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No. ICC-01/12-01/18

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TRIAL CHAMBER X

Before:

**Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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 redacted version of

Decision on Defence Adjournment Request

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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Other

TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, issues this ‘Decision on Defence Adjournment Request’.

I. Procedural history

1. On 6 January 2020, the Chamber set the date for the commencement of trial at 14 July 2020, with the presentation of evidence to begin on 25 August 2020, and adopted a calendar leading up to this date.¹ Some extensions to deadlines set in this decision were later granted by the Chamber at the request of the Office of the Prosecutor (the ‘Prosecution’), including a postponement to the Prosecution’s final disclosure deadline from 14 April to 12 May 2020,² and the Prosecution’s submission of its Trial Brief from 14 to 30 April and then again to 18 May 2020.³
2. On 16 June 2020, the Defence filed a request to terminate the proceedings and seeking the immediate release of Mr Al Hassan (the ‘Termination Motion’).⁴
3. On 25 June 2020, the Prosecution filed an urgent request in relation to the Termination Motion (the ‘Prosecution Request’).⁵ On 30 June 2020,⁶ 1 July

¹ Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548.

² Decision on the Prosecution request for extension of deadlines relating to the disclosure of evidence and a postponement of the starting date for trial, 20 March 2020, ICC-01/12-01/18-677.

³ Decision on Prosecution request for a variation of the time limit to file Trial Brief, 5 March 2020, ICC-01/12-01/18-629; Decision on the Prosecution request for a further extension of the time limit to file the Trial Brief, 23 April 2020, ICC-01/12-01/18-770.

⁴ Defence Request to terminate the proceedings, ICC-01/12-01/18-885-Conf-Exp-Corr (confidential *ex parte*, available only to the Defence and Prosecution; with confidential Annexes A, B and G to I, confidential *ex parte* Annex C (available only to the Prosecution, Registry and Defence only), and confidential *ex parte* Annexes D to F and J (available only to the Prosecution and Defence); a confidential redacted version of the main filing was notified simultaneously, ICC-01/12-01/18-885-Conf-Red; these filings were all notified on 17 June 2020, having been filed after 4pm the day before, upon permission of the Single Judge: see email from the Single Judge to the Defence, 16 June 2020 at 12:48; a corrigendum of the main filing was later notified on 25 June 2020; a public redacted version of the main filing was also later notified on 26 June 2020, ICC-01/12-01/18-885-Corr-Red but was subsequently reclassified as confidential following a request from the Prosecution: see email from the Single Judge to the parties and participants, 29 June 2020 at 14:11). *See also* Decision on the Defence request for extension of the time limit and page limit for the filing of pre-trial motions, 29 May 2020, ICC-01/12-01/18-833 (reclassified public on 2 June 2020), granting a Defence request to postpone the deadline for filing of the Termination Motion to 16 June 2020, and partially granting a request for extension of page limit to 50 pages.

⁵ Prosecution’s urgent request to strike Confidential Annex B to the Defence Request to terminate the proceedings, and request for extensions of the page and time limits to respond to the Defence Request, ICC-01/12-01/18-906-Conf (with confidential Annexes A and B; notified on 26 June 2020).

2020,⁷ and 2 July 2020,⁸ the Chamber received submissions in relation to the Prosecution Request and the timing for the adjudication of the Termination Motion.

4. On 3 July 2020, the Defence filed a request seeking the adjournment of the start of the trial until 15 October 2020 ('Adjournment Request').⁹
5. On 6 July 2020, the Chamber partially granted the Prosecution Request, granting an extension of page-limit for the Prosecution response and setting a series of time limits for responses and replies to the Termination Motion.¹⁰
6. On 7 July 2020, the Prosecution filed its response to the Adjournment Request (the 'Response'), not opposing, in principle, the Adjournment Request.¹¹ It also requests that the Chamber order the Defence to notify of any defences it will raise under Articles 31, 32 and 33 of the Rome Statute (the 'Statute') and disclose any material accordingly.¹²
7. On that same date, the legal representatives for victims (the 'LRVs') filed their responses to the Adjournment Request, expressing very generally their serious

⁶ Email from the Defence to the Chamber, 30 June 2020 at 15:52; Email from the Prosecution to the Chamber, 30 June 2020 at 18:20.

⁷ Defence response to "Prosecution's urgent request to strike Confidential Annex B to the Defence Request to terminate the proceedings, and request for extensions of the page and time limits to respond to the Defence Request" (ICC-01/12-01/18-906-Conf), ICC-01/12-01/18-915-Conf. Deadline was set via email from the Single Judge to the parties and participants dated 26 June 2020 at 10:31.

⁸ Prosecution's request for leave to reply to the "Defence response to 'Prosecution's urgent request to strike Confidential Annex B to the Defence Request to terminate the proceedings, and request, ICC-01/12-01/18-922-Conf.

⁹ Defence adjournment request (with confidential *ex parte* Annex A available only to the Registry and Defence), ICC-01/12-01/18-927-Conf-Exp. A confidential redacted version was filed on that same date.

¹⁰ Decision on Prosecution requests concerning the Defence motion to terminate the proceedings, ICC-01/12-01/18-932-Conf-Corr (with Confidential Annexes A and B; corrigendum notified on 8 July 2020). Specifically, the Chamber directed the Defence to file any application for leave to refile Annex B to the Termination Motion by 10 July 2020. It also extended time limit for responses to the Termination Motion to 27 July 2020, and set the deadline for any reply from the Defence at 7 August 2020.

¹¹ Réponse de l'Accusation à la requête de la Défense demandant un ajournement du procès, ICC-01/12-01/18-935-Conf.

¹² Response, ICC-01/12-01/18-935-Conf, para. 22.

reservations as to the legal basis, pertinence and clarity of the Adjournment Request, but leaving the decision to the Chamber.¹³

II. Analysis

8. The Chamber notes that although the Defence raises several issues in its Adjournment Request, these are based on four central conditions that in its view have not been met and thus justify the adjournment of the start of trial: (a) Mr Al Hassan's adequate opportunity to meet with counsel so as to provide instructions and assess issues; (b) Mr Al Hassan's ability to meet with his family; (c) the Defence's ability to investigate and prepare for trial; and (d) Mr Al Hassan physical presence at the trial.¹⁴
9. The Chamber will therefore assess the aforesaid circumstances in light of the scheduled commencement of the trial on 14 July 2020. It will also evaluate whether the adjournment of the trial is necessary as regards Mr Al Hassan's ability to enter a plea, his physical attendance at trial, and the adjudication of the Termination Motion. Finally, the Chamber will determine whether, as requested by the Defence, adjournment of the trial proceedings until at least 15 October 2020 is the only available measure or whether, other alternative measures are available to adequately protect Mr Al Hassan's fair trial rights.
10. The Chamber will not address the Prosecution's request to instruct the Defence to raise any defences pursuant to Articles 31, 32 and 33 of the Statute. As noted already by the Single Judge in the recent status conference, the Chamber considers that the statutory framework is clear and that Rules 79 and 80 of the Rules of Procedure and Evidence (the 'Rules') provide sufficient guidance on this issue. The notification that is sufficiently in advance to enable the Prosecutor to prepare adequately and to respond implies a notification prior to the commencement of trial.¹⁵ However, as noted by Rule 79(3) of the Rules, failure to provide notice shall not limit the Defence right to raise a defence. Should the Prosecution seek the Chamber's order for disclosure of any other

¹³ Réponse à la requête d'ajournement de la Défense (ICC-01/12-01/18-927-Conf-Red), 7 July 2020.

¹⁴ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, paras 2, 31-50, 36.

¹⁵ Transcript of status conference on 30 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 32, lines 7-10.

evidence under Rule 79(4) of the Rules, it needs to file a separate request to that extent.

**(a) *Mr Al Hassan's adequate opportunity to meet with counsel
so as to receive instructions and assess issues***

Submissions

11. The Defence notes that in light of the COVID-19 pandemic it has been unable to meet with Mr Al Hassan in person since 12 March 2020.¹⁶ It submits that even if the Defence is expected to meet with Mr Al Hassan in mid-July, this is not enough to 'condense all necessary instructions and communications into the space of a few days or weeks'.¹⁷
12. The Prosecution submits that in the past months the Defence has been able to communicate with the accused via videoconference.¹⁸

Analysis

13. The Chamber acknowledges the Defence submissions that it has been unable to physically meet with Mr Al Hassan since mid-March 2020.¹⁹ In fact, this issue has been addressed by the Single Judge since it was first raised by the Defence at the end of March 2020. Accordingly, from the beginning of June 2020, videoconferencing has been put in place, facilitating interaction between the accused and his counsel.²⁰ Also, more recently, and as a result of the status conference of 30 June 2020, the Chamber instructed the Registry to facilitate physical meetings between counsel and Mr Al Hassan no later than 8 July 2020, particularly in light of the start of trial on 14 July 2020.²¹
14. Accordingly, and as the Single Judge already stated during that status conference of 30 June 2020, the Defence does have communication with the

¹⁶ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, paras 14, 31-35.

¹⁷ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 35.

¹⁸ Prosecution Response, ICC-01/12-01/18-935-Conf, para. 15.

¹⁹ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 33.

²⁰ Transcript of status conference on 30 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 35, lines 11-18.

²¹ Order instructing the Registry to lift certain measures imposed on Mr Al Hassan, 3 July 2020, ICC-01/12-01/18-925-Conf, para. 9. *See also* Transcript of status conference on 30 June 2020, ICC-01/12-01/18-T-014-CONF-EXP-ENG, p. 5, line 21 to p. 6, line 5.

accused, and there are issues that counsel can deal with and receive instructions upon, despite the inability to physically meet with Mr Al Hassan.²² In fact, the Chamber notes that in the course of the past months, the case record contains numerous examples in which Defence counsel has received specific instructions from the accused. For example, the Defence submission that there are some sensitive medical or personal issues it cannot discuss with the accused unless physical meetings take place²³ seems to contradict the Defence submissions contained in the Termination Motion, which has been prepared and filed during this period and touches upon such sensitive medical and personal issues.²⁴ More recently, in the context of the status conference of 30 June 2020, Defence counsel requested time to consult with her client in relation to the adjudication of the Termination Motion. [REDACTED].²⁵

15. In light of the above, the Chamber considers that despite the exceptional circumstances surrounding the COVID-19 pandemic, Defence counsel has been able to communicate with the accused, including via video-link, since the beginning of June. Moreover, physical meetings will take place between Defence counsel and the accused on 8 July 2020,²⁶ that is seven days before the start of trial, and seven weeks before the start of the evidence in the trial, allowing the Defence enough time to discuss any outstanding matter with the accused in preparation for trial and particularly, in preparation for the first witnesses due to testify at the end of August 2020.

(b) Mr Al Hassan's ability to meet with his family

Submissions

²² Transcript of status conference on 30 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 11, lines 5-8.

²³ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 33.

²⁴ See for example Termination Motion, ICC-01/12-01/18-885-Conf-Red, paras 15, 27.

²⁵ E-mail from Defence counsel to Trial Chamber X Communications on 30 June 2020 at 15:52.

²⁶ E-mail from the Registry to Trial Chamber X Communications on 8 July 2020 at 00:02.

16. The Defence submits that a family visit must be organised in advance of the trial. It submits that a visit was supposed to take place early in 2020, but was suspended due to COVID-19.²⁷
17. The Prosecution argues that this issue is unrelated to the commencement of trial. Furthermore it submits that conditioning the start of trial to the possibility to have family visits would leave the start of trial indeterminate.²⁸

Analysis

18. Although the Chamber acknowledges that the accused may understandably be personally affected by the inability to meet with his family, the Chamber considers this is not an issue that is even indirectly linked to the adjournment of the trial. Moreover, the Chamber notes that given the current travel restrictions related to the COVID-19 pandemic, [REDACTED],²⁹ it is currently not possible to arrange such family visits. Although the Chamber has stated that a visit from Mr Al Hassan's family should be facilitated as soon as possible,³⁰ recognising the current circumstances, it has strongly encouraged the use of videoconference to maintain the accused's contact with his family until a physical family visit can be arranged.³¹
19. The Chamber emphasises that this is not a matter that warrants the delay of the start of trial and therefore is not relevant to the issue to be determined. The Chamber nonetheless reiterates it remains seised of the matter,³² and will make any determination deemed necessary to facilitate future family visits, once the current travel restrictions and COVID-19 circumstances will have changed.

²⁷ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 36.

²⁸ Prosecution Response, ICC-01/12-01/18-935-Conf, paras 4-6.

²⁹ Second Registry Report on the Security Situation in Mali, 3 July 2020, ICC-01/12-01/18-928-Conf-Red, paras 11-13.

³⁰ Decision on the measures restricting Mr Al Hassan's contacts while in detention, ICC-01/12-01/18-871-Conf-Exp-Red2, para. 43. *See also* Second Registry Report on the Security Situation in Mali, 3 July 2020, ICC-01/12-01/18-928-Conf-Red, para. 41.

³¹ Decision on the measures restricting Mr Al Hassan's contacts while in detention, ICC-01/12-01/18-871-Conf-Exp-Red2, paras 54-55.

³² Decision on the measures restricting Mr Al Hassan's contacts while in detention, ICC-01/12-01/18-871-Conf-Exp-Red2, para. 55.

(c) *Defence investigations and preparation for trial*

Submissions

20. The Defence submits that because of the extensions granted to the Prosecution to finalise disclosure and submit its Trial Brief, Defence preparation was delayed by a month.³³ It also submits that the late disclosure of material and evidence, including the names of witnesses, have an impact on its ability to start trial.³⁴ The Defence additionally submits that the Prosecution's request to amend the charges and include a further 13 incidents and its Regulation 55 motion are also facts that affect its ability to be trial-ready.³⁵
21. Also in the context of the COVID-19 pandemic, the Defence submits it has seised the Chamber on several occasions on how the current circumstances 'were impeding its ability to be 'trial ready' by 14 July 2020', including the impact working in a virtual manner has had on its work.³⁶
22. The Prosecution submits that the Defence cannot downplay its entire preparation for trial to the COVID-19 pandemic. It submits that the Defence was able to investigate already since 2018. The Prosecution argues that disclosure of evidence has been ongoing since 2018 and throughout that time the Defence was able to conduct [REDACTED] investigations [REDACTED].³⁷ The Prosecution submits that specifically in respect of the expert witnesses, the Prosecution disclosed most of the evidence to the Defence already at the pre-trial stage.³⁸ [REDACTED], but decided to focus its investigations and its strategy on the Termination Request instead.³⁹

Analysis

23. In relation to this issue, the Chamber considers that the Defence's submissions can be divided into three sub-issues that in its view have prevented an adequate

³³ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 21(d).

³⁴ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 21(e) and (g).

³⁵ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 21 (f).

³⁶ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 21.

³⁷ Prosecution Response, ICC-01/12-01/18-935-Conf, paras 7-9.

³⁸ Prosecution Response, ICC-01/12-01/18-935-Conf, para. 10.

³⁹ Prosecution Response, ICC-01/12-01/18-935-Conf, para. 11.

preparation and investigation in advance of trial. Firstly, the Defence refers to the extension of time-limits granted to the Prosecution. Second, the Defence refers to the COVID-19 related circumstances that in its view prevent its investigation [REDACTED]. Third, the Defence refers to how remote work has also affected its ability to prepare for trial.

24. As regards the first sub-issue, the Chamber acknowledges that the Prosecution was granted an extension of time limits to finalise disclosure and submit its Trial Brief. However, the Chamber does not consider that this automatically justifies an adjournment of the trial, as requested, for a period of at least three months. First, the Chamber notes that although the final disclosure deadline was moved from 14 April 2020 to 12 May 2020, the Prosecution transmitted to the Defence on 31 January 2020, a first provisional list of witnesses, which already included a brief summary of the anticipated testimony.⁴⁰ A further list of witnesses and provisional list of evidence was provided on 14 April 2020, which included a more detailed summary of each witness's expected testimony, including any relationship with other witnesses and the relevance to the charges. The provisional list of evidence already included the vast majority of the items the Prosecution intends to rely on at trial.⁴¹ Thus, although the date of 12 May 2020 was established as the final date for the disclosure of all evidence to the Defence, disclosure was ongoing and indeed most of the material was already disclosed to the Defence by the original deadline of 14 April 2020.⁴²
25. As regards the Trial Brief, although this Chamber has reiterated on several occasions that it is a useful document to prepare the trial, it is not an authoritative document.⁴³ At the same time, the Defence has been aware of the facts and circumstances and details of this case since the pre-trial stage, with the

⁴⁰ Prosecution submission of Provisional list of Prosecution witnesses, ICC-01/12-01/18-572 (with Confidential Annex A).

⁴¹ Dépôt de la Liste des témoins de l'Accusation, des résumés desdits témoins et de la Liste provisoire des éléments de preuve à charge, ICC-01/12-01/18-740-Conf (with Confidential Annexes A, B, and C).

⁴² See Annex B of Prosecution submission of further information in the Prosecution List of Witnesses and of the Prosecution Final List of Evidence, 12 May 2020, ICC-01/12-01/18-805-Conf (with Confidential Annexes A and B).

⁴³ Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548, paras 15-18.

notification of the document containing the charges.⁴⁴ Although not all charges were confirmed and amendments have been made, the core of the case has remained. Accordingly, the Defence has been in a position to investigate throughout this period and the Chamber cannot accept the argument that the Defence needed the final disclosure to develop a strategy and begin its investigative work.

26. Accordingly, the Chamber does not consider that the extension of time limits granted to the Prosecution warrants, per se, the adjournment of the start of trial.
27. As regards the sub-issue of the COVID-19 circumstances, the Chamber notes the Prosecution submissions above that a significant amount of evidence had already been disclosed to the Defence since 2018 and that in fact, the Defence already carried out investigations before the COVID-19 travel restrictions were put in place. In fact, as noted by the Prosecution, the recent Termination Request submitted by the Defence demonstrates that the Defence was able to carry out investigations [REDACTED].
28. Moreover, the Chamber acknowledges the Defence's submissions that in light of the COVID-19 pandemic, the Defence has faced challenges in its ability to prepare for trial. Bearing that in mind, the Chamber held several *ex parte* status conferences with the Defence and the Registry in order to facilitate the Defence's readiness for trial, and in particular its ability to carry out investigations.⁴⁵ Moreover, in light of the COVID-19 situation the parties have been invited several times to discuss the order of calling of witnesses, in order to facilitate the Defence's preparation for eventual cross-examination.
29. The Chamber does not accept the Defence general allegation that all experts witnesses are generally linked to fact witnesses and issues which the Defence

⁴⁴ Prosecution's Notification of amendment and correction to the Document Containing the Charges, 11 May 2019, ICC-01/12-01/18-344-Conf.

⁴⁵ Transcript of ex parte status conference of 30 June 2020, ICC-01/12-01/18-T-016-CONF-EXP-ENG; Transcript of ex parte status conference of 29 May 2020, ICC-01/12-01/18-T-014-CONF-EXP-ENG; Transcript of ex parte status conference of 18 February 2020, ICC-01/12-01/18-T-012-CONF-EXP-ENG, Transcript of ex parte status conference of 13 December 2020, ICC-01/12-01/18-T-010-CONF-EXP-ENG.

intends to verify through [REDACTED] investigations.⁴⁶ Specifically, as noted by the Prosecution, much of the evidence related to experts was already disclosed to the Defence at the pre-trial stage. Moreover, as recently noted by the Single Judge in the status conference of 30 June 2020, there are at least seven witnesses, including experts, in relation to whom the Defence appears to agree that they could be called to testify in 2020.⁴⁷ In fact, during that same status conference the Single Judge instructed the parties to discuss and agree on a possible number of 10 witnesses to start the presentation of evidence on 25 August 2020.⁴⁸ In light of the above, the Chamber considers that the Defence has not demonstrated it is not prepared to start trial for at least the first batch of witnesses due to testify as of 25 August 2020.

30. In addition, considering the current travel restrictions to Mali and other COVID-19 related measures, the Chamber does not consider that adjourning the trial would necessarily mean the Defence would be able to conduct [REDACTED] investigations.⁴⁹ Instead, the Chamber is of the view that calling available evidence at this stage is the most efficient use of time [REDACTED]. At that stage the Defence may revert to the Chamber to request an adjournment, if necessary, or it may indeed be a natural point for a break in proceedings which will also accommodate such [REDACTED] investigations. Although the Chamber agrees that it is preferable to avoid recalling Prosecution witnesses at a later stage, the Chamber again emphasises its request for agreement on 10 witnesses where the likelihood of this is minimal. If in any event the need arises this is an alternative that could be available for witnesses to be determined on a case-by-case basis.
31. Lastly, the Chamber acknowledges that all parties and participants, as well as the organs of the Court, have experienced many challenges in the context of the

⁴⁶ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 3(c).

⁴⁷ Transcript of status conference on 30 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 23, lines 4-7.

⁴⁸ Transcript of status conference on 30 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 51, lines 11-12.

⁴⁹ The Chamber refers in particular to the confidential *ex parte* version of the Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 42. See in this regard Second Registry Report on the Security Situation in Mali, 3 July 2020, ICC-01/12-01/18-928-Conf-Red, para. 12. [REDACTED].

COVID-19 pandemic, including the need to work remotely, which often comes with technical, logistical and human challenges. However, the Chamber does not consider that the issue of remote work *per se* warrants the adjournment of trial, particularly in light of the different information technology options available to counsel and the organs of the Court.

(a) *Mr Al Hassan's ability to enter a plea*

Submissions

32. The Defence submits that Mr Al Hassan's ability to enter a plea is conditioned on its ability to conduct investigations.⁵⁰ It also submits that in light of the amendment to the charges, it must be given additional time and facilities to address and investigate such additions.⁵¹

Analysis

33. The Chamber does not agree with the Defence's submission that Mr Al Hassan cannot enter an informed plea on the first day of trial unless the Defence has had time to fully investigate the case and advise him accordingly.⁵²
34. As noted above, the charges along with the details of the case have been known to the Defence since the pre-trial stage. The Chamber notes that during the confirmation hearing on 8 July 2019, the accused confirmed he knew and understood the charges.⁵³
35. The Chamber also acknowledges that, as submitted by the Defence, the Pre-Trial Chamber, upon the request of the Prosecution, amended parts of the charges.⁵⁴ However the Chamber observes that these were discrete amendments which do not affect the nature of the case overall and which were capable of being assessed in the intervening period sufficiently for an informed plea. The

⁵⁰ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 43.

⁵¹ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 43.

⁵² Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 3(a).

⁵³ Transcript of hearing on 8 July 2019, ICC-01/12-01/18-T-003-ENG, p. 5, lines 3-10.

⁵⁴ Décision relative aux corrections apportées par le Procureur à ses observations déposées suite à la « Décision sur la procédure applicable suite au dépôt par le Procureur de sa requête pour corrections et modifications de la Décision relative à la confirmation des charges », 18 June 2020, ICC-01/12-01/18-888-Conf.

Chamber is further of the view that the proceedings surrounding the confirmation of the original charges and those related to the amendments, especially the litigation of the Defence, demonstrate clearly the ability of the accused to understand the nature of the charges against him and thus to enter a plea.

36. Taking into account Article 64(8) of the Statute and the purpose of it and the obligation of the Chamber to satisfy itself that the accused understands the nature of his charges, the Chamber considers that the Defence submission that this ability is dependent on further investigations is unwarranted. Moreover, as noted recently by the Chamber, any issue related to the accused's fitness to stand trial and/or to enter a plea, must be raised clearly and unequivocally,⁵⁵ but also in a manner and timing that would allow the Chamber to analyse the merits without forcing an adjournment. Considering that to date the Chamber has not been seized of any such request, the Chamber is of the view that the prospect of a possible motion of this nature, not yet before it, cannot warrant the adjournment of trial.

(b) Mr Al Hassan's physical presence in trial

Submissions

37. The Defence submits that if Mr Al Hassan would be released, then there would be an advantage to video-link, which would also be in line with Rule 134bis of the Rules.⁵⁶ However, considering he is detained, the Defence submits that Mr Al Hassan would be appearing via video-link against his will.⁵⁷ The Defence further submits that exceptions to the presence at trial should guide the Chamber in the current COVID-19 circumstances.⁵⁸ The Defence further argues that the right to communicate with counsel in confidence and to consult during breaks

⁵⁵ Decision on Prosecution requests concerning the Defence motion to terminate the proceedings, 6 July 2020, ICC-01/12-01/18-932-Conf, para. 31.

⁵⁶ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 44.

⁵⁷ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 45.

⁵⁸ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, paras 46-47.

must be guaranteed, particularly in light of Mr Al Hassan's personal circumstances.⁵⁹

Analysis

38. The Chamber firstly notes that the Defence acknowledges that video-link presence could be acceptable if Mr Al Hassan would be released. Thus, as recently recognised by the Defence, video-link presence is not automatically unfair or inappropriate, but depends on the nature of the hearing and the personal circumstances of the accused.⁶⁰
39. The Chamber notes that recently it determined that participation of the accused in the trial is a significant matter and encouraged the Registry 'to take all necessary steps to ensure that Mr Al Hassan's physical presence can be guaranteed for the start of trial which is currently scheduled for 14 July 2020'.⁶¹ The Chamber particularly reiterated the need to reconsider the 14-day quarantine requirement applicable at the Detention Unit should Mr Al Hassan attend hearings physically.⁶² The Chamber therefore instructed the Registry to report back by 10 July 2020 on the results of its efforts regarding the physical presence of Mr Al Hassan during the opening statements scheduled on 14 July 2020, and during the hearings scheduled to commence on 25 August 2020.⁶³
40. Accordingly, the Chamber is actively addressing this issue and there is no basis at this stage to assume that Mr Al Hassan will not be able to appear physically for the 14 July hearing.

(c) *Adjudication of the Termination Motion*

Submissions

⁵⁹ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, paras 48-49.

⁶⁰ Transcript of status conference on 30 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 38, lines 8-10.

⁶¹ Order instructing the Registry to lift certain measures imposed on Mr Al Hassan, 3 July 2020, ICC-01/12-01/18-925-Conf, para. 11.

⁶² Order instructing the Registry to lift certain measures imposed on Mr Al Hassan, 3 July 2020, ICC-01/12-01/18-925-Conf, para. 11.

⁶³ Order instructing the Registry to lift certain measures imposed on Mr Al Hassan, 3 July 2020, ICC-01/12-01/18-925-Conf, para. 12.

41. The Defence submits that in relation to the Termination Motion the adjournment of the trial is necessary to preclude parallel litigation and ‘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’.⁶⁴

Analysis

42. In this regard the Chamber notes that, at the Defence’s request, the deadline for filing the Termination Motion was extended by two weeks until 16 June 2020.⁶⁵ Thus, the Defence filed the Termination Motion less than 4 weeks before the commencement of the trial, while at the same time it acknowledges that its nature and contents warrant an extension of time limit for the Prosecution to respond and therefore for the Chamber to adjudicate.⁶⁶ If at the same time the Chamber would accept the Defence arguments that the Termination Motion must be adjudicated before the start of trial, the Defence would literally be forcing a postponement. The Chamber will not permit such tactics in the strongest possible terms.⁶⁷

(d) Trial adjournment as only available measure

Submissions

43. The Defence submits that adjournment of the trial at least until 15 October 2020 is the only means to guarantee the accused’s fundamental rights, and that no other alternative measure is available.⁶⁸
44. The Prosecution submits that the COVID-19 situation could have had an impact on the Defence’s ability to prepare for trial, and thus, in principle, does not oppose the adjournment of the trial. However, it submits that the opening

⁶⁴ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 4. *See also* Defence response to “Prosecution’s urgent request to strike Confidential Annex B to the Defence Request to terminate the proceedings, and request for extensions of the page and time limits to respond to the Defence Request” (ICC-01/12-01/18-906-Conf), ICC-01/12-01/18-915-Conf, paras 26-36.

⁶⁵ Decision on the Defence request for extension of the time limit and page limit for the filing of pre-trial motions, 29 May 2020, ICC-01/12-01/18-833.

⁶⁶ Decision on Prosecution requests concerning the Defence motion to terminate the proceedings, 6 July 2020, ICC-01/12-01/18-932-Conf, paras. 22.

⁶⁷ Trial Chamber IX, *Prosecutor v. Dominic Ongwen*, Transcript of hearing on 6 December 2016, ICC-02/04-01/15-T-26, p. 3, line 3 to page. 7, line 12.

⁶⁸ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 3.

statements and the start of the evidence should remain close in time, also considering that the current order of witnesses is based on present logistic reasons.⁶⁹

Analysis

45. As noted by the Defence,⁷⁰ there are two competing interests that the Chamber must balance in deciding on the Adjournment Request. Pursuant to Article 67 of the Statute, Mr Al Hassan has the right to be tried without undue delay, while at the same time he has the right to have adequate time and facilities for the preparation of the defence and to communicate freely with counsel. The Chamber notes that the Defence emphasised previously that ‘Mr Al Hassan continue[d] to instruct the Defence that he does not wish for the trial to be delayed’.⁷¹ Although the Defence avers that a ‘pragmatic solution’ must be found to reconcile these competing interests,⁷² the Chamber considers that delaying the trial is neither pragmatic nor appropriate. Adjournment of the trial until at least 15 October 2020 is also inappropriate in light of other available measures that have been put in place and remedies referred to above that are available to the Defence. These would enable Mr Al Hassan to enjoy his right to an adequate defence without affecting his fundamental right to an expeditious trial.
46. As noted above, particularly in light of the current travel restrictions and other COVID-19 related measures,⁷³ the adjournment requested by the Defence, is neither appropriate nor even realistic to address the issue of [REDACTED] investigations in preparation for trial. Moreover, adjourning the trial potentially *indefinitely*, as suggested by the Defence in relation to some of the issues above, is clearly not fair or appropriate for the accused. When there is a realistic

⁶⁹ Prosecution Response, ICC-01/12-01/18-935-Conf, para. 17.

⁷⁰ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 23.

⁷¹ Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 23. *Referring to* Defence submissions pursuant to Trial Chamber X’s “Order to provide information on methods of work to minimise the impact of COVID-19 and related measures on the conduct of proceedings” - ICC-01/12-01/18-776, 22 May 2020, ICC-01/12-01/18-825-Conf-Red, para. 9.

⁷² Adjournment Request, ICC-01/12-01/18-927-Conf-Red, para. 23.

⁷³ Second Registry Report on the Security Situation in Mali, 3 July 2020, ICC-01/12-01/18-928-Conf-Red, para. 12. [REDACTED].

opportunity for [REDACTED] investigations, it may then seize the Registry, and if needed seize the Chamber in order to request adequate time and facilities to carry out such investigations.

47. In the view of the Chamber, the Defence preparation, and the entire preparation for this trial in the midst of the COVID-19 situation has been challenging and has demanded great effort on behalf of all of the parties and participants and organs of the Court involved in these proceedings. However, Mr Al Hassan has the right to a fair and expeditious trial. Participating victims in this case also have an interest in commencement of the trial. There is also an obligation on the Chamber to ensure a fair and expeditious trial.
48. Accordingly, the Chamber rejects the Defence Adjournment Request and confirms the trial schedule, starting with the opening statements on 14 July 2020 and thereafter with the presentation of evidence on 25 August 2020.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence Adjournment Request.

Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated this 8 July 2020

At The Hague, The Netherlands