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**International
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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Single Judge

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF

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

Public

**Public redacted version of the “Request on behalf of Mr Al Hassan to vary the
conditions of his detention”**

**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:

The Office of the Prosecutor

Fatou Bensouda
James Stewart

Counsel for the Defence

Melinda Taylor
Marie-Hélène Proulx

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. The Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the “Defence” and “Mr Al Hassan”), submits the present request to vary the restrictive measures imposed on Mr Al Hassan’s contact with the outside world, so that he is better able to exercise his right to privacy and his right to family life within the parameters of the International Criminal Court’s (the “ICC”) obligation to protect witnesses and victims.
2. Since his transfer to the ICC, Mr Al Hassan has been subject to extensive restrictions on his contact with the outside world. These measures, having been imposed to ‘ensure the safety of witnesses’,¹ go further than what is necessary to achieve their objective and needlessly curtail Mr Al Hassan’s right to privacy and right to family life.
3. In addition, the recent postponement of the confirmation of charges hearing, to a date yet to be determined, has for consequence to substantially prolong the period of implementation of these measures. Such lengthy implementation of drastic measures goes above and beyond what could be considered reasonable by any court of law. The Defence therefore respectfully submits that the Single Judge should review the conditions of detention and end the active monitoring of Mr Al Hassan’s non-privileged communications.

II. Procedural history

4. On 27 March 2018, Pre-Trial Chamber I (the “Chamber”) issued a warrant for the arrest of Mr Al Hassan.²
5. On 29 March 2018, in anticipation of the surrender of Mr Al Hassan to the Court, the Prosecution filed an application for the Single Judge to impose restrictive measures on Mr Al Hassan’s contact with other persons upon his arrival at the Court’s detention

¹ *Al Hassan*, Second Decision on the Restrictions on Contact with Other Persons during the Pre-Trial Proceedings, 20 July 2018, ICC-01/12-01/18-93-Conf-Exp-Red (**Second Decision**), para. 70. All cases referenced in this document are to the Al Hassan case unless stated otherwise.

² Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 27 March 2018, ICC-01/12-01/18-2.

centre.³ The basis for the Prosecution’s application was to prevent offences pursuant to Article 70 of the Rome Statute (the “Statute”) from being committed by putting into place measures that are necessary, minimally intrusive and proportionate to the risk of interference and/or contamination.⁴ The same day, the Single Judge granted the Prosecution’s Application and advised that a written decision would be issued as soon as possible.⁵

6. On 31 March 2018, Mr Al Hassan was transferred to the Court and is now held at its detention centre in The Hague (the “Detention Centre” or “DC”). He has been subject to severe restrictions on his communication since this time.
7. On 5 April 2018, the Single Judge issued his written decision instructing the Registrar to put in place measures to restrict Mr Al Hassan’s contact with other persons while at the Detention Centre.⁶ These measures include: (i) restricting Mr Al Hassan’s non-privileged telephone calls and visits to a limited list of individuals whose identities and contact details have been duly verified beforehand and with whom any discussion related to the case is prohibited⁷; (ii) prohibiting the use of obscure or coded language⁸; (iii) putting in place active monitoring of non-privileged telephone calls, written correspondence and visits, including by prohibiting the use of languages other than French and Arabic⁹; (iv) limiting the duration of phone calls to two hours per week¹⁰; (v) ordering the audio-recording and active monitoring of non-privileged visits.¹¹
8. On 30 April 2018, following a request from the Defence, the Single Judge authorised, within the framework of the other restrictive measures imposed in the First Decision,

³ Confidential redacted version of “Prosecution’s urgent application under article 57 of the Rome Statute and regulation 101(2) of the Regulations of the Court”, 29 March 2018, ICC-01/12/01/18-9-Secret-Exp, 31 March 2018, ICC-01/12-01/18-9-Conf-Exp-Red (**Prosecution Application**).

⁴ Prosecution Application, para. 15.

⁵ Email from the Pre-Trial Chamber on 29 March 2018 at 17.38, referenced in Third Decision on the Measures to Restrict Contact throughout the Pre-trial Phase of the Proceedings, 20 July 2018, ICC-01/12-01/18-95-Conf-Exp-Red, para. 3 and fn. 4 (**Third Decision**).

⁶ Decision on the Prosecution’s Application under Regulation 101 of the Regulations of the Court, 5 April 2018, ICC-01/12-01/18-16-Conf-Exp (**First Decision**).

⁷ First Decision, paras 17, 20.

⁸ First Decision, para. 18.

⁹ First Decision, paras 18-19.

¹⁰ First Decision, para. 19.

¹¹ First Decision, para. 21.

the use of Tamasheq as a language of communication between Mr Al Hassan and his contacts outside of the DC.¹²

9. On 22 May 2018, the Registrar filed a report on the implementation of measures to restrict Mr Al Hassan's contact with other persons.¹³
10. On 20 July 2018, the Single Judge decided to maintain the measures adopted in the First Decision and to restrict Mr Al Hassan's contact with other persons throughout the pre-trial phase of the proceedings, noting that such measures could be reconsidered in case of a change of circumstances.¹⁴
11. On the same day, the Single Judge also ordered [REDACTED].¹⁵
12. Also on 20 July 2018, the Single Judge issued the decision on "Postponing the Date of the Confirmation Hearing",¹⁶ in which he allowed the postponement of the confirmation of charges hearing from 24 September 2018 to 6 May 2019 (the "First Postponement Decision").
13. On 22 October 2018, the Defence submitted its request for the implementation of certain measures relating to Mr Al Hassan's detention, including regular reporting of his compliance with the restrictive measures and his ability to exercise the rights afforded to him.¹⁷ On 2 November 2018, the Registrar submitted his observations to the Defence request, indicating that the Registry would be able to provide behaviour reports every three months.¹⁸ On 22 November 2018, the Single Judge granted the Defence request for regular reporting on Mr Al Hassan's detention, specifying that such reports would indeed be filed every three months.¹⁹

¹² Decision on the "Request to allow Mr Al Hassan to communicate in the Tamasheq language", 30 April 2018, ICC-01/12-01/18-24-Conf-Exp.

¹³ Registry Report on the Implementation of the Monitoring Measures Ordered by the Single Judge, 21 May 2018, ICC-01/12-01/18-34-Conf-Exp (**First Registry Report**).

¹⁴ Second Decision, para. 87.

¹⁵ [REDACTED].

¹⁶ ICC-01/12-01/18-94-Red (**First Postponement Decision**).

¹⁷ Request for the implementation of certain measures relating to Mr Al Hassan's detention, 22 October 2018, ICC-01/12-01/18-161-Conf-Exp.

¹⁸ Registry Observations on the Defence Request ICC-01/12-01/18-161-Conf-Exp, 2 November 2018, ICC-01/12-01/18-169-Conf-Exp.

¹⁹ Décision relative à la requête de la défense aux fins de la mise en œuvre de certaines mesures concernant la détention de M. Al Hassan, 22 November 2018, ICC-01/12-01/18-189-Conf-Exp.

14. On 14 February 2019, the Defence was notified of the Prosecution's "*Éléments d'information concernant notamment la communication des éléments de preuve et les requêtes aux fins d'expurgation à venir et demandes d'extension de délai pour déposer le Document contenant les charges ainsi que la Liste des témoins et des éléments de preuve*",²⁰ in which the Prosecution candidly admitted its lack of progress in the preparation of its document containing the charges (the "DCC") and the partial state of Prosecution disclosure of incriminating evidence to the Defence.
15. [REDACTED].²¹
16. On 25 February 2019, the Single Judge vacated the date of the confirmation of charges hearing, stating that a new date would be set at some point after 15 March 2019.²²

III. Classification

17. In accordance with regulation 23bis(2) of the Regulations of the Court, this request is classified confidential *ex parte*, available to the Chamber and the Defence, as the it contains information with is confidential and *ex parte* to the Prosecution. The Defence will file a confidential redacted version in due course.

IV. Applicable law

18. Article 60 of the Statute stipulates, in relevant parts, that:

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to

²⁰ *Al Hassan*, Secret redacted version of the "*Éléments d'information concernant notamment la communication des éléments de preuve et les requêtes aux fins d'expurgation à venir et demandes d'extension de délai pour déposer le Document contenant les charges ainsi que la Liste des témoins et des éléments de preuve*", 12 February 2019, ICC-01/12-01/18-243-Secret-Exp, notified to the Defence on 14 February 2019 (**Prosecution's Request for a second postponement**).

²¹ [REDACTED]

²² Ordonnance fixant une date butoir pour le dépôt des requêtes en vue du dépôt du document contenant les charges, 25 February 2019, ICC-01/12-01/18-255 (**Second Postponement Decision**), para. 15.

inexcusable delay by the Prosecution. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

19. Article 67 of the Statute also provides that the Suspect has the right ‘to be tried without undue delay’.
20. Regulation 91(1) of the Regulations of the Court (the “RoC”) provides that ‘[a]ll detained persons shall be treated with humanity and with respect for the inherent dignity of the human person.’ Regulation 99, in addition, sets out some of the general entitlements of detained persons, including the right to maintain contact with their family.
21. Conversely, pursuant to Regulation 101(2) of the RoC, the Prosecution may request a chamber to ‘prohibit, regulate or set conditions for contact between a detained person and any other person’ only where there are reasonable grounds to believe that such contact ‘could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation’; ‘could be harmful to a detained person or any other person’; or ‘could be used by a detained person to breach an order for non-disclosure made by a judge’.
22. International human rights law also provides for similar guarantees for detained persons. For example, Rule 37 of the United Nations Standard Minimum Rules for Treatment of Prisoners (the “Mandela Rules”) provides that ‘prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.’²³ Principle 19 of The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment expresses family visitation as a right in itself: ‘[a] detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family.’²⁴
23. Although it may be permissible to impose restrictions on communication between a detainee and the outside world, such decisions abrogate fundamental human rights and

²³ UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, 8 January 2016, A/RES/70/175.

²⁴ UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 9 December 1988, A/RES/43/173.

must not be taken lightly. Indeed, rule 3 of the Mandela Rules provides: ‘measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore, the prison system shall not [...] aggravate the suffering inherent in such a situation.’

24. The Trial Chamber in *Katanga* held that any restrictions on detainee communication must ‘have a legitimate aim’ and be ‘absolutely necessary in the case at hand.’²⁵ Extensions of any measures must, likewise, ‘continue [...] to be absolutely necessary.’²⁶ The conduct allegedly justifying the restrictions must also involve ‘specific violations of the detention regime by the detained persons against whom such measures were requested’.²⁷

V. Submissions

(A) *The current circumstances warrant the variation of Mr Al Hassan’s conditions of detention*

25. In its Second Decision on the conditions of detention, the Single Judge expressly stated that he would review the measures imposed on Mr Al Hassan should the circumstances change. The Defence submits that circumstances have indeed changed since the Second Decision thereby warranting a thorough review of the conditions of detention.
26. Second Postponement: At the time of the Second Decision on the active monitoring measures in July 2018, the Single Judge was acting on the premise that the confirmation of charges hearing was going to be held in early May 2019, with an end to pre-trial proceedings, and therefore of the active monitoring measures, shortly thereafter.

²⁵ *Katanga and Ngudjolo*, Decision on request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre, 24 June 2009, ICC-01/04-01/07-1243-tENG-Red, para. 25.

²⁶ *Katanga and Ngudjolo*, Fourth decision on measures of prohibition and restriction of contacts outside and inside the Detention Centre in respect of Mathieu Ngudjolo, 4 December 2009, ICC-01/04-01/07-1709-tENG-Red, para. 18.

²⁷ *Katanga and Ngudjolo*, Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui, 13 March 2008, ICC-01/04-01/07-322, p. 11.

27. However, in the Prosecution's Request for a second postponement, the Prosecution admitted that it was encountering serious delays in the preparation of the DCC. It notably stated that several motions for withholding identities of witnesses still had not been filed,²⁸ that it was struggling to apply the appropriate redactions to interview transcripts,²⁹ and that [REDACTED]³⁰ among other alleged obstacles. The Prosecution notably did not attempt to justify these delays by any external causes and admitted in passing that some of the delays are caused by their decision to continue their investigations against Mr Al Hassan³¹ despite the advanced stage of the pre-trial proceedings. The Defence submits that the delays are in fact essentially due to time mismanagement on the Prosecution's part and should in no way be at the expense of Mr Al Hassan's right to privacy and to family life. Inexcusable delays by the Prosecution should not be at the expense of Mr Al Hassan.
28. The Defence submits that these circumstances are not only new, warranting a variation of conditions of detention, they also constitute inexcusable delay by the Prosecution, in the sense of Article 60(4) of the Statute and cause a prejudice to Mr Al Hassan. As such, and while this provision suggests that release is the appropriate remedy in such case, the Defence submits that ending the strict active monitoring measures is warranted in the present circumstances.
29. [REDACTED]
30. Judicial authorisation to withhold the identities of numerous Prosecution witnesses renders the current surveillance regime moot: In addition, the Single Judge has granted all of the Prosecution's requests in relation to the withholding of identity of witnesses, and has allowed the Prosecution to submit several summaries of witness statements, under Article 61(5) of the Statute. Given that the names of these witnesses are not known to Mr Al Hassan, there is no risk that their identities will be disclosed by him, or even to him. His knowledge of the details of his own case is so limited by the extensive redactions applied on evidentiary material that he can pose no threat whatsoever.

²⁸ Prosecution's Request for a second postponement, paras 19-36, 38, 41-42.

²⁹ Prosecution's Request for a second postponement, paras 21, 25, 32.

³⁰ Prosecution's Request for a second postponement, [REDACTED].

³¹ Prosecution's Request for a second postponement, para. 16.

31. Health issues and psychological well-being: Mr Al Hassan has now been detained without charges for two years. The Second postponement of the date of the confirmation hearing, without any indication as to the new date of the hearing, means that this period is in fact prolonged indefinitely. This, combined with the strict restrictions imposed on him, has weighed heavily on his morale and on his psychological well-being in general.
32. [REDACTED]. He has not seen his family for the entire time of his detention in Mali and in The Hague and has not been able to speak to them without the presence of a stranger tasked with actively monitoring his private calls and ready to interrupt them at any point. This inflicted suffering and humiliation to him and to his family, in addition to being a logistical burden limiting the length of the calls and making them more complicated to arrange. While these restrictions may have been deemed justified by the Single Judge in July 2018, as of today, over seven months later and with no end date in sight, they have become a violation of Mr Al Hassan's basic human rights.³²
33. Active monitoring measures are not meant to be implemented on a long term basis. They are supposed to be temporary in nature, and strictly justified in the circumstances of the case and for the person concerned. There should be a regular re-evaluation of whether active monitoring measures are still necessary over time, especially in cases where no violations have been committed. This is no longer the case here.

³² See for example, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly resolution 43/173 of 9 December 1988, Principle 19: "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations." (emphasis added); United Nations Office on Drugs and Crime (UNODC), Handbook on Dynamic Security and Prison Intelligence, New York, 2015, p.v22: "Prisoners' outside contacts must be seen as entitlements rather than privileges. They should, therefore, not be used as either rewards or punishments"; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991, 1992, CPT/Inf (92) 3, para. 51: "It is also very important for prisoners to maintain reasonably good contact with the outside world. Above all, a prisoner must be given the means of safeguarding his relationships with his family and close friends. The guiding principle should be the promotion of contact with the outside world; any limitations upon such contact should be based exclusively on security concerns of an appreciable nature or resource considerations."; Mandela Rules, Rule 106: "Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both"; Mandela Rules, Rule 43(3): "Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order." (emphasis added).

34. A real balancing of security risks against the rights of the detainee to maintain his family links should mean that full compliance of the detained person with the conditions of detention imposed on him must eventually be rewarded with the end of active monitoring measures. The Defence submits that we are at this juncture in this case.
- (B) *The current restrictions on Mr Al Hassan's contact with the outside world are not justified by any reasonable grounds*
35. There is no reasonable ground to believe that ending the active monitoring will make an attempted escape possible, or will prejudice or affect the outcome of the proceedings. There is also no ground to believe that Mr Al Hassan could be harmful to another person, or could breach a non-disclosure order.
36. Contrary to what has been argued by the Prosecution immediately after the surrender and transfer of Mr Al Hassan³³, he does not pose an actual, or even a remote, risk to victims and witnesses. Mr Al Hassan is unaware of the identity as well as large parts of evidence related to an important number of witnesses in his case. Therefore, there are no reasonable grounds to believe that he could prejudice or affect the outcome of the proceedings, or breach a non-disclosure order. Simply said, Mr Al Hassan cannot divulge information he does not possess.
37. Mr Al Hassan has been in detention since April 2017, almost two years ago. Since his arrival in the DC in March of last year, he has been almost 4000 km away from Mali, and from any armed group of which he is alleged of having been a member.
38. Communications with these armed groups has simply been impossible for the past two years and remains as such. It is unreasonable to restrain Mr Al Hassan's contacts with his family based on a far-fetched scenario whereby armed group members would try to stay in touch with him while he is in The Hague, completely removed from these armed groups' objectives, interests or reach. While the situation in Mali may well remain volatile, Mr Al Hassan has been removed from the country a year ago, and his communicating more freely with his family will have no impact on the general

³³ Second Decision, para. 65.

situation. Similarly, while the armed groups may well use violent methods, these have nothing to do with Mr Al Hassan's family contacts.

39. The European Court of Human Rights has held that the extended prohibition of direct contact can only be justified when a genuine and continuing danger continues to exist.³⁴ In addition, as the Single Judge ruled in the Second Decision, it is very important for a detained person to keep in contact with family and the outside world. Any measures restricting such contact must be proportionate and justified³⁵. This is not the case anymore and the conditions must be varied, as requested below.

(C) *The active monitoring of Mr Al Hassan's non privileged communications must come to an end*

40. The Defence respectfully requests the following:
41. End of the active monitoring: Mr Al Hassan's non-privileged communication should no longer be subjected to active monitoring. This would allow him to maintain his family relationships without the presence of a stranger actively listening to all of his personal conversations and in particular his private communication [REDACTED]. The Defence submits that at this stage, passive monitoring pursuant to Regulation 174 of the Regulations of the Registry (the "RoR"), is sufficient. The two hour limit should also be lifted.
42. If the Chamber deems necessary to impose additional conditions in the context of passive monitoring, it could, for example, order that a number of calls per week be monitored from their recording, as foreseen by Regulation 174 of the RoR. It could also request the Registry for more regular reports on the results of the passive monitoring, to ensure that Mr Al Hassan is complying with his obligations.
43. Permission for a private visit: [REDACTED]. The Defence submits that in the context of future family visits, nothing justifies the prohibition of private visits imposed by the Single Judge in the Second Decision. Any such visit could be preceded and followed by a search, to minimise any perceived risk. [REDACTED].

³⁴ ECtHR, *Khoroshenko v. Russia*, 30 June 2015, Application no. 41418/04, para. 125. See also *Kučera v. Slovakia*, 17 July 2007, Application no. 48666/99, paras 129-131; *Lavents v. Latvia*, 28 November 2002, Application no. 58442/00, paras 141-142.

³⁵ Second Decision, para. 50.

44. Permission to be shown videos of his children: [REDACTED] However, the Defence submits that it would be reasonable and easily feasible to show Mr Al Hassan's short videos of his children, produced by his family members. [REDACTED]. As a preventative measure, the Defence suggests that [REDACTED]. [REDACTED]. This simple measure could allow Mr Al Hassan to see his young children for the first time in two years and would considerably improve his morale while he is awaiting the confirmation of charges.

VI. Relief sought

45. In light of the above, and with view of the prolonged and significant curtailment of Mr Al Hassan's right to privacy and right to family life under the current restrictions on his contact with the outside world, the Defence respectfully requests that: (i) Mr Al Hassan's non-privileged telephone calls be subject to passive monitoring rather than active monitoring; (ii) Mr Al Hassan's calls time limit be lifted; (iii) Mr Al Hassan be permitted to receive private visits; and (iv) Mr Al Hassan be permitted to be shown videos of his young children.



Dated this 28th Day of February 2019
At The Hague, The Netherlands