

**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 observations on monitoring regime, ICC-01/12-01/18-2494-Conf-Exp, 12 May 2023’

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

Mr Karim A. A. Khan KC
Ms Nazhat Shameem Khan
Mr Mame Mandiaye Niang

Counsel for the Defence

Ms Melinda Taylor
Ms Felicity Gerry KC

Legal Representatives of the Victims

Mr Seydou Doumbia
Mr Mayombo Kassongo
Mr Fidel Luvengika Nsita

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

Oswaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. The Prosecution's monitoring observations fail to demonstrate:
 - An objectively identifiable risk that Mr Al Hassan's contacts with family and friends, will generate a risk to any witnesses or the integrity of the proceedings;
 - That it is necessary to impose additional measures – above and beyond the detention unit vetting and passive monitoring processes – to address such risks; and
 - That it is proportionate to maintain such restrictions, in light of the length of Mr Al Hassan's pre-trial detention and the current stage of the proceedings.
2. Mr Al Hassan has, moreover, demonstrated his compliance with both the detention regulations and the directives issued by this Chamber. This includes during the periods of active monitoring and passive monitoring. The absence of any breaches during the latter period demonstrates that active monitoring is unnecessary to ensure his full compliance. His contacts with close family members are necessary to promote rehabilitation and mitigate the psychological effects produced by the radical reduction in social and family contacts during the pandemic as well as being in detention.¹
3. For these reasons, the Prosecution's burden of justifying the extension of the monitoring regime, more than five years after Mr Al Hassan's transfer to the ICC and over three months after the close of evidence, is not satisfied.²

II. Classification

4. The current response has been filed Confidential *ex parte*, in order to comply with the confidentiality level of documents that are cited herein. The Defence will file a redacted version forthwith.

III. Submissions

The Prosecution has failed to demonstrate the existence of an objectively identifiable risk linked to Mr Al Hassan's detention unit contacts

¹ ICC-01/12-01/18-2100-Conf, para 9: "Contact with the outside world and visits are imperative for a detained person's well-being".

² [ICC-01/04-02/06-1817-Red](#), para. 93.

5. Mr Al Hassan has been detained at the ICC for over five years. Since his transfer, the Registry has actively and passively monitored his communications and reported periodically to the Chamber. He was provided with the names of Prosecution witnesses in 2020, with last disclosures occurring in 2021. The Registry has not reported any incidents where Mr Al Hassan has used, or tried to use his detention unit communications for improper purposes or ends that would result in an ongoing risk for witnesses. The Prosecution, in turn, has not adduced any reliable evidence that Mr Al Hassan contravened the regulations or that there is a risk that he would do so. These vague and unsubstantiated allegations fail to satisfy the obligation to demonstrate the existence of a “a genuine and continuing danger”.³

The developments concerning JNIM are not probative to this matter

6. The media reports relied upon by the Prosecution are not relevant to the matter before the Chamber. The current security developments in Mali have no linkage to Mr Al Hassan’s communications with his family. None of the reported security developments have any linkage to the ICC, this case, Mr Al Hassan or the persons on his contact list. Neither the Prosecution nor the Registry have referred to any indicia that Mr Al Hassan would use his telephone contacts to establish communications with JNIM or to breach the strict non-disclosure orders that will continue to apply, even if the monitoring restrictions are lifted. Conversely, reports concerning the security in North Mali heighten Mr Al Hassan’s right to maintain regular contacts with family members to receive regular updates concerning their security and well-being.
7. The Prosecution has also misconstrued the contents of media reports pertaining to JNIM. The reported incidents were not directed against civilians in or around Timbuktu, nor do they demonstrate any increased risk linked to Mr Al Hassan’s family or detention contacts. As an example, whereas the Prosecution has claimed that “Iyad Ag GHALY personally visited the Menaka region near the border with Niger to recruit new members, as a result of which many Touareg notables pledged allegiance to him”,⁴ the report clarifies that these interactions concerned efforts to protect civilian communities from EIGS (*i.e.* the Islamic State in the Greater Sahara) and further, that the ‘Touareg’

³ ICC-01/04-02/06-2236-Red, para. 27, citing “ECtHR, Khoroshenko v. Russia, 30 June 2015, Application no. 41418/04, para. 125. See also Kučera v. Slovakia, 17 July 2007, Application no. 48666/99, paras 129-131; Lavents v. Latvia, 28 November 2002, Application no. 58442/00, paras 141-142.”

⁴ Observations fn. 22.

notables are from a specific tribe (“Touaregs de la fraction Daoussak”) that has no affiliation to Mr Al Hassan, his family or his contacts. Similarly, the claim that “around 80 persons from a village in the Gourma-Rharous cercle, in the Timbuktu region, reportedly left their village for fear of reprisals by JNIM, which accused them of collaborating with the Malian authorities” is not supported by the MINUSMA report in question.⁵

8. ‘Annex A’, which remains redacted in part, is comprised of Prosecution analysis that should have been included in the application rather than as an annex. It would be contrary to the right to adversarial proceedings to rely on information that remains redacted from the Defence. The remaining analysis fails to disclose any justification for the Chamber to maintain any judicially ordered measures. The generic nature of the risks is underscored by the claim that the level of risk is likely to persist for at least another two years.⁶ The risk clearly has no link to Mr Al Hassan or developments in this trial or with respect to Mr Al Hassan’s monitoring regime. Accepting such generic risks as a basis for continued monitoring would be tantamount to imposing an open-ended/unending surveillance regime.

Allegations pertaining to [Redacted]

9. The Defence has addressed this allegation in past observations. The incident is not probative of any intent to interfere with witnesses or engage in improper conduct. It does not relate to confidential information or persons identified as witnesses at that time.
10. [Redacted] has no links to the individuals or groups referred to in the Prosecution observations. [Redacted]⁷ - i.e. [Redacted].⁸ [Redacted].
11. [Redacted].
12. [Redacted].

⁵ The cited paragraph (para 28) of the March 2023 MINUSMA report states: “a situation sécuritaire reste préoccupante à Tessit, dans le cercle d’Ansongo. Les populations des villages environnants, fuyant les combats entre les groupes armés, continuent de se réfugier dans cette commune rurale. Par ailleurs, la présence des déplacés internes dans certaines localités, notamment la ville de Gao, suscite des préoccupations sécuritaires dans la mesure où il est fait état de la présence sur les sites des déplacés internes de membres des groupes armés tels que l’EIGS, le JNIM et autres groupes similaires. La MINUSMA a documenté au moins deux attaques contre des campements de personnes déplacées internes dans la région (voir paragraphe 37).”

⁶ Annex A, para. 9.

⁷ [S/2018/581](#), para. 94.

⁸ [Redacted]

13. Mr Al Hassan also has no intention to request [Redacted] inclusion in his future list of contacts.

Allegations from [Redacted]

14. This claim is based solely on an investigators' note pertaining to an alleged conversation with [Redacted], concerning information he allegedly received from [Redacted], who apparently learned it from wholly unidentified sources.⁹ The note, which is second-hand hearsay based on anonymous sources, has no probative value. [Redacted] also denied, under oath, that he had such a conversation with [Redacted].¹⁰ The Prosecution also made no attempt to confirm the accuracy of this note with [Redacted] when he testified. Given that Mr Al Hassan's location in Zohro was known to international authorities before his arrest in 2017,¹¹ [Redacted] lacks plausibility or coherence. This note has even less evidential value than a rumour. While such information might be sufficient to justify restrictions at the pre-trial stage or during the presentation of the Prosecution's case, it fails to satisfy the more elevated threshold required for extensive monitoring after the closure of trial proceedings.¹²

Other incidents

15. While referring to findings of the Pre-Trial Chamber concerning past breaches, the Prosecution has omitted the Pre-Trial Chamber's finding that these breaches were not "tinged with bad faith".¹³ The incidents did not relate to witnesses or confidential information related to ICC proceedings, but were based on, for example, the fact that when speaking Tamasheq, Mr Al Hassan sometimes used Arabic words or lapsed into Arabic, which is consistent with the dialect he speaks, as a Tamasheq speaker who spent significant periods in an Arabic-speaking country. The Chamber viewed this phenomenon during the testimony of other Tamasheq speakers.¹⁴

⁹ [Redacted]

¹⁰ [Redacted]

¹¹ D-0534, [MLI-D28-0006-4188-R01](#) at 4199.

¹² ICC-01/04-02/06-2236-Red, para. 27

¹³ ICC-01/12-01/18-186-Conf-Exp-tENG, para. 29.

¹⁴ D-0540: T-183, p. 63 lines 3-19 (Conf).

[Redacted]

7 THE INTERPRETER: [15:49:16] Message from the Tamasheq booth: The witness is
8 speaking another language, and he has been very verbose.

9 MS TAYLOR: [15:49:30] I believe the witness is speaking Arabic, so I don't know if

The Prosecution has failed to demonstrate that the requested measures are necessary or proportionate, at this stage of the proceedings

16. The Regulations of the Court and the Registry (ROC and ROR respectively) contain sufficient safeguards to protect the integrity of the proceedings. Any request to add additional persons to Mr Al Hassan’s contact list are vetted by the Registry, and the Registry possesses the capability to conduct passive monitoring. Mr Al Hassan is also subject to non-disclosure orders that expressly prevent him from disclosing any confidential information concerning this case to any persons outside his Defence. Given that detention related measures and communication restrictions must be the “least restrictive possible to the rights of the detained person”,¹⁵ the Prosecution has failed to demonstrate why measures - beyond those which apply under the standard communications regime – are either necessary or proportionate.
17. Due to the financial situation of Mr Al Hassan’s family and acquaintances, he has not received any in-person visits except for family visits arranged by the Registry. This means that he is heavily dependent on phone contacts to maintain links with his family. His need for meaningful familial contacts is of heightened importance following the closure of trial proceedings, as he now has less stimulation through attendance at trial or interactions with his Defence team. While the Defence will continue to interact with Mr Al Hassan, the Defence cannot replace the role played by family. The Defence team will also be reduced in number, through the operation of cuts in legal aid.

10 the Arabic booth can help.

11 THE WITNESS: [15:49:51](Interpretation) Yes. When I was explaining what I had
12 before me, I was speaking Arabic.

13 MS TAYLOR: [15:50:02]

14 Q. [15:50:02] Mr Witness, can you repeat your explanation in Tamasheq.

15 A. [15:50:21] Which explanation precisely?

16 Q. [15:50:24] Mr Witness, you were explaining this to the Chamber, and you were

17 explaining it in Arabic, but we didn’t manage to interpret the Arabic. So can you

18 explain to the Chamber what this is.

19 Unless the interpreters can assist.

¹⁵ ICC-01/12-01/18-2100-Conf, para. 9.

18. The close of evidential proceedings and general effluxion of time are two separate factors, which militate against continued restrictions.¹⁶ At the end of the Prosecution case, the Chamber found that:¹⁷

retaliatory attacks against witnesses who have already testified, and risks to future witnesses, the Chamber considers that, as previously foreshadowed, the risk of interference with Prosecution witnesses and, consequently, the risk to their safety, has significantly diminished at this current stage of the proceedings.

19. In January 2022, the Chamber also considered that the passage of time alleviated the risks associated with past breaches (namely, those identified in 2018),¹⁸ while placing weight on the fact that none of the persons on the list had been associated with past incidents. These considerations apply with even greater force to the current period, where the evidence has closed, and Mr Al Hassan does not intend to extend his lift to include persons who have any involvement in armed groups.

20. While any decision on monitoring needs to be tailored to the particularities of the case, it is relevant that both Trial Chamber VI and Trial Chamber IX concluded that it was unnecessary to continue contact restrictions after the close of trial related evidentiary proceedings.¹⁹ Neither the hypothetical possibility that the parties could call evidence at a hypothetical sentencing hearing nor the risk of retaliation or contacts with witnesses were sufficient to justify the continuation of such measures: the evidence heard at sentencing is of a more reduced scope, and the standard procedures set out in relevant detention regulations were sufficient to address such risks.²⁰

21. There is no basis to distinguish their approach from the current case. Mr Al Hassan has been subjected to a monitoring regime since his arrival – that is, for over five years. The proportionality concerns cited by Trial Chamber VI are equally applicable to Mr Al Hassan’s situation. The security situation concerning JNIM is also of no greater risk than the LRA, or as presented by armed groups in DRC or Rwanda.

¹⁶ ICC-01/04-02/06-1817-Red, para. 72: “The passage of time is a factor that could become more significant as more time elapses and the Trial Chamber must continue to actively review the restrictions in place and carefully balance the need for and proportionality of the restrictions against the important right accorded to detained persons to have contact”.

¹⁷ ICC-01/12-01/18-2100-Conf, para. 15.

¹⁸ ICC-01/12-01/18-2100-Conf, para. 16.

¹⁹ [ICC-01/04-02/06-2236-Red](#), paras. 21-26; [ICC-02/04-01/15-1733-Corr](#), paras. 34-42.

²⁰ [ICC-02/04-01/15-1733-Corr](#), paras. 34-42; ICC-01/04-02/06-2236-Red, paras. 28-33.

IV. Relief sought

22. For the reasons set out above, the Defence for Mr Al Hassan respectfully requests the Trial Chamber to terminate all monitoring measures imposed by the Chamber.



Melinda Taylor
Counsel for Mr. Al Hassan

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