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**International
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Court**

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Date: **10 February 2023**

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

Request for Variation of Time Limit to the Final Briefing Schedule

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. Mr Al Hassan respectfully requests, pursuant to Regulation 35(2) of the Regulations of the Court,¹ an extension to 26 April 2023 of the Defence's deadline to submit its final trial brief. This amounts to a variation of nine working days (seven in real terms given that two days are compensation for ICC holidays occurring on normal working days). The Chamber declared the closure of the submission of evidence on 8 February 2023; as such, the briefing schedule as outlined by the Chamber in its Sixth Decision² now falls squarely during the Ramadan, Eid al-Fitr, and Easter periods.
2. In its current iteration, the briefing schedule requires the Al Hassan Defence to submit its final trial brief on Tuesday, 11 April 2023, thus requiring the team to work throughout Ramadan (20 March to 20 April) as well as the Easter weekend, including Good Friday and Easter Monday (7 and 10 April), the latter of which are Court-recognised holidays. Following that, the Defence will also be compelled to work through Eid al-Fitr (21 April) to submit its response by the current deadline of 26 April 2023. Like Easter, Eid al-Fitr is a Court-recognised holiday.
3. Approximately half the Al Hassan Defence, as well as Mr Al Hassan himself, observes the month of Ramadan, of which Eid al-Fitr is the culmination. Some members of the Al Hassan team worked throughout the winter recess in anticipation of celebrating Eid al-Fitr with their families. Other members of the team, including those constrained by school holidays, have similarly made plans for the Easter weekend in the understanding that, since it is the Court recess, no critical deadlines would fall during or immediately after these holidays. Compelling team members to work during Court holidays, especially when most team members will be with their families and thus working remotely and/or at a reduced capacity, would not only be unfair but could also result in significant difficulties and an inability to meet the briefing deadlines. It would also

¹ All references hereafter to "Regulation" are to the ICC Regulations of the Court ("RoC"). The present submission is filed confidentially pursuant to Regulation 23*bis* (1) as it refers to confidential filings by the Office of the Prosecutor and confidential communications between Trial Chamber X and the parties.

² Sixth decision on matters related to the conduct of proceedings: end of Defence case, potential rebuttal/rejoinder evidence, and closure of evidence, ICC-01/12-01/18-2308, 29 August 2022 ("Sixth Decision").

generate an objective inequality in that the time afforded to the Prosecution for finalisation of its brief is not similarly impacted by ICC holidays.

4. The Defence is thus seeking a limited extension of nine working days of its final brief deadline, from 11 April to 26 April 2023,³ to allow its team members to appropriately observe and benefit from these holidays. This would also result in a shift of the response deadline for all parties from 26 April 2023 to 12 May 2023.⁴ This discrete request considers the four public holidays occurring during the month of April as well as the change in working arrangements – including to Mr Al Hassan’s availability and schedule – that is likely to arise during the month of Ramadan. Granting this request, which is supported by good cause in accordance with Regulation 35(2), (i) would be consistent with this Court’s jurisprudence; (ii) meets statutory requirements of fairness granting the accused adequate time and facilities in the preparation of his defence; and (iii) would be in the interests of justice by allowing the Defence to properly prepare its response without being required to work, possibly at reduced capacity, during public holidays. The Prosecution has been consulted on this issue and has suggested that the Defence seise the Chamber directly.

II. PROCEDURAL HISTORY

5. On 29 August 2022, the Chamber issued its sixth decision on the conduct of the proceedings, in which it ordered the Prosecution and Legal Representative of Victims to submit their briefs four weeks after the official closure of evidence submission and the Defence to file its final brief four weeks thereafter.⁵ It further ordered that responses to the briefs be submitted two weeks after notification of the Defence’s final brief.⁶
6. On 3 February 2023, the Chamber instructed the Defence to “notify the formal closure its presentation of evidence by Monday, 6 February 2023”.⁷ The Defence did so on that date,⁸ while the Prosecution submitted a notice on 8 February that it does not intend to

³ Eid al-Fitr (21 April 2023) and King’s Day (27 April 2023), both of which are Court holidays, have been excluded from these calculations.

⁴ The filing deadline for the responses would begin to run on 28 April 2023, as 27 April 2023 is a Court holiday.

⁵ Sixth Decision, paras. 11 (i) and (ii).

⁶ Sixth Decision, para. 11(iii).

⁷ Email, Trial Chamber X to Defence and Prosecution, “TC X: Decision on Defence request to defer the closure of its presentation of evidence”, 3 February 2023, 18:40.

⁸ Defence Notice Concerning the Close of Evidence, ICC-01/12-01/18-2465, 6 February 2023.

seek leave to present rebuttal evidence.⁹ The Chamber issued its decision on the closure of submission of evidence on the same day, thus triggering the running of the final brief deadlines outlined in its Sixth Decision.¹⁰ The Prosecution's final trial brief must now be submitted on **9 March 2023**; the Defence must file on **11 April 2023**;¹¹ and both parties' responses are due on **26 April 2023**.

7. On 8 February 2023, the Chamber also issued its seventh decision on the conduct of proceedings,¹² in which it ordered the Prosecution to annex to its closing brief a map of Timbuktu showing various locations relevant to the case; enlarged versions of the aforementioned map, where necessary; and a separate map indicating the districts and neighbourhoods of Timbuktu.¹³ The Defence was invited to annex similar maps to its own closing brief in case of disagreement, provided that explanations of its dissent were included as well as references to submitted evidence, where appropriate.¹⁴
8. On 9 February, the Prosecution filed a motion seeking an extension of 25 pages for its final trial brief,¹⁵ the Defence does not intend to oppose this request.

III. APPLICABLE LAW

9. Regulation 35(2) provides that a Chamber may extend a prescribed time limit on the application of a party or participant if good cause is shown. The Appeals Chamber has recognised the inherent difficulties faced when team members, including counsel, are less available during holidays and judicial recess,¹⁶ and has, both in this and other cases,

⁹ Prosecution final notice regarding potential rebuttal evidence, ICC-01/12-01/18-2467, 8 February 2023, para. 1.

¹⁰ Declaration of the closure of the submission of evidence, ICC-01/12-01/18-2468, 8 February 2023.

¹¹ The four weeks allotted to the Defence from 9 March 2023 results in a Defence filing deadline of 6 April 2023, which is deferred to 11 April 2023, in light of the fact that 7 and 10 April are both ICC holidays during which time filing deadlines are suspended.

¹² Seventh decision on matters related to the conduct of proceedings: closing briefs, ICC-01/12-01/18-2466, 8 February 2023.

¹³ Seventh Decision, paras. 6(A), (B) and (C).

¹⁴ Seventh Decision, para. 7.

¹⁵ Prosecution request for an extension of the page limit for its closing brief, ICC-01/12-01/18-2469-Conf, 9 February 2023.

¹⁶ Decision on the Defence request for extension of time, ICC-01/12-01/18-2074, 15 December 2021, paras. 7 (“[t]hird, the Defence refers to the jurisprudence of this Court regarding the relevance of a judicial recess and its impact on the availability of counsel”); 8 (“[o]n the basis of the reasons for the Request given by the Defence, the Appeals Chamber finds that “good cause” exists for an extension of time within the meaning of regulation 35(2) of the Regulations”). *See also Banda*, Decision on Mr Banda’s request for extension of time for the filing of a document in support of the appeal, ICC-02/05-03/09-624, para. 6 (“[t]he Appeals Chamber notes the argument of Mr Banda that the time limit for the filing of the document in support of the appeal runs at the time of judicial recess, when members of his defence team are unavailable to work. In the particular circumstances of the present

found good cause to exist and accommodations appropriate where a party has difficulties meeting a deadline that falls during public holidays.¹⁷ The Single Judge in this case has also taken into consideration a team’s workload in finding good cause to extend time limits.¹⁸

IV. SUBMISSIONS

10. The Chamber issued its sixth decision on the conduct of proceedings in the expectation that it would “declare the submission of evidence closed immediately before or after the winter judicial recess”.¹⁹ Instead, the decision on the closure of evidence was issued on 8 February 2023, resulting in the staggered briefing schedule to run between early February and late April 2023. This timeframe falls squarely in the middle of Ramadan (22 March to 20 April), Eid al-Fitr (21 April), Easter (7 to 10 April), and King’s Day (27 April). The latter four days are public holidays recognised by the ICC, on which days judicial activity is typically suspended.
11. Since late last year, and despite the absence of a firm briefing deadline, the Defence has endeavoured to properly allocate its resources to assure the timely submission of its brief. However, it could not have predicted that the briefing schedule would fall during April, a month that, incidentally, contains the greatest number of ICC holidays in the year. Nor could it have expected that the schedule would encompass the entire month of Ramadan – a period which will necessarily require modified working arrangements within the team and with Mr Al Hassan – or Eid al-Fitr, which is celebrated by half its team members. In short, despite its best efforts, the Defence may well be unable to meet the deadlines of the current briefing schedule.

case, the Appeals Chamber is satisfied that, in light of these submissions, “good cause” has been shown. The Appeals Chamber considers the requested extension to be reasonable”).

¹⁷ Decision on the Defence request for extension of time, ICC-01/12-01/18-2074, 15 December 2021, para. 8. *See also Katanga*, Decision on the “Defence Application for Extension of Time to File the Document in Support of Appeal”, ICC-01/04-01/07-121, 21 December 2007, para. 5 (finding that it was appropriate to extend the deadline for filing the document in support of appeal in light of the fact that the “work schedule of members of the Defence team would be limited during the prescribed time limit, as it included Christmas and New Year”).

¹⁸ Email, Trial Chamber X to All Parties, “TC X: Single Judge decision on Defence Regulation 35 Request for Extension of Time to File Rule 68 Responses relating to P-0582, P0605 and P-0590”, 25 November 2021, 17:09 (“[h]aving considered the arguments presented, most notably the volume of material expected to be submitted and the current workload, the Single Judge finds that good cause exists to extend the standard time limits applicable for responses to some of these upcoming filings”).

¹⁹ Sixth Decision, para. 9.

12. *First*, the hours of sunlight in The Netherlands from 20 March to 20 April means the fasting periods are particularly long towards the latter part.²⁰ Daylight savings time also starts in the middle of Ramadan this year, on 26 March, which pushes even further back the time to break one’s fast. Though the entire team will continue to work full-time and at full capacity during the month of Ramadan, the Defence is cognisant that it will need likely to modify its working arrangements during this period as the fasting period will necessarily impact upon the team’s schedule, timings, and coordination. For example, timings of team and client meetings may need to be changed to take place earlier as opposed to later in the day, when there exists a higher possibility of fatigue or an ebb in concentration.
13. Flexibility during the period of Ramadan is well-established in international criminal law. The ICC Trial Chamber in *Al Mahdi* acceded to a Defence request that the trial not start during Ramadan and postponed the start of proceedings from June 2016 to the end of August 2016.²¹ During the *Gacumbitsi* trial at the ICTR, the presiding judge scheduled the end of the testimony to accommodate persons needing to break their fast,²² as did the *Ndindiliyimana et al* Trial Chamber.²³
14. Similarly, both the Prosecution and this Chamber have, in past years, recognised the importance and effect of Ramadan on both Mr Al Hassan and the proceedings as a whole. In 2021, the Prosecution chose not to call any Muslim witnesses until the conclusion of Ramadan. The Chamber, “[b]earing in mind the rights of the accused”, authorised a modified hearing schedule for the duration of Ramadan, which included, *inter alia*, video-link attendance for Mr Al Hassan, compressed hearing hours, and one-day breaks between witness testimony for rest and recovery.²⁴
15. Notably, the mechanisms that were in place in preceding years to account for the modification to the team’s work schedule during Ramadan are inapposite this year. In

²⁰ On 22 March 2023, the fasting period takes place between 4:43am and 6:57pm. By 20 April 2023, the fasting period will be from 4:15am to 8:47pm.

²¹ Decision Setting the Commencement Date of the Trial, ICC-01/12-01/15-93, 1 June 2016, para. 11 (“[i]n order to ensure that the parties have a reasonable opportunity to secure the testimony of their witnesses, and also noting the summer recess and the Chamber’s accession to a Defence request that the trial not commence during Ramadan, the Chamber is prepared to set a late August trial commencement date.”)

²² *Gacumbitsi*, Transcript of 21 November 2003, p. 29, lines 11-12; p. 39, lines 34-36.

²³ *Ndindiliyimana et al*, Transcript of 4 October 2005, p. 79, lines 8 (“[t]oday is the starting of Ramadan, so we will have an early break”).

²⁴ Email, Trial Chamber X to All Parties, “Re: Trial Schedule for March and Ramadan period”, 9 March 2021, 14:17.

prior years, team members have been able to exercise a degree of flexibility in their work, for example by identifying, completing, deferring, or otherwise distributing to other team members individual tasks in advance of the fasting period to ensure compliance with relevant deadlines. Some team members chose to attend trial during the morning as opposed to the afternoon sessions while others planned investigative missions around the timings of witnesses who were also observing the fasting period. Given the multitude of distinct tasks needing completion and the fact that most team members could work independently on them, the fluctuating timings to which practicing team members adhered during Ramadan did not affect either the team or their deadlines as a whole.

16. This proves impossible in the present case. Drafting the final trial brief is a meticulous process requiring coordination and collaboration across the entire team. Every member of the Al Hassan Defence is working together to create a single document, which makes it impossible for any one person to work completely independently of their colleagues. The inherent flexibility within the team in past years is simply unviable this year. On the contrary, the team's work is now wholly interdependent and is focused on a single, synchronised document, which requires working on a harmonised schedule that, unfortunately, does not allow for the flexibility of preceding years.
17. A short deferral of its briefing deadline as per this request would mitigate any delays faced by the Defence by the necessary modifications to its working arrangements during this period.
18. *Second*, the deadline of 11 April 2023 falls during the Easter holidays, in addition to Ramadan. Good Friday and Easter Monday are Court-recognised public holidays. If the 11 April deadline were to remain static, Counsel will either be forced to compel her team to work during their days off, sacrifice two full days of the deadline afforded by the Chamber, or complete the brief without the benefit of most of the defence team.
19. Furthermore, the Registry (including the IT Service Desk) will not be available on 7 or 10 April. This means that, should the Defence encounter any problems with NUIX, it will not have any recourse or support to resolve those issues, and would be unable to access the record of and evidence in the case. The Appeals Chamber acknowledged in the *Bemba et al.* case “that access to the Court record, via TRIM, is usually necessary

to verify the authorities relied on”,²⁵ and found it appropriate to extend the time limit by the same number of days as the Defence teams would be unable to access court records.

20. Indeed, access to NUIX is essential, particularly in the days immediately preceding the deadline as it is precisely when the Defence will be finalising its brief and must edit, double-check, and cross-reference all supporting authorities. Any potential issues with NUIX, coupled with an inability to resolve it until the actual day of the filing deadline, would effectively amount to a loss of two full days of work. This would impose a significant burden on the Defence, which has no control over the deadline or the unavailability of the IT/e-Courts staff due to the holidays and which could not have foreseen or taken steps to mitigate this issue since the briefing schedule was only formalised on 8 February 2023.
21. This is an unjust situation and could not have been the intention of the Chamber at the time it issued its Sixth Decision. A modest postponement of nine working days to the Defence’s final trial brief deadline would remedy this situation by recognising the challenges arising in this specific context of preparing a final trial brief during Ramadan and Easter when numerous team members, as well as Court personnel, will be unavailable.
22. *Third*, if the 11 April deadline is not moved, the response deadline for the parties falls on 26 April 2023. This is three working days after Eid al-Fitr, a day celebrated by many members of the Al Hassan Defence as well as Mr Al Hassan. It is customary to spend this day, which is the equivalent of Christmas, with family members. Bearing in mind the prolonged COVID-related travel restrictions that plagued the trial phase of this case, practising team members would appreciate being able to travel to their respective home countries to celebrate Eid al-Fitr with their families. A discrete adjustment to the briefing schedule would facilitate their travel and allow them to fully benefit from this Court holiday. A failure to do so, on the other hand, would put Counsel in the unenviable position of either completing the response brief without the physical presence and/or assistance of a significant part of her team or compelling her team to work through Eid al-Fitr. Incidentally, a 26 April deadline for the final trial brief – as

²⁵ *Bemba et al.*, Decision on extension of time limits for documents in support of the appeals, ICC-01/05-01/13-2136, 10 April 2017, para. 9.

is being requested in this motion – is not comparable to a 26 April deadline for the response, given that the time limit for the response is half that provided for the brief, and resources cannot be already allocated to the response since work thereon can only commence after submission of the Defence’s brief.

23. The Defence also notes that the Prosecution has filed a motion for a 25-page extension of the page limit for its closing brief, on the grounds that it needs to provide “lengthier submissions on the legal requirements” of gender-based crimes and the passing of sentence without due process;²⁶ the need to address “a large number of incidents”;²⁷ and the copious use of footnotes in its draft, currently amounting to 67 pages.²⁸ While the Defence does not oppose this motion insofar as the same extension would be afforded to all parties and participants, this also demonstrates the complexity of the closing briefs and sums up the additional work the Defence will have to do prior to filing its own brief: In addition to drafting its arguments and summarising its case, the Defence will also need to review the Prosecution’s brief – including each reference in the currently-67 pages of citations – prior to submitting its brief to ensure that its own brief fully addresses the Prosecution’s case. This is detailed work that requires the participation of all team members, and would be difficult, if not impossible, to complete when some or most team members are unable to work.
24. In its Seventh Decision, the Chamber also ordered the Prosecution – and possibly the Defence – to annex at least two maps to its closing brief in addition to the two other annexes the Prosecution already foresees. The Defence anticipates it will need at least three days to review and analyse these maps as well as to create its own versions, should that prove necessary. This is time and work that the Defence had not anticipated and with which a modest postponement of the briefing schedule would greatly assist.
25. *Finally*, the Appeals Chamber has found support for an extension request where a defence team has had to “dedicat[e] time and resources” to issues and proceedings outside of those deadlines directly at issue.²⁹ In this respect, the Defence notes that,

²⁶ Prosecution Extension Request, para. 6.

²⁷ Prosecution Extension Request, para. 7.

²⁸ Prosecution Extension Request, para. 12.

²⁹ *Bemba et al.*, Decision on requests for an extension of the time limit for the filing of the documents in support of the appeal, ICC-01/05-01/13-2046, 23 November 2016, para. 18 (“[i]n the circumstances of the present case, the Appeals Chamber is satisfied that good cause exists for an extension [...] the Appeals Chamber is persuaded

until submission of the closure of its evidence on 6 February 2023, it had also been working assiduously on other issues relating to the presentation of its evidence and its case at large. These matters have required significant time and attention and have diverted Defence resources from preparation of the final trial brief.

26. *First*, the Rule 68 litigation, which has been ongoing since early November 2022, has required the full-time attention of several team members. The Defence attempted to reach no fewer than 18 witnesses for Rule 68 purposes in the three months prior to the close of its evidence,³⁰ an effort which required, *inter alia*, rigorous logistical and administrative planning, repeated attempts to reach witnesses and review their witness statements, travel missions by team members, drafting a protocol for remote certification outside Bamako, identifying locations as well as testing equipment for safe and effective remote certification outside Bamako, and the coordination and day-to-day liaison with multiple Registry sections³¹ for the certification of each witness statement. Conversely, since the Prosecution has elected not to call any rebuttal evidence, it has had the full benefit of the last three month to prepare its brief. The Prosecution request for an extension of the page limit reflects the advanced stage of its preparations in this regard.
27. *Second*, the Defence has also been involved in ongoing communications with the Office of the Registry in respect of the upcoming period of reduced activity. Unless otherwise determined, this period comes into effect at the conclusion of oral arguments and triggers profound consequences for team members who may lose paid employment and legal rights of residence in The Netherlands. The Defence cannot afford to disband its current team – and to lose the valuable skills and institutional memory on which it relies – especially in light of the outstanding tasks that must be completed in the period between the conclusion of trial and the sentencing phase. Part of these communications have included substantiating to the Registry the resources required, including by listing in detail each specific task which remains outstanding and will need to be completed; by whom the task will need to be performed; and the anticipated amount of time

by the parties' submissions regarding: (ii) the ongoing sentencing proceedings before the Trial Chamber, to which the defence teams are currently dedicating time and resources").

³⁰ D-0004, D-0008, D-0511, D-524, D-0534, D-0539, D-0003, D-0146, D-0553, D-0554, D-0312, D-0245, D-0611, D-0627, D-0628, D0219, D-0002 and D-0231.

³¹ These sections include the Victims and Witnesses Section, Registry Legal Office, Bamako Field Office, Language Services Section, and the Counsel Support Section.

required. As such, team resources have had to be allocated to researching and resolving this issue, which has prevented some team members from working full-time on the trial brief.

28. The extension sought by the Defence is limited and tailored to counter the very specific issues detailed above. It would not prejudice the expeditiousness of the trial proceedings, which have, in any event, come to a close, but would allow the Defence to expend the necessary time and resources on its brief and response in a manner most likely to aid the Chamber in its deliberations as well as consistent with Mr Al Hassan's fair trial rights.
29. Furthermore, given that the Defence has already consulted with the Prosecution, which has not voiced any objections, no prejudice is foreseen by this limited extension of nine working days.

V. CONCLUSION AND RELIEF REQUESTED

30. For these reasons, Trial Chamber X is respectfully requested to grant Mr Al Hassan's request for a variation of the time limit for the submission of the Defence's closing brief from 11 April 2023 to 26 April 2023, and, consequently, for the parties' responses to the briefs to be moved from 26 April 2023 to 12 May 2023.



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Respectfully submitted this 10 February 2023,
At The Hague, The Netherlands