

1 International Criminal Court
2 Trial Chamber X
3 Situation: Republic of Mali
4 In the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
5 Mahmoud - ICC-01/12-01/18
6 Presiding Judge Antoine Kesia-Mbe Mindua, Judge Tomoko Akane and Judge
7 Kimberly Prost
8 Status Conference - Courtroom 1
9 Thursday, 12 December 2019
10 (The hearing starts in open session at 9.31 a.m.)
11 THE COURT USHER: [9:31:39] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE MINDUA: [9:32:00](Interpretation) The hearing is commenced.
15 Court officer, could you please call the case.
16 THE COURT OFFICER: [9:32:27](Interpretation) Thank you, Mr President.
17 The situation in the Republic of Mali, in the case the Prosecutor versus Al Hassan Ag
18 Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18.
19 We are in open session.
20 PRESIDING JUDGE MINDUA: [9:32:46](Interpretation) Thank you very much,
21 court officer.
22 Good morning to everybody. I would like to welcome all parties and all participants
23 to the courtroom for the first status conference in Trial Chamber X in this case, in the
24 present case.
25 The Defence has informed the Chamber via email dated 10 December that

1 Mr Al Hassan would like to be excused for today's status conference. The Chamber
2 granted authorisation on the basis of a certain number of considerations for him to be
3 absent today. The Chamber would like to note the current status of proceedings and,
4 more particularly, the fact that this status conference will have a bearing on issues of
5 a procedural nature.

6 The Chamber then notes that Mr Al Hassan has voluntarily renounced his right to be
7 present in the courtroom here today and that he is duly represented by his counsel.

8 The Chamber yesterday received an email, a courtesy copy of his discharge form,
9 signed, after having requested that the Defence provide such a form for the case file.

10 The Chamber would like to underscore that this procedure will be the one to follow in
11 the time to come and preferably within a time limit that would allow the parties and
12 the participants to respond to it, if the need arises.

13 In such circumstances, the Chamber was of the opinion that it was appropriate to
14 authorise the absence of Mr Al Hassan for this status conference because his
15 absence -- because his presence is not required and it does not in any way affect the
16 expeditious nature of the proceedings; so today's hearing will be held in his absence.

17 I would now like to call upon the parties and participants to introduce themselves.

18 Could I please turn to the representatives of the Office of the Prosecutor and request
19 that they introduce themselves and the members of their teams, please.

20 MR DUTERTRE: [9:35:44](Interpretation) Good morning, Mr President. Good
21 morning, your Honours.

22 I would like to introduce myself, first and foremost, for the record, efficiency
23 overrides politeness. My name is Gilles Dutertre, I am the senior trial attorney in
24 charge of the Mali situation. I am accompanied today by my colleague, trial lawyer
25 Dianne Luping, by my colleague Hesham Mourad, also a trial lawyer. And behind

1 me you have Sanja Bokulic, our case manager, as well as Yayoi Yamaguchi and
2 Claudine Umurungi, assistant trial lawyer. And on the last bench you have
3 Sandra Schoeters and Florie Huck, who are also assistant trial lawyers. Thank you,
4 Mr President.

5 PRESIDING JUDGE MINDUA: [9:36:51](Interpretation) Thank you very much,
6 Mr Prosecutor Dutertre.

7 Now I'm turning towards counsel for Mr Al Hassan. Could you please introduce
8 yourselves.

9 MS TAYLOR: [9:37:03] Thank you very much.

10 Good morning, Mr President, your Honours. My name is Melinda Taylor and I'm
11 appearing today on behalf of Mr Al Hassan, and I am assisted by Ms Marie-Helene
12 Proulx, Ms Sarah Bafadhel, Mr Gyo Suzuki, Ms Sarah Marinier-Doucet, Mr Mohamed
13 Youssef, Ms Dolly Chahla. And we are assisted today by two interns, Mr Waleed
14 Mahmoud, and Mr Wayne Miller.

15 Thank you very much.

16 PRESIDING JUDGE MINDUA: [9:37:40](Interpretation) Thank you very much, Ms
17 Taylor. And finally I'd like to turn my attention to the Legal Representatives for
18 Victims, could you please introduce yourselves.

19 MR LUVENGIKA: [9:37:57](Interpretation) Thank you very much, Mr President,
20 your Honours. My name is Mr Fidel Nsita Luvengika, legal representative in this
21 case. I am accompanied by, to my right, Maître Mayombo Kassongo, and also
22 Ms Claire Laplace, who is our case manager in this case.

23 I would like to underscore the fact that there is another learned colleagues of ours,
24 Mr Doumbia, who should also be in our midst today but he is absent today
25 because -- by virtue a decision of the Counsel Support Section. And there is also

1 another case manager who is not able to be in our midst either for another reason.

2 Thank you.

3 PRESIDING JUDGE MINDUA: [9:38:58](Interpretation) Thank you very much,
4 Counsel. As to the difficulties of your colleague, I think we will have an opportunity
5 to address them in the future.

6 Now, I would now like to introduce myself and my colleagues, the Judges of Trial
7 Chamber X. My name is Antoine Kesia-Mbe Mindua and I am presiding judge. To
8 my right we have Judge Tomoko Akane and to my left we have Judge Kimberly
9 Prost.

10 We each were of the opinion that we would be able to fulfil our judges' obligations in
11 this case and deemed that we were not in any position of conflict of interest.

12 I -- well, before giving the floor to my colleague, I would now like to give the floor to
13 the office of the Registry. I think I forgot to mention their presence. I would like
14 them to also introduce themselves, please.

15 MR DUBUISSON: [9:40:24](Interpretation) Thank you, your Honour, your Honours.
16 For the Registry, we have Jamila Zoubir-Afifi, jurist and coordinator within the
17 judicial services. We have Diederick Zanen, who is the coordinator for field
18 interpretation and operational interpretation, and myself, Director of Judicial Services,
19 Marc Dubuisson on behalf of Peter Lewis, the Registrar of the Court.

20 PRESIDING JUDGE MINDUA: [9:40:50](Interpretation) Thank you, Mr Marc
21 Dubuisson, your presence here today in the hearing is obviously very important, as
22 we shall see at a later stage today.

23 As I was saying, the Judges of this Chamber are of the opinion that they are not in
24 a situation of a conflict of interest. Nevertheless, Judge Prost would like to make
25 a brief statement. Your Honour, please, the floor is all yours.

1 JUDGE PROST: [9:41:16] (Interpretation) Thank you, Mr President.

2 (Speaks English) Like my colleagues, I have carefully considered my past activities for
3 any real or perception of conflict. In particular, I have reflected on my role as
4 ombudsperson for the Security Council Al-Qaida Sanctions Committee, which I
5 fulfilled from 2010 to 2015.

6 In that role, I served essentially as the fair process mechanism for those listed by the
7 Council as being associated to Al-Qaida. Listed individuals and entities could bring
8 a petition directly to me for delisting, and I would examine their case and the
9 information supporting the listing and make a recommendation to the Security
10 Council Committee.

11 On March 20, 2013 Ansar Dine was added to the Security Council list. As
12 ombudsperson I had no involvement whatsoever in the listing process. I became
13 aware of the listing when it was publicly disclosed and I have no information
14 regarding the listing beyond that which is published on the website.

15 During the remaining period of my term as ombudsperson, I had no cases related to
16 this listing. In the course of my five-year term, I handled over 60 cases, none of
17 which were related in any way to any situation in Mali.

18 On this basis, I am completely satisfied that there is no conflict arising from that role.
19 However, I place this information on the record at this early stage so that the parties
20 are clearly aware of it.

21 Thank you, Mr President.

22 PRESIDING JUDGE MINDUA: [9:43:26](Interpretation) I was waiting for the end of
23 the interpretation in the French language. It's because I was waiting for the
24 interpretation.

25 Thank you, your Honour. It is very clear now. I think the parties and participants

1 are now in a position to be able to make their own assessment of the situation.

2 It is useful to recall and to clarify the nature of this status conference. Its aim is to
3 discuss the date that we shall establish for the commencement of trial, as well as the
4 various stages that need to be gone through for the trial to be able to commence.

5 In the order organising or scheduling the status conference, the first status conference,
6 the Chamber ordered the parties and participants to submit to it observations with
7 regard to the questions of the agenda of this very conference. Filing 516 to 519 are
8 those concerned and they were received on Friday, 6 December last.

9 The submissions are very useful in nature with a view to preparing today's session
10 and we would like to thank you for your submissions. I'm very grateful to the
11 parties and participants for these filings and submissions. They were very well
12 presented and very well structured and they went right to the crux of the matter, the
13 matter that we shall be examining today. Thank you very much indeed.

14 Now, on 10 December the Chamber handed down an order for the agenda of the
15 present status conference. This morning's discussions will be inter partes in nature
16 and, in principle, will be held in open session.

17 Having granted the Office of the Prosecutor's request to this effect, request number
18 515, that is, the Chamber this afternoon will hold an ex parte session in closed -- or in
19 private session in the presence of the Office of the Prosecutor and the Registry alone
20 with a view to discussing questions to do with the protection of witnesses and the
21 security situation.

22 This session does in no way constitute a right to reply for the Prosecutor, to the extent
23 that the Chamber does not intend to receive any observations in the form of requests
24 that are currently pending before the Chamber, this having been the subject of
25 exchanges between the parties.

1 In this regard, and having taken note of the various obstacles encountered by the
2 parties and participants in this procedure, in the exercise of their respective mandates,
3 the Chamber is so minded that it should be informed on a regular basis of the security
4 situation in the zone concerned.

5 In order to do this, it instructs the Registry to present, first, a detailed report on the
6 question by 31 January 2020, followed by a second report by 3 July 2020. A version
7 of these reports - redacted, if necessary - should be made available for the parties and
8 participants. That is for the purposes of transparency of course.

9 Now before addressing the issues on the agenda today, the Chamber would like to
10 make a number of observations with regard to the manner and the intention -- and its
11 intentions with regard to the preparation and conduct of proceedings.

12 First and foremost, in order to expedite matters, the Chamber would like to encourage
13 the parties and participants to continue to exchange information in order to reach an
14 agreement on procedural matters. This is the favoured approach because it enables
15 a considerable amount of time and resources to be saved. The parties are, of course,
16 free to seize the Chamber whenever an agreement cannot be reached, but in principle
17 they must make an effort in order to exchange, to discuss and to attempt to find
18 a solution between themselves -- between the parties, that is, before seizing the
19 Chamber of any issue.

20 With regard to email communication with the Chamber, the parties and participants
21 are called upon to use the Chamber's address that has been disseminated,
22 Trial Chamber X communications, that is, in the English language.

23 Generally speaking, and with the exception of particularly urgent situations, any
24 issues broached in emails should not have a bearing on the merits of the trial.

25 Whatever the case may be, it is vital for the parties and the participants to be cc'd into

1 these messages that are addressed to the Chamber; unless, of course, there is
2 a justification for not doing so.

3 The Chamber would like to insist upon this point. The parties and participants,
4 without any exception, have all sent emails to the Chamber over the past few days
5 without cc'ing the other parties and participants, but this practice must cease.

6 In this regard, as far as the classification of documents is concerned, the Chamber
7 would like to recall or remind the parties and participants that filings should
8 preferably be public, and, if the need be, confidential, and when strictly necessary,
9 ex parte, because of course this should be a public trial.

10 The Chamber strongly encourages the filing of various versions without any
11 time frame and, if possible, on the same day without any delay and when possible on
12 the same day. And the Chamber can only process an ex parte request if it is notified
13 or disclosed as "urgent" when they are waiting for the filing of a confidential version
14 that would enable the other party to then make use of its right to respond.

15 I'm pausing for the interpretation to follow and catch up.

16 Now, let's move on to the specific points on the agenda of today's status conference.

17 I would like you to bear in mind the fact that today, we have a limited time and I
18 would call upon you to be as concise as possible. I would also like to ask everyone
19 to speak slowly and to observe pauses between each speaker in order to enable the
20 interpreters to do their job.

21 Let us commence with point (a) on today's agenda, the ongoing disclosure obligations
22 and disclosure and investigations.

23 In its submissions, the Prosecutor indicated that investigations are ongoing in
24 a targeted manner. The Defence stated that it would like to address the Court on
25 this matter.

1 Mr Prosecutor Dutertre, do you have anything to add with regard to this? The floor
2 is all yours, please.

3 MR DUTERTRE: [9:55:07](Interpretation) Thank you, Mr President. Yes, indeed, I
4 would like to intervene on this point, but please allow me to set myself up before
5 doing so.

6 PRESIDING JUDGE MINDUA: [9:55:20](Interpretation) Yes, please go ahead.

7 MR DUTERTRE: [9:55:48](Interpretation) Thank you, Mr President, your Honours.
8 Now before broaching this matter, Mr President, your Honours, I would like to make
9 a brief remark. The OTP has taken note of the Chamber's decision as to the presence
10 of the accused and notes that it's very much a last-minute surprise to the OTP, and the
11 Defence had not copied in the Prosecution in its request.

12 Logistically speaking, of course this is to do with matters of organisation for the
13 Registry and it's not a last-minute thing at all. So in the future, it would be very nice
14 if the Defence would copy the parties and participants in on such matters. And you
15 have commented on other such things too.

16 Now, with regard to the ongoing investigations, Mr President, your Honours, the
17 Prosecution is indeed conducting ongoing and targeted - let me recall,
18 targeted - investigations to date. That means to say that most of the investigative
19 work was conducted before the confirmation of charges hearing in respect of -- fully
20 respecting Article 54(1) and 68(1) of the Statute. And in this instant case, such
21 investigations are necessary in view of the security matters for the witnesses to be
22 searched for before the confirmation of charges, and I would say that the current
23 situation in Mali is quite unique in nature in regard to security concerns and
24 challenges.

25 Now these supplementary target investigations are necessary for us to increase our

1 number of witnesses, but also in order to take into account some of the decision

2 matters of the confirmation of charges and to explore some lines of defence that were
3 given during the confirmation of charges hearing for the very first time.

4 Now, let me hark back to the legal aspects with regard to this issue of pursuing or
5 ongoing investigations. The Statute does not prohibit the conduct of investigations
6 after the confirmation of charges, and the decision dated 26 April 2013 in the Kenyatta
7 case also mentions this.

8 Referring to the Appeals Chamber in the Lubanga case, that indicated as well that the
9 investigation should be conducted for the most part before the confirmation of
10 charges, but that it can continue thereafter.

11 And the Defence contends in its last filings that there are only a number of limited
12 situations to this, i.e., that investigations should be, for the most part, conducted
13 before the trial -- before the confirmation of charges hearings.

14 This is not exactly what was said in Kenyatta, but it is true that Trial Chamber V did
15 give us a certain framework and we should come back to this framework and we
16 should also refer to the specific circumstances of the Kenyatta case.

17 Now most specifically Trial Chamber V in this case said that if there are no
18 preconditions to the conduct of investigations after the confirmation of charges stage,
19 there are, and I quote:

20 "This is not an unlimited prerogative. In particular, the Majority of this Chamber ...
21 is of the view that under the procedural framework of the Statute, the Prosecution is
22 expected to have largely completed its investigation prior to the confirmation [of
23 charges] hearing."

24 Now the Chamber continued, and I shall quote in English:

25 (Speaks English) "Post-confirmation investigation may be appropriate when it

1 pertains to evidence which the Prosecution could not with reasonable diligence have
2 discovered or obtained prior to [the] confirmation. It may also be appropriate when
3 certain evidence that was available prior to the confirmation, unexpectedly and
4 through no fault of the Prosecution, becomes unavailable for use at trial, e.g. a witness
5 dies or otherwise becomes unavailable. Furthermore, if the Prosecution can establish
6 that it could not have taken a particular investigative step prior to confirmation
7 without unduly endangering the security of particular individuals".

8 That's a situation -- (Interpretation) Now that is the case where investigations can
9 continue.

10 So there you have it for the legal aspect of matters and the jurisprudence from the
11 Appeals Chamber, which said that investigations must be, for the most part,
12 completed by the time of confirmation of charges.

13 Now if I could now turn to something more specific within the Kenyatta case, I quote
14 paragraph 18:

15 (Speaks English) "The Chamber is concerned by the considerable volume of
16 evidence collected by the Prosecution post-confirmation and the delays in disclosing
17 all relevant evidence to the Defence."

18 (Interpretation) And furthermore, at paragraph 122 the Chamber noted:

19 (Speaks English) "In this case, as far as the Chamber has been able to ascertain, at
20 least 24 of the Prosecution's 31 fact witnesses were interviewed for the first time after
21 the confirmation hearing. In addition, a large quantity of documentary evidence
22 appears to have been collected post-confirmation and to have be disclosed at a late
23 stage."

24 (Interpretation) End of quote.

25 Quite clearly, your Honours, in this case, the Prosecution believes that we find

1 ourselves in a situation whereby continued investigations are fully justified after
2 confirmation. Also, when it comes to the actual facts of the matter, we are in a quite
3 different situation compared to Kenyatta case.

4 A large amount of the evidence has already been disclosed. For example, 59
5 witnesses are on the list of witnesses for confirmation and then many, a great many
6 witnesses were disclosed under Regulation 77 or Article 67(2). And approximately
7 9,000 documents that have been disclosed on the list of incriminating evidence for
8 communication -- confirmation of charges.

9 What I am driving at is that the Prosecution is not trying to catch up for time lost or
10 delays or anything like that. We have done our work. We have investigated. We
11 have disclosed evidence, a large amount of evidence, with some redactions, but we
12 find ourselves in a specific situation -- and, this is about the security matters, and
13 allow me to explore this point in greater detail very briefly.

14 Currently, in Mali, there are a number of terrorist groups. The situation is highly
15 volatile. Attacks are occurring, and all of this is accompanied by multiple attacks
16 amongst multiple groups, and various groups are present, such as Daesh. We see
17 that AQMI, Ansar Dine and Iyad Ag Ghaly are groups and people that were present
18 in Timbuktu at the time of the events and we argue that the accused person was
19 associated with these groups and still is.

20 So we find ourselves in quite a complex situation in Timbuktu; it is not easy to go and
21 investigate. And the Defence themselves have acknowledged in their brief that, and
22 I quote, they could not have -- that it was not possible to act in that way in a short
23 time frame, and there's no challenge from the Defence I would imagine in this regard.
24 In other words, given this context, the OTP strategy has been to be selective and to be
25 quite parsimonious, if I could put it this way, because we don't want to put staff in

1 danger or a witness; so we cannot go in, screen everyone.

2 So we are trying to be very targeted and investigate, both in exculpatory matters and
3 incriminating matters, and thus you see it is necessary to continue investigations after
4 confirmation of charges. But once again, we are very far away from the
5 configuration that we saw in the Kenyatta case.

6 The Chamber noted then that 29 of the 31 witnesses -- crime-based witnesses had
7 been heard after the confirmation of charges. No, about a hundred people have been
8 heard; 59 are already on the list of witnesses at the time of confirmation of charges.

9 So we are continuing in a targeted fashion. This is what the Prosecution is doing
10 currently. We are not trying to make up for any delay or shortcomings on our side.

11 Furthermore, there is some evidence that is no longer available, and this is to be
12 found in a filing that we provided. For example, a number of experts cannot be
13 brought before the Court. They have provided reports, and it's a confidential matter
14 mentioned in a filing, so the Chamber will be aware of this, and it relates in some
15 ways to -- well, owing to the jurisprudence in Kenyatta, we do have to take some
16 further investigative steps to make up for this particular problem.

17 All in all, the Prosecution continues to investigate, but not all out or under no
18 conditions. Because of the security situation, we cannot do a lot in the field. We
19 have come back with additional evidence and such evidence shall be disclosed as
20 quickly as possible, and it will not be comparable in volume to what was provided in
21 the Kenyatta case, which I mentioned.

22 So our investigations do continue. They're entirely appropriate and justified under
23 these conditions.

24 Thank you.

25 PRESIDING JUDGE MINDUA: [10:09:10](Interpretation) Thank you very much,

1 Prosecutor, for your explanations.

2 Now I'd now like to hear from Ms Taylor.

3 Ms Taylor, please proceed.

4 MS TAYLOR: [10:09:25] Thank you very much, Mr President.

5 In November 2015, at a discussion concerning efficiencies at the ICC, the ICC

6 Prosecutor stated that we shall also endeavour to be trial ready as early as possible,

7 and, in any case, not later than the confirmation of charges hearing.

8 These new approaches promise greater speed and efficiency in eventual proceedings

9 before the Court, since well-founded cases that are cogently presented help the

10 Chamber to conduct proceedings that are fair and efficient.

11 Now we wholeheartedly subscribe to these principles and we are concerned that they

12 are not being adhered to in the submissions today.

13 This morning, the Prosecutor has referred to a raft of case law concerning the ability,

14 the exceptional ability to conduct investigations post-confirmation. It is not,

15 however, seen that the scenario set out in that case law is applicable to the particular

16 examples given by the Prosecutor.

17 I would, for example, respectfully submit that the mere fact they have declined to rely

18 upon an expert is in no way analogous to the disappearance of evidence or the death

19 of a witness.

20 And in their written submissions, they have advanced four reasons for continuing

21 their investigations, and we submit that none of them are valid.

22 Firstly, the Prosecutor claimed that it needed to limit its search for witnesses at the

23 confirmation stage due to security. This is not a valid argument, particularly when

24 an individual is detained. The Prosecutor has a duty to conduct their investigations

25 with the greatest degree of expedition possible. They can't just wait and see if the

1 charges are confirmed and then investigate the case fully.

2 They filed the charges in this case with a view to bringing Mr Al Hassan to trial. The
3 filing of such charges was tantamount to a commitment that they were trial ready;
4 that they were willing and able to bring this case to trial in the event that the charges
5 were confirmed.

6 At no point in time at the pre-confirmation stage did they ever indicate that they had
7 only conducted partial investigations. And the suggestion that it is in any way
8 appropriate to conduct partial investigations is also completely contrary to their duty
9 to search for the truth, and it should be self-evident that you can't search for the truth
10 if you are only conducting partial investigations.

11 The second justification was the need to increase witnesses at trial. And this
12 argument doesn't make sense. What matters is the quality of witness testimony.
13 Not the quantity. And the Prosecution brought this case to trial on the
14 understanding and the commitment that it had sufficient evidence to do so; that it
15 had quality evidence to do so.

16 And if anything, given the delays in this case that have been foreshadowed by the
17 Registry submissions concerning translation, the Prosecution should be using the
18 current period to streamline its case with the view of putting the best evidence before
19 the Chamber. Not simply numerically increasing the number of witnesses.

20 The third justification concern the fact that certain aspects of the confirmation
21 decision had triggered a need for further investigations. And again, this argument is
22 incomprehensible to us; it's vague and insufficient.

23 The Pre-Trial Chamber dismissed certain incidents and forms of liabilities. They
24 didn't increase the charges. There were no issues of re-characterisations. The
25 charges were confirmed on the basis of the case brought by the Prosecution, a case

1 that they themselves knew and were fully competent and able to investigate prior to
2 confirmation.

3 The fourth justification is the claim that the Defence only brought to their attention
4 certain lines of defence at the confirmation hearing. And this argument is invalid for
5 two reasons.

6 Firstly, unlike the ad hoc tribunals, the Prosecution has a duty to search for and
7 disclose PEXO and Rule 77 materials, and that duty is completely independent of the
8 Defence. They don't need to and they shouldn't wait for the Defence to proffer their
9 lines of inquiry to conduct such investigations; they have a duty to do so from the
10 very outset.

11 Secondly, the Defence filed a detailed pre-confirmation brief on 4 June, it was about a
12 100 pages. This was over six months ago, and yet in the intervening six months the
13 Prosecution has only disclosed three PEXO items, that is, three exculpatory items in
14 that time period.

15 This suggests that any further investigations aren't focusing on the identification of
16 PEXO items or defence lines of inquiry, they are rather seeking to bolster the
17 Prosecution case in response to Defence arguments. And we would submit that that
18 is prejudicial and inconsistent with the statutory right to conduct further
19 investigations.

20 Now, in the Lubanga case, the Appeals Chamber affirmed that the Prosecution could
21 conduct post-confirmation investigations, but this finding was very much tied to its
22 related recognition of the Prosecution's ongoing duty to search for and disclose
23 exculpatory information, that is, the duty or ability to conduct further investigations
24 was linked to the duty to search for exculpatory information.

25 But in subsequent cases, as referred to by Mr Dutertre, in the context of investigations

1 into incriminating matters, the Court has emphasised that the Prosecution should be
2 trial ready at confirmation and limit its post-confirmation investigations to
3 exceptional issues, and no such exceptional issues have been referred to today. And
4 if the Prosecutor is permitted to adopt a contrary approach, there is a risk that this
5 case will mutate to the detriment of the defendant.

6 The Defence needs to spend its time and resources focusing its preparation on the
7 case as it is now. If that case shifts, if it grows, the Defence will not know the
8 parameters of the case against Mr Al Hassan and the Defence will not be trial ready
9 by a date that is consistent with Mr Al Hassan's right to expeditious proceedings.

10 My colleague referred repeatedly to the Kenyatta case and argued, "Well, at least
11 we're not there." Again, in our respectful submission, that's not a valid argument.

12 The Kenyatta case might be on the outer spectrum of what is
13 acceptable -- unacceptable for post-confirmation investigations, but that doesn't mean
14 that anything that's outside that spectrum is acceptable or consistent with the right to
15 expeditious proceedings. And here, we are starting to see the case mutate. We are
16 seeing the Prosecution refer to 10 new witnesses. At confirmation, there was 57.
17 Now they are discussing 70. That is a significant increase, and we are yet to have
18 any information about the nature of the increase or the impact that that will have on
19 Defence rights.

20 In conclusion, I think it's important to bear in mind that this situation was referred to
21 the Court in 2012. The Prosecution has been investigating the situation for seven
22 years. They then had the benefit of the entire proceedings in the Al Mahdi case to
23 investigate matters related to Timbuktu. The Prosecution identified Mr Al Hassan as
24 a suspect in 2017. So this case against him has already been investigated for two and
25 a half years all the while he was in detention.

1 And the Defence agrees on the issues of security, but those issues affect the Defence
2 even more adversely. We haven't had that time to investigate. We are only starting
3 now. If we are faced with additional rafts of evidence, additional allegations,
4 additional incidents, then we won't be trial ready for at least a year or so, and that will
5 significantly prolong the proceedings to the detriment of the defendant's right to
6 speedy trial and the right to know the case against him.

7 So if the Prosecution really still need to investigate this case to bring it to trial, then we
8 would submit that the charges should be withdrawn. Mr Al Hassan should be
9 released while they do so. Thank you.

10 PRESIDING JUDGE MINDUA: [10:19:40](Interpretation) Thank you very much, Ms
11 Taylor, for your submissions.

12 Now I can see Mr Dutertre would like to address the Court. Please proceed, sir.

13 MR DUTERTRE: [10:19:53](Interpretation) The difficulties are not only in the field
14 but also in the courtroom at times, unfortunately. All this to say, in other words, I
15 will try to be brief, but I do need to respond to a number of points, although not
16 necessarily in detail, in relation to the points raised by my learned friend opposite.
17 So I will try to keep it brief.

18 First of all, there were no partial investigations conducted by the OTP. That is an
19 erroneous interpretation of the activities of the OTP. The various aspects of the case
20 were considered, explored, as necessary, and we questioned a number of witnesses,
21 collected documents. And as of today, in light of the obvious security problems, we
22 are trying to seek further corroboration and we are also investigating in relation to
23 possible lines of defence, and these activities are not - how should I put
24 this - a thriving business, as the Defence portrays it.

25 It's not a question of partial investigations. We have not ignored any aspects of the

1 case. We have conducted our investigations and the Prosecution cannot do
2 everything in the field. The Prosecution has to realise that each time we make
3 a move, there are considerations of security and we have to be precautionary in our
4 approach.

5 Now my second point has to do with potentially exonerating materials. Once again,
6 during the period of time preceding confirmation of charges, we did explore these
7 matters. The Defence -- the Defence received the information at the time of
8 confirmation of charges, and unless my memory fails me, they were received. There
9 were only three PEXO packages disclosed; perhaps in the PEXO packages, there were
10 exonerating information in other documents that we may have disclosed. And, in
11 particular, in the statements recently provided to the Chamber for redaction, there
12 was some information, and I believe we did make it quite clear, in the request for
13 redaction we made it quite clear what the situation was. But to say that only three
14 items were disclosed, that is a misrepresentation of the work done by the Prosecution.

15 When we investigate, we address the various aspects of the case through our
16 activities and particularly when we interview witnesses. So this is an outrageously
17 restrictive interpretation of our methods.

18 Now, everything that the Prosecution can provide by way of additional
19 evidence - and sometimes with the benefit of the Defence - will not change the nature
20 of the case or shift the case or transform it. A decision about the confirmation of
21 charges has been handed down and this decision sets the parameters for the case.

22 The information that we shall collect, that can also be exculpatory, will deal with
23 various aspects of a particular incident but will not change the complete nature of the
24 case. And the Prosecution case has, well, has been delineated by way of the decision
25 from the Pre-Trial Chamber; so this really is not relevant.

1 Now, yes, the situation has been open since 2013, but the specific case of
2 Mr Al Hassan, which we have investigated, is much more recent. Each case is
3 unique and requires targeted investigation. I'm sure everyone realises that the
4 charges confirmed against Mr Al Mahdi were much more restricted in comparison to
5 the charges against Mr Al Hassan.

6 Now, the situation in Mali is such that there is no change to the requirement to
7 investigate a broad range of charges, a multitude of charges. There have been no
8 delays by the Prosecution in this regard.

9 Now, when it comes to the most conclusive aspect of the Defence, continuing
10 investigations by the OTP, this is not just to -- well, of course, we are coming up to the
11 final deadline for disclosure of evidence but -- and this also brings us to Regulation 35,
12 but it is the Chamber that shall set the various deadlines, particularly for disclosure,
13 relatively short disclosure deadlines, so the Defence does not -- cannot expect an
14 exaggerated volume of evidence.

15 And in any event, the period of time that we continue before we come under 35 will
16 be relatively limited and reasonable, not different to what we might have seen in
17 other cases, previous cases before this Court.

18 All in all, in total, it is quite clear that, that our case has not changed. We are
19 providing additional evidence that corroborates a number of points, and the Defence
20 knows exactly what to expect given the decision from the Chamber.

21 PRESIDING JUDGE MINDUA: [10:27:12](Interpretation) Thank you very much,
22 Mr Prosecutor.

23 Now I see that counsel would like to address the Court, is that correct?

24 MS TAYLOR: [10:27:21] Thank you very much, Mr -- oh, sorry.

25 PRESIDING JUDGE MINDUA: [10:27:25](Interpretation) I beg your pardon. I beg

1 your pardon.

2 I call upon your sense of responsibility. We have been discussing point 1 for nearly
3 an hour now and we have approximately 14 points to deal with; so please try to be
4 brief.

5 Ms Taylor, please proceed.

6 MS TAYLOR: [10:27:56] Thank you very much, Mr President. I will be very brief.

7 I promise I will be less than a minute. I just wanted to clarify for the record that the
8 Prosecution's submissions, paragraph 26 point (a), refers to the need to restrict or limit
9 their investigations at the pre-confirmation phase for reasons of security and
10 protection of witnesses. This is language they put in their own submissions where
11 they said that they deliberately conducted a limited, that is, a partial investigation at
12 that stage. Thank you.

13 PRESIDING JUDGE MINDUA: [10:28:33](Interpretation) Thank you very much for
14 that specific point, Ms Taylor.

15 I would now like to ask the participants if anyone else would like to add anything?

16 MR LUVENGIKA: [10:29:04] (Interpretation) Thank you very much for allowing us
17 to address the Court.

18 We have taken stock of the agenda as well as the various filings that have been
19 exchanged in the lead-up to today's hearing. And in reference to point (a) on the
20 agenda, disclosure obligations, we think it's a shame really to see that clearly there is a
21 problem with access, as far as we are concerned, to certain information and certain
22 filings.

23 In particular, we note that in the submissions from the Prosecution reference is made
24 to information that directly impacts victims, for example, paragraph 18 of the public
25 version of filing 1538. And the public version, public and redacted version of the

1 filing has not been provided. So we see that mention is made of victims, particularly
2 dual-status victims, but we have no opportunity to have access to these people and
3 respond efficiently and effectively to ensure that victims' considerations are dealt
4 with.

5 Now, the Legal Representatives of Victims would like parties to be reminded that
6 specific justification is needed and it is important for parties to be attentive and not to
7 deprive the Legal Representatives of Victims of information relating to their clients.

8 Now, when it comes to -- for a more ... The -- mention is made of the OTP's
9 disclosure obligations; that for all participation forms that must be disclosed, in turn,
10 there has been a request for all participation forms, and this is what we are opposed
11 to.

12 So it's imperative for the Legal Representatives to have access to filings, submissions
13 in their entirety when such filings relate to victims authorised to participate in the
14 trial or applicants who have not yet been accepted. So fundamentally this is what I
15 can say at this point in this regard; namely, point (a) of the agenda, and I thank you.

16 PRESIDING JUDGE MINDUA: [10:32:10](Interpretation) Thank you very much,
17 Maître Nsita, for your presentation.

18 We should normally have been moving on to point 2, transcription and translation
19 issues, but for now I would like to go to point 3 directly, that is, redactions protocol.

20 The protocol adopted so far is in paragraph 27 to 35 of decision number 31. The first
21 point was raised by the two parties in their submissions, and there is a disagreement,
22 that is, nonstandard redactions under Rule (4).

23 On the one hand, this category is not part of the protocols adopted by the
24 Trial Chambers in the other cases of the Court. The Defence is asking that this
25 category should be the subject of an individual request by the Prosecutor and it

1 should be examined on a case-by-case basis by the Chamber.

2 On the other hand, it seems that the Prosecutor would like the leave of the Chamber
3 to continue using this category and that it should be broadened such that the OTP
4 should be able to redact *proprio motu* the identity of certain Prosecution witnesses.

5 The parties should provide responses because it is necessary to regulate the
6 implementation of redactions, both standard and nonstandard.

7 Mr Prosecutor, you have the floor.

8 MR DUTERTRE: [10:34:50](Interpretation) Mr President, we have the following
9 observations.

10 The decision of Trial Chamber, that is, decision number 31, stipulates a certain
11 number of redactions that the Prosecution can carry out *proprio motu*, including B.5 of
12 redactions that is under Rule 84 of the Rules.

13 In terms of volume, this situation is very limited because if my calculations are exact,
14 there are only six documents for which we used category B.5, and in relation to the
15 20,000 documents disclosed, this is really insignificant.

16 Secondly, the protocol in decision number 31 stipulates that the OTP should provide
17 the justification for the redactions. For example, if an investigator's name is redacted,
18 it should be indicated. And then you have residual cases. The Pre-Trial Chamber
19 asked us for justifications and we provided justifications on each case and we also
20 provided a filing containing tables on this.

21 So there is a volume of evidence that is very limited and the OTP has always given
22 justifications that make it possible for the Defence to advance. So I do not see the
23 need to change the system.

24 The Defence, I don't remember that they disputed category B.5, so you'll have these
25 issues on volume and substance.

1 Regarding the broadened powers, there is the redaction of new witnesses. We had
2 discussions with the Defence on this point. It is not a secret. The objective of the
3 Prosecution is that as soon as we have evidence, we provide it and then there is
4 a decision taken, then we disclose the evidence with the necessary redactions. And
5 each time the Defence might challenge it, if they feel that it is not necessary, and then
6 we would have to justify why.

7 But when we look at the reality and the security situation that is prevailing, there are
8 frequently good reasons for the OTP to request redaction of identities, so it is an
9 indispensable -- it is not indispensable for the Chamber to have to settle issues related
10 to security in various areas where security is a major problem.

11 So if the witnesses are not in these areas, then the Prosecutor will come back to the
12 Chamber. But if we are talking about Timbuktu, for example, we can skip this
13 burdensome procedure. The OTP will carry out the redactions and save time, while
14 protecting everyone's rights. And if we submit a motion, then the Chamber might
15 grant that motion.

16 So this is a system in place and we are aware that in the coming months it will be
17 a disclosure phase and this should not affect a considerable number of witnesses.
18 We are really looking here for efficiency.

19 PRESIDING JUDGE MINDUA: [10:40:27](Interpretation) Thank you very much,
20 Mr Prosecutor.

21 Maître Taylor, I don't know whether you have a response to that.

22 MS TAYLOR: [10:40:37] Thank you very much, Mr President. With your leave, Ms
23 Sarah Bafadhel will be addressing the Chamber.

24 PRESIDING JUDGE MINDUA: [10:40:53](Interpretation) Please proceed.

25 MS BAFADHEL: [10:40:56] Good morning, your Honours. I will be brief on this

1 matter. And really just at the outset, we are obviously in agreement. The
2 redactions process should not be designed in a manner which is going to then delay
3 disclosure. However, the Prosecution's suggestion that a move to *proprio motu*
4 application of redactions to identities of witnesses under the guise of preventing such
5 delays to disclosure is especially alarming at this stage of the proceedings.
6 Whilst it will be the subject of lead counsel's submissions after my part, what I will
7 limit my submissions is, that whilst the Prosecution may have been authorised at the
8 pretrial stage to withhold the identities of these witnesses at pretrial, this was for
9 a different purpose.
10 This justification no longer exists. We are at trial stage now. The charges have been
11 confirmed. And whether it is a matter of weeks or select months, the OTP, the
12 Prosecution will be ordered to show its cards.
13 The notion, therefore, of creating a framework which only makes it easier for the
14 Prosecution to withhold identities at trial than it was even at pretrial defeats this fact.
15 The identities of these witnesses will need to be provided to us.
16 Your Honours, we submit that this isn't a burdensome process. The need for such
17 judicial oversight of nondisclosure of the identities of witnesses is actually only more
18 heightened at this stage ahead of the commencement of trial. Needless to say,
19 nondisclosure is the exception and not the norm.
20 This overarching principle must be given reality -- given effect in reality in order to
21 ensure that the rights of Mr Al Hassan are intact and that Defence investigations can
22 commence and we remain on track for the scheduled trial start date.
23 The Prosecution offers you no justification to depart from the normal framework for
24 the discrete application system that we have in place or reasons as to why the
25 Chamber would essentially delegate its responsibilities to safeguard the fairness of

1 these proceedings.

2 Nor is the importance of the need for judicial oversight outweighed by the

3 Prosecution's suggestion that *proprio motu* redactions to identities will speed up

4 disclosure, particularly when we consider the other available means to us.

5 And we have addressed this in our submissions, but in short we suggest that the

6 Prosecution, while submitting its application for nondisclosure should, at the same

7 time, submit the proposed redactions to the Chamber and to the Defence at the same

8 time. Therefore, disclosure would not be delayed, the application continues.

9 Indeed, this is the practice before other Trial Chambers at this Court.

10 Turning now to the issue of nonstandard redactions, your Honours, the category B.5.

11 As your Honour has set out, this is the practice before the other Trial Chambers.

12 This miscellaneous category, if I can call it that, is so broad, it can encompass

13 a number of factors that we are unaware of as the Defence and therefore are unable to

14 address the prejudice.

15 For this reason, there is again a heightened need for judicial oversight, irrespective of

16 whether it is six applications, 10, 20, whatever the number may be. The broadness of

17 this category remains that we need this judicial oversight and the discrete application.

18 And as I just suggested, this won't delay disclosure if the Prosecution adopts or is

19 ordered to adopt the process we have set out in that the proposed redactions are also

20 simultaneously disclosed at the same time as the applications.

21 Those are my submissions to address your two points, your Honour.

22 PRESIDING JUDGE MINDUA: [10:45:44](Interpretation) Thank you very much,

23 Counsel.

24 The Prosecutor, I have seen you raising your hand, but I don't want to give you the

25 floor because we may not end. So please, be very, very brief.

1 MR DUTERTRE: [10:46:01](Interpretation) Thank you, Mr President. In reality,
2 the proposal to broaden the possibility of making *proprio motu* redactions was
3 intended to be more expeditious and we thought that this was something that would
4 be suitable to the Defence. Maybe we misunderstood.

5 I'm not insisting on this point. We can proceed as before by filing motions as has
6 been done in the past. We thought we were proposing a good point, but it doesn't
7 seem to be so.

8 And secondly, if we continue with this system, the Prosecution proposes that the
9 annexes with the statements should be included because we realised that Pre-Trial
10 Chamber I exercised its discretionary powers to ask us to lift certain redactions and
11 then to impose other redactions that we did not even propose. But if we continued as
12 proposed, then the Chamber will no longer have those powers. So it is possible to
13 have confidential redacted versions, but those should remain *ex parte* and the
14 Chamber should use its discretion under Article 68.

15 PRESIDING JUDGE MINDUA: [10:48:22](Interpretation) Thank you, Mr Prosecutor.
16 This point is really important. The Chamber is aware that a redaction protocol is
17 a priority and in order to avoid problems, the Chamber wishes to indicate that the
18 Prosecutor can continue to apply redactions as provided for in decision 31 of the
19 Pre-Trial Chamber, which is not challenged by the Defence.

20 The exception is category B.5, which seems to be more problematic at this stage of the
21 proceedings. The Chamber will deal with this issue subsequently in a written
22 decision. That decision will also deal with the Defence application requesting that
23 the materials for which nonstandard redactions are requested should be filed
24 simultaneously with the submission or filing of the Prosecutor.

25 The second point concerns the procedure to be followed at this stage to deal with

1 certain redactions that have been implemented previously. The Defence has raised
2 issues relating to the necessity of reviewing all the disclosed materials in order to
3 ensure that the redactions implemented by the Pre-Trial Chamber or by
4 a trial chamber should always be rigorously necessary. This issue is particularly
5 urgent, and I would like to know the time limits within which the Prosecutor can
6 carry out such verifications.

7 The priority is redactions in the Al Mahdi case; whereas, implementation under 42
8 shall be necessary and then there is the possible lifting of nonstandard redactions that
9 were implemented by the Pre-Trial Chamber in this case.

10 Mr Prosecutor, you have the floor if you wish to take it.

11 MR DUTERTRE: [10:51:36](Interpretation) Thank you, Mr President,
12 your Honours. I have two points. The implementation of point 42, which will
13 require the seizing of Pre-Trial Chamber VIII - and we are working on that - and then
14 the lifting of redactions implemented by Pre-Trial Chamber I.

15 In the two cases, it depends on the security situation in the field. We have to consult,
16 assess the situation, and then apply to the relevant Chamber to request the lifting of
17 such redactions.

18 This means that the Prosecution will be involved in missions to the field to be able to
19 assess the situation of those witnesses and, if we do not do that, we cannot make any
20 concrete proposals to any of the Chambers. So we cannot broaden the process.

21 Otherwise, we made a proposal in our submissions - and this concerns 27 witnesses, if
22 I remember correctly - we propose a timeline from January to April.

23 And we have specific difficulties, and we are going to assess each situation and come
24 back to the Chamber. So we are proposing four months to carry out this fieldwork
25 and then we will come back on a rolling basis to the Chamber to talk about redactions

1 related to Prosecution witnesses.

2 So we are not going to wait for the full four months. We are going to do it
3 progressively. But we have to take on board the realities in the field in Mali and we
4 cannot go any faster than the security situation allows. Thank you.

5 PRESIDING JUDGE MINDUA: [10:54:36](Interpretation) Thank you. I followed
6 you keenly and you talked about four months, but concretely, when do you intend to
7 disclose the identity of these witnesses, subject to delayed disclosures to the Defence
8 or the accused? Which is the date on which you intend to lift these redactions?

9 MR DUTERTRE: [10:55:12](Interpretation) Mr President, I was obviously not very
10 clear. From January to April, we intend to go and meet with each witness concerned
11 by those redactions. And on an individual basis, we will come back to the Chamber.
12 Maybe we will deal with the last witness around April. The application should be in
13 early May, and then we should be able to complete all the work between the end of
14 April and mid-May. But the work will start as early as January and we will
15 immediately contact the Chamber to lift some of the redactions; so we have four
16 months of missions. And the last applications will be made in May and then all
17 those materials will be made available.

18 Maybe we will have to ask for further arrangements, but that will concern only an
19 insignificant number of witnesses.

20 PRESIDING JUDGE MINDUA: [10:56:52](Interpretation) Thank you. Ms Taylor,
21 you have understood? The Prosecutor has said that the missions will start in
22 January and up to April, and the Chamber will be updated.

23 What do you think about that, Ms Taylor?

24 MS TAYLOR: [10:57:12] Thank you very much, Mr President. We're obviously
25 extremely shocked and concerned by this time frame. But with your permission, Ms

1 Bafadhel will address the Bench.

2 MS BAFADHEL: [10:57:27] Firstly, your Honours, on seizing Trial Chamber VIII in
3 relation to the Al Mahdi redactions, to be honest, your Honours, we are quite
4 concerned that this process is only happening now. There is no reason as to why
5 this Prosecution hadn't made this application under regulation 42 already.

6 Of the 26 anonymous witnesses in this case, 22 were relied on in the Al Mahdi case.

7 We should already have a decision on this at this stage. However, we obviously
8 can't turn back time, but what we do need now is a firm date as to when the

9 Prosecution says they will seize Al Mahdi Chamber, firstly; and secondly, in relation
10 to the nonstandard redactions - so I'm not talking about nondisclosure of witness
11 identities Ms Taylor will deal with - but in relation to the other redactions, for
12 example, that were authorised by the Pre-Trial Chamber. For example, in relation to
13 the date of interviews - for example.

14 There is a number of these similar redactions that we need a firm date as to when
15 there'll be lesser redacted versions of such materials will be provided to us. We are
16 conducting our reviews now, our investigations at this stage. It does not make sense
17 for us to sit and wait with no firm date in place until we then have to re-review, start
18 the process again. This will only delay matters.

19 Just on the last point in this idea of these processes, the Defence also submits that we
20 need concrete bimonthly reviews to ensure that these redactions are necessary and
21 proportionate at all stages in the lead-up to trial and throughout trial.

22 This, we submit, is only possible if we have these regulated reviews to ensure that we
23 are not waiting for six months down the line until the next review is done.

24 Thank you, your Honours.

25 PRESIDING JUDGE MINDUA: [10:59:58](Interpretation) Thank you very much,

1 Maître Bafadhel.

2 Ms Taylor?

3 MS TAYLOR: [11:00:02] May I just respectfully request clarification as to whether
4 the issue of delayed disclosure will be addressed now or at a later point under the
5 agenda? Thank you.

6 PRESIDING JUDGE MINDUA: [11:00:26](Interpretation) Thank you very much for
7 your question, Counsel. Not on this specific point, but we will be discussing this in
8 the day, yes, certainly.

9 Now, Mr Prosecutor, as Ms Bafadhel said, she underscored the need to have a date,
10 but I'm not going to give you the floor anymore on this subject because we need to
11 move on. We cannot today broach all of the issues that have been covered in the
12 filings. The Chamber would note nevertheless that it has received a number of
13 requests for clarification of other issues, issues to do with the redaction system,
14 especially on the part of the Defence. The Chamber intends to hand down a decision
15 in writing on this issue and is of the mind that the parties should be given the floor
16 once again for one last time to respond to the challenges that I have not yet broached.
17 Now, Mr Prosecutor, very rapidly the floor is yours, briefly, please.

18 MR DUTERTRE: [11:01:41](Interpretation) I don't know what the Defence is going
19 to say with a view to the other challenges, but lifting redactions can only be done once
20 we have reassessed the situation of each individual witness, after a further assessment,
21 that is.

22 And secondly, the fact that there are redactions that have been suggested in the
23 Al Mahdi or the Al Hassan case is not -- doesn't have any particular result.

24 Now, the assessment, we had to do this after the confirmation of charges, but in view
25 of the sources that we have in the court, the assessment can only start in the month of

1 January. So that is what we were suggesting, the window of January to the end of
2 April.

3 Now with regard to the redacted measures imposed in the Al Mahdi case with a view
4 to, on the analysis of the Prosecution witnesses, if my memory serves me correctly,
5 there was only Witness 431 and maybe 151 for whom the 42 standard applies. Now
6 the other witnesses for whom there were redactions was under Rule 77. Now, this is
7 a very limited number of witnesses that we are talking about here. Now as for
8 Witness 151, the 42 standard was not with regard to the identity, but something to do
9 with his statement that the Chamber had said should not be disclosed.

10 Now, as for Trial Chamber VIII, the volume of work is relatively limited and
11 restricted.

12 PRESIDING JUDGE MINDUA: [11:03:37](Interpretation) Thank you very much,
13 Mr Prosecutor.

14 Ms Bafadhel or Ms Taylor, do you have anything further to add?

15 MS BAFADHEL: [11:03:49] No, your Honour, only just to state that I think the
16 Prosecution's submission only underscores this need for a specific timeline and time
17 frame.

18 PRESIDING JUDGE MINDUA: [11:04:08](Interpretation) Very well, Ms Bafadhel, I
19 have understood only too well.

20 Now it is 5 past 11. We have exceeded our programme by five minutes, and as I
21 hold punctuality very much to heart, I think we shall now rise. And when we
22 reconvene in 25 minutes, at half past 11, we shall continue with the next item on the
23 agenda on the protection of witnesses and the delayed or tardy disclosure of
24 Prosecution witnesses' identities.

25 We shall rise. Courtroom officer, please.

1 (Recess taken at 11.04 a.m.)

2 (Upon resuming in open session at 11.34 a.m.)

3 THE COURT USHER: [11:34:17] All rise.

4 Please be seated.

5 PRESIDING JUDGE MINDUA: [11:34:44](Interpretation) The hearing is resumed.

6 We shall now move on to point (d) on the agenda, protective measures of witnesses

7 and possible exceptions, that is to say the tardy disclosure of some Prosecution

8 witnesses, delayed or rolling disclosure, that is.

9 The Chamber notes that the Prosecutor has mentioned a number of options in their

10 submissions with regard to the delayed disclosure of some of the Prosecution

11 witnesses, that is to say delayed or rolling disclosure.

12 The Prosecutor makes mention of the possibility of disclosing the identity of some

13 witnesses a month before commencement of trial, even one or two months before the

14 effective date of their testimony before the Chamber, according to or in keeping with

15 the protective measures in place in the context of the witness management operations.

16 The Defence requests that the date of the filing by the Prosecution of any request for

17 delayed disclosure be established in January 2020. The Defence also requests that, if

18 authorised by the Chamber, this delayed disclosure should be conducted on a rolling

19 basis. Lastly, the Defence requests for the deadline for any delayed disclosure to be

20 established sufficiently ahead of time and before the trial commences.

21 The Chamber would like to hear from the Prosecution or the Defence with regard to

22 this procedure.

23 Well, the Prosecutor has already taken the floor sufficiently enough, so now I am

24 going to give the floor to Ms Taylor. Sorry, we are going to try and move on with

25 things.

1 Ms Taylor, please.

2 MS TAYLOR: [11:37:37] Thank you very much, Mr President.

3 The Defence, as indicated in our submissions, is extremely opposed to this proposal
4 as concerns rolling disclosure and I think it's important to note the marked lack of
5 diligence that we have heard today. The charges in this case were confirmed at the
6 end of September, two and a half months ago. In their filing they purview that
7 disclosure should be completed by mid-May, but today we are hearing that several
8 applications to lift redactions will only be submitted in May, so it looks like the time
9 frame goes beyond even that which is set out in its submissions. And given these
10 delays, given this lack of diligence, we submit that the prejudice can't form
11 the Defence and at some point exclusion of evidence might need to be the appropriate
12 remedy.

13 Now concretely, the Prosecutor has indicated that it will request rolling disclosure for
14 at least or more than 10 of its witnesses. That's 14 per cent of its witnesses, so it's
15 hardly exceptional in nature.

16 And this request is linked closely to Mr Al Hassan's right to a speedy trial. If you
17 delay disclosure, you delay defence preparation. We can't prepare our case, we can't
18 investigate until we receive these critical details. And we would question the logic
19 of using rolling disclosure in a case that is likely to last several years. The logic
20 arises from the risk presented through investigations, but even if we don't have much
21 time to investigate before the witness testifies, we will do so afterwards. So any risk
22 insofar as it relates to investigations, remains the same.

23 And if our later investigations produce information that impacts on the veracity of the
24 witness testimony, then we will either have to request the witness to be recalled or
25 mount a much more substantive defence case. Either possibility prolongs the

1 proceedings further.

2 We would also submit that the security situation militates in favour of immediate
3 disclosure rather than delayed disclosure, and that is because it is equally, if not more
4 prejudicial, as concerns defence preparations and investigations. The longer these
5 proceedings last, the greater risk that Defence witnesses will disappear or possibly
6 die.

7 Defence witnesses are also more likely to be based in and around Timbuktu or
8 Mauritania, rather than Bamako. We don't have NGOs in situ who are willing to
9 help us out. And in terms of our ability to travel to these places, it takes several
10 weeks to prepare a secure mission request. And for non-State Parties such as
11 Mauritania, it can take months. So it should be self-evident that we have neither the
12 time nor resources to conduct investigations while the trial is ongoing or in the
13 immediate lead-up to the trial. And it should be equally self-evident that we can't
14 conduct effective investigations if we don't have the identity of the witnesses in
15 question, because without that identity, we can't conduct any form of verification as
16 to whether the person was actually in Timbuktu at the time of the events and what
17 links they might have to other persons in the case.

18 And it is only when we receive that identity that we can formulate specific targeted
19 disclosure requests to the Prosecution. And that takes time for them to review and
20 process. And I'm pretty sure they won't be able to respond to such requests
21 effectively if they are receiving them in the weeks immediately before the trial.

22 The Prosecution requests also has to be viewed within the context of the fact that until
23 now the Prosecution has only disclosed the identities of 34 out of the 57 witness it
24 relied upon at the confirmation hearing. That is a significant number of anonymous
25 witnesses and it stands in stark contrast to other cases where the Prosecution only

1 relied upon anonymity for a handful of witnesses.

2 So when the Chamber examines the prejudice caused by the rolling disclosure of 10 or
3 more witnesses, that prejudice can't be viewed in isolation but must take into account
4 the residual prejudice caused by the extremely high number of anonymous witnesses
5 and redactions in this case.

6 And finally, I would note with my concern the fact that the Prosecution has not
7 clearly addressed its position concerning the disclosure of the identity of individuals
8 whose statements were disclosed under Rule 77 or Article 67(2). If we don't have the
9 identity of these witnesses, the statements are virtually worthless to us. We can't use
10 them as evidence and we can't contact the individuals in question to interview them
11 as potential Defence witnesses.

12 And many of these statements and summaries are so heavily redacted that we can't
13 even formulate a meaningful request to have the redactions lifted.

14 And it is one thing to redact this information at the confirmation process, but it is
15 entirely another thing to maintain these redactions in the lead-up to trial.

16 The ICC case law is clear, the Prosecutor's duty to search for and disclose exculpatory
17 information is just as important as its duty to do so as concerns incriminating
18 information.

19 It follows that the Prosecution can't be allowed to put this issue aside and only deal
20 with it as and when it's finished preparing its case and when it's finished preparing its
21 incriminating materials. We therefore request the Trial Chamber to order
22 the Prosecution to file a schedule as concerns when it will lift *proprio motu* or when it
23 will apply to lift redactions concerning Rule 77 and PEXO materials as well. And
24 that that deadline should fall such that we receive it sufficiently in advance of the
25 commencement of trial that we can actually use the materials, which is the objective

1 of these Rules.

2 Thank you very much.

3 PRESIDING JUDGE MINDUA: [11:45:12](Interpretation) Thank you very much,

4 Ms Taylor. Of course I was listening for the end of the interpretation into the French
5 language.

6 Now, as I said, the Prosecution has already addressed us sufficiently on this matter,
7 and I do not believe that he wants to hark back to this question once again.

8 Now, it seems that he is consenting, the Prosecution is in agreement. Oh, no, he is
9 opposed to this.

10 Now, Mr Prosecutor.

11 MR DUTERTRE: [11:45:40](Microphone not activated)

12 PRESIDING JUDGE MINDUA: [11:45:41](Interpretation) Now, Mr Prosecutor, I do
13 not see what you can come back on. You have already provided sufficient
14 explanations.

15 Now we are going to move on to the next point with regard to the commencement
16 date for the trial itself.

17 Now, in the light of everything that we have heard up to now and the filings that you
18 have sent to the Chamber, I believe that you do not need to say much on this question.

19 I am going to give the floor to the parties now and to the participants, just for five
20 minutes.

21 Now, Mr Prosecutor, five minutes, please.

22 MR DUTERTRE: [11:46:22](Interpretation) The Prosecution suggests to start the trial
23 in the month of September. And let me explain the calculation of this date. As I
24 indicated, first and foremost we need four months to go out into the field and assess
25 the security situation for each witness. And this is not done one or two years before

1 the trial commences, but a few months before the trial commences, after which we
2 will be in a position to lift redactions and disclose materials.

3 Now, at the end of April, it could be that we might be disclosing until mid-May,
4 which would be the deadline to disclose all of the evidence to the Defence, that is to
5 say, incriminating and exonerating, Rule 77. So that's four months for us to do the
6 work correctly and take into account the security of the witnesses.

7 Now, if the Chamber establishes a deadline of three months from the end of
8 disclosure to the beginning of the trial, this inevitably takes us to mid-August and it
9 would be from then that we could be able to start the trial in a useful manner once
10 the Defence has, of course, and unless there's any other further disclosures, but it will
11 have enough time to prepare itself. There has been a great deal of evidence
12 disclosed since June 2018 and the Defence has had sufficient time to analyse all of this.

13 Thank you.

14 PRESIDING JUDGE MINDUA: [11:48:11](Interpretation) Thank you very much for
15 your concise approach.

16 Now over to the Defence, Ms Taylor, please.

17 MS TAYLOR: [11:48:20] Thank you very much, Mr President, and I assure you we
18 will be even more brief.

19 We are here just to reiterate our desire to have the trial commence as quickly as
20 possible, as soon as possible is exactly what the preference of Mr Al Hassan is. That
21 is subject to the caveat of having adequate time and facilities and for strict deadlines
22 to be imposed on the Prosecutor so that we can receive disclosure in advance of the
23 commencement of trial.

24 I would just add to that that as concerns the proposed date of September, if the trial
25 commences after the judicial recess, that will necessarily impact on Defence

1 preparation in that we will receive the bulk of materials at a time when the Court is
2 not functioning as hundred per cent, let's put it that way. Even though obviously
3 people will be working to their capacity, judicial recess is harder to organise things,
4 it's harder to organise missions, so that does impact upon the deadlines that might be
5 imposed.

6 Thank you very much.

7 PRESIDING JUDGE MINDUA: [11:49:40](Interpretation) Thank you very much,
8 Counsel, for your presentation.

9 The Chamber has taken note of your various observations and of course will render
10 a decision in a timely manner.

11 Now let us move on to the next point on the agenda, that is the provision of a pretrial
12 brief and other matters related to the charges.

13 The Chamber requested written submissions on this. The pretrial brief is a very
14 useful document used here in this court to prepare the trial and such a document
15 provides an explicit explanation of the manner in which the Prosecution intends to
16 show the charges confirmed by the Pre-Trial Chamber.

17 Now, of course, I would also like to hear what the parties have to say very briefly on
18 the matter.

19 Mr Prosecutor, please.

20 MR DUTERTRE: [11:50:49](Interpretation) Very briefly, Mr President.

21 The pretrial brief is often something that is very useful in nature, but we are often in
22 configurations or cases where the DCC or the decision on the confirmation of charges
23 are relatively short. I am talking here where there might be a 50-page DCC. But in
24 our opinion, in this case, everything has already been clearly indicated by
25 the Prosecution in its document, its DCC, which is 450 pages in length with

1 approximately 3,000 footnotes. So the Defence knows only too well what
2 the Prosecution's position is, what its evidence is, and exactly where the Prosecution
3 is going.

4 And, of course, this is not the document that bears authority. It is the decision on the
5 confirmation of charges that does that.

6 And when we look at the decision on the confirmation of charges, we can see that it is
7 far more lengthy than the DCC itself. It is 467 pages in length with, well, I'm not
8 here to compliment you, but it is very, very well written in a very limpid and clear
9 French and it establishes the parameters of the trial very clearly.

10 And the Pre-Trial Chamber counted itself the number of times that a witness was
11 whipped, for example, or flagellated. So see here the length, the quality and the
12 volume of this decision, as is the DCC. So we are of the opinion that this is
13 absolutely sufficient for the Defence to be in a position to know how the Prosecution
14 is going to present its case and what the Prosecution case actually is. With a decision
15 of 467 pages in length, the Prosecution is of the opinion that there is no need to file
16 a pretrial brief that would be limited to 120 pages and would only be repetitive in
17 nature with regard to what the Pre-Trial Chamber I has already only too well written,
18 even if we are not in agreement with absolutely everything it has to say, but it is very
19 well explained indeed.

20 PRESIDING JUDGE MINDUA: [11:53:33](Interpretation) Thank you very much,
21 Mr Prosecutor. If I have understood correctly what you just said, you are not or you
22 do not have the intention of producing a pretrial brief because the decision
23 confirming the charges is sufficient in itself and you are not either going to produce or
24 neither are you going to produce the -- an updated DCC.

25 So how would I put it? You are not going to provide an updated version. I find

1 that difficult to put in the French language for some reason. "Updated".

2 MR DUTERTRE: [11:54:14](Interpretation) Our position is that the decision on the
3 confirmation of charges, and that under the light of the DCC itself, is sufficiently clear,
4 concise and precise to shed light on the matter for the Defence as to the Prosecution
5 and the way it is going to move forward and present its evidence in the case. And
6 that is why it has no intention of filing a pretrial brief.

7 PRESIDING JUDGE MINDUA: [11:54:43](Interpretation) There we are. So we
8 have the decision on the confirmation of charges, that in itself was, was perused as a
9 result of your Document Containing the Charges and you are going to limit yourself
10 to this and you have no intention of producing anything further. Very well.

11 Now let me turn to the Defence to see what their position is.

12 MS BAFADHEL: [11:55:12] Your Honours, I will be addressing you on this matter.

13 The idea or the notion that because the pretrial brief -- oh, sorry, because the DCC and
14 the confirmation decisions are lengthy documents equals or equates to the Defence
15 being fully informed is a red herring. What we currently are facing is our -- the
16 allegations against Mr Al Hassan are spread across two documents amounting to
17 a record-breaking 991 pages.

18 We do not have a clear demarcation as to the operative part of the charging section,
19 nor is there confirmed pleading language and there isn't a verbatim reproduction of
20 the charges in the confirmation decisions as set out in the DCC. Instead, what we are
21 facing are unwieldy paragraphs with cross-references to block paragraphs in the
22 DCC.

23 The emphasis is not, therefore, on length as suggested by the Prosecution, but on the
24 clarity of the scope of the charges against Mr Al Hassan.

25 Whether we call it a pretrial brief or an updated DCC or even a third title is to

1 a degree semantics. What we require is a readily accessible statement of facts
2 underlining the confirmed charges, which is clearly the operative section. So this
3 can, for example, be confirmation that part 9 of the DCC is the operative part, for
4 example. And that this is then updated to reflect the confirmation decision and the
5 incidents that were not charged or confirmed as well as updated links to new
6 evidence or lesser redacted versions.

7 So, therefore, your Honours, we are not insisting on a pretrial brief either, but, rather,
8 we want a concise statement of facts so that we know what the charges are, as is the
9 rights of Mr Al Hassan, and in order to ensure efficient proceedings before you.

10 PRESIDING JUDGE MINDUA: [11:57:46](Interpretation) That's a very difficult
11 question. Of course, thank you, Counsel for your presentation.

12 Now, I would like to remind you that it is the confirmation decision that is the point
13 of reference throughout the trial. We are in agreement on that, are we not,
14 Mr Prosecutor?

15 And in the jurisprudence of this Court, in the Bemba case, the Appeals Chamber
16 stated that the tactic or the method by which a Document Containing the Charges was
17 filed in an amended or improved form is not in compliance with the Statute of our
18 Court.

19 So I think I'm going to huddle for a moment with my colleagues before we see what
20 the Chamber is going to do in this regard because, of course, there is a problem here.
21 (Trial Chamber confers)

22 PRESIDING JUDGE MINDUA: [11:59:16](Interpretation) The Chamber needs to
23 refresh its memory on a matter and it will come back to you with a decision on the
24 matter in due course.

25 Thank you.

1 So let us now move on to the following point, that is point (g) on the agenda, namely,
2 the provision of an updated list of witnesses from the Prosecution.

3 The Defence has indicated that it would like to obtain a list of the Prosecution
4 witnesses before the deadline of disclosure or the disclosure deadline. The Defence
5 suggests that this contain the type of witness to appear, the order and the duration of
6 their testimony as well as any clarifications or specific details as to the use of Rule 68.

7 Mr Prosecutor, you may take the floor now if you would like to make some
8 comments.

9 MR DUTERTRE: [12:00:38](Interpretation) (Overlapping speakers).

10 PRESIDING JUDGE MINDUA: [12:00:39](Interpretation) What sort of date did you
11 have in mind, if you have one, for providing the list?

12 MR DUTERTRE: [12:00:47](Interpretation) This is a somewhat complex matter,

13 Mr President. First of all, I don't remember the Prosecution being asked to provide
14 preliminary lists of witnesses, because, you see, at this point we can only provide
15 a rather preliminary list. We are still in the process of managing our witnesses over
16 four months and then we will be able to come back with a definitive list.

17 For the time being we are not opposed to providing a provisional list, if that can be
18 useful to the Chamber and Defence, to get a general idea of what kind of witness will
19 be called and what the witness will deal with. But of course such a list will be
20 subject to change, additions, deletions and we do not believe that we need to provide
21 particular explanations as to changes, additions, deletions during a period of time
22 when witness management is underway and we are consolidating our witness list.

23 Now, of course, with this provisional list - and I stress this is provisional - we can
24 indicate the status of the witness, insider, expert, crime base. Now, as it comes to
25 other indications, such as the order of witnesses, it would be extremely premature to

1 provide that information because that will depend on security issues, which are
2 extremely important, which we will be dealing with in the next four months.
3 As for duration, it's a bit premature to say how long a particular witness will testify.
4 We're still working on that.

5 And then use of 68, that is a possibility, but, once again, the use of Article 68 will
6 depend to some extent on witness management, security assessments and, thus,
7 we cannot necessarily fill out that particular box on the form, so to speak, for
8 a particular witness.

9 So I think it would be easier to use 68 under some circumstances, but I do think we
10 will have to meet some witnesses and go through our witness management process.
11 So, yes, a list, but it will be quite provisional and all the -- not all the information
12 requested by the Defence can be provided at this juncture.

13 Thank you.

14 PRESIDING JUDGE MINDUA: [12:03:30](Interpretation) Thank you very much,
15 Prosecutor.

16 Ms Taylor, I can see that -- oh, I see that it's Ms Proulx who will address the Court.

17 MR PROULX: [12:03:42] Thank you very much, Mr President, your Honours. Once
18 again, unfortunately, the Defence is slightly concerned by what we've just
19 hear - we've just heard, sorry - that the Prosecution seems to not have made a decision
20 yet as to which witnesses they want to call during trial, in particular, for us regarding
21 those witnesses whose evidence was disclosed under Rule 77, but not exclusively
22 these witnesses.

23 We just heard our colleague from the Prosecution say that the order of witnesses was
24 a question that's premature. We disagree. With respect, they are themselves
25 suggesting a mode of disclosure on a rolling basis, which is predicated upon having

1 chosen an order of appearance.

2 In their submissions, the Prosecution indicates that its list, its current list of witnesses
3 comprises about 70 witnesses, but nowhere can we find an exhaustive list of these 70
4 witnesses, knowing that the Defence has received disclosure relating to about just
5 over a hundred witnesses. We don't know which ones of these hundred plus are the
6 70 chosen by the Prosecution so far.

7 So it goes without saying that the provision of an up-to-date witness list as soon as
8 possible would go a long way in helping the Defence prioritise resources, prepare and
9 structure our investigations with the limited time available before trial.

10 This would also clarify the parties' obligations with regard to the protocol on
11 handling of confidential information which we will discuss a bit later, I believe. And
12 it would also assist Registry, probably in getting logistical arrangements taken care of
13 with sufficient notice.

14 In our view, there is no downside to preparing a witness list. Actually, it would
15 clarify and simplify things for all parties involved, including the Chamber. And we
16 believe that this list should be prepared and shared with the parties and participants
17 as soon as possible. We would suggest a deadline of late January 2020, but of course
18 we would welcome any order that the Chamber could make in this regard.

19 Thank you very much.

20 PRESIDING JUDGE MINDUA: [12:06:12](Interpretation) Thank you very much,

21 Ms Proulx.

22 Prosecutor.

23 MR DUTERTRE: [12:06:20](Interpretation) Very briefly, your Honour. Just to set
24 the record straight, the rule and the practice, rather, is that the Chamber sets a date for
25 trial and a deadline for disclosure and then the Prosecution files its list of evidence, its

1 list of witnesses and disclosure ends.

2 We are quite willing to accommodate the Defence and provide a provisional list, but
3 the Prosecution needs some time to do its work and to consider the situation of the
4 various witnesses and make a final choice.

5 But if we set a deadline in January, and we have other deadlines as well before the
6 disclosure deadline, usually three months before commencement of trial, that could
7 hinder the Prosecution, keep it from doing its work properly, and it would be a first
8 in the Court's history that the Prosecution would have to file a large number -- a list
9 with large, a large list of witnesses.

10 If the disclosure deadline is quite a bit later, there will be -- several months will go by
11 and the Prosecution will have to -- needs to be able to work in a calm, serene fashion.

12 We are quite willing to provide a provisional list, but another list we are opposed
13 because we do have to go through our witness management system. We have no
14 control over certain factors -- problems, for example, security in the field.

15 A definitive list of witness with modes of participation under 68, well, we need some
16 time and that time cannot be compressed. We absolutely need that time to do our
17 work, otherwise this will have an impact on the duration of trial.

18 PRESIDING JUDGE MINDUA: [12:08:32](Interpretation) Thank you, Mr Prosecutor.

19 I listened carefully and you said that the rule is not -- does not provide for provision
20 of a list months in advance. You may be correct. But for practical matters, just to
21 allow the Defence to do their preparation, a provisional list is important. In the Ruto
22 case and even in the Ntaganda case, a provisional list of witnesses was provided.

23 Don't you agree?

24 MR DUTERTRE: [12:09:03](Interpretation) Yes, we agree to providing a provisional
25 list, but the Defence wants a definitive list. We are quite willing to provide

1 a provisional list, but such a list is subject to change, because until the disclosure
2 deadline, at which time we will provide the definitive list and the definitive list of
3 evidence. A provisional list, yes, but not a final list, because we are not in a position
4 to provide that.

5 PRESIDING JUDGE MINDUA: [12:09:34](Interpretation) Thank you very much.

6 Ms Taylor, just one minute. We need to move on.

7 MS TAYLOR: [12:09:42] Thank you very much, Mr President. On this issue of
8 provisional versus final, the Prosecution submitted its charges on the basis that the
9 witnesses referred to in those charges were willing and able to testify at trial. That is
10 the matrix underpinning the charges. It's disturbing for us to hear now
11 the Prosecution is only now deciding which witnesses to choose. That presupposes
12 that the case might mutate beyond that which was actually submitted in support of
13 the charges. So we submit that any witness list should reflect the case that was
14 brought to the confirmation hearing.

15 Now, of course in exceptional circumstances the Prosecution can indicate that
16 a witness is unavailable, but those exceptional circumstances should be disclosed to
17 the Defence because it could be exculpatory or it could be that that witness has now
18 produced information that is relevant to the Defence. So it's not a list cast in stone,
19 but it's certainly not a list that is completely open-ended and permitted to mutate
20 from the confirmation stage.

21 Thank you.

22 PRESIDING JUDGE MINDUA: [12:10:48](Interpretation) Thank you very much,

23 Ms Taylor.

24 Once again, thank you, everyone.

25 Now, as for the decision regarding commencement of trial, the Chamber shall

1 consider your submissions on this point and will decide upon a date or possibly two
2 dates for the Prosecution to file an updated list of their witnesses.

3 The Chamber shall also specify the necessary details to be provided on that list.

4 We will now move on to point (h) on our agenda, use of expert witnesses and use of
5 Rule 68 of the Rules of Procedure and Evidence.

6 Now we have just made reference to this matter and the Chamber would like to
7 encourage the parties to strive to consult one another inter partes and in consultation
8 with the Registry, if necessary, so as to instruct experts together, jointly. Given the
9 amount of time that we have, I don't wish to take any oral submissions on this point
10 from the parties, because we have received some filings that are clear enough.

11 We will now move on to point (i) on our agenda, agreed facts in relation to evidence.
12 As provided for under Rule 69 of the Rules of Procedure and Evidence, the Chamber
13 commends the parties for their efforts to find possible areas of agreement when it
14 relates to evidence in accordance with Rule 69. The Chamber encourages the parties
15 to continue in this vein, in particular when it comes to factual findings found in the
16 decision on Mr Al Mahdi. The Defence was trying to obtain explanations from
17 the Prosecution on this specific point.

18 Now, Ms Taylor, did you want to make any initial remarks in this regard?

19 Ms Proulx, you may address the Court.

20 MS PROULX: [12:13:52] (Interpretation) Thank you very much, your Honours.

21 Very briefly, the agreements on agreed fact under Rule 69. Indeed, the parties have
22 agreed on a limited number of facts. For the time being the Defence has not
23 identified other facts that could be agreed upon before trial, but we intend to continue
24 considering any proposal from the Prosecution. We must remember that the
25 amendment of the charges has not been filed or confirmed by the Chamber, and until

1 all inculpatory evidence has been disclosed, it would be very difficult for us to carry
2 out a comprehensive assessment and then decide whether or not to agree upon
3 additional facts. That is all I had to say about this particular point.

4 Now, the factual findings in the Al Mahdi decision, yes, we would like
5 the Prosecution to clarify their position and we must realise that the Chamber cannot
6 deem that those facts were established under the Statute. Unlike what has happened
7 in other tribunals, we would like the Prosecution to clarify their position here, if
8 possible, or at a later date.

9 PRESIDING JUDGE MINDUA: [12:15:26](Interpretation) Thank you, Maître Proulx.

10 Mr Prosecutor, I believe the Defence does need clarification on this point and the
11 necessary information about amendments that you may wish to make to the DCC.

12 What do you have to say?

13 MR DUTERTRE: [12:15:50](Interpretation) Absolutely, your Honour. Once
14 the Chamber has handed down its decision on redactions pending, we could provide
15 the amendments with the necessary information redacted, amended to the DCC. So
16 as soon as we have a ruling from the Chamber, we shall add or remove redactions
17 and make changes, as necessary, to the DCC. And at this point I am not revealing
18 any great secret here. The draft amendment is about 20 pages and it is relatively
19 restricted in its scope, and we do plan, we do intend for the decision on redactions to
20 be filed.

21 Now as for the agreed facts, we have sent the Defence quite a long time ago, 2018
22 I believe it was, a number of proposals for agreed facts, quite simple matters that do
23 not touch upon the liability of Mr Al Hassan in this case.

24 We have managed to find a few points that we agree on, a very modest number of
25 points, for example, the existence of an armed conflict, that does not directly impact

1 the liability of Mr Al Hassan, and we believe that we can make some progress and
2 save quite a bit of time in the courtroom.

3 Now, whether or not there is an amendment, that really does not have any impact on
4 such proposals relating to agreed facts.

5 Now, as for -- Mr President, I am being told to slow down.

6 Now to the findings from the Chamber in the Al Mahdi case, the useful provision in
7 the Statute is restricted to 69(6), which states, and I have it here in English:

8 (Speaks English) "The Court shall not require proof of facts of common knowledge
9 but may take judicial notice of them."

10 (Interpretation) That's the only possible option, I would say, in terms of judicial notice,
11 unlike -- well, maybe the case at ICTY. In the Bemba case, the Trial Chamber,
12 Trial Chamber VII stated, and I quote, (Speaks English) that the "... 'facts of common
13 knowledge ... include facts which are capable of ready determination by resort to
14 sources whose accuracy cannot reasonably be questioned."

15 (Interpretation) And on that basis the Chamber had admitted various transcripts
16 showing what they showed.

17 Now, in the Bemba case the Trial Chamber III provided judicial notice for the entire
18 code of criminal procedure of the Central African Republic and I refer you to the 2012
19 decision in that case.

20 Now, in the Al Mahdi case a number of findings were made that we wish to identify
21 and we intend to revert to the Chamber. These are facts of common knowledge and
22 we shall provide the Chamber with this information by way of a written filing.

23 So that is what I can say at this particular juncture, and all this with the aim of
24 reducing the duration of trial.

25 PRESIDING JUDGE MINDUA: [12:20:11](Interpretation) Very well. Thank you,

1 Mr Prosecutor.

2 I see the Defence does not wish to address the Court, so we shall move on.

3 Now the request from the Prosecution to have a status conference on this point,
4 the Chamber is of the view a priori that inform discussions inter partes are a better
5 option for dealing with such issues at this particular juncture.

6 Parties are requested to file a joint filing once they have come to an agreement.

7 Now, if there are no further remarks about agreed facts, I believe we can move on to
8 the next point on our agenda.

9 So the next item on our agenda, (j), languages at trial.

10 The Chamber wishes to stress that Mr Al Hassan has made a request to receive Arabic
11 translation of the hearing transcripts. Now I don't know whether the Defence has
12 any submissions on this point.

13 Maître Proulx.

14 MS PROULX: [12:22:14] Just very briefly because we have detailed this in our
15 submissions at paragraph 18. We are indeed requesting that an Arabic version of the
16 daily transcript be made available on a daily basis or a regular basis. The Defence is
17 not requesting for a live Arabic transcript. However, a transcript in Arabic should
18 be provided so that Mr Al Hassan can follow the proceedings in a language that he
19 fully understands.

20 Just as a comparison this is a system that is in place at the Special Tribunal for
21 Lebanon where there is no live Arabic transcript but a version is prepared overnight
22 and available the next day. So we would suggest that we should explore a similar,
23 a similar solution in this trial.

24 Thank you.

25 PRESIDING JUDGE MINDUA: [12:23:06](Interpretation) Thank you very much,

1 Ms Proulx.

2 In this regard I now turn to Mr Marc Dubuisson from the Registry who can provide
3 us with further information.

4 Mr Dubuisson, please.

5 MR DUBUISSON: [12:23:20] (Interpretation) Thank you, Mr President,
6 your Honours.

7 Now, indeed, we have the working languages here at the Court and we provide
8 a transcript in English and French, and the same thing holds true if we have an
9 accused person who speaks other languages such as Lingala. We have always
10 provided a transcript in two languages. Right now the Registry does not intend to
11 provide a transcript in Arabic. An option has been found, namely, directly after the
12 hearing we could provide the audio, an audio recording of what occurred during the
13 hearing and that would be available to the Defence, to Mr Al Hassan immediately
14 after the hearing; it would not be in written form, it would be the audio.

15 As for the request from the -- by the Defence to CSS for additional resources for
16 a language assistant, and on this particular point I can already say that additional, an
17 additional resource, a language assistant shall be provided.

18 Thank you.

19 PRESIDING JUDGE MINDUA: [12:24:47](Interpretation) Thank you very much,
20 Mr Dubuisson.

21 I think that the Defence is a bit puzzled. Ms Proulx.

22 MS PROULX: [12:24:59] First of all, thank you to the Registry for the additional
23 resources, and we are willing to explore practical options other than what we have
24 suggested. Thank you.

25 PRESIDING JUDGE MINDUA: [12:25:11](Interpretation) Marvellous. The Defence

1 is open for such discussions, Mr Registrar.

2 Now very, very briefly could the Prosecution intervene, if necessary, as you wish.

3 MR DUTERTRE: [12:25:29](Interpretation) Just to say that there seems to be an
4 agreement, a preferable solution.

5 But just to say that Mr Al Hassan speaks French, has even written in French, he
6 understands French, and if he was in a position to write I believe that means he, he
7 has polished his French. We have many references that show this and we provided
8 information to Judge Brichambaut during pretrial proceedings and just for the record
9 I wanted to make that point.

10 Thank you.

11 PRESIDING JUDGE MINDUA: [12:26:17](Interpretation) Thank you very much.
12 Ms Taylor.

13 MS TAYLOR: [12:26:20] Just briefly. I would firstly invite the Prosecution to file
14 those references in a record for the Defence.

15 Secondly, Mr Al Hassan studied at a university in Tripoli in Arabic, not in French.
16 So yes, he can speak French, he can understand French, he cannot read or write in
17 French to the level required under the Statute.

18 Thank you.

19 PRESIDING JUDGE MINDUA: [12:26:47](Interpretation) Thank you very much,
20 Ms Taylor, for clearing that up.

21 We will now move on to point K, item K, the protocol on the handling of confidential
22 information during investigations and contact between a party or participant and
23 witnesses of the opposing party or of a participant.

24 Now, the protocol that has been applied so far in this particular case is the one that is
25 appended to decision 40. Of course, we have received written submissions on this

1 matter and the Chamber encourages the parties to contact one another with a view to
2 coming up with a joint proposal.

3 And furthermore, discussions shall be necessary relative to the role played by the
4 LRVs when it comes to dual status witnesses. The parties are encouraged to revert
5 to the Chamber in February 2020 before there are any further exchanges in this
6 regard.

7 Now I see that the Prosecution, perhaps the Prosecutor wishes to say something?
8 No? Very well.

9 Defence? If necessary. Ms Taylor.

10 MS TAYLOR: [12:28:47] Mr President, it's my understanding that this will be
11 addressed further through inter partes discussions or in writing, so we will reserve
12 our submissions. Thank you.

13 PRESIDING JUDGE MINDUA: [12:29:00](Interpretation) Very well. But I believe
14 LRVs, Mr Luvengika.

15 MR LUVENGIKA: [12:29:12] (Interpretation) Yes, your Honours.

16 I do hope that when the parties speak amongst themselves -- well, when they speak of
17 inter partes, I hope they are also referring to LRVs, because all the problems that
18 relate to dual status witnesses, that's a very important issue and is of great concern to
19 us.

20 The protocol does exist and we have noticed that the protocol really does not bear in
21 mind the role of the victims or the LRVs in relation to contact that parties may have
22 with such witnesses in the field, so we are willing to make possible suggestions for
23 changes to the protocol for the parties before February 2020. Perhaps before that date
24 we will be in a position to submit an amended protocol that will take into account the
25 role of dual status witnesses.

1 PRESIDING JUDGE MINDUA: [12:30:23](Interpretation) Thank you. Your filings
2 will be quite welcome, of course, and I realise that witnesses who are also victims are
3 a major concern of yours.

4 We will now move on --

5 MR LUVENGIKA: [12:30:44] (Interpretation) I wanted to mention that it's not just
6 dual status witnesses. The events that concern us affected an entire region, all of
7 Timbuktu. And be it the Defence or the Prosecution, the entire area, the entire field
8 was affected and that is where investigations are conducted, where contacts are made.
9 Nearly all inhabitants of Timbuktu can claim to be victims in this case, so this means
10 that other than dual status witnesses, the Defence, like the Prosecution, may have to
11 deal with victims, perhaps victims who are participating in the trial or who may be
12 applying for participation. So we did want to make a number of possible
13 amendments to the protocol, much broader amendments. Thank you.

14 PRESIDING JUDGE MINDUA: [12:31:49](Interpretation) Thank you, very much,
15 Mr Nsita, for your remarks.

16 Now we move to point L, the protocol for the presentation of evidence in electronic
17 form, that is, eCourt protocol.

18 The two parties underscored the need to be able to sometimes disclose certain
19 materials on an inter partes and informal basis before fulfilling the more rigorous
20 requirements of the protocol.

21 This interpretation which makes it possible for the parties to obtain more rapidly
22 a courtesy copy of certain documents is quite acceptable to the Chamber, with the
23 understanding that the protocol is subsequently respected. I don't think that there
24 are any observations necessary on this point.

25 Now, regarding the Defence application to waive the application of the protocol in

1 certain cases such that the disclosed materials would not be communicated either to
2 the Registry or the legal representatives or the Chamber, I understand their position
3 but I would like to understand better what is really the objective of such an exception.

4 Ms Taylor, can you be more comprehensive on that.

5 MS BAFADHEL: [12:33:51] I'm afraid it's me, your Honours.

6 But just to put it concisely, our understanding that once its disclosure, inter partes
7 disclosure is uploaded on to the eCourt system then it's available to everybody, so
8 inter partes, the Chamber and the victims. There are certain scenarios that may arise
9 on an ad hoc basis whereby inter partes disclosure either from the Prosecution or
10 from the Defence is not appropriate to then also disclose or provide access to the LRV
11 at the same time.

12 So that's, in short, we are requiring some sort of system to be able to limit that, as and
13 when the need arises.

14 Thank you.

15 PRESIDING JUDGE MINDUA: [12:34:55](Interpretation) Thank you very much,

16 Ms Bafadhel. I was trying to remember the name.

17 Mr Prosecutor.

18 MR DUTERTRE: [12:35:11](Interpretation) Yes, your Honours.

19 All the materials disclosed by parties and participants should exist clearly in the case
20 file. The Registry is the guarantor of the integrity of the materials disclosed and shall
21 preserve their authenticity. So that does not prevent materials being sent by emails
22 to gain time, while -- but it is possible that the Defence sometimes wants to limit
23 access to the Prosecutor,

24 And it is possible to do so.

25 But in this case the Prosecution feels that it is incumbent on the Defence to apply to

1 the Chamber justifying such restrictions. It should be a controlled practice,
2 monitored and assessed by the Chamber. So you have parties and participants
3 participating in the proceedings, we disclose our evidence. So they have to justify
4 their decisions, but it is the Chamber that has to make the final decision and
5 the Defence has to respect and comply with the protocol.

6 PRESIDING JUDGE MINDUA: [12:36:59](Interpretation) Thank you very much,
7 Mr Prosecutor.

8 Now, do the participants want to add something? And I am thinking here about the
9 Registry and the LRVs.

10 Registry, please.

11 MR DUBUISSON: [12:37:18] (Interpretation) Based on the experience in this Court,
12 sometimes there are disclosures at the last minute, so I can understand that if it is
13 a public holiday or a weekend and the parties disclose something, the system that is
14 operational should not be an obstacle, it should not delay the process. Obviously we
15 have to be flexible, but the usual practice in this Court is direct communication or
16 disclosures between the parties themselves. We do not have any specific procedure
17 here. We are simply alert to what is happening and we follow up what is going on.
18 Regarding disclosure of materials by email, I think we have to be quite careful about
19 that. Sometimes you can communicate a notification of disclosure, but disclosing the
20 material itself has a security aspect to it and sometimes such materials cannot be
21 transmitted through our electronic system, so this requires a certain degree of
22 flexibility.

23 PRESIDING JUDGE MINDUA: [12:38:59](Interpretation) Thank you very much,
24 Mr Dubuisson. I appreciate your sense of realism.

25 The Legal Representative of Victims, do you have anything to add?

1 MS KASSONGO: [12:39:26] (Interpretation) Thank you, your Honours. I subscribe
2 to the observations made by the OTP and we appreciate the fact that the legal
3 representatives are not excluded from this procedure. Thank you.

4 PRESIDING JUDGE MINDUA: [12:39:49](Interpretation) Very much,
5 Maître Kassongo.

6 But the Chamber recalls that the access of victims to the confidential files of the case
7 shall be limited to the legal representatives only. All applications for access to -- or
8 rather, by individual victims must be authorised by the Chamber on a case-by-case
9 basis. Do you agree with that?

10 MS KASSONGO: [12:40:28] (Interpretation) Yes, very well, Mr President. Thank
11 you.

12 PRESIDING JUDGE MINDUA: [12:40:34](Interpretation) Thank you.

13 I think we have concluded with that; so for the time being we will follow the eCourt
14 protocol. We did not receive any proposed amendment, so the protocol that is
15 currently in force shall continue to be implemented for the duration of the process or
16 proceedings. It is the annex to the Pre-Trial Chamber decision number 31.

17 Now let us move on to point (m), that is, the assignment of an alternative judge.

18 Ms Taylor, you raised this issue in your submissions. You have the floor now in
19 order to speak to this topic, which you yourself added to the agenda.

20 MS PROULX: [12:41:46] Thank you, Mr President, your Honours. Considering the
21 likely long duration of the proceedings in this case and the possibility - although,
22 theoretical - that one of the Trial Chamber judges could become unavailable at
23 a moment or another in the course of the proceedings of the trial, we would
24 respectfully suggest that the Chamber should consider requesting the presidency for
25 the appointment of an alternative judge as is foreseen by Rule 39 of the Rules of

1 Procedure and Evidence.

2 We see it as a sort of insurance policy, if I may use that expression, for the integrity of
3 the proceedings. While this has not occurred at the ICC, it's a practice that has been
4 tested at other tribunals, ICTY, STL to name only these two, and this could help
5 safeguard the integrity of the proceedings in unforeseen circumstances.

6 Thank you.

7 PRESIDING JUDGE MINDUA: [12:42:51](Interpretation) Thank you very much,
8 Maître Proulx.

9 I think you are very alive to anything that might be unpredictable.

10 Now, this issue can be resolved by the presidency of this Court, so it shall be
11 considered by the presidency. The Chamber thanks you for that request.

12 Mr Prosecutor, will you want to add something?

13 MR DUTERTRE: [12:43:32](Interpretation) I will be very brief, Mr President. I am
14 favourable to it.

15 PRESIDING JUDGE MINDUA: [12:43:39](Interpretation) Now, parties and
16 participants, Registrar, LRVs, do you have anything to add?

17 MR LUVENGIKA: [12:43:57] (Interpretation) We defer to the witness of
18 the Chamber.

19 PRESIDING JUDGE MINDUA: [12:44:10](Interpretation) Thank you very much.
20 Mr Marc Dubuisson.

21 MR DUBUISSON: [12:44:19] (Interpretation) No observation.

22 PRESIDING JUDGE MINDUA: [12:44:22](Interpretation) Thank you. We will now
23 move on to the last item, that is, the procedure to be followed during judicial recess.
24 We are actually approaching the judicial recess period, which begins
25 tomorrow, 13 December, up to Monday, 6 January 2020.

1 Ms Taylor, you will be the first to take the floor on this issue, because you were the
2 one who added it to the agenda.

3 You have the floor.

4 MS TAYLOR: [12:45:06] Thank you very much, Mr President.

5 Our proposal is as follows -- so of course we are open to counter-proposals as they
6 might exist: Throughout these proceedings, which are likely to be long, we would
7 suggest that the participants, all the participants have the opportunity to identify
8 certain weeks throughout the year, which are effectively blackout periods and that no
9 key judicial deadlines fall within those periods.

10 Now the purpose of this is to allow everyone within the courtroom to plan their
11 family lives, because it is very difficult throughout the course of a long trial to balance
12 these competing objectives and we feel that it's in the best interests of everyone to
13 have some degree of certainty throughout the process. And that was our proposal.
14 Thank you.

15 PRESIDING JUDGE MINDUA: [12:46:09](Interpretation) Thank you very much,
16 Ms Taylor.

17 Mr Prosecutor?

18 MR DUTERTRE: [12:46:15](Interpretation) Thank you, Mr President.

19 I support that proposal also, but I have a few observations. This should not prevent
20 any of the parties or the participants to file certain things during the recess, knowing
21 that it will be pending. So if we file something on the 28th and then the recess ends
22 later, it will be dealt with later. But if there is something urgent, it should be treated
23 as an exceptional case and each of the parties and participants will be required to deal
24 with those on a case-by-case basis.

25 PRESIDING JUDGE MINDUA: [12:47:19](Interpretation) Thank you. LRVs?

1 MR LUVENGIKA: (Interpretation) Yes, Mr President, what the Defence is asking is
2 not new. In the Katanga case, we agreed with the Chamber, the parties and
3 participants, to follow a certain procedure during the recess, because the teams were
4 exhausted and needed to have a breather.

5 I believe that I have understood that the work that the OTP needs to do actually
6 requires them to have a rest and during the recess, the LRVs actually carry out their
7 field visits, meet with victims, and so on.

8 So these are periods that have to be reserved for the teams to organise themselves,
9 rather than use that time to draft submissions and so on. And as the Prosecutor has
10 said, in cases of emergency, it should still be possible to make applications or filings.

11 PRESIDING JUDGE MINDUA: [12:48:59](Interpretation) Thank you.

12 Registrar?

13 MR DUBUISSON: [12:49:03] (Interpretation) Thank you, Mr President.

14 The Registry has put into place mechanisms to work 24 hours a day. We are
15 sensitive to the needs of the staff, but you have to be aware that there are people who
16 are in custody and deprived of their freedom.

17 Now, if we are talking about what is coming in during the Christmas holiday, for
18 example, if something comes in, we have three weeks to wait. So it depends on the
19 various recesses; so I imagine that that will apply in all cases of recess.

20 PRESIDING JUDGE MINDUA: [12:50:17](Interpretation) Thank you for your
21 observation. It is very relevant.

22 The Chamber would like to advise all counsel to grant your respective teams some
23 time to rest. This time is very well deserved and necessary, so we have to agree to
24 slow down the pace of the exchanges of filings and motions.

25 My colleagues and myself believe that this is a best practice to be adopted and we

1 hope to be able to contribute -- that this process will contribute to the expeditiousness
2 of the proceedings.

3 I would like now to find out whether there is anything to add?

4 (Trial Chamber confers)

5 PRESIDING JUDGE MINDUA: [12:51:34] Very well. We have now exhausted the
6 agenda of this status conference. I would like to call on the parties and participants
7 to take the floor if they have any further questions or requests to make. And you
8 have to be very brief.

9 Prosecutor?

10 MR DUTERTRE: [12:52:06](Interpretation) (Microphone not activated)

11 PRESIDING JUDGE MINDUA: [12:52:10](Interpretation) Ms Taylor?

12 MS TAYLOR: [12:52:12] Thank you very much, but no.

13 PRESIDING JUDGE MINDUA: [12:52:15](Interpretation) Thank you.

14 Mr Registrar?

15 MR DUBUISSON: [12:52:23] (Interpretation) No observations, thank you.

16 PRESIDING JUDGE MINDUA: [12:52:27](Interpretation) LRVs.

17 MR LUVENGIKA: [12:52:29] (Interpretation) We have no further observations.

18 PRESIDING JUDGE MINDUA: [12:52:33](Interpretation) Thank you very much for
19 your cooperation.

20 Once again, the Chamber would like to thank all of you for your respective
21 contributions.

22 The Chamber now has all the necessary information. We will assess that
23 information and draw up guidelines, as well as a schedule so as to prepare the
24 commencement of proceedings in the case The Prosecutor v. Mr Al Hassan.

25 The Chamber will circulate its schedule after the judicial recess.

- 1 The Chamber would also like to thank the interpreters, the court reporters, the
- 2 security officers, and of course the members of the public in the gallery.
- 3 Thank you to everyone and have a good day.
- 4 Let me point out that in the afternoon, we have a hearing with the OTP and
- 5 the Registry.
- 6 Court is adjourned.
- 7 THE COURT USHER: [12:54:05] All rise.
- 8 (The hearing ends in open session at 12.54 p.m.)