

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-01/12-01/18

Date: 22 March 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 redacted version of

Decision on the Defence's request for admission of evidence and fair trial remedy

To be notified in accordance with Regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 64(2), 66, 67(1) and 69 of the Rome Statute (the ‘Statute’), issues the following ‘Decision on the Defence’s request for admission of evidence and fair trial remedy’.

I. Procedural history

1. On 8 February 2023, the Chamber declared the submission of evidence in this case closed.¹
2. On 1 March 2023, the Defence filed a request concerning activities of the Court’s Outreach Unit in Timbuktu which, in its view, violates Mr Al Hassan’s fair trial rights (the ‘Request’).² The Defence requests the Chamber to: (i) authorise the admission of five additional pieces of evidence concerning an outreach mission in May 2022;³ (ii) issue a declaration acknowledging that Mr Al Hassan’s fair trial rights have been violated, including his presumption of innocence, pursuant to Article 64(2) of the Statute; and (iii) order the Outreach Unit to rectify the content of the relevant articles to the extent necessary to be impartial pursuant to Article 64(2) of the Statute.⁴
3. On 13 March 2023, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Request (the ‘Response’).⁵
4. The parties’ submissions are discussed below to the extent necessary.

¹ Declaration on the closure of evidence, ICC-01/12-01/18-2468.

² Request for admission of evidence and fair trial remedy, ICC-01/12-01/18-2473-Conf.

³ Article MLI-D28-0006-9206 and related social media post MLI-D28-0006-9200, article MLI-D28-0006-9214 and related social media posts MLI-D28-0006-9202 and MLI-D28-0006-9204.

⁴ Request, ICC-01/12-01/18-2473-Conf, para. 41.

⁵ Prosecution’s response to the Defence “Request for admission of evidence and fair trial remedy”, ICC-01/12-01/18-2477-Conf.

II. Submissions and analysis

5. The Request concerns an outreach mission conducted in Timbuktu in May 2022, and recorded in two articles⁶ published on the Court's website in February 2023. The Chamber will first address the second prong of the Request, namely whether Mr Al Hassan's fair trial rights have been violated.
6. The Defence's submissions in this regard are twofold. First, the Defence submits that the activities of the Outreach Unit 'had the ability to interfere with the preparation of the Defence's case at crucial time of the trial'.⁷ In the Defence's view, these activities 'undermine the Defence's right to conduct its own defence and the right to adequate facilities to prepare its defence'.⁸ Second, the Defence submits that the language utilised in the relevant articles, having been published by a neutral organ of the Court, undermine Mr Al Hassan's right to be presumed innocent as enshrined in Article 66 of the Statute, and also impact the perception of Mr Al Hassan receiving a fair trial at this Court.⁹
7. The Prosecution observes that information concerning the outreach mission has been available since July 2022 and the Defence accordingly failed to exercise due diligence in the discovery of the relevant documents.¹⁰ On the merits of the Request, the Prosecution submits that the Defence's claims concerning the language of the article are unsupported by any evidence.¹¹ The Prosecution further avers that the language used in the relevant articles do not violate Mr Al Hassan's rights under Article 66 of the Statute.¹²
8. At the outset, the Chamber recalls that outreach activities were specifically endorsed by the Pre-Trial Chamber in this case, in line with established practice, which held, *inter alia*, that 'the first step in enabling victims to participate in the

⁶ MLI-D28-0006-9206 (available at <https://www.icc-cpi.int/about/outreach/stories/story/if-we-dont-have-peace>); and MLI-D28-0006-9214 (available at <https://www.icc-cpi.int/about/outreach/stories/story/icc-and-communities-timbuktu-meet-first-fabled-city>).

⁷ Request, ICC-01/12-01/18-2473-Conf, para. 25.

⁸ Request, ICC-01/12-01/18-2473-Conf, para. 25.

⁹ Request, ICC-01/12-01/18-2473-Conf, para. 25.

¹⁰ Response, ICC-01/12-01/18-2477-Conf, para. 4.

¹¹ Response, ICC-01/12-01/18-2477-Conf, paras 8-10.

¹² Response, ICC-01/12-01/18-2477-Conf, paras 12-13.

proceedings in compliance with the obligation cast on the Court by article 68(3) of the Statute is to hold outreach activities about the Court's work for those who may be affected by the present case, that is to say, those who may be affected by the crimes entered in the warrant of arrest for Mr Al Hassan'.¹³ Indeed, the Chamber considers that outreach activities are an essential tool to ensure that the public, and most notably those affected by the alleged crimes, are able to follow all stages of proceedings before the Court. While such activities may not be conducted at the expense of the rights of accused persons, the Chamber stresses that outreach activities are not *per se* incompatible with the rights of the accused, unless specifics of an outreach activity call for a different conclusion.

9. Turning to the outreach mission at hand, the Defence contends that its potential evidence was 'contaminated' as the Outreach Unit distributed material resulting in a heavy prosecutorial influence, which affected witnesses' recollections with respect to Mr Al Hassan and the ability for the Defence to put all relevant defence arguments before the Court.¹⁴ The Chamber finds these submissions unmeritorious. First, the material to which the Defence makes reference, namely the case information sheet for the *Al Hassan* and the *Al Mahdi* cases and the *Al Mahdi* Judgment, are readily available to the public on the Court's website. Further, while the Request refers to the content of the case information sheet,¹⁵ the relevant part states that Mr Al Hassan 'aurait été commissaire de facto de la Police islamique'.¹⁶ As the use of the conditional form clearly signals that Mr Al Hassan's position as *de facto* commissioner of the Islamic Police remains an allegation at this stage, the Chamber considers that the provision of this case information sheet does not 'contaminate' potential Defence witnesses nor do they prejudice issues that are *sub judice*. Moreover, since [REDACTED],¹⁷ the Chamber also considers unfounded the Defence's argument that this is an additional factor amplifying the potential witnesses' views *vis-à-vis* Mr Al Hassan.¹⁸ Accordingly, the Chamber dismisses the Defence's submissions that

¹³ Decision Establishing the Principles Applicable to Victims' Applications for Participation, 24 May 2018, ICC-01/12-01/18-37-tENG, para. 11.

¹⁴ Request, ICC-01/12-01/18-2473-Conf, paras 30, 32.

¹⁵ Request, ICC-01/12-01/18-2473-Conf, para. 30.

¹⁶ <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/al-hassanFra.pdf> [emphasis added]

¹⁷ [REDACTED]

¹⁸ Request, ICC-01/12-01/18-2473-Conf, para. 30.

the activities of the Outreach Unit interfered with Mr Al Hassan's Article 67(1)(b) rights.

10. The Chamber will now turn to whether the articles published by the Outreach Unit violate Mr Al Hassan's presumption of innocence. In support of this part of the Request, the Defence points to the article describing that the communities of Timbuktu had borne 'the full brunt of the occupation of Ansar Eddine' and that the Court was 'trying the grave crimes that were committed'.¹⁹ The Defence asserts that these statements concern legal arguments that are disputed between the parties.
11. The Chamber considers that the presumption of innocence, as enshrined in Article 66 of the Statute, cannot prevent the organs of the Court from informing the public about criminal proceedings in progress, but it requires that they do so with all the discretion and circumspection necessary for the presumption of innocence to be respected.²⁰ The Chamber also considers that, while the presumption of innocence extends to public statements made outside court proceedings and protects all persons from a formal declaration of guilt before a judicial determination, not all statements going to contested elements of a case would *per se* be in breach of the presumption of evidence. Whether particular statements violate the presumption of innocence needs to be considered in light of all of the relevant circumstances.²¹
12. With respect to the specific statements in question, the Chamber observes that the relevant article is a general overview of the Court's outreach activity in Timbuktu, the aim of which was to 'inform the population about the Court and the cases concerning Mali', notably the *Al Mahdi* Judgment and the *Al Hassan* trial.²² The references the Defence impugns are on the first page of the relevant article, before

¹⁹ Request, ICC-01/12-01/18-2473-Conf, para. 34.

²⁰ Appeals Chamber, *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the Request for Disqualification of the Prosecutor, 12 June 2012, ICC-01/11-01/11-175 (the '*Gaddafi* Disqualification Decision'), para. 27; Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, 31 January 2011, ICC-01/04-01/10-51, para. 10.

²¹ *Gaddafi* Disqualification Decision, ICC-01/11-01/11-175, para. 28.

²² MLI-D28-0006-9214 at 9215.

any reference to Mr Al Hassan is being made.²³ The Chamber also recalls in this regard that Trial Chamber VIII found that Ansar Dine and AQIM occupied Timbuktu and that crimes within the jurisdiction of the Court were committed.²⁴ Considering the article at hand in this context, the Chamber finds that general reference to the ‘occupation’ of Timbuktu or the commission of crimes do not amount to a breach of Mr Al Hassan’s presumption of innocence.²⁵

13. The Defence also avers that ‘the comment that community members were “shocked” by the good conditions of Mr Al Hassan’s detention is suggestive that he is deserving of punishment of these crimes’. The Chamber observes that the relevant statement appears in the section where the article records the reactions of the participants and states that ‘[h]owever, some [participants] said that they were shocked at the “good conditions” in which the accused are held at the detention centre in The Hague’.²⁶ The Chamber notes that this comment originates from the participants to the outreach activity, rather than an organ of the Court. Further, the Chamber considers the Defence’s interpretation of the community members’ remarks highly speculative. The Chamber notes that the participants may have been referring to the general condition of detention of accused persons before the Chamber, rather than to Mr Al Hassan specifically. Additionally, had they meant to refer to Mr Al Hassan, it is not clear to the Chamber why such a reference would be ‘suggestive that he is deserving of punishment of these crimes’. Given what was reported in the article, the Defence’s arguments is entirely conjectural. Consequently, the Chamber dismisses the Defence’s argument that the publication of this statement is

²³ See MLI-D28-0006-9214 at 9214.

²⁴ Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171, in particular paras 31, 53.

²⁵ The Chamber notes that the Defence also submits that article MLI-D28-0006-9206 ‘appears to conflate the Al-Mahdi judgment and the case as against Mr Al Hassan’ when stating that the destruction of protected historic and religious buildings ‘was found to be a war crime when the Court prosecuted the offence for the first time’ (Request, ICC-01/12-01/18-2473-Conf, para. 34 *referring to* MLI-D28-0006-9206 at 9210). The Chamber sees no conflation in the relevant excerpt or in the article itself and finds that the Defence has failed to provide sufficient reasons in support of its argument. Having reviewed its content, the Chamber also finds that the rest of article MLI-D28-0006-9206 does not violate Mr Al Hassan’s presumption of innocence.

²⁶ MLI-D28-0006-9214 at 9216.

suggestive that Mr Al Hassan should be punished for crimes he is alleged to have committed.

14. For the aforementioned reasons, the Chamber rejects the request for a finding of a fair trial violation. Considering that the remainder of the Request is premised on a finding of a fair trial violation, in light of the aforementioned conclusion, the Chamber considers it unnecessary to address these submissions further.²⁷

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

RECLASSIFIES the Response (ICC-01/12-01/18-2477-Conf) to public.

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 Wednesday, 22 March 2023

At The Hague, The Netherlands

²⁷ The Chamber also notes that the Defence alleges that it has not been invited by the Outreach Unit to participate in any outreach missions in Mali, despite a previous communication indicating that the Defence would be able to participate in subsequent outreach activities (Request, ICC-01/12-01/18-2473-Conf, paras 7, 23). The Chamber considers that it is neither appropriate nor necessary for adjudicating the Request to assess whether the Outreach Unit should have invited the Defence to its missions.