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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 reviewing the measures restricting Mr Al Hassan's contacts whilst in
detention following the closure of the submission of evidence**

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

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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 21(3), 43(6), 64, 67 and 68 of the Rome Statute (the ‘Statute’), Rule 18 of the Rules of Procedure and Evidence (the ‘Rules’), Regulations 23*bis*, 90-92 and 99-101 of the Regulations of the Court (the ‘Regulations’) and Regulations 169, 173-175, 179-180, 183-185 and 187 of the Regulations of the Registry, issues the following ‘Decision reviewing the measures restricting Mr Al Hassan’s contacts whilst in detention following the closure of the submission of evidence’.

I. Background

1. Pre-Trial Chamber I imposed a series of restrictions on Mr Al Hassan’s contacts and accesses in detention during the pre-trial phase of the case.¹

¹ 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-tENG (confidential *ex parte*, only available to the Prosecution and the Defence); 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-tENG (confidential *ex parte*, only available to the Prosecution; a confidential *ex parte* redacted version available to the Defence and the Prosecution was filed on that same date, ICC-01/12-01/18-93-Conf-Exp-Red-tENG); Third Decision on the Restrictions on Contact with Other Persons during the Pre-Trial Proceedings, 20 July 2018, ICC-01/12-01/18-95-Conf-Exp-tENG (confidential *ex parte*, only available to the Prosecution and the Registrar; a confidential *ex parte* redacted version available to the Defence, the Prosecutor and the Registrar was filed on 8 August 2018, ICC-01/12-01/18-95-Conf-Exp-Red-tENG); Fourth Decision on the Measures Restricting Mr Al Hassan’s Non-Privileged Contact, 9 May 2019, ICC-01/12-01/18-340-Conf-Exp-tENG (confidential *ex parte*, only available to the Registry; confidential *ex parte* redacted versions were filed on that same date; and a public redacted version was filed on 5 July 2019, ICC-01/12-01/18-340-Red3); Decision following the Registry’s Filing of Reports concerning Two Alleged Incidents that Occurred during Active Monitoring of Mr Al Hassan’s Telephone Communications, 7 June 2019, ICC-01/12-01/18-367-Conf-Exp-tENG (confidential *ex parte*, only available to the Chamber; confidential *ex parte* redacted versions were filed on that same date, ICC-01/12-01/18-367-Conf-Exp-Red-tENG); Decision Following Filing by the Defence of an Urgent Request to be Granted Conjugal Visits and for the Variation of Arrangements for Mr Al Hassan’s Family Visit, 7 June 2019, ICC-01/12-01/18-368-Conf-Exp-tENG (confidential *ex parte*, only available to the Registrar and the Detention Section; confidential *ex parte* redacted versions were filed on that same date, ICC-01/12-01/18-368-Conf-Exp-Red2-tENG, ICC-01/12-01/18-368-Conf-Exp-Red3-tENG, ICC-01/12-01/18-368-Conf-Exp-Red4-tENG); Decision Following an Urgent Request filed by the Defence for the Single Judge to Vary his Decision to Prohibit Conjugal Visits, 18 June 2019, ICC-01/12-01/18-378-Conf-Exp-tENG (confidential *ex parte*, only available to the Defence and the Registrar; a confidential *ex parte* redacted version available to the Defence, the Prosecution and the Registrar was filed on that same date, ICC-01/12-01/18-378-Conf-Exp-Red). *See also* Décision relative à la requête du Greffier sur les communications vidéo au centre de détention, 1 November 2019, ICC-01/12-01/18-481-Conf (reclassified as confidential on 14 April 2020).

2. On 11 June 2020, this Chamber issued a decision (the ‘First Restrictions Decision’)² ordering that the restrictions, with some slight adjustments,³ remain in place until the end of the testimony of the last witness called by the Office of the Prosecutor (the ‘Prosecution’).⁴
3. Subsequently, the Chamber exceptionally varied the restrictions so as to facilitate additional communication on a temporary basis between Mr Al Hassan and his family following the death of his daughter,⁵ and during Eid,⁶ as well as when ongoing telephone network problems were observed in Mali as of August 2021.⁷ The Chamber also exceptionally varied the restrictions so as to permit private visits between Mr Al Hassan and his wife during a family visit in November 2021,⁸ as well as longer family visiting hours during the visit.⁹
4. On 20 October 2021, considering the then forthcoming end of the Prosecution case, the Chamber set a timetable for submissions to assist it in deciding on the continuation, if any, of the restrictions past the end of the testimony of the last Prosecution witness.¹⁰
5. On 31 January 2022, the Chamber issued a decision in which it lifted several of the restrictions imposed on Mr Al Hassan and determined that the amended

² ICC-01/12-01/18-871-Conf-Exp (confidential *ex parte*, available only to the Registry; two confidential redacted *ex parte* versions were filed simultaneously, one available only to the Defence and Registry, ICC-01/12-01/18-871-Conf-Exp-Red and one available only to the Prosecution and Registry, ICC-01/12-01/18-871-Conf-Exp-Red2; a confidential redacted version was filed on 2 November 2021, ICC-01/12-01/18-871-Conf-Red3; a public redacted version was filed on 4 November 2021, ICC-01/12-01/18-871-Red4). *See also* Decision on Mr Al Hassan’s restrictions and accesses while in detention, 21 January 2020, ICC-01/12-01/18-557-Conf-Exp (confidential *ex parte*, available only to the Registry, confidential *ex parte* redacted versions were issued simultaneously; a public redacted version was filed on 14 February 2020).

³ First Restrictions Decision, ICC-01/12-01/18-871-Conf-Red3, para. 44. *See also* Decision on interim release, 5 May 2020, ICC-01/12-01/18-786-Conf, para. 39(d).

⁴ First Restrictions Decision, ICC-01/12-01/18-871-Conf-Red3, para. 41.

⁵ Emails from the Chamber, 15 December 2020, at 13:20 and 16 December 2020, at 15:12, authorising a combination of active and passive monitoring for two weeks.

⁶ Email from the Chamber, 11 May 2021 15:38, authorising a one-off passively monitored phone call.

⁷ Emails from the Chamber, 10 August 2021, at 17:57 and 22 October 2021, at 09:09, authorising a flexible approach to actively monitored calls.

⁸ Decision on Defence request for exceptional variation of detention conditions, 26 July 2021, ICC-01/12-01/18-1611-Conf (the ‘Private Visits Decision’).

⁹ Email from the Chamber, 12 November 2021, at 15:21, authorising a combination of active and passive monitoring for family visits so as to facilitate longer visiting hours to the extent possible.

¹⁰ Order setting timetable in relation to the restrictions on Mr Al Hassan’s contacts in detention, ICC-01/12-01/18-1827.

restrictions should remain in place until the end of the evidentiary phase of the case (the ‘Second Restrictions Decision’).¹¹ Beside the active monitoring of all non-privileged correspondence, the restrictions to remain in place were as follows (the ‘Restrictions’):¹²

- restrictions to persons Mr Al Hassan may receive as visitors or call on the phone (limited list of individuals whose identity and contact details have been duly checked in advance by the Victims and Witnesses Unit (the ‘VWU’), with the exception of privileged communications);
- VWU to carry out *post-facto* analysis of the recordings of Mr Al Hassan’s monitored conversations on a sporadic basis for the purpose of identifying any risk or threat to potential witnesses;
- prohibition on having telephone calls or correspondence in obscure or coded language or in a language other than French, Arabic or Tamasheq; and
- prohibition on discussing the present case in any non-privileged communication.

Mr Al Hassan is also authorised to receive pre-recorded videos of his family members, as well as to send pre-recorded videos of himself to his family.¹³

6. On 22 June 2022, the Chamber granted a Defence request and confirmed that Mr Al Hassan’s telephone calls with two individuals who had been added to his list of contacts after the issuance of the Second Restrictions Decision would be governed by the Restrictions and therefore need not be actively monitored.¹⁴
7. On 8 February 2023, the Chamber declared the submission of evidence closed.¹⁵

¹¹ Decision reviewing the measures restricting Mr Al Hassan’s contacts in detention, ICC-01/12-01/18-2100-Conf.

¹² Second Restrictions Decision, ICC-01/12-01/18-2100-Conf, paras 1, 20-33.

¹³ Second Restrictions Decision, ICC-01/12-01/18-2100-Conf, para. 25; First Restrictions Decision, ICC-01/12-01/18-871-Conf-Red3, para. 19.

¹⁴ Decision on request for lifting of the active monitoring of telephone calls with two individuals on Mr Al Hassan’s list of non-privileged contacts, ICC-01/12-01/18-2268-Conf-Exp (confidential *ex parte*, only available to the Defence and the Registry; a confidential redacted version was filed simultaneously).

¹⁵ Declaration of the closure of the submission of evidence, ICC-01/12-01/18-2468.

8. On 30 March 2023, the Chamber issued an order setting a timetable for observations to assist it in deciding on the continuation, if any, of the Restrictions and confirmed that the Restrictions remain in force unless ordered otherwise by the Chamber.¹⁶
9. On 20 April 2023, the Prosecution filed its observations, requesting the continuation of the Restrictions ‘until after the end of any appellate proceedings and/or the Accused’s departure from the ICC Detention Centre’ (the ‘Prosecution Observations’).¹⁷ The Prosecution submits that there continues to be an objectively justifiable risk to the security of witnesses, despite the conclusion of the evidentiary phase of the proceedings, including retaliatory attacks against and abductions of witnesses and others who have cooperated with the Court.¹⁸ Specifically in this regard, the Prosecution refers to: (i) the continued ability of armed groups to target and harm persons perceived as cooperating with the Malian authorities and international entities as well as other civilians, as evidenced by recent attacks and other events;¹⁹ (ii) Mr Al Hassan’s prior violations of the contact restrictions. In this regard, the Prosecution submits that [REDACTED], and that the accused’s prior violations of the Restrictions indicate a risk he would use the opportunity of a lifting of the Restrictions to reveal confidential information concerning witnesses to non-privileged third parties;²⁰ and (iii) [REDACTED].²¹ Finally, the Prosecution submits that maintaining the Restrictions is the least restrictive possible means of ensuring the protection of witnesses and the integrity of the proceedings.²²

¹⁶ Email from the Chamber, 30 March 2023, at 09:16.

¹⁷ Prosecution’s request to maintain restrictions on Mr Al Hassan’s contacts and access whilst in detention, 20 April 2023, ICC-01/12-01/18-2486-SECRET-Exp (Secret, *ex parte*, only available to the Prosecution and the Registry; a confidential, *ex parte*, redacted version, only available to the Prosecution, the Defence and the Registry was filed on 25 April and reclassified to confidential on 2 May 2023; with Secret, *ex parte*, annex A, only available to the Prosecution and the Registry, and annex B, initially filed as Secret, *ex parte*, only available to the Prosecution and the Registry, and reclassified to confidential on 3 May 2023), para. 1.

¹⁸ Prosecution Observations, ICC-01/12-01/18-2486-Conf-red, paras 15-21.

¹⁹ Prosecution Observations, ICC-01/12-01/18-2486-Conf-red, paras 2-6, 14. and generally 17-22; ICC-01/12-01/18-2066-Conf-Exp-AnxA.

²⁰ Prosecution Observations, ICC-01/12-01/18-2486-Conf-red, paras 22-29.

²¹ Prosecution Observations, ICC-01/12-01/18-2486-SECRET-Exp, paras 30-33.

²² Prosecution Observations, ICC-01/12-01/18-2486-Conf-Exp-Red, paras 40-52.

10. On the same date, the Registry filed its observations (the ‘Registry Observations’).²³ The Registry notably reports that: (i) the current orders and monitoring regime applicable to Mr Al Hassan are clear and it has no challenges in their implementation; (ii) it has no incident to report since its last report on the implementation of the Restrictions; and (iii) in carrying out the *post-facto* analysis of the recordings of Mr Al Hassan’s phone calls, the VWU did not identify any element of concern related to victims and witnesses.²⁴
11. On 3 May 2023, the Defence submitted a request seeking the lifting of redactions applied to the Prosecution Observations and access to its *ex parte* annex (the ‘Request for Lifting of Redactions’).²⁵ The Defence submitted that the extensive redactions prevented it from being heard in connection with a substantial portion of the Prosecution’s justification for maintaining restrictions and was contrary to the principle of open adversarial justice.²⁶
12. On 4 May 2023, having received observations from the Prosecution and the Registry,²⁷ the Single Judge partially granted the Request for Lifting of Redactions and instructed the Prosecution to lift some of the contested redactions as well as to file a redacted version of annex A to the Prosecution Observations (the ‘Redactions Decision’).²⁸ The Single Judge also granted an extension for the Defence to file its observations on the continuation, if any, of the Restrictions, pending lifting of the redactions.²⁹
13. On 12 May 2023, the Defence filed its observations requesting that the Restrictions be lifted in full (the ‘Defence Observations’).³⁰ It submits that the Prosecution fails to demonstrate: (i) an objectively identifiable risk that Mr Al Hassan’s contacts with family and friends will generate a risk to any witnesses or

²³ Registry’s Observations Pursuant to the Order Concerning Review of Contact Restrictions Imposed on Mr Al Hassan, ICC-01/12-01/18-2487-Conf.

²⁴ Registry Observations, ICC-01/12-01/18-2487-Conf, paras 8-9.

²⁵ Email from the Defence, 3 May 2023, at 11:49.

²⁶ Email from the Defence, 3 May 2023, at 11:49.

²⁷ Email from the Prosecution, 4 May 2023, at 13:05; Email from the Registry, 4 May 2023, at 13:48 (*ex parte*, only available to the Chamber and the Prosecution).

²⁸ Email from the Chamber, 4 May 2023, at 20:38.

²⁹ Email from the Chamber, 4 May 2023, at 20:38.

³⁰ Defence observations on monitoring regime, ICC-01/12-01/18-2494-Conf-Exp (confidential, *ex parte*, only available to the Defence and the Registry).

the integrity of the proceedings; (ii) that it is necessary to impose additional measures – above and beyond the detention unit vetting and passive monitoring processes – to address such risks; and (iii) that it is disproportionate to maintain such Restrictions, in light of the length of Mr Al Hassan’s pre-trial detention and the current stage of the proceedings.³¹ The Defence notes that Mr Al Hassan has demonstrated his compliance throughout his detention and the incidents of breach of restrictions cited by the Prosecution fail to justify the imposition of additional restrictions as they do not evidence any attempt by Mr Al Hassan to contravene the applicable regulations.³² Further, the Defence submits that the Prosecution’s reliance on the activities of the JNIM and the general security situation in Mali is misplaced and does not demonstrate any risk linked to Mr Al Hassan or the present trial proceedings.³³ The Defence also submits that the Regulations and the Regulations of the Registry contain sufficient safeguards to protect the integrity of the proceedings and that the need for Mr Al Hassan to maintain meaningful family contacts is of heightened importance given that he will have less frequent contacts with Defence team members.³⁴ Whilst emphasising the passage of time and the current stage of the proceedings, the Defence also observes that all non-standard contact restrictions were lifted in recent trial proceedings before the Court after the closure of trial related evidentiary proceedings.³⁵

II. Confidentiality and the use of *ex parte* submissions

14. The Chamber is cognisant that the Prosecution Observations, and annex A thereto, were filed as *ex parte*, and only a redacted version has been provided to the Defence. In the Redactions Decision, the Single Judge lifted part of these redactions, whilst confirming that the remaining redactions were justified. The Defence avers that ‘[i]t would be contrary to the right to adversarial proceedings to rely on information that remains redacted from the Defence’.³⁶

³¹ Defence Observations, ICC-01/12-01/18-2494-Conf-Exp, paras 1, 3.

³² Defence Observations, ICC-01/12-01/18-2494-Conf-Exp, paras 2, 5, 9-15.

³³ Defence Observations, ICC-01/12-01/18-2494-Conf-Exp, paras 6-8.

³⁴ Defence Observations, ICC-01/12-01/18-2494-Conf-Exp, paras 16-17.

³⁵ Defence Observations, ICC-01/12-01/18-2494-Conf-Exp, paras 18-21.

³⁶ Defence Observations, ICC-01/12-01/18-2494-Conf-Exp, para. 8.

15. Pursuant to Regulation 101(3) of the Regulations, '[t]he detained person shall be informed of the Prosecutor's request [for contact restrictions] and shall be given the opportunity to be heard or to submit his or her views'. The Chamber nonetheless recalls that the fact that information may be withheld from a detained person in proceedings under Regulation 101 of the Regulations is not *per se* unfair.³⁷ However, the Chamber must consider any *ex parte* evidence bearing in mind that the detained person has not had an opportunity to challenge said evidence.³⁸ Where reliance in a decision is placed on redacted or *ex parte* material, the detained person must be able to understand, to the extent possible, the basis for the decision from the reasons discerned from the materials *in toto* available to him or her.³⁹
16. Turning to the case at hand, the Chamber has carefully balanced the rights of Mr Al Hassan against the need to maintain redactions and is satisfied that the redactions confirmed in the Redactions Decision remain strictly necessary.⁴⁰ The Prosecution is nonetheless instructed to continually assess the necessity of these redactions, particularly in relation to any developments in light of the document mentioned at footnote 39 of the Prosecution Observations.
17. Where reliance is made on *ex parte* information, the Chamber has duly considered Mr Al Hassan's inability to rebut such information.
18. The present decision has been filed on a confidential basis. As envisaged in the Second Restrictions Decision, the Chamber is minded to issue public versions of the present decision and the Second Restrictions Decision. To this end, the parties are instructed to file, in consultation with each other and the Registry, public

³⁷ Redactions Decision, email from the Chamber, 4 May 2023, at 20:38; Appeals Chamber, *The Prosecutor v. Mahamat Said Abdel Kani*, Public Redacted Version of 'Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled 'Decision on the "Prosecution's Request for Extension of Contact Restrictions"', 17 May 2022, ICC-01/14-01/21-111-Red (the '*Said* OA Judgment'), para. 69; Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on Mr Bosco Ntaganda's appeal against the decision reviewing restrictions on contacts of 7 September 2016, ICC-01/04-02/06-1817-Red (the '*Ntaganda* OA 4 Judgment'), 8 March 2017, ICC-01/04-02/06-1817-Red, para. 89.

³⁸ *Said* OA Judgment, ICC-01/14-01/21-111-Red, para. 69; *Ntaganda* OA 4 Judgment, ICC-01/04-02/06-1817-Red, para. 89.

³⁹ *Said* OA Judgment, ICC-01/14-01/21-111-Red, para. 69.

⁴⁰ See Redactions Decision, email from the Chamber, 4 May 2023, at 20:38.

redacted versions of the underlying filings⁴¹ within four weeks of notification of the present decision.

19. Pursuant to Regulation 23*bis* of the Regulations, the Chamber also instructs the Registry to reclassify ICC-01/12-01/18-2268-Conf-Red and ICC-01/12-01/18-2487-Conf to public.

III. Analysis on the continuation of the Restrictions

20. The Chamber incorporates by reference the applicable legal framework.⁴² The Chamber also reiterates some key principles:⁴³ The Chamber recalls its obligation to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses, as well as to preserve evidence and the integrity of the proceedings. Detainees' rights to communicate with others outside the Detention Centre are not absolute; however, any restrictions imposed must be the least restrictive possible to the rights of the detained person. Contact with the outside world and visits are imperative for a detained person's well-being and any restrictions imposed on the contact of the accused person must be justified and proportionate, in accordance with internationally recognised human rights, as provided in Article 21(3) of the Statute. 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.
21. In line with its previous approach, in reviewing the current restrictions regime, the Chamber will assess whether: (i) there exists an objectively justifiable risk that warrants continuation of the Restrictions; and (ii) the measures are necessary and proportionate to the legitimate aim pursued.⁴⁴

⁴¹ ICC-01/12-01/18-2066-Conf-Red; ICC-01/12-01/18-2087-Conf; ICC-01/12-01/18-2486-Conf-Red; ICC-01/12-01/18-2487-Conf.

⁴² First Restrictions Decision, ICC-01/12-01/18-871-Red4, paras 12-17. *See also* Private Visits Decision, ICC-01/12-01/18-1611-Conf, para. 7.

⁴³ Second Restrictions Decision, ICC-01/12-01/18-2100-Conf, para. 9; First Restrictions Decision, ICC-01/12-01/18-871-Red4, paras 14-15, 17; Private Visits Decision, ICC-01/12-01/18-1611-Conf, para. 9.

⁴⁴ Second Restrictions Decision, ICC-01/12-01/18-2100-Conf, para. 11; First Restrictions Decision, ICC-01/12-01/18-871-Red4, para. 25. *See also* Private Visits Decision, ICC-01/12-01/18-1611-Conf, para. 7.

22. In conducting this assessment, the Chamber shall have particular regard to developments occurring since the Second Restrictions Decision was issued in January 2022.⁴⁵

A. The existence of an objectively justifiable risk

23. The Chamber recalls its detailed findings in the First Restrictions Decision on the existence of an objectively justifiable risk linked to Mr Al Hassan's communications that warranted maintaining restrictions to his non-privileged contacts until the end of the last Prosecution witness's testimony.⁴⁶ These findings were notably based on consideration of: (i) the general security situation in Mali, including the exceptional and extreme risks to persons perceived as cooperating with international entities posed from the relevant armed groups;⁴⁷ (ii) the accused's own association with those groups;⁴⁸ (iii) the accused's conduct and that of his interlocutors, notably the fact that the accused had previously violated some of the Restrictions at the pre-trial stage of proceedings during his communications with one family member;⁴⁹ (iv) the then stage of the proceedings (just before the start of the trial); and (v) the situation arising out of the COVID-19 pandemic and the resulting restrictions on the Court's ability to act in terms of witness protection.

24. It also recalls that, in the Second Restrictions Decision, the Chamber noted the extreme risks to witnesses should their identities be made known to the armed groups operating in Mali, and the grave general security situation in Mali that still persist.⁵⁰ Nonetheless, giving particular regard to the stage of the trial, where the submission of evidence has concluded, the Chamber considered that the risk of interference with Prosecution witnesses and, consequently, the risk to their safety, had significantly diminished at that stage of the proceedings.⁵¹ The Chamber found that, while still existing, the objectively justifiable risks associated with the

⁴⁵ See *similarly* Second Restrictions Decision, ICC-01/12-01/18-2100-Conf, para. 12; First Restrictions Decision, ICC-01/12-01/18-871-Red4, para. 25.

⁴⁶ First Restrictions Decision, ICC-01/12-01/18-871-Conf-Exp, paras 27-38.

⁴⁷ First Restrictions Decision, ICC-01/12-01/18-871-Conf-Exp, paras 27-29.

⁴⁸ First Restrictions Decision, ICC-01/12-01/18-871-Conf-Exp, para. 30.

⁴⁹ First Restrictions Decision, ICC-01/12-01/18-871-Red4, para. 37.

⁵⁰ Second Restrictions Decision, ICC-01/12-01/18-2100-Conf, para. 14.

⁵¹ Second Restrictions Decision, ICC-01/12-01/18-2100-Conf, para. 15.

accused's contacts had diminished since the Chamber's previous review of the monitoring regime, especially when considering Mr Al Hassan's approved list of non-privileged contacts.⁵²

25. The Chamber considers that the grave general security situation in Mali continues to persist.⁵³ Nonetheless, considering that the evidentiary stage in the present trial proceedings has concluded, the Chamber finds that any potential risks to witnesses have significantly diminished since its previous assessment.
26. In relation to Mr Al Hassan's own conduct, the Prosecution refers, *inter alia*, to incidents involving Mr Al Hassan during the pre-trial phase in 2018 and 2019.
27. With respect to the first breach cited by the Prosecution, the Chamber recalls that on 7 September 2018, Mr Al Hassan briefly used Arabic in a conversation that was supposed to be held in Tamasheq and discussed his views towards his proceedings before the Court.⁵⁴ While finding that the applicable contact restrictions had been breached, the Single Judge of Pre-Trial Chamber I was of the view that 'there is no proof that this error of judgment is tinged with bad faith'.⁵⁵ The Chamber notes Mr Al Hassan's explanation at that time – that this was due to a misunderstanding that 'he could inform his family, in general terms and without reference to confidential matters, as to his current circumstances so as to reassure them'⁵⁶ – and notes that it has received no reports of similar breaches since then.
28. The second incident concerns a conversation between Mr Al Hassan and his family member which was reported to Pre-Trial Chamber I by the VWU on 12

⁵² Second Restrictions Decision, ICC-01/12-01/18-2100-Conf, paras 16-17.

⁵³ See Annex I to the Third Registry Report on the Security Situation in Mali, 6 May 2022, ICC-01/12-01/18-2215-Conf-AnxI.

⁵⁴ Registry Report on an incident that occurred during the active monitoring of Mr Al Hassan's telephone communications, 25 October 2018, ICC-01/12-01/18-162-Conf-Exp, para. 9. The Registry was of the view that this went beyond what can be considered normal 'code-switching' within the Tamasheq language. *See contra* Defence Observations, ICC-01/12-01/18-2494-Conf-Exp, para. 15.

⁵⁵ Decision following the Report filed by the Registrar concerning an Incident that Occurred during Active Monitoring of Mr Al Hassan's Telephone Communications, 19 November 2018, ICC-01/12-01/18-186-Conf-Exp-tENG (English translation filed on 19 January 2021), para. 29.

⁵⁶ Defence observations to the Registry report on an incident that occurred during the active monitoring of Mr Al Hassan's telephone communications, 5 November 2018, ICC-01/12-01/18-172-Conf-Exp, para. 11.

April 2019.⁵⁷ The VWU expressed concern that Mr Al Hassan may have [REDACTED] when he recommended to his family member to [REDACTED].⁵⁸ In the same report referenced by the Prosecution, the VWU also added that ‘[REDACTED]’.⁵⁹ The Chamber further notes the submissions made by the Defence on this incident, in particular that Mr Al Hassan ‘[REDACTED]’.⁶⁰

29. The Chamber recalls its previous determination that, considering the stage of the proceedings at that time, the incidents during the pre-trial proceedings demonstrated potential risks that might arise for the safety of witnesses if further breaches are committed in the future.⁶¹ Nonetheless, the Chamber observes that since April 2019, the Registry has reported no incidents involving Mr Al Hassan’s communication. While refraining from prohibited conduct should be the norm and compliance with the applicable restrictions does not *per se* mean that the risks warranting contact restrictions have diminished or disappeared,⁶² the lack of subsequent breaches of the restrictions bears relevance in assessing the weight to be given to the aforementioned incidents at present. The Chamber has also considered the nature of the incidents in its assessment of an objectively justifiable risk.
30. The Chamber considers that irrespective of their gravity, breaches of restrictions cannot be condoned and any such breaches may be considered in assessing the need for continuation of contact restrictions. However, in light of the foregoing considerations, the Chamber does not consider substantiated the Prosecution’s position that these incidents support the proposition that ‘if the Accused’s contacts with third parties are not subject to restrictions, he may, intentionally or

⁵⁷ Registry’s additional Report on the two incidents that occurred during the active monitoring of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud’s telephone conversation, ICC-01/12-01/18-307-Conf-Exp.

⁵⁸ Registry’s additional Report on the two incidents that occurred during the active monitoring of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud’s telephone conversation. ICC-01/12-01/18-307-Conf-Exp, para. 20.

⁵⁹ Registry’s additional Report on the two incidents that occurred during the active monitoring of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud’s telephone conversation, ICC-01/12-01/18-307-Conf-Exp, para. 20.

⁶⁰ Defence Observations, ICC-01/12-01/18-2494-Conf-Exp, paras 9-13.

⁶¹ First Restrictions Decision, ICC-01/12-01/18-871-Red4, paras 36-37.

⁶² Second Restrictions Decision, ICC-01/12-01/18-2100-Conf, para. 16; Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on Mr Ngaïssona’s Restrictions on Contacts and Communications in Detention, 16 February 2021, ICC-01/14-01/18-484-Red, para. 24.

inadvertently, reveal to family members and other third parties confidential information relating to witnesses, with consequential risks to the latter's security'.⁶³ The Chamber notes, in particular, that throughout the present trial proceedings, including during the exceptional relaxations of the applicable Restrictions, no incidents were reported to the Chamber.⁶⁴ The Registry has previously reported that Mr Al Hassan has 'a solid understanding and respect for the restrictions measures' and that '[h]is conversations are generally on personal matters and he talks to a limited number of individuals'.⁶⁵

31. The Chamber has also considered the information provided by the Chamber on an *ex parte* basis concerning [REDACTED].⁶⁶ Nevertheless, in light of its finding in the preceding paragraph, the Chamber considers that this information only has marginal weight in assessing the risks associated with Mr Al Hassan's contacts.
32. In light of the foregoing considerations, the Chamber finds that there remains an objectively justifiable risk to the safety of witnesses who have testified in the present proceedings, in light of the general security situation in Mali. However, noting the conclusion of the evidentiary phase of the present proceedings as well as Mr Al Hassan's conduct whilst being subject to the contact restrictions, the Chamber considers that the said risk has significantly diminished since its previous assessment in the Second Restrictions Decision.

B. Necessity and proportionality of the restrictions

33. In this context, and in assessing the continuing necessity and proportionality of maintaining the Restrictions at this stage of the trial, the Chamber gives particular regard to the now significant passage of time since the restrictions on contact were first imposed, noting that the Restrictions have been in place for over five years.⁶⁷ The Chamber is mindful that the passage of time does not *per se* mean that the risk in question no longer exists and/or that restrictions have become

⁶³ Prosecution Observations, ICC-01/12-01/18-2486-Conf-Red, para. 29.

⁶⁴ See *similarly* Second Restrictions Decision, ICC-01/12-01/18-2100-Conf, para. 16.

⁶⁵ Registry's Observations pursuant to the "Order setting timetable in relation to the restrictions on Mr Al Hassan's contacts in detention", 20 October 2021, ICC-01/12-01/18-1827, 10 December 2021, ICC-01/12-01/18-2064-Red, para. 8.

⁶⁶ Prosecution Observations, ICC-01/12-01/18-2486-SECRET-Exp, paras 34-39.

⁶⁷ See *similarly* Second Restrictions Decision, ICC-01/12-01/18-2100-Conf, para. 18.

disproportionate.⁶⁸ Further, as the Defence concedes,⁶⁹ decisions issued by other Trial Chambers lifting contact restrictions following the conclusion of the evidentiary phase or the testimony of the last Defence witness are not determinative, as any decision on contact restrictions must be tailored to the specifics of each case.⁷⁰ Nonetheless, the Chamber recalls the Appeals Chamber's finding that the passage of time is a factor that could become more significant as more time elapses and that the necessity and proportionality of restrictions must be carefully assessed in this light.⁷¹

34. The Chamber recalls that irrespective of the continuation of the Restrictions, the standard monitoring measures under the Regulations of the Registry apply. In particular, pursuant to Regulations 169 and 170 of the Regulations of the Registry, the Chief Custody Officer (the 'CCO') will continue to review all incoming and outgoing mails and packages and take appropriate action if he considers that there are, amongst other things, risks of interference with witnesses. Regulation 174(1) of the Regulations of the Registry stipulates that '[a]ll telephone conversations of detained persons shall be passively monitored, other than those with counsel, assistants to counsel entitled to legal privilege, diplomatic or consular representatives, representatives of the independent inspecting authority, or representatives of the Registry, a Chamber or the Presidency' and the CCO may also actively monitor telephone calls at random pursuant to Regulation 175(1) of the Regulations of the Registry. Regulation 173 of the Regulations of the Registry also prescribes the Registrar's and the CCO's capacity to restrict telephone calls of detained persons.
35. In light of its aforementioned finding that any existing risk has significantly diminished, the Chamber considers that the standard monitoring regime, as recalled above, is sufficient to appropriately mitigate any residual risks and to ensure the safety of witnesses, the preservation of evidence and the integrity of

⁶⁸ *Ntaganda* OA 4 Judgment, ICC-01/04-02/06-1817-Red, para. 72.

⁶⁹ Defence Observations, ICC-01/12-01/18-2494-Conf-Exp, para. 20.

⁷⁰ Trial Chamber IX, *The Prosecutor v. Domini Ongwen*, Decision on the Defence Request for Immediate Release and the Communication Restrictions Applying to the Accused, 17 April 2020, ICC-02/04-01/15-1733-Corr, para. 33.

⁷¹ *Ntaganda* OA 4 Judgment, ICC-01/04-02/06-1817-Red, para. 72.

the proceedings. Conversely, the Chamber considers that maintaining the Restrictions is no longer necessary nor proportionate in the present circumstances. Accordingly, the Chamber finds that the Restrictions shall be lifted.⁷²

36. Nevertheless, should any incident be reported with respect to Mr Al Hassan's communications, the Chamber will immediately order any measures it considers necessary to address the matter. As per the Chamber's previous directions,⁷³ to allow the Chamber to take prompt action if and where necessary, the Registry is instructed to report any incidents or challenges in relation to Mr Al Hassan's communications as soon as they arise. The Prosecution may also seize the Chamber, should it consider that there has been a change of circumstances necessitating a review of the present decision.
37. The Chamber emphasises that, notwithstanding the lifting of the Restrictions, Mr Al Hassan remains prohibited from disclosing any confidential information pertaining to the case, including the identity of witnesses.⁷⁴ The Chamber also recalls that, pursuant to paragraph 27 of the Contact Protocol, Mr Al Hassan is prohibited from contacting any individual who has been called as a witness by the other party or participants.⁷⁵ The Defence is instructed to ensure that Mr Al Hassan fully understands the contents of the present decision and the scope of prohibited conduct. It is further instructed to explain that restrictions could be reinstated should Mr Al Hassan engage in any prohibited conduct or should there otherwise be a change of circumstances.

⁷² The Chamber considers that the ability for Mr Al Hassan to receive pre-recorded videos of his family members, as well as to send pre-recorded videos of himself to his family, shall remain in place.

⁷³ First Restrictions Decision, ICC-01/12-01/18-871-Red4, para. 60.

⁷⁴ See Annex 2 to the Decision on the 'Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant', the 'Dual Status Witness Protocol', and related matters, 19 March 2020, ICC-01/12-01/18-674-Anx2 (the 'Contact Protocol'), paras 6-9.

⁷⁵ Contact Protocol, ICC-01/12-01/18-674-Anx2, para. 27.

FOR THESE REASONS, THE CHAMBER HEREBY

ORDERS that the Restrictions be lifted immediately and Mr Al Hassan's contacts whilst in detention be governed by the standard monitoring measures applicable to detained persons;

INSTRUCTS the Defence to inform Mr Al Hassan in accordance with paragraph 37 of the present decision;

INSTRUCTS the Registry to reclassify ICC-01/12-01/18-2268-Conf-Red and ICC-01/12-01/18-2487-Conf to public; and

INSTRUCTS the parties to file public redacted versions of their filings, as specified in paragraph 18 of the present decision, within four weeks of notification of the present decision.

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, 24 May 2023

At The Hague, The Netherlands