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**International
Criminal
Court**

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TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

With Confidential *ex parte* Annex A [Registry and Defence]

Public redacted version of “Defence adjournment request”

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

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

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I. Introduction

1. The Defence for Mr. Al Hassan requests the Trial Chamber to adjourn the start of the trial ('the Request'), such that it will start no earlier than 15 October 2020.
2. It is both necessary and reasonable to defer the trial until this date in order to ensure that:
 - a. The Defence has an adequate opportunity to meet with Mr. Al Hassan, with a view to: obtaining confidential instructions on Prosecution witnesses and exhibits, and assessing the full array of issues concerning his participation at trial, and which steps might be required to address these issues in advance of the trial;
 - b. Mr. Al Hassan can meet with his family in advance of the commencement of the trial;
 - c. The Defence has the length of time to investigate, which the Chamber previously identified as being sufficient, to allow the Defence to "meaningfully prepare [Mr. Al Hassan's] defence" in advance of the start of the trial,¹ and the Defence can complete necessary forms of preparation that were impacted by the COVID-19 pandemic, and amendments to the charges; and
 - d. Mr. Al Hassan can attend the trial in person.
3. This Request is justified by reasons falling beyond the control of the Defence. The Defence assiduously attempted to find a solution to these issues in order to ensure that it would be trial ready at an earlier date, but it has been unable to do so. There are also no alternative measures that would adequately protect Mr. Al Hassan's fundamental fair trial rights, and ensure that the trial will be conducted in a manner which respects the principle of equality of arms. Specifically, 'shuffling' witnesses to bring forward non-fact witnesses is not an adequate and appropriate solution at this juncture since:
 - a. Mr. Al Hassan has the right to enter an informed plea on the first day of trial: he cannot do this if the Defence has not had sufficient time to investigate the case, and advise him accordingly as to his rights;

¹ ICC-01/12-01/18-548, para. 12.

- b. It is imperative that the Defence develops a coherent Defence strategy, and approach to Prosecution allegations, before the commencement of the trial, in order to avoid the need to recall witnesses;
 - c. The testimony of expert witnesses is generally linked to the testimony of fact witnesses, or factual issues, including evidential representations of particular locations and buildings in Timbuktu, which the Defence intends to verify through onsite investigations;
 - d. Since the Defence does not have a separate investigations team, the commencement of the trial would also prevent the Defence from using this very limited period to conduct the bare minimum of investigations that need to be conducted at this point (and exercising full oversight over any *in situ* investigations); and
 - e. It would not address the prejudice caused to Defence preparation by the COVID-19 pandemic and the multiple extensions granted to the Prosecution, which pushed back the preparation schedule.
4. The Request is submitted for reasons that are independent, albeit complementary, to Defence arguments concerning the importance of adjudicating the Defence Termination Request in advance of the commencement of the trial. In particular, adjourning the trial would avoid parallel litigation, which would completely divert Defence resources, and undermine its ability to focus on the core elements of trial proceedings. It would also avoid any uncertainty or issues as concerns the evidential foundation of this case, and Mr. Al Hassan's ability to effectively participate in the proceedings.
5. The Request is also without prejudice to Mr. Al Hassan's ongoing right to expeditious proceedings. Given that it is motivated by factors that fall outside the control of the Defence, the Defence cannot be deemed to have waived this right, or in any way, have contributed to delays.

II. Classification

6. This request is classified as confidential *ex parte*, available to the Defence and the Registry only. The Defence will submit simultaneously a confidential redacted version of the Request.

III. Submissions

Procedural History

7. On 6 January 2020, the Trial Chamber set the date for the opening of trial as 14 July 2020, and the opening of evidence on 25 August 2020.² This timing was set by reference to the following deadlines:

14 April 2020: Disclosure of material in the Prosecution's possession, final list of Prosecution witnesses (with summaries of anticipated witness testimony), Prosecution list of evidence, and Prosecution trial brief.

1 June 2020: Motions requiring resolution prior to the commencement of trial and any joint submission on agreed facts.³

8. The decision was also predicated on the Prosecution's assertion that it had "already disclosed most of the evidence it intends to use at trial, including evidence under Rules 76 and 77 of the Rules".⁴ The Chamber further found that "the above disclosure deadline of three months prior to the commencement of trial, and over four months prior to the start of the evidentiary presentation, is sufficient notice for Mr Al Hassan to meaningfully prepare his defence."⁵
9. Since the issuance of this decision, the Prosecution obtained several extensions of time, which shifted the time-table back by several weeks, such that the deadline for final disclosure was pushed back until 12 May 2020, and the Trial Brief was filed on 19 May 2020. The Prosecution has also continued to disclose incriminating items after the 12 May 2020 deadline.
10. In response to such requests, the Defence foreshadowed the impact on Defence preparation, and its ability to be 'trial-ready' by 14 July 2020.
11. For example, in response to the Prosecution's request for an extension of time to submit redaction requests, the Defence informed the Chamber of the following prejudice to Defence preparation, that would ensue from the requested delay:⁶

² ICC-01/12-01/18-548, para. 24.

³ ICC-01/12-01/18-548, para. 24.

⁴ ICC-01/12-01/18-548, para. 6.

⁵ ICC-01/12-01/18-548, para. 12.

⁶ ICC-01/12-01/18-554-Red, paras. 25-28.

The requested extension of time would impede effective Defence investigations, and undermine Mr. Al Hassan's right to a speedy trial. Given the volume of redacted material in this case, the Defence was not able to conduct effective investigations during the pre-confirmation phase. At this point, the Defence only has a very limited time to do so before the commencement of the trial. Whereas the Prosecution can pull resources from other teams in order to meet particular deadlines, the Defence team must review evidence, conduct investigations, submit disclosure requests, and prepare filings, with a very limited number of staff. In practice, this means that the Defence can only conduct a limited number of investigative missions, within the next months. It is therefore imperative that such missions are prepared and planned in an effective manner. This, in turn, means that the Defence must be able to familiarise itself with the contents of Prosecution evidence as soon as possible. Put simply, the Defence cannot investigate the credibility of Prosecution witnesses if it has yet to receive any information concerning their identity and background. Of further concern, Ramadan is scheduled from 23 April until 23 May 2020, which means that Defence might not be able to conduct investigations in certain areas (or with certain witnesses) during these dates. The time frame for Defence investigations is thus very short, and necessarily focused on the earlier part of the year. The delays occasioned by the Request would, however, mean that the Defence will not receive key information until after it is too late to incorporate into Defence investigations. The requested delays would disturb the delicate and necessary balance between the right of the Defence to have adequate time, and timely disclosure, to investigate this case, and Mr. Al Hassan's right to a speedy trial. If disclosure is further delayed, the Defence will not have sufficient time to complete its preparation before the current date scheduled for trial.

12. In granting the request, the Single Judge emphasized that the disclosure would continue to be effected on a rolling basis, and further, that the deadline for full disclosure, and the trial date, remained unchanged.⁷

13. On 5 March 2020, the Single Judge granted the Prosecution an extension of time to file the Trial Brief, relying on the Prosecution's assurance that the delay:⁸ \

will not impact i) the commencement date of the trial, ii) the three-month period between full disclosure and the start of the trial, nor iii) the (almost) four-month period between the filing of the Trial Brief and the start date of the Prosecution's presentation of evidence.

14. On 12 March 2020, as soon as the Covid-19 pandemic measures were announced by the Registry, the Defence expressed the importance of finding a way to meet with Mr.

⁷ ICC-01/12-01/18-558, para. 18.

⁸ ICC-01/12-01/18-629, para. 6.

Al Hassan in person,⁹ a position which the Defence has reiterated throughout the pandemic.

15. On 17 March 2020, the Prosecution requested the Trial Chamber to shift back each of the deadlines set out in the 6 January 2020 time-table by 30 days, in order to address the consequences of the COVID-19 pandemic. This included the date for opening statements, and the date for the presentation of evidence. In its decision, the Trial Chamber:¹⁰

Agree[d] with the Prosecution that the current circumstances are exceptional: the ICC premises are closed and the host country has adopted various measures that inevitably have an effect on the overall functioning of the Court. In this regard, the Chamber notes that, although the Court's principals took the decision to close the ICC premises from 16 to 31 March 2020, the measures taken by The Netherlands so far may affect the proper functioning of the Court beyond that date and at least until 6 April 2020. In sum, the situation remains an evolving one with much uncertainty at the moment. Pursuant to Regulation 35(2) of the Regulations, the Chamber is satisfied that the Prosecution has shown good cause and in fact force majeure that goes beyond anyone's control.

16. The Chamber thus shifted back the final deadline for disclosure until 12 May 2020, while retaining the initial date for the trial. The Chamber nonetheless indicated that it would examine further requests for extensions, taking into account "developments in terms of travel restrictions and access to witnesses and evidence."¹¹

17. On 17 April 2020, the Prosecution requested a second delay concerning the transmission of the trial brief, in response to which, the Defence underscored firstly, that:

"A matter is not ready for trial when the Prosecution is ready to proceed; it is ready for trial when the Defence has been given a sufficient opportunity to consider the Prosecution's case and is prepared to defend their client in light of their client's right to a fair trial.

Secondly, that:

The provision of the trial brief in a timely manner is essential for the preparation of the Defence case. Once provided, the Defence have the trial brief translated to Arabic in order for Mr. Al Hassan to be able to read it and

⁹ICC-01/12-01/18-680-Red2, para. 33: "These conditions impede the Defence from reviewing evidence with Mr. Al Hassan, and taking instructions, or from gauging his well-being through in person interactions".

¹⁰ ICC-01/12-01/18-677, paras. 6-7.

¹¹ ICC-01/12-01/18-677, para. 18.

for the Defence to be able to obtain Mr. Al Hassan's instructions on the trial brief. Mr. Al Hassan's instructions are likely to play a key role in Defence investigations, and cross-examination preparation. Furthermore, the Defence, like the Prosecution, will not be in a position to undertake any missions to Mali for the foreseeable future, given the uncertainty caused by the COVID-19 pandemic. Such missions are indispensable to its investigations and, in particular, its ability to identify the need for any pre-trial motions.

The Defence may also wish to challenge the specificity of the charges, in light of information and allegations provided in the trial brief. Clearly, it cannot formulate such challenges unless it first receives, and has sufficient time, to analyse the brief. Given the above, any extension of time granted to the Prosecution will compromise the Defence's ability to prepare for trial and prepare any necessary pre-trial motions ahead of the deadline set for 1 June 2020. This will lead to prejudice to the Defence's case and/or the necessity of further extensions of time in terms of the other timeframes set for the proceedings.

And thirdly, that:

the Chamber **REVIEW** in its entirety the timetable for the conduct of the proceedings as made on 6 January 2020 and as varied on 5 March 2020 and 20 March 2020 and make orders appropriately.

18. In its assessment as to the validity of the reasons adduced by the Prosecution, while the Chamber observed that some of the reasons concerned "the same difficulties faced by other sections of the Court including Chambers and by the Defence", ¹² the Chamber ultimately found that it was:¹³

satisfied that the Prosecution is facing difficulties linked to the situation arising out of the COVID-19 pandemic and its continued duration, which impact on its ability to complete its competing tasks in an ordinary fashion. Consequently, the Chamber finds that there are objective reasons justifying the Prosecution's inability to meet the deadline set for the filing of the Trial Brief, constituting a good cause within the meaning of Regulation 35 of the Regulations.

19. The Trial Chamber therefore granted a further 18 day deadline, but maintained the same date for the commencement of the trial. The Chamber did not otherwise address the Defence request to review the 6 January 2020 time table in its entirety.
20. On 29 April 2020, the Trial Chamber ordered the parties, participants and Registry to liaise, and file observations on methods of work to address the impact of COVID on

¹² ICC-01/12-01/18-770, para. 8.

¹³ ICC-01/12-01/18-770, para. 9.

their work. Although the Chamber recognised that there had been such an impact, the Chamber nonetheless stipulated that:¹⁴

the submissions should be premised on the current deadlines for the trial proceedings and unless it is agreed by parties and participants no request for delay should be presented in the submissions.

21. After liaising with the Prosecution, LRV, and Registry, the Defence seized the Chamber with observations concerning various structural issues, that were impeding its ability to be ‘trial-ready’ by 14 July 2020.¹⁵ This included the fact that:

- a. The Defence had been unable to meet with Mr. Al Hassan, or conduct any face-to-face consultations;¹⁶
- b. The Defence had not been able to travel, or conduct any investigations requiring travel;¹⁷
- c. The Defence had worked in an entirely virtual manner, which has impacted on its overall level of efficiency and coordination;¹⁸
- d. Extensions of time, granted to the Prosecution, had delayed essential Defence preparation related to evidence review: “the date on which material is disclosed to the Defence marks the beginning of Defence review, analysis, and investigations linked to the disclosed materials. If the Defence receives materials in May rather than April, key Defence preparation is consequently delayed by a month”;¹⁹
- e. The disclose of verbatim extracts of BSQs in May, would delay the completion of the Defence Termination Request;²⁰
- f. The Prosecution had amended the charges to include a further 13 incidents, and further expressed its intention to file a Regulation 55 notice;²¹ and
- g. The Chamber had authorised the Prosecution to disclose the identities of several witnesses after the commencement of the trial;²²

¹⁴ ICC-01/12-01/18-776, para. 10.

¹⁵ ICC-01/12-01/18-825-Conf-Red.

¹⁶ ICC-01/12-01/18-825-Conf-Red, para. 2.

¹⁷ ICC-01/12-01/18-825-Conf-Red, para. 2.

¹⁸ ICC-01/12-01/18-825-Conf-Red, para. 2.

¹⁹ ICC-01/12-01/18-825-Conf-Red, para. 3.

²⁰ ICC-01/12-01/18-825-Conf-Red, para. 4.

²¹ ICC-01/12-01/18-825-Conf-Red, para. 6.

²² ICC-01/12-01/18-825-Conf-Red, para. 7.

22. For these reasons, the Defence argued that “it should be clear that there is a need to undertake significant adjustments and measures to accommodate and compensate for the significant obstacles that the Defence has encountered over the past few months.”²³ The Defence further averred that:²⁴

As a matter of principle, the right to expeditious proceedings cannot trump fundamental fair trial considerations. This includes the right to conduct investigations, with a view to exercising the right to examine the witnesses called against the defendant, in an effective manner. The notion of expeditiousness must also be assessed by reference to the length of the proceedings as a whole. Any short term gains achieved by starting the trial now, will be lost, and ultimately outweighed, by the additional delays, caused by firstly, the need to grant adjournments during the trial process (to conduct necessary investigations), and secondly, the need to re-call witnesses, who were examined at a point where the Defence had yet to collect relevant evidence.

23. While the Defence noted that “Mr. Al Hassan continues to instruct the Defence that he does not wish for the trial to be delayed”, the Defence underlined that “the Defence cannot, however, reconcile this instruction with Mr. Al Hassan’s right to effective representation, unless pragmatic solutions are found, which can reconcile the two competing interests.”²⁵ The Defence further explained that:²⁶

The current uncertainties concerning the COVID-19 pandemic and related restrictions and the lack of available information as concerns the feasibility of conducting Defence investigations make it impossible for the Defence to provide concrete estimates as concerns the amount of time that would be necessary and reasonable to conduct specific investigations in advance of the trial and in advance of specific witnesses.

24. An *ex parte* Status Conference was convened on 24 May 2020 to address issues concerning Mr. Al Hassan’s ability to meet with his Defence, and Defence investigations *in situ*, but unfortunately, no solutions were found. Accordingly, on 10 June 2020, in its Rule 134(1) observations, the Defence expressed its concern that:²⁷

It would be unfair and overly prejudicial to commence the trial while these issues are outstanding and unresolved. Mr. Al Hassan should not be compelled to renounce his right to be physically present at trial, nor should the Defence

²³ Para. 5. See also para. 26: “unless some adjustments are made, the cumulative impact of these factors will give rise to a clear inequality of arms”.

²⁴ ICC-01/12-01/18-825-Conf-Red, para. 16.

²⁵ ICC-01/12-01/18-825-Conf-Red, para. 9.

²⁶ ICC-01/12-01/18-825-Conf-Red, para. 30.

²⁷ ICC-01/12-01/18-870-Conf-Exp, para. 4.

be required to examine Prosecution witnesses without the benefit of investigations, and effective instructions.

25. The Defence once again noted that before submitting a specific estimate of the time required, it was necessary to first ascertain if and when certain underlying structural issues would be resolved.²⁸ And, as an interim measure, the Defence expressly requested the Trial Chamber to:²⁹

- Reconsider the date for the commencement of substantive testimony in this case, taking into consideration:
 - o The ability of the Defence to conduct *in situ* investigations in the North of Mali, and receive relevant information through disclosure and/or State cooperation requests; and
 - o The ability of the Defence to meet Mr. Al Hassan in person, and for Mr. Al Hassan to attend trial hearings in person.

26. On 16 June 2020, the Defence filed the Defence Termination Request, which amongst other things, argued that Mr. Al Hassan's experiences in Mali had impacted on his ability to testify in his Defence, which was, in turn, a fundamental component of his fitness to stand trial.³⁰ The Defence further requested the Chamber to convene an evidentiary hearing on the issues raised in the Request.

27. During the Status Conference convened on 30 June 2020, the Registry indicated that the current COVID-19 restrictions would continue until at least 13 July, and, as concerns the period after this date, it was still unclear as to:³¹

- a. When the Defence would be able to meet with Mr. Al Hassan in person; and
- b. When Mr. Al Hassan would be able attend hearings in person.

28. [REDACTED].³²

29. Although the Defence had understood that further to the Defence Rule 134 motion, the Chamber was seized of an active request to amend the date and schedule for trial,

²⁸ ICC-01/12-01/18-870-Conf-Exp, paras 4-5.

²⁹ ICC-01/12-01/18-870-Conf-Exp, para. 41.

³⁰ ICC-01/12-01/18-885-Conf-Corr-Red, para. 106.

³¹ ICC-01/12-01/18-T-015-CONF-ENG, p. 36, lns 4-7.

³² ICC-01/12-01/18-T-016-CONF-EXP-ENG, p. 17, lns 13-17 and p. 30 lns 5-8.

the Single Judge clarified that the Defence would need to submit a separate adjournment request; otherwise the current schedule would be maintained.³³

30. Following the Status Conference, the Defence conveyed its position that the Defence Termination Request should be adjudicated in advance of the commencement of the trial. The Defence has nonetheless submitted the present request in light of the fact that there independent, salient justifications for adjourning the commencement of the trial.

An adjournment is necessary to afford the Defence with sufficient opportunities to meet with Mr. Al Hassan over an adequate period of time, and to arrange a family visit in advance of the trial

31. Article 67(1)(b) of the Statute sets out Mr. Al Hassan’s right to communicate freely with his Counsel in “confidence”. The term “confidence” denotes not only a formal element of confidentiality but also a subjective willingness to freely and fully confide through the communication means in question.
32. For the duration of the pre-trial stage, the Defence communicated with Mr. Al Hassan through multiple in-persons visits during the week (on average 3-4 times a week). Such visits played a vital role in ensuring that Mr. Al Hassan was fully aware of all procedural and legal issues in his case, and was able to fully discuss and proffer information and instructions on evidential issues. These visits also allowed the Defence to monitor Mr. Al Hassan’s well-being, and to ensure that it did not overload him with information or raise sensitive issues, at inopportune times.
33. The Defence has not been able to visit Mr. Al Hassan since mid-March. Although the Defence hopes and expects a solution to be found forthwith, such a solution is occurring very late in the day as concerns this essential period of pre-trial preparation. The cessation of visits for the last three months has also had an appreciable impact on both Defence preparation, and Mr. Al Hassan’s well-being, which cannot be cured immediately. There are certain issues that Mr. Al Hassan will only discuss in person. This is a normal human approach as concerns sensitive medical or personal issues, particularly given Mr. Al Hassan’s history. As explained by the ECHR Grand

³³ ICC-01/12-01/18-T-015-CONF-ENG ET 30-06-2020, p. 52-54 lns. 5-11, 1-25 and 1-3.

Chamber, while video-link communications are not *per se* impermissible, the use of this technology (as an alternative rather than a supplement to in person communications), may give rise to subjective concerns for the defendant. Thus in the case of *Sakhnovskiy v. Russia*, the ECHR found that,³⁴

it is questionable whether communication by video link offered sufficient privacy. The Court notes that in the *Marcello Viola* case (cited above, §§ 41 and 75) the applicant was able to speak to his lawyer via a telephone line secured against any attempt at interception. In the case at hand the applicant had to use the video-conferencing system installed and operated by the State. The Court considers that the applicant might legitimately have felt ill at ease when he discussed his case with Ms A.

34. Since it was not possible to import or export documents to the detention unit (or provide them during meetings), it was necessary for the Defence to access the ICC building so that it could upload documents onto Mr. Al Hassan's computer. This was always possible (albeit for a limited number of team members, as has been experienced across the Court), but since the Defence was not, during the lock-down period, based in the building, this slowed down communication, and consultation. This means of communication concerning documentary evidence also continues to make it difficult to discuss and obtain instructions on issues pertaining to Mr. Al Hassan's informed consent on medical issues.
35. The appreciable reduction of meaningful contacts also impacted on Mr. Al Hassan's well-being. This issue has been canvassed in other filings, but for the purposes of the present Request it suffices to stress the need for the Defence to meet with Mr. Al Hassan sufficiently (and frequently enough) in advance of the trial so that it can gauge the extent to which the last four months of restrictions (essentially, a lock-down within a lock-down) have impacted on him, and request any remedies that might be necessary. Conversely, it would be extremely practically difficult and personally harrowing to expect Mr. Al Hassan to meet with the Defence in mid-July, and condense all necessary instructions and communications into the space of a few days or weeks.
36. An essential component of Mr. Al Hassan's well-being also concerns his right to family visits. A visit was supposed to take place earlier this year, but could not be

³⁴ *Sakhnovskiy v. Russia*, [21272/03](#) para. 104.

implemented due to COVID-19. [REDACTED] he has not seen for over three years. This situation is highly stressful for him, and in turn, distracting. For this reason, the Defence has also consistently emphasised the importance of organising a family visit in advance of the trial. These visits are highly necessary, but also highly emotional. They also create a significant workload for the Defence (as family members, particularly women and children, need logistical assistance during their stay).

It is necessary and reasonable to grant the Request in order to allow the Defence to “meaningfully prepare [Mr. Al Hassan’s] defence” in advance of the start of the trial

37. ICC case law has consistently recognised that in light of the complexities of legal proceedings at the ICC, and the difficulties involved in conducting *in situ* investigations, it is necessary for the Defence to have at least three months, from the date of full disclosure, to conduct further pre-trial investigations and preparation.³⁵ In circumstances where external factors have prevented the Defence from conducting such preparation, the Chambers have suspended or adjourned the proceedings.³⁶
38. The situation in Mali is considerably more complex than other cases at the ICC. The Prosecution and the Registry have underscored these difficulties in a multitude of filings;³⁷ the Prosecution has, moreover, relied on these difficulties and the sensitivities of the case to justify investigative delays of over three years, and an amendment to the charges that was introduced almost two years after Mr. Al Hassan’s

³⁵ See B. Gumpert, Y. Nuzban, ‘[Part I: What can be done about the length of proceedings at the ICC?](#)’, *EJIL Talk!*: “A significant source of delay between the first appearance of an accused and the commencement of their trial is the time taken to effect disclosure of relevant documentary materials in the possession of the prosecution to the defence team. Typically, judges require this process to be completed three months before the commencement of trial.” See also ICC-01/04-01/06-1019, para. 18: “The fact that the accused remains in custody without unimpeded access to his legal counsel imposes limitations on preparation. He will need to give instructions on the evidence which is to be disclosed and he may wish to communicate his views on trial preparation in light of the prosecution’s disclosure”; para. 21: “Taking all the above factors into consideration, in the Trial Chamber’s assessment a period of three months after the full disclosure of the prosecution case and before the commencement of trial, as requested by the defence, is reasonable. Further, while the Chamber has paid careful attention to the practices of other international bodies, its decision must be taken in the context of the work of this Court and the requirements of this particular case, bearing in mind the Trial Chamber has an obligation to ensure a fair and expeditious trial of the accused”.

³⁶ ICC-01/04-01/06-1401 (suspended due to inability of the Defence to access PEXO materials); [ICC-01/04-02/06-T-22-Red-ENG](#) (granted three month adjournment to allow Defence adequate opportunity to review evidence); *The Prosecutor v. Niyitegeka*, ICTR-96-14-T, Trial Chamber Decision, Decision to adjourn proceedings due to the unavailability of witnesses, 19 June 2002, p. 2;

³⁷ ICC-01/12-01/18-121-Conf-Exp-Red para 5, ICC-01/12-01/18-571-Conf at paras 35-38

surrender to the ICC, and which was confirmed less than three months before the start of the trial.³⁸

39. And yet, while the date of the commencement of the trial was conditioned on the Defence having three months from the date of full disclosure before the start of the trial (and more than four, before the commencement of substantive testimony), the Defence in fact received full disclosure just over two months before the start of the trial. At the same time, the COVID-19 pandemic:
 - a. Prevented the Defence from conducting *in situ* investigations;
 - b. Affected the availability of Defence witnesses and sources;
 - c. Generated additional delays in the trial preparation schedule;
 - d. Impeded Defence preparation; and
 - e. Created an additional layer of litigation and argumentation in relation to impacted issues (including as concerns detention issues).
40. As a result, the Defence is nowhere near the position it would have been in, had the COVID-19 pandemic not occurred, and nowhere near the position the Chamber assumed the Defence would be in, when the trial schedule was established. There has been a significant amount of lost time caused by the changes to the trial schedule, and no accounting for the impact of this lost time, on the trial date. In short, the Defence is not trial-ready, and it would occasion the Defence considerable, and indeed irreparable, prejudice to maintain the present trial date.
41. There is a clear distinction between less than ideal conditions for Defence preparation, and conditions which have rendered essential Defence preparation impossible. As things stand, as a result of its inability to conduct necessary *in situ* investigations, the Defence is not in a position to make informed decisions as to the consequences of advancing certain lines of argument, during cross-examination. It has not had sufficient time or means to collect evidence and information concerning the reliability of Prosecution witnesses. It has not been able to collect physical evidence concerning certain locations mentioned by witnesses in surrounding areas.

³⁸ ICC-01/12-01/18-75-Red, ICC-01/12-01/18-625-Conf-Exp, ICC-01/12-01/18-823-Conf

42. [REDACTED].³⁹ [REDACTED]⁴⁰ [REDACTED].

43. The right to adversarial proceedings means that the Defence should not be compelled to enter a plea, and examine witnesses, under conditions in which it is fundamentally disadvantaged *vis-à-vis* the Prosecution, which has conducted multiple missions over the course of several years.⁴¹ The ECHR has also emphasised that where changes have been made to charges (as occurred here, through the inclusion of 13 additional incidents, in the immediate lead up to the trial), the Defence must be given additional time and facilities to address and investigate such additions.⁴²

It is necessary and reasonable to adjourn the proceedings to allow for Mr. Al Hassan to attend trial hearings in person

44. If Mr. Al Hassan was released, and with his family, then these advantages would be likely to outweigh his concern and the disadvantages presented by video-link participation. This is consistent with the plain language of Rule 134 *bis*, which allows for video-link testimony in case an accused, who is the subject of a summons, requests such a measure, as a means to participate in the proceedings, while benefitting from the conditions of release.

45. The current scenario, where Mr. Al Hassan is being asked to participate by video-link, against his will, while detained at the ICC detention unit, presents a very different situation. This mechanism is not being used on a consensual basis to facilitate a separate right (the right to liberty), but instead, to qualify an existing right (the right to be present at trial). Given these key distinctions, it would unfair and unreasonable to impose this measure on him, rather than adjourning the proceedings to enable for a solution to be devised, which allows him to participate in person, without being quarantined upon his return to the detention unit.

46. It is notable, in this regard, that the exceptions to presence at trial fall into two different categories: either the accused has requested such a measure (and thus waived the right), or the Chamber has imposed it, as per the procedure set out in Article

³⁹ [REDACTED]

⁴⁰ Annex A.

⁴¹ ICC-01/12-01/18-825-Conf-Red, fn. 23.

⁴² *Pélissier and Sassi v. France*, [25444/94](#) para. 62.

63(2). Neither of these two categories apply to the current situation, and there are, therefore, clear issues of fairness and legality as concerns the prospect of carving out an additional exception to a key Statutory right, in order to address the current short-term situation.⁴³

47. Even if the current pandemic constitutes an adequate legal basis to deviate from the existing procedural regime, at the very least, the Court should be guided by the principles which currently guide existing exceptions. Article 63(2) specifies that the remote participation is an exceptional measure that should only be employed “after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required”. This wording imposes a clear obligation to consider whether other options, such as a temporary adjournment, would prove to be a reasonable alternative.
48. The overarching obligation to ensure Mr. Al Hassan’s right to a fair trial also requires the Chamber to ensure that the use of such measures is compatible with the nature of the hearing, and Mr. Al Hassan’s right to follow the proceedings, and effectively participate.⁴⁴ The right to communicate in confidence applies equally to trial hearings, and the technical possibility to consult during breaks (or to request such breaks) does not lessen the difficulty of obtaining full and uninhibited instructions on sensitive issues, when speaking by telephone or video-link.
49. The Defence has also expressed clear concerns in this regard as concerns the compulsory application of such measures to Mr. Al Hassan, given his dissociative disorder, and his indication that he has negative associations with being in front of a

⁴³ *Coëme and Others v. Belgium*, nos. [32492/96](#), [32547/96](#), [32548/96](#), [33209/96](#) and [33210/96](#), para. 102: “102. The Court reiterates that the principle that the rules of criminal procedure must be laid down by law is a general principle of law. It stands side by side with the requirement that the rules of substantive criminal law must likewise be established by law and is enshrined in the maxim “*nullum iudicium sine lege*”. It imposes certain specific requirements regarding the conduct of proceedings, with a view to guaranteeing a fair trial, which entails respect for equality of arms. The principle of equality of arms requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see, among other authorities, the *De Haes and Gijssels v. Belgium* judgment of 24 February 1997, Reports of Judgments and Decisions 1997-I, p. 238, § 53). The Court further observes that the primary purpose of procedural rules is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules.”

⁴⁴ *Stanford v. United Kingdom*, para. 26: “Nor is it in dispute that Article 6 (art. 6), read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general this includes, *inter alia*, not only his right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 (art. 6-3-c, art. 6-3-d, art. 6-3-e), - “to defend himself in person”, “to examine or have examined witnesses”, and “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

video-recorder. These concerns resonate with the cautionary positions expressed by human rights bodies, and domestic authorities,⁴⁵ as concerns the specific situation of defendants with conditions like PTSD.⁴⁶

50. Given these contraindications as concerns the use of remote participation in this particular case, and in these particular circumstances (including Mr. Al Hassan's reluctance to participate through such a mechanism), the fairest and most reasonable option would be to adjourn the proceedings.
51. The present request is without prejudice to Mr. Al Hassan's residual right to expeditious proceedings
52. The Defence anticipates that its planned investigative actions will promote the overall expeditiousness of the proceedings, by avoiding the need to recall witnesses, or to request adjournments during the trial process itself. If direct and personal access to Mr. Al Hassan is granted in the near future, the Defence will also have the means to review evidence with a view to identifying and discussing lines of inquiry and strategies in advance of the trial, rather than during the trial process itself, which can be difficult, stressful and tiring for a detained defendant.⁴⁷ The Defence nonetheless wishes to underscore that the fact that Mr. Al Hassan wishes to avail himself of the right to adequate time and facilities does not constitute explicit or implicit waiver as concerns his right to be tried within a reasonable time.⁴⁸

⁴⁵ [Publication on Preventing the health crisis from becoming a justice crisis by the Equality and Human Rights Commission](#) April 2020 : "people who have a learning disability or are experiencing mental ill health can find it difficult to participate fully in proceedings using the courtroom video and audio links";

⁴⁶ Prior to, and independent of the assessment by Dr. Porterfield, the Detention Unit psychiatrist also diagnosed Mr. Al Hassan with PTSD, see ICC-01/12-01/18-680-Conf-AnxA Cf [T v United Kingdom](#), no. 24724/94, 16 December 1999 para. 87.

⁴⁷ *Razvozhayev v. Russia and Ukraine and Udaltsov v. Russia* [75734/12 2695/15 55325/15](#), para. 252: "The Court reiterates that the States' duty under Article 6 § 3 (b) to ensure the accused's right to mount a defence in criminal proceedings includes an obligation to organise the proceedings in such a way as not to prejudice the accused's power to concentrate and apply mental dexterity in defending his position".

⁴⁸ See for example, K. Zeegers, [International criminal tribunals and human rights law: Adherence and contextualization](#), 2015, para. 2.2.1: "the defendant has the right to use all procedural remedies at her/his disposal and is by no means under an obligation to actively cooperate with the authorities conducting judicial proceedings against her/him. The genuine use of procedural remedies may thus not be construed as a sort of implicit waiver of the right to be tried within a reasonable time. Still, the ECtHR has held that while the defendant cannot be reproached for making full use of procedural remedies, 'such conduct constitutes an objective fact, not capable of being attributed to the respondent State, which is to be taken into account when determining whether or not the proceedings exceeded a "reasonable time".' At the same time, the ECtHR has affirmed that the fact that a portion of the delays in the judicial proceedings is attributable to the defendant does not absolve the state from its responsibility. In that sense, it has found violations of the right to be tried without undue delay despite the defence having also contributed to such delays. The ECtHR followed this line of

IV. Relief sought

53. For the reasons set out above, the Defence for Mr. Al Hassan requests the Trial Chamber to adjourn the commencement of the trial, until 15 October 2020.



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At The Hague, The Netherlands

reasoning even in a case where the defendant had contributed the delays by evading the authorities for a certain period.”

See also ICTY, Prosecutor v. Šešelj (IT-03-73-T), [Decision on Motion by Accused to Discontinue Proceedings](#), 29 September 2011, 26; similarly ICTY, Prosecutor v. Šešelj (IT-03-67-AR15bis), [Decision on Appeal against Decision on Continuation of Proceedings](#), 6 June 2014, para. 65, concerning the fact that the defendant’s choice to make procedural challenges cannot be construed as waiver of the right to be tried within a reasonable time.