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TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

Public redacted version of Defence observations on the conduct of proceedings

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

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

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I. Introduction

1. The Defence for Mr. Al Hassan hereby submits its submissions concerning the conduct of the proceedings, Rule 79, and as concerns points of disagreement concerning the witness contact protocol.[1]
2. As a preliminary point, although it was not possible to finalise a joint protocol, the parties and the Legal Representatives for Victims (LRV) reached broad agreement on the following matters:

    a. The type of questions: For the parties, no leading in chief, except for preliminary or uncontested issues, leading in cross-examination, and no leading during re-examination. Leading questions can be used in connection with Chamber's witnesses.
    b. The system for checking the transcripts (as will be proposed by the Prosecution);
    c. The use of video-conferencing technology;
    d. For opening statements, it was agreed that the Defence and LRV could elect to give their statements either at beginning of trial or beginning of the their case, but no agreement could be reached as concerns whether the Defence and LRV should also have a short opportunity to introduce themselves at the beginning of the trial, in case they elect to postpone their opening statements; and
    e. The application of the standard forms of in court protective measures.

3. In case it serves to further focus potential points of agreement and disagreement, the Defence informs the Chamber that it indicated to the Prosecution and the LRV that it would not object to the application of the following paragraphs from the proposed order on the conduct of the proceedings, as submitted by the Prosecution in the *Gbagbo & Blé Goudé* case:[2]

> Paragraphs 21, 22, 32, 36, 38, 39, 42, 43, 44, 46, 47, 48, 51, 52, 54-46. Our agreement to para 50 would also be prefaced by the words 'in exceptional circumstances' (as per decision ICC-02/11-01/15-205, par. 40), and for paras 47-48 - it would be necessary for the calling party to establish that a) the materials used to refresh were disclosed in advance and b) the materials reflect the personal recollections of the witness.

4. The Prosecution communicated, in turn, its position on these proposals.[3]

[1] The current filing has been submitted on a confidential basis, due to the fact it refers to specific items of confidential evidence. The Defence will aim to file a public redacted version by 4pm, 3 March 2020.
[2] ICC-02/11-01/15-59-AnxA.
[3] See Annex C.

II. Submissions

A. Procedure for reading the charges

5. It would be helpful for the Defence and Mr. Al Hassan to have a clear understanding as to what constitutes 'the charges'. Once this is clarified, it is not necessary for the charges to be read out at the opening of the trial.

B. Opening statements

6. The Defence and the Legal Representatives should be afforded the opportunity to elect as to whether they wish to make opening statements at the beginning of the trial, or at the beginning of their respective cases. This stated preference should be communicated to the Trial Chamber and the respective parties and participants, no later than fifteen days before the start of the trial. In order to ensure coherence as to the presentation of cases, the LRV should adopt a joint position as concerns whether their opening statements will be presented at the beginning of the trial, or at the beginning of their case.
7. Given the likely publicity that will attend the opening of the trial, and the importance of ensuring that the public appreciates the role of the respective parties and participants, if the Defence and the LRV elect to provide opening statements at the beginning of their case (rather than at the beginning of the trial), they may nonetheless be afforded a brief opportunity (no more than thirty minutes) to introduce themselves, and explain their role in the proceedings, and this particular trial. This time shall be deducted from the time allocated to their opening statements.
8. The party/participant giving the opening statement should, no later than 7 days (or 5 working days) before the scheduled date for the opening statement, file a list of materials which they intend to cite to during their submissions. The opposing party/participants should file any objections, no later than 3 working days before the date for opening statements.
9. For the Legal Representatives of Victims, the content of the opening statement should be confined to the views and concerns of participating victims, and an evidentiary overview of any evidence or testimony they intend to introduce: the statements should not refer to, or rely upon information/allegations set out in applications forms that have not been disclosed to the Defence.

10. Bearing in mind the specific function of the opening statement, the fact that this is a single accused case, and the time allocated in comparable cases,[4] no more than 4 hours should be allocated to the parties, and 2 hours to the LRV.

C. Scheduling of witnesses

11. Various factors are likely to impact on the scheduling of witnesses. This includes the timing for Ramadan in 2021 (approximately 12 April - 11 May), and possible elections. In order to avoid any hearing delays during these periods, the Defence proposes that the Prosecution identifies witnesses, not impacted by these events, who would be available to testify during these periods.
12. It is also essential that witnesses are scheduled in a manner that is consistent with Mr. Al Hassan's right to adequate time and facilities to prepare his Defence. Witnesses should not be grouped in a manner that would generate prejudice as concerns the defendant's right to adequate time and facilities to prepare its case. This would be the case if the Prosecution were to group together witnesses who:
    a. Touch directly on Mr. Al Hassan's individual responsibility; and
    b. Were the subject of delayed disclosure requests.
13. Bearing in mind the difficulties that the Defence has, and will continue to experience in conducting investigations, it is likely that the Defence will need to prioritise its preparation and investigations, by reference to the proposed witness schedule. For this reason, the Defence proposes two options.
14. Option 1:[5] The Prosecution should file the order of its witnesses, at the same time as it files its final list of witnesses. An updated version must then be filed on the first working day of the month, and any changes to the proposed order of a particular witness must be made at least thirty days before the proposed date of their testimony. The parties should also endeavor to reach agreement as concerns any changes to the proposed order of testimony.
15. Option 2:[6]
    a. The schedule for Prosecution witnesses should be filed three months before the start of the trial;

[4] Three hours for the parties in *Gbgabo,* one hour in *Katanga & Ngudjolo*, 90 minutes in *Bemba*, 90 minutes in *Bemba et al*., 4 hours in *Ntaganda*, 2 hours in Ruto & Sang, 4 hours in *Kenyatta.*
[5] For a similar system, see ICC-02/04-01/15-497, para. 16.
[6] For a similar system, see ICC-01/09-02/11-867, paras. 17-18.

b. Any changes to the order of the first ten witnesses should be communicated at least one month before the proposed date of testimony of the affected witness; and
c. The composition of this 'batch' should not be altered, without prior agreement of the parties; and
d. The schedule for the next batch of ten witnesses should also be communicated one month in advance of the testimony of the first witness in that batch, and the above processes would then apply to this batch.

16. This process should then apply to the next batch of ten witnesses, and so forth.

D. Length of testimony

17. At the same time as the Prosecution files its final witness list, it should also provide estimates concerning the length of testimony. The Defence should be afforded the same amount of time for its cross-examination, although this may be exceeded upon demonstration of good cause. The time allocated to the LRV should be determined on a case by case basis, depending on the link to the views and concerns, or interests of participating victims.

E. Format of questioning

18. During examination-in-chief, and re-examination, only neutral issues should be allowed, unless the issue is uncontested.
19. If the calling party wishes to refer to 'refresh' the witness's memory, by referring them to information set out in prior statements or records, then it would be necessary for the calling party establish that firstly, the materials used to refresh were disclosed in advance and secondly, the materials reflect the personal recollections of the witness.[7] Such applications should only be granted in exceptional circumstances,[8] and the record must state clearly which particular sections were relied upon to 'refresh' the witness's memory.[9]

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[7] ICC-02/11-01/15-205, para. 47; *Lubanga,* oral decision of 16 January 2009, ICC-01/04-01/06-T-104-ENG, pp. 16-29.
[8] See ICC-01/04-01/07-1665-Corr; para. 109; ICC-01/04-01/06-1390, paras. 8, 13, 18 (referring to the practice as "exceptional"); ICC-02/11-01/15-205, para. 47 (noting that "In principle, a witness shall testify orally to what he or she remembers having personally observed. Witnesses are not permitted to simply read from earlier statements or other documents.")
See also ICC-01/04-01/07-T-97-Red-ENG, p. 67, ll. 16-22 ("[a]nd if [the witness] is determined hostile by the Court, then you will proceed with cross-examination with the questions which will show possible contradictions and which will give ruse to hostility. It won't go into new issue. If you take, on the other hand, a decision not to consider that person as hostile then you will continue with your classic questions within the framework of the examination-in-chief."
[9] *Prosecutor v. Hadžihasanović & Kubura,* IT-01-47-AR73.2, Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness, 2 April 2004 ("if refreshment is permitted, the Trial Chamber may

20. If the calling party wishes to use leading questions, that party must first file an application to declare the witness hostile. Applications, which should only be granted in exceptional circumstances,[10] and, if granted, "cross-examination must be limited to issues raised during the initial part of the interrogation or contained in the witness' previous statements."[11]
21. Leading questions may be used in cross-examination.
22. The LRV shall use neutral (non-leading) questions. If the LRV is authorised to challenge the credibility/accuracy of a witness's testimony, leading, closed as well as questions challenging the witness's reliability may be allowed, subject to the same limitations that apply to cross-examination.[12]

F. Order of questioning

23. The calling party shall commence with examination in chief. If granted authorization, the LRV will then put questions to the witness. The Defence will then conduct cross-examination, and subject to the restrictions set out above, and to prior authorization on a case by case basis,[13] the Prosecution may then conduct re-examination. Subject to Rule 140(2)(d), the Chamber may put questions to the witness at any time. Pursuant to rule 140(2)(d), the Defence shall have the right to be the last to question the witness, but may only address issues that arose after cross-examination.

G. The scope of questioning

i- Prosecution case

24. The scope of examination-in-chief shall be confined to the issues set out in the witness's statement/summary of proposed testimony.
25. The Defence may address issues outside the scope of the proposed testimony during cross-examination, in particular, where relevant to the credibility of the witness or the Defence case. The parties must, to the extent possible, put their case to the witness. However, the cross-examining party is required only to put the general substance of its case conflicting with the evidence of the witness, and not every detail that the party

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consider the means by which the memory was refreshed, when assessing the reliability and credibility of the witness's testimony").
[10] ICC-02/11-01/15-205, para. 40
[11] ICC-01/04-01/07-1665-Corr, para. 67.
[12] ICC-01/04-01/07-1665-Corr, para. 91.
[13] "Following cross-examination, any re-examination by the calling party, which will be authorised on a case-by-case basis, will be restricted to matters which were raised for the first time in cross-examination": ICC-01/09-02/11-867, para. 20.

does not accept. Additionally, the cross-examining party is required to put to the witness any facts or evidence upon which it intends to rely to impeach the credibility of the witness, in order to give the witness an opportunity to respond thereto.

26. The parties may refer to evidence given by other witnesses in order to impeach the witness, subject to the proviso that the parties may not identify the other witnesses.

27. Re-examination should be confined to the issues arising from cross-examination.

ii- Defence case

28. The Prosecution should, in general, present all evidence in support of its case during its case-in-chief.[14] Accordingly, in principle, the Prosecution cross-examination of Defence witnesses should be confined to issues directed towards impeaching Defence witnesses,[15] or corroborating existing elements of its case: it should not address new allegations or matters that were not raised in its case-in-chief.[16]

H. Rebuttal case

29. There is no automatic right, under the Rome Statute, to call a rebuttal case. Rather, the possibility of introducing evidence in rebuttal is exceptional,[17] and should be determined on a case by case basis, taking into consideration the interests of justice, and the defendant's rights under Article 67(1) of the Statute.[18]

I. No case to answer

30. Rather than litigating this issue in the abstract, and given that issues concerning the applicable legal standard are presently before the Appeals Chamber, the Defence proposes that the Order on the Conduct of the Proceedings should specify that the Defence may seek leave to make a no case to answer application, at a defined point,

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[14] ICC-01/04-02/06-1997, paras. 7, and 15;
See also *Prosecutor v. Prlic et al.,* 'Decision on the Interlocutory Appeal against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Crossexamination of Defence Witnesses', 26 February 2009, para. 23 (" "[a]s a general rule, the Prosecution must present the evidence in support of its case during its case in chief". This stems from the rights of the accused under Article 21(4)(b) and (e) of the Statute pursuant to which "when evidence is tendered by the Prosecution there must be a fair opportunity for the accused to challenge it""), and the authorities cited at fn. 70.

[15] See, for instance, SCSL: *Prosecutor v. Taylor,* Decision on Public with Annex A and Confidential Annex B Urgent Application for Leave to Appeal Oral Decisions of 14 January 2010 on Use of Documents in Cross-Examination, dated 29 January 2010, pp. 4-6.

[16] *Prosecutor v. Bagosora,* Decision On Request For Severance Of Three Accused, 7 March 2006, para. 7.

[17] ICTY: *Prosecutor v. Lukic and Lukic*, Trial Chamber "Decision on Motion for Reconsideration or Certification to Appeal the Decision on Rebuttal Witnesses", 9 April 2009 ; *Prosecutor v. Nahimana et al*, Trial Chamber "Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses as Corrected According to the Order of 13 May 2003", 13 May 2003 ; *Prosecutor v. Halilovic*, Trial Chamber "Decision on Prosecution Motion to Call Rebuttal Evidence", 21 July 2005;

[18] ICC-01/04-02/06-2246, para. 20; ICC-01/04-01/06-2727-Red, paras. 42 to 43; ICC-01/04-01/07-T-222-Red2-ENG WT, p. 77, lns 11-25.

after the close of the Prosecution's or LRV's case. The Chamber will be better placed at this juncture to determine whether it would be fair and appropriate to entertain such an application.

J. The Trial Chamber should issue rulings on the admission of evidence

31. Article 69(4) of the Statute specifies that the Court "may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or a fair evaluation of the testimony of a witness".

32. As a first point, the Defence underlines that as a matter of statutory construction, the word 'may' is transformed into a compulsory directive, when it is coupled with enabling language, which empowers a judicial authority to give effect to a legal rights.[19] As explained by Judge Shahabudeen in the context of ICTY regulations:[20]

> "may" in that sentence does not have its usual discretionary meaning: it attracts the standard jurisprudence which says that enabling words are construed as compulsory whenever the object of the power which they confer is to effectuate a legal right.

33. When viewed through this lens, it is clear that object and purpose of Article 69(4) is to enable the Chamber to consider an in-exhaustive list of criteria, as part of its duty to rule on the admissibility of evidence. This characterization is consistent with Article 64(9), which uses similar enabling language to describe the power of the Chamber to issue evidentiary determinations. The role of Article 69(4) as an enabling provision also fits squarely with the text of the corresponding Rules of Procedure and Evidence (RPE). Indeed, Article 69(4) states explicitly that the Chamber must apply this provision in accordance with the RPE, and Rule 63(2) confirms that whereas the Chamber is empowered to assess evidence freely, the Chamber must issue evidentiary

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[19] See 'When the word "may' shall mean "shall"? Law discussed', referring to: Lord Cairns in Julius Vs. Lord Bishop of Oxford, (1874-80) All ER Rep. 43 where Lord Cairns enunciated Principles of Statutory Interpretation in the following words:-
"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty and make it the duty of the person in whom the power is reposed to exercise the power when called upon to do so.
Where a power is deposited with a public officer for the purpose of being used for the benefit of persons specifically pointed out with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the Court will require it to be exercised. The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right"

[20] *Prosecutor v. Milutinovic et al.,* Decision On Interlocutory Appeal On Motion For Additional Funds, 13 November 2003, IT-99-37-AR73.2, Separate Opinion, para. 6.

determinations as part of this process. Similarly, Rule 64(2) obliges the Chamber to give reasons for any rulings it makes on evidentiary matters, and to place these rulings in the record. If a party challenges the admissibility of evidence, pursuant to Article 69(4), the Chamber cannot, therefore, dispose of this challenge by making a private assessment of relevance and reliability, which is never disclosed to the parties.

34. These provisions provide the contextual framework for Judge Henderson's conclusion that the:[21]

> distinction between articles 69 (4) and 69 (7) of the Statute is not that in the case of the former the Chamber may *rule* on admissibility and that in the case of the latter the Chamber must *rule* on admissibility. Rather, the difference is that in the case of the former the Chamber may *exclude* the evidence if there are concerns, whereas in the case of the latter the Chamber must *exclude* the evidence if the conditions are met.

35. This interpretation is also consistent with the use of the word 'may' in similar evidentiary provisions at other international tribunals. For example, Rule 89 of the SCSL RPE specifies that "[a] Chamber may admit any relevant evidence", and Rule 89(C) of the ICTY RPE similarly provides that, "A Chamber may admit any relevant evidence which it deems to have probative value", and yet it has never been suggested that the word 'may' affords either the SCSL or ICTY Chambers with the discretion not to rule on the admission of relevant or probative evidence.[22]

36. Even if Article 69(4) were to afford the Chamber with a measure of discretion as concerns its approach to evidential rulings, this discretion would also have to be exercised in a manner, which is consistent with the Statute, and the Court's legal framework. The ICC Appeals Chamber has affirmed in this regard that the power to 'freely' consider evidence, and the delicate balance arrived at in Rome, do not exempt the Chamber from the duty to render an item-by-item assessment as to the admissibility of evidence, and to give reasons for this assessment.[23]

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[21] Separate Opinion, ICC-01/05-01/13-2275-Anx, para. 64.

[22] See for example, Prosecutor v. Blagojevic & Jokic, in which the Trial Chamber emphasized that notwithstanding the fact that the Chamber had accessed the evidence through a 'dossier' style system, "requested materials will not be regarded as evidence by the Trial Chamber unless and until submitted and admitted in the course of trial in accordance with the Rules". 'Decision on joint defence motions for reconsideration of Trial Chamber's decision to review all discovery materials provided to the accused by the prosecution', Case No IT-02-60-T, para. 16.

[23] ICC-01/05-01/08-1386, para. 2: "By admitting into evidence all the items on the Revised List of Evidence based on a "prima facie finding of admissibility", without an item-by-item evaluation or giving reasons, the Trial Chamber acted outside the legal framework of the Court".

37. Article 74 of the Statute also provides the ultimate guide as to the scope and purpose of trial proceedings; namely, the purpose of trial proceedings is to produce a fair and impartial judgment on the charges. Since Article 74 sets out specific requirements for such a judgment, it is incumbent on the Chamber to conduct the proceedings in a manner which facilitates this objective. In practical terms, this means that the Chamber must ensure that its findings are confined to the facts and circumstances of the charges (Article 74(2)), which in turn, translates to an obligation to ensure that any evidence considered, as part of the judgment drafting process, is relevant to these facts and circumstances. Article 74(5) further requires the Chamber to provide "a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions". As concerns the implications of this requirement within the context of a criminal trial, the ECHR has pronounced that:[24]

> according to the Court's established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 84, 11 July 2017). In examining the fairness of criminal proceedings, the Court has held in particular that by ignoring a specific, pertinent and important point made by the accused, the domestic courts fall short of their obligations under Article 6 § 1 of the Convention (see *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 280, 21 April 2011).

And further, at paras. 73-74:

> Lastly, the Court observes that the domestic courts at all three levels of jurisdiction failed to give any assessment to the applicant's specific pertinent and important points about the serious flaws in the prosecution witness evidence and about the alleged unlawfulness and arbitrariness of the exclusion of all the defence witness evidence from the file (see paragraph 61 above).
>
> The foregoing considerations are sufficient to enable the Court to conclude that the criminal proceedings against the applicant, taken as a whole, constituted a violation of his right to a fair trial under Article 6 § 1 of the Convention.

38. It follows that irrespective as to whether a Court adheres to a common law or civil law system of evidence, in circumstances where the Defence has raised concerns regarding reliability and probative value of Prosecution evidence, and tendered

[24] *Zhang v Ukraine*, 6970/15, para. 61.

evidence in response, the Court has a duty to give a reasoned determination in relation to such challenges. As underscored by the ECHR in the aforementioned judgment, this duty forms a fundamental component of the right to a fair trial. Evidentiary rulings are the bedrock of any judgment, particularly in a joint trial, where the admission and weight of evidence potentially varies between each defendant, and the need for independent corroboration might vary depending on against which defendant the evidence is employed, and for which purpose.

39. The system for evidential rulings employed in a particular case must also promote, and fully respect the defendant's right to fair and expeditious proceedings. Specifically, in the *Tadic* case, the Chamber "recognize[d] the value to the parties of knowing the standards it will apply in determining whether hearsay is admissible".[25] This finding applies with equal force to ICC proceedings, where the Court continues to lack congruence between cases as concerns the specific legal approaches to the admission of different categories of evidence. The issuance of regular rulings concerning the admission of tendered evidence would thus promote clarity and streamline the evidential issues in play. This, in turn, would serve to focus, and delimit the later cases that will be brought by the LRV and the Defence. If the Defence is aware that certain items have been admitted into evidence, it can rely on them without making additional or duplicative arguments as concerns admissibility. Conversely, if items have been excluded, the Defence need not call evidence to counter these items.

40. The parties would also be better placed to seek interlocutory appellate relief in a timely manner, in the event of a dispute as concerns the applicable legal standard to the admission of particular types of evidence. This would avoid the possibility that the Appeals Chamber must quash the verdict or order a re-trial, due to errors concerning the legal standard applied to evidence.

K. Tendering exhibits/documentary evidence

41. Although documentary evidence may be tendered through a witness, or from the 'bar', the parties should first and foremost endeavor to submit evidence through a witness.[26] This will ensure a proper contextualization of the relevance of the evidence

[25] *Prosecutor v. Tadic,* 'Decision on Defence Objection to Hearsay', para. 14.
[26] ICC-01/09-01/11-1436, para. 11 ("[a]lthough the admission of evidence other than through a witness is permissible in the Court's proceedings, the Chamber nonetheless considers admission of evidence through a witness to be a preferable approach, where possible. It is recalled that while the Chamber guided the Ruto

to the charges.[27] This preference for tendering evidence through witnesses is of heightened importance at the ICC, due to the principle of the presumption of orality, which governs the principles of admissibility set out in Article 69,[28] and which distinguishes the ICC from its *ad hoc* Tribunal counterparts. Moreover, the "fact that evidence is being tendered without authentication by a witness may be an important factor in the Chamber's assessment of its admissibility".[29] For this reason, the parties should justify why evidence is submitted *via* a bar table motion, rather than through a witness.[30]

42. Irrespective as to whether evidence is tendered through a witness or from the bar, the tendering party should also specify the purpose for which evidence has been tendered. This obligation stems from the duty to satisfy the Chamber that the criteria for admissibility have been fulfilled. Specifically, as part of its determination as to the admissibility of particular items of evidence, the Chamber must assess the "prejudice that such evidence may cause to a fair trial or a fair evaluation of the testimony of a witness".[31] This assessment of prejudice will be affected by the purpose for which the evidence has been tendered: for example, less prejudice may arise if the item has been tendered for impeachment purposes, and not for the truth of its contents.[32]

43. Parties should only seek to use documents during witness examination that are relevant to that witness's testimony. It is for a party to demonstrate a clear connection between the document and the substance of the testimony of that witness.[33]

Defence to seek admission of the relevant evidence through a 'bar table motion', it also indicated that the Ruto Defence has the possibility of calling witnesses to testify on this matter");
See also *Prosecutor v. Tolimir,* 'Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties During Trial' , para. 20: *"*The preferred method for tendering evidence is for the evidence to be tendered through a witness while the witness is on the stand"

[27] *Prosecutor v. Karadzic*, 'Decision on Prosecution's Motion for Admission of Evidence from the Bar Table, 1 May 2012, para. 4.

[28] ICC-01/05-01/08-1386, para. 3.

[29] ICC-01/04-01/07-2635, para. 12. See also Prosecutor v. Oric, IT-03-68-T, Judgement 30 June 2006 para. 29

[30] ICC-01/09-01/11-847-Corr, para. 17.

[31] Article 69(4).

[32] *Prosecutor v. Prlic et al.,* Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Crossexamination of Defence Witnesses' para. 27." In its Delic Decision, the Appeals Chamber emphasized that specifying the purpose of admission of fresh evidence despite the Defence's objections is necessary in order to properly address the prejudice caused by such admission.86 In this sense, the Appeals Chamber considers that the risk of prejudice caused by the admission of fresh evidence probative of guilt is potentially greater as compared to fresh evidence admitted with the sole purpose of impeaching the witness." Citing to para. 23 of Prosecutor v. Rasim Delic, Case No. IT-04-83-AR73.1, Decision on Rasim Delic's Interlocutory Appeal Against Trial Chamber's Oral Decision on Admission of Exhibits 1316 and 1317, 15 April 2008 ("Delic Decision")

[33] ICC-01/04-02/06-619, para. 31.

L. Format of bar table motions

44. In terms of the format of bar table motions, "[t]he Chamber cannot permit a wholesale admission of documents based on generalised arguments".[34] For this reason, in a bar table motion, [35]

> Unless immediately apparent from the exhibit itself, it is the responsibility of the party tendering it to explain: (1) the relevance of a specific factual proposition to a material fact of the case; (2) how the item of evidence tendered makes this factual proposition more probable or less probable. If submissions on these points are not sufficiently clear or precise, or if the Chamber cannot ascertain the relevance of an item of evidence with reasonable precision, it may decide to reject it on those grounds.

45. This would be best promoted by adopting the requirement, established in the *Ruto & Sang* case, that: [36]

> The Party tendering evidence without it being introduced by a witness shall submit an application accompanied by a table, providing a short description of the content of each document through, averment of its authenticity, an indication of the reason for not tendering the document through a witness (if that is the case), an index of the most relevant portions of the document, as well as description of its relevance and intended probative value. Before submitting the application, the tendering party shall first seek the consent of the opposing party to tender document through this method or an indication of the opposing party's objection (and the grounds for any such objection).

46. The timing for submitting bar table applications should take into consideration the Appeals Chamber's determination that:[37]

> [d]epending on the circumstances, the authenticity of a given document may be further elucidated by other evidence, be it evidence specifically adduced for that purpose or evidence otherwise submitted in the course of the trial.
> […]
> If additional information is adduced on the relevance or admissibility of documents previously submitted, the Defence will not be precluded

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[34] *Prosecutor v. Ndindiliyimana et al*, Trial Chamber "Decision on Bizimungu's Motion to Admit As Exhibits Certain Documents Marked for Identification", 14 February 2008, para. 5. See also para. 12.
[35] ICC-01/04-01/07-2635, para. 16.
[36] ICC-01/09-01/11-847-Corr, para. 17. See also ICC-02/11-01/15-205, para. 58, which specified that a party wishing to introduce evidence from the bar should submit an application setting out:

(i) A description of the item;
(ii) An averment as to its authenticity;
(iii) The reason the item is not introduced through a witness;
(iv) Reasons as to the item's relevance and probative value;
(v) The date on which it was previously disclosed to the other parties; and,
(vi) If applicable, an index of the most relevant sections of the item.

[37] ICC-02/11-01/15-995, paras. 1-2.

from making additional submissions pursuant to rule 64 (1) of the Rules.

47. Although the tendering party has the opportunity to bolster arguments on authenticity by reference to other items of evidence or testimony elicited during the hearings, the submission of multiple and staggered arguments on such matters is unlikely to promote a streamlined and efficient trial. Accordingly, bearing in mind firstly, the importance of contextualizing the relevance of evidence, secondly, the general preference for tending evidence through a witness, and thirdly, the undesirability of staggered litigation on the same issue, it would be logical, efficient, and fair to direct the parties to submit such applications after, and not before the Chamber has heard all relevant testimony on the issues covered by the documentary evidence (which is the subject of the bar table application).

M. Procedures and deadlines for notifying and tendering exhibits

48. These issues are necessarily impacted by the Chamber's decisions on the system for admission of evidence, witness preparation, and the time limits for preparation, familiarisation, and non-contact that are established therein.

49. In terms of the impact of witness preparation, the ICTY has recognised that the Defence deadline for notifying the Prosecution of its list of exhibits for cross-examination should fall after, and not before the cut-off point for contacts between the Prosecution and the witness.[38] In line with the principle that the Defence should not be compelled to put forward a positive case until it has received full disclosure of the Prosecution's case, the Defence will also require sufficient time to review any preparation notes disclosed by the Prosecution, before it submits its list for exhibits as concerns that witness.

50. The Defence further notes that in past cases, the Chambers have established deadlines by reference to days, without specifying a particular time of day, by which the information should be conveyed. This can be highly problematic in situations where key materials are transmitted extremely late at night, or during the weekend. The Defence therefore suggests that it would be appropriate to specify that for deadlines

[38] See *Prosecutor v. Haradinaj et al.,* 'Decision on Notification of Cross-examination Material', 31 May 2007, recognizing firstly, that the Defence should not be compelled to disclose its list of exhibits for cross-examination until after the witness is sworn in (which marks the end of permissible contact with the calling party) (para. 4), and secondly, that a "witness must not be "forewarned and provided an opportunity to prepare a response" to cross-examination" (para. 5).

falling on a Monday to Thursday, the materials should be conveyed no later than 5pm, and for those falling on a Friday, no later than 12 (midday).

51. The procedure for making objections to the admission of exhibits will depend on the system of evidence adopted by the Chamber. For example, under the submission scheme, since the Chamber did not intend to make immediate rulings on admissibility, the parties submitted such requests and observations *after* the conclusion of the witness's testimony, whereas under the admission scheme, the calling party was required to express its position as to whether it wished to admit any specific items of evidence *before* the witness testified. In line with its support for the admission system of evidence, the Defence further supports the adoption of the latter approach as concerns the admission of exhibits. This approach will ensure that the Chamber and parties are aware of the purpose for which evidence is being shown to a witness, and further facilitate timely objections as concerns the use of materials in a prejudicial manner.

52. In terms of concrete deadlines as concerns the notification of exhibits, the Defence requests the Chamber to adopt the following:

<u>If the Chamber decides not to have witness preparation</u>

53. At least five days before a witness commences testifying, the calling participant should provide the Chamber and other participants with a list, via email, of any material(s) to be used during its examination of that witness. This list shall also indicate: (i) any passages intended to be used within any lengthy document(s); (ii) whether the participant intends to tender the document(s) as evidence; (iii) which tendered evidence, if any, is understood to fall under Rule 68(3) of the Rules and (iv) the ERN under which the material can be found in e-court. This list is solely for notice purposes, and does not constitute the formal submission of any document.

54. As *per* the procedure in the Kenyatta case, as regards documents to be used during cross-examination that are not already in evidence, the party intending to make use of such documents shall provide a list of the documents, and, where the documents are not already part of the case record, copies thereof, to the Chamber, the other party and participants, no later than 24 hours before the commencement of cross-examination.[39] For the purposes of ensuring that this deadline is met, the calling party is directed to inform the Chamber, the other party and Legal Representative of when it reasonably

[39] ICC-01/09-02/11-867, para. 31.

anticipates it will conclude its examination-in-chief, sufficiently in advance so as to enable the opposing party to provide the said material at least 24 hours before commencement of the cross-examination.

55. The LRV should submit the list of documents they intend to refer to during questioning, at the same time that they submit their list of questions for authorization.[40]

If there is witness preparation

56. The Defence deadline for filing its list of exhibits should fall no earlier than 48 hours **after** the conclusion of witness preparation, **and** the disclosure of any additional items arising from witness preparation (including any necessary translations).

N. Self-incrimination

57. The system for advising witnesses on their privilege against self-incrimination impacts on the fairness, impartiality and publicity of the proceedings. Although Rule 74(1) specifies that the Chamber should notify the witness concerning the privilege against self-incrimination, this task has been delegated to VWU and external legal advisors. The Defence does not object to the role of VWU in this regard, but it does have concerns regarding the systematic appointment of Rule 74 advisors, many of whom may not understand the purpose and limits of their duty to furnish independent legal advice to witnesses.[41] These concerns are heightened as concerns the possibility of legal advisors attending the proceedings, and intervening actively as concerns specific questions.

58. This concern is further grounded by the fact that witnesses in this case are extremely vulnerable to the threat of retaliation or prosecution from national authorities at the domestic level. This threat differs from the standard risk of self-incrimination.

[40] ICC-01/09-02/11-867, para. 24.

[41] See 'IBA Monitoring Report: First Challenges', June 2009, p. 25 "The IBA endorses the Chamber's ruling that sensitive, informed advice given by the legal representatives of the witnesses (or, where there is no legal representative present in Court, the ad hoc lawyer assigned to give advice) may allay witnesses' fears of future prosecution. The Chamber has, however, left it to counsel's discretion to explain the nuances of a very complex legal provision. While the Chamber's aversion to a strict formulaic approach to the advice that should be given to witnesses is understood given the variances in the circumstances of different witnesses, the absence of guidelines in this regard could be potentially problematic. The IBA recommends that consideration be given to formulating guidelines for counsel who must provide advice to their clients on the issue of self-incrimination. In addition, it is recommended that the Registry includes this issue in its training for List Counsel in order to encourage a uniform approach to the provision of such advice. The assistance of the VWU will be particularly important in formulating guidelines where such advice is being given to young or particularly sensitive witnesses (such as former child soldiers). In such cases, it may well be (as submitted by the prosecution) that if based on the law there is no reasonable prospect of prosecution, serious consideration should be given to whether a warning is indeed necessary."

Specifically, there are a great many Prosecution witnesses [REDACTED]: the [REDACTED] exercise absolute, unchecked power over the basic rights of these individuals, and can subject them to a range of [REDACTED] punishments and privations, for entirely arbitrary, and political reasons. The threat of prosecution, persecution and indeed torture is not necessarily linked to the witness's involvement in domestic crimes, or the truth or falsity of statements, but rather the potential that the witness's testimony might deviate from the narrative of events promulgated by the certain domestic authorities.

59. Given that this threat will loom large over witnesses in the lead up to their testimony, it is imperative that Rule 74 legal advice provided to these witnesses does not engrain or further entrench the concern that a deviation from a previous script or statement could result in adverse consequences for the witnesses. This would be the case if the legal advisor were to suggest that prior interviews (many of which were conducted while the witnesses were detained) fall within the ambit of Article 70 of the Statute. At the same time, if witnesses are advised of the extremely draconian measures that have been adopted at the domestic level in relation to anyone who is suspected of being affiliated with, or supportive of certain groups, this may have a chilling effect as concerns the witnesses' willingness to testify in a truthful manner in relation to the positive/exculpatory aspects of Ansar Dine.

60. While the routine issuance of assurances may obviate some of thornier problems concerning self-incrimination, it would also come at the expense of the right to public proceedings.[42] Rule 74(7) measures may also impact on the ability of the Defence to investigate matters arising from the witness's testimony.

61. In order to minimise the use of assurances, and, differentiate between the different types of risks, the parties should be invited to specify, in its final witness list, whether any witnesses are at risk of potential prosecution before the ICC. Such witnesses may request the Registry to appoint a Rule 74 legal advisor to provide advice on this specific issue and risk. Further, the appointment of counsel in accordance with Rule 74(10) should be conducted under the direction of the Trial Chamber, and accompanied by clear guidelines as to the scope of advice, and independent nature of

[42] ICC-01/04-01/07-1665-Corr, para.52 "At the same time, it cannot be a ground for upsetting the public character of the proceedings and therefore the Chamber cannot systematically provide assurances under rule 74, given the fairly drastic measures this requires." See also Oral decision, 28 January 2009, ICC-01/04-01/06-T-110-ENG, pp.6-7.

such advice.[43] If the risk of prosecution/further measures lies elsewhere, then this risk might be better addressed, and mitigated through protective measures, as recommended in an independent manner by the VWU.

O. Rule 68(2) and (3) issues

62. The use of Rule 68 is also impacted by the issues raised above. Specifically, the Defence does not object to the use of Rule 68 in relation to non-contentious or background issues that do not concern the acts and conduct of Mr. Al Hassan. In circumstances where a statement encompasses both background information and highly incriminating/pertinent information, it would, however, be highly problematic to apply the procedures and cautions set out in Rule 68(2)(b)(ii) and (iii) to the entirety of the statement, including sections which will be entered through *viva voce* testimony. In particular, if the person is made to believe that any deviation from any part of the Rule 68 statement would render them "subject to proceedings for having given false testimony", then cross-examination would become an exercise in futility.
63. In order to avoid these issues, if the calling party wishes to employ Rule 68(2) or (3) in connection with *viva voce* testimony, the better approach would be to require the parties to file an application to admit particular passages or sections from witness statements through Rule 68, at least three months in advance of the scheduled date for testimony.
64. The application should be accompanied with a copy of the prior statement indicating precisely which passages the party calling the witness wishes to enter into evidence, either through Rule 68(2) or (3). If these passages contain references to other material that is available to the party calling the witness, they shall equally be attached to the application. If the party intends to still ask questions of the witness that go beyond confirming, clarifying or highlighting the passages of the prior recorded testimony that will be entered in written form, this shall be indicated in the application. In such a case, the party calling the witness shall give an indication of the topics it intends to address orally with the witness. The other parties shall have ten days following the notification of the application to raise any procedural objections, including as concerns whether certain passages should be admitted through Rule 68(2), or on a *viva voce* basis.

[43] See IBA recommendations set out in its June 2009 report (*ibid* at fn. 41).

65. If the Chamber grants the application, the calling party shall then ensure that the necessary arrangements are taken to comply with the requirements set out in Rule 68(2)(b)(ii) and (iii), and disclose the prior recorded statement (or extracts), no later than one month before the scheduled date of the witness's testimony (or the commencement of the trial, if the witness will not be called *viva voce*). This will ensure firstly, that the resources of the Court are not unnecessarily expended in relation to a procedure that was rejected by the Chamber, and secondly, that the witness is not asked to sign a declaration of truthfulness in relation to written evidence, that overlaps with the pending oral testimony before the Chamber.

66. The objective of Rule 68 (and its amendments), which is "to reduce the length of proceedings before the Court and streamline the presentation of evidence",[44] would also be rendered obsolete if the parties could have two bites of the cherry in relation to exactly the same testimonial issues. It therefore follows that if the calling party applies to admit prior recorded testimony through Rule 68(3), the scope of this application should be confined to matters that will not be addressed *viva voce* during examination in chief. When the witness is asked to give a declaration of truthfulness as concerns the prior testimony submitted through Rule 68(3), the Chamber should specify clearly that this declaration is confined to the specific sections that will be submitted, and admitted through Rule 68(3). The calling party also may not use any language, which would suggest that the witness has certified the truthfulness of any sections that were not introduced through Rule 68(2) or (3), or that would imply that the witness could be subject to proceedings for false testimony if he or she were to provide different testimony on the stand, in relation to sections that were not introduced through Rule 68(2) or (3).

67. Ultimately, it is imperative that there is no duplication as concerns Rule 68 and *viva voce* evidence introduced in chief, particularly on issues that concern Mr. Al Hassan's individual responsibility. If the evidence in question is sufficiently important to justify its admission through *viva voce* testimony, then it is equally important that the rules and safeguards as concerns the admission of prior statements for the truth of their contents are triggered. Specifically, in line with the principle of orality,[45] although

[44] ICC-02/11-01/15-744, para. 60.
[45] ICC-02/11-01/15-744, para. 65: "The Appeals Chamber notes that, in considering article 69 (2) of the Statute in that judgment, the Appeals Chamber held that "[t]he direct import of the first sentence […] is that witnesses

extracts from prior statements may be shown to a witness to refresh their memory, or impugn their credibility, this cannot be done as a matter of course in relation to a party's own witness.[46] These extracts also should not be admitted for the truth of their contents unless the calling party first establishes that the criteria set out in Article 68 are fulfilled.[47]

68. It is also important to distinguish between procedural objections as concerns the potential applicability of Rule 68, and the admissibility of the statement itself. Even if the calling party obtains authorization to introduce statements or extracts through Rule 68, it would still be incumbent on them to demonstrate that the relevant criteria for admission are fulfilled, after the formalities for Rule 68 are completed.[48] The responding party would, in turn, have a right to respond on these issues, by a clear deadline established by the Chamber.

P. Expert witnesses

69. The Prosecution's witness list includes a range of experts on various topics [REDACTED], who were selected and appointed without any prior consultation with the Defence, or attempt to engage in joint consultation. The list also includes several individuals, whose status has not been clearly denoted.[49]

70. The Defence has the right to contest the qualifications and scope of the proposed testimony, but its ability to do so is contingent on the extent to which the Prosecution fulfils its disclosure obligations in a timely manner. Nonetheless, although the Defence conveyed its position concerning the scope of the Prosecution's disclosure obligations in relation to expert evidence in its December 2019 submissions,[50] a range

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must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality.""

[46] See para. 19 above.

[47] See ICC-01/05-01/13-2275-Red, paras. 306-308, and ICC-01/04-02/06-1481, para. 16, as concerns distinction between admitting a prior statement shown to a witness for impeachment purposes, and admitting it for the truth of its contents.

[48] ICC-01/04-02/06-2124, para. 7.

[49] [REDACTED] ('Technical witness'), [REDACTED] ('Technical witness'), [REDACTED] ('Technical witness') – it is also unclear as to whether several of the 'overview' witnesses are testifying on the basis of personal knowledge, or learned knowledge.

[50] ICC-01/12-01/18-519-Red, para. 11. See also the following case law concerning the obligation to specify the sources of expert conclusions: 4"There must be sufficient information as to the sources used in support of the statements. The sources must be clearly indicated and accessible in order to allow the other party or the Trial Chamber to test or challenge the basis on which the expert witness reached his or her conclusions. In the absence of clear references or accessible sources, the Trial Chamber will not treat such a statement or report as an expert opinion, but as the personal opinion of the witness, and weigh the evidence accordingly". *Prosecutor v. Dragomir Milosevic*, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, at para 8. See also *Prosecutor v. Ojdanic*, Order on Procedure and Evidence, 11 July 2006, para. 7, "Expert reports

of relevant materials have yet to be disclosed.[51] The time needed to evaluate these issues must also take into consideration the Defence's right to instruct a counter-expert – not just for the purpose of calling them as Defence experts during the Defence case – but also for the purpose of challenging the expertise of the Prosecution expert in question, and following their testimony (with a view to advising the Defence on potential lines of inquiry). Indeed, their input will allow the Defence to make an informed and timely decision as to whether to challenge or accept the expert testimony proffered by the Prosecution, which, in turn, will expedite and streamline fair proceedings.[52]

71. The Defence will not be in a position to instruct such counter-experts until it receives the necessary information (reports, disclosure materials) from the Prosecution. There is also likely to be further delays occasioned by the need for Defence experts to be vetted by the Registry (and to comply with the external 'expert' review) as part of the appointment process.

72. It is therefore imperative that:

    a. The Prosecution discloses all relevant materials that are related to the compilation of expert reports (including sources) on a rolling basis, and no later than the final deadline for the disclosure of Prosecution evidence;
    b. The deadline for challenging the expertise and scope of Prosecution experts affords the Defence with sufficient time to instruct its own experts, with a view to making an informed decision as to whether to challenge the qualifications and scope of the proposed testimony; and

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should, however, be fully referenced in order to facilitate the Chamber's determination of their probative value and, ultimately, the weight to be ascribed to them." See also ICC-01/09-01/11-844, para. 27, concerning the relevance of a witness's sources to the weight of the expert's testimony.

[51] See Annex B.

[52] ICC-01/05-01/13-T-15-Red2-ENG p. 33, lns. 16-22: "And I have to remind, especially also the Prosecution, that we changed the sequence of witnesses, experts on application of the OTP. We took submissions. We made a ruling and we allowed for a good reason the Defence expert to be present tomorrow, also for a reason, because this -- this was to give the Defence expert the possibility to have an immediate impression, he could also of course have the transcripts, that's okay, but it is of course best, better, and it serves the fair trial for the Defence better, if their expert is present tomorrow." See also *Prosecutor v. Galic,* 'Decision Concerning The Expert Witnesses Ewa Tabeau And Richard Philipps', 3 July 2002, p. 3: "CONSIDERING that the Defence will have the opportunity to cross-examine the expert witnesses Richard Philipps and Ewa Tabeau; that the Defence is allowed to have its experts present in the courtroom to assist it in understanding the testimony of any expert witness and to prepare for cross examination in respect of, for instance, the methodology, theory or technique used by the expert to form his or her opinion;"

c. The Prosecution does not group different types of expert witnesses together, but spaces them out in a manner which affords the Defence with sufficient time to instruct counter-experts.

Q. Rules 79 and 80 Disclosures

73. The key words in Rules 79 and 80 are 'intent' and 'intends' – that is, the obligation of the Defence to furnish certain particulars as concerns an alibi defence, or grounds for excluding criminal responsibility under Article 31, is only triggered once the Defence formulates a concrete intent to raise such defences.[53] As underscored by the Trial Chamber in the *Gbagbo & Blé Goudé* case, [54]

> Rule 79 of the Rules specifically provides that failure by the Defence to provide such notice shall not limit its right to raise such matters and to present evidence thereon.

74. The clear language of Rule 79(3) would be defeated by judicial orders to advance specific details concerning defences, which have yet to be formulated.

75. It is, moreover, important to bear in mind that the approach of the *ad hoc* Tribunals as concerns notice is linked to the reciprocal disclosure obligations that are a feature of their rules.[55] In contrast, it is well recognized that no such obligations exist within the Rome Statute legal system,[56] and, the Prosecutor's extremely broad investigative powers are fettered by duties to search for and disclose exculpatory information (including as concerns information concerning possible defences), independently of the Defence. It follows, therefore that given that the *ad hoc* Tribunals provided a degree of leeway to notify the particulars of defences at a later stage,[57] it would be illogical and unfair to impose a stricter approach at the ICC.

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[53] ICC-01/04-01/07-2388, paras. 45-46: "With regard to disclosure pursuant to Rule 79(l)(a) and (b), the Chamber was informed during a status conference held on 2 November 2009, that the two defence teams had indicated to the Prosecution that they did not intend (the Ngudjolo Defence specified, "at that stage") to raise the existence of an alibi or any ground for excluding criminal responsibility of the accused provided for in Article 31(1) of the Statute. The Chamber considers that under Rule 79(1) and (2) the defence teams have the responsibility to notify their intention, if any, to raise a defence to the Prosecution and the Chamber as soon as a determination to rely on such ground has been made. This is without prejudice to Rule 79(3)."

[54] ICC-02/11-01/15-205.

[55] See for example, *Prosecutor v. Rutaganda,* Appeals Judgment, 26 May 2003, para. 240: "Rule 67(A)(ii) relates to the reciprocal disclosure of evidence at the pre-trial stage of the case and places upon the Defence the obligation to notify the Prosecution of its intent to enter a defence of alibi and to specify the evidence upon which it intends to rely to establish the alibi."

[56] ICC-02/05-03/09-501, para. 34; ICC-01/04-01/06-T-254-Red-ENG, p.68; ICC-01/04-01/06-2192-Red, para. 63.

[57] *Prosecutor v. Rutaganda,* Appeals Judgment, 26 May 2003, para. 243: "to ensure a good administration of justice and efficient judicial proceedings, any notice of alibi should be tendered in a timely manner, ideally before the commencement of the trial. However, were the Defence to fail in this regard, Rule 67(B) provides that the Defence may still rely on evidence in support of an alibi at trial. Consequently, the obligations laid down by Rule 67 (A)(ii) must be read in conjunction with the caveat provided for by Rule 67(B)".

76. The specific parameters of Rules 79 and 80 must also be tailored to the particular features of the case, and the capability of the Defence to raise such matters, in accordance with their duty of diligence. A first such feature concerns the fact that the Prosecution conducted extensive interviews with Mr. Al Hassan at an early stage of its investigations in this case. Given that the Prosecution was obliged to conduct such interviews with a view to identifying both incriminating and exculpatory matters, it was well-placed to identify the existence of any possible defences to the charges.

77. Of further pertinence, the ability of the Defence to formulate a concrete intention on these matters has been impeded by firstly, the extremely limited, and highly redacted nature of PEXO disclosure that has been furnished thus far,[58] and secondly, the logistical impediments that the Defence had faced in conducting its own investigations. As an example, amongst the 28 PEXO items disclosed by the Prosecution, there is a one paragraph summary concerning an unidentified person's testimony that "any lawyer or intellectual would understand that whatever was done – by soldiers and civilians – during the occupation was done under duress, in that they did not have any choice".[59] Since the Prosecution disclosed this document under Article 67(2), it is clearly aware of the possibility that a defence of duress could be made out on the facts. Nonetheless, in the absence of this individual's name, position or contact details, it has been extremely difficult for the Defence to take any investigative steps to further substantiate this claim. This results in the perverse position that the Prosecution is better placed than the Defence to identify the specific features and content of a defence of duress.

78. It is, moreover, notable that the Prosecution's own case is based on the 'coercive circumstances' in Timbuktu during the relevant time period.[60] Accordingly, if, after further investigations, the Defence formulates an intent to raise a defence based on such coercive circumstances, the Prosecution cannot claim to be unaware of the likely factual matrix underpinning such a defence, nor could it claim to be prejudiced in its trial preparation.

[58] See for example, [REDCATED], which is a one paragraph summary concerning an unidentified person's testimony that "any lawyer or intellectual would understand that whatever was done – by soldiers and civilians – during the occupation was done under duress, in that they did not have any choice".
[59] [REDACTED]
[60] See for example, ICC-01/12-01/18-335-Conf-Corr, para. 761.

79. Of further import, since May 2019, the Defence has also conveyed its clear intention to file an application based on issues concerning the detention and questioning of Mr. Al Hassan and other Prosecution witnesses.[61] On 6 June 2019, the Defence noted that the Prosecution was aware that Mr. Al Hassan had been subjected to severe mistreatment in detention, and further invited the Prosecution to withdraw the charges, in line with its duty to fully respect the rights of Mr. Al Hassan and to investigate the case in a manner which is consistent with internationally recognized human rights law.[62] The Defence has also communicated a range of specific details concerning this application, through *inter partes* disclosure requests, and related filings. Many of these requests have yet to be fulfilled.[63] And, approximately two weeks after the Defence highlighted the importance of receiving information concerning Mr. Al Hassan's treatment and detention in Mali, the Prosecution applied to the Single Judge to withhold the disclosure of highly relevant corroborative materials concerning the detention and mistreatment [REDACTED].[64] As a result, the Defence did not have access to these materials for over seven months. This delay had an appreciable knock on effect as concerns Defence preparation.
80. The Defence intends to file this application as soon as possible, and in any case, prior to the June cut-off for raising matters in advance of the trial. The investigation and litigation directed towards meeting this deadline has, nonetheless, absorbed a significant amount of time and resources on the part of the Defence, and diverted its focus from preparation related to the 2012 events. It would, therefore, be unfair and unrealistic to expect the Defence to be capable, at this point, of furnishing further particulars as concerns a possible defence of duress or alibi.
81. The ability of the Defence to formulate and advance specific details as concerns a potential alibi defence is, moreover, impacted by:

[61] Annex A.
[62] Annex A.
[63] For example, on 27 May 2019, the Defence requested the Prosecution to disclose any correspondence (including minutes, records, RFAs, emails, and notes of telephone contacts), between the Prosecution and the French and Malian authorities in relation to Mr. Al Hassan's arrest by Operation Barkhane, and subsequent detention in Mali (Annex A). This request was repeated on 6 June 2019, and 6 February 2020. Nonetheless, apart from two investigator's notes which refer to communications with the Malian authorities (including an email – [REDACTED]), the Defence has not receive any of the actual communications (*cf* ICC-01/04-01/06-3031, para.8; ICC-01/04-01/06-3017, para. 11).
[64] ICC-01/12-01/18-388-Conf-Red (the original version was filed secret, *ex parte* Prosecution only).

- The pending application to correct and amend the charges, which includes, *inter alia,* a new position concerning a particular date;[65]
- The lack of precise dates as concerns other allegations;
- The fact that Mr. Al Hassan has been charged for many incidents pursuant to Article 25(3)(c) or (d) (which lessens the relevance of his physical presence),[66] and
- The Pre-Trial Chamber's recent observations that firstly, the Prosecution could have recourse to Regulation 55, and secondly, the Prosecution could advance different details concerning the charged incidents at trial.[67]

82. The burden, in any case, rests on the Prosecution to substantiate all aspects of their case. If it is their position that Mr. Al Hassan's presence at a certain location on a certain date is relevant to the charges, the burden falls on the Prosecution to substantiate his presence, to the standard of beyond reasonable doubt. Article 67(1)(i) states, in unequivocal terms, that this burden cannot be reversed or lessened by virtue of Mr. Al Hassan's silence on such points.

R. Modalities of victim participation

83. In general, when the LRV seek to intervene on a particular matter, the Chamber *may* request the LRV to explain the link to the personal interests of direct victims, if such link is not apparent.[68] Participation shall occur within the framework of the confirmed charges.

i- Specific forms of participation

84. Subject to the Chamber's directions concerning timing and length, the LRV may make opening and closing statements. The content of these statements may not address any information or allegations that have not been disclosed to the Defence, or which are not otherwise in issue in this trial.

85. In terms of attendance at hearings, the LRV may participate in all hearings unless, in the circumstances of the case, the Chamber concerned is of the view that his or her intervention should be confined to written observations or submissions. The

[65] ICC-01/12-01/18-568-Red, paras 1, 13-14 (the date of the arrest of a victim by the Islamic police).
[66] ICC-02/11-02/11-186, para. 50: "The Chamber notes that the Defence has raised an alibi, asserting that Charles Blé Goudé cannot be responsible for the crimes in Yopougon on or around 12 April 2011, because at that time he had already left Côte d'Ivoire. However, the Chamber notes that the evidence demonstrates that Charles Blé Goudé undertook the conduct which led to the commission of the crimes in Yopougon during the period preceding the alleged time of his escape to Ghana, and it is only the consequence of his conduct, i.e. the realisation of the objective elements of the crimes by the direct perpetrators, that occurred thereafter."
[67] ICC-01/12-01/18-608-Red, para. 47.
[68] ICC-01/04-01/07-1788-tENG, para. 62.

Prosecutor and the Defence must have the opportunity to respond to any oral or written observation by the legal representative of the victim.[69] The Chamber shall determine on a case by case basis whether the LRV should attend *ex parte* hearings.[70]

86. Under rule 91(3)(a) of the Rules, when a legal representative wishes to question a witness, an expert or the accused, he or she must make application to the Chamber. The Chamber may order that the questions be formulated in writing and communicated to the Prosecutor and, if appropriate, the Defence, for their observations. Pursuant to rule 91(3)(b) of the Rules, the Chamber shall issue a ruling on the request, taking into account "the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3". In accordance with the Chamber's powers under article 64 of the Statute, the ruling may include directions on the manner and order of the questions and the production of documents. The Chamber may, if it considers it appropriate, put questions to a witness, expert or accused on behalf of the legal representative.

87. The questions may not:

- Address issues that do not have a direct link to the personal interests of victims, who are actively participating in the proceedings;
- Address issues that have already been put to the witness by the Prosecution; or
- Refer to allegations that are new or fall outside the scope of the confirmed charges.[71]

88. The LRV must also organise themselves in such a manner to avoid any duplication between questions posed by the different LRV. The LRV may be present during witness familiarization. Given their role, the LRV may not be present, or participate in any forms of witness preparation (if such practices are authorized by the Chamber).[72]

89. In order to ensure Mr. Al Hassan's right to a speedy trial, and privilege against self-incrimination, one month before the start of the trial, the LRV shall file a preliminary

[69] ICC-01/04-01/07-1788-tENG, para. 69.
[70] ICC-01/04-01/07-1788-tENG, para. 71.
[71] ICC-01/09-01/11-460, para. 75.
[72] ICC-01/09-02/11-867, para. 25: "Where the Legal Representative is granted authorisation to examine a dual status witness, the Legal Representative will not ordinarily have the right to conduct a preparation session with the witness".

list of witnesses and evidence and evidence, and disclose anticipated witness summaries, and the documentary evidence that the LRV will seek to rely upon.[73]

90. One week after the Prosecution has filed its notice concerning the close of its case, the LRV shall:[74]

    a. confirm its final lists of evidence and witnesses;
    b. certify that all necessary witness information forms have been completed and given to the VWU;
    c. provide anticipated testimony summaries for all witnesses;
    d. complete disclosure of all items it intends to use during its evidence presentation (to the extent not already disclosed); and
    e. request any protective measures or relief under Rule 68 of the Rules.

91. By the same date, the LRV shall also submit an application to the Chamber in writing, setting out how the evidence they intend to adduce is relevant to the personal interests of active/direct victims, and how it may contribute to the determination of the truth. The Chamber will authorise the submission of such evidence only if it:

    - will not result in any prejudice to the Defence (including in particular, the right to be informed promptly of the nature of the charges, and the right to have adequate time and facilities to prepare);
    - will not be prejudicial to the fairness and impartiality of the trial;
    - falls within the scope of the confirmed charges; and
    - does not duplicate evidence or testimony that has been introduced by the Prosecution.

92. The Chamber shall not authorize the LRV to tender evidence or testimony that emanates from anonymous witnesses, or victims, whose identities were not transmitted to the Defence in advance of the commencement of the trial.[75]

93. The LRV may have access to confidential filings and evidence disclosed in Ringtail. Confidential information from filings or evidence shall not be communicated to participating victims, without prior approval from the Chamber. Any requests for access for individual victims shall be specifically motivated and provide detailed information about 1) the necessity of sharing the information with a particular victim or group of victims, 2) the identity of the victim(s) who would have access to the

[73] ICC-02/05-03/09-545, para. 26.
[74] ICC-02/04-01/15-1021, para. 6.
[75] ICC-02/05-03/09-545, para. 19; ICC-02/05-03/09-165, paras. 5-6.

confidential material, and 3) how the LRV would guarantee that the information would not be circulated beyond the specifically authorised victim(s).

S. Issues concerning the witness contact protocol

94. Although the parties and participants were unable to reach agreement on a specific text for the entirety of the protocol, it is the view of the Defence that the points of substantive disagreement are quite limited, specifically:

    a. The parties do not disagree as concerns the definition of 'witness' – the issue concerns, rather, the interpretation of this definition;
    b. The Defence opposes the insertion of any formal requirement to disclose records of inadvertent contacts;
    c. Although the Defence offered to discuss particular wording to address the concerns raised by the LRV as concerns the application of the contact protocol to victims, the LRV declined this offer; and
    d. The Defence is concerned that certain phrases are overly broad or unclear, and that this ambiguity will adversely affect the ability of the parties to know and enforce their respective obligations.

95. The Defence also wishes to clarify that it proposed merging the contact and dual status protocols to minimise the number of protocols and, ensure a comprehensive and clear regime. This proposal is a matter of format and not content. The Defence had also proposed inserting the word 'victim' into Section III of the protocol in order to extend its coverage to information concerning participating victims. Given that this proposal was opposed by the LRV, the Defence does not maintain it.

96. The Defence further sets out its position as concerning the substantive issues, below.

i- The interpretation of the word 'witness'

97. This word must be interpreted in a consistent manner as concerns both Prosecution and Defence witnesses. Accordingly, if the Chamber endorses the Prosecution's argument that it must be interpreted to take into account the stage of the party's investigations, then this would mean that it should be interpreted broadly in connection with Defence investigations: it would thus extend to any person, who has been questioned by the Defence, irrespective as to whether the Defence has included the individual on a witness list, or formally designated them as such.

98. The Defence notes, nonetheless, that:

- The Prosecution's interpretation would be inconsistent with the uniform case law on this point;[76]
- Several Rule 77 and PEXO individuals, whom, for the duration of the pre-confirmation stage, the Prosecution averred were 'witnesses' for the purposes of the protocol, were ultimately not included in the Prosecution's witness list;[77] and
- Notwithstanding the fact that the broad definition advanced by the Prosecution increases the risk of inadvertent contacts, the Prosecution opposed the inclusion of additional provisions, which aimed to minimise or eliminate this risk.[78]

99. The Defence advances no further submissions on this point.

ii- The Prosecution's proposal that the parties must disclose records of inadvertent contacts, and submit these records in E-Court

100. This proposal is unnecessary, and inconsistent with the Court's legal framework. It would also have a chilling effect as concerns the ability of the Defence to conduct effective investigations. It should therefore be rejected outright.

101. Inadvertent contact means exactly that – contact which is not advertent – that is, the Defence has contacted someone because it doesn't know that the person is a Prosecution witness. These contacts can happen for several reasons, including the possibility that:

- The person might not know that they are a witness in this case; or

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[76] See for example, ICC-02/11-01/15-200 paras. 14-15: "The Single Judge finds that the definition suggested by the Defence is too broad and would lead to application of the Protocol to individuals who are only remotely linked to the Court and/or who are not likely to be called to testify. In the view of the Single Judge, this would not usefully serve the purpose of the Protocol, which is mainly intended to protect the safety of witnesses and preserve the integrity of investigations. The Single Judge further notes that the fact that the calling party intends to call a witness or to rely upon his/her statement may become known to the non-calling party as a result of the filing of a list of witnesses or when the witness himself/herself informs the investigating party." At footnote 16, the Single Judge set out the following decisions in support of this position:

Trial Chamber VI, (...) ICC-01/04-02/06-412-AnxA, para. II(3)(f) ('Ntaganda Protocol');(...)Trial Chamber IV, ICC-02/05-03/09-451 -Anx, para. 26(d); Trial Chamber V,(...) ICC-01/09-01/ll-449-Anx, para. 1. It is noted that Trial Chamber V adopted an equivalent decision in the case of The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, which is to be found at ICC-01/09-02/11-469.

See also **ICC-01/09-02/11-469**, para. 6: "In particular, the Chamber sees no risk of prejudice to the defence on account of the fact that the prosecution can contact persons whom the defence does not at this stage intend to call to testify but may choose to do so later on".

[77] [REDACTED].

[78] The proposed wording was as follows:

A calling party or participant is obliged to clearly inform all persons it has met with and/or obtained statements from, as to whether or not it intends to rely on that individual as a witness.

A calling party or participant is obliged to direct all persons who have consented to being called as a witness to identify themselves as such when approached by the other party or participants

- The person might believe that they shouldn't tell anyone (including the Defence) that they have met with the Prosecution and given a statement in this case.

102. In the first scenario, it is standard Defence practice to ask individuals if they have spoken to the Prosecution at the very beginning of the interview. This question precedes any further inquiries as concerns the willingness of the person to give an interview, and to have that interview recorded. As a result, there are no independent records of these interactions.

103. The Defence has consistently informed the Prosecution of these interactions and communicated a description of the inadvertent contact. These descriptions, which have been communicated solely for the purpose of complying with the Protocol, do not constitute 'evidence', and they do not fall under the E-Court protocol. There are three important legal considerations underpinning this position.

104. *Firstly,* under Article 12(3) of the Code of Professional Conduct for Counsel:

> *Counsel shall not act in proceedings in which there is a substantial probability that counsel or an associate of counsel will be called to appear as a witness unless:*
> *(a) The testimony relates to an uncontested issue; or*
> *(b) The testimony relates to the nature and value of legal services rendered in the case.*

105. The characterisation of these descriptions as 'evidence' would effectively force Counsel to give evidence, and act as a witness in this case, in violation of the aforementioned ethical obligation. Given linguistic issues and the specific profiles of potential witnesses, it is also not always feasible to delegate this initial contact to resource persons.

106. *Secondly,* the Defence cannot be compelled to tender or disclose evidence against the wishes of the defendant. This right is established in absolute terms by Article 67(1)(g) of the Statute.[79]

107. *Thirdly,* the Appeals Chamber has affirmed that apart from the scenarios regulated by Rule 112, the Prosecution is not obliged to make a formal record as concerns every interaction with potential witnesses.[80] Given that Defence obligations and

[79] See *Prosecutor v. Mucic et al.*, Decision On The Prosecution's Oral Requests For The Admission Of Exhibit 155 Into Evidence And For An Order To Compel The Accused, Zdravko Mucic, To Provide A Handwriting Sample, 19 January 1998, paras. 45-60.

[80] *Prosecutor v. Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses", ICC-01/04-02/06-1330, 20 May 2016 at paras 28 and 33.

responsibilities are lower than that of the Prosecution,[81] it follows that the Defence cannot be obliged to create a record, where one would not otherwise exist.

108. The second scenario concerns the situation where witnesses have not informed the Defence that they have been interviewed as a witness in this case, and the Defence has spoken to them on the good faith understanding that they are not Prosecution witnesses. In this scenario, since the Defence does not know that the individual is a Prosecution witness, the objective of the protocol is not engaged. There is no risk that the Defence might interfere with the individual's decision to testify for the Prosecution because the Defence does not know that they have in fact decided to do so. Practically speaking, the circumstances are no different than if the Defence had interviewed the person *before* the Prosecution did so, and decided to rely upon them as a witness.

109. The requested measure is also unnecessary. If the Prosecution has reason to think that the Defence has, in any way, crossed the line in its discussions with the individual in question, it is free to contact its witness in order to verify the circumstances of the contact. The Prosecution can also file an application setting out the basis for any suspicions concerning improper contact or influence.

110. This situation can thus be addressed on a case by case basis, rather than the adoption of a hard and fast rule that runs contrary to Article 67(1)(g). This was the practice adopted in other cases. For example, in *Ongwen*, there appears to have been several instances where the Prosecution inadvertantly interviewed Defence witnesses.[82] These incidents were addressed on a case by case basis, rather than through an amendment to the Protocol. If that solution was deemed appropriate and effective as concerns inadvertent contacts between the Prosecution and defence witnesses. then it is equally appropriate as concerns the opposite scenario. It is also notable that no such requirement was deemed necessary at the *ad hoc* Tribunals: indeed, there was no general requirement to record and disclose records of interactions with witnesses from

[81] See for example, *Prosecutor v. Stanisic & Simatovic,* 'Decision on Prosecution Urgent Motion Related to Non-Compliance of Stanisic Defence with Rule 65 Ter (G) and Rule 67 of the Rules', 12 October 2011, para. 30: "Under the Rules the Defence does not have corresponding disclosure obligations to those of the Prosecution. Taking this into consideration, the Chamber finds that interpreting Rules 67 (A) (ii) and 66 (A) (ii) in a similar manner would be inconsistent with the general asymmetry of the parties' disclosure obligations. Accordingly, the Chamber finds that the Defence does not have an obligation to disclose to the Prosecution interview or other notes of its prospective witnesses. In the absence of such a disclosure obligation, the Chamber does not consider it necessary to address the Stanisic Defence's argument regarding the scope of disclosure protections offered by Rules 70 (A) and 97."

[82] ICC-02/04-01/15-1335.

other opposing party, even where the party was aware of their status as a witness for the opposing party.[83]

111. The requested measure would also severely curtail the right of the Defence to conduct confidential investigations. When the Defence interviews potential witnesses, it is essential that it can do so in a very open manner – that is, to not only ask the witness about issues that are exculpatory but also matters that could be incriminating, so that the defendant can then make an informed decision as to whether to call the individual in question. There is therefore a possibility that interviews with potential Defence witnesess could generate incriminating information or evidence. But when the Defence puts these questions to potential witnesses, it does so, on the understanding that pursuant to Article 67(1)(g), there is no obligation on the part of the Defence to call the person as a Defence witness. Investigations do not, in themselves, constitute a waiver of the right to silence.

112. The ability of the Defence to conduct confidential investigations would therefore be eroded if the Defence were faced with the risk that it could be compelled to disclose the content of its interviews with potential witnesses to the Prosecution, simply because the potential witness failed to identify themselves as a Prosecution witness. In effect, the Defence would either have to forego investigations, or risk becoming investigators for the Prosecution. Neither possibility is acceptable.

iii- Contacts with victims

113. During the Status Conference, the LRV expressed their position that additional wording or provisions were required in order to address the situation where the parties interview potential witnesses, who happen to be victims.

114. The Defence notes that this situation appears to be regulated by the following provision of the *Ongwen* dual status protocol:

a. When a party wishes to contact an individual with dual status, it shall provide notice as soon as possible of this to the legal representative, when it is aware the person has legal representation.

b. If a person with dual status participating in ICCPP requests to contact the parties or participants, the VWU will facilitate the contact which will be revealed to the party calling the witness.

[83] See for example, *Prosecutor v. Karadzic,* 'Decision On Interview Of Defence Witnesses By The Prosecution', 8 December 2012, para. 4.

c. The party contacted should inform the legal representative of the dual status witness concerned.

d. When in situations of urgency, in order to preserve or collect evidence, the Prosecution or the Defence does not contact the legal representative, the party who has contacted the individual shall as soon as possible thereafter inform the legal representative, and where applicable disclose any relevant material.

115. The scenario referred to by the LRV (where the parties interview an anonymous victim as a potential witness) would be captured by paragraph d – that is, if during the course of an interview with a potential witness, the party in question learns that the individual is a victim, then either they can trigger the procedure set out in paragraph a, or, "in situations of urgency, in order to preserve or collect evidence", they can notify the LRV as soon as possible afterwards.

116. Further regulation (including the adoption of the procedures used in the Katanga case) would be unnecessary and inappropriate.

117. *Firstly*, the particular procedures employed in the *Katanga* case are not transposable to the current case:

- There was a significantly smaller pool of victims in the Katanga case as compared to this case;
- The Defence had time to investigate and speak to potential witnesses before victims were admitted into the proceedings, whereas in this case, there are already over 800 victims at the point where the Defence is only just starting its investigations;
- In the Katanga case, the Defence received the application forms of victims, and the majority of victims were not anonymous.[84] There was thus less risk that inadvertent contacts could disrupt carefully planned investigations.

118. *Secondly,* given the very relaxed procedures that have applied to the admission of victims in this case, their status is in no way analogous to that of witnesses, and the rationale of the witness contact protocol is therefore inapplicable to victims who are participating on a purely passive level.

119. *Thirdly,* it is important to underline that there is a real stigma in Timbuktu as concerns any real or perceived association with Ansar Dine. There is thus a real likelihood that individuals might wish to assist Mr. Al Hassan without it being known by their community or indeed their family that they are interacting with his Defence. The fact that individuals have applied to participate and have been designated a common LRV (whom they might never have spoken to) also does not signify the individual's

[84] ICC-01/04-01/07-1788-tENG paras. 21, 92.

consent to having their status as a potential Defence witness automatically disclosed to the LRV, without any prior consultation between the Defence and the VWS.

120. *Fourthly,* a key equality of arms issue would arise if unduly onerous requirements, that impede effective investigations, were to be adopted at this juncture. For the entire investigation and pre-confirmation phase, the Prosecution had an unfettered ability to speak to potential witnesses, and neither the the LRV nor the Prosecution deemed it necessary to regulate this scenario for the last two year. If it wasn't necessary to impose additional restrictions in order to govern contacts with victims last year, then it is also not necessary to do so this year.

iv- Terminology suggestions

121. The Defence is concerned that the certain terms are overly vague or broad, and that the absence of clarity could adversely impact the implementation of the Protocol.

122. Specifically, the current definition of 'confidential information' is somewhat circular: information is confidential because it is included in a confidential document, and a confidential document is one that is not public. This focus on the 'label' of a document:

a. Unnecessarily extends confidentiality protections to public (or non-confidential information), which happens to be included, or referred to, in a confidential document; and
b. Fails to provide adequate protection in case confidential information has incorrectly or inadvertently been included in a public document.

123. For this reason, and in line with the approach of the *ad hoc* Tribunals, the Defence proposed a definition, which focused on the qualitative nature of the information:

> "Confidential information" shall mean any information which is directly the subject ~~order~~ of protective measures under Article 68 of the Statute, or which identifies documents or information directly subject to confidentiality agreements or protective measures , ~~contained in a confidential document which has not otherwise legitimately been made public, and~~ including any information ordered not to be disclosed to third parties by any Chamber of the Court or which is otherwise subject to Rules 81(3) or (4) of the Rules of Procedure and Evidence.

124. The second issue concerned the inclusion of the phrase "any person who performs tasks at their request" in the definition of a party. Any person, whom the Defence asks to perform tasks as part of its investigations, would be considered to be an 'intermediary'. Persons who receive confidential information during Defence investigations would be captured by the reference to 'third parties'. The phrase "any person who performs tasks at their request" would, however, capture a range of

Registry sections and personnel, who receive confidential information, as part of their role in administering legal aid or organizing Defence missions/requests. Given that the Defence exercises no control or supervision over such persons, it cannot be held accountable for their actions.

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Dated this 28th Day of February 2020
At The Hague, The Netherlands