

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**

Date: **14 July 2023**

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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

Public Redacted Version of “Defence Response to ‘Prosecution’s request to maintain restrictions on Mr Al Hassan’s contacts and access to others whilst in detention until the end of the case’, ICC-01/12-01/18-2087-Conf, 17 January 2022”

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction¹

1. The Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the ‘Defence’) respectfully requests that the Chamber reject the ‘Prosecution’s request to maintain restrictions on Mr Al Hassan’s contacts and access to others whilst in detention until the end of the case’² (‘Prosecution Request’), and significantly ease the restrictions on Mr Al Hassan’s contacts and accesses while in detention (‘Restrictions’) to permit unmonitored communication with those on his list of approved contacts.³ The Defence submits that the Restrictions are no longer necessary or proportionate, and are outweighed by the significant prejudice they cause to Mr Al Hassan.⁴ This is amplified by the long passage of time, the intense strain of the Covid-19 pandemic, and the lack of incentive to engage in any activity that would create any risk to witnesses or interfere with the integrity of the proceedings.⁵
2. The Prosecution’s last witness –[Redacted] – is due to complete her testimony by 25 January 2022⁶ and, as previously noted by the Chamber, the possibility of interference with Prosecution witnesses is therefore on the cusp of being entirely eradicated.⁷ Further, the Prosecution’s submissions relating to remaining risks to the safety of its witnesses are premised entirely on speculation and tenuous evidence that has been seriously undermined.⁸ The same holds in respect of the two witnesses who the Chamber has authorised to be called by the Legal Representatives of the Victims.⁹
3. The Defence accordingly submits that the present Restrictions are no longer necessary, and that lesser measures – namely the complete lifting or significant easing of the existing restrictions – must be explored to achieve the stated aim of safeguarding the integrity of the proceedings while upholding Mr Al Hassan’s fundamental human rights the fullest extent possible. The Defence does not object to the maintenance of the Restrictions until the conclusion of the testimony of the witnesses to be called by the

¹ This filing is submitted pursuant to the deadline fixed by Trial Chamber X in ICC-01/12-01/18-1827, para. 3(b).

² ICC-01/12-01/18-2066-Conf-Exp.

³ ICC-01/12-01/18-871-Conf-Exp, para. 41

⁴ [ICC-01/05-01/08-118-tENG](#), para. 20.

⁵ [ICC-01/04-01/07-322](#), p. 9; [ICC-01/05-01/08-310](#), paras 52, 56; [ICC-01/04-02/06-1817-Red](#), para. 71; *Dragojevic v. Croatia*, [68955/11](#), paras 83-84, 94.

⁶ Email from the Registry dated 5 January 2022 at 14:27.

⁷ ICC-01/12-01/18-871-Conf-Exp, para. 41.

⁸ ICC-01/12-01/18-2066-Conf-Exp, paras 13-30.

⁹ ICC-01/12-01/18-2063-Red, paras 22, 28 and Disposition.

Legal Representatives of Victims, on the understanding that this is to conclude by 11 February 2022.¹⁰

II. Classification

4. Pursuant to Regulation 23bis(2) of the Regulations of the Court, the present request is filed confidentially as it concerns confidential matters relating to security of individuals and responds to submissions of the same classification.

III. Submissions

5. Mr Al Hassan remains presumed innocent.¹¹ He has been detained since 2017, and under the jurisdiction of the ICC detention scheme since 31 March 2018.¹²
6. The presumption of liberty must be given full effect at the ICC. This presumption means that the burden of justifying restrictive measures rests with the Prosecution.¹³ It is necessary to establish the existence of reasonable grounds to believe that there is a risk that contacts between the defendant and third persons could engage any of the specific scenarios set out in Regulation 101(2) of the Regulations of the Court.¹⁴ Given that the belief as to the existence of a risk must be ‘reasonable’, the evidence relied upon to establish the existence of such a risk must be credible.¹⁵
7. As the Chamber has previously emphasised, ‘contact with the outside world and visits are imperative for a detained person’s well-being and consistent with international human rights standards.’¹⁶ These rights may be curtailed only to the extent that is strictly necessary and proportionate.¹⁷ As previously held by the Chamber:

[C]ontact with the outside world and visits are imperative for a detained person’s well-being. Restrictions imposed on the contact of the accused

¹⁰ ICC-01/12-01/18-2063-Red, para. 37; ICC-01/12-01/18-2084-Conf-AnxA, p. 2.

¹¹ Article 66.

¹² ICC-01/12-01/18-13-Conf-Exp-Red, paras 8 and 14.

¹³ [ICC-01/04-02/06-1817-Red](#), para. 93.

¹⁴ [ICC-01/04-02/06-1817-Red](#), para. 48.

¹⁵ *Prosecutor v. Seselj*, ‘[Decision on Appeal Against the Registrar’s Decision of 19 October 2006](#)’, 23 November 2006, para. 10: ‘the Registrar does have an obligation to satisfy himself that the request of the Prosecutor is not arbitrary and is made on the basis of credible information. It is not sufficient for the Registrar to take any such Request made by the Prosecutor at face value, rather the Registrar has an obligation to ensure that any request which would result in the infringement of the rights of the accused is justified and made on reasonable grounds.’

¹⁶ ICC-01/12-01/18-871-Conf-Exp-Red, para. 52.

¹⁷ Article 21(3).

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. While detainees' rights to communicate with others outside the Detention Centre are not absolute, the restrictions imposed must be the least restrictive possible to the rights of the detained person.¹⁸

8. Pre-Trial Chamber II has recalled 'that restrictions on contacts and communications under the Court's statutory framework must be (re-)assessed in light of concrete, specific and up-to-date information.'¹⁹
9. In line with the guiding principle of proportionality, it is incumbent on the Chamber to consider whether (i) the objective served by the restrictions on contact is outweighed by the prejudice caused to the defendant,²⁰ and (ii) less intrusive measures could achieve the same objective.²¹ The necessity and proportionality of restrictive measures must be assessed in light of the passage of time,²² and other developments that might lessen either the risk to witnesses, or the incentive to engage in such conduct. This is consistent with the ECtHR's directive that it is necessary to exercise effective and rigorous scrutiny over the duration, scope and necessity of such measures.²³ As noted by the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment:

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 safe-guarding his relationships with his family and close friends. The guiding principle should be the promotion of contact with the outside world;

¹⁸ ICC-01/12-01/18-871-Conf-Exp-Red, para. 15.

¹⁹ [ICC-01/14-01/18-176-Red2](#), para. 29, citing ICC-01/14-01/18-137-Conf-Exp.

²⁰ See [ICC-01/05-01/08-118-tENG](#), para. 20, where the Single Judge determined that 'although further monitoring measures may enable witnesses to be protected more effectively, extending such measures to include all of Mr Jean-Pierre Bemba's correspondence, visits, and contact with the other detained persons would make the conditions of his detention particularly difficult.'

²¹ [ICC-01/04-01/07-322](#), p. 9; [ICC-01/05-01/08-310](#), paras 52, 56.

²² [ICC-01/04-02/06-1817-Red](#), para. 71.

²³ *Dragojevic v. Croatia*, [68955/11](#), paras 83-84, 94.

any limitations upon such contact should be based exclusively on security concerns of an appreciable nature or resource considerations. The CPT wishes to emphasise in this context the need for some flexibility as regards the application of rules on visits and telephone contacts vis-à-vis prisoners whose families live far away (thereby rendering regular visits impracticable).²⁴

10. In the Report of the Experts, the Panel of Experts recommended the following:

Numerous references have been made to the hardship experiences by AH as a result of him being separated from his family. It is an exhausting, resource intensive process for a family member to make one visit at a prison. Maintaining a relationship with his family has become an increasingly complex proposition and as such is a chronic stressor. A review of the provisions for family contact should be made between him and his family to see if there are other avenues in which family contact can be facilitated. The pandemic has clearly had a major impact on prisoners and their families around the world. Reviewing the access and communication strategy with the aim of finding a durable solution for Mr Al Hassan and his family is warranted.²⁵

11. While a margin of discretion is afforded to the Chamber to assess the security imperatives of the case,²⁶ this margin is significantly circumscribed where the detainee is a vulnerable individual. In such cases, the principle of proportionality places a special duty on the Chamber to verify, in light of the specific psychological or physical characteristics of the detainee, whether the measures in question are likely to give rise to a degree of mental suffering or distress that exceeds the unavoidable level of suffering inherent in detention.

12. For the reasons set out below, the Defence submits that it cannot fairly be argued that there is any reasonable risk of Mr Al Hassan engaging in witness interference. The

²⁴ Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, [Extract from the 2nd General Report of the CPT](#), 1992, para. 51.

²⁵ ICC-01/12-01/18-1197-Conf-Exp-Anx, para. 315.

²⁶ See ICC-01/12-01/18-93-Conf-Exp-Red-tENG, paras 52-53.

arguments presented by the Prosecution are merely speculative and do not meet the requisite standards of concreteness and specificity.

The original basis for the Restrictions is no longer well-founded

13. The Prosecution's original application for restrictive measures was premised upon extremely weak evidence and conjecture, namely: a single media reference; the first day of Prosecution interviews while Mr Al Hassan was arbitrarily detained in Mali; biased interpretations of telephone recordings; and a muddled third-hand anonymous hearsay rumour [Redacted].²⁷ As previously noted, the tenuous factual basis for this last premise has fallen away: [Redacted].²⁸ [Redacted].²⁹ As found by Pre-Trial Chamber II, the Chamber's assessment of the ongoing necessity and proportionality of the extant monitoring regime must be performed in light of this more up to date information.³⁰
14. The only 'possible breaches' of the restrictive measures applicable to non-privileged calls were also limited to those reported by the Registry on 19 and 26 March 2019. As confirmed by the Registry, no further 'possible breaches' have since occurred.³¹ The Registry has repeatedly informed the Chamber that 'Mr Al Hassan also appears to have a solid understanding and respect for his restrictive measures and does not hesitate to inform his interlocutors of the restrictions if necessary.'³² The Registry also stated, in April 2020, that 'none of the family members on Mr Al Hassan's current list of non-privileged contacts have been involved in any incidents of breaching the restrictions on contact.'³³ This too should be taken into consideration in assessing the necessity and proportionality of the current regime of restrictions.
15. The Chamber has previously varied the monitoring regime in order to facilitate communication between Mr Al Hassan and his family in the aftermath of his daughter's death,³⁴ during Eid,³⁵ and most recently to permit private visits between Mr Al Hassan

²⁷ [Redacted]

²⁸ [Redacted]

²⁹ [Redacted].

³⁰ [ICC-01/14-01/18-176-Red2](#), para. 29, citing ICC-01/14-01/18-137-Conf-Exp.

³¹ ICC-01/12-01/18-2064-Conf, para. 7.

³² ICC-01/12-01/18-732-Conf-Red, para. 18; ICC-01/12-01/18-2064-Conf, para. 8..

³³ ICC-01/12-01/18-732-Conf-Red, para. 20.

³⁴ ICC-01/12-01/18-1569-Conf-AnxB.

³⁵ ICC-01/12-01/18-1569-Conf-AnxC.

and his wife.³⁶ No security concerns arose from these variations. This too contributes favourably to the Chamber's instant assessment.

The Prosecution fails to demonstrate that the Restrictions are objectively justified

16. It is incumbent upon the Prosecution to demonstrate that there are reasonable grounds to believe that Mr Al Hassan would *in fact* abuse his telephone communications at all or in order to interfere with witnesses or the integrity of the proceedings.
17. The Prosecution Request relies on a highly speculative Witness Security Update, which (1) makes general reference to the current and potential security situation in Mali, (2) posits that 'Al Hassan *may* have intent to share information with his family members once the restrictions on his contacts are lifted', (3) claims without substantiation that 'there are indications that members of Al Hassan's network continue to have links to armed groups', and (4) places an overtly biased and prejudicial gloss over Mr Al Hassan's awareness that his calls are being monitored and compliance with the terms of the applicable Restrictions.³⁷
18. *First*, the Prosecution's assertion that the Restrictions continue to be in place for the duration of the proceedings is premised on speculation regarding the general security situation in the north of Mali and the Court's supposed reduced ability to exercise its protection abilities.³⁸ The logical consequence of this argument would be that both the Restrictions and the Court's responsibilities persist in perpetuity, pending an elusive stabilisation in the region at a time following the expected withdrawal of international forces. This cannot be considered feasible let alone proportionate.
19. The Prosecution Request refers to attacks on UN peace-keepers and the national army, which it attributes to 'al-Qaeda affiliated groups, to which the Accused belongs.'³⁹ It does not provide evidence to support this unproven assertion. As previously noted by the Chamber, '[t]he general security situation in Mali, [REDACTED], and the fact that

³⁶ ICC-01/12-01/18-1611-Conf, para. 12.

³⁷ ICC-01/12-01/18-2066-Conf-Exp-AnxA.

³⁸ ICC-01/12-01/18-2066-Conf-Exp-AnxA.

³⁹ ICC-01/12-01/18-2066-Conf-Exp, para. 2.

there is a general threat to Prosecution witnesses cannot be the sole basis to continue to impose all of the Pre-Trial Restrictions.⁴⁰

20. The persistence of the prospect of retaliatory attacks for cooperation with foreign entities is a factor external to the instant assessment of the continued proportionality of the Restrictions.⁴¹ These circumstances apply also to potential Defence witnesses. It is the Prosecution who sought to call its witnesses in such circumstances, most of whom are and will remain protected by public anonymity. The protection regime under Article 70 and Rule 87(3)(b) is sufficient to mitigate these risks.
21. Faced with a similar argument, Trial Chamber VI held that it was ‘not persuaded by the argument that the restrictions should remain in place on the basis that Prosecution witnesses “remain vulnerable to pressures to recant and to retaliation”’, and that, upon the closure of the Prosecution case, ‘the risk of interference with Prosecution witnesses is significantly lower’.⁴² The same holds true in the instant circumstances.
22. The Prosecution itself also states that the circumstances have not changed,⁴³ meaning that the Court’s ability to uphold its protection obligations to witnesses remains the same as through the Prosecution case. The Defence is not aware of any compromise of witness safety, nor of any threat of retaliation for cooperation with the Court, arising during this period. Instead, as observed by the Chamber, ‘the risk of interference with Prosecution witnesses and, consequently, the risk to their safety, [are] likely to have significantly diminished at [this] stage.’⁴⁴
23. That [Redacted] ‘[Redacted]’ tells the Court only that [Redacted] holds a subjective concern about cooperating with the Prosecution in the current political climate in the region. This cannot be laid at the feet of Mr Al Hassan. Nor does it substantiate an objective threat to the safety of [Redacted] or any other witness that can be linked to permitting unmonitored communications between Mr Al Hassan and his wives and children. That [Redacted] is an inescapable and irrelevant fact that again fails to substantiate an objective need to maintain the Restrictions. Notably, [Redacted] was

⁴⁰ ICC-01/12-01/18-871-Conf-Red3, para. 16.

⁴¹ ICC-01/12-01/18-2066-Conf-Exp, para. 5.

⁴² [ICC-01/04-02/06-2000-Red2](#), para. 27.

⁴³ ICC-01/12-01/18-2066-Conf-Exp, para. 3.

⁴⁴ ICC-01/12-01/18-1827, para. 1.

fully aware of both the prospect of and the actual disclosure of his identity to Mr Al Hassan and the Defence, and told the Prosecution that he had no security concerns in this regard.⁴⁵

24. *Second*, the Prosecution fails to demonstrate that Mr Al Hassan has any intention to share information with his family members. Instead, as the Registry emphasises, the real indication is that Mr Al Hassan understands the terms and the rationale of the Restrictions, and there is no basis for supposing that he would not continue to respect the need to avoid jeopardising the safety of those cooperating with the Court.⁴⁶ It should be plain that as the proceedings enter the Defence case, any perceived risk of harm occasioned by cooperation with the Court would be exceedingly deleterious to Mr Al Hassan's interests.
25. Mr Al Hassan's contact list is restricted to identified members of his family and he has no intention to expand the list at this point in time. If that were to occur, the correct procedures would be followed. The Chamber's determination should therefore be restricted to the risk that stems from contacts with these persons, rather than individuals who are not on the list. As confirmed by the Registry, there have been no breaches of the monitoring regime as concerns Mr Al Hassan's communications with these individuals.⁴⁷ Nor has the Prosecution provided any reasonable grounds to believe that there is a risk that these individuals would breach disclosure orders, or otherwise engage in conduct that would adversely affect the security of witnesses.
26. The Prosecution's reliance on a previous, early VWU report regarding supposed coded language is similarly weak. The conclusions drawn therein are the most cynical possible; [Redacted].⁴⁸ [Redacted] also do not reflect any intent on the part of Mr Al Hassan or his associates to interfere with witnesses or the integrity of the proceedings.
27. Again, and as noted above, no security concerns have arisen from previous discrete variations of the Restrictions to facilitate unmonitored communications between Mr Al Hassan and his family. This indicates the understanding and willingness of all parties to comply with the general rules on confidentiality, and demonstrates the family's focus

⁴⁵ [Redacted]

⁴⁶ ICC-01/12-01/18-2064-Conf, para. 8.

⁴⁷ ICC-01/12-01/18-732-Conf-Red, para. 20.

⁴⁸ The Defence has previously made similar arguments at ICC-01/12-01/18-791-Conf-Exp, paras 33 to 36.

on establishing and maintaining long-constrained normal familial relations. In any event, the stark consequences that would rightly accompany any breach of case-related confidentiality act as a strong deterrent in themselves.

28. *Third*, nor does the Prosecution demonstrate how its assertion that ‘members of Mr Al Hassan’s network continue to have links to armed groups’ translates to or substantiates its assertion that the lifting of the Restrictions would cause a risk to witnesses. The Prosecution does not demonstrate: (i) that there are in fact any links between what the Prosecution terms ‘Mr Al Hassan’s network’ and armed groups; (ii) that Mr Al Hassan would in fact communicate with any such persons either directly or indirectly; nor (iii) that any such links would create a risk to witnesses. Again, the protection regime afforded by Article 70 and Rule 87(3)(b) is sufficient to ensure the protection of witnesses, evidence and the integrity of the proceedings in this case.

29. Additionally, the Prosecution has not provided any information to contradict the Registry’s previous report that there is no indication that the Al Hassan case has gained any traction or attention among the armed groups in Mali.⁴⁹ This is despite the intervening open conduct of the trial and intensifying ICC activities, including a very visible recent visit to Timbuktu by the then-Prosecutor.

30. *Fourth*, no adverse inference can be drawn from the fact that Mr Al Hassan is aware that his communications are monitored. Nor can any adverse inference be drawn from the fact that he understands and respects the terms of the current Restrictions and takes care to ensure that his interlocutors also respect them. The Prosecution’s attempt to place an overtly biased and prejudicial gloss over diligent compliance with a strict monitoring regime is unduly cynical and should be disregarded as such. While it is true that the Restrictions may intrinsically play a deterrent role, there are other less restrictive deterrent measures available, including the fact that the consequences of any violation of the Rome Statute’s confidentiality regime would be severely deleterious to Mr Al Hassan’s own interests.

31. None of the Prosecution’s arguments satisfies its burden to demonstrate that there are reasonable grounds to believe that Mr Al Hassan would *in fact* abuse his telephone

⁴⁹ ICC-01/12-01/18-871-Conf-Red3, para. 34, citing ICC-01/12-01/18-571-Conf, para. 27.

communications at all or in order to interfere with witnesses, the collection of evidence, or the integrity of the proceedings.

The Restrictions should be lifted at this stage of the proceedings

32. The Chamber is under a duty to impose only the least restrictive measures feasible.

The risk of interference with Prosecution witnesses is significantly diminished

33. The completion of the Prosecution's presentation of evidence is a very significant stage in the proceedings. As observed by the Chamber, 'the risk of interference with Prosecution witnesses and, consequently, the risk to their safety, are likely to have significantly diminished.'⁵⁰ While previously it was conceivable that Prosecution witnesses could be deterred from testifying, the conclusion of the Prosecution case removes this as a factor of consideration.⁵¹ This also significantly undermines the need for active monitoring, since there is no concern that urgent intervention might ever be necessary to ensure Prosecution witnesses can testify.

34. The Defence considers that the realistic prospect of interference with Prosecution evidence and the integrity of the proceedings is and always has been minimal. As consistently recognised, there have been no incidents of witness intimidation or threats. This cannot be attributed to the use of active monitoring, [Redacted].⁵²

Right to private and family life

35. The Court has a positive duty under internationally recognised human rights law to take steps to enable detainees to maintain meaningful relationships with their family.⁶⁰ The Court's duties cannot be reconciled with the prolonged use of active monitoring, which can generate harmful effects for Mr Al Hassan, his relationship with his family, and indeed his family itself.

36. Mr Al Hassan's right to private and family life is a factor of increasing weight in the Chamber's assessment of the proportionality of maintaining the Restrictions. Since 2017, Mr Al Hassan and his family have been severely curtailed in their ability to

⁵⁰ ICC-01/12-01/18-871-Conf-Red3, para. 41.

⁵¹ ICC-01/12-01/18-786-Conf, para. 62. ICC-01/12-01/18-871-Conf-Red3, para. 31.

⁵² [Redacted].

maintain meaningful family relations. As previously noted by the Defence, monitoring ‘is a far-reaching intervention into the private life of the prisoner, which seriously hampers communication about personal issues and may lead to emotional isolation of the prisoner.’⁵³

37. The use of active monitoring has significant ongoing consequences as concerns Mr Al Hassan’s right to private life and that of his family (in particular his children), and his right to regular meaningful contacts. These intensify with the passage of time. In particular, the active monitoring requirement has very real implications in that it:

- a. Triggers significant resource implications, which in turn, limits the number of hours available for family contacts, including during family visits conducted in person;
- b. Creates unnecessary and humiliating impediments as concerns Mr Al Hassan’s right to receive videos and communications from his children in a timely manner; and
- c. Complicates the possibility of Mr Al Hassan communicating with his wives and children via video-conference.

38. The Defence emphasises the restricted number of persons on Mr Al Hassan’s contact list, and his complete dependence on telephonic communications as his sole means of maintaining meaningful social contact. Mr Al Hassan has no visitors other than his Defence team. Often the Defence’s ability to monitor his emotional state and seek to provide support is limited to brief meetings during morning or luncheon breaks in the court hearings. Since 2017, Mr Al Hassan has received just two visits from different members of his family; he was unable to grieve with his family following the sudden death of his young daughter, and met his four-year-old son for the first time in November 2021. Relevant cultural strictures make maintaining emotional intimacy between husband and wife over the telephone particularly challenging for Mr Al Hassan and his wives; this is impossible under any monitoring regime.

⁵³ Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy*, Oxford University Press, 2009, p. 213, previously cited by the Defence at ICC-01/12-01/18-791-Conf-Exp, fn. 61.

39. The Defence accordingly requests that, at a minimum, any remaining restrictions be amended to permit unmonitored communication between Mr Al Hassan and his wives and children. These individuals hold important rights to family and private life themselves, which, as the detaining authority, the Court is under a duty to fulfil to the fullest extent possible.⁵⁴ Simultaneously, these people pose a minimal risk to witnesses even in the event that they knew and understood who they were. The Defence notes that other detainees have been permitted unmonitored communications with their wives and children, even in the context of active monitoring regimes, and even during the pre-trial phase of proceedings, when the risk of interference with potential witnesses might be considered highest.⁵⁵

40. Both Mr Al Hassan and his family are aware that any forms of misconduct or witness interference would generate extremely prejudicial consequences as concerns his case before the Court, as well as their ability to maintain telephone communications. Again, the protection regime afforded by Article 70 and Rule 87(3)(b) is sufficient to ensure the protection of witnesses, evidence and the integrity of the proceedings in this case.

Mr Al Hassan's particular vulnerabilities

41. Mr Al Hassan's health is another significant factor weighing in favour of the lifting of the Restrictions. He is a survivor of prolonged arbitrary detention and other serious forms of torture.

42. As found by the Panel of Experts, the constraints on Mr Al Hassan's ability to maintain a relationship with his family (including against the backdrop of the pandemic) 'is a chronic stressor'.⁵⁶ This was identified as a component necessitating a review of 'the access and communication strategy with the aim of finding a durable solution for Mr Al Hassan and his family.'⁵⁷ The lifting of the Restrictions, and certainly the active monitoring of telephone communication with Mr Al Hassan's immediate family, is a

⁵⁴ [International Covenant on Civil and Political Rights](#), Articles 10(1), 17 and 23; [Convention on the Rights of the Child](#), Articles 3(1), 7, 9 and 10; [Charter of Fundamental Rights of the European Union](#), Article 24(3) [COVID-19: Focus on Persons Deprived of Their Liberty](#), March 2020 OHCHR and WHO, p. 5: 'State agencies who care for persons deprived of their liberty should be reminded that families and children of those persons are right holders with specific needs that must be known and considered. Families, especially women and children, are both protected and impacted by necessary prevention measures.'

⁵⁵ [ICC-01/14-01/18-137](#), paras 19 and 20.

⁵⁶ [ICC-01/12-01/18-1197-Conf-Exp-Anx](#), para. 315.

⁵⁷ *Ibid.*

crucial step towards finding any such durable solution that might ease the disproportionate stress currently placed on both him and his family.

43. In this regard, the Defence emphasises the length of time for which Mr Al Hassan has been detained and separated from his family, including his young children. This has been compounded by the Covid-19 pandemic and the deleterious impact of the uncertainty and general fear for his family's health and safety that this has occasioned. As noted by the Legal Representatives of the Victims, the Appeals Chamber has found that 'the passage of time is a factor that could become more significant as more time elapses'.⁵⁸ This is certainly the case in this instance.

Conclusion

44. The Court may authorise the use of restrictions only where these are necessary and proportionate to ensure the safety of witnesses, the preservation of evidence and the integrity of the proceedings.⁵⁹ Since, for all the reasons expounded herein, maintenance of the Restrictions is no longer necessary to achieve these ends and would constitute a disproportionate incursion on Mr Al Hassan's fundamental rights, they must be lifted. The Defence accordingly requests that the Chamber reject the Prosecution Request.
45. It is of paramount importance that the Court considers alternatives to active monitoring. This is particularly the case given that apart from vague and unsupported claims that witnesses *could* be 'harmed', neither the Prosecution nor the Registry have adduced specific grounds to conclude that there is an element of immediacy that requires active monitoring, or that it is necessary to monitor all communications with all family members all of the time. For those reasons, the Defence requests that the Restrictions be lifted in their entirety such that Mr Al Hassan be permitted unmonitored communication with his approved list of contacts. At a minimum, and for the reasons expounded herein, the Defence respectfully requests that the Trial Chamber vary the applicable restrictions to permit unmonitored communication between Mr Al Hassan and his wives and children.

⁵⁸ [ICC-01/04-02/06-1817-Red](#), para. 72, referred to at ICC-01/04-02/06-1913-Red2, para. 14

⁵⁹ ICC-01/12-01/18-93-Conf-Exp-Red-tENG, para. 70.

46. The Defence does not object to the maintenance of the Restrictions until the conclusion of the testimony of the witnesses to be called by the Legal Representatives of the Victims, on the understanding that this is to conclude by 11 February 2022.

IV. Relief sought

47. For all the reasons herein, the Defence respectfully requests that the Trial Chamber:

- a. **REJECT** the Prosecution's request to maintain restrictions on Mr Al Hassan's contacts and access to others whilst in detention until the end of the case; and
- b. **PERMIT** unmonitored communication between Mr Al Hassan and his approved list of contacts.



Melinda Taylor
Lead Counsel for Mr Al Hassan

Dated this 14th day of July 2023
At The Hague, The Netherlands