that we need. So we have been hoping for clarity on this so that we  
20 could actually put forward concrete proposals in terms of order of witnesses, et cetera.  
21 But for the last couple of months we have been in a morass of uncertainty. We have  
22 been getting two-week memos about when we can see Mr Al Hassan. We have been  
23 getting two-week memos as to if and when investigations can be conducted.  
24 So in terms of us thinking or understanding that we were dealing with a status quo,  
25 particularly when we've had repeated deadlines pushed back from the Prosecution,

1 that was not our understanding. And we would submit that it would be  
2 significantly unfair to soldier on, to pretend that all is right, that there's been no  
3 impact on a fair trial when there has been such an appreciable impact that has been  
4 mentioned in almost every filing by the Prosecution, every filing by the LRV, every  
5 filing by the Registry.

6 So we're here today expecting that when we raise those issues, they will deserve  
7 similar consideration. But if what we're hearing is that, no, they're irrelevant, they  
8 don't matter, then of course we're a little bit surprised.

9 Thank you.

10 JUDGE PROST: [12:46:38] Let me be very clear, Ms Taylor. It is certainly not a  
11 question that the Chamber is in any way ignoring any submissions or is suggesting  
12 that the concerns you have expressed regarding the difficulties that the Defence is  
13 encountering is in any way dismissed or diminished. Not at all.

14 To the contrary, as all of the interactions have indicated, the Chamber is very  
15 concerned about the situation with the Defence. However, what we do not have  
16 before us is a specific motion from the Defence for an adjournment as of yet. And  
17 that has not been presented. Yes, I note that there were comments, but it wasn't  
18 framed in that way, at least insofar as the Chamber is concerned. But we are  
19 cognizant of the difficulties.

20 What you have expressed today is, as I take it, a concern that the Defence is of the  
21 view that because of these situations they are not in a position to proceed, which is,  
22 for me at least, and perhaps it's just my perspective, a clearer statement of that  
23 position but presented here today.

24 So I would simply -- I don't know, Mr Dutertre, if you have any comments on this. I  
25 mean, it is a question of the Chamber is here if either of the parties wish to present a

1 motion. At the moment the evidence is scheduled to proceed on that date, but the  
2 Chamber is obviously prepared to entertain any motion to the contrary.

3 Mr Dutertre, do you have any comments?

4 MR DUTERTRE: [12:48:12](Interpretation) Just very briefly, your Honour. It's true  
5 that the word "adjournment" has been raised in certain Defence filings but without  
6 there being any kind of precision with regards to the duration of an adjournment or  
7 which month it would be. So indeed it has not been characterised or made concrete.  
8 What we have to do is to be able to do communicate with the Defence on the order of  
9 witnesses and we're going to be as flexible as we can, your Honour, but there is a risk  
10 that sometimes, given the presentation of evidence, this might change, but we have to  
11 do things in a way such that they advance.

12 Now there are witnesses, P-7, P-10, for example, who are witnesses that the Defence  
13 knows about for a long time, and I think that we're going to be able to find a list of 10  
14 witnesses, for example, that we can present such that we can be able to, within the  
15 deadline of the 13th or at the beginning of August, subject to reservations on the part  
16 of the Defence, the Prosecution will make the effort to be able to do that.

17 Thank you.

18 JUDGE PROST: [12:49:17] Thank you.

19 So, Ms Taylor, what I do wish to make clear is there's been no determination of this  
20 issue whatsoever by the Trial Chamber. We have taken regard of all the comments  
21 you have made and have been working to try and assist vis-à-vis your efforts in terms  
22 of investigations, et cetera. But if there is a request from the Defence, if there is an  
23 issue as you have expressed it today, then please bring that forward before the  
24 Chamber.

25 MS TAYLOR: [12:49:48] Certainly, thank you very much. And just briefly I would

1 like to note another issue which is the dangers of parallel litigation, that we are one  
2 team, we don't have a significant amount of resources. So if we are engaging  
3 litigation on the termination request and being in trial to hear witnesses and doing an  
4 investigations that should have been done earlier, it's just not possible. We can't  
5 duplicate ourselves. So that's also an issue. It's just that there's only so many of us.

6 JUDGE PROST: [12:50:19] Well, and as I say, I mean, all of these factors can be, can  
7 be weighed by the Chamber, but I hope we're clear now that at the moment the date  
8 is scheduled, but the Chamber is here and you can take the action that you consider  
9 appropriate in your circumstances. Okay.

10 All right. And we will still look forward, though, to the potential for those filings on  
11 13 July. And regardless of the start date, I think that's a useful exercise in any event.  
12 So unless there's anything else from anyone, I believe that concludes the agenda items  
13 for the status conference.

14 I would like to thank the interpreters - and I apologise, I get carried away on certain  
15 points, so I apologise to the interpreters - the court reporters, the security officers, of  
16 course, and all those involved in facilitating the status conference. And in particular  
17 an extra thanks today, Mr Dubuisson, to the Registry for -- this is not an easy time to  
18 put together any form of hearing. I did a virtual ex parte status conference and I've  
19 also now done this one today, and I know that a lot of work has to go into it because  
20 of the special circumstances so I am grateful and I'm sure all the parties and  
21 participants are as well. My thanks, special thanks to the Registry.

22 And I wish you all a good rest of the day. Thank you very much. We are  
23 adjourned.

24 THE COURT OFFICER: [12:51:53] All rise.

25 (The hearing ends in open session at 12.51 p.m.)