

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **30 November 2020**

TRIAL CHAMBER X

Before: Judge Kimberly Prost, Single Judge

SITUATION IN THE REPUBLIC OF MALI

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

Public

With Confidential *ex parte* Annexe A [Registry and Defence only]

Public redacted version of ‘Defence Reply to “Registry’s Observations on the Defence Rule 134(1) Observations (ICC-01/12- 01/18-870-Conf-Exp)” - ICC-01/12-01/18-891-Conf-Exp’ (ICC-01/12-01/18-905-Conf), filed 25 June 2020

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

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

The Office of the Prosecutor

Counsel for the Defence

Melinda Taylor

Marie-Hélène Proulx

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. The Defence for Mr. Al Hassan hereby submits its reply to the observations of the Registry¹ ('Registry Observations') in relation to the following discrete issues:
 - a. Legal visits to the Detention Unit; and
 - b. Mr. Al Hassan's position as concerns the use of Webex/video-conferencing.
2. The present submission has been filed on a confidential *ex parte* basis in order to respect the classification of the Registry Observations. The Defence does not, however, object to it being reclassified as public.

II. Submissions

Legal Visits to the Detention Unit

3. The Defence has consistently emphasized the importance of being able to conduct in person visits with Mr. Al Hassan, as soon as possible, and sufficiently in advance of the commencement of the trial.² The Defence is also willing to comply with any protocols that would enable this to occur.³
4. The Registry Observations do not, however, provide any indication as to when visits will be allowed, nor do they set out the legal basis for continuing to prohibit such visits. Instead, it would appear that [REDACTED] has recommended that the ICC "cautiously observe the consequences of national and international easing of the measures, which took effect on 1 June 2020."⁴
5. The indefinite nature of these restrictions, and related uncertainty as to if and when they might be lifted, are [REDACTED], particularly as the underlying rationale for the prohibition appears to him, and other detainees, to be illogical. ICC guards come in and out of the facility each day, and interact directly with the detainees. This

¹ ICC-01/12-01/18-891-Conf-Exp.

² ICC-01/12-01/18-T-014-CONF-EXP-ENG, p. 3-4 "[REDACTED] ."

³ Mr. Al Hassan does not, however, accept to be quarantined for 14 days (in an isolated wing by himself), as a precondition for any meetings with his Defence.

⁴ ICC-01/12-01/18-891-Conf-Exp, para. 8.

includes handing them food, and entering their cells. The composition of the guards changes throughout the day. External medical staff also visit the detainees. All of these interactions entail the same degree of risk that would result from a legal visit. And given that the overarching purpose of Mr. Al Hassan's detention is to ensure his presence for trial, it is difficult to see why legal visits are not being afforded a similar or sufficient degree of priority.

6. Mr. Al Hassan also has no interactions with the Mechanism detainees, who are limited in number, and have either completed their proceedings, or are at a stage where interactions with their Counsel are of less importance. Since their situation is different, the Defence is concerned by the fact that Mr. Al Hassan's rights are being restricted due to the arbitrary notion that it is somehow necessary to adopt the same policy for the ICC, as is adopted for the Mechanism.

7. Since the Registry mentioned, without attaching or hyperlinking, the Host State Policy, the Defence has endeavoured to locate this policy. In doing, it has identified the following information, which it seeks leave to introduce to the Chamber. According to the policies adopted by the Dutch authorities:
 - a. Essential legal visits were allowed throughout the COVID-19 pandemic;⁵ and
 - b. As of 1 June 2020, penitentiary centers also allowed non-legal visits from family members (1 visit of 1 hour *per week*).⁶

8. In a public redacted filing in the *Yekatom and Ngaïssona* case, the Counsel for Mr. Ngaïssona indicates that he has been able to visit clients in other facilities in The Netherlands.⁷

⁵ Fair trials "Short update" 30 March 2020, <https://www.fairtrials.org/news/short-update-prison-visiting-room-hours-cancelled-netherlands>

⁶ Annex A (translation)

⁷ *Prosecutor v. Yekatom and Ngaïssona*, "Public redacted version of "Request to allow Defence team in-person visit to Mr Ngaïssona in order to prepare for the Status Conference of 9 July 2020", 23 June 2020, ICC-01/14-01/18-564-Red, para. 16.

9. Given firstly, that Dutch prisoners and detainees are allowed to receive visits from their lawyers, and secondly, the importance of effective legal communication between Counsel and clients in cases involving allegations of war crimes and crimes against humanity, it is difficult for the Defence and Mr. Al Hassan to understand the basis for deviating from Dutch policies in respect of ICC detainees.
10. Whereas the Registry Observations refer to medical advice provided by [REDACTED], the Defence would like to note that this medical advice has not been provided to either the Defence or Mr. Al Hassan. Given the Registry's reliance on this advice, it is pertinent to note that:
 - a. In light of the fact that the initial memorandum concerning the imposition of restrictions referred to medical advice from [REDACTED], the Defence requested the Registry to provide the Defence with any medical advice provided by [REDACTED] to the Registry on this point. The Registry responded that:⁸

As to your mention of the CCO measures regarding COVID-19, there are no documents pertaining to Mr Al Hassan to provide you with. Internal Registry discussions do not involve detained persons or their medical records but are rather administrative matters. Specific questions regarding Mr Al Hassan and his medical treatment during COVID-19 can be addressed directly to the Medical Officer by Mr Al Hassan using the appropriate request forms that he has in the Detention Centre.
 - b. On 4 May 2020, the Defence wrote to [REDACTED] directly, to request access to "all records and advice concerning Mr. Al Hassan's medical situation, from 12 March 2020 until the present day."⁹ The Defence further noted "that the Registry indicated that your medical opinion was sought in relation to the effects of the lock down measures in relation to the detainees", and therefore asked "that this advice be included insofar as it concerns Mr. Al Hassan". The Defence received no response from [REDACTED]. Instead, on 12 May, the legal officer for the detention unit informed the Defence that in order to obtain access to such records, it would be

⁸ Email from the Registrar to the Defence, 1 May 2020 at 14:22.

⁹ Email from the Defence to [REDACTED], 4 May 2020 at 13:31.

necessary for Mr. Al Hassan to submit a new written request. The legal officer further noted that¹⁰:

[REDACTED] does not have any specific information regarding Mr Al Hassan and the COVID-19 measures. All detained persons are vulnerable to the virus just as all humans are vulnerable to the virus. The Detention Section and the medical team have enacted the measures in the CCO memos to protect the detained persons to the extent possible.

11. The Defence does not have the time and resources to engage in a new wave of litigation on this point, and would be unfair to expect Mr. Al Hassan to personally shoulder the burden of doing so. It is, in any case, apparent from the above correspondence that [REDACTED]'s advice concerning the prolongation of the COVID-19 restrictions might not have been based on a case-by-case assessment of the impact of such measures on the specific circumstances of individual detainees, taking into account, in particular, specific mental health issues, the vulnerable nature of the detainees in question, and the proportionality of such measures in light of the consequences for the detainees' fair trial rights.¹¹

¹⁰ Email from the Legal Officer to the Defence on 12 May 2020 at 12:34

¹¹ The World Health Organization has recommended that "[d]ecisions to limit or restrict visits should take into account the impact on the mental well-being of people in prisons and the increased levels of anxiety that separation from friends and family and the outside world may cause": ['Frequently asked questions about prevention and control of COVID-19 in prisons and other places of detention'](#), p. 8. See also: "For asymptomatic visitors with recent travel history or coming from affected areas, there should be protocols in place to permit entry (e.g. for legal advisers), but additional measures, such as non- contact visits, should be considered."

OHCHR and WHO Inter-Agency Standing Committee, ['COVID-19: Focus on persons deprived of their liberty: Interim guidance'](#), March 2020, p. 5: "Ability to meet with legal counsel must be maintained, and prison or detention authorities should ensure that lawyers can speak with their client confidentially."

Penal Reform International, ['Coronavirus: Healthcare and human rights of people in prison'](#), 16 March 2020, p. 6: "Decisions to limit or restrict visits need to bear in mind that contact is essential to the mental well- being of people in detention and can reduce levels of violence. In many countries it is common for visitors to bring prisoners supplies of food, drinks, sanitary items and medicine. Furthermore, restricting visits from legal representatives can bring increased levels of anxiety and impact on the right to fair trials"; p. 9: "Law enforcement, prisons, parole boards and courts should take all appropriate measures to protect anybody from contracting COVID-19. To ensure criminal justice bodies can continue functioning, measures such as remote hearings or appointments should be put in place and/or providing recommended protective gear for face-to-face processes. Any restrictive measure – if needed at all – should be individualised and based on independent medical findings. Blanket restrictive measures contravene to principles of fair trial and the right to access legal counsel."

See also ['Guidance Document on the Nelson Mandela Rules'](#), p. 135: "While phone calls and other remote forms of communication are important means of communicating with legal representatives they must never be considered a substitute for in- person meetings unless (...) specifically requested by a prisoner. Direct contact with a lawyer or legal aid provider is essential for establishing client-lawyer trust and for effective representation."

12. Given the link between such matters, and the conduct of the proceedings in this case, these issues should not be shielded from any form of judicial scrutiny or oversight: if advice is being relied upon to take decisions that affect core fair trial rights, then this advice should be made available to persons who are directly affected by it (including their Counsel), so that the implications can be addressed, in an informed manner, before the Chamber. This advice also should not bind the Registry or the Chamber if there is a conflicting advice, including the advice that informed the policies of the Host State. And, it might also be helpful to solicit the views of the ICRC, as the entity responsible for monitoring detention conditions, as concerns the impact of these restrictions, on an indefinite basis, on the mental health of the detainees.

Mr. Al Hassan's position as concerns the use of Webex/video-conferencing

13. This option was presented to Mr. Al Hassan in the third month of lockdown. During these months, [REDACTED]. This includes [REDACTED]. The Defence would have wished to review these materials with him, [REDACTED]. That was not possible. The Defence has been advised to [REDACTED].
14. Mr. Al Hassan has informed the Defence that he does not wish to communicate with the Defence *via* Webex or to participate via video-conferencing. He has informed the Defence that when he considered these options, [REDACTED]. At present, he also feels cut-off from the outside world, and does not wish to use any technology that reinforces this sense of distance, and his fear concerning the indefinite nature of his separation from his Defence. This fear is aggravated by the absence of clear and comprehensible reasons for the current measures, and the lack of information as concerns when they will be lifted. There has been no dialogue with the detainees on these issues to solicit their views and concerns: Mr. Al Hassan was instead merely provided a memorandum in French.¹²
15. In light of the above considerations, Mr. Al Hassan has informed the Defence that he intends to waive his right to participate during the Status Conference. The Defence

¹² Mr. Al Hassan has consistently requested to receive written communications in Arabic.

will endeavor to obtain his views, during the proceedings, by communicating, in real time (through electronic means) with a person in the office, who will speak to Mr. Al Hassan on the privileged phone line. The efficacy of this measure may depend on lockdown times, and the detention unit schedule.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 30th Day of November 2020
At The Hague, The Netherlands