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No. ICC-01/12-01/18

Date: 21 January 2020

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 Mr Al Hassan's restrictions and accesses while in detention

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

The Office of the Prosecutor

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

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Nigel Verrill

Detention Section

Paddy Craig

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER X (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, pursuant to Articles 57, 61(11), 64 and 68(1) of the Rome Statute (the ‘Statute’), Regulations 90-92, 95, 97 and 99-101 of the Regulations of the Court and Regulations 169, 173-175, 179-180, 182-185 and 187 of the Regulations of the Registry, issues this ‘Decision on Mr Al Hassan’s restrictions and accesses while in detention’.

I. Procedural history and submissions

1. In a series of seven decisions (the ‘Pre-Trial Decisions’),¹ the Pre-Trial Chamber I (hereinafter: ‘PTC I’) Single Judge ordered restrictions on Mr Al Hassan’s contacts and accesses while in pre-trial detention (the ‘Pre-Trial Restrictions’). These orders were implemented by the Registry who reported thereon in several filings.²
2. On 22 November 2019, the Office of the Prosecutor (the ‘Prosecution’) filed an urgent request, seeking to maintain the restrictions on non-privileged communications of Mr Al Hassan whilst in detention (the ‘Prosecution Request’).³ First, the Prosecution seeks an *interim* decision to ensure the continuity of the Pre-Trial Restrictions. Second, the Prosecution requests that these restrictions remain until the end of the trial.⁴ The Prosecution submits that there is no change in circumstances and that these should remain in full force in the context of the upcoming trial and disclosure of Prosecution witnesses’ identities.⁵ The Prosecution also requests the Chamber to implement additional measures concerning Mr Al Hassan’s list of non-privileged contacts, consisting

¹ [REDACTED].

² [REDACTED].

³ Prosecution’s urgent application to maintain restrictions on Mr Al Hassan’s contacts and access to others whilst in detention, 21 November 2019, ICC-01/12-01/18-505-Conf-Exp (confidential *ex parte*, only available to the Prosecution, the VWU and the Detention Section; with confidential *ex parte* Annexes A and B, only available to the Prosecution, the VWU and the Detention Section; a confidential *ex parte* redacted version of the main filing available to the Prosecution, the Defence, the VWU and the Detention Section was filed on 26 November 2019, ICC-01/12-01/18-505-Conf-Exp-Red) (hereinafter: ‘Prosecution Request’).

⁴ Prosecution Request, ICC-01/12-01/18-505-Conf-Exp-Red, paras 2-3, 39.

⁵ Prosecution Request, ICC-01/12-01/18-505-Conf-Exp-Red, paras 4-5.

of (i) limiting this list to only the accused's immediate family members, and (ii) excluding from this list individuals who are members of, affiliated or in close contact with Ansar Dine/AQIM.⁶

3. On 9 December 2019, the Defence filed its response, opposing the Prosecution Request (the 'Defence Response').⁷ The Defence argues that allegations that Mr Al Hassan was affiliated with Ansar Dine and AQIM at the time of his arrest [REDACTED] while in detention are unsubstantiated.⁸ The Defence submits that there is no link between Mr Al Hassan's detention regime and the Prosecution allegations that Mr Al Hassan has supporters that could harm or intimidate witnesses.⁹ It further submits that the current restrictions should be relaxed as they cause psychological distress to Mr Al Hassan.¹⁰ The Defence further argues that since much of the Prosecution's submissions and the findings of the PTC I Single Judge are *ex parte*, it is unable to submit an informed view to challenge these allegations and findings.¹¹ The Defence states that the Chamber has an independent obligation to review the restrictions, particularly considering the time and length of the proceedings, which impacts on the continued proportionality of the restrictive measures.¹² The Defence also submits that the three most recent Registry reports have confirmed that there have been no violations of the monitoring regime, despite the disclosure of sensitive data and the confirmation of charges proceedings.¹³ The Defence finally requests the transmission of the detention centre transcripts of Mr Al Hassan's conversations transmitted to the Prosecution.¹⁴

⁶ Prosecution Request, ICC-01/12-01/18-505-Conf-Exp-Red, paras 3, 74-77.

⁷ Defence response to Prosecution urgent application to maintain restrictions on Mr. Al Hassan's contacts and access to others while in detention, ICC-01/12-01/18-520-Conf-Exp (confidential *ex parte*, only available to the Defence; with confidential *ex parte* Annexes A and B only available to the Defence and the Prosecution, and the Defence, respectively; a confidential *ex parte* redacted version of the main filing available to the Defence, the Prosecution, the VWU and the Detention Section was filed on 17 December 2019, ICC-01/12-01/18-520-Conf-Exp-Red) (hereinafter: 'Defence Response').

⁸ Defence Response, ICC-01/12-01/18-520-Conf-Exp-Red, paras 2, 12-18.

⁹ Defence Response, ICC-01/12-01/18-520-Conf-Exp-Red, paras 21-23.

¹⁰ Defence Response, ICC-01/12-01/18-520-Conf-Exp-Red, para. 3.

¹¹ Defence Response, ICC-01/12-01/18-520-Conf-Exp-Red, para. 7.

¹² Defence Response, ICC-01/12-01/18-520-Conf-Exp-Red, paras 8-9.

¹³ Defence Response, ICC-01/12-01/18-520-Conf-Exp-Red, para. 10.

¹⁴ Defence Response, ICC-01/12-01/18-520-Conf-Exp-Red, para. 11.

4. On 11 December 2019, the Defence filed a related request, seeking an order from the Chamber to the Registry to provide the Defence, on request, with all audio files of Mr Al Hassan's detention centre recordings.¹⁵
5. On 13 December 2019, the Single Judge authorised the Prosecution [REDACTED].¹⁶
6. On 13 January 2019, the Registry filed its observations on the Prosecution Request and the Defence Request.¹⁷ [REDACTED].¹⁸ [REDACTED].¹⁹ The Registry further informs that none of the current non-privileged contacts of Mr Al Hassan have violated any of the restrictions in place.²⁰ The Registry reports that [REDACTED].²¹ However, the Registry explains that it is common practice authorised by the Registry for the family members of the detained person to share their phones with other interlocutors who will talk with the detained person. [REDACTED].²² The Registry reports that to date, no breach has been reported for interlocutors passing the telephone to unauthorised persons.²³ The Registry finally states that contact with the outside world is recommended and that family visits, and visits in general, are also important positive events for detained persons.²⁴

¹⁵ Request to access audio files from the detention unit recordings, ICC-01/12-01/18-525-Conf-Exp (confidential *ex parte*, only available to the Defence, the Prosecution and the Registry; with confidential *ex parte* Annexes A and B, only available to the Defence and the Registry) (hereinafter: 'Defence Request').

¹⁶ [REDACTED].

¹⁷ Registry Observations to Defence Request to Access Audio Files (ICC-01/12-01/18-525-Conf-Exp) and the Prosecutor's Application on Restrictions on Contact (ICC-01/12-01/18-505-Conf-Exp), ICC-01/12-01/18-550-Conf-Exp (confidential *ex parte*, only available to the Detention Section and the Victims and Witnesses Unit; two confidential *ex parte* redacted versions, available to the Prosecution and the Defence, were notified on 14 January 2020, ICC-01/12-01/18-550-Conf-Exp-Red and ICC-01/12-01/18-550-Conf-Exp-Red2, respectively) (hereinafter: 'Registry Observations') An extension of time limit was granted to the Registry to submit its observations. See e-mail of Trial Chamber X Communications on 6 January 2020 at 13:51.

¹⁸ Registry Observations, ICC-01/12-01/18-550-Conf-Exp-Red/Red2, para. 26.

¹⁹ Registry Observations, ICC-01/12-01/18-550-Conf-Exp-Red/Red2, para. 26.

²⁰ Registry Observations, ICC-01/12-01/18-550-Conf-Exp-Red/Red2, para. 26.

²¹ Registry Observations, ICC-01/12-01/18-550-Conf-Exp, paras 27, 29.

²² Registry Observations, ICC-01/12-01/18-550-Conf-Exp-Red/Red2, para. 30.

²³ Registry Observations, ICC-01/12-01/18-550-Conf-Exp-Red/Red2, para. 30.

²⁴ Registry Observations, ICC-01/12-01/18-550-Conf-Exp-Red/Red2, para. 31.

II. Analysis

A. The restrictions currently in place

7. The Pre-Trial Restrictions ordered by the PTC I Single Judge²⁵ which are still applicable are as follows:

[REDACTED]²⁶

[REDACTED]

8. Furthermore, the PTC I Single Judge authorised Mr Al Hassan to receive pre-recorded videos of his family members.²⁷
9. The PTC I Single Judge also authorised [REDACTED].²⁸
10. The Chamber considers that contact with the outside world and visits are imperative for a detained person's well-being. Restrictions imposed on the contact of the accused person must be justified and proportionate, in accordance with internationally recognised human rights.²⁹ A balance must be struck between the right of every detained person to maintain family life and contact with the outside world, and the absolute necessity of ensuring the safety of witnesses, the preservation of evidence and the integrity of the proceedings.³⁰ Although in general detained persons have the right to communicate with others outside the detention centre, these rights are not absolute.³¹ However, the restrictions imposed must be the least restrictive possible to the rights of the detained person.³² Furthermore, as noted by the PTC I Single Judge, 'such restrictions, because they interfere with the rights of the detained person, must be based on the existence of an objectively justifiable risk'.³³ The general security situation in Mali, [REDACTED] and the fact that there is a general

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ Fourth PTC Decision, ICC-01/12-01/18-340-Red3, para. 62.

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED]

³³ [REDACTED].

threat to Prosecution witnesses cannot be the sole basis to continue to impose all of the restrictions ordered by the PTC I Single Judge on Mr Al Hassan.

11. The Chamber notes that, in light of the disclosure deadlines set by the Chamber, the Prosecution, [REDACTED].³⁴ The circumstances of the protection of individual witnesses are therefore likely to evolve in the coming months. In addition, the Chamber needs to be provided with up to date, concrete and detailed information in order to be able to review the measures restricting Mr Al Hassan's contacts while in detention. In order for the Chamber to be able to take a fully informed decision on the measures restricting Mr Al Hassan's contacts while in detention in accordance with the criteria set out above,³⁵ the Registry shall submit by 8 April 2020 a report on the measures, including potential alternatives to the regime currently in place, and any other relevant information. [REDACTED] The Prosecution shall respond and provide up to date, concrete and detailed information [REDACTED]. So as to enable the parties to make submissions on the matter, redacted versions of these filings (if needed) should be simultaneously filed on the record.
12. Pending completion [REDACTED] the restrictions ordered by the PTC I Single Judge remain in place.
13. The Chamber also notes [REDACTED].³⁶ [REDACTED].

B. Additional restrictions sought by the Prosecution

14. In light of the above, the Chamber will not consider the Prosecution Request for additional restrictions at this stage. In view of the deadline for the filing of up to date, concrete and detailed information, that part of the Prosecution Request is rejected at this stage, without prejudice.

³⁴ Decision on the evidence disclosure protocol and other related matters, 30 December 2019, ICC-01/12-01/18-546; Decision Setting the Commencement Date of the Trial, 6 January 2020, ICC-01/12-01/18-548.

³⁵ See para. 10 above.

³⁶ [REDACTED].

C. Defence Request to obtain audio files

15. At the outset, the Chamber notes that the Single Judge already authorised the transmission of the transcripts of the detention centre sought by the Defence.³⁷ Accordingly, these submissions of the Defence Response have been resolved.
16. The Chamber notes that the remaining part of the Defence Request is twofold: it requests the audio files related to translated transcripts already disclosed to the Defence but also requests all audio files of recorded communications from the detention centre.
17. In this regard, the Chamber observes that although the Registry does not oppose in principle the Defence Request for specific and justified audio files, it argues that the Defence should not make an open ended request for access to all audio recordings.³⁸ [REDACTED].³⁹
18. The Chamber notes that in its request, the Defence has specified and justified its request. It has identified the specific conversations it seeks (those linked with the disclosed transcripts). It also justifies the need to have the audio files so that Mr Al Hassan can have access to the recordings in the original language (Tamasheq) as opposed to French (a language he cannot read).⁴⁰ The Chamber notes that the Defence argues that these recordings are relevant in making submissions in relation to the current restrictions imposed on the accused.⁴¹ Accordingly, this part of the Defence Request is granted.
19. However, the Chamber agrees with the Registry that as a practical matter, the Registry should be ordered to provide the audio files to the Defence team, [REDACTED].⁴²
20. Accordingly, although the Defence requests that the audio files are transmitted directly to Mr Al Hassan, the Chamber considers it more appropriate for the

³⁷ [REDACTED].

³⁸ Registry Observations, ICC-01/12-01/18-550-Conf-Exp-Red/Red2, para. 17.

³⁹ Registry Observations, ICC-01/12-01/18-550-Conf-Exp-Red/Red2, para. 19.

⁴⁰ Defence Request, ICC-01/12-01/18-525-Conf-Exp, para. 2.

⁴¹ Defence Request, ICC-01/12-01/18-525-Conf-Exp, para. 3.

⁴² Registry Observations, ICC-01/12-01/18-550-Conf-Exp-Red/Red2, para. 22.

Registry to transmit the audio files related to the translated transcripts to the Defence.

21. The Chamber notes that the Defence requests that the Chamber defer its ruling on the Prosecution Request until Mr Al Hassan receives the audio recordings. However, in light of the above conclusions of the Chamber, limiting the application of the current restriction regime, the Defence will be given the opportunity to address any new issue arising of these audio recordings when the Registry files the report ordered in paragraph 11 above.
22. In relation to the broader Defence Request, seeking the transmission of all audio files, regardless of whether they correspond to transcripts, the Chamber notes the Registry Observations stating that this would be an extremely burdensome task for the Registry and an unprecedented access to a Defence team to audio files that may not be at issue.⁴³ The Chamber considers that unlimited access to the Defence is not warranted if there is no justification and no specific reason why certain audio files would be relevant for the preparation of Mr Al Hassan's defence.
23. If and when the Defence identifies issues that are of interest or relevant for the preparation of trial or to safeguard the rights of the accused, the Defence is free to approach the Registry. Although the Chamber notes the Registry Observations indicating that it may not always be able to decide on Defence requests,⁴⁴ the Registry and the Defence should first attempt to reach an agreement. Only if no agreement is reached between the Defence and the Registry, or if, as indicated by the Registry, it is unable to take a decision, shall the Chamber be seized of a specific request seeking disclosure of certain audio files.

⁴³ Registry Observations, ICC-01/12-01/18-550-Conf-Exp-Red/Red2, para. 20.

⁴⁴ Registry Observations, ICC-01/12-01/18-550-Conf-Exp-Red/Red2, para. 22.

FOR THESE REASONS, THE CHAMBER HEREBY

ORDERS that the restrictions as described in paragraph 7 above shall, in the *interim*, remain in place;

REJECTS the Prosecution Request to impose additional restrictions;

ORDERS the Registry to submit a report pursuant to paragraph 11 above, by **8 April 2020**;

ORDERS the Prosecution to respond to the Registry report and provide up to date, concrete and detailed information as to witness protection arrangements and any other relevant information by **23 April 2020**;

ORDERS the Defence to file any response to the Registry and the Prosecution filings above by **7 May 2020**;

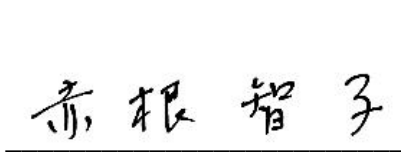
ORDERS the Registry to immediately transmit to the Defence the audio files related to the transcripts identified by the Defence; and

REJECTS the remainder of the Defence 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 21 January 2020

At The Hague, The Netherlands