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No. **ICC-01/12-01/18**
Date: **16 November 2023**
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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 on Defence request for exceptional variation of detention conditions

Decision 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*, issues the following decision.

I. Procedural history and submissions

1. Pre-Trial Chamber I imposed a series of restrictions on Mr Al Hassan's contacts and accesses while in detention during the pre-trial phase of the case.¹ This included a prohibition on Mr Al Hassan receiving private visits.²
2. On 11 June 2020, the Chamber ordered that certain restrictions on Mr Al Hassan's contacts and accesses in detention remain in place until the end of the testimony of the last Prosecution witness.³ In relation to a Defence request which preceded this decision for Mr Al Hassan to be allowed to have private visits, the Chamber found that it would be premature to make any determinations on the modalities of a future family visit, notably in relation to the organisation of private visits, at a time where there was much uncertainty as to the planning of such visit.⁴ The Chamber noted that it nonetheless remained seized of the issue, and found that its findings in the decision in relation to active monitoring of Mr Al Hassan's

¹ See Decision on the measures restricting Mr Al Hassan's contacts while in detention, 11 June 2020, 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) (the 'Restrictions Decision'), para. 1.

² Pre-Trial Chamber I, 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*, available only to the Prosecution; a confidential *ex parte* redacted version available only to the Defence and the Prosecution was filed on the same date, ICC-01/12-01/18-93-Conf-Exp-Red-tENG), para. 84; 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*, available only to the Registry; confidential *ex parte* redacted versions were filed on the same date; and a public redacted version was filed on 5 July 2019, ICC-01/12-01/18-340-Red3), para 61; 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*, available only to the Registry and the Detention Section; confidential *ex parte* redacted versions were filed on the same date), paras 54-56.

³ Restrictions Decision, ICC-01/12-01/18-871-Conf-Exp, p. 31.

⁴ Restrictions Decision, ICC-01/12-01/18-871-Conf-Exp-Red, para. 55.

contacts were without prejudice to any future determination as concerns future family visits.⁵

3. On 8 July 2021, the Defence requested the Chamber to vary the existing detention restrictions to permit private visits between Mr Al Hassan and his wife [REDACTED] during an anticipated upcoming family visit (the ‘Defence Request’).⁶ The Defence submits that it cannot fairly be argued that there is any reasonable risk of Mr Al Hassan engaging in witness interference, nor that a private visit with his wife would give rise to a risk of witness interference, and that any arguments to the contrary would be merely speculative.⁷ It submits that the Prosecution’s original application for restrictive measures was premised upon ‘extremely weak evidence and conjecture’, which it avers has been partly eroded by the recent testimony of witness P-0638,⁸ and that no ‘possible breaches’ of restrictions have occurred since March 2019.⁹
4. The Defence further submits that the relationship between conjugal visits and the well-being, stability and rehabilitative prospects of detainees is well-established.¹⁰ It submits that Mr Al Hassan has [REDACTED].¹¹ The Defence submits that Mr Al Hassan and his wife both understand the serious ramifications arising from any perceived security violation, and that both are willing to provide detailed written assurances not to discuss, nor transmit, anything relating to the case.¹² The Defence also notes that no security concerns arose from two prior variations to Mr Al Hassan’s monitoring regime, and that the Prosecution case is now materially advanced and several witnesses whose safety was cited as a reason for restricting Mr Al Hassan’s freedom to communicate with his family have now testified.¹³ The Defence also submits that Mr Al Hassan’s wife is not a potential

⁵ Restrictions Decision, ICC-01/12-01/18-871-Conf-Exp-Red, para. 55.

⁶ Defence Request for Exceptional Variation of Detention Conditions, ICC-01/12-01/18-1569-Conf (with confidential *ex parte* Annex A, available only to the Defence and Registry only and confidential Annexes B and C).

⁷ Defence Request, ICC-01/12-01/18-1569-Conf, para. 21.

⁸ Defence Request, ICC-01/12-01/18-1569-Conf, para. 19.

⁹ Defence Request, ICC-01/12-01/18-1569-Conf, para. 20.

¹⁰ Defence Request, ICC-01/12-01/18-1569-Conf, para. 14.

¹¹ Defence Request, ICC-01/12-01/18-1569-Conf, para. 17.

¹² Defence Request, ICC-01/12-01/18-1569-Conf, para. 21.

¹³ Defence Request, ICC-01/12-01/18-1569-Conf, para. 22.

witness, and has no link to any witnesses, and refers to precedents from other cases, where monitored detainees have been permitted private and unmonitored visits with wives and children.¹⁴

5. On 14 July 2021, as requested by the Single Judge,¹⁵ the Registry filed observations on the Defence Request (the ‘Registry Observations’).¹⁶ The Registry is not opposed to private visits for Mr Al Hassan (or any other detained person), should the requirements of Regulation 185 of the Regulations of the Registry be met. It notes that such visits are not supervised or recorded.¹⁷
6. On 15 July 2021, in accordance with the deadline set by the Single Judge,¹⁸ the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Defence Request (the ‘Prosecution Response’).¹⁹ The Prosecution opposes the Request, submitting, *inter alia*, that the restrictions on contacts should remain in place to ensure the security of upcoming key witnesses.²⁰

II. Analysis

7. The Chamber incorporates by reference the applicable legal framework previously set out by it.²¹ In line with the approach previously taken, the Chamber will consider whether: (i) there exists an objectively justifiable risk that warrants a prohibition on private visits; and (ii) the measure is necessary and proportionate to the legitimate aim pursued.²²
8. In relation to the first limb, the Chamber recalls its detailed findings in the Restrictions Decision on the existence of an objectively justifiable risk linked to Mr Al Hassan’s communications that warranted maintaining restrictions to his

¹⁴ Defence Request, ICC-01/12-01/18-1569-Conf, para. 23.

¹⁵ Email from the Single Judge, 8 July 2021, at 16:17.

¹⁶ Registry Observations on the “Defence Request for Exceptional Variation of Detention Conditions” (ICC-01/12-01/18-1569-Conf), ICC-01/12-01/18-1589-Conf.

¹⁷ Registry Observations, ICC-01/12-01/18-1589-Conf, para. 6.

¹⁸ Email from the Single Judge, 8 July 2021, at 16:17.

¹⁹ Prosecution response to Defence request for exceptional variation of detention conditions, ICC-01/12-01/18-1592-Conf.

²⁰ Prosecution Response, ICC-01/12-01/18-1592-Conf, paras 3, 28.

²¹ Restrictions Decision, ICC-01/12-01/18-871-Conf-Exp-Red, paras 12-17.

²² Restrictions Decision, ICC-01/12-01/18-871-Conf-Exp-Red, para. 25.

non-privileged contacts while in detention.²³ The Chamber finds nothing in the submissions of the Defence, including regarding P-0638's testimony, which disturbs those detailed findings at this stage and thus considers its previous findings unchanged at this time.

9. In relation to the second limb, at the outset the Chamber recalls that contact with the outside world and visits are imperative for a detained person's well-being and that 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.²⁴ As previously noted, 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.²⁵ 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.²⁶
10. The Chamber notes that although the Prosecution case is now at a more advanced stage than when the Restrictions Decision was issued, insider and crime base witnesses are still yet to testify. However, in assessing the necessity and proportionality of a prohibition on private visits at this stage of the trial, the Chamber gives particular regard to the discreet and time limited nature of the requested amendment to the restrictions regime, being limited to the duration of the family visit, and only between Mr Al Hassan and his wife for the purpose of private visits (also referred to as 'conjugal visits' in the Defence Request). The Chamber is also mindful of the passage of time since the restrictions on contact were first imposed on Mr Al Hassan at the Detention Centre and since the Restrictions Decision was issued, and the fact that since his arrival at the Detention Centre more than three years ago, Mr Al Hassan has received only one

²³ Restrictions Decision, ICC-01/12-01/18-871-Conf-Exp-Red, paras 27-38.

²⁴ Restrictions Decision, ICC-01/12-01/18-871-Conf-Exp-Red, para. 15.

²⁵ Restrictions Decision, ICC-01/12-01/18-871-Conf-Exp-Red, para. 15.

²⁶ Restrictions Decision, ICC-01/12-01/18-871-Conf-Exp-Red, para. 15.

family visit in June 2019.²⁷ The Chamber further notes that since March 2020, Mr Al Hassan, as all other detainees at the Detention Centre, has been subjected to additional and significant limitations on contact as a result of COVID-19 measures imposed at the Detention Centre.²⁸ The Chamber previously noted in relation to these restrictions that it is necessary to give particular attention to the increased need for emotional and psychological support, including contact with family.²⁹ The Chamber also notes the Registry observation that family visits are important for the well-being of detained persons, especially after the long period of separation due to COVID-19.³⁰

11. The Chamber further notes that according to the Registry, in April 2020, ‘none of the family members on Mr Al Hassan’s current list of non-privileged contacts [had] been involved in any incidents of breaching the restrictions on contact’.³¹ Further, in mitigation of the risks, Mr Al Hassan and his wife have undertaken to provide certain written assurances.³² Finally, the Chamber further recalls that it exceptionally relaxed the restrictions regime applicable to Mr Al Hassan on two previous occasions,³³ and that there were no issues reported by the Registry following these discreet and time limited amendments.
12. In view of all of the foregoing, and in balancing the absolute necessity to protect witnesses, preserve evidence and ensure the integrity of these proceedings with the rights of Mr Al Hassan to preserve his family life, the Chamber finds it proportionate to authorise private visits between Mr Al Hassan and his wife during the anticipated upcoming family visit.

²⁷ In this regard the Chamber also notes the Defence submission that Mr Al Hassan has not seen his wife since 2017, and that this is the mother of both the young daughter of Mr Al Hassan’s who died suddenly in December 2020, and also of the four year old son whom Mr Al Hassan has never met, Defence Request, ICC-01/12-01/18-1569-Conf, para. 6.

²⁸ See Decision on interim release, ICC-01/12-01/18-786-Conf, para. 27.

²⁹ Decision on interim release, ICC-01/12-01/18-786-Conf, para. 38.

³⁰ Registry Observations, ICC-01/12-01/18-1589-Conf, para. 6.

³¹ Registry Report pursuant to the “Decision on Mr Al Hassan’s restrictions and accesses while in detention”, ICC-01/12-01/18-557-Conf-Exp, 8 April 2020, ICC-01/12-01/18-732-Conf-Exp (confidential, *ex parte*, available only to the Registry; confidential redacted version filed on the same day, ICC-01/12-01/18-732-Conf-Red), para. 20.

³² Defence Request, ICC-01/12-01/18-1569-Conf, para. 21.

³³ Email from the Single Judge, 16 December 2020, at 15:12; Email from the Single Judge, 11 May 2021, at 13:12.


FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Defence Request.

Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated 26 July 2021

At The Hague, The Netherlands