

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/12-01/18

Date: 22 January 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**

Confidential, *ex parte*, only available to the Defence and the Registry

**Decision on the scope of privileged visits and phone calls to Mr Al Hassan by
medical experts and members of the Defence team**

Decision 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

Sarah Bafadhel

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

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

Nigel Verrill

Detention Section

Paddy Craig

**Victims Participation and Reparations
Section**

Other

Judge Kimberly Prost, acting as Single Judge on behalf of Trial Chamber X (the ‘Single Judge’ and the ‘Chamber’, respectively) 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 67(1)(b), 68(1) and 69(5) of the Rome Statute (the ‘Statute’), Rules 22 and 73 of the Rules of Procedure and Evidence (the ‘Rules’), Regulations 44, 68, 97 and 101 of the Regulations of the Court (the ‘Regulations’) and Regulations 56 and 124 to 127 of the Regulations of the Registry (the ‘Registry Regulations’), issues the following ‘Decision on the scope of privileged visits and phone calls to Mr Al Hassan by medical experts and members of the Defence team’.

I. Background

1. On 6 December 2019, the Defence filed its submissions pursuant to the ‘Order Scheduling First Status Conference’ in which it raised *inter alia* the issue of privileged visits and phone calls, and requested an *ex parte* status conference to be scheduled.¹
2. Further submissions were made during an *ex parte* status conference held, Defence and Registry only, on 13 December 2019.²
3. In relation to the issue of privileged visits and phone calls, the Defence requests the Single Judge to entertain the following two requests. Firstly, the Defence requests the Single Judge to order that ‘Registry appointed Defence medical experts are, by default, automatically afforded privileged visits and calls to Mr. Al Hassan’ (the ‘First Request’). Secondly, the Defence requests the Single Judge to ‘confirm that all legal staff on the Defence team (case managers, legal assistants, legal consultants, and counsel) are entitled to enjoy privileged visits and phone calls to Mr. Al Hassan’ (the ‘Second Request’). During the

¹ Annex A to Submissions pursuant to ‘Order Scheduling First Status Conference’, 6 December 2019, ICC-01/12-01/18-519-Conf-Exp-AnxA (hereinafter: ‘Annex A Submissions’), paras 19-21.

² Transcript of hearing, 13 December 2019, ICC-01/12-01/18-T-010-CONF-EXP-ENG (hereinafter: ‘Ex Parte Status Conference Transcript’), p. 11, line 19 to p. 12, line 2. *See also* Order Convening an Ex Parte Status Conference, 10 December 2019, ICC-01/12-01/18-522-Conf-Exp.

aforementioned status conference, the Defence modified the Second Request such that it only concerns visits and not phone calls.³

II. Submissions and analysis

A. The First Request

4. The Defence asserts that granting the First Request ‘would provide clarity as to the status of such experts and would eliminate the need for repeated and time-consuming discussions between the Defence, the [Detention Unit Chief Custody Officer], and the Trial Chamber on each occasion that privileged visits or calls are necessary’ and that ‘[i]t would also facilitate the conducting at short notice of such visits or calls’.⁴
5. In the Registry’s view, judicial authorisation is necessary for a visit by a medical expert to be privileged, but authorisation should not be required for every visit; once an initial authorisation is given, that medical expert would continue to enjoy privileged visits in the future.⁵
6. The Single Judge understands the use of the expression ‘Registry appointed medical experts’ by the Defence as being synonymous with medical experts who have been vetted by the Registry and have been included by the Registry in the list of experts as envisaged by Regulation 44 of the Regulations and Regulation 56 of the Registry Regulations (hereinafter: ‘Listed Medical Experts’). Therefore, the scope of the present decision is limited to visits and phone calls by Listed Medical Experts.
7. Pursuant to Rule 73(2) of the Rules, the Single Judge shall decide, in determining whether privileges shall be accorded, whether: ‘(a) [c]ommunications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure; (b) [c]onfidentiality is essential to the nature and

³ *Ex Parte* Status Conference Transcript, p. 13, lines 23–25.

⁴ Annex A Submissions, para. 19.

⁵ *Ex Parte* Status Conference Transcript, p. 10, lines 5-15.

type of relationship between the person and the confidant; and (c) [r]ecognition of the privilege would further the objectives of the Statute and the Rules’.

8. In making a decision under Rule 73(2) of the Rules, the Single Judge is mindful that she shall give particular regard, pursuant to Rule 73(3) of the Rules, to recognising as privileged the communications made ‘in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor’. While noting the intention of drafters, as reflected in Rule 73(2), to avoid absolutely declaring privileges for any relationship apart from that between a legal counsel and a client, the Single Judge also notes that the explicit listing of medical doctors, psychiatrists and psychologists in Rule 73(3) signals a strong preference on the drafters part to recognise the relationship with individuals belonging to these categories as privileged.⁶ Indeed, the Single Judge is of the view that it is essential that medical experts are able to communicate freely and in confidence with their client in order to properly discharge their professional duties. In other words, the professional relationship between a medical expert and a patient produces ‘a reasonable expectation of privacy and non-disclosure’ which is ‘essential to the nature and type of relationship’, within the meaning of Rule 73(2).
9. Further, as reflected in the first requirement under Rule 73(2) of the Rules, the existence of confidential medical information does not *per se* warrant privileges under this Rule.⁷ In order to have particular communications privileged under Rule 73(2) of the Rules, such communications must be made in the context of the professional relationship between a person and his or her medical doctor. The Single Judge considers that the scope of the request self-evidently demonstrates that the present decision is limited to Listed Medical Experts acting in their professional capacity as medical experts.
10. Concerning the vetting process conducted by the Registry in accordance with Regulation 44 of the Regulations and Regulation 56 of the Registry Regulations,

⁶ D. K. Piragoff, ‘Evidence’ in R. S. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 363-64.

⁷ See Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Decision on the review of potentially privileged material, 15 June 2011, ICC-01/04-01/10-237, p. 6.

the Single Judge understands that it requires that individuals possess at least seven years of relevant experience and maintain high standards of professional and personal integrity and show strict respect for confidentiality. Having reviewed the application form for the list of experts, the Single Judge also notes that the Registry actively collects information on any connections that applicants may have with persons participating in the proceedings before the Court,⁸ and is satisfied that the Registry would be able to promptly inform the Chamber, should a Listed Medical Expert raise any particular concerns.

11. Overall, and having further considered the existing risks which have justified the current restrictions to Mr Al Hassan's contact imposed by the Single Judge of PTC I,⁹ the Single Judge is of the view that allowing privileged communications with vetted Listed Medical Experts will not negatively affect the Chamber's duty under Article 68(1) of the Statute to ensure the safety of witnesses. Furthermore, the Single Judge finds that, as argued by the Defence, requiring judicial authorisation for such communications would be 'repeated and time-consuming' and that granting the First Request would indeed 'facilitate the conducting at short notice of such visits or calls'. Consequently, the Single Judge considers that granting the First Request will contribute to a more fair and expeditious trial and will further the objectives of the Statute and the Rules, within the meaning of the third requirement under Rule 73(2). Accordingly, all future visits and phone calls between Mr Al Hassan and Listed Medical Experts acting in their professional capacity shall be privileged.

⁸ Application form for the List of Experts, https://www.icc-cpi.int/layouts/download.aspx?SourceUrl=https%3a//www.icc-cpi.int/get-involved/Documents/ICC_Experts_Form_Eng.docx

⁹ PTC I has held that 'there are "reasonable grounds to believe" that possible contact between Al Hassan and persons affiliated with the armed groups Ansar Dine and AQIM could prejudice or otherwise affect the outcome of the proceedings against Al Hassan, or could be a threat to the protection of potential witnesses and victims'. See 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, para. 16. 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*, only available to the Registry; two confidential, *ex parte*, redacted versions available to the Defence and the Registry (ICC-01/12-01/18-557-Conf-Exp-Red) and the Prosecution and the Registry (ICC-01/12-01/18-557-Conf-Exp-Red2) were filed on the same day).

12. As the principal organ responsible for vetting experts, the Registry may at any time seize the Chamber, should it consider that an exception to the privileges accorded by the present decision is warranted.

B. The Second Request

13. The Defence requests the Single Judge to confirm that all legal staff on the Defence team (case managers, legal assistants, legal consultants, and counsel) are entitled privileged visits and asserts that '[a] more restricted regime would put undue strain on Defence resources, by effectively requiring that particular persons be present at all meetings between Defence Team members and Mr. Al Hassan, even in circumstances when their presence is not otherwise (strictly speaking) necessary for the meeting in question'.¹⁰ The Defence further argues that should the Single Judge reject the Second Request, it would represent a larger impediment to Defence preparations during the trial period,¹¹ and that it is unreasonable for the Single Judge to hold that privileged correspondence emanating from the counsel would lose its privilege simply because it is delivered to Mr Al Hassan by a person without entitlement to privileged communications.¹²
14. The Registry emphasises that, while practice has been to be flexible with the scope of privileges at early stages of the proceedings, the present case is now entering a more active phase of the proceedings and the Defence is equipped with a larger team in preparation for trial.¹³ In the Registry's view, in order to maintain consistency with other cases, the scope of privileged visits should be limited to lead counsel, co-counsel, and assistants to counsel, as defined by the relevant statutory provisions.¹⁴
15. The Single Judge notes that Article 67(1)(b) of the Statute provides that the accused shall be entitled to 'communicate freely with counsel of the accused's

¹⁰ Annex A Submissions, para. 20.

¹¹ Annex A Submissions, para. 21.

¹² *Ex Parte* Status Conference Transcript, p. 14, lines 10-11.

¹³ *Ex Parte* Status Conference Transcript, p. 12, lines 16-20.

¹⁴ *Ex Parte* Status Conference Transcript, p. 12, lines 20-25. *See also* ICC-01/12-01/18-T-010-CONF-EXP-FRA, p. 13, lines 10-14.

choosing in confidence'. Furthermore, Rule 73(1) provides that 'communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged'. Finally, Regulation 97(2) of the Regulations stipulate that '[a]ll communication between a detained person and his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68 Regulations of the Court and interpreters shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre'. The scope of 'assistants' is defined by Rule 22(1) of the Rules, Regulation 68 of the Regulations and Regulations 124 to 127 of the Registry Regulations.¹⁵

16. The Single Judge considers that the aforementioned provisions make it clear that privileged communication is afforded only to: (i) counsel, whether lead counsel or co-counsel; and (ii) assistants to counsel.
17. The Single Judge notes that the above interpretation of the statutory provisions is consistent with the decision of Trial Chamber III in the *Bemba* case and that Chamber's finding that 'Article 67(1)(b) of the Statute only grants the accused the right to communicate freely "with counsel"; it does not entitle every person working in the defence team to privileged communication with the accused'.¹⁶
18. Furthermore, the Single Judge is not persuaded by the Defence claim that 'it is entirely arbitrary to restrict privilege to a very limited category of persons' and that it does not make sense if 'a legal assistant benefit[s] from privilege and not a legal consultant when a legal consultant might have more experience and professional responsibility'.¹⁷ While counsel is free to employ staff of his or her

¹⁵ Rule 22(1) of the Rules states that 'Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise'. Regulation 68 of the Regulations states that '[p]ersons assisting counsel as described in rule 22, sub-rule 1, may include persons who can assist counsel in the presentation of the case before a Chamber' and that '[t]he criteria to be met by these persons shall be determined in the Regulations of the Registry'. Regulations 124 to 127 of the Registry Regulations require assistants to counsel to (i) have either five years of relevant experience in criminal proceedings or specific competence in international or criminal law and procedure, and (ii) be included on a list of persons who may assist counsel created and maintained by the Registry. Admission to the list is decided by the Registrar with the possibility to apply for review by the Presidency.

¹⁶ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Defence Motion on Privileged Communications", 3 June 2014, ICC-01/05-01/08-3080 (hereinafter: '*Bemba Privileges Decision*'), para. 21.

¹⁷ *Ex Parte* Status Conference Transcript, p. 14, lines 6-9.

choosing, that does not result in an extension of the scope of privileged communication beyond what is provided for within the Court's statutory framework.¹⁸ The Single Judge remains equally unconvinced by the Defence's contention that 'it doesn't make sense that a Defence draft suddenly loses any privilege quality just because it's in the hands of a case manager rather than a legal assistant'.¹⁹ Any privileged material from Defence counsel would retain its privileged character even if it is delivered by a person without privilege, provided that the correspondence is clearly identified as emanating from counsel and secured in such a manner as to prevent persons, other than the intended recipient, from seeing the contents of the correspondence.²⁰

19. Having determined the default scope of privileges under the statutory framework, the Single Judge will now consider whether it should vary the scope of privileges accorded by PTC I.
20. The Single Judge notes that, on 19 February 2019, PTC I granted a Defence request to extend privileged visits and phone calls to one legal consultant and three case managers.²¹ The Defence request stated that

[a]t this stage of the proceedings, the Defence team for Mr Al Hassan does not have a Co-Counsel or a Legal Assistant and consequently, Counsel [for Mr Al Hassan] relies on the assistance of the team members listed above to conduct his duties as counsel. Therefore it is necessary for the team members to have privileged and confidential access to Mr Al Hassan as soon as possible in order to prepare adequately for the upcoming confirmation of charges hearing.²²
21. As clearly described in the Defence request, the Single Judge understands that the basis for granting an expansion of privileges was that the counsel, who was

¹⁸ *Bemba Privileges Decision*, para. 21.

¹⁹ *Ex Parte Status Conference Transcript*, p. 14, lines 10-11.

²⁰ Although under different rules, see IRMCT, Judge Vagn Joensen acting as Single Judge, *The Prosecutor v. Maximilien Turinabo et al.*, Decision in Relation to Material Seized From Dick Prudence Munyeshuli, 18 February 2019, MICT-18-116-PT, para. 18; ICTR, Trial Chamber II, *The Prosecutor v. Prosper Mugiraneza et al.*, Decision on the Defence Urgent Motion for Relief Under Rule 54 to Prevent the Commandant of the UNDF From Obstructing the Course of International Criminal Justice, 19 September 2001, ICTR-99-50-T, para. 12. See also Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Second decision on the review of potentially privileged material, 12 July 2011, ICC-01/04-01/10-277, pp. 6-7.

²¹ Email from PTC I, 19 February 2019, at 17:27.

²² Email from the Defence for Mr Al Hassan to PTC I, 19 February 2019 at 09:38.

the *only* individual enjoying privileged communications under Regulation 97(2) at that time, was frequently out of the country and unavailable.²³

22. With the recent appointment of Ms Sarah Bafadhel as associate counsel,²⁴ the lead counsel for Mr Al Hassan is currently being assisted by two associate counsels. The Single Judge considers that the circumstance that warranted an expansion of privileged communications has ceased to exist and that the Defence has failed to provide any convincing additional factual basis for privileged communications to be extended beyond the default rule, as mentioned in paragraph 16 above. Absent any justifications, the Single Judge considers that the scope of privileged communications shall be adjusted in accordance with the default rule.
23. The Single Judge therefore rejects the Second Request and decides that only (i) counsel, whether lead counsel or co-counsel, and (ii) assistants to counsel, as defined by the provisions mentioned in paragraph 15 above, shall be entitled to privileged visits.

²³ See also Email from the Registry (DJS) to PTC I, 18 March 2019, at 18:07.

²⁴ Notification of the Appointment of Ms Sarah Bafadhel as Associate Counsel for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 19 December 2019, ICC-01/12-01/18-534.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DECIDES that all future visits and phone calls between Mr Al Hassan and medical experts included in the Registry's list of experts shall be privileged, subject to paragraph 12 of the present decision;

DECIDES that only visits by Defence team members referred to in paragraph 16 of the present decision shall be privileged; and

ORDERS the Defence to file a redacted confidential *ex parte*, Prosecution, Defence and Registry only, version of its request (ICC-01/12-01/18-519-Conf-Exp-AnxA) within seven days of notification of the present decision.

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



Judge Kimberly Prost
Single Judge

Dated this Wednesday, 22 January 2020

At The Hague, The Netherlands